1. **Proper Plaintiff**
   1. In order to maintain a successful lawsuit under the DTPA, a plaintiff must show:
      1. He/she is a consumer;
         1. Consumer + goods/services as basis of complaint + Anyone who violates the act = DTPA case
      2. Committed one of the four acts specified in § 17.50(a)(1)-(4); and
      3. The defendant's action was a "producing cause" (not proximate cause) of the consumer's damages.
      4. Proper plaintiff, proper defendant, violation, defenses, and remedies.
   2. Section 17.50(a) permits a consumer to maintain an action under four different circumstances:
      1. (1) violation of its list of prohibited practices (laundry list);
      2. (2) unconscionable practices;
      3. (3) any breach of warranty; and
      4. (4) violations of Article 21.21 of the Insurance Code.
   3. The term "consumer" is defined by § 17.45(4) as an individual who:
      1. seeks or acquires
      2. by purchase or lease,
      3. any goods or services
      4. This excluding bus. consumers and subsidiaries with > $25MM gross assets
         1. § 17.45(10) "business consumer" means an individual, partnership, or corporation who seeks or acquires by purchase or lease, any goods or services for commercial or business use.
   4. § 17.44(a) This subchapter 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.
2. **Seek or Acquire**
   1. *Martin v. Lou Poliquin Enterprises, Inc.* (Tex. App. 1985) - (Ad placed in the yellow pages, but was not published correctly). A DTPA consumer is one who in good faith initiates the purchasing process when he:
      1. (1) presents himself to the seller as a willing buyer with the subjective intent or specific objective of purchasing (good faith intention to purchase)
         1. No actual exchange of consideration is required (dicta);
      2. (2) possesses at least some credible indicia of the capacity to pay (if challenged, proof of both of these items must be offered by the plaintiff).
   2. Seeking is not necessary when one has acquired
   3. *Holeman v. Landmark Chevrolet Corp.* (Tex. App. 1999) - (Ad on radio claiming all offers would be accepted. Some plaintiffs may not have had good faith intention to purchase due to ridiculously low offers).
3. **Purchase or Lease**
   1. *Kennedy v. Sale* (Tex. 1985) - (Employer [purchaser] switched ins. carriers and misrepresented the coverage of pre-existing conditions to the employee [who acquired]). A plaintiff establishes his standing as a consumer in terms of his relationship to a transaction, and need not be the one who purchases or leases.
   2. Although the term "purchase" is not defined in the Act, it should be read liberally to include any transfer of goods or services in exchange for "consideration."
   3. *Wellborn v. Sears, Roebuck & Co.* (5th Cir. 1992) - (incorrectly installed garage door opener killed purchaser's son).
      1. A third-party beneficiary may qualify as a consumer as long as he transaction was specifically intended to benefit the third party (and not only an incidental benefit), even a gift can qualify as 3rd party "acquired" from "purchaser."
   4. *Exxon Corp. v. Dunn* (Tex. Civ. App. 1979) - (Plaintiff, while getting his battery charged, noticed his A/C was broken and def. attempted to fix. He was not charged and did not pay for any goods and services (did not purchase or lease = not a consumer).
   5. *Sherman Simon v. Lorac* (Tex. 1987) - (group of men rented a car using the company credit card during the scope of employment). Corporations (and their agents) are covered as consumers.
4. **Goods or Services**
   1. § 17.45(1) "Goods" means tangible chattels or real prop. purchased or leased for use.
   2. § 17.45(2) "Services" means work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods.
   3. *E. F. Hutton and Co. v. Youngblood* (Tex. 1987) - (Withdrawn opinion - Plaintiff sued after receiving bad tax and investment advice - stocks and bonds). If statues cannot be harmonized, the more specific [TX Securities Act] applies over the more general [DTPA].
      1. Could have just said that stocks were intangibles and not a "good."
      2. Court overlooked that statutes should, when possible, be interpreted in a manner whereby they can both be applied consistently.
      3. The court should always look to the nature of the transaction and ask whether this was a sale of securities or the rendering of an independent service? Only the former should be deemed incompatible with the DTPA.
   4. *Hennessey v. Skinner* (Tex. App. 1985) - (Hennessey purchased a percentage of a herd of cattle and a portion of the grass lease [to become a partner with Skinner]). However, he was buying a number of cows via a percentage description, which is a tangible good.
      1. The plaintiff is still a consumer even if purchasing a tangible good (% of cattle) with an intangible item (partnership interest - not covered).
   5. Purchasers of a lottery ticket (intangible) are not consumers under the DTPA as the purposes of this transaction is a right to participate in the drawing held twice a week. The store's participation in that process is merely incidental to the transaction.
   6. Futures contracts (e.g. oil) are intangible (not consumers), although some collateral service inevitably accompanies the transaction (such as investment advice).
   7. The goods or services sought or acquired by the consumer must form the basis of the complaint, which is why the store selling lottery tickets and investment advice accompanying futures purchases are not covered under the DTPA.
   8. A pure loan transaction is not covered under the DTPA
      1. *Riverside National Bank v. Lewis* (Tex. 1980) - (Plaintiff obtained a car loan from a bank, and was told to switch banks; the new bank represented that he had a new loan, but was rescinded due to bad credit and the car was repossessed).
         1. Money is not a good and plaintiff only sought to acquire a loan and money is the basis of the complaint.
      2. *Walker v. FDIC* (5th Cir. 1992) - (Loan promised but not delivered). Plaintiff is not a consumer simply because he intended to acquire goods (a hotel) with the loan. They allege no complaint pertaining to the hotel itself, and therefore are not consumers.
   9. A loan to make a purchase is subject to the DTPA
      1. *Flenniken v. Longview Bank and Trust Co.* (Tex. 1983) - (Plaintiffs purchased home, builder sold note [construction lien] to bank for construction loan then never finished house; bank foreclosed).
         1. In this case, the plaintiffs sought to acquire a house and the house is the basis of the complaint.
   10. *Flenniken* - Privity between the plaintiff and the defendant is not a consideration in deciding the plaintiff's status; which is determined by the relationship to the transaction. The only requirement is that the goods or services sought or acquired by the consumer form the basis of the complaint.
   11. Goods are goods "for use" for whatever use was intended to be made of the goods.
       1. *Big H Auto v. Saenz Motors* (Tex. 1984) (Plaintiff bought vehicles with "lost titles" for resale [cars were stolen]).
       2. Any limitation of the "for use" concept would be contrary to the § 17.44 mandate of liberal construction.
   12. The fact that the plaintiff is a business consumer > $25MM and outside the DTPA must be plead as an affirmative defense. *Eckman v. Centennial Savings Bank* (Tex. 1990).
5. **Waiver of DTPA Rights**
   1. The DTPA can generally only be waived in certain limited circumstances § 17.42:
      1. the waiver is in writing and is signed by the consumer;
      2. the consumer is not in a significantly disparate bargaining position; and
      3. the consumer is represented by legal counsel in seeking or acquiring the goods or services.
      4. A waiver under is not effective if the consumer's legal counsel was directly or indirectly identified, suggested, or selected by a defendant (or his agent).
      5. The waiver must be conspicuous, have the appropriate heading, and substantially follow the form and wording outlined in the DTPA.
6. **Exemptions from the DTPA**
   1. There are several statutory exemptions to the DTPA found in § 17.49:
      1. The rendering of a professional service is exempt , the essence of which is the providing of advice, judgment, opinion, or similar professional skill
      2. Exceptions to the professional services exemption:
         1. Misrepresentation of material fact not characterized as advice, judgment, or opinion.
         2. Unconscionable act not characterized as advice, judgment, or opinion.
         3. Breach of express warranty not characterized as advice, judgment, or opinion.
         4. Failing to disclose information known at the time of the transaction if such failure was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed. § 17.46(b)(24).
         5. Burden is on the plaintiff to prove that an exception is inapplicable once claimed as an affirmative defense.
      3. Written contracts are exempt from the DTPA if (INCLUSIVE):
         1. Transaction or series of transaction with total consideration > $100K;
         2. represented by legal counsel during negotiations (not suggested by opposing party); **AND**
         3. contract does not involve the consumer's residence.
      4. Any transaction (other than involving the consumer's residence) with total consideration > $500k is exempt from the DTPA.
      5. Except as provided in § 17.50(b) [mental anguish] and § 17.50(h) [Tie-in statutes], no cause of action for bodily injury or death or mental anguish.
         1. § 17.50(b) authorizes economic damages with no express ban on medical expenses. Therefore, this would allow damages sought for monetary loss resulting from a personal injury (medical, lost wages, physical therapy, etc..) but physical pain and suffering and the like would not be allowed.
   2. *Head v. U.S. Inspect DFW* (Tex. App. 2005) - (Real estate inspection, contract disclaimed all warranties. Report stated water damage but that roof currently performing well. House was damaged due to water penetration. This is a professional service and analyzed under the exceptions to the exemptions).
      1. Misrepresentation of Fact - report stated only opinion.
      2. Failure to Disclose (unqualified inspector) - failure to disclose how the services were being rendered after entering into the transaction.
      3. Unconscionability - had an attorney, additional inspections done.
      4. Breach of Express Warranty - contract provided for licensed inspector. Although inspection services were received, they arguably did not conform to the quality of services bargained for. ((Defeats summary judgment)).
7. **Proper Defendant**
   1. While privity is not required, DTPA liability cannot extend to all entities
   2. The defendant's deceptive conduct must occur in connection with a consumer transaction.
      1. *Amstadt v. United States Brass* (Tex. 1996) - (Resin manufactured by Shell turned into defective pipes by U.S. Brass and marketed/sold to home builders).
         1. All were improper defendants as deceptive conduct not in connection with the sale of the house but with marketing to the home builders.
   3. DTPA claims are not assignable (UCC says warranty claims are assignable).
      1. *PPG Industries v. JMB* (Tex. 2004) - (JMB purchased a building from HCC with defective windows. JMB sued PPG based on the assignment of warranty claims from HCC to JMB). PPG warranted to HCC and is still valid under UCC (not DTPA).
         1. One of the statutes primary purposes is to encourage consumers themselves to file their own complaints.
   4. The DTPA does not require a consumer prove a knowing or intentional action (*Miller*).
   5. An agent can be held personally liable for corporate activities ("any person")
      1. *Miller v. Keyser* (Tex. 2002) - (Sales agent personally misrepresented to homeowners the boundary of an easement).
      2. § 17.555 (indemnification) provides a means for an agent to recoup his losses from the employer if the employer is responsible for the consumer's harm.
   6. Conspiracy - Two or more persons can be held liable for a conspiracy to violate the DTPA
      1. Each conspirator is responsible for all acts done by the conspirators in furtherance of the conspiracy (joint and several liability).
      2. One without knowledge of the object and purpose of the conspiracy cannot be a co-conspirator; he cannot agree (no intent to injure).
8. **Violations of the Act: The Laundry List**
   1. Once you have established that your client is a consumer (proper plaintiff), that the DTPA applies (proper defendant), and that your transaction is not exempt, the next step is to show the use of conduct prohibited by subsection 17.50(a)
   2. These violations are created by the act.
   3. A DTPA violation does not need to occur before or at the time of the transaction.
   4. A violation of the laundry list § 17.46b must be relied on by a consumer to the consumer's detriment (but not limited to the enumerated list):
      1. (5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not;
      2. (7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
      3. (9) advertising goods or services with intent not to sell them as advertised;
      4. (10) advertising goods or services with intent not to supply a reasonable expectable public demand, unless the advertisements disclosed a limitation of quantity;
      5. (12) representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;
      6. (13) knowingly making false or misleading statements of fact concerning the need for parts, replacement, or repair service;
      7. (16) disconnecting, turning back, or resetting the odometer of any motor vehicle so as to reduce the number of miles indicated on the odometer gauge;
      8. (17) advertising of any sale by fraudulently representing that a person is going out of business;
      9. (24) failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed.
   5. Misrepresentations, as long as of a material fact and not “puffing” or opinion, are actionable.
      1. Puffing - A representation should be considered mere opinion only if:
         1. it is merely a statement of the seller's personal belief;
         2. it is based on information generally known to the buyer; AND
         3. it is made under circumstances in which the buyer would not expect the seller to have any superior knowledge or expertise.
            1. If seller has superior knowledge and the consumer is ignorant, then opinion can sometimes be considered a fact.
      2. *Pennington v. Singleton* (Tex. 1980) - (The def. said that the boat and motor were in excellent condition and just like new [def. -> inadequate repairs]). The plaintiff relied upon the statements (not puffing) and would not have purchased the boat without them. DTPA violation as statements are of quality of good.
      3. *Douglas v. Delp* - a general representation that the agreement would "protect the Delp's interest" is too vague to support DTPA liability.
      4. *First Title v. Garrett* (Tex. 1993) - (Plaintiff bought land and indicated to def. that they wanted something in writing, verifying clear title before purchase. Report represented clear title despite restrictive covenant. Ruled a misrepresentation despite the presence of a waiver in report (did not waive DTPA rights).
         1. "Under Texas law, when a seller makes an affirmative representation, the law imposes a duty to know whether that statement is true."
   6. There is no requirement that representations be express; it may arise by implication.
      1. *Texas Farm Bureau Mutual Ins. v. Vail* - (although no liability, one could argue that by implication and as part of the service provided, they will settle claims fairly).
9. **Violations of the Act: Unconscionability**
   1. § 17.46(5) "Unconscionable action or course of action" means 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 (procedural unconscionability).
   2. **NO** substantive unconscionability (eliminated in 1995) - gross disparity between the value received and consideration paid.
   3. Unconscionability created by the Act.
   4. *Chastain v. Koonce* (Tex. 1985)
      1. § 17.45(5) does not expressly require a consumer prove the mental attitude of the defendant (no knowingly, intentionally, or conscious indifference).
      2. Unconscionability is an objective standard
      3. Evidence that the defendant simply took unfair advantage is not enough.
      4. The term "gross" should be given its ordinary meaning of glaringly noticeable, flagrant, complete and unmitigated.
   5. Unconscionability does not need to be at the same time as the transaction, but it must certainly be related to the transaction to be actionable under the DTPA.
   6. *Latham v. Castillo* (Tex. 1998) - (Sued their attorney who affirmatively represented that the medical malpractice suit had been filed when, in fact it had not. Evidence of unconscionable action as there was a trusting [fiduciary] relationship).
      1. Usually very hard to sue an attorney for malpractice because you have to show that you would have won the malpractice case (but just misrepresentation plus damages for DTPA).
10. **Assignee Liability**
    1. In most cases, once an instrument is assigned or negotiated, the consumer's right to raise a DTPA claim against the assignee or transferee is cut off (holder in due course - free from claims and defenses). Unless the party with instrument commits a separate violation of the DTPA, the consumer would have a claim only against the party he or she dealt with. However, a FTC Rule changes this result.
       1. The FTC rule makes the holder of the consumer credit liable to all claims and defenses which the debtor could assert against the original seller.
       2. This provision also limits recovery to the amount paid by the debtor
          1. *Home Savings Association* v. Guerra (Tex. 1987) - (Guerra borrowed $7700. MB assigned to HSA. HSA received $1256 from Guerra. Under FTC Rule 433, G can recover no more than $1256 from HSA).
             1. No derivative liability - must show that the def. has committed a deceptive act which is the producing cause of damages.
             2. Unless a separate DTPA violation - HSA just an innocent party to transaction.
11. **Violations of the Act: Warranty Law - UCC**
    1. The DTPA does not create a warranty claim
       1. Tex. Business and Commerce code [UCC],
       2. Common law
    2. A mere breach of contract is not a violation DTPA
       1. *La Sara Grain* (Tex. 1984) - (Corporate officer embezzled funds through checks not signed by two officers as required by corp. resolution filed at bank). The bank's implied promise that it will not pay checks on an unauthorized signature is not a warranty, but only an implied term of the contract.
          1. Bank did not perform a deceptive trade practice as the plaintiff was fully informed of the bank's practice (returned the canceled checks with the statement of its account).
    3. Distinguish between a breach of promise and a breach of warranty. Your argument must be framed such as the warranty is more than just an implied promise of the contract.
    4. Something cannot be the basis of the bargain if you heard about it after the transaction.
    5. Be sure to analyze the good (a good is movable) or services argument to know which law applies (UCC or common law).
    6. Remember warranty of title (seller warrants that title is good and transfer is rightful - no encumbrances [including liens]), especially if asked for all existing warranties.
12. **Express Warranties**
    1. Remember to go through all of the elements of the various warranties.
13. UCC § 2-313(1) **Express Warranty**
    * 1. (a) Any affirmation of fact or promise; becomes part of basis of the bargain
      2. (b) Any description of the goods; becomes part of basis of the bargain
      3. (c) Any sample or model becomes part of basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample.
    1. In *American Tobacco v. Grinell* (Tex. 1997), "basis of the bargain" from § 2.313(a)(1) loosely reflects the common law express warranty requirement of reliance.
    2. (2) It is not necessary to use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty; but "puffing" does not create a warranty.
    3. Cannot disclaim - there is great deference towards the continuance of an express warranty once given and essentially an express warranty cannot be rescinded.
    4. Watch out for merger clauses in contracts - any express warranties outside of the document are negated (parol evidence rule).
    5. One of the most obvious examples of a warranty is a description of a particular refrigerator as yellow (a breach of warranty follows if a white refrigerator is delivered).
14. **Implied Warranties**
    1. The law imposes upon the seller the duty to provide goods and certain minimal quality standards (implied warranties of "merchantability" [§ 2-314] and "fitness for a particular purpose" [§ 2-315]).
15. § 2-314 **Implied Warranty of Merchantability**
    1. (1) Unless excluded or modified (must mention merchantability and if in writing be conspicuous), a warranty that the goods shall be merchantable is implied in a contract for sale if the seller is a merchant of goods of that kind.
    2. (2) Goods to be merchantable must be at least such as:
       1. (a) pass without objection in the trade under the contract description; and
       2. (b) with fungible goods, are of fair average quality within the description;
       3. (c) are fit for the ordinary purposes for which such goods are used; and
          1. goods must be reasonably safe and perform in accordance with one's reasonable expectations
       4. (d) run, within the variations permitted by the agreement, and even kind, quality, and quantity for each unit and among all units involved; and
       5. (e) are adequately contained, packaged, and labeled within the agreement may require; and
       6. (f) conform to the promises or affirmations of fact made on the container or label if any.
    3. § 2-104 Merchant: A person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction.
    4. § 2-314 Comment 7: "In case of doubt as to what quality is intended, the price at which a merchant closes a contract is an excellent index of the nature and scope of his obligation."
    5. Proof of the defect is required in an action for breach of implied warranty of merchantability
       1. *Plas-Tex v. U.S. Steel Corp.* (Tex. 1989) - (US Steel made resin which Plas-Tex made into pools which were defective).
          1. Defect means a condition of the goods that renders them unfit for the ordinary purposes for which they are used because of a lack of something necessary for adequacy.
          2. Evidence of proper use of the goods together with the malfunction may be sufficient evidence of the defect (circumstantial).
16. § 2-315 **Implied Warranty of Fitness for a Particular Purpose**
    1. Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified (must be by a writing and conspicuous; general language will do) an implied warranty that the goods shall be fit for such purpose.
       1. In most cases, reliance will be inferred from the circumstances surrounding the transaction. Ex: The buyer makes his general needs known to the seller who then selects a product.
       2. Reliance will not be inferred when the buyer has actively participated in the selection process or has examined and selected the goods himself.
17. § 2-316. **Exclusion or Modification of Warranties.** (see individual warranties)
    1. (a) All implied warranties are excluded by expressions like "as is" or similar language.
    2. (b) When the buyer, before entering into the contract, has examined the goods as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed.
    3. (c) an implied warranty can also be excluded or modified (or created) by course of dealing or course of performance or usage of trade.
    4. *Willoughby v. Ciba-Geigy Corp.* (Tex. App. 1979) (Defendant recommended and applied herbicide to corn which resulted in a drastically reduced yield of bushels per acre). Disclaimer of implied warranty on package but plaintiff never saw it and was not told of it and it was therefore ineffective.
18. **Notice**
    1. § 2-607(c)(1) 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
       1. In TX, you must tell the remote manufacturer of the breach of warranty directly, not just the seller.
    2. *Hobbs v. General Motors* (M.D. Ala. 2001) - (Plaintiff purchased an Impala SS and relied upon the window sticker which indicated that a full-size spare was included [was not]).
       1. There was breach of an express warranty, but since no notice, no claim.
19. **Violations of the Act: Warranty Law - Common Law**
20. **Real Estate**
    1. *Humber v. Morton* (Tex. 1968) - (House caught burned after the first time chimney and fireplace used). Defendant impliedly warranted that the house was constructed in a good workmanlike manner and was suitable for human habitation.
    2. Implied warranty that the premises are suitable for their intended commercial purpose.
       1. At the inception of the lease there are no latent defects in the facilities that are vital to the use of the premises for their intended commercial purpose and these essential facilities will remain in a suitable condition.
       2. *Davidow v. Inwood* (Tex. 1988) - (Plaintiff leased space for use as a medical office and defendant knew of the intended use. The space was rendered unsuitable for use as a medical office by the defendant).
       3. Among the factors to be considered when determining whether there has been a breach of this warranty are:
          1. (1) the nature of the defect;
          2. (2) its effect on the tenant's use of the premises;
          3. (3) the length of time that defect persisted;
          4. (4) the age of the structure;
          5. (5) the amount of rent;
          6. (6) the area in which the premises are located;
          7. (7) whether the tenant waived the defects; and
          8. (8) whether the defect resulted from any unusual or abnormal use by the tenant.
    3. *Gym-N-I v. Snider* (Tex. 2007) - (Plaintiffs leased a commercial building "as-is," disclaiming all warranties. They were recommended to install a sprinkler system by fire marshal but did not. Building burned and they sued landlord.)
       1. No liability - the implied warranty of suitability in commercial transactions can be expressly disclaimed in the terms of the lease.
       2. In commercial transactions there is not the feature of unequal bargaining power (freedom of contract/risk allocation) which justifies the non-waivability of the implied warranty of habitability in residential transactions.
21. Chapter 92 of the Texas Property Code deals with the repair of "residential tenancies."
    1. A landlord is liable to a tenant as provided by this subchapter if:
       1. (1) the tenant has given the landlord notice to repair or remedy a condition
       2. (2) the condition materially affects the physical health or safety of an ordinary tenant;
       3. (3) the tenant has given the landlord a subsequent written notice to repair or remedy the condition after a reasonable time to repair or remedy the condition (rebuttably 7 days) following the notice given under Subdivision (1)
       4. (5) the landlord has not made a diligent effort to repair or remedy the condition after the landlord received the tenant's notice; AND
       5. (6) the tenant was not delinquent in the payment of rent at the time any notice was required
    2. A tenant to whom a landlord is liable may:
       1. (1) terminate the lease;
       2. (2) have the condition repaired or remedied;
       3. (3) deduct from the tenant's rent, the cost of the repair
       4. (4) obtain judicial remedies according to Section 92.0563.
22. **Services**
    1. There is a broad implied warranty of good and workmanlike manner performance which will apply to all services involving the repair or modification of existing tangible goods or property.
       1. That quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work (not a guarantee of performance).
       2. The term "existing tangible goods" refers generally to all moveable personal property other than money.
       3. The term "modification" broadly includes any change or alteration that introduces new (or takes away) elements into the subject matter while leaving the general purpose and effect of the subject-matter intact.
       4. The implied warranty of good workmanship serves as a gap-filler and may be disclaimed by the parties when their agreement provides for the manner, performance, or quality of the desired construction.
       5. *Melody Home v. Barnes* (Tex. 1987) - (Plaintiff bought home and Melody came out to repair sink, but caused additional damage by failing to reconnect drain - somewhat incidental service).
          1. The plaintiffs have the option to immediately sue for money damages or give the defendant the opportunity to cure the problem. The parties' choices to allow and make repairs relates back to the original purchase and were a continuation of that transaction. Accordingly, the Barneses "purchased" the repair services.
       6. *Archibald v. Act III Arabians* (Tex. 1988) - (Horse given for training became injured and was destroyed).
          1. A horse is an existing tangible good and the trainer of a horse seeks to alter the demeanor and skills of the animal (which results in a gain in value of the animal).
       7. *Murphy v. Campbell* (Tex. 1998) - (no implied warranty of good and workmanlike performance for professional accounting services).
    2. An implied warranty that services will be performed in a good and workmanlike manner may arise under the common law as public policy mandates (or for repair or modification under *Melody Homes*).
       1. Public policy does not dictate the imposing an implied warranty for service transactions in the absence of a demonstrated, compelling need.
       2. There is no compelling need for an implied warranty when other adequate remedies are available to the consumer
       3. *Rocky Mountain Helicopter* (Tex. 1999) - (Hospital contracted for helicopter services. A re-fueling spill caused damage and needed to be cleaned up).
          1. There is no implied warranty that services incidental to helicopter maintenance will be performed in a good and workmanlike manner
          2. They did not indemnify defectively (as contractually obligated to do), they didn't indemnify at all (mere breach of contract, no warranty claim)
    3. *Codner v. Arellano* (Tex. App. 2001), No recovery under an implied warranty theory from a subcontractor with whom the owner has no direct contractual relationship.
       * 1. Also public policy does not dictate a warranty (other remedies).
    4. The implied warranty of habitability (the state of the completed structure) provides separate and distinct protection from that of the implied warranty of good workmanship (builder's conduct).
       1. It is more limited in scope, protecting the purchaser only from those defects that undermine the very basis of the bargain (unsuitable for its intended use as a home).
       2. This warranty can only be disclaimed if defects are adequately disclosed.
23. **Establishing a Warranty**
    1. Express warranty claim must focus on the way in which the service is to be performed, not on whether that service was performed.
    2. Failure to perform = breach of contract
    3. Defective performance = breach of warranty (counter with merely breach of contract)
       1. *Brooks* (5th Cir. 1987) - (A group of lawyers obtained malpractice insurance who agreed to defend them in any suit brought against them. The insurance company did not defend the lawyers).
          1. Therefore, an express warranty DTPA claim concerning the fact that no goods were delivered is not proper (mere breach of contract).
          2. There is no reason why the sale of a service should receive more protection than the sale of a good - the same limitation holds to service contracts as to goods (compared common law to UCC).
          3. Footnote 8 - However, the mere promise to perform does not constitute an express warranty (defective performance alone isn't enough, need some other affirmation to create an express warranty).
       2. *Southwestern Bell v. FDP Corp.* (Tex. 1991) - (failure to publish display portion of ad in the phone book).
          1. Bell's omission of the display was a defect in the performance of its advertising contract.
          2. Again compared common law services to UCC for goods.
    4. Tex. § 38.001 A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for:
       1. (1) rendered services;
       2. (2) performed labor;
       3. (3) furnished material;
       4. (4-5) lost or damaged or overcharged freight or express;
       5. (6) killed or injured stock;
       6. (7) a sworn account; or
       7. (8) an oral or written contract.
    5. The breach of an express warranty is a suit based on a written or oral contract and recovery of attorney's fees under § 38.001(8) is allowed.
       1. While an express warranty is a distinct claim from breach of contract, it is nonetheless a part of the basis of the bargain (negotiated exchange) and is contractual in nature.
       2. When we ascertain the parties' intentions in a warranty, we look to the well established rules for interpretation and construction of contracts.
    6. When the damages are purely economic, the claim sounds in contract, but a breach of implied warranty claim alleging damages for death or personal injury sounds in tort (and Chapter 33 proportionate responsibility lies).
       1. *JCW Electronics v. Garza* (Tex. 2008) - (Plaintiff hung himself in jail with a phone. Violation of the warranty of fitness as phones represented to be safe for unsupervised inmates. Plaintiff 60% at fault = no recovery).
          1. This is not a DTPA case, just warranty (not allowed - death).
24. **DTPA Remedies**
    1. A prevailing consumer may recover economic damages as found by the trier of fact
    2. "Economic damages" means 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.
    3. Knowing violations can recover mental anguish and treble economic damages
    4. Intentional violations can treble economic damages and mental anguish damages
    5. Tie-in statutes award actual damages, which can be trebled by knowing violations
25. **Notice**
    1. Before filing suit, you must give 60d written notice before filing suit advising the person in reasonable detail of the consumer's specific complaint and the amount of economic damages, damages for mental anguish, and expenses, including attorneys' fees (up until the time of notice, not future anticipated fees).
    2. If statute is about to toll (or a counterclaim), can still file claim and serve notice afterwards.
    3. If no notice is received, you can file a plea of abatement within 30d of the answer
       1. Abatement granted after hearing if you can prove no notice given
       2. Automatic abatement if, after the 11th day after filing the plea:
          1. the pleas verifies no notice was given
          2. is not controverted by a consumer's affidavit
    4. Abatement continues until 60d after written notice is served
    5. The purpose of the notice provision is to discourage litigation and to encourage settlement - there is a fairly low threshold for a notice letter (just meet requirements)
       1. *Richardson v. Foster & Sear* (Tex. App. 2008) - (Asbestos DTPA claim, suit abated for lack of notice, first letter inadequate, second deemed OK).
          1. Letter states with enough detail for this court - knowing nothing of the claims and allegations except what is asserted in the letter - to grasp the basis of the complaints.
          2. Although the DTPA does not expressly provided for dismissal when a plaintiff fails to serve the defendant by post-suit notice when the suit is abated for that purpose, dismissal is appropriate in some circumstances.
26. **Settlement**
    1. Defendant has 60d after notice to tender a settlement offer
    2. If no mediation, defendant can also offer a settlement within 90d of original answer
    3. If mediation conducted, can offer a settlement within 20d of the end of the mediation
    4. Settlement offer must include cash value for damages and attorney's fees
       1. Both damages and attorney's fees must be accepted or offer rejected
    5. If the court finds that the amount tendered in the settlement offer for damages is the same as, substantially the same as, or more than the damages found by the trier of fact, the consumer may not recover as damages any amount in excess of  the amount of damages tendered in the settlement offer.
       1. If this is so, and the offer of attorney's fees is the same as, substantially the same as, or more than the amount of reasonable and necessary attorneys' fees incurred by the consumer as of the date of the offer (calculated by the court), the consumer may not recover attorneys' fees greater than the amount of fees tendered in the settlement offer.
       2. These sections do not apply if the offering party could not pay at time of offer
    6. Tex. Civ. Prac. and Rem. Code § 42.003(a)/TRCP Rule 167 A settlement offer must:
       1. (1) be in writing;
       2. (2) state that it is made under this chapter (and Rule 167);
       3. (3) state the terms by which the claims may be settled;
       4. (4) state a deadline by which the settlement offer must be accepted; and
       5. (5) be served on all parties to whom the settlement offer is made.
       6. Defendant must invoke these rules.
    7. You will pay the opposing party's litigation costs incurred after rejection if:
       1. Defendant offers and the award is less than 80 percent of the offer; or
       2. Plaintiff offers and the award is more than 120 percent of the offer.
       3. Mediation or arbitration settlements do not count
    8. A settlement made which does not invoke Rule 167/Ch.42 will not get attorney's fees.
    9. Rule 167 probably would be best used in smaller cases ($20-100k) in which a plaintiff's recovery is likely about the same as litigation costs. There, the plaintiff may have an incentive to take the lower settlement offer or risk having his for her recovery offset by the defense's litigation costs.
27. **Defenses to Damages**
    1. It is a defense to the award of any damages or attorneys' fees if the defendant proves that before consummation of the transaction he gave reasonable and timely written notice to the plaintiff of the defendant's reliance on:
       1. (1)  written information relating to the particular goods or service in question obtained from official government records or tests or another source if the written information was false or inaccurate and the defendant did not know and could not reasonably have known of the falsity or inaccuracy of the information;
    2. Must prove the written information was a producing cause of the alleged damage
    3. It is a defense if you paid all of the damages and attorney's fees within 30d of notice
28. **Mediation**
    1. A party may, 90d after pleading, file a motion to compel mediation
    2. The parties shall share the mediation fee
29. **Damages**
    1. Defendant acted knowingly --> up to 3X economic + mental anguish
    2. Defendant acted intentionally --> up to 3X economic + 3X mental anguish
    3. "Knowingly" means actual awareness, at the time of the act, of the falsity, deception, or unfairness of the act (or failure constituting the breach of warranty).
    4. "Intentionally" means "knowingly" coupled with the specific intent that the consumer act in detrimental reliance on (or in ignorance of) the falsity or deception.
       1. Actual awareness/intention may be inferred where objective manifestations indicate that a person acted with actual awareness/intent.
    5. The plaintiff should be allowed to recover the greatest amount of damages established by proof that was actually caused by the defendant's conduct.
       1. Damages disregarded if no proof that they were reasonable and necessary.
    6. Generally, in suits based on fraud or deceit, damages are measured by the "out of pocket" rule.
       1. The difference between the value the plaintiff gave and the value received.
       2. Example: vehicle represented as being in excellent condition and purchased for $5000. Its value as delivered was $3000. Consumer awarded $2000.
    7. In breach of warranty cases, the measure of damages is generally the "benefit of the bargain" rule (UCC § 2-714).
       1. The difference between the value of what was promised and what was received.
       2. Example: widget represented as being in excellent condition and purchased for $5000. Its value as delivered was $3000. But what if the consumer has made a good deal, and a widget in excellent condition would have been worth $6000? Under the benefit of the bargain rule the consumer recovers $3000.
    8. The cost of repairs should in all cases be a permissive alternative to the benefit of the bargain or out-of-pocket rules.
       1. Some courts have suggested that the cost of repairs is not a proper formula in breach of warranty cases, but it should not preclude the introduction of evidence of cost of repairs (goods delivered cost $500 to repair, you received goods $500 less than the value promised).
    9. **UCC**
    10. All give you expectation damages (plus incidental and consequential damages § 2-715).
        1. Incidental damages include:
           1. Expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected (including cover), and
           2. Any other reasonable expense incident to the delay or other breach.
    11. (2) Consequential damages resulting from the seller's breach include:
        1. (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
        2. (b) injury to person or property proximately resulting from any breach of warranty.
    12. § 2-712 (non-delivery) cover - buy goods on the open market to get what you expected. Amount paid on the open market ($100) - contract price ($80) = entitled to $20.
    13. § 2-713 (non-delivery) market price ($90 - don't actually have to buy) - contract price ($80) = $10.
    14. § 2-714 (defective goods) promise ($80) - what you got ($40) = entitled to $40.
    15. An expert is helpful but not required to prove market value.
        1. The owner of property can testify as to its market value, but testimony must refer to the market value (even scrap value), not personal or some other value.
    16. *Breihl v. General Motors Corp* (8th Cir. 1999) - (Class action products liability claim. The plaintiffs have not alleged that their ABS brakes have malfunctioned or failed, only lost resale value [but none have actually resold - too speculative]).
    17. *Luna v. North Star Dodge* (Tex. 1984) - (Vehicle bought with 30d/1000mile guarantee. She tried to return the vehicle but they gave her the run-around. Eventually they informed her that her car was over mileage for return. She seeks loss of use damages for a rental of her vehicle from the time she left with dealer until trial [didn't actually rent, but continued payments]).
        1. No attempts need to be made to secure alternative transportation to be compensated for loss of use of an automobile.
    18. For mental anguish damages, the plaintiff must have a high degree of mental pain and distress; mere emotions do not rise to a compensable level.
    19. There must be direct evidence of the nature, duration, and severity of their mental anguish, thus establishing a substantial disruption in the plaintiff's daily routine.
    20. *Latham v. Castillo* (Tex. 1998) - (Lawyer represented that claim had been filed when it had not. No need for economic damages to recover mental anguish damages).
        1. Since suit for deceptive practice and mental anguish damages, no need to prove the suit within a suit (would have won unfiled claim).
    21. *Finger v. Ray* (Tex. App. 2010) - (Lawyer misrepresented what he was going to do regarding a bankruptcy claim. Plaintiff claims she would have done the same thing as the lawyer and not had to pay the attorney's fees. The Court ruled that an expert would be required to determine if she would have recovered more money from the judge [she must have won the "suit within a suit"]).
        1. Dissent says outcome of the suit is irrelevant, just wouldn't have incurred fees without the misrepresentation (not collected more money from the judge).
30. **Tie-In Statutes**
    1. Can receive actual damages from a tie-in statute regardless of mental state.
    2. Can treble actual damages from a tie-in statute with the mental state of knowing.
    3. Must show that you qualify under the tie-in statute AND that you are a DTPA consumer.
    4. *Digangi v. 24 Hour Fitness* (Tex. App. 2005) - (24 represented machines were top of the line and plaintiff was injured on a machine. Sued under DTPA and Health Spa Act tie-in).
       1. No claim under DTPA as for bodily injury (Court did not expressly deny medical expenses, just loss of consortium, etc. [perhaps were recoverable]).
       2. No implied warranty as no compelling need and alternative remedies available.
       3. Health Spa Act does not afford a right of action for bodily injury.
31. **Attorney's Fees**
    1. § 17.50(c) On a finding by the court that an action under this section was groundless in fact or law or brought in bad faith, or brought for the purpose of harassment, the court shall award to the defendant reasonable and necessary attorneys' fees and court costs.
       1. Determined by the court, not a jury
       2. Groundless: no basis in law or fact and not warranted by good faith argument for extension, modification, or reversal of existing law
          1. Not no evidence standard, even inadmissible evidence may be considered that an arguable basis existed for the suit.
       3. Harassment: brought for the “sole” purpose of harassment
       4. *Zak v. Parks* (Tex. App. 1987) - (Demand letter was unrealistic and seemed to show an intent to punish).
    2. Consumers can recover attorneys fees even though the claim might be entirely offset by a claim of the opposing party.
    3. No net recovery, no trebling.
    4. Attorney's fees will not be taken as a % of recovery, even if on a contingency basis.
    5. Factors considered when determining the reasonableness of a fee (Texas):
       1. (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
       2. (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
       3. (3) the fee customarily charged in the locality for similar legal services;
       4. (4) the amount involved in the results obtained;
       5. (5) the time limitations imposed by the client or by the circumstances;
       6. (6) the nature and length of the professional relationship with the client;
       7. (7) the experience, reputation, and ability of the lawyer performing the services;
       8. (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services are rendered.
    6. Federal courts will calculates a "lodestar" by multiplying the reasonable number of hours expended by the reasonable hourly rate. This will then be adjusted by:
       1. Most of the same factors as Texas plus (great flexibility in adjustment)..
       2. the “undesirability” of the case;
       3. the nature and length of the professional relationship with the client; and
       4. awards in similar cases.
       5. *Keeton v. Wal-Mart Stores* (E.D. Texas 1998) - (Court split the difference between what a Texas and federal award of attorney's fees would be).
    7. DTPA and non-DTPA attorney's fees need to be segregated.
       1. Only when fees are so intertwined do they need not be segregated (would have been incurred on the recoverable claim alone).
    8. Chapter 30 Civ. Prac. Rem. Code provides for attorney's fees, upon motion, for a dismissal of causes of action that have no basis in law or fact.
32. **Cumulative Recovery**
    1. DTPA recoveries are not exclusive, but no double recovery allowed.
    2. *Mayo v. John Hancock Mutual Life* (Tex. 1986) - The recovery under the violation of the Ins. Code is based on failure to pay under the policy within thirty days. The separate violations of the DTPA is based upon false, misleading, or deceptive practices. Recovery on these different claims would not constitute recovery for the same act or practice.
    3. *Berry Property Management v. Bliskey (*Tex. App. 1993) - (Woman attacked at apt. after apt. complex refused a keyless night latch).
       1. Only one compensable injury was suffered and therefore properly awarded one recovery for actual damages. Because the jury found that the defendant engaged in two different acts (negligence and DTPA), the trial court did not err in awarding both sets of punitive damages.
33. **Defenses**
    1. Defenses:
       1. precluded/preempted (MLIIA/RCLA)
       2. plaintiff waived DTPA
       3. statute of limitations (affirmative defense)
       4. settlement provisions
       5. notice - abatement
       6. consumer (proper plaintiff)
       7. exemptions (proper defendant)
       8. mediation
       9. DTPA claims may not survive the death of the consumer
34. **Statute of Limitations**
    1. DTPA actions 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 (discovery rule) the occurrence of the false, misleading, or deceptive act or practice.
       1. To apply, the discovery rule requires that the injury be inherently undiscoverable and objectively verifiable.
    2. SOL Texas - Torts 2 years, Contracts 4 years
       1. Warranty claims are created in the common law/UCC outside of the DTPA and perhaps are not covered by the language in § 17.565 SOL of 2 years. Warranty claims based upon contracts may have a SOL of 4 years.
    3. The statute of limitations is an affirmative defense. The defendant must plead and prove that the consumer either discovered or should have discovered the alleged act/practice.
    4. Knowledge of the injury begins to toll the Statute of Limitations
       1. *KPMG Peat v. HCH Finance* (Tex. 1999), (sued, discovered they were suing the wrong person during discovery, then sued the right person. SOL had expired).
          1. In this case, the injury/loss suffered should have caused an investigation into the source of that loss.
    5. *Murphy v. Campbell* (Tex. 1997), (A taxpayer may know his advice was faulty [injury] long before he receives a deficiency notice [from the IRS]). Therefore, in this case a party would have to file suit before suffering any damages).
35. **Preclusion by Statute**
    1. Care must be taken to determine if the legislature has chosen to exempt a particular class of defendants from any or all of the provisions of the DTPA. See *Sorokolit* and the MLIIA. Other laws do the same for veterinarians and residential contractors (RCLA).
    2. *Sorokolit v. Rhodes* (Tex. 1994) - (MLIIA exempts physicians from the DTPA for breaches of the accepted standard of medical care. In this case it was a misrepresentation and breach of implied warranty, not a negligence claim --> DTPA liability).
36. **Residential Construction Liability Act (RCLA)**
    1. RCLA applies to any action to recover damages resulting from a construction defect, except a claim for personal injury, survival, wrongful death, or for damage to goods.
    2. Scope of Act - Covers contractors and construction defects
    3. Have to give notice, like the DTPA (60d) - abatement
    4. Has similar settlement provisions to the DTPA (but can offer repairs instead).
    5. Can only recover economic damages + attorney's fees, but no exemplary damages.
    6. 27.0042 – homebuilder can buy back the house for what you paid
    7. To the extent that there is a conflict between the RCLA, including the DTPA and any other common law action, RCLA prevails.
    8. 2003 Amendments overruled
       1. *Bruce* (said RCLA does not apply to fraud claims; but RCLA now preempts "any common law action" § 27.002(b))
       2. *Sanders* (said RCLA does not apply to exemplary damages; specifically excluded in § 27.001(6))
       3. *Carns* (said RCLA doesn’t apply to rescission/restitution )
37. **Common Law Defenses**
    1. Traditional contractual notions do not apply to the DTPA (not contract-based).
    2. The substantial performance doctrine does not apply to the DTPA.
       1. Substantial performance is when a contractor's performance is in some way deficient, through no willful act by the contractor, is so nearly equivalent that it would be unreasonable for the owner to deny the agreed upon payment. If a contractor successfully demonstrates substantial performance, the owner remains obligated to fulfill payment, less any damages suffered as a result of the deficiencies in workmanship by the contractor.
    3. The parol evidence rule does not apply to the DTPA and the use of oral representations can form the basis for a DTPA claim (fraud is a common law exception).
       1. *Weitzel v. Barnes* (Tex. 1985) - (Signed "as-is" contract to buy a house but told plumbing and A/C was up to code. They were not. PER does not apply and successfully sued under the DTPA).
    4. *Prudential Ins.* (Tex. 1995) - (Plaintiff bought building "as-is" with a provision that they were not "relying upon any representations." Def. said building was good but asbestos eventually discovered. Fairly sophisticated parties).
       1. "As-is" provision must be an important part of the basis of the bargain.
       2. An "as is" can be ineffective because of fraudulent representation or concealment of information by the seller, prevention of inspection, boiler plate provision, or is entered into by parties of unequal bargaining position.
    5. *Schlumberger* (Tex. 1997) - (Def. allegedly misrepresented the value of the project and induced the plaintiff to sell their interest at an undervalued price. Contract contained an "as-is" + "no reliance" provision). No liability as you can disclaim reliance on fraudulent representations (despite *Prudential*).
       1. Limited the holding to the circumstances in the case.
       2. Intent of parties was clear, highly sophisticated parties dealing at arm's length.
    6. *Celotex* (Tex. App. 2006) somewhat limits both *Prudential*  and *Schlumberger*
       1. *Prudential* exempts fraudulent inducement, failure to disclose, and prevention of inspection.
       2. *Schlumberger* is limited to: (1) clear and unequivocal disclaimer of reliance; (2) in a contract whose purpose is to definitively end a dispute; and (3) in an arm's length transaction between sophisticated parties represented by counsel.
    7. *Italian Cowboy* (Tex. 2011) - Plaintiff least a restaurant and was told the building was in top shape. The building instead had a horrid smell which the lessor knew about. Both parties were fairly sophisticated and represented by counsel. Claim for fraudulent inducement allowed.
       1. Pure merger clauses, without an express clear and unequivocal intent to disclaim reliance or waive claims for fraudulent inducement, have never had the effect of precluding claims for fraudulent inducement.
       2. Reliance disclaimers should have a phrase approximating "we are relying on our own judgment." The lease in question here said, "no representations or promises made."
    8. *Erwin v. Smiley* (Tex. App. 1998) - P.bought a house with an "as-is" provision. The D. was asked about termites and said that there was a problem which had been fixed. There turned out to be extensive termite infestation. "As-is" prevents fraud claim in this case as elements of fraud missing (knowing; statements did not induce transaction).
       1. Both parties were in equal bargaining position, represented by counsel, and the "as is" provision was freely negotiated, not merely boilerplate language.
    9. *Pairett v. Gutierrez* (Tex. App. 1999) - Property purchased "as-is." Ds were aware of the foundation problems and made an affirmative representation that they knew of no problems. The plaintiffs relied on the defendant's representation in purchasing the house. Liability despite the "as-is" provision. (elements of fraud established).
    10. "As-Is” does not waive DTPA rights, but says they cannot prevail because the “as-is” agreement established that the defendant's conduct could not have been a producing cause of the damages (negates causation, buyer assumes the risk).
    11. Elements of fraud are ("but for" the misrepresentations, the buyer would not have assented to the contract):
        1. (1) a material representation;
        2. (2) which was false;
        3. (3) which was known to be false or made recklessly without knowledge of its truth;
        4. (4) which was intended to be relied upon;
        5. (5) which was relied upon; and
        6. (6) which caused injury.
    12. *Ojeda de Toca v. Wise* (Tex. 1988) - House sold to plaintiff which was subject to a demolition order recorded with the city; this fact was not revealed to the plaintiff. This does not provide constructive notice of the demolition (recording statute meant to show proper title) and does not preclude a DTPA claim.
    13. *Kennemore v. Bennett* (Tex. 1988) - Acceptance of defective performance doesn’t prevent you from making a DTPA claim (waiver/estoppel).
    14. *Gunn Infiniti* (Tex. 1999) - The DTPA does not abrogate the common law duty to mitigate damages.
38. **Arbitration**
    1. DTPA claims are arbitrable under the Federal Arbitration Act (federal law preempts).
       1. *Jack B. Anglin* (Tex. 1992) - Plaintiff agreed to build an earthen dam for the City of Jacksboro. The contract contained an arbitration clause. Excessive moisture in the dam produced a mudslide. After remedial work, this dispute arose regarding the expenses incurred for such work. DTPA suit must go to arbitration and this does not violate the non-waiver clause (simply a different forum - also federal law preempts).
    2. Efficiency and lower costs (not now) are cited as the main benefits of arbitration.
    3. Texas procedure governs the determination of whether the Federal Act applies.
       1. Decided summarily (on affidavits, pleadings, discovery, and stipulations)
       2. However, a evidentiary hearing must be held to determine disputed dispositive material facts.
    4. A challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.
       1. *Buckeye Check Cashing* (U.S. 2006) - (Plaintiffs entered into various payday loan transactions with Buckeye and each agreement they signed contained an arbitration clause. Suit was filed alleging Buckeye charged usurious interest rates and is void while Buckeye moved to compel arbitration). Since challenge to the contract as a whole and not just the arbitration clause, it must go to an arbitrator.
          1. An arbitration provision is severable from the remainder of the contract.
          2. If the claim is fraud in the inducement (or unconscionable) of the arbitration clause itself - an issue which goes to the making of the agreement to arbitrate, a court may adjudicate.
    5. Principles of contract law and agency may bind a non-signatory to an arbitration agreement such as : (1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) equitable estoppel; and (6) third-party beneficiary.
       1. Under (5) "direct benefits estoppel," a non-signatory plaintiff may be compelled to arbitrate if he seeks to enforce terms of a contract containing an arbitration provision (receives benefits and burdens).
       2. If a non-signatory's claims can stand independently of the underlying contract, then arbitration should not be compelled under this theory.
          1. *In re Weekley Homes* (Tex. 2005) - (Forsting contracted with Weekley for construction of a home for both him and his daughter's family to live in. Only Forsting executed the contract, which contained an arbitration clause. After problems with the house, the daughter (as the main point of contact) arranged for repairs. The daughter claimed that Weekley's negligent repairs caused her to develop asthma and she sued for personal injuries).
             1. Arbitration clause applies as suit is based off of the contract (broad applicability)
             2. Texas procedure applies to determine of the Act applies (summarily).
             3. Once the daughter deliberately sought substantial and direct benefits from the contract, and Weekley complied, equitable estoppel prevents her avoiding the arbitration clause.
             4. Claims can be brought in tort (and not arbitrated) if liability arises from general obligations imposed by law (and not from the contract).
    6. When an arbitration agreement lacks fee allocation, it will not be unenforceable on its face (only with a showing of actual hardship especially when costs far exceed the amount in controversy).
       1. *Green Tree Financial (U.S. 2000)* **-** Plaintiff purchased a mobile home in Alabama and sued for a violation of the TILA, and arbitration was compelled. The arbitration agreement was silent with respect to the paying of arbitration costs. This fact alone (even though plaintiff could not pay and would not be able to present claim) does not make an arbitration clause unconscionable.
       2. *Olshan Foundation v. Ayala* (Tex. App. 2005) Ayala contracted with Olshan for foundation repairs to their home. Alleging that the foundation stabilization system failed, they filed suit and arbitration compelled. Arbitration clause ruled unconscionable.
          1. Costs which would amount to 45% of his gross earning and 28% of the Ayala's combined gross income.
          2. Arbitration fee 3X of the amount in controversy.
    7. In general, once an arbitration clause is found it will be binding.
       1. *Pine Ridge Homes* (Tex. App. 2004), "while the arbitration agreement facially appears to apply to both parties equally, a review of the agreement in light of the remedies available shows it grossly favors Pine Ridge. We conclude the arbitration agreement in this case so one-sided at the time of its making as to render it unconscionable."
    8. From *Perry Homes*, the FAA provides four grounds for vacating an arbitration award:
       1. (1) where the award was procured by corruption, fraud, or undue means;
       2. (2) where there was evident partiality or corruption in the arbitrators;
       3. (3) where the arbitrators were guilty of misconduct in which the rights of any party have been prejudiced; or
       4. (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
    9. A neutral arbitrator exhibits evident partiality if he does not disclose facts that might create a reasonable impression of the arbitrator's partiality to an objective observer.
       1. Relationships or connections that are trivial need not be disclosed.
       2. *Perry Homes v. Cull* (Tex. App. 2005) **-** Refusal to vacate the arbitration award because the arbitrator's failure to disclose that he represented homeowners in residential construction cases in the past.
    10. There is a strong presumption against waiver of arbitration (but it can be waived).
        1. *Perry Homes v. Cull* (Tex. 2008) - The plaintiffs vigorously opposed arbitration in their pleadings and in open court but only days before trial and after months of discovery under the rules of the court (having gotten what they wanted from the litigation process), changed their minds and decided that they would prefer to arbitrate after all.
           1. As waiver by litigation conduct focuses solely to the arbitration clause rather than the whole contract, consistency suggests it is an issue for the courts.
           2. There can be no waiver of arbitration when substantially invoking the litigation process.
           3. Waiver must be decided on a case-by-case basis and courts should look to the totality of the circumstances (such as how much discovery and how useful in arbitration [as opposed to the merits], who initiated discovery, how long arbitration clause was known, etc.).
    11. Manifest disregard of the law is no longer an allowable independent bases to vacate an arbitration award. *Citigroup Global Markets Inc. v. Bacon*.
    12. Class arbitration is not allowed. *AT&T Mobility LLC. v. Vincent Concepcion*.
39. **Disclaimers and Limitation of Damages**
    1. *Alvarado v. Bolton* (Tex. 1998) - The doctrine of merger states that when a deed is delivered and accepted as performance of a contract to convey, the contract is merged in the deed (only the deed terms control). However, like the PER, the merger doctrine does not apply to the DTPA and prior express warranties in the earnest money contract are not merged with the deed.
    2. *Southwestern Bell Telephone Co. v. FDP Corp.* (Tex. 1991) - The liability limitation clause (to amount paid) is a valid disclaimer for a suit based upon breach of warranty (but not for unconscionable activity or violations of the laundry list).
    3. *Rinehart v. Sonitrol of Dallas, Inc.* (Tex. App. 1981) - Burglary alarm system contained a warranty provision which limited liability to a maximum of $5000. However, liability limitation clauses are contractual while treble damages are not. Damages trebled to $15K.
40. **Wrongful Debt Collection**
    1. 1. Does the Act apply?
    2. 2. Did the defendant violate the act (prohibitive conduct)?
    3. 3. Are there any defenses?
    4. 4. What are the remedies?
41. **Tort of Wrongful Collection**
    1. *Duty v. General Finance Company* (Tex. 1954) - when a course of conduct has the intended effect of causing great until anguish to the debtor, resulting in physical injury and causing loss of employment, the creditor is liable to respond in damages.
    2. Could possibly also use other common law causes of action IIED, defamation.
    3. Might want to use the common law as opposed to the statute if you do not qualify under the statute (such as collection of business debt, or if do not fit into the categories of the statute).
       1. IIED requires outrageous and intolerable conduct that it offended generally accepted standards of decency and morality.
42. **Texas Debt Collection Act (TDCA) § 392.XXX**
    1. This is a tie-in statute for the DTPA.
    2. "Consumer" means an individual who has a consumer debt.
    3. "Consumer debt" means an obligation, or an alleged obligation (not just $$), primarily for personal, family, or household purposes and arising from a transaction or alleged transaction.
    4. "Debt collection" means an action, conduct, or practice in collecting, or in soliciting for collection, consumer debts that are due or alleged to be due a creditor.
    5. "Debt collector" means a person who directly or indirectly engages in debt collection
    6. "Third-party debt collector" means a debt collector, as defined by the FDCPA but does not include an attorney collecting a debt on behalf of a client unless the attorney has non-attorney employees who:
       1. (A) are regularly engaged to solicit debts for collection; or
       2. (B) regularly make contact with debtors for the purpose of collection or adjustment of debts.
       3. A third-party debt collector must obtain a surety bond issued by a surety company authorized to do business in this state.
    7. In debt collection, a debt collector may not use threats, coercion, or attempts to coerce that employ any of the following practices:
       1. (1) using or threatening to use violence or other criminal means to cause harm to a person or property of a person;
       2. (2) accusing falsely or threatening to accuse falsely a person of fraud or any other crime;
       3. (3) representing or threatening to represent to any person other than the consumer that a consumer is wilfully refusing to pay a nondisputed consumer debt when the debt is in dispute and the consumer has notified in writing the debt collector of the dispute;
       4. (4) threatening to sell or assign to another the obligation of the consumer and falsely representing that the result of the sale or assignment would be that the consumer would lose a defense to the consumer debt or would be subject to illegal collection attempts;
       5. (5) threatening that the debtor will be arrested for nonpayment of a consumer debt without proper court proceedings;
       6. (6) threatening to file a charge, complaint, or criminal action against a debtor when the debtor has not violated a criminal law;
          1. *Brown v. Oaklawn Bank* - Closed account, given $2k too much. Threatened to arrest and criminally prosecute for fraud.
       7. (7) threatening that nonpayment of a consumer debt will result in the seizure, repossession, or sale of the person's property without proper court proceedings; or
       8. (8) threatening to take an action prohibited by law.
    8. A debt collector may:
       1. (1) informing a debtor that the debtor may be arrested after proper court proceedings if the debtor has violated a criminal law of this state;
       2. (2) threatening to institute civil lawsuits or other judicial proceedings to collect a consumer debt; or
       3. (3) exercising or threatening to exercise a statutory or contractual right of seizure, repossession, or sale that does not require court proceedings.
    9. In debt collection, a debt collector may not oppress, harass, or abuse a person by:
       1. (1) using profane or obscene language or language intended to abuse unreasonably the hearer or reader;
       2. (2) placing telephone calls without disclosing the name of the individual making the call and with the intent to annoy, harass, or threaten a person at the called number;
       3. (3) causing a person to incur a long distance telephone toll, telegram fee, or other charge by a medium of communication without first disclosing the name of the person making the communication; or
       4. (4) causing a telephone to ring repeatedly or continuously, or making repeated or continuous telephone calls, with the intent to harass a person at the called number.
    10. It is unconscionable to collect on checks you did not write (must dispute, inform authorities).
    11. In debt collection or obtaining information concerning a consumer, a debt collector may not use a fraudulent, deceptive, or misleading representation that employs the following practices:
    12. (1) using a false name;

(3) representing falsely that the debt collector has information or something of value for the consumer in order to solicit or discover information about the consumer;

(4) failing to disclose clearly in any communication with the debtor the name of the person to whom the debt has been assigned or is owed when making a demand for money;

(5) in the case of a third-party debt collector, failing to disclose the things generally required under the FDCPA

* 1. A person does not violate this chapter if the action complained of resulted from a bona fide error that occurred notwithstanding the use of reasonable procedures adopted to avoid the error.
  2. A violation of this chapter is a misdemeanor punishable by a fine of $100-500.
  3. A person may sue for:
  4. (1) injunctive relief to prevent or restrain a violation of this chapter; and
  5. (2) actual damages and attorney's fees sustained as a result of a violation of this chapter
  6. On a finding by a court that an action under this section 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.
  7. Entitled to not less than $100 for threats or coercion.

1. **Fair Debt Collection Practices Act (FDCPA)**
   1. "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes.
      1. *Miller v. McCalla* - Bought house, moved and rented it out. Not a business debt as the character of the debt is when it arose rather than when collected.
      2. *Heintz v. Jenkins* - lawyers engaged in litigation (in this case settlement offer) are still covered by the Act.
      3. *Goldstein v. Hutton* - If the volume of a person's debt collection services is great enough, it is irrelevant that these services only amount to a small fraction of his total business activity; the person still renders them "regularly." notices in 12 months plus had a system for preparing and issuing the notices.
         1. The plaintiff in an FDCPA action bears the burden of proving the defendant's debt collector status.
      4. *Romine v. Diversified Collection* - Western Union a debt collector; advertised its services as a method of collecting debts by deceptively soliciting telephone numbers (different than their normal telegram service).
      5. *Zimmerman v. HBO* - HBO went around trying to identify those who were pirating signal and sent collection letters. However, HBO collecting tort claim (theft, no purchase) and not collecting a debt.
      6. *Bass v. Stolper* (7th Cir.) - Collecting on a bad check is a debt as debt not limited solely to transactions for the extension of credit (10th Cir. *Zimmerman* does limit) but instead debt is a consensual transaction for the purchase of consumer goods or services.
      7. *Romea v. Heiberger* - Back rent due (is a debt). Stautory notices (which are not pleadings [eviction in this case]) must conform with that law and the FDCPA if attempting to collect a debt.
   2. (6) The term "debt collector" means 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.
      1. This does not include:
      2. any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control
      3. any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;
      4. obligations incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement;
   3. A debt collector cannot contact consumer:
      1. (1) at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer.
      2. (2) if the debt collector knows the consumer is represented by an attorney
      3. (3) at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.
   4. A debt collector may not communicate, in connection with the collection of any debt, with any person other than a consumer or his attorney.
      1. *Zortman v. J.C.C.* - Voicemail message heard by children. No intent requirement when disclosing to 3rd parties, even if you have other disclosure obligations.
      2. *Tinsley v. Integrity Financial* - If consumer says do not communicate, you can still communicate freely with the attorney,
   5. If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer except :
      1. (1) to advise the consumer that the debt collector's further efforts are being terminated;
      2. (2) to notify the consumer that the debt collector or creditor may or is invoking specified allowable remedies.
   6. A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Has a non-exclusive list of conduct.
   7. A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Non-exclusive list:
      1. (2) The false representation of the character, amount, or legal status of any debt; or
         1. *Shorty v. Capital One Bank* - Knowing attempt collect a time-barred debt. SOL is a procedural right and if no other violations or a lawsuit threatened, then this practice is allowed.
         2. *O'Rourke v. Palisades Acquisition* - Act does not extend to communications that are allegedly meant to mislead a judge (only those which stand in the consumer's shoes.
      2. (5) The threat to take any action that cannot legally be taken or that is not intended to be taken.
      3. (7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.
      4. (8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.
      5. (10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.
      6. (11) The failure to disclose in the initial communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector.
      7. False representation that one is an attorney.
         1. *Miller* - Mass amounts of letters sent on letterhead. Just a letterhead will not due, the attorney must exhibit independent professional judgment that collection is appropriate or the Act has been violated.
   8. A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt.
2. **Validation Notice**
   1. Within five days after the initial communication (unless info given in that communication)send the consumer a written notice containing --
      1. (1) the amount of the debt, and the creditor;
      2. (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid;
      3. (4) a statement that the debt collector, if debt disputed, will obtain and mail verification of the debt or a copy of a judgment against the consumer
      4. If the consumer notifies the debt collector in writing within the thirty-day period that the debt is disputed, the debt collector shall cease collection of the debt until verified.
         1. *Wilson v. Draper* - Plaintiff disputed debt, and deferred to atty, but Chase continued foreclosure proceedings and direct contact. Ruled a debt collection (central not incidental to fiduciary duty) as debt continued despite proceedings.
         2. *Shimek v. Forbes* - Filed lien (required) before dispute. Do not have to take affirmative action to stop lien, just stop activities.
      5. The required notice cannot be overshadowed by text (visual), especially text which can be misleading regarding statutory rights (content).
         1. *Swanson v. Southern Oregon* - Visually impaired and indication of immediate payment required. Must be understood by the least sophisticated debtor (only a handful on debtors mislead - majority).
         2. *Blum v. Fisher* - unsophisticated consumer" a significant of debtors would be deceived . The unsophisticated consumer is assumed to be a "reasonable" person (uninformed, naïve, trusting, possessing below average intelligence).
         3. *Jenkins v. Union Corp* - immediate payment and full validation notice, created confusion (false sense of urgency).Saying grace period is about to expire is not a violation.
            1. Unsophisticated consumer - an express threat is not essential to an overshadowing claim and a consumer confusion standard is used.
            2. The debtor should be able to determine how those rights fit together (the ability to sue simultaneously while pursuing collection of the debt).
         4. 5th Cir. uses both un- and least sophisticated consumer tests.
   2. Violations of this Act provide for any actual damage sustained, costs + reasonable atty's fees + additional damages as the court may allow, not exceeding $1,000; or
   3. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.
   4. In determining the amount of liability for statutory damages, the court shall consider, among others: the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or
   5. A debt collector may not be held liable in any action brought under this title if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.
      1. *Jerman v. Carlisle* - Bona fide error exception does not apply mistakes of law (including ignorance), for clerical or factual mistakes.
      2. *Randolph v. IMBS* - If in bankruptcy, you cannot collect if automatic stay invoked. If you unknowingly try to collect, this is a violation but bona fide error.