

**TEXAS CONSUMER RIGHTS**  
**Lecture and Study Handout**

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**I. TEXAS DECEPTIVE TRADE PRACTICES ACT**

**Construction, Application and Waiver**

The DTPA shall be liberally construed and applied to promote its underlying purposes which are to “protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection.” With only a few exceptions any waiver of the Act is contrary to public policy and unenforceable and void.

**the Act to be liberally construed in favor of consumers and generally may not be waived.**

**Disclaiming Warranties or Causation is Not Waiver**

Casey agreed to buy a car from Sam’s Motors. The contract stated that the car was sold “as is” and that Casey was not relying on any statement made by Sam. She also agrees that she is relying only on her own mechanic’s examination of the car.

Can Sam have any liability under the DTPA based on a breach of implied warranty or a misrepresentation? Why/Why not?

**“As is” disclaimers warranties so no warranty. Negating reliance precludes damages but this is not a waiver**

**Remedies are Cumulative**

The Provisions of the DTPA are not exclusive. The remedies provided by the DTPA are in addition to any other procedures or remedies provided for in any other law. There may, however, not be a double recovery of damages.

Merchant deceives consumer into purchasing a defective product. Consumer sues for damages based on the cost to repair the product under the DTPA, fraud, and breach of contract. The jury finds for Consumer on all claims and awards \$5,000 in damages for breach of contract, \$5,000 in damages and \$5,000 in exemplary damages for the fraud claim, and \$5,000 in damages and \$5,000 in additional damages under the DTPA. Consumer’s total recovery cannot exceed \$10,000.

**Separate Act or Practice**

Cumulative recovery under the DTPA is limited only for damages or penalties resulting from the

same act or practice.

Assume in the above example that the DTPA claim is based on the defective product. The fraud claim, however, is based on conduct occurring in connection with the repair of the product. The jury finds for Consumer on both claims. The jury awards \$5,000 in damages and \$5,000 in additional damages under the DTPA. The jury also finds \$4,000 in different damages arising from the fraud claim and awards exemplary damages in the amount of \$10,000. **The Consumer may recover all of the damages awarded by the jury because they do not arise from the same act or practice.**

**If there are separate acts or practices - you may recover all damages and multiple punitive**

### **TERMINOLOGY**

**1. "Consumer"**

**(3) only party that may maintain a private action under DTPA**

**2. "Business consumer"**

**(6) Buying for a business purpose**

**3. "Goods"**

**(5) For DTPA, tangible property and R.E.**

**4. "Services"**

**(5) does not include lending money**

**5. "Unconscionability" \_**

**(14) Taking advantage of someone to a grossly unfair degree.**

**6. "Knowingly"**

**What is required to recover damages for mental anguish and 3X economic damages**

**7. "Intentionally"**

**(22) What is required to recover 3X mental anguish damages**

**8. "Economic damages"**

**Current general damage standard.. Recurring loss**

**9. "Actual damages"**

**(25) Former general damage standard (prior to 1995). Current standard for Ins. code and tie in statutes**

**10. “Tie-in Statute”**

**(34) Total of 31 state statutes that makes a violation of that statute actionable through DTPA**

**APPLICABILITY: PROPER PARTY PLAINTIFF–CONSUMER**

an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of \$25 million or more, or that is owned or controlled by a corporation or entity with assets of \$25 million or more.

**an entity who seeks or acquire by sale or lease**

**Seek or Acquire**

Martin contacts a company to place an advertisement in the local yellow pages. The company fails to properly place the ad and violates the DTPA. Martin sues under the DTPA. The company defends by asserting that because Martin did not pay for its services, there was no consideration and, therefore, Martin was not a consumer. The court held that the DTPA does not require the transfer of consideration. An entity is a consumer if it seeks to purchase goods.

**must have a good faith intent to purchase and ability to purchase - not necessary to consumer acquire**

Ms. Wellborn purchased an electric garage door opener. It malfunctioned and killed her son. An action was brought under the DTPA on behalf of the son, claiming consumer status. The defendant argued that the mother bought the garage door opener and was the owner of the property on which it was installed. Therefore, it continued, the son was not a consumer. The court disagreed and held the son was a consumer. The court held that although there was no contractual relationship between the son and the seller, the son acquired the garage door opener and the benefits it provided. The son acquired the garage door opener when it was purchased for his benefit.

**if you are intended beneficiary–you acquire it. If you are an incidental beneficiary–you do not acquire it.**

**Other examples:**

1. a tenant may be a consumer with respect to services purchased by a landlord;
2. an employee may be a consumer with respect to goods purchased by an employer; and
3. a purchaser of property may be a consumer with respect to an inspection paid for by the seller.
4. a passenger riding in a car is not a consumer with respect to the car;
5. a friend who borrows goods is not a consumer with respect to the goods;
6. an employee who occasionally uses goods is not a consumer with respect to the goods; and
7. a fiancé of a consumer is not a consumer with respect to goods purchased by the consumer.

**Purchase or Lease**

To be a consumer under the DTPA, an entity must do more than merely seek or acquire goods or services. The goods or services must be sought or acquired by “purchase or lease.”

Dunn brought his car to a gas station to have it filled with gasoline and to have the battery charged. After he picked up his car he noticed that the air conditioning was overheating. He brought the car back to the station several times and each time the station attempted to repair the unit. Dunn was not charged for the services provided by the station. Dunn filed suit under the DTPA based on the unsuccessful attempts to repair the car. Dunn is not a consumer because he did not seek or acquire the services by purchase.

**Truly free services are not subject to the DTPA but purchase is broadly defined and consumer does not have to be the one who makes the purchase**

**Other examples:**

1. a child is a consumer with respect to services paid for by the parent;
2. a person who receives legal services paid for by another is a consumer with respect to those services;
3. a wife is a consumer with respect to services purchased by the husband; and
4. a purchaser is a consumer with respect to accounting services paid for by the seller.

**A: did person claiming to be a consumer acquire goods or services by a purchase**

**Goods or Services**

The final element in consumer status under the DTPA is that the purchase or lease be of “goods or services.” Note that both of these terms are defined by the Act. “**Goods**” is defined to mean “tangible chattels or real property purchased or leased for use.” “**Services**” is defined to mean “work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods.”

**Goods include RE, excludes intangibles and money. Services include services performed in connection with goods or non goods. Money ≠ goods loaning**

Flenniken purchased a home to be built by Easterwood. Flenniken signed

a note secured by a deed of trust naming Easterwood as payee. Easterwood assigned the note to Longview National Bank in exchange for financing. After Easterwood failed to perform, Flenniken refused to pay. After Longview foreclosed, Flenniken sued Longview under the DTPA. Longview asserted that Flenniken was not a consumer because all that Longview did was loan money. The court held that from Flenniken's perspective there was only one transaction, the purchase of a house. The bank's financing of the transaction was merely Easterwood's means of making the sale. Flenniken was a consumer as to anyone who sought to enjoy the benefits of that transaction.

**A: Merely loaning \$\$ is not subject to DTPA but if from the consumer's perspective, the loan was an essential part to the transaction, the lender is under DTPA.**

Saenz purchased a car to resell. When problems arose, Saenz claimed the seller violated the DTPA. The seller alleged that Saenz was not a consumer because something purchased for resale is not purchased "for use." the court held that the ordinary meaning of "use" should be applied to the DTPA. Therefore, purchasing for any purpose is purchasing "for use."

## **Exemptions**

### **a. Business Consumer**

Once an entity is a "consumer," it is within the scope of the Act. The DTPA, however, excludes certain business consumers from the definition. A "business consumer" with assets of \$25 million or more, or one that is owned or controlled by a corporation or entity with assets of \$25 million or more, is not a consumer for purposes of the DTPA. Business consumer is defined to mean "an individual, partnership, or corporation who seeks or acquires by purchase or lease, any goods or services for commercial or business use."

X Corp. has assets of \$5 million. It recently purchased a widget from Y Corp. In the course of the transaction, Y violated the DTPA. X Corp. is a consumer under the Act.

Assume, however, that X Corp is a wholly owned subsidiary of Z Corp. Z Corp has assets in excess of \$50 million. X Corp. is not a consumer under the DTPA.

Bill Gates purchased a new dishwasher for his home. He is a consumer.

- 1. Business consumers are covered by DTPA.**
- 2. Business consumers 25mm or more not under DTPA.**
- 3. All non-business consumers are covered regardless of assets.**

**A DEFENDANT HAS THE BURDEN TO PROVE THE BUSINESS CONSUMER**

## **EXCEPTION AS AN AFFIRMATIVE DEFENSE.**

### **b. Statutory Exemptions**

The DTPA provides a list of conduct exempt from the provisions of the Act. The Act does not apply to newspapers that published advertisements without knowledge of the false, misleading or deceptive nature of the publication. Nothing in the Act applies to an act or practice authorized by specific rules or regulations of the Federal Trade Commission.

### **1995 Exemptions**

#### **1. Professional Services**

Section 17.49(c) provides that nothing in the DTPA shall apply to “a claim 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.”

Stuart is a real estate broker. Casey hires Stuart to obtain a property evaluation and sales recommendation regarding some property he intends to sell. Stuart prepares a report indicating the potential value of the property based on several different growth scenarios. The services provided by Stuart involved advice, judgment, and opinion.

Stuart is also contacted by Carey. Carey hires Stuart to list his house with the listing service, to place advertisements for the sale and to show the home to potential purchasers. The essence of the service provided by Stuart is not advice, judgment or professional opinion.

**Test = what is the essence of the service. The exemption is service specific, not profession specific.**

Karen is an attorney. In the course of representing her client, Bob, Karen makes several professional decisions regarding what claims should be filed, and which parties should be included in the suit. The essence of the service provided was advice, judgment, and opinion.

**Lawyers, doctors, architect, engineers - all exempt but, this section continuous with exception to exemption.**

### **EXCEPTIONS TO THE EXEMPTION**

“This exemption does not apply to:

1. an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion;
2. a failure to disclose information in violation of Section 17.46(b)(23);
3. an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion; or
4. breach of an express warranty that cannot be characterized as advice, judgment, or opinion.

#### **Examples:**

1. Doctor tells patient that her nose will look exactly like Marilyn Monroe’s after the operation.

2. Attorney takes unfair advantage of a client's ignorance to a grossly unfair degree.
3. Architect fails to tell client that his license has been suspended.
4. Accountant guarantees client that he will save at least 25% on his taxes compared to last year's tax bill.

**Even a professional service is subject to DTPA for material misrepresentation, failure to disclose, unconscionability and breach of warranty.**

## **2. Personal Injury Claims.**

DTPA \_ 17.49(e) states:

*Except as specifically provided by Subsections (b) and (h), Section 17.50, nothing in this subchapter shall apply to a cause of action for bodily injury or death or the infliction of mental anguish.*

**Key is "except" - if 17.50(b) or (h) apply - this exemption does not apply**

Jane brought her car into Bob's repair shop to have the brakes repaired. Bob improperly repaired the brakes, violating the warranty of good and workmanlike performance and the DTPA. As a result, the car crashed, destroying the car and injuring Jane. Jane brought a claim under the DTPA seeking damages for the value of the car, reimbursement of medical bills, pain and suffering, mental anguish and loss of consortium. Under section 17.50(b) she may recover her "economic loss including the value of the car and her medical expenses, excluding pain and suffering and loss of consortium. She also may recover mental anguish damages if she establishes that Bob's acted "knowingly."

**Damages arising from a P.I are recoverable if found in general damage provisions of 17.50 (b)**

Pat went to a health club to discuss his annual "I am going to get in shape plan." The health club, in violation of the Health Spa Act, misrepresented the services it would provide and the nature of its program. As a result, Pat was injured using the equipment. He filed suit under the DTPA for violation of the Health Spa Act, a "tie-in" statute. He sought damages for medical expenses, pain and suffering, mental anguish, and loss of consortium. He is entitled to recover his "actual damages" including all elements of damages alleged.

**All damages arising out of P.I. are recoverable under 17.50(h) as actual damages if claim based on a tie in statute.**

## **3. Large Transactions Written Contracts**

The DTPA does not apply to a claim arising out of a written contract if the contract relates to a “transaction, project, or set of transactions related to the same project” involving consideration by the consumer of more than \$100,000.

**1) signed K; 2) consumer Reped by Atty; 3) over 100K = no DTPa but exemption does not apply to residence**

### **Transactions Over \$500,000**

The DTPA does not apply to a cause of action arising out of a transaction, a project, or a set of transactions relating to the same project, involving a total consideration by the consumer of more than \$500,000.

**1) no need for writing or atty; 2) look to total cost of the project; 3) does not apply to residency**

## **WHO MAY BE SUED**

### **1. Basis of the Complaint/No privity**

**Privity is not a requirement. Test = transaction must form the basis of the complaint**

Cameron purchased a house. Prior to the sale the seller’s agent, Terrell & Garrett, misrepresented the square footage of the home. After the sale, Cameron discovered the misrepresentation and sued the agent. The agent defended by claiming that it had no contractual relationship with Cameron and, therefore, he was not a consumer under the Act. The court held that there is nothing in the Act that limits its application only to deceptive trade practices committed by persons who furnish goods or services on which the complaint is based. Consumer is defined only in terms of a person’s relationship to a transaction in goods or services. As long as the goods or services form the basis of the consumer’s complaint he may sue any entity that violates the Act.

**1) Consumer may sue anyone who violates DTPA; 2) DTPA is silent about proper party defendants but the act complained of must occur**

### **“In Connection with” Requirement**

**In connection with a transaction with consumer**

Armstadt purchased a home from General Homes that had a defective plumbing system. Brass manufactured the piping used in the system installed in Armstadt’s home. Armstadt sued the manufacturer under the

DTPA based on misrepresentations made to plumbing suppliers and contractors. The court held the consumer may not sue upstream manufacturers or suppliers who were not a party to the sale of the home. The court held that to be actionable a violation of the Act must be made “in connection with” the consumer’s transaction.

## **CLAIMS UNDER THE ACT**

### **Four Claims**

Section 17.50(a) of the DTPA provides that a consumer may maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish:

(1) The use or employment by any person of a false, misleading, or deceptive act or practice that is:

(A) specifically enumerated in a subdivision of Subsection (b) of Section 17.46 of this subchapter; and

(B) relied on by a consumer to the consumer’s detriment;

(2) breach of an express or implied warranty;

(3) any unconscionable action or course of action by any person; or

(4) the use or employment by any person of an act or practice in violation of Article 21.21, Insurance Code.

### **Four separate claims but conduct may give rise to more than one claim**

#### **Reliance**

#### **Reliance is an express element of a laundry list claim**

#### **Cumulative**

#### **Multiple claims - OK, but only one recovery**

Carey brought her car into Bob’s for repairs. Carey knew nothing about automobile engines and relied entirely on Bob’s expertise. Bob, knowing that he had a “sucker” told Carey that she needed a complete engine overhaul, a statement that was untrue. He then performed a minor engine repair. The repair, however, was done improperly. Based on this conduct, Carey could establish a laundry list violation, a breach of the warranty of good and workmanlike performance, and unconscionability.

### **1. The Laundry List**

The DTPA includes a list of twenty-six acts or practices that are deemed to be false, deceptive, or misleading under the Act. This list is generally referred to as “the laundry list.”

**The most common DTPA claim. Conduct may violate more than one section of the laundry list.**

## **Reliance Required**

### **Reliance by a consumer**

Husband, in reliance on a salesperson's misrepresentation, purchases a widget for Wife. Wife uses the widget and it catches fire damaging Wife's other property. Wife is a consumer. (She acquired the widget by Husband's purchase) Husband is a consumer. (He purchased the widget) Wife may recover as a consumer because Husband relied on the misrepresentation to Wife's detriment.

### **Prohibited Practices**

The laundry list makes 25 different acts and practices prima facie false, deceptive or misleading.

**1) Been misreps about goods, services; 2) misreps about legal rights; 3) failure to disclose**

### **No Privity/Knowledge/Intent**

Violations of the laundry list are actionable without regard to privity and may occur prior to, simultaneously with, or after a contract has been formed. It is also significant to note that knowledge or intent is not an element of a laundry list violation, unless required by the particular subdivision. This is a substantial change from common law fraud.

Singleton sold his boat to Pennington. Singleton had never sold a boat before and was not in the business of selling boats. Singleton made oral statements to Pennington that the boat and motor had just had \$500 worth of work and was in "excellent condition," "perfect condition," and "just like new." These statements were made as statements of fact. The statements were false because the mechanic had not adequately repaired the motor. Singleton did not know the statements were false, did not intend to mislead Pennington, and acted in good faith. The court found that Singleton violated subsection 17.46(b)(5) and (7). These subsections do not require proof of knowledge or intent.

### **Unless Section requires it - no need for culpable mental state**

### **General Misrepresentations**

To constitute a violation of subsection (5) or (7), it is only necessary that the actor makes a misrepresentation of fact regarding goods or services that is inaccurate or false. Statements may be oral or written. Statements that constitute mere opinion, or puffing, are not actionable under the DTPA.

### **Examples:**

1. Misrepresentation regarding coverage of title insurance policy.

2. Misrepresentation that property “properly drained.”
3. Implied misrepresentation that services had been performed.
4. Oral misrepresentation that house complied with housing code.
5. Doctor’s misrepresentation regarding benefits of drug.
6. Builder’s misrepresentation regarding quality of house.
7. Car dealer’s misrepresentation regarding rebate.

**As long as statement is not mere puffing, opinion, or vague generalization it is actionable**

### **Parol Evidence Rule Inapplicable**

**per does not apply to a DTPA claim**

### **Misrepresentations Regarding Legal Rights**

#### **Examples:**

1. Misrepresentation that layaway agreement gave seller the right to retain all monies deposited by buyer.
2. Landlord’s misrepresentation of right to enter and take equipment.
3. Misrepresentation regarding right to repossess.
4. Implicit misrepresentation regarding legal right to tow car from condominium complex.

**Asserting legal rights you do not have is actionable unless it is a valid k interpretation.**

### **Failure to Disclose**

The consumer must establish four elements:

1. the defendant knew information regarding the goods or services;
2. the information was not disclosed;
3. there was an intent to induce the consumer to enter into the transaction; and
4. the consumer would not have entered into the transaction on the same terms had the information been disclosed.

**Requires intent, no special relationship required duty is imposed on everyone**

### **2. Unconscionability**

For purposes of the DTPA, unconscionability is defined as “an act or practice, which to a consumer’s detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree.

**1) Separate but cumulative claim; 2) not C/L or UCC; 3) determined at time of the K**

### **Objective Standard**

**No need to show any kind of a culpable mental state**

### **Grossly Unfair**

**Did someone take advantage to a grossly unfair degree. GU = ?? noticeable, flagrant and unmitigated**

### **3. Breach of Warranty**

The DTPA is both an independent basis for a cause of action and a vehicle through which to bring an otherwise existing claim. Any breach of warranty is actionable by a consumer under the DTPA.

#### **DTPA Does Not Create Any Warranties**

**The warranty must exist and be established independent of DTPA. Breach of warranty is actionable under DTPA.**

#### **May Be Created By Statute or Common Law**

**Look to other state law to see if a warranty exists**

#### **Warranties May be Disclaimed**

**Disclaimer of a warranty is not affected by the fact that it is ?? through DTPA.**

Casey bought a television at a going out of business sale. It was sold, “as is, with no warranties express or implied.” After a problem developed with the television Casey sued under the DTPA for breach of the warranty of merchantability. Casey’s claim will fail because under the state law the implied warranty was properly disclaimed by the “as is” clause.

Assume that the television was sold “as is,” but with a 90 day written warranty guaranteeing parts. After a problem Casey sued under the DTPA for breach of the implied warranty of merchantability. In this case the warranty disclaimer would be invalid under federal law, the Magnuson-Moss Warranty Act. Therefore, the warranty exists and its breach is actionable under the DTPA.

**Analyze warranty claim as though no DTPA. If there is a breach go to DTPA for damages**

#### **a. Express and Implied Warranties Under Chapter 2 of the Business and Commerce Code**

**all actionable under DTPA**

#### **b. Implied Warranty of Suitability in Commercial Leaseholds**

**Property is fit for intended purposes and has no latent defects. May be waived by contract**

### **c. Implied Warranty of Good and Workmanlike Performance in Service Contracts**

**Applies to X for repair or modifications of tangible chattels. This warranty may not be waived.**

### **No Implied Warranty for Professional Service**

### **d. Implied Warranty of Good and Workmanlike Performance and Habitability in Sale of Home**

**Two separate warranties (G & WL Perf) = standard of ?? services. May not be waived.**

#### **4. ARTICLE 21.21**

The fourth claim that may be brought under the DTPA is the use or employment of an act or practice in violation of Article 21.21 of the Texas Insurance Code. Note that this claim is similar to a claim for breach of warranty in that it must be established outside of the DTPA. Article 21.21 is discussed in **Section V** of the Outline.

**Any violation of Art 21.21 is automatically a violation of DTPA**

### **DEFENSES**

**Very little statutory defenses and C/L defenses do not apply.**

#### **Negation of Producing Cause**

**Debate damages by negating produciary cause**

#### **Mediation/Arbitration**

**Can compel mediation or arbitration**

#### **Pre-Suit Notice**

When Required

**Unless your suit is filed as counterclaim you must give notice including your damages and attorney's fees 60 days before filing.**

#### **Class Action**

**A consumer may give notice on behalf of the class**

#### **Settlement**

**The \_ may send a settlement offer or response to consumer's notice**

### **Contents of Settlement**

A settlement offer must include an offer to pay the following amounts of money, separately stated:

- (I) an amount of money or other consideration reduced to its cash value (settlement in kind), as settlement of the consumer's damages; and
- (ii) an amount of money to compensate the consumer for the consumer's reasonable attorneys' fees incurred as of the date of the offer. [DTPA \_17.5052(d)]

Consumer sends written notice to defendant advising him of a claim under the DTPA. Consumer states that defendant misled him with respect to the extent of repairs necessary to repair his car. Consumer requests \$2,000 for overcharges, and \$2,000 to restore the car to its original condition. He also demands \$300 for a rental car (**\$4,300** total). Finally, consumer requests **\$500** for attorneys' fees. Defendant tenders a settlement offer including \$1,000 for over charges, a promise to restore the car to its original condition, valued at \$1,000 and the use of a loaner car, valued at \$300 (**\$2,300 total**). He also offers to pay **\$500** for attorney's fees. Defendant's tender complies with the requirements of the Act.

**\_ may offer to settle in kind but must give it a \$ value and must offer \$\$ for attorney's fees.**

### **Effect of Settlement**

If the consumer rejects the defendant's tender of settlement, it may be filed with the court together with an affidavit certifying its rejection.

### **Damages**

Rejection of a reasonable settlement offer limits a consumer's recovery of damages. If the court finds that the Defendant's settlement offer is the same, substantially the same as, or more than, the damages found by the trier of fact, the consumer may not recover as damage an amount in excess of the lesser of:

- (I) the amount of damages tendered in the settlement offer; or
- (ii) the amount of damages found by the trier of fact.

Assume in the above example that the consumer rejects the defendant's offer and the matter proceeds to trial. The jury awards the consumer damages in the amount of \$1,000 for overcharges, \$900 to restore the car, \$300 for a rental car, (**\$2,200** total), **\$4,000** additional damages and **\$15,000** for attorney's fees. Because the Defendant's settlement offer (**\$2,300**) was "substantially the same or more than" as the amount of damages the consumer would be limited to the lower amount, **\$2,200**. No additional damages may be recovered.

**A reasonable settlement offer limits damages and precludes additional damages**

## **Attorneys' Fees**

Rejection of a reasonable settlement offer also limits a consumer's attorneys' fees.

Assume in the above example that the court determines that the amount of reasonable attorneys' fees at the time the settlement offer was rejected was **\$550**. Even though the jury awarded **\$15,000** for attorneys' fees, the consumer will be limited to the recovery of **\$500**, the amount offered in the settlement offer.

**If the offer of damages were reasonable then attorneys' fees are also limited if attorneys' fees were reasonable at the time it was made.**

## **Limitations**

### **Discovery Rule**

An action under the DTPA must be commenced within two years after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice.

**C/S work to date of injury to determine when consumer should have known.**

## **REMEDIES**

### **Producing Cause**

An efficient, exciting, or contributing cause, which in a natural sequence, produced injuries or damages complained of. The Texas Supreme Court has modified this standard somewhat when it stated: "A producing cause is a *substantial factor* which brings about the injury and without which the injury would not have occurred."

**Low causation standard, lower than proximate cause**

#### **a. As Is**

Goldman, a sophisticated businessperson, agreed to purchase property from Prudential Insurance. Goldman signed a contract that stated the purchase was as is, "with any and all latent and patent defects." Goldman also stated that he was not relying upon any representation of the seller. Goldman sued the seller under the DTPA after discovering that the seller misrepresented the condition of the building. The court held that the agreement signed by Goldman negated any producing cause and precluded any recovery under the DTPA.

**Causation may be negated and it is not a waiver**

## **Damages in General**

The DTPA provides that each consumer who prevails may obtain economic damages and, in an appropriate case, damages for mental anguish and additional damages of not more than three times the damages awarded.

**General damage standards - economic damage. Mental anguish damages if show knowingly**

### **Economic Damages**

“compensatory damages for pecuniary loss, including costs of repair and replacement. The term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.”

**economic damages are everything but “soft damages” - all money spent and lost**

Consumer purchased a toaster from seller. The toaster had a warranty defect. As a result it caught on fire. Consumer was burned, the toaster was destroyed and the kitchen was damaged. Consumer sued for breach of warranty under the DTPA and negligence. She sought damages for her medical expenses, the cost of the toaster, the cost to repair the kitchen, pain and suffering, and disfigurement. Under the DTPA, she may recover only “economic damages,” including her medical expenses, the cost of the toaster and the cost to repair the kitchen.

### **Mental Anguish Damages**

“If the trier of fact finds that the conduct of the defendant was committed knowingly, the consumer may also recover damages for mental anguish.”

**Damages for MA must be knowingly**

#### **a. Knowingly**

“actual awareness, at the time of the act or practice complained of, of the falsity, deception, or unfairness of the act or practices giving rise to the consumer’s claim, or, in an action brought under Subdivision (2) of Subsection (a) of Section 17.50, actual awareness of the act, practice, conditions, defect, or failure constituting the breach of warranty, but actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.”

**Knew or should have known**

#### **b. Mental Anguish-Standard of Proof**

“substantial disruption in...daily routine” or “a high degree of mental pain and distress” that is “more than mere worry, anxiety, vexation, embarrassment or anger.”

**Very high standard of proof for mental anguish damages**

### **Additional Damages**

### **When recoverable**

“If the trier of fact finds that the conduct of the defendant was committed knowingly...the trier of fact may award not more than three times the amount economic damages; or if the trier of fact finds that the conduct was committed intentionally,...the trier of fact may award not more than three times the amount of damages for mental anguish and economic damages.”

**must show culpable mental state to recover additional damages**

### **Computing Additional Damages**

If consumer prevails, jury may award “**economic damages.**”

If jury finds defendant acted “**knowingly,**” jury may award additional damages, up to twice the economic damages, and may also award damages for “**mental anguish.**”

If jury finds defendant acted “**intentionally,**” jury may award economic damages, damages for mental anguish and additional damages up to twice the amount of economic damages and damages for mental anguish.

#### **Example:**

Consumer prevails. Jury awards \$10,000 for economic damages.

#### **Jury finds “knowingly”**

(Economic damages in the amount of \$10,000 have already been awarded) Jury awards damages for mental anguish in the amount of \$10,000. Jury may award additional damages in an amount between \$0 and \$20,000.

(Up to twice economic damages)

*Total recovery after a finding of knowingly is between \$20,000 and \$40,000.*

#### **Jury finds “intentionally”**

(Economic damages in the amount of \$10,000 and damages in the amount of \$10,000 have already been awarded)

Jury may award additional damages in an amount between \$0 and \$40,000.

(Up to twice economic damages and damages for mental anguish)

*Total recovery after finding of intentionally is between \$20,000 and \$60,000.*

Jane purchased a home from Robert. Robert’s agent Susan knowingly misrepresented the square footage of the home, however, she believed that this information was not relevant to Jane and would not be relied upon. Robert, on the other hand, intentionally failed to disclose material information regarding the foundation to induce Susan to purchase the home. Jane, in reliance on the misrepresentations of Susan and the nondisclosure of Robert purchased the home. The jury determined that she suffered economic damages in the amount of **\$22,000**. It also found that Susan acted knowingly and awarded **\$5,000** in damages for mental anguish. The jury may award additional damages against Jane in an

amount up to **\$44,000**. (Two times economic damages) The jury found that Robert intentionally failed to disclose material information. It awarded **\$30,000** in economic damages and **\$5,000** in damages for mental anguish. The jury may award additional damages against Robert in a n amount of up to **\$70,000**. (Two times economic damages and damages for mental anguish.

### **Total recovery can never be more than 3X damages**

#### **Attorneys' Fees**

In order to fully compensate the consumer, as well as encourage attorneys to represent consumers, the DTPA mandates the award of attorneys' fees to a prevailing consumer. Additionally, to deter frivolous lawsuits, the Act mandates the award of attorneys' fee to a defendant when the suit was "groundless **or** brought in bad faith, **or** brought for the purpose of harassment."

#### **a. Consumers' Attorneys' Fees**

##### **When Awarded**

"Each consumer who prevails shall be awarded court costs and reasonable and necessary attorneys' fees."

##### **Award is mandatory, amount is discretionary**

##### **Amount of Fees**

Consumer retains law firm to represent her in a DTPA suit. Consumer's fee arrangement with the firm states that the firm shall receive a 35% contingency fee, based on the amount recovered as damages by the consumer. Consumer prevails and recovers damages in the amount of \$150,000. The jury must award attorneys' fees in a stated amount in light of the work performed, not as a percentage of the recovery. This amount will then be applied to the 35% that the firm is entitled to recover. (As an alternative, the fee arrangement may state that the "recovery" is damages plus attorneys' fees. The firm would then be entitled to 35% of that amount.)

##### **The contingency between consumer and attorney is valid but DTPA award must be in a \$\$ amount**

#### **b. Defendants' Attorneys' Fee**

##### **In General**

"on a finding by the court that an action under this section was groundless **or** brought in bad faith, **or** brought for purposes of harassment, the court shall award to the defendant reasonable and necessary attorney's fees and court costs."

##### **Groundless**

**No basis in law or fact**

**Bad Faith**

**Malice, ill will or spite**

**Harassment**

**For sole purpose of harassment**

**Amount of Fees**

**Dollar amount on an hourly basis**

## **ACTUAL DAMAGES**

### **Pre-1995 Standard**

Prior to 1995, the DTPA permitted a consumer who prevailed to recover all “actual damages.” This term has been replaced with the term “economic damages.” Actual damages, however, may still be recovered in cases brought through the so-called “tie-in statutes.”

**Actual damages means all damages recoverable under any theory**

### **Tie-in Statutes**

Since the enactment of the DTPA, the legislature has chosen to incorporate its provisions into many other statutes dealing with consumer-related issues. This is accomplished by making a violation of those statutes a violation of the DTPA, actionable under the provisions of the DTPA.

### **Recovery of Actual Damages**

Consumer went to a health club to discuss a possible membership. The salesperson misrepresented the qualification of the instructors and the terms of the membership agreement. As a result, Consumer was injured. If consumer files a complaint under the laundry list she will recover economic damages. To recover mental anguish damages she must show the defendant acted knowingly. To recover treble economic damages she must show the defendant acted knowingly. To recover treble mental anguish damages she must show the defendant acted intentionally. If, however, Consumer filed her DTPA claim through the Health Spa Act, a tie-in statute, she would be authorized to recover all actual damages. (Which includes mental anguish as well as pain and suffering) To recover treble all actual damages, including mental anguish damages, she must show the defendant acted knowingly.

#### **d. Standard of Recovery**

The term actual damages has been defined to include any damages recoverable at common law.

**A DTPA claim through a tie in statute may recover substantially greater damages.**

## **II. FEDERAL DEBT COLLECTION**

The federal law that regulates debt collection is known as the Federal Debt Collection Practices Act. (“FDCPA”)

**There are both federal and state acts - know the difference**

### **Definition of “Debt Collector”**

Application of the law is limited to conduct engaged in by a “Debt Collector.” Debt Collector is defined as any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who *regularly* collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. The term debt includes only consumer debts.

Bob runs a small business out of his home. He recently purchased a fax machine for his office from Jones Office Supply. The next day he returned to Jones and purchased a new telephone for his home. Both purchases were on credit. After several months in default, a collection agency contacts Bob about paying the debts. The agency is a “debt collector” under the FDCPA with respect to the phone but not the fax machine.

**1) must be collecting debt for another, 2) must be a consumer debt**

### **Applies to Attorneys**

Sam received two identical letters from attorneys regarding consumer debts he owed. One letter was from the firm of Baker & Elkins; the other was from The Jones Law Firm. Baker & Elkins is a large law firm that engages primarily in commercial litigation. The partner who wrote the letter has never written a consumer debt collection letter but did so at the request of a friend and good client. Jones is a sole practitioner. A substantial portion of his income is derived from collecting consumer debts. Baker & Elkins is not a debt collector under the FDCPA. Jones is a debt collector under the Act.

**Attorney who regularly collects debts is subject to the Federal law.**

### **Debt Collector if Not Using Own Name**

The term debt collector includes any entity that in the process of collecting its own debt, uses a name other than its own, which would indicate that a third person is collecting the debt.

Sara owes Jones Office Supply \$1,000 for a home computer. In an attempt

to collect the debt, Jones calls Sara. Jones states “This is Affiliated Collection Services, I want to speak with you about your debt to Jones Office Supply.” Jones, using the name Affiliated, is a debt collector and the FDCPA applies.

**You are subject to federal law if you collect own debts under a different name.**

## **Prohibited Communication With Debtor**

### **1. Time and Place**

Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer at any unusual time or place or place known to be inconvenient to the consumer.

**A: not before 8 am and after 9 pm**

### **2. Represented by an Attorney**

A debt collector may not communicate with the consumer if the debt collector knows an attorney represents the consumer.

**Unless attorney consents, no communication with consumer**

### **3. Place of Employment**

A debt collector may not communicate with the consumer at the consumer’s place of business if the debt collector knows or has reason to know that the consumer’s employer prohibits the consumer from receiving such communication.

**May contact at work until employer objects**

### **4. Communication With Third Parties**

As a general rule, a debt collector may not communicate with parties other than the consumer.

**with the exception of location information**

#### **a. Location Information**

Debt collectors have the right to try and locate the consumer.

**Collector may not say he is a debt collector or that he is attempting to collect a debt**

### **5. Validation of Debts**

In order to insure that consumers are not misled or deceived regarding the amount or existence of a debt, the FDCPA requires that consumers be provided notice about the amount and existence of the debt.

**In initial communication or within 5 days must tell consumer he has 30 days to dispute the**

**debt.**

**a. Notice Must Reach Least Sophisticated Consumer**

**Context is important. Validation language must be obvious and clear**

**b. Disputed Debts**

**Collection must be stopped until debt is verified**

**Prohibited Conduct**

The FDCPA prohibits debt collectors from engaging in harassment or abuse, making false or misleading representations, or engaging in unfair practices.

**1. Harassment or Abuse**

**Prohibitions are defense in general and specific terms. All harassment and abuse prohibited including but not limited to a list of practices**

**2. False or Misleading Representations**

Consumer owes \$100 debt to merchant. Merchant hires Debt Collector to collect the debt. Debt Collector calls consumer's employer and states that consumer owes Merchant \$10,000 and that employer should be concerned about consumer possibly embezzling funds. Employer re-assigns consumer to a position with substantially less authority. Consumer may maintain an action under the FDCPA. If employer can establish any damages, it too may maintain an action.

**Any person injured may sue**

**3. Unfair or Unconscionable Practices**

**Brood catch all**

**Liability**

The FDCPA may be enforced through a private cause of action or administratively.

**1.Private Enforcement**

**One Year Limitation**

**2. Liability**

A debt collector who fails to comply with the FDCPA is liable to any person in an amount equal to any actual damage sustained by such person.

**a. Additional Liability**

In the case of any action by an individual the court may award additional damages not exceeding

\$1,000.

**b. Class Action**

In the case of a class action, the court may award actual damages for all class members, without regard to a minimum individual recovery, not to exceed \$500,000 or 1% of the net worth of the defendant debt collector.

**c. Attorneys' Fees**

In any successful action to enforce liability under the FDCPA, the court may award the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that the action was brought in bad faith *and* for the purpose of harassment, the court may award to the defendant, attorney's fees in relation to the work expended and costs.

**same as DTPA**

**3. Relation to State Laws**

Conduct that violates the FDCPA may also violate the Texas Debt Collection Act, discussed below.

**III. STATE DEBT COLLECTION**

In Texas, common law and statute govern wrongful debt collection. Texas is one of the few states that recognizes a tort of "wrongful debt collection." This tort, however, has been largely replaced by the enactment of the Texas Debt Collection Act in 1973. ("TDCA")

**Still is an independent tort for wrongful debt collection and it includes exemplary damages. Debt collection Act is a tie in statute**

**Tie-in Statute**

**"Debt Collector"**

Like the FDCPA, the TDCA uses the word "consumer" instead of debtor to describe the type of obligations covered by the Act. Consumer is defined as "an individual who has a consumer debt." "Consumer debt" means an obligation, or alleged obligation, primarily for personal, family, or household purposes and arising from a transaction or alleged transaction.

Casey buys a home computer from Office Supply Inc. on credit. After defaulting on his payments, Casey receives a call from Office Supply regarding the status of his account. Office Supply is a debt collector under the TDCA.

**Anyone collecting a consumer debt is a debt collector under state law**

**Debt Collectors–Prohibited Conduct**

**1. List is Exclusive**

Debt Collector is trying to collect a debt from Consumer. Debt collector repeatedly telephones consumer and causes the phone to ring continuously with

the intent to harass Consumer. Debt Collector also sends Consumer numerous e-mails with the intent of clogging Consumer's mail box, interfering with his receipt of legitimate emails, and harassing him. Debt Collector's conduct with respect to the phone is unlawful harassment under TDCA. Debt Collector's conduct with respect to the emails, even if harassing, does not violate TDCA because that specific form of conduct is not included within the list.

**List of prohibited practices is only those listed and no other.**

## **2. Threats or Coercion**

**Threat of arrest, or to take action prohibited by law**

## **3. Harassment and Abuse**

**Excessive use of profanity, annoying phone calls**

## **4. Unfair or Unconscionable Conduct**

**Attempting to collect amounts not authorized by law**

## **5. Fraudulent, Deceptive, or Misleading Representations**

**Using misleading name, deceiving consumer to get information, misrepresenting what can happen if you don't pay**

## **6. Use of Independent Debt Collector**

**Generally - no liability on condition for using independent debt collector unless he had knowledge the collector engaged in prohibited conduct**

## **Enforcement**

### **1. Bona Fide Error Defense**

A person does not violate the TDCA if the action complained of resulted from a bona fide error that occurred notwithstanding the use of reasonable procedures adopted to avoid the error.

Debt collector sends consumer a letter indicating an incorrect amount. Debt collector may show as defense that it has developed a system of verifying the amount of debts that involves checking and double checking all data and in the instant case, a clerical error resulted in an error producing the inaccurate amount.

Debt collector uses obscene language when speaking with consumer with the intent to abuse her. Debt collector defends by stating it was a mistake, the employee was acting against company policy and that it was a bona

fide error for any employee to use such language. This is not a defense under the bona fide error defense.

**Need bona fide error or mistake and specific procedures to avoid that error.**

**2. Criminal Penalty**

A person who violates the TDCA may be charged with a misdemeanor and fined not less than \$100 or more than \$500 for each violation.

**3. Civil Remedies**

**a. Actual Damages**

b. A person may sue for:

(I) injunctive relief to prevent or restrain a violation of the TDCA; or

(ii) actual damages.

The term actual damages should be defined consistent with the way the term is defined when used in connection with the DTPA. Therefore, economic and noneconomic damages are recoverable under the TDCA.

**b. Attorney's Fees**

A person who successfully maintains an action under the TDCA is entitled to attorney's fees reasonably related to the amount of work performed and costs. If the court finds that the action was brought in bad faith or for purposes of harassment, the court shall award the defendant attorney's fees reasonably related to the work performed and costs

**c. Minimum Recovery**

A person who successfully maintains an action under the TDCA for the failure to maintain a bond, or the failure to properly review the accuracy of information in a file or the use of threats or coercion is entitled to not less than \$100 for each violation.

**In very limited cases, may be recovery of punitive damages**

**4. Remedies Under Other Laws**

A violation of the TDCA is a deceptive trade practices under the Texas Deceptive Trade Practices Act, and is actionable under that law.

**This is a tie in statute**

**IV. TIE-IN STATUTES**

**Definition**

The Texas Deceptive Trade Practices Act (DTPA) permits a claim to be brought through it based on other state statutes. [Tex. Bus. & Com. Code \_17.50(h)] These statutes that cross-reference the DTPA are generally referred to as "tie-in" statutes because they permit their provisions to be tied-into the more beneficial remedies available under the DTPA. All of the "tie-in" statutes deal with areas of law that may affect consumers.

A health club that falsely represented the qualifications of its staff recently misled Casey Consumer. This is a violation of the Health Spa Act.

Section 21 of that Act states:

A violation of this Act is a false, misleading, or deceptive act or practice within the meaning of section 17.46, Business & Commerce Code. [DTPA] Any public or private rights or remedy prescribed by Chapter 17 of the Business & Commerce Code may be used to enforce this Act.

Casey's claim, therefore, is actionable under section 17.50(h) of the DTPA. The Health Spa Act is a "tie-in" statute.

### **31 tie-in statutes**

#### **Major Benefit**

There is one major and very significant benefit of using a tie-in statute to bring a claim under the DTPA—damages are measured by the "actual damages" standard rather than economic loss.

Consumer went to a health club to discuss a possible membership. The salesperson misrepresented the qualifications of the instructors and the terms of the membership agreement. As a result, Consumer was injured. If consumer files a complaint under the laundry list she will recover **economic damages**, excluding damages for pain and suffering. To recover **mental anguish** damages she must show the defendant acted knowingly. To recover treble economic damages she must show the defendant acted knowingly. To recover treble mental anguish damages she must show they acted intentionally.

If, however, Consumer filed her DTPA claim through the Health Spa Act, a tie-in statute, she would be authorized to recover all **actual damages**, including damages for mental anguish as well as pain and suffering. She may recover up to three times all actual damages upon a showing that the defendant acted knowingly.

**DTPA remedies for a tie in statute are actual damages + 3X actual damages if done knowingly**

There are thirty-one tie in statutes. Each of them has provisions, making a violation of that law a violation of the DTPA, actionable through section 17.50(h). Here are the most common statutes.

#### **A. BUSINESS OPPORTUNITY ACT**

**Apply when S promises to sell B goods or services to enable buyer to start a business**

#### **B. CONTEST AND GIVEAWAY ACT**

**Contests designed to induce consumer to attend a sales presentation**

**C. DEBT COLLECTION ACT**

**Tie in statute**

**D. HEALTH SPA ACT**

**Health clubs**

**E. HOME SOLICITATION ACT**

**Door to door sales**

**F. CREDIT SERVICE ORGANIZATIONS**

**Credit repair organizations**

**G. REMOVAL OF UNAUTHORIZED VEHICLES FROM PARKING FACILITY**

**Towing from parking lots**

**H. RENTAL-PURCHASE AGREEMENTS**

**Rent to own**

**I. REPRESENTATION AS ATTORNEY**

**Prohibits notary from holding out as attorney**

**J. MANUFACTURED HOUSING STANDARDS ACT**

**Mobile homes**

**K. MOTOR VEHICLE COMMISSION CODE**

**Lemon law - only applies to new cars**

**L. TIMESHARE ACT**

**Regulates timeshares**

**M. UNFAIR CLAIMS SETTLEMENT PRACTICES ACT**

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**N. REGULATION OF TELEPHONE SOLICITATION**

## **Protects against unsolicited phone calls and damages**

### **V. INSURANCE**

Insurance law deals with a special form of contract, wherein one party, called the **insurer**, assumes a risk from another party, called the **insured**. In an insurance contract, the insurer distributes this risk among a substantial number of people, other insureds.

U.S. Casualty sells automobile insurance. Casey Consumer met with an agent of the company and discussed the cost and availability of insurance to cover her liability in the event of an automobile accident. She was told the rates for the coverage she wanted and signed a contract agreeing to purchase the insurance policy. U.S. Casualty is the insurer, Casey is the insured, and the contract is an insurance contract.

Casey Consumer is starting a new business. Her potential landlord has asked that she obtain another party to cover her liability in the event that she cannot meet her rent payment. Casey approaches her major supplier who agrees with the landlord to pay any and all liabilities that Casey may incur, in the event that Casey does not pay. The supplier's contract with the landlord is that of a guarantor or surety, not an insurance contract.

**Must tell you it's an insurance contract. Don't assume surety or guarantor K's are insurance K's**

### **Misrepresentation and Discrimination Article 21.21**

#### **1. Objective**

**To protect against unfair and deceptive practices in the business of insurance**

#### **2. Scope**

**In most cases DTPA and 21.21 are the same. Art 21.21 applies "to any person"**

#### **3. Unfair Methods of Competition and Deception**

**21.21 applies to the business of insurance**

Insurer engages in an act defined to be a misrepresentation under section 4 of Article 21.21. The injured person may file suit against insurer pursuant to section 16 of Article 21.21. Additionally, if the injured party is a "consumer" he may file suit under 17.50(a) of the Deceptive Trade Practices Act.

**DTPA makes any violation of 21.21 actionable under 21.21**

**1. Misrepresentations and False Advertising of Policy Contracts**

**Any misrepresentation and false advertising in selling policy contracts**

**2. Defamation**

**Defaming a competitor**

**3. Unfair Discrimination**

**Discriminating against people that are same insurance risk and class**

**4. Deceptive Name, Word, Symbol, Device, or Slogan**

**Trading off on name of another**

**5. Unfair Settlement Practices.**

**Failing to attempt in good faith to effect a prompt faith and equitable settlement after liability is reasonably clear**

**6. Misrepresentation of Insurance Policy**

**After policy exists, or whether policy exists**

**Relief Available to Injured Persons**

Section 16 of Article 21.21 establishes a private cause of action for a violation of the article's provisions. A claim may be filed by any person who has sustained actual damages caused by another's engaging in an act or practice declared in Section 4 of Article 21.21 to be unfair methods of competition or unfair or deceptive acts or practices in the business of insurance. Such persons may maintain an action against any person or persons engaging in such acts or practices.

**Provisions very similar to DTPA**

**a. Deceptive Trade Practices Act**

As discussed above, a person who is a "consumer" may file a claim under the Deceptive Trade Practices Act (DTPA) based on any violation of Article 21.21.

Insurer engages in an act that violates section 4 of Article 21.21 and also engages in a different act that violates section 17.46(b) of the Deceptive Trade Practices Act. A "person" who suffers actual damages due to such

conduct may file suit under Article 21.21 for both acts. If the person qualifies as a “consumer” under the DTPA, and suffers economic damages, the person also may file suit based on both acts under the DTPA.

## **21.21 makes any violation of DTPA laundry list actionable under 21.21**

### **Remedies**

#### **1. Actual Damages**

In a suit filed under this section, any plaintiff who prevails may obtain “actual damages” plus court costs and reasonable and necessary attorneys’ fees. Note that the recovery of actual damages is broader than that permitted under the “economic damages” standard of the DTPA.

#### **Actual Damages Defined**

The term actual damages has been defined under the DTPA to include any damages recoverable at common law. The amount of damages recoverable is determined by the total loss of the consumer.

#### **Same as DTPA**

#### **2. Additional Damages**

If the trier of fact finds the defendant knowingly committed the acts complained of, the trier of fact may award not more than three times the amount of actual damages. In other words, when an act is committed knowingly, the jury may award an amount between actual damages and three times actual damages.

Casey Consumer spoke with an agent of Fidelity Insurance regarding a policy of insurance to cover her business. The agent assured her that the policy would cover any damage to the property, including a loss caused by severe weather. Following a severe storm that damaged her inventory, Casey contacted Fidelity. Fidelity denied her claim because the policy did not cover rented property. Casey filed suit under Article 21.21 \_4. A jury finds in her favor and awards her \$30,000 in actual damages. The jury also finds that Fidelity has knowingly misrepresented the extent of the policy’s coverage. The jury may award her an additional amount of damages between \$0 and \$60,000.

#### **Same as DTPA**

#### **3. Plaintiff’s Attorneys’ Fees**

Article 21.21 provides that a plaintiff who prevails is entitled to recover attorney’s fees in an amount that is “reasonable and necessary.”

## **Same as DTPA**

### **4. Defendants' Attorneys' Fees**

On a finding by the court that an action under Article 21.21\_4 was "groundless and brought n bad faith or brought for the purpose of harassment," the court shall award to the defendant reasonable and necessary attorneys' fees and court costs.

## **Groundless AND brought in bad faith**

### **Limitations**

All actions under Article 21.21 must be commenced within two years after the date on which the unfair method of competition or unfair or deceptive act or practice occurred or within two years after the person bringing the action discovered or, in the exercise of reasonable diligence, should have discovered it.

On 1/17/98 Insurer misrepresented the terms of a policy to Insured. On 6/17/98, Insured discovers the misrepresentation. On 1/26/99 an accident occurs that is not covered by the policy, but would be covered if the policy was as represented on 1/17/98. Limitations began to run on 6/17/98.

## **DTPA**

### **Notice**

Similar to the DTPA, Article 21.21 requires that as a prerequisite to filing suit a consumer must give the defendant written notice at least 6y0 days before filing the suit.

## **DTPA**

### **Remedy for Failure to Give Notice**

#### **Abate - DTPA**

### **Settlement**

#### **1. When Offered**

A person who receives notice as provided by the statute may tender an offer of settlement at any time during the period beginning on the date notice is received and ending on the 60<sup>th</sup> day after that receipt.

## **DTPA**

#### **2. Contents of Settlement**

A settlement offer must include an offer to pay the following amounts of money, separately stated:

(1) an amount of money or other consideration reduced to its cash value (settlement in kind), as settlement of the consumer's damages; and

(2) an amount of money to compensate the consumer for the consumer's reasonable attorneys' fees incurred as of the date of the offer.

Claimant sends written notice to defendant advising him of a claim under Article 21.21. He requests \$2,000 for overcharges on his policy, and \$5,300 in damages due to a covered accident. He also demands \$300 for a rental car. Finally, claimant requests \$500 for attorneys' fees. Defendant tenders a settlement offer including \$1,000 for overcharges, a promise to restore the car to its original condition, valued at \$5,000 and the use of a loaner car, valued at \$300. He also offers to pay \$500 for attorneys' fees. Defendant's tender complies with the requirements of the Act.

## **DTPA**

### **3. Effect of Settlement**

If the consumer rejects the defendant's tender of settlement, it may be filed with the court together with an affidavit certifying its rejection.

Rejection of a reasonable settlement offer limits a person's recovery of damages. If the court finds that the Defendant's settlement offer is the same, or substantially the same as, or more than, the damages found by the trier of fact, the claimant may not recover as damages an amount in excess of the lesser of:

- (1) the amount of damages tendered in the settlement offer; or
- (2) the amount of damages found by the trier of fact.

Assume in the above example that the claimant rejects the defendant's offer and the matter proceeds to trial. The jury awards the consumer damages in the amount of \$1,100 for overcharges, \$4,900 to restore the car, \$300 for a rental car and \$20,000 for attorneys' fees. Because the Defendant's settlement offer was "substantially the same" as the amount of damages the claimant would be limited to \$1,000 for overcharges (the lesser amount), \$4,900 to restore the car (the lesser amount), and \$300 for a loaner car.

## **DTPA**

### **4. Attorneys' Fees**

Rejection of a reasonable settlement offer also limits a claimant's attorneys' fees.

Assume in the above example that the court determines that the amount of reasonable attorneys' fees at the time the settlement offer was rejected was \$550. The consumer will be limited to the recovery of \$500 for attorneys' fees, the amount offered in the settlement offer.

## **Mediation**

Either side may file a motion to compel mediation. The motion must be filed within 90 days after service of a pleading seeking relief under section 16 of Article 21.21. Both sides must share the costs of the mediation, unless the amount of economic damages sought is less than \$15,000.

In that case, the party requesting mediation must pay the costs. Mediation generally must be held within 30 days of the request.

### **Class Action**

If a member of the insurance buying public has been damaged by an unlawful method, act, or practice defined in Section 4 of Article 21.21 an individual may bring an action on behalf of himself and others similarly situated.

### **Statutory but same as DTPA**

#### **UNFAIR CLAIM SETTLEMENT PRACTICES ACT**

The Unfair Claim Settlement Practices Act is designed to help guarantee that no insurer doing business in Texas engages in unfair claims settlement.

### **Unfair Claim Settlement Practices**

#### **When Insurer does not promptly settle when it should**

### **Violation of DTPA**

An insurer who commits a prohibited practice under this article commits a deceptive trade practice under the DTPA.

#### **PROMPT PAYMENT OF CLAIMS**

### **Article 21.55 for lawyers**

#### **1. Notice of Claim**

An insurer must respond to a claim not later than the 15<sup>th</sup> day after receipt of notice of a claim or the 30<sup>th</sup> business day if the insurer is an eligible surplus lines insurer.

#### **2. Acceptance or Rejection of Claims**

##### **Promptly accept or reject claim**

#### **3. Unable to Accept or Reject**

**Can have time period extended to 45 days**

#### **4. Failure to Accept or Reject**

**Insurer subject to statutory penalty**

#### **5. Payment of Claim**

**Generally must pay within 5 days of the notice to pay or be subject to penalties**

## **6. Damages**

To insurance compliance with the imposed time limits, the statute provides for liquidated damages to the claimant. In all cases where a claim is made pursuant to a policy of insurance and the insurer liable therefore is not in compliance with the requirements of this article, such insurer shall be liable to pay the holder of the policy, or the beneficiary making the claim, in addition to the amount of the claim, 18% per annum of the amount of such claim as damages. In addition the insurer shall be liable for reasonable attorney fees.

**Wrongful delay = 18% penalty + attorney's fees**

## **COMMON LAW DUTY OF GOOD FAITH**

### **Duty on part of insurer to exercise good faith and fair dealings RE insured**

#### **1. Definition**

An insurer breaches the duty of good faith and fair dealing it owes to an insured in handling a claim when it fails to "attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear."

**Same as 21.21 but this is a tort**

Note that under this definition, the same conduct is actionable under the common law and the Insurance Code

#### **a. Bona Fide Dispute**

If there is a bona fide dispute about coverage, the insurer's denial of a claim will not be in bad faith.

Two women filed death benefits under an insurance policy provided by U.S. Fire. U.S. Fire investigated and decided that one of the women was not entitled to benefits due to the application of a Workers' Compensation Commission Rule. The women filed alleging the denial breached the duty of good faith and fair dealing. The court noted that the denial was based on an arguable interpretation of the Rule and not legally groundless because it was shared by three of the five commission reviewing officers. Although U.S. Fire's interpretation turned out to be wrong an insurer cannot be liable for bad faith simply because it misinterprets a rule.

**There is no bad faith if there is a bona fide dispute RE legal or factual basis for liability**

#### **2. Third Party Claims-*Stowers* Doctrine**

### **a. The Problem**

An insured has a liability policy with a limit of \$100,000. A third party brings an action against the insured for \$200,000. The claim is clearly covered by the policy. Pursuant to its obligations under the policy the insurer takes over defense of the suit. The third party offers to settle the claim for \$100,000. Assuming that the third party has a sound case the insurer is now faced with conflicting loyalties. From the point of view of the insured, the insurer should settle the matter within the policy limits and protect the insured from any liability in excess of the policy limits. From its own perspective, however, the insurer should decline the offer and litigate the matter because its liability can be no more than the policy limits.

**Good faith extends to the duty to settle rightful claims against the insured.**

### **b. The Rule-*Stowers* Doctrine**

The Texas Supreme Court has held that in cases such as that presented in the above example, the insurer's relationship with the insured imposes an obligation to settle the claim within the policy limits or be liable for any additional damages imposed upon the insured. In Texas, this rule is generally referred to as the "*Stowers* Doctrine," based on the name of the case from which it has been established. [G.A. *Stowers* Furniture Co., v. American Indem. Co., 15 S.W.2d 544 (Tex. Comm'n App 1929, opinion approved)]

Insured has a homeowner's policy with a limit of \$300,000 written by National Insurance. A third party sues insured for \$1,000,000 based on a claim covered by his homeowner's policy. The third party offers to unconditionally settle the claim for \$300,000, the policy limits. The insurer refuses the offer and the case proceeds to trial. The jury finds for the third party and awards damages in the amount of \$1,000,000. Insurer has *Stowers* liability to insured in the amount of \$700,000.

**If P offers to settle for policy limits when liability is reasonable certain, the insurer has a duty to settle**

### **d. Extent of *Stowers* Liability**

A *Stowers* plaintiff may recover as damages all amounts rendered against the insured in excess of the insured's policy limits, including postjudgment interest on the judgment amount. An insurer's wrongful refusal to defend the insured subjects the insurer to potential liability for extra-contractual and statutory damages including both punitive and treble damages.

**Wrongful refusal to settle subject's insurer to all damages even in excess of limits.**