Texas Consumer Law Alderman, Summer 2010

# Background

Why do we have Consumer Laws?

* Elimination of uncertainty
* Promotes efficiency and predictability
* Eliminates transaction costs from business
* Eliminates litigation

DTPA changed the world from caveat emptor to caveat venditor (let the seller beware)

* Consumer law is not good guy – bad guy. Consumer law is based on the notion that a seller is in a better position to bear the risk than a buyer.

What are the problems with traditional remedies?

* Contract Law
  + Privity, disclaimers, limitations, and recovery (don’t usually get attorney’s fees or pain and suffering)
  + Not well suited to the small suits typical of consumer law
  + In Texas, K law has always been fairly constant in terms of favoring the consumer
* Tort Law
  + Fault, scientor (knowledge), intent, recovery
  + Big benefit, however, is ability to recover punitive damages
  + In Texas, Tort law grew pro-plaintiff. Compared to 1973, tort law is far worse in terms of the plaintiff’s amount of recovery
* DTPA was designed to include the best of both Contract and Tort law

# Chapter 1

# Deceptive Trade Practices Act - DTPA

**Designed to prevent false, deceptive, or misleading practices**

Pre-DTPA, consumers were generally left only with an action based on fraud.

* Major problem was that fraud required rigorous proof (proof of intent to deceive) and high cost of litigation

Early attempts at DTPA included several exclusions (broad public official, insurance industry, advertising media, any conduct compliant with FTC). Contained no provision for private remedies.

1973: Texas DTPA

* Basically everyone was a consumer. Why should it be ok for anyone to mislead people?
* Notice & Settlement provisions. Requirement to notify other party and settle if at all possible.
* 3x damages + attorney’s fees if you win your suit
  + Easy and predictable (incentive to sue?)
  + 3x damages are really punitive damages (unheard of in other countries)
  + Defendant gets attorney’s fees if you file a frivolous suit
* Capacity or tendency to deceive sufficient, actual deception not required

1979: $25MM business exception, must show “knowingly” to be awarded treble damages over $1000

### Major Provisions of the DTPA (post-1995)

* Broad applicability
* Basically no-fault liability
* Lowest causation standard (producing cause)
  + PC very similar to “but-for” cause of Tort law
* Economic damages + damages for mental anguish (in certain cases)
  + Certain tort damages not usually recoverable, like P&S
* Lowest standard for an award of punitive damages
  + Standard is “knowingly,” meaning knew or should have known
* Attorney’s fees are recoverable (on both sides)
  + Very significant because often the attorney’s fees far exceed what the consumer actually gets. Encourages attorney’s to take the cases.
* §17.44 extremely significant. DTPA “liberally construed to protect consumers”

### How To Maintain a Suit under DTPA

1. Consumer: “seek or acquire” by “purchase or lease” any “goods or services” (includes business consumers with less than $25 million in assets)
2. D has committed an action under 17.50(a)
3. Laundry list
4. Unconscionable
5. Any breach of warranty
6. Any violation of Article 21.21 of the Insurance Code
7. Action was a producing cause of consumer’s damage

*Koons Buick Pontiac GMC v. Nigh, US S Ct, 2004 (new car, 3Ks later wanted to return it)*

* Statutory interpretation
* 3/5 judges said the statute was unambiguous. But unambiguous means incapable of alternative reasonable interpretation. So what about the other 2 judges?
* Ginsburg (opinion) – ambiguous – used a holistic approach (a little bit of everything)
* Stevens – not ambiguous – common sense approach
* Kennedy – not ambiguous (sort of) – extra textual sources approach
* Thomas – ambiguous – historical approach
* Scalia = not ambiguous – simply says “read it!”
* If legislature didn’t want the statute to read the way it did, then they should change it. Not my role, as a judge, to make law

### Ways to Figure out the Meaning of a Word

* Statute defines it
* Context and common usage
* Dictionary
* Other courts
* Legislative intent
* Other sources
* Rules, like never interpret words to negate other words
* Common sense
* Legislative history

## What is a Consumer? §17.45

* Consumer: “seek or acquire” by “purchase or lease” any “goods or services” (includes business consumers with less than $25 million in assets)
* Note the “OR.” Need just one from each category, and you can challenge consumer status by attacking any of the three
* Whether or not a person is a consumer is always in dispute, b/c if the P is not a consumer the case ends immediately

### Seek or Acquire (common mistake on the exam)

*Martin v. Lou Poliquin Enterprises, Inc, Tx Ct of Appeals, 1985 (modeling school wanted to put ad in paper, ad never appeared)*

H: Valuable (redundant word) **consideration not a prerequisite** for DTPA consumer status

* Interestingly, the whole opinion is irrelevant b/c there was a signed K. The K itself shows consideration, which means acquired by purchase
* Objective is of paramount importance – person’s objective must have been to purchase or lease
* **2-pronged test for consumer status**
  + - Good-faith intention to purchase
* This is the biggie
  + - Credible indicia of the capacity to purchase the goods or services
* No court has ever really enforced this particular principle to hold someone not a consumer

*Holeman v. Landmark Chevrolet Co, Tx Ct of Appeals, 1999 (car dealer, all offers will be accepted)*

H: J/D, Ps were not consumers. Trier of fact must decide if buyer is a consumer. Ridiculously low offers may be a sign of bad faith. D won on the “bad faith” factor.

* The dealership said something that wasn’t true. That alone gets you a DTPA claim.
* One of the best DTPA cases out there for when the D used the same terms as existing case law to win the suit
* Example: Sticker price is $15. A usual sale is for $11, but the seller would sell it for $9. Two consumers both believe the item usually sells for 2x its value and so they both offer $4. The offers are rejected.
  + Consumer 1 leaves. Is he a consumer? Will need to argue he was seeking the item, and the two-pronged test of intent + capacity.
  + Consumer 2 buys for $9. Is he a consumer? Yes, be acquired the item! Basic principle but ½ of the people missed it on the last exam. If you buy something, you are a consumer, period.
    - If there was a misrepresentation, Consumer 2 tries for $5

**Acquire**: someone got something. Don’t forget this basic principle!

* + - Usually means you have ownership or control
    - Also acquire when you are the **intended beneficiary** (but **NOT** if you are an **incidental beneficiary**) as determined by the facts
    - EE? Sure, if employer purchases something for the EE to use and then EE is injured. Often in employer’s best interest to help EE establish consumer status.
    - Tenant? Sure. Really easy if he installs something in your apartment, because now you have acquired it (ownership). Still easy if something was installed in a common area (intended beneficiary)
    - Friend? Sure. But you can’t intend for the world to use it.
* “Seek” principle is to avoid the “bait and switch.” Even though most of us don’t fall prey to the switch, the basic practice is deceptive.

### “By” Purchase or Lease

* Purchase not defined, but should be construed liberally to include any transfer of goods or services in exchange for **consideration** (use K law to guide you)
  + Cash
  + Credit
  + Barter
  + Forbearance
  + Gift (if purchased, a true gift may not be purchased)
* A is a consumer if B purchases something and then gives it to A. A “acquired” “by purchase.” Beyond this is remote, it doesn’t say acquired after any purchase.
* 3-point exam question that was commonly missed. “A person who receives a gift may be a consumer under the DTPA” is a True statement. Explain why.
  + The gift was *acquired* from someone else who obtained it *by purchase*
* P establishes their standing as a consumer if the act occurs as part of the **transaction**
  + Unborn baby? *Birchfield*.
  + Radio listener? Consideration was giving up of right to listen to other stations, thus purchased
  + Free abortion services? *Seeking* is easy. What about *by purchase*?
    - Transaction is: seeking to acquire a service (abortion) that she will pay for. S went to clinic to have an abortion, the clinic tells her she must attend free counseling in order to have the abortion. The free counseling was just a little extra service, not a new transaction.
  + Fiance? Sure, if the intended beneficiary
  + One side always argues a big transaction, one side argues a small transaction
* Purchased or leased “for use”
  + Ordinary meaning applies
  + “For use” is not a restriction, because to limit “use” would be contrary to §17.44
  + *Big H Auto,* resale is “use” under the DTPA, good are goods “for use” for whatever use was intended to be made of the goods

*Kennedy v. Sale, Tx SC, 1985 (insurance policy provided by hospital, provider changed)*

H: Privity is not required to be a consumer. No requirement that the consumer himself be the one who pays for the purchase or lease (recall *Birchfield*, where unborn infant was held to be a consumer)

* Not seeking, but definitely acquired when her Co purchased the insurance for her
* Legislature could have written statute as “purchaser or lessee,” but they didn’t, they said “by purchase or lease”

*Wellborn v. Sears, Roebuck, 5th Circ, 1992 (son killed by defective garage door opener)*

H: Son acquired the garage door opener and the benefits it provided. Son was a consumer.

* One may acquire goods or services that have been purchased by another for the plaintiff’s benefit (like parent who purchases for child). Intended beneficiary.
* Unresolved: whether decedent’s cause of action survives under Tx Survival Statute

*Exxon v. Dunn, Tx Civ Appeals, 1979 (repairs on battery, then A/C didn’t work, several attempts but never fixed)*

H: Debatable. Said P was not a consumer b/c did not purchase or lease the repairs

* Facts: P brought car to Exxon car-care center for gas and battery, p/u and found a/c didn’t work, D tried several times to fix and could not, P never paid D nor was P ever charged
* Not a consumer if you *acquire* for free
* Easy to argue P could have been a consumer because she was *seeking* (to get the A/C fixed) *by purchase* (nothing indicates she wouldn’t have paid if they had indeed fixed the A/C)
* An agent may purchase services for a principal (especially common for corporations)
* Borrowers and passengers not generally DTPA consumers

### Goods or Services, §17.45(1)-(2)

* **Goods**: tangible chattels or real property purchased or leased for use
* **Services**: work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods

1. Stocks and Bonds (*E.F. Hutton v. Youngblood, Tx SC, 1987- opinion later withdrawn; received tax advice about withdrawing money*)

* Said DTPA didn’t apply b/c another, more specific statute, dealt with securities and so trumps the DTPA
* Could have just said that the sale of securities is an intangible
* Argue he was seeking a service. Hutton was a full-service broker, the free advice was a part of their services, but you pay for those services through transaction fees.

1. Partnership Interest (*Hennessey v. Skinner, Tx Ct of Appeals, 1985; partnership in a herd of cattle*)

* Court said he didn’t buy a partnership interest (which would be intangible), but rather he was buying a number of cows via a percentage description (he bought 6.3 cows, or 10% of the herd)

1. Lottery Tickets (*Kinnard*)

* Lottery ticket is clearly an intangible, DTPA does not apply.
* So how do we argue? Argue that clerk screwed up the *service* of putting in the numbers, and you pay for the service by buying the ticket. Only issue is that transaction must be the **basis** of the complaint. When the transaction’s central objective is the acquisition of an intangible, service that is incidental to the performance of a transaction is excluded under the DTPA

1. Liability of Banks

* A “pure” loan transaction is NOT subject to the DTPA (*Riverside Nat’l Bank v. Lewis, Tx SC, 1980; attempted to refinance car*)
  + Court held that money is not a good
  + Court also held that lending money is not a service
* A loan to make a purchase IS subject to the DTPA (*Flenniken v. Longview Bank and Trust Co., Tx SC, 1983; purchased home, builder sold note to bank for construction loan then never finished house*)
  + Court says we look at things from the consumer’s perspective. Here, consumer perspective was “I am buying a house”. Successfully argued that bank loaned the money to Flenniken to build a house, that there was one single transaction of buying a house
  + No requirement that Ds unconscionable act occur simultaneously with the sale or lease of the goods in question
* After *Flenniken*, lawyers got much better. *Walker* illustrates how important framing your case is. With the DTPA, a tie goes to the consumer.
  + In *Walker*, the courts separated the loan from building the hotel, and the bank won.

### Business Consumers, §17.45(10)

* DTPA includes business consumers with assets of less than $25 MM
* Under (*Eckman v. Centennial Savings Bank, Tx SC, 1990*) D has the burden to plead and prove the applicability of the $25MM exception as an affirmative defense
* Very little case law leaves 2 major unresolved issues
  + How do you calculate assets?
    - Suppose you have a $30MM building with a $28MM loan.
    - Net? $2MM. Included under DTPA.
    - Gross? $30MM. Excluded under DTPA. Most lawyers argue that gross is the correct measure, but farmers always cause problems
  + At what point in time do you measure assets?
    - Never been discussed. Alderman leans towards a reasonable period of time around the day of the misrepresentation based on the purpose of the exception being that major companies have the ability to protect themselves
    - Any time during the transaction is also likely very relevant

## Waiver, §17.42

* Alderman has never seen a case where a waiver applied. Would also suggest that you never be the lawyer who advises his client to sign the waiver.
* DTPA generally may not be waived
* Consumer waiver valid if
* In writing and signed
* Not in disparate bargaining position
* Represented by an attorney in seeking or acquiring the goods (note, **not** when signing the waiver)

## Statutory Exemptions to the DTPA, §17.49

* 17.49(c) – Rendering of **Professional Services**, the **essence** of which is the providing of advice, judgment, opinion, or similar professional skill
* Summary: you cannot sue a professional unless they violate the DTPA (this exemption is essentially meaningless)
* Service specific, not profession specific (i.e. the question is what do they do, not what is their job title)
* Ex. Real estate agent hired to do a property evaluation and let sellers know approximate selling rate – professional service
* Ex. Seller contacts real estate agent and they list property on HAR – not a professional service b/c not particularly difficult
* **EXCEPTIONS** to the exemption
* Express misrepresentation of a material fact
* Failure to disclose information
* Unconscionable (as defined in §17.45) action or course of action
* Breach of an express warranty
* 17.49(e) – **Except** as provided in **17.50 (b) and (h)**, no cause of action for **bodily injury** or death or the infliction of mental anguish
* Summary: as in (c), basically does not mean anything, because (b) and (h) are the only two ways to sue under the DTPA anyway
* 17.50(b): General damage provision
* May recover economic damages
* “Knowingly” – may recover for mental anguish, treble economic damages
* “Intentionally” – mental anguish, treble mental anguish and economic damages
* Ex. if a mechanic says it is “good as new,” you could get hospital bills, lost income, rehab, and mental anguish. Could not get pain and suffering, loss of consortium, disfigurement, etc.
* 17.50(h): Tie-In damage provision
* If you can sue under another statute (like Health Spa Act), you can recover actual damages
* “Knowingly” - treble damages
* Significant for those plaintiffs who have no economic damages
* 17.49(f) and (g) – **Large Transactions** ($100K and $500K)
* Summary: huge change in the law
* (f): transaction, project, or set of transactions related to the same project involving total consideration by **the** consumer of more than **$100,000**. DTPA does not apply if
* Written contract
* Consumer represented by counsel while negotiating contract
* K does not involve consumer’s residence
* (g): transaction, project, or set of transactions related to the same project involving total consideration by **the** consumer of more than **$500,000**. DTPA does not apply if
* Absolute exemption (other than consumer’s residence)
* …Consideration by “**the**” consumer. Who is “**the**” consumer?
* Ex. Jones Corp buys land for $2MM. OJones Corp builds a building for $1.5MM (in big cases like this, usually get a performance bond). Smith Corp operates. SC, a separate entity, is “**the**” consumer.
* Other exemptions for
* Publishers
* Acts authorized under FTC

## Whom May You Sue?

* Short answer – anyone who violates the DTPA

Consumer + goods/services as Basis of Complaint + Anyone who Violates the Act = DTPA case

* No privity requirement between consumer and defendant (*Cameron v. Terrell & Garrett, Tx SC, 1981; seller’s RE agent misrepresented the square footage in the house*)
* 2 requirements to be a Consumer
* Seek or acquire, by purchase or lease, goods or services
* But a person need not seek or acquire goods or services furnished by the D to be a consumer
* Goods or services purchased or leased must be the **basis of the complaint**
* The above works until we get to *Amstadt*. The Ds deceptive trade act or practice is not actionable unless it was committed **in connection with** the Ps transaction in goods or services (*Amstadt v. US Brass Corp, Tx SC, 1996; Homeowners sued the manufacturers, not the builders or plumbers, based on their representations about the plumbing materials*)
* Q is, can H sue M for the misrepresentations that M made to the B & Ps?
* Ct confirms the “no privity” requirement but then adds “in connection with.” Ct thought they needed this language to prevent people being sued just for introducing a product.
* Ct said you need a violation of the act + a producing cause of damage
* 2 classes of parties
* **Immediate**: anyone who deals with a consumer, “in connection with” is never a problem here
* **Remote**: anyone who doesn’t deal with a consumer, “in connection with” means the misrepresentation must actually reach the consumer
* Significance? Ct ended up creating a bunch of indemnity cases. Note, this was tried on pre-1995 principles. Post-1995 “reliance” principle might overrule this.
* DTPA claims generally cannot be assigned by a consumer to someone else (*PPG Industries v. JMB/Houston Centers, Tx SC, 2004; JMB brought a DTPA breach of warranty claim for faulty windows against PPG based on the sale and an assignment of warranty claims from HCC to JMB*)
* Ct said downstream buyer can sue a remote seller for breach of an implied warranty under Tx UCC §§ 2.314 and 2.315, but not under DTPA b/c not “in connection with.” Consumer must sue seller, seller can go and sue remote.
* But at the same time, the legislature was saying you have to sue the manufacturer. Whoops.
* Significance? As Ps lawyer, you might have to sue someone you don’t want to sue
* No requirement that one know the misrepresentations were false or have intent to deceive
* If an agent personally made misrepresentations, agent can be held liable under DTPA, even if acting within scope of employment. You can sue an agent b/c the statute says you can sue any person, and an agent is any person. Agents and EEs receive protection through the indemnity provision of §17.555 (*Miller v. Keyser, Tx SC, 2002; sales agent misrepresented that homeowners could fence in property despite easement*)
* Conspiracy: two or more persons can be held liable for a conspiracy to violate the DTPA (*Laxson v. Giddens, Tx App, 2001*)
* Key element of conspiracy – meeting of the minds on the object or course of action
* Each conspirator is responsible for all acts done by the conspirators in furtherance of the conspiracy (i.e. joint and several liability)

## Class Actions

* Significance? Virtually impossible to maintain a class action in Texas.
* DTPA no longer contains a separate class action provision. Class actions are governed under Tx Rules of Civil Procedure, Rule 42

|  |  |
| --- | --- |
| **The Good** | **The Bad** |
| Allows small claims to be asserted | Coercive |
| Efficiency | Allows collusion |
| Cost | Attorneys’ fees |

* DTPA claim accrues when the consumer discovered or should have discovered the deception (*In Re Alford Chevrolet-Geo, Tx SC, 1999*)
* Courts must perform a **rigorous analysis** before ruling on class certification
* For a class to be defined, it must be precise: the class members must be presently ascertainable by reference to objective criteria
* Cannot use a fail-safe class (where the class depends on the Ds liability, like “all people who the D lied to,” b/c we won’t know who the class is until the trial ends, which is backwards) (*Intratex Gax Co v. Beeson, Tx SC, 2000*)
* No individual issues allowed. In Texas, this is defined very narrowly. Cannot use the word “allege” in Tx.
* Element of **reliance** is often a problem. This kills many DTPA claims b/c by definition it is an individual issue. If a P could prove reliance in an individual action with the same evidence offered to show class-wide reliance, then the issue is one of law and fact common to the class
* Anything involving **state of mind** also usually kills the DTPA claim

### Choice of Law

* Can Texas law be applied in a nationwide class-action suit?
* 1st, decide if Texas law conflicts with the laws of other interested states
  + No conflict, then no issue applying Texas law
  + Class representatives bear burden of proof that there is no conflict
  + TC must conduct an in-depth analysis of the differences
  + If it conflicts (in a way that is important to the case), then Texas law cannot be applied

## Violations of the Act

* 4 types of conduct that may be actionable under the DTPA

1. Laundry list\*
2. Unconscionable\* action or course of action
3. Any breach of an express or implied warranty
4. Any violation of Chapter 541 of the Insurance Code

* Suppose an insurance agent makes a misrepresentation. Use DTPA to make a claim under 1 and 2, and then you can use Chapter 541 to get another claim under 4
* \*exist only by the DTPA. 3 and 4 exist independent of DTPA.
* Typical claim involves all of the first 3. Almost any time you have 3 you also have 1, and 2 is a catch all that you almost always include

## The Laundry List §17.46(b)(1)-(27)

* Broadly interpreted, some overlap may occur
* While some of the provisions require knowledge, most do not
* (5) and (7) are there generally to ensure that descriptions of goods or services offered for sale are accurate. These two provisions cover almost everything and are the general misrepresentation provisions.
  + Misrepresentation may be express or implied
  + May be oral or written
* Examples: best engineered in the world, completely fixed, next Blockbuster
* Alderman argues (12), representation of legal rights, has the potential to be one of the most far-reaching. Arguably any conduct by a party who is subsequently found to be in breach of a K or violation of a statute would fall under (12)
  + Misrepresentation is related to the rights or obligations of a party, not the goods
  + Very common in LL/T cases. Ex, LL who tows T car in violation of city ordinance
* (24) is “deceptive silence,” or failure to disclose, and requires intent
  1. Failure to disclose
  2. Info must be known
  3. Intent
  4. Info would matter to a consumer (presumption of deception)
* Misrepresentations, as long as of a material fact and not “puffing” or opinion, are actionable
  + Figure out what the truth is. If the words meant anything but then you have a misrepresentation. Cannot apply the literal meaning to the words, client has to provide the meaning.
  + Consumer’s understanding is the most important. (*First Title Co. v. Garrett, Tx SC, 1993; title contained the words “none of record” in the easement section, they really kind of meant “none found”*). Not the same thing.
* 1995 amendments to 17.50(a) requires that any violation of the laundry list be accompanied by **reliance** for a claim to be actionable
  + …relied on by **A** consumer to **THE** consumer’s detriment
* **A** consumer is anyone
* **THE** consumer is the person suing
* Ex. Father, in reliance on store’s misrepresentation, purchases item for use by himself and his son. Son injured as a result of the misrepresentation. Father is “a consumer” and son is “the consumer”
* Manufacturer

Retailer 🡪 Consumer

* + Might overrule *Amdstad’s* “in connection with” requirement (*Amstadt* was decided on pre-1995 principles). However, this is not official yet and currently we need to meet both the “reliance” and “in connection with” standard

*Pennington v. Singleton, Tx SC, 1980; regular people suing for $500 of boat repairs*

* Ct said statement was “material fact, not merely opinion or puffing”
  + Just like new
  + Excellent condition
  + Perfect condition
* Ct said these were statements on quality. It’s easy to say the boat was poor quality b/c it didn’t work at all! Not a gray area here, basically strict liability
* Still the leading case
* If too vague, then you cannot have a misrepresentation. Must give meaning to the misrepresentation (*Douglas v. Delp, told her to sign to “protect your interests”*)

## Unconscionability §17.50(a)(3)

* Unconscionable is defined in §17.45(5)
* Be careful with dates! Pre-1995, reliance had 2 parts:
  + Procedural: (A) takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree; or
  + Price Element: (B) results in a gross disparity between the value received and consideration paid in a transaction involving transfer of consideration. ---This part no longer exists. Problem because old cases rarely said which part they were ruling under
* Post-1995, reliance is part (A) only
* Without unconscionability, it may be hard to prove anything was wrong. There is just an inherent sense of it being wrong (*Bennett v. Bailey, Tx Civ Appeals, 1980; dance lessons, weird opinion b/c at that time there was no definition of unconscionability*)

*Chastain v. Koonce, Tx SC, 1985; built a pipe yard on land, but yard didn’t decrease value of home, no evidence of unconscionability b/c acts occurred way after transaction*

* Leading unconscionability case, even though the P lost
* Unconscionability is an **objective standard**
  + No requirement D acted intentionally, knowingly, or with conscious indifference
  + Does not require proof of intent. Consumer need only prove that he was taken advantage of to a grossly unfair degree
* **Gross** should be giving its ordinary meaning of glaringly noticeable, flagrant, complete, and unmitigated

*Latham v. Castillo, Tx SC, 1998; sued attorney for never filing malpractice suit, attorney kept saying he was working on it*

* Unconscionability commonly used with professionals
* Usually very hard to sue an attorney for malpractice b/c you have to show that you would have won the malpractice case. Not so for DTPA, all you need to show is misrepresentation plus damages.
* What probably sealed the deal? P used the word “trust” to describe her relationship with the attorney.

## Assignee Liability

* HIDC: Holder In Due Course doctrine (commercial world)
  + If you take a note (1) for value, and (2) in good faith, you take free of any defenses
  + Idea: Consumer purchases from Store on credit. Store wants their money now, so they sell the note to Bank. B collects from C. Works well in the commercial world, and we want to protect that.
* Consumer World: FTC Rule 433
  + Holder is subject to all claims and defenses in a consumer credit contract (essentially eliminates HIDC doctrine in consumer context)
  + BUT, recovery is limited to the amount paid by the debtor

*Home Savings Association v. Guerra, Tx SC, 1987*

* Guerra borrowed $7700. Promised to pay Modern Builders $125.69 / month.
* MB assigned to HSA. HSA received $1256 from Guerra.
* G sues HSA under FTC Rule 433. G can recover no more than $1256 from HSA.
* Ct introduces an “inextricably intertwined” term, and says “Guerra simply never advanced this theory of recovery.” What is this?
  + Following year Ct decides *Qantel*, and says “inextricably intertwined” is meaningless (for our purposes)
* Consumer 🡪 Merchant (assignor) 🡪 Finance via Bank (assignee). Consumer v. Assignee
  + **Derivative Liability**: Sue the assignee b/c of something the assignor did (*Guerra*)
* FTC Rule 433 always applies
* Limits the creditor’s derivative liability
* Does not limit or foreclose a direct right of recovery based on independent grounds
* Only works in consumer law, not commercial law
  + **Direct Liability**: Sue the assignee b/c of something the assignee did (*Flannigan*)
* Regular suit

# Chapter 2

# Warranty

* DTPA does not create warranties, it merely provides recovery for any breach of warranty.
  + Consequently, the DTPA does not define the term “warranty”
  + Why have the DTPA at all? Better remedies than the UCC.
* To maintain a Breach of Warranty DTPA claim, must prove
  1. Consumer
  2. Warranty
  3. Warranty not Disclaimed
  4. Breach of Warranty resulting in an injury
* Establishing a Warranty in Texas
  + Tx Business and Commerce code
* Chapter vs article
* 2.316(c)(1) vs 2-316(3)(a)
  + 2.102 – applies to “transactions in goods”
  + 2.105 – goods are all things movable at the time of identification
* Intangibles / services / real estate not included
* What about mixed goods/svcs/real estate?
  + - * Predominant factor versus severing test (Tx is severing)
      * Electricity a good

## UCC warranties (Goods)

### Title, §2.312

* Least litigated
  + When it applies, really beneficial and easiest to use
  + Arises in **all** sales.
* Seller warrants that title is good and transfer is rightful
  + - * If someone else claims title or a lien, that violates Warranty of Title
* Difficult, but not impossible, to disclaim. Basically have to admit it is stolen before selling it to disclaim

### Express, §2.313

* **Created by seller**…(any seller, not just merchants)

1. Affirmation of fact or promise made by the seller

* Special words not required
* Not warranty if affirmation of merely a price or merely opinion

1. Any description of the goods (not just by the seller)

* Difference b/w 1 and 2 is irrelevant, just as long as you get the right person saying it

1. Any sample or model

* Sample is a piece of the whole, model is just a smaller version of what you will buy. Warranty is not that the product will be the same as the model, but that it will work the same. Sample says this is what you’ll get.
* Must be a part of the basis of the bargain
  + Basis means it mattered at all, the bargain covers quite a length of time
  + In Tx, pretty much have to show reliance. Many other states are different, so watch out for cases from other jurisdictions
* Can’t make an express warranty if you aren’t selling something. Based on something the seller does – conduct, language, whatever
* **CANNOT DISCLAIM**. So as a consumer you always look for an express warranty
* Watch out for **merger clauses** in contracts. Any express warranties outside of the document are negated b/c you cannot introduce any evidence that they exist.

### Implied

* Merchantability, §2.314
  1. Must be a **merchant** (one who deals in goods of that kind)
  2. Must also meet 1 of 6 requirements
     + - * Pass w/o objection in the trade: manner in which it is made
         * Fit for **ordinary** purpose: does what it should for the length of time it should, the quality of the product (made for A and used for A)
         * Adequately contained and packaged: Fancy dinner, toast w/wine, stem breaks and wine spills on clothes. Not adequately contained.
  + Best warranty you can have, basically strict liability
  + Must have a defect present before there is a breach
* Fitness, §2.315
  + Seller knows of buyer’s **particular** purpose, and that buyer is relying on his skill (made for A and used for B).
  + Doesn’t have to be a merchant
  + Disappearing in today’s world – the particular purpose has become the ordinary purpose
  + Must have an ordinary purpose to also have a particular purpose, and they cannot be the same. So if you get a warranty of fitness, there will be some associated warranty of merchantability too
* **CAN DISCLAIM**. Not that difficult. “As-Is” gets you out of all implied warranties (but not express warranties)
* Code takes the approach that the default rules are very consumer friendly, but trade off is that they are easy to change by contract

### Disclaimer, §2.316

* Default rule is that the buyer wins
* Freedom of K makes it easy for sellers to change the rules if they want

### Limitation of Remedy, §2.719

* Contract may limit damages, unless unconscionable
* K may make a remedy exclusive
  + Unless remedy “fails of its essential purpose”
  + Most common? Repair or replace

### Parol Evidence Rule, §2.202

* Can’t disclaim, but doesn’t mean that express warranties are always there. Car dealer sales person starts talking about the car. Anything oral or written, anything they say, is an express warranty.
  + But PER says written agreement may not be contradicted
* “Merger” clause may bar introduction of express oral warranty
  + This is not a waiver! Can’t have a waiver until something exists, and PER says this doesn’t exist
* Don’t forget about the DTPA. PER does not apply to the DTPA. So in this case, don’t even discuss warranty, make your case a pure DTPA claim

### Notice, §2.607

* The buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach *or be barred from any remedy*
  + Seller means a person who sells or contracts to sell goods

### Warranty Cases

*Willoughby v. CIBA-Geigy Corp., Tx Civ Appeals, 1979; farmer applied Evik to kill weeds, ended up affecting the corn production*

* Great case b/c “completely wrong”
* Particular purpose? Purpose was ordinary, so there was no warranty of fitness
* Disclaimer? Said it was not effective b/c it was never brought to the attention of the farmer (but it was on the bags).
* Treat warranties as infinite or nonexistent. If it was there, it is always there. If disclaimed, ceases to exist.

*Plas-Tex, Inc v. US Steel, Tx SC, 1989; resin used for swimming pools was defective*

* **Defect**: product lacks something necessary for adequacy
* “Evidence of proper use of the goods together with a malfunction may be sufficient evidence of a defect”
* Prove a defect by showing you bought it, used it as you should, and something other than what should have happened happened

*Hobbs v. GM, US Dist Ct – Alabama, 2001; window sticker said “full size spare”*

* Notice to manufacturer: Cts were saying that filing a lawsuit was notice, and you don’t have to give notice to manufacturer. Hobbs said opposite, lawsuit is not notice and you do have to notify manufacturer
* The second you have a client with a warranty claim, give notice to everyone you might sue

## Real Estate

*Humber v. Morton, Tx SC, 1968; new home, purchased house, house caught fire and burned after using fireplace*

* Ct creates 2 implied warranties
  + **Good and Workmanlike Manner**: manner in which it is built (sounds a lot like negligence, but it is warranty)
    - Parallels the warranty of merchantability
    - CAN be waived
  + **Habitability**: quality of the product (similar to SPL)
    - CANNOT be waived

## Leases

### Residential Lease

*Kamarath v. Bennett, residential lease*

* Residential leases contain an **implied warranty of habitability**
* If LL breaches the warranty, they cannot collect rent
* Note: legislature enacted the property codes at almost the same time as Kamarath was decided. These codes severely limited the decision in Kamarath, so it sounds like it did a lot more than it really did

### Commercial Lease

*Davidow v. Inwood, commercial lease of a building for a doctor’s office*

* Commercial leases contain an **implied warranty of suitability**: premises are suitable for their intended commercial purpose
  + CAN be waived
  + Like the warranties of habitability and merchantability, this warranty focuses on results

## Services

### Implied Warranties – MH

*Melody Home v. Barnes, Tx SC, 1987; one of most significant warranty cases, purchased manufactured home, repair services tried to fix sink and caused new problems that made things worse*

* An implied warranty arises when public policy so mandates
  + Things to consider: public interest in protecting consumers from inferior services, ability to prevent loss, reliance on expertise of service provider, ability to absorb cost of damages
* **Implied warranty of good and workmanlike performance** in the **repair or modification** of **existing tangible goods or property**
  + Ct did not distinguish professional from non-professional services
  + “Quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade and performed in a manner generally considered proficient by those capable of judging such work”
  + “We do not require repairmen to guarantee the results of their work”
* Ct said cannot waive or disclaim, later we find you CAN disclaim
* Gonzalez’ Concurring Opinion
  + Said there was no need to create a warranty b/c you could have extended the original *Humber* warranty
  + Should not apply to “incidental services”
  + Focuses on results, not conduct
  + Believes it will create a battle of experts

### Post-MH

### Waiver

*GWL v. Robichaux, Tx SC, 1982; contract for new house, waiver was in the promissory note*

* Said warranties of GWP and Habitability can be waived
* MH said they reverse *Robichaux*. For ~10 years, everyone assumed *MH* overruled *Robichaux* (so you cannot waive or disclaim the warranties)

*Centex v. Buecher, Tx SC, 2003*

* Attempts to reconcile *MH* with *Robichaux*
* WoHabitability generally CANNOT be disclaimed
  + Except in limited instances when the defects were fully disclosed
* WoGWP CAN be waived
* WoSuitability CAN be waived (“as-is” generally sufficient) (*Gym-N-I Playgrounds v. Snider, Tx SC, 2007*)
* TRCCA, RCLA: made it very difficult to sue home builders

### Professionals

Implied Warranties

*Archibald v. Act III Arabians, Tx SC, 1988; horse training services, trained horse and horse died*

* Ct held horse training was “repair or modification of tangible goods”
* Irrelevant whether someone is or is not a professional
* Gonzalez’ Dissent: concerned Ct created a warranty that is easier than negligence (b/c producing cause is the standard instead of proximate cause) but is concerned with results

*Murphy v. Campbell, Tx SC, 1998; accounting services*

* **No implied warranties** for **professional services**

***Rocky Mountain Helicopter****, Tx SC, 1999; improperly refueled a helicopter, caused serious environmental damage*

* \*\*\*D’s best friend for negating implied warranties
* P tried to argue an implied warranty of GWP
  + Ct said implied policy arises only when public policy mandates, and public policy mandates only if there are no other adequate remedies available to the consumer
  + H: **No implied warranty** of GWP for services **incidental to** helicopter maintenance
    - World’s worst opinion: tiny scope. What about services incidental to bus maintenance?
    - Refueling was the maintenance. Forgetting to turn off the refueler was incidental. Ct adopted Gonzalez’ dissenting opinion in *MH*
* Is there a warranty?
  + Not Adequate Remedies
    - Privity or reliance problems
    - Difficulty of assigning responsibility
  + Adequate Remedies
    - Obtain recovery under other theory
    - Other theories are conceivably available
* Ct looked to see if another remedy was available for this P (case by case basis). Earlier cases looked at the whole population.
* Significance? Can read *RM* as “*MH* still exists and is applied any time you have repair or mod, regardless of the plaintiff in the case”, or you can read it as “There are no implied warranties and you have to always look on a case by case basis.” Regardless, it seriously affects *MH* b/c even if you read it as “*MH* still exists”, *MH* doesn’t apply to **incidental** services. Not sure how we define incidental services!
  + Don’t know what a court would do today. Need to be very careful how you define your case – were you fixing part A or were you fixing the car?

Contract or Express Warranty?

*Southwestern Bell v. FDP, Tx SC, 1991; published ad but published it incorrectly*

* Ct distinguished breach of contract versus breach of warranty (acceptance is the magic word)
  + Why does it matter?
    - DTPA applicability
    - Attorney’s fees
      * Tx Provision 2226 says you can recover attorney’s fees for breach of K.
      * Ct comes to correct conclusion that express warranties are contractual in nature, thus covered under 2226
* No performance = Contract remedies = Not a DTPA claim
* Defective performance = Warranty law = DTPA claim
* How your case goes depends on how well you argue. Case law goes both ways and they are all dependent on how the Ct wanted to rule.

REVIEW: *Head v. US Inspection, Civ App, 2005; inspection of the roof by apprentice inspector*

* Claims asserted
  + Breach of K
  + Implied warranty
  + Negligence – Cts don’t like if you also have a negligence claim b/c sounds like you are trying to recast as DTPA claim
* DTPA
  + Professional service exemption – D must raise
    - Misrepresentation: Ct found they were all opinion
    - Unconscionability: Ct said not unconscionable
    - Failure to disclose: at the time they made the misrepresentation, didn’t know it wouldn’t be a licensed inspector
    - Express warranty: Ct buys that this was defective performance, not no performance

# Chapter 3

# Remedies

## Notice and Settlement

### History

* Originally notice was a defense to treble damages
* Notice then became a pre-requisite
  + Consequence of not giving notice is abatement
  + Low threshold for what constitutes “notice”
    - 60 days
    - “Reasonable Detail” of 1) specific complaint, 2) amt of damages, and 3) attorney’s fees

### Current Scheme, §17.505

* How and When can D Propose a Settlement? §17.5052(a)-(c)
  + P gets 1 shot at settlement by sending the required notice
  + D has up to 60 days after receiving notice to offer settlement
  + D has 2nd chance to propose settlement within 90 days of filing answer
* What Must be in the Settlement? §17.5052(d)
  + Can offer to settle in kind, but must reduce the value to a $ amount for damages (as P, you can prevent a settlement in kind by having your client liquidate their damages)
  + $ amount for attorney’s fees
* Consequences if Consumer Does NOT Accept?
  + §17.5052(g), (h): Limit damages and attorney’s fees
  + Precludes punitive damages
  + Absolute defense under §17.506(d) if D offered to settle in full
* If D’s offer is the same/substantially the same as the jury’s verdict, Consumer gets the lower of the 2 amounts and no punitive damages. Judge decides if the attorney’s fees offer was the same/substantially the same as when the settlement offer was made.
  + Ex. P asks for $10,000 damages and $1,000 attorney’s fees
  + D offers $6,000 damages and $500 attorney’s fees
  + Jury awards $5,000 damages, $15,000 attorney’s fees, and $10,000 punitive
  + P gets $5,000 damages, zero punitive, and (if Ct finds it was reasonable at the time the offer was made) $500 attorney’s fees
* What is “substantially”? Don’t know. Safe to assume 80% and higher.
* Summary:
  + As a P, always ask for a little more than what you think a jury will award
  + As a D, always offer a little less than substantially the same. Always offer something, b/c that is the only way to protect yourself.
  + D’s second offer should be substantially the same or in full
  + Ds should consider Chapter 42 for all DTPA claims b/c you are on the hook for attorney’s fees anyway
* DTPA allows either side to compel mediation. Mediation must be held within 90 days of petition

### Tx Chapter 42: Settlement

* Also called Rule 167. Loser pays the litigation costs.
* 167.2(a): D must invoke Rule 167 and make a settlement offer to have the “loser pays” rule kick in
* Can be initiated up to 14 days before trial
* After offers are made, if they are rejected, and the result is significantly less favorable (20%), Ct must award litigation costs against offeror
  + 20% rule
  + If P offers to settle for $100 and jury comes back with $200 (if P wins 20% more than X), offer was a good offer and the D has to pay attorney’s fees – the D should have taken the offer
  + If D offers $100, and jury comes back with 20% less ($50), offer was good and P should have taken it, so P pays attorney’s fees
    - “American rule” means everybody pays their own costs (versus loser pays)
    - To Alderman’s knowledge, it has been used only 1 time

## Damages

### Pre-1995

* Original damage standard was **actual** damages
  + **1973**: Automatic 3x actual damages + reasonable attorney’s fees (based on work)
  + **1979**: Actual damages + 2x damages up to $1000 + attorney’s fees
    - “Knowingly”: up to 3x damages + attorney’s fees
  + **1987**: Damages tied to Ch 33 and 41 of Civil Practice and Remedies Code for personal injury
    - Actually increased damages. Whoops, ended up with 4x damages
* Still the standard for tie-in statutes
* Includes pecuniary and non-pecuniary loss. Basically, it covers everything.

### DTPA Damages

* Consumer is entitled to use whatever measure of damages results in the greatest recovery
  + **Out-of-pocket**: ∆ between price paid and actual value of property acquired
  + **Benefit of bargain**: ∆ between value of goods had they been as promised and value delivered
  + **Cost of repairs**

Loss of Use (*Luna, 1984; loss of use of having a car, never rented a car. Even though pre-1995, economic loss and still good case law*)

* Damages are recovered for loss of convenience
* Damage amount is the cost of replacement goods, even if not purchased (like a rental car)
* Anything you can put a value on is compensable

Mental Anguish

* Already included in “actual” damages
* Historically required physical manifestation
* Must meet both the
  + **Legal Standard**: heightened state of culpability - willful, gross negligence, knowingly
  + **Standard of Proof**: (*Parkway*)
    - High degree of mental pain and distress
    - Must have direct evidence of nature, duration, severity that establishes a substantial disruption of daily routine
  + Usually meet the legal standard but have difficulty with the standard of proof

Post-1995 Damages

* Amended 17.50(b); Chapter 33 now applies to DTPA (proportionate responsibility statute); Chapter 41 does not apply (significant b/c punitive damages statute); added §17.50(h) (tie-in statute, works like pre-1995 DTPA b/c actual damages); amended 17.50(c) (attnys fees provisions for Ds, significant effect)
* 17.50(b)
  + Economic damages + attorney’s fees
    - Economic damages: direct, incidental, consequential loss (any pecuniary loss)
  + “Knowingly”: damages for mental anguish + up to 3x economic
    - No requirement that you have economic loss to get mental anguish
  + “Intentionally”: up to 3x both economic and mental anguish
* 17.50(h) – “Tie-In” Provision
  + If another law references the DTPA, Consumer can recover “actual” damages
  + “Knowingly”: recover up to 3x actual damages

*Digangi v. 24-Hr Fitness, 2005. Crappy, and wrong, opinion*

* + Can a personal injury claim be brought under the DTPA (recall 17.49(e))? YES.
  + Ct basically said you can’t use a tie in statute, which is completely wrong. Significant opinion to know about and be aware that the other side is going to throw this case out there.
  + HSA says a court may award actual damages, equitable relief, or punitive damages
  + May not use the term “bodily injury” but they allow damages for bodily injury!
* Don’t have to prove the “suit within the suit” to recover under the DTPA (like you go in negligence malpractice cases)
* *Douglas v. Delp*: changed the law outside of the DTPA. Cannot recover mental anguish damages that arise from economic loss.

Proving Damages

* By law, P is always considered a competent witness to testify to the **value** of his property or damages
  + Client has to establish **market** value, not personal value
* Experts not required

Additional / Exemplary / Punitive Damages

* Originally 3x actual damages
  + 1979 *Valencia* standard: Not more than 3x the amount of actual damages, meaning your max is 3x damages. The “additional damages” are 2x actual damages.
* Despite the 1995 amendments, max is still 3x

Multiple Defendants – Chapter 33

* Economic Damages: Jury takes P and all Ds and determines a % liability for each. D liable for their % of the economic damages.
* Punitive Damages: % irrelevant. Jury gives an amount of punitive damages for each D, judge takes these and applies any DTPA cap based on knowingly or intentionally. But after this, we don’t know how they award damages. Is it personal, do you split them, what? Just keep in mind the maximum allowed under the DTPA.
* Attorney’s fees - segregate

## Attorney’s Fees

### Fees for the Consumer / Plaintiff, 17.50(d)

* Awarded to “each consumer **who prevails**”
  + B sued C for $5000. C countersues for $1000. Both B and C win. C is down a net value of $4000, but C “prevailed” so they still get full attorney’s fees
  + If there is no Net recovery, your award is not trebled (so C’s $1000 is NOT trebled)
* Contingency fees (*Arthur Anderson*)
  + Client and lawyer can have any gee agreement they want, but the DTPA will not award attorney fee’s on a contingency % basis
  + Ct ruled that “in light of the work performed”, jury can award an amount using some hourly rate, must be reasonable and necessary
* 8 reasonableness factors
  + Time and labor required / novelty and difficulty, preclusion of other employment, custom fees, amount involved and results obtained, time limitations imposed, nature and length of relationship, experience / reputation, whether the fee is fixed or contingent
  + Results Obtained – Factor 4?
    - Is this objective? Subjective? As a D, always argue that any time the award changes, you need to re-try the case and throw out the earlier award or attorney’s fees
* *Keeton* – federal case
  + Lodestar approach in federal court
  + Ct split the difference between what a Tx court would award and the Federal calculation. No statutory basis for “splitting the difference”
* Limited by Settlement provisions of 17.5052(h)
  + If it was a good offer, limited by the offer
* Ways to Calculate Attorney’s Fees
  + Hourly
  + Hourly fee, contingent on winning
  + Hourly, increased b/c contingent
    - If you do this, need to make it clear that the fees are increased b/c of the circumstances “in this case”
  + Hourly, with bonus
  + % Contingent (cannot fee shift)
  + Combination

### Fees for the Defendant, 17.50(c)

* Awarded for groundless OR bad faith OR harassment
* Determined by the court
  + **Groundless**: no basis in law or fact and not warranted by good faith argument for extension, modification, or reversal of existing law
  + **Harassment**: brought for the “sole” purpose of harassment
  + *Zak v. Parks*, demand letter was unrealistic and seemed to show an intent to punish

### Segregation of Attorney’s Fees

* Originally, Ct gave you all attorney fee’s if the claims and facts were “inextricably intertwined”
* *Tony Gullo Motors, Tx SC, 2006; claims for contract, fraud, and DTPA*
  + Any fees related solely to a claim for which attorney fees are not recoverable must be segregated
  + Only when the fees are “so intertwined” do they not need to be segregated
  + In practice, segregate and think about what claims you really should bring
* What is recoverable? Assume claims for negligence, K, and DTPA all in once case
  + Client interview – probably have to segregate
  + Preparing petition – segregate
  + Legal research – segregate
  + Factual research – segregate
  + Depositions, Motions, Trial – segregate

### Cumulative Recovery, §17.43

* Only one recovery for the “same act or practice”
* Summary
  + Same act 🡪 single recovery
  + Separate injuries, separate acts 🡪 multiple punitives, multiple actuals
  + Separate acts, same injury 🡪 multiple punitives, but only one actual
* *Bliskey, Ct of App, 1993; premises liability. Woman attacked at apt after apt complex refused a keyless night latch*
  + Negligence: $3.013MM actual, $5MM punitive
  + DTPA: $3MM actual, $3MM punitive
  + Ct awarded only one set of actual damages, both sets of punitive, plus attorney’s fees because Bliskey elected to receive the DTPA actual damages
  + Ct held there were 2 different acts so they could have both punitive damages
* Multiple recovery governed by Chapter 41

# Chapter 4

# Defenses

## Statutory Defenses

### Waiver

### Reliance: post-1995, always plead reliance

### Settlement

### Mediation, §17.5051

* Generally a “voluntary” process. Once an agreement is reached, both parties sign a K and that K becomes enforceable
* May be compelled within 90 days of pleading. Mediation must begin within 60 days. Alderman says to always ask for mediation.
* Parties share mediation fee. If amount claimed is less than $15,000 then the party seeking to compel mediation must pay the cost of mediation
* Problems? Doesn’t occur until right before trial, very formal, system is a tad off base (mediators paid very well)

### Limitations

* Must sue within 2 years of when you discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice
  + *KPMG*; *sued, discovered they were suing the wrong person during discovery, then sued the right person*. Ct said too late. When there is an injury, you have a duty to figure out who actually caused it
* Discover **damages**. Believe caused by party A. Better figure it out b/c statute starts to run for everyone. Ct said date of injury starts the S/L.
* But in *Murphy*, Ct held that the **act** triggers the statute, even if you don’t know whether or not you have any damages yet
* If you are a D, raise it in every suit ever filed (**affirmative defense**). As P, ask all the info – any important data might be a S/L starter

### Other Statutory Defenses

* Medical Liability Improvement Act
  + Physicians were one of the first to be pulled out of the DTPA
  + No DTPA claim allowed if resulting or alleged to have resulted from negligence (*Sorokolit*)
    - Can’t take negligence and “re-cast” it
    - Effectively Ct won’t really let you bring both a negligence and DTPA claim, pick one and go with it
    - Interestingly, if a Dr is sued and wants to raise this statute as a defense, Dr can actually say he was negligent and so there can be no DTPA claim
* TRCCA and RCLA
  + Initially, RCLA first said that if you sue a homebuilder, the most you can recover is the amt you paid for the house. Crazy statute.
  + TRCCA only for new houses and homebuilders, RCLA applies to all contractors
  + TRCCA said you set up a commission to protect homebuyers.
    - Before you could sue anyone, you had to file a claim with the commission.
    - Trumped DTPA for warranty claims, couldn’t sue, and replaced common law warranties with its own warranties. Ended in 2009.
  + RCLA
    - Applies to any lawsuit to recover anything on any theory for suits based on a construction defect (overrules the cases below). RCLA only applies to Ds.
    - 2003 Amendments overruled
      * *Bruce* (said RCLA does not apply to fraud claims)
      * *Sanders* (said RCLA does not apply to exemplary damages)
      * *Carns* (said RCLA doesn’t apply to rescission/restitution)
    - Must give notice
      * Originally, if you didn’t give notice a claim was dismissed
    - Must give the right to inspect, repair
    - Limits on damages
      * Like DTPA, D has right to offer reasonable settlement. If P rejects a reasonable offer, damages / attnys fees capped at the amt of the offer (subsection e)
      * P can recover only the following economic damages proximately caused by a construction defect (subsection g)
        + No mental anguish, no punitive
        + Severely limits ability to recover under DTPA
        + Right to repurchase
    - 27.0042 – homebuilder can buy back the house for what you paid
    - 27.005 – “this chapter does not create a cause of action” was added in 1995. But there is a goof in 27.0031 b/c it says “any party who files a suit under this chapter”. You can’t file a suit under this chapter.

## Common Law Defenses

### Substantial Performance

* *Smith v. Baldwin*. Substantial performance is not applicable, and so is not a defense, to a DTPA claim

### “As-Is” and “No Reliance”

* *Weitzel v*. *Barnes; as-is contract to buy a condemned house. As-is part was irrelevant, the claim was based on a misrepresentation about the house.*
  + Oral misrepresentations are actionable as a DTPA claim
  + PER may apply to a K claim but does not apply to a DTPA claim
  + DTPA does not require trickery, artifice, or device (no culpable mental state)
* *Prudential Insurance, Tx SC, 1995; sophisticated business person purchased building, later learns it contains asbestos*
  + Contract had an “As-Is” clause + “No Reliance” clause
  + “As-Is” + “No Reliance” conclusively negate causation. As a matter of law, in this case, there can be no damages (yes, you have the misrepresentation, but since you didn’t rely on it you have zero damages) \*D’s argument
  + Ct leaves the door open by saying there are times where an “As-Is” clause will be unenforceable, like if you are fraudulently induced to sign the K, boilerplate language, parties of different sophistication
    - **“As-Is” Clause**: normally negates all implied warranties, does not effect express warranties
    - **“No Reliance” Clause**: acknowledges not relying on any representations
      * Not relying on any inducement
* *Schlumberger, Tx SC, 1997*. Is Schlumberger limited to its facts? Does 2 things

1. You **can** contractually disclaim reliance on any inducement

* Ct argues that “no reliance clause” means “I’m not relying on anything you say”. Also argues that it waives your right to complain about failure to disclose b/c these are just converses - i.e. not saying anything doesn’t matter to me, b/c if you said it I wouldn’t have listened anyway. Hmmm. This really doesn’t work.

1. “As-Is” + “No reliance” applies to failure to disclose as well as misrepresentation. I.E., you can waive fraudulent inducement.

* *Celotex, Ct of Appeals, 2006*. If Celotex is right, *Schlumberger* is a narrow case that applies only to 2 very sophisticated parties and is limited only to those facts, but the SC was not saying you can just get out of fraudulent inducement. But this is open – Celotex was a Ct of Appeals case, not a SC case. Beware!
* *Erwin, Ct of Appeals, 1998*. Is Prudential limited to its facts?
  + **Similarly situated**. Prudential probably meant sophisticated parties, not unsophisticated parties.
  + In Erwin, only the “As-Is” clause is present. Missing a reliance clause.
  + **Freely negotiated**. Ct tried to say it was freely negotiated, but the form was a preprinted contract.
* *Pairett, Ct of Appeals, 1999*. No waiver of reliance.
* *Larsen*. “As-Is” does not waive DTPA rights, but says they cannot prevail because the “as-is” agreement established that the Ds conduct could not have been a producing cause of the damages

### “As-Is” and “No Reliance” Clauses – The Alderman Summary

* “As-Is” means no implied warranties, does not negate express warranties
  + If the “as-is” has a **merger clause**, then any express warranties outside of the document are negated. Cannot disclaim it, but cannot introduce any evidence that they exist.
* *Prudential* is “As-Is Plus”
  + No warranties (via as-is clause)
  + No reliance
  + Can challenge based on fraudulent inducement or different circumstances
* *Schlumberger* is “As-Is Plus Plus”
  + No warranties (express or implied b/c you included a merger clause)
  + No reliance
  + Cannot challenge for fraudulent inducement
* Looks like SC has said if you draft everything right, you are free and clear

### Other Defenses

* Imputed notice is not a defense (*Ojeda de Toca*)
* Can’t waive the DPTA, and acceptance of defective performance doesn’t prevent you from making a DTPA claim (waiver/estoppel) (*Kennemore*)
* P has a duty to mitigate damages (*Gunn Infiniti*)

# Alternate Dispute Resolution

* Mediation: less involved, don’t generally give an opinion, doesn’t force you to do anything, probably 98% of all cases will have had mediation
* Arbitration: binding decision, have a K that says someone else will make the binding decision, private justice system, K usually says which company (AAA – American arbitration association)

## Arbitration

* Why arbitration? Efficient and lower cost
* How does it work
  + Federal Arbitration Act recognized arbitration (applies when there is a written K requiring arbitration)
  + Selection: exclude people, you don’t pick people (like striking a jury)
  + Procedures: also part of K or part of organization, usually very informal, not a judge – not bound by rules of law or rules of court or procedure
  + Cost: was less expensive, today it is extremely expensive
* Consequences
  + No jury, no law, no appeal. Everything is final. Generally everything is secret – no requirement for written opinion.

DTPA claims are subject to arbitration. Ct says arbitration doesn’t waive your rights, it is “just another forum” (*Anglin, one of the first Tx cases, 1992*)

### Severability

*Buckeye*, *payday loan, under FL law the K was void but K contained an arbitration clause*

* As a matter of federal law an arbitration provision is **severable** from the rest of the K
* If challenge is to the arbitration clause itself, Ct hears the case
* If challenge is to the contract’s validity, suit is considered by the arbitrator
* These rules apply to state as well as federal courts
* Only way to challenge an arbitration clause is to say the clause is unenforceable (i.e. unconscionable)

### Who is Bound?

*In re Weekley Homes, K between A and B. C, the daughter of A, sues in tort for personal injury*

* **Direct-benefits estoppel**: people who get benefits from the K are bound by the arbitration clause. Applies to any claim that arises solely from the K. Then the Ct also looks to the question below
* Did she “**embrace**” the K? Even though the tort claims had nothing to do with the K, b/c she embraced the K and derived benefits from it, direct-benefits estoppel applies
* In Tx, once you have an arbitration clause, it is almost always valid and it applies to almost everyone involved in the K
* Non-signatory may be bound (as in *Weekley*)
  + Incorporation, assumption, agency, alter ego, equitable estoppel, TPB

### Challenging Arbitration

* Unconscionability: “so one sided as to render it unconscionable”
* Cost:
  + Can excessive cost form the basis for invalidating an arbitration provision? Ct seems to suggest that it depends on the P’s situation, but then holds that it is too speculative and said it wasn’t unconscionable. Suggests that excessive costs might be unconscionable (*Green Tree*)
  + 3x as much to resolve dispute as amount in dispute. 2:1 said unconscionable, but plenty of other cases have said it was not. Ct spent a lot of time discussing P and whether or not he could afford the arbitration (subjective) (*Olshan*)
* Fraud/Evident Partiality/Misconduct:
  + Only grounds to **vacate** the award. Very narrow and difficult to raise
  + Evident Partiality (*Perry Homes*)
    - Have to really show favoritism, cannot be trivial
    - *Falbaum* dissent emphasized the “objective observer”
  + Manifest disregard
    - Arbiter clearly recognizes the applicable law but chooses to ignore it
    - Very hard b/c they don’t usually write opinions
    - Insane application is ok, as long as you don’t disregard law
    - *Citigroup* case – 5th circuit said manifest disregard is no longer grounds to vacate

### Why does Arbitration Matter?

* Substance, not forum
  + Businesses win over 97% of the time, repeat players.
  + Different application of law. No precedent, no opinions.
  + Costs deter claims
* Class actions
  + Most arbitration clauses say you waive your rights to a class action. So far, Cts haven’t clearly said this is unconscionable

### Miscellaneous Facts

* Car dealers & people in the military (for credit matters) cannot be forced to arbitrate, people who work for the military can’t force their EEs to arbitrate
* Arbitration Fairness Act is in Congress (been there for awhile) and basically ends Consumer arbitration.
* Monday, SC said you could put a clause in the arbitration clause that says if you challenge the arbitration clause you have to go to the arbiter.

# Disclaimers and Limitations

* Bringing claim through DTPA doesn’t affect the validity of a limit on damages, or a disclaimer of warranty
* “Pure” DTPA Claims
  + Cannot waive or disclaim the DPTA – §17.42
  + Can negate causation
* Warranty claims
  + If you find a breach you can sue under DTPA, but the law governing warranties is non-DTPA
  + Merger doctrine (*Alvarado*). Still good law. Said merger doctrine does not apply to the DTPA.
    - In this case, there was a warranty and a merger clause, consumer sued for breach of warranty (no separate misrepresentation).
    - Somehow this non-existent warranty was resurrected and used under the DTPA.
  + *FDP, limitation of damages*. If claim is in warranty, then any limitation or disclaimer is valid, even if you bring it through the DTPA
    - Economic damages are controlled by the limitation in the K
    - Cannot limit exemplary (additional) damages (*Rinehart*)
* This is why misrepresentations are better than warranties
* Forum selection clauses are valid