

- H. **Claims Excluded from the DTPA.** With certain exceptions, the DTPA does not apply to: 1) advertisements in a regularly published newspaper, magazine, telephone directory, broadcast station, or billboard;³⁸⁸ 2) acts or practices authorized by rules or regulations of the Federal Trade Commission;³⁸⁹ 3) causes of action for bodily injury or death or for the infliction of mental anguish;³⁹⁰ 4) claims against persons or their employers³⁹¹ for damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill;³⁹² 5) claims arising out of a written contract if the total consideration was more than \$100,000, the consumer was represented by legal counsel of their choosing, and does involve the consumer's residence;³⁹³ and 6) causes of action arising from a transaction(s), or project, involving total consideration by the consumer of more than \$500,000, other than a cause of action involving a consumer's residence.

15 PROCEDURAL ISSUES FOR DTPA AND INSURANCE CODE CLAIMS

- A. **Notice Requirements.** Many times a consumer will attempt to resolve the complaint informally with the Defendant before hiring an attorney. This is usually the best opportunity for a potential Defendant to resolve the complaint with the consumer. Assuming those discussions breakdown, a consumer is required to give 60 days written notice to the Defendant advising in reasonable detail of the consumer's specific complaint, the amount of economic damages, damages for mental anguish, and expenses, including attorneys' fees, if any, reasonably incurred by the consumer in asserting the claim against the defendant.³⁹⁴ If an appropriate demand/notice is not sent timely, the case may be abated until 60 days after the date the proper notice is provided.³⁹⁵ Once a demand letter is received, the Defendant should seek advise of legal counsel for response. Depending on the response made, a Defendant may be entitled to special defenses provided for in the DTPA and Texas Insurance Code, and can effectively take away the claimant counsel's incentive to pursue the claim further. In a DTPA case, during the 60-day period a Defendant can make a written request to inspect, in a reasonable manner and at a reasonable time and place, the goods that are the subject of the consumer's action or claim.³⁹⁶
- B. **Offers of Settlement.** Both the DTPA and the Insurance Code encourage Defendants to make offers of settlement after receiving a demand letter, by giving the Defendant a special defense based on the settlement offer. Usually Defendants can tender a settlement offer at any time within sixty days after the notice is

³⁸⁸ See TEX. BUS. & COM. CODE ANN. § 17.49(a).

³⁸⁹ See TEX. BUS. & COM. CODE ANN. § 17.49(b).

³⁹⁰ See TEX. BUS. & COM. CODE ANN. § 17.49(e).

³⁹¹ See TEX. BUS. & COM. CODE ANN. § 17.49(d).

³⁹² See TEX. BUS. & COM. CODE ANN. § 17.49(c).

³⁹³ See TEX. BUS. & COM. CODE ANN. § 17.49(f).

³⁹⁴ See TEX. BUS. & COM. CODE ANN. § 17.505(a); TEX INS. CODE §541.154.

³⁹⁵ See TEX. BUS. & COM. CODE ANN. § 17.505(c); TEX INS. CODE §541.155.

³⁹⁶ See *id.*

received.³⁹⁷ An offer of settlement by a defendant must include an offer to pay, separately stated: 1) an amount of money or other consideration, reduced to its cash value, as settlement of the consumer's claim for damages; and 2) an amount of money to compensate the consumer for the consumer's reasonable and necessary attorneys' fees incurred as of the date of the offer.³⁹⁸ Unless both parts of an offer of settlement are accepted by the consumer within 30 days after the date the offer is made, the offer is considered.³⁹⁹ A settlement offer, comprised of both elements, rejected by the consumer may be filed with the court with an affidavit certifying its rejection.⁴⁰⁰ If the court finds that the amount tendered in Defendant's settlement offer is the same as, substantially the same as, or more than the damages found by the trier of fact, the consumer can recover only the lesser of the amount of the settlement offer or the amount of damages found by the trier of fact,⁴⁰¹ and an amount for reasonable and necessary fees as of the date of the offer.⁴⁰² If the court finds that the offering party could not perform the offer at the time the offer was made or that the offering party substantially misrepresented the cash value of the offer, then the consumer can recover their economic damages and attorneys fees,⁴⁰³ and in a DTPA case mental anguish damages.⁴⁰⁴ An offer of settlement is not an admission of engaging in an unlawful act or practice or liability under either the DTPA or Insurance Code,⁴⁰⁵ and in a DTPA case only, the offer, or its rejection, may not be offered in evidence at trial for any purpose.⁴⁰⁶ Even if a Defendant does not choose to make an offer of settlement for the entire claim, a Defendant can at any time make an unconditional offer to the plaintiff that attempts to ameliorate an injury caused by Defendant's conduct. If the offer does not require the plaintiff to release her claims against the Defendant, the Defendant can raise the issue of plaintiff's failure to mitigate her own damages as an affirmative defense at the trial of the case.⁴⁰⁷

- C. **Mediation.** Within 90 days after the date a pleading seeking DTPA or insurance code relief is served, a party may file a motion to compel mediation.⁴⁰⁸ Within 30 days of that motion being filed, the Court is required to sign an order for mediation, setting the time and place of mediation.⁴⁰⁹ If the parties cannot agree on a mediator, the court shall appoint one.⁴¹⁰ Unless the parties agree otherwise, mediation shall be conducted within 30 days of the mediation order, all parties to the action shall attend,

³⁹⁷ See *id.* §17.5052(a); TEX INS. CODE §541.156(a).

³⁹⁸ See *id.* §17.5052(d); TEX INS. CODE §541.157.

³⁹⁹ See *id.* §17.5052(e); TEX INS. CODE §541.158(a).

⁴⁰⁰ See *id.* §17.5052(f); TEX INS. CODE §541.158(b).

⁴⁰¹ See *id.* §17.5052(g); TEX INS. CODE §541.159(a).

⁴⁰² See *id.* §17.5052(h); TEX INS. CODE §541.159(b).

⁴⁰³ See *id.* §17.5052(i)(DTPA also allows for recovery of mental anguish damages on proper showing); TEX INS. CODE §541.159(c).

⁴⁰⁴ See *id.* §17.5052(i).

⁴⁰⁵ See *id.* §17.5052(k); TEX INS. CODE §541.160.

⁴⁰⁶ See *id.* §17.5052(k).

⁴⁰⁷ See *Gunn Infiniti, Inc. v. O'Byrne*, 996 S.W.2d 854, 859-60 (Tex. 1999).

⁴⁰⁸ See TEX. BUS. & COM. CODE ANN. § 17.5051(a); TEX INS. CODE §541.161(a).

⁴⁰⁹ See TEX. BUS. & COM. CODE ANN. § 17.5051(b); TEX INS. CODE §541.161(b).

⁴¹⁰ See TEX. BUS. & COM. CODE ANN. § 17.5051(c); TEX INS. CODE §541.161(c).

and costs of mediation are to be shared by the parties.⁴¹¹ A party may not compel mediation if the amount of economic damages claimed is less than \$15,000, unless the party seeking to compel mediation agrees to pay the costs of the mediation.⁴¹²

- D. **Recommendations.** Because the DTPA and Insurance Code require notice by the plaintiff before suit is filed, Defendants usually have advance knowledge that a lawsuit is forthcoming. The codes encourage and reward Defendants who attempt to resolve the matter through a settlement offer. Thorough consideration of the merits of the claim and determination of defense strategy at this early phase, can often take the incentive out of the case for the opposing attorney. Many of these claims are taken on contingency, and if a thoughtful settlement offer is made during this phase, it can effectively prevent plaintiff and plaintiff's counsel from collecting additional damages and the attorney's fees that may be incurred by plaintiff to develop the case for trial. Defendants waste powerful defenses by not taking advantage of the procedural aspects of these codes.

- 16 **CONCLUSION.** Most, if not all, claims handling problems that result in the potential for extra-contractual liability can be eliminated by an adjuster's familiarity and education in three basic areas of Texas law: 1) The Prompt Payment of Claims statute; 2) the list of prohibited unfair claim settlement practices, and 3) Stowers. The importance of adjuster education cannot be underestimated. This Guide provides information regarding the laws and regulations that adjusters should be aware of in handling Texas claims. Forms have been provided to assist adjusters with specific time deadlines. Please keep this Guide available for future reference when questions arise regarding the handling of a Texas claim.

⁴¹¹ See TEX. BUS. & COM. CODE ANN. § 17.5051(d), (e); TEX INS. CODE §541.161(d), (e).

⁴¹² See TEX. BUS. & COM. CODE ANN. § 17.5051(f); TEX INS. CODE §541.161(f).