**Why do we have CL:** (1) The right to safety: to be protected against the marketing of Gs which are hazardous to health or life. (2) The right to be informed: to be protected against fraudulent deceitful, or grossly misleading information and to be given the facts needed to make an informed choice. (3) The right to choose: Access to a variety of products and serv. at competitive prices. (4) The right to be heard: To be assured that cons. interest will receive consideration in the formulation of Government policy.

**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

**Interpretation of DTPA:** \*DTPA is supposed to be liberally construed.

**5 Ways to “IN” to SUE – actions that may be actionable under DTPA: 17.50**

**1. False Misleading, Deceptive Act - 17.46(a)** Failure to disclose information – failure to inform something wrong or peculiar about the product.  **To prove a claim for failure to disclose, P must show:** (1) Failure to disclose info concerning goods or services, (2) Which was known at the time of transaction, (3) if such failure was intended to induce the consumer into a transaction, (4) which the consumer would not have entered had the info been disclosed. NOTE: A mere nondisclosure of material info is NOT enough to establish an actionable DTPA claim.

Reliance – whoever is suing has to show that they relied on the false misleading acts of the seller.

**2. “Unconscionable Act” –** taking advantage of someone because of lack of education, ability or experience of a person that is grossly unfair.

**3. Breach of Warranty –** any breach of warranty is actionable (NOT in DTPA but can be used as a vehicle for a cause of action).

**4. Insurance Code Ch. 541 –** insurance company not acting in good faith, not found in DTPA but can be used as a vehicle to bring an action.

**5. Tie-In Statute –** another law Back of index (40 of them.) Violation of statute contains a DTP actionable claim. Actual damages of this section, no need to get to intentional stage. Most common DTPA with debt collection.

**Benefits of DTPA:**

-Broad appli-Cons. is broadly defined; Basically no-fault liability; Lowest causation standard [Producing cause]; economic damages and damages for mental anguish; Lowest standard for award of punitive damages [Knowingly];and Attorneys’ Fees

**ESTABLSHING CONS. STATUS: §17.45** Seek or Acquire/by Purchase or Lease/ any G or S.

An individual, entity (P and C), TX, or state agency (excluded if more than $25m in assets—limitation to keep DTPA for small business & individual use.) D anybody who violates the Act.-

The Two-Part test:

1) P must have sought or acquired by purchase or lease some Gs or serv.; AND

2) *The Gs or serv. purchased or leased must form the* ***basis of the complaint****.*

*Standard:* If facts are undisputed, then it’s a question of law for the judge or; If the facts to determine cons. status are disputed, then it’s a fact question for the jury.

**What is “*Seek or Acquire*”**

Neither privity nor K relationship is required to have C status. Focus is on C’s relationship to the transaction.

**Test:** Where no purchase was made, P must have sought (1) in GF to purchase or lease and (2) must have had the capacity to P or L. **Martin v. Poliquin** – yellow pages. **Holeman v. Landmark** – reasonableness of buyer’s intention. Buying car for $50 is unreasonable.

*-* An individual initiates the purchasing process when he: (1) presents himself to she seller as a wiling buyer with the subjective intent or specific objective of purchasing, and (2) possesses at least some credible indicia of capacity to consummate transaction.

**“Purchase or Lease”**

-Gratuitous acts/good is not a purchased good/ service under the DTPA (unless one is an intended beneficiary, one who receives G or S as a gift does not qualify as a cons.).

**Kennedy v. Sale -** K did not purchase insurance himself, but was the *intended beneficiary.*

**Wellborn v. Sears –** dead son. *Intended beneficiary.* No privity of K required.

**Exxon v. Dunn -** D brought car for repairs did not pay nor charged. *Incidental beneficiary.*

***If you did not make the purchase?*** *Test:*

*-If you are an intended beneficiary you acquire cons. status when you use it. If you are an incidental beneficiary you do not acquire it*

**“Goods or Services”**

**1) Good**- ***tangible*** chattels or RP purchased or **leased *for use.***Gs include real estate oil & gas, but exclude ***intangibles*** such as money, insurance proceeds, accounts receivable, option K’s, lottery tickets, CD’s, trade marks, LLP interest, stock, account receivable, deposit, trade marks, lottery tix.

- For use – includes for purely resale reasons n breeding stock. Foreign currency purchase is a good.

**2)Services-** work, labor, or serv. purchased or leased for use, including serv. furnished in connection with the sale or repair of Gs.

Is Money a good or Service?($ alone is not a good or service)Determining ***Factor***: Was the borrower’s objective solely to obtain a loan or to obtain a good or service?

-While the mere borrowing of money from a bank would not be Gs or serv., banks provide other serv.(checking, cc, savings) that qualify as service under DTPA.

-In determining whether a transaction is a cons. transacion, it is considered from the perspective of the alleged cons..

**Riverside Bank v. Lewis:** new loan to pay old loan. Borrow $ is not a service and $ not good.

**Flenniken v. Longview Bank:**  Home builder quit, bank foreclosed. Customer is defined by relationship to transaction; all parties who enjoy benefits can be part of DTPA claim.

**Walker v. FDIC:** homotel. Did not allege anything about homotel so no DTPA claim. It was only loan.

**Big H Auction v. Saenz:** Purchase of 2 cars for reale is a “*use*” within DTPA.

**Waiver of DTPA §17.42**: Gen. void bc waivers are contrary to PP unless: A waiver is valid and enforceable if:

(1) The waiver is in writing and is signed by the cons.;

(2) The cons. is not in a significantly disparate bargaining position; and

 (3) the cons. is represented by legal counsel in seeking or acquiring the Gs or serv..

-***Ineffective:*** Waiver is not effective if the cons.’s legal counsel was directly or indirectly identified or selected by a D or an agent of the D.

Waiver must be: Conspicuous and in bold-face type of (at least 10 points in size.)

-Identified by the heading “Waiver of Cons. Rights,” or words of similar meaning; and in substantially specific form.

***Atty Gen -*** The Att. General can still bring an action under Section **§17.47**.

**Statutory Exemptions: §17.49**

**i.** **Business Cs with** assets of more than $25 million NOT consumers.

**Eckman v. Centennial Bank:** *Defendant has the burden to prove that the P falls within the $25M exception. Affirmative defense. Starbucks Hypo.*

**ii.** **Large Transaction Exemption:**

-1.Over 100K: must have a) written contract dealing with the transaction, project, or set of transactions related to the same project. (b) Cons. must be represented by independent legal counsel. (c) transaction does not involve cons.’s residence.

-2.Over $500K: a) deals with a transaction, project, or set of transactions related to the same project. (b) transaction does not involve cons.’s residence.

**iii.** **Personal Injury Claims§17.49(e)**: not available under DTPA unless the claim is for mental anguish or is brought in under a tie-in statute( in which case actual damages are available).

**iv. Prof. Serv. §17.49(c):** 1) PS the essence of which is providing of advice, judgment, opinion, or similar prof. skill. 2) prof.s still have liability for misrp. of fact, failure to disclose, BOW, and unconscionable conduct.

***Prof. Service TEST?*** (1) engages in work involving mental or intellectual rather than physical labor, (2) requires special education to be used on behalf of others, and (3) earns profits dependent mainly on these considerations.

Test is what is the essence of the service provided. It is what you do, not who you are; service specific, not profession specific.

**Retherford v. Castro:** real estate inspector, only opinions so DTPA not applicable.

**Exception to Exemption**

-If there is: (1) an express misrp. of a material fact;(2) an unconscionable action §17.45 or course of action; (3) a failure to disclose information; or (4) breach of an express warranty. If none of those can be characterized as advice, judgment or opinion.

**Who May you Sue?**

In (1981) C’s were permitted to sue anyone who violated the DTPA, until Amstadt (1996)

-A C. may sue anyone, provided that person directly or indirectly benefits, or seeks to benefit, from the transaction forming the basis of the C’s complaint.

**Amstadt(1996) –** 100 houses plumbing issue

- A C. may sue anyone who violated the DTPA if the transaction is the basis of the C.’s complaint but the act complained of must occur in connection with the transaction. “**in connection with”** the C.’s purchase, the P must establish a connection between the P, ‘s purchase or lease, and the D’s conduct (representation).

- **Miller v. Keyser:** An agent that made representations acting in the scope of employment can be sued because agent qualifies as any person under DTPA.

**Assignment of DTPA**

TXSC has held that DTPA cannot be assigned. DTPA claims are uniquely personal to the original C. They do not survive the death of the C. The legis. is silent on assignment and therefore did not intend for assignment to occur. (1) Treble damages could be used for commercial profit and consumer will get ripped off twice.

- Court is worried that a floodgate of litigation will occur with assignments of DTPA claims.

**CLASS ACTION**

**Alford Chevrolet:** Reliance element of the DTPA is usually enough to defeat a class action. C must timely advise D in reasonable detail of C’s specific complaint and amount of damages.

**VIOLATIONS OF THE ACT?** LL **§17.46(b)**

(false, misleading, or deceptive act or practice that is:

Causation Standard is **Producing Cause:** D’s acts be **a** substantial factor in bringing about the injury which without the harm would not have occurred.

In 1995, the reliance element to a claim under the laundry list was added. [**17.50(a**)]. **First Title v. Garrett:** salvage yard case.

* + - It is important to note that reliance must be by “a” C. to “the” C’s detriment.

-In Professor Alderman’s opinion, the use of the words “a” and “the” indicate that there could be two different people. **A** consumer is anyone, and **the** consumer is the person suing.

**LL:**

5) representing that Gs/ serv. have characteristics that they do not have; (7) Quality: Representing that g/s are of a particular quality if they aren’t; (9) False advertising g/s **with intent** not to sell them as advertised; 12(Agreement- most far reaching); 20 (Warranty); (24) Deceptive Silence (was intended to induce).

-If there is no intent element, then it is strict liability and no inquiry into the S innocent/guilty mind state.

-If there is an intent requirement, P has the burden to prove intent and court will not let you fall back on broad items like #5 or # 7.

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)

**Defense: Puffing:** To be actionable, a LL statement must be of a material fact; statements of opinion (puffing) are not actionable. (1) An exaggerated, blustering, and boasting statement upon which no reasonable buyer would be justified in relying; or (2) a general claim of superiority over comparable products that is so vague that can be understood as nothing more than a mere expression of opinion. **Test**: 1) Specificity v. vagueness of the statement; 2) Comparative knowledge of the buy. & sell.; and 3) Whether the representation relates to a past or current event or condition, versus a future event or condition.

**UNCONSCIONABILITY (17.45(5)) Definition**

Pre-1995, reliance: 1) ***Procedural***l- bargaining naughtiness and **2) *Substantive*** overly harsh terms: Takes advantage of **the lack of knowledge**, **ability, experience, or capacity** of a person to a grossly unfair degree; MUST prove (1) grossly unfair, AND (2) detrimental to C. ~~(Price Element) results in a gross disparity btw the value received and consideration paid in a transaction involving transfer of consideration.~~ **Latham v. Castillo** dead daughters.

Post- 1995 eliminated the price element: Reliance only. Uncons. Is an **Objective Standard.** There is no req. that D acted intentionally, knowingly or with conscious indifference. Does not require proof of intent. Consumer only needs to prove that he was taken advantage to a grossly degree.

In K law uncons. Gets you out of the K; in DTPA gets you out of the K and damages.

**ASSIGNEE LIABILITY**

- *What did assignee mean the last time we saw it?* Cons. was assigning her claim under DTPA.

*What does it mean here?* Someone is transferring commercial paper. (Ex. Builder takes a promissory note for job on C home. Builder then assigns that note to bank.)

-**HDIC (**Holder in Due Course)- without notice of claim, take instrument free of most defenses, take for value.

**FTC Rule:** Liability of the assignees is limited to the amounts paid to the promissory note.

- **Derivative Liability**: assignee is liable because the sell. did something wrong and not them. **Home Savings v. Guerra.**

* If lender is ***inextricably intertwined*** with the transaction then there is no limit and C. can sue on anything.
* ***“Inextricably intertwined”*** is a way to establish C. status not a theory of vicarious liability. **Qantel v. CC**
* FTCC requires a notice in K for assignee liability

**WARRANTY LAW (Increased in damages authorized by DTPA)**

-DTPA does not create warranties—warranties must exist independently of the DTPA. Suing for BOW under the DTPA allows for more remedies: atty’s fees and treble damages.

**LaSara v. Bank:** Jones stole money and bank didn’t do shit. Breach of implied term in K NOT DTPA.

-BOW occur when there is **partial performance on the K,** BOK occurs when there is **non performance**

Warranty ***is created when:*** manufacturer sells to wholesaler, wholesaler sells to retailer and retailer sells to C.

- K deals with promises, while **warranty deals with factual** statements, or terms by operation of law. A breach of a promise (breach of K) is not actionable under DTPA. Every sale creates a warranty.

**BOW claim Elements: 1)** C standing, 2) Existence of a W, 3) Breach of W and W not disclaimed, and 4) Breach was producing cause of damages to consumer.

**Warranties**: **Goods**:1) Title 2) Express, (3) Implied W of Merchantability, and 4) Implied W of Fitness for a Particular Purpose.

**Services**: 1) Express and Implied Warranty of Good and Workmanlike repair or Modification of Existing Tangible Goods.(Melody)

**UCC Warranties:** (**SOL DTPA 2yrs**: UCC: 4)

**Title Warranty:** Arises in all sales and 1) Sell. warrants that title is good and transfer is rightful. **If someone else claims title or lien**, that violates the Warranty of Title. Not considered an implied warranty; can be waived or disclaimed only by specific language telling the buy. sell. does not claim title. (that item is stolen). -Sell. may K limit damage unless unconscionable. (Cannot limit in PI case)

**Express Warranty** (difficult to disclaim): A)any affirmation of fact or promise made by the sell. which is made a part of the basis of the bargain (TX requires reliance) or B) Any description of the Gs which is made a part of the basis of the bargain or (C) any sample or model which is made a part of the basis of the bargain. (Sell.’s opinion is not a warranty).

To prove a breach of an express warranty under the DTPA, a plaintiff must prove:

 (1) he or she is a C.,

(2) a warranty was made,

(3) the warranty was breached, and

(4) as a result of the breach, an injury resulted.

**Basis of the bargain:** C must prove that they saw or heard the warranty, and they relied on it when purchasing. Sell. dn need to intend to create EW>

**Defense for Sell. is puffing,**

-EW extend to the ultimate C regardless of privity of K. Brings problem of notice bc UCC requires notice given to S within reasonable time when BOW is discovered of be barred from remedy. Remote manufacturer must also receive notice.

**Parole Evidence Rule** may bar introduction of warranty. Even if a contract does not disclaim an express warranty, the evidence of an oral express warranty may be barred under 2.202, by virtue of a merger clause.

-**Implied warranty of Merchantability (**Privity not required)**:** Implied into all K for the sale of goods-waivable with As is clause. 1)Must be a merchant;2) Buy. must purchase Gs, (3) Goods must be merchantable)Merchantability. The six requirements:

(1)pass without objection in the trade (2)are of fair average quality w/i the description(3)fit for the ordinary purposes for which such Gs are used **(**defect=unfit for ordinary purposes); (4)run, of even kind, quality and quantity;(5)adequately contained, packaged, and labeled;(6) conform to the promises made on container .

 **Willoughby v. Ciba-Geigy:** disclaimer not good enough. Corp liable.

**Plas-Tex v. Steel Corp:** pool issues. P has burden of proving goods were defective at the time they left manufacturer’s or seller’s possession.

 -Reminders: \* That the buy.’s misuse goes to damages not liability.

-\***breach of an implied warranty may not be asserted against a remote sell. under the DTPA. (*PPG* in Note).**

To exclude or waive the IWM the language must mention merchantability.

-**Implied warranty of fitness for a particular purpose:**1.Sell. has skills or expertise with respect to the Gs.2. S has reason to know that B is relying on her skills or expertise in selecting a product for a particular purpose. 3. Actual reliance by the buy.. 4. May be disclaimed.

Buy. must prove: 1) Sell knew or had reason to know the buy.’s particular purpose for which the goods were required and (2) Sell knew that B was relying on the S expertise to select the goods. UCC- Must give timely notice of BOW to retailer and manuf. Notice must contain reasonable detail of damages, repairs, and a demand. Notice is a condition precedent. No notice=no lawsuit.

In order to have a claim for BOW, the C must satisfy the notice requirement of the UCC and DTPA.

To exclude IWFPP, As is must be in writing and conspicuous, i.e there are no warranties that extend beyond this document.

**Limitation of Damages:** Only works for warranty because it is controlled by the UCC, can still get full damages under LL or unconscionability. Limitation of consequential damages for PI in a C case is unconscionable.

**CL Implied Warranties:** W created as a matter of PP.

Court dismisses caveat emptor as the old rule and imposes a pair of warranties in the sale of new house by a vendor- builder. (1) the implied warranty of habitability(parallels the warranty of merchantability and can be waived) and, (2) the implied warranty of good workmanship.(Similar to SPL and cannot be waived). Makes sell. responsible for defects instead of the buy..

***Real Estate: Has a IWGWM(CAN be waived) and IWH(CANNOT be waived, when parties agree); Leases have an IWH; Commercial lease has an implied warranty of suitability(can be waived)-*** there are no latent defects in the facilities that are vital to the use of the premises for their intended commercial purpose and they will remain in a suitable condition.

***Do warranties apply to a remote purchaser of the house? Yes*,** the original purchaser, as well as any subsequent purchaser, to sue for BOW.

**Implied Warranty of Good and Workmanlike:**

Quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of the occupation. Extends only to repairs or modification of tangible goods and property. Elements to establish a breach are: (1) the D sold services to the plaintiff, services consisted of a repair/ modification of existing tangible goods, and (3) the D did not perform services in a good and workmanlike manner.

- It can be superseded/waived if the parties’ agreement specifically describes the manner, performance, or quality of the serv. It serves as a gap filler or default warranty.p **Gonzales v. Olshan.**

-IWGWR to train(modify) a horse (found to be a tangible thing); NO COA IWGWR for accounting services.**Archibald v. Arabians**

*-The term “modification” includes any change or alteration that “introduces new elements into the details of the subject matter or cancels some of them” but which leaves the general purpose and effect of the subject matter intact*

-***Policy reasons:*** 1) Protecting consumers from inferior services outweighs the prospective damages to seller; (2) service provider in better position to prevent bad work;(3) A C should be able to rely on the expertise of a service provider and SP can absorb the cost.

*Incidental services* will be subject to W only if there is a need, based on inadequacy of available remedies. Only those *direct aspects* of the service transaction are subject to the implied warranty of good and workmanlike performance.

-**Implied Warranty of Habitability**

-May be waived only to the extent that defects are adequately disclosed at the time of the K. NOT waivable for latent defects.

-The language of the waiver must be *clear and free from doubt*. Ex. “ No warranties expressed or implied.”

***What does it mean that LL’s obligation to repair and T’s obligation to pay rent are independent?*** Independent covenant rule - T still has to pay rent even if LL does not repair. (Court dislikes this rule because Because in modern times land is not important – the .structure is, LL knows of defects, and LL better cost bearer b/c permanent owner. Thus Kamarath held that LL impliedly warrants premises habitable and fit for living in residential lease

*Is there a warranty of habitability in residential leases?* (Yes and no. *Kamarath* created one, but the Property Code replaces it with a statutory repair obligation)

Habitability focuses on structure; public policy; limited to only stop conditions very defective; public policy.Applies to only defects that render the property so defective that it is unsuitable for its intended use as a home. Applies to only latent defects. Does not apply to defects know or disclosed to the buyer.

**An Implied Warranty of Suitability** by the LL in a commercial lease that the premises are suitable for their intended commercial purpose.

-This warranty means that 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 that these essential facilities will remain in a suitable condition.”

**Can you disclaim IWS with As IS?** Yes, to waive and disclaim IF LEASE expressly disclaim it **Gym v. Snider.**

**TEST - Factors used to prove BOW of the implied warranty of suitability in CL.**

-the nature of the defect; its effect on the tenant's use of the premises; the length of time the defect persisted; the age of the structure; the amount of the rent; the area in which the premises are located; whether the tenant waived the defects; and whether the defect resulted from any unusual or abnormal use by the tenant.” **Davidow v. Inwood.**

Implied Warranty for Serv.: Arises when PP so mandates.

**TRCCA (*Texas Residential Commission Act )***

-Sunset Commission recommended abolishing b/c it fails to protect C’s, and it lapsed. **NOT IN EFFECT**

-Act applied when there was a construction defect: builders had to register, created a commission to promulgate regulations; created admin procedure required before lawsuit; and Warranties that the TRCCA created were: 1)one year warranty period, gen. applicable to workmanship and materials;2) two year warranty period, gen. applicable to plumbing, electrical, heating, ac.;3) a 10-year warranty period, applicable to major structural components and the warranty of habitability was for a 10- year period.

**Establishing a Warranty**

UCC Breach Contract 2.711(a): “Where the Sell. fails to make delivery”. Not actionable under DTPA.

UCC BOW 2.714: Where Buy. has finally accepted Gs, but discovers the Gs are defective in some manner. BOW because delivered an incomplete package. Actionable under DTPA.

**Delivery & Acceptance:** If the C accepts the non-conforming goods, the consumer may revoke if it is made within reasonable time of acceptance and the goods are in the substantially the same condition as when delivered. Revocation is a BOW remedy.

*Breach warranty claims are awarded attorneys fees. Atty fees cannot be recovered under UCC as consequential damages.*

**Suing Remote manufacturer;** Under LL consumer can only sue the RM if a representation by the M reaches the consumer; Under warranty consumer an sue RM without a representation because no privity is required.

***Proportionate Liability (TX RULE)***

Sec. 33.001. PROPORTIONATE RESPONSIBILITY. In an action to which this chapter applies, a claimant may not recover damages if his percentage of responsibility is greater than 50 percent.

*What is difference btw comparative fault and proportionate liability? Comparative fault does not have a bar if P is greater than 50% to blame*

*When the damages are purely economic, the claim sounds in K. But a breach of an implied warrant claim alleging damages for death or personal injury sounds in tort.*

**REMEDIES §17.50(b)(c)(d)**

-Pre 1995 used to give actual damages and post 1995 only gives economic damages, mental anguish when DTPA is knowingly or intentionally- substantial disruption of daily routine, and additional damages when knowingly, no more than 3 times, and intentionally, no more than three times **both** economic and mental aguish

**NOTICE:(**To encourage Parties to settle **§15.505(a))**

Consumer requirement- 1) 60 days written notice to D is a pre-requisite to filing a suit under DTPA, must advise the person with reasonable detail (1) of the C’s specific complaint and (2) the amount of economic damages, damages for mental anguish, and expenses, including Attorney’s fees. (Cannot ask for additional treble damages) **Richardson v. Foster & Sear**

**§15.505 Inspection:** During the 60-day period a written request to inspect, in a reasonable manner and at a reasonable time and place, the Gs that are the subject of the C's action or claim may be presented to the C.

What is the practical effect of the NOTICE provisions? If the statute works as it should, Ds should always get out for less than 100 cents on the dollar, but Cs should be promptly compensated, avoiding the time and expense of a lawsuit.

-The D should always make a settlement offer because it allows the D to limit damages by making settlement offer within a certain number of days of getting notice.

**Attorney’s fees should be awarded even if defendant settles after receiving proper notice. Per** Section 17.50(c)

-**17.505(b):SOL or Counterclaim** If either(a) the SOL is about to run(within 60 days) OR (b) the claim is made by counterclaim, OR (c) notice impracticable then no notice is required, may be w/i 60d after service of suit or counterclaim.

**§15.505(c) Plea in Abatement-** D can file a plea in abatement if notice not received. May file plea not later than 30th day after date person files an original answer in court while suit is pending. Suit automatically abated on 11th day after date PIA is filed.

**§15.505(c) Abatement** court abates suit after a hearing, finds person is entitled to PIA because notice was not provided as required.

- 17.506(d): If the D pays the notice demand amount in full- this is a full defense to consumers DTPA claim.

**§17.506 Damages: Defenses:** defense to the award of any damages or atty fees if the D proves that before consummation of the transaction he gave reasonable and timely written notice to the P of the D’s reliance on…

**§17.5052 Settlement Offers:** D gets two shots to settle:

1) D may make an offer to settle within 60 days of getting notice demand. Or (2) if no mediation, the D may make an offer to settle within 90 days after the original answer is filed. If mediation, offer to settle must be made within 20 days after mediation to offer settlement. Offer must state the amount of $ offered to settle the damages claims and the atty fees. Consumer has 30 days to accept both offers for the settlement to be enforced or it is rejected.

**Danger for P: For damages: 17.5052(g):** if the court finds that the amount tendered in the settlement by D is the same as, or substantially (almost the same) the same as, or more than the amount found by the trier of fact, the consumer may not recover an amount in excess of the lesser: 1) the amount of damages tendered in the settlement offer; or 2) the amount of damages found by the trier of fact.

**For Attorney’s fees: 17.5052(h):** If the court finds that P’s atty fees at trial are the same as or substantially the same as, or more than the amount of reasonable and necessary atty fees incurred by the consumer as of the date of the offer, the consumer may not recover attorney’s fees **greater than what was offered in the settlement.**

***Why should all defendants always offer something?*** If they do not, they might owe large amount for the C’s atty fees and punitive. This is an extremely important provision designed to insure that defendants are not drawn into time-consuming, expensive litigation when reasonable settlement offers have been proposed. They should settle!!!!

**Chapter 42/Rule 167-** only time a D will use this rule is when it already is subject to atty fees if it loses. It does not disrupt the notice and settlement provisions of DTPA, it does, supplement them. Triggered by a D. A D has to file a declaration to invoke the rule for it to apply and must be filed at least 45 days before the case is set for trial.

- P’s rejects defendants offer and the judgment doesn’t come within 80% of the offer at trial or D rejects counter-offer and the damages awarded to P would exceed the counteroffer by 120%

-In other words, Rule 167 should be used in all DTPA cases to propose a settlement near the time of trial.

**Actual Damages**

Designed to compensate the consumer, distinguished from nominal or exemplary damages, which are designed to make a point. CL Remedy that affords consumer greatest recovery.

**Measure:**

**Out of Pocket:** difference between what paid and MV of what you got at time of delivery.

**Benefit of the Bargain: F**MV as represented- FMV as received. If made a good deal, get the value of the deal. Benefit of the bargain would be higher when you paid less than the Gs are worth

**Cost of Repair:** cost to fix the item to the condition as warranted. Must show repairs are necessary and the cost is reasonable.

Only limits = no economic waste [repair in excess of value of Gs] and repairs must be reasonable and necessary

 Makes sense b/c avoids valuation problems

*Pipes* case – redoing pipes would be extremely expensive, so ct gives diminution in value of property b/c of different pipes

**Economic Damages:§17.45(11)** Means compensatory damages for pecuniary(money) loss, including cost of repair or replacement. (Medical Bills, loss wages, cost of repair, tangible economic loss, cost of replacement. 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.

**§17.50(b)** C who prevails receives economic damages (Pecuniary loss, cost of repair and replacement). **If knowingly** then C. may also recover damages for mental anguish and not more than three times the amount of economic damages.

"**Knowingly" means actual awareness**, at the time of the act or practice complained of, of the falsity, deception, or unfairness of the act or practice giving rise to the cons.'s claim

 …or…in [warranty] action, actual awareness of the act, practice, condition, defect, or failure constituting the BOW.

**-If … intentionally**, the C may recover damages for mental anguish. Not more than three times the amount of economic damages … and mental anguish.

**-“Intentionally" means actual** awareness of the falsity, deception, or unfairness of the act or practice, or the condition, defect, or failure constituting a BOW giving rise to the cons.'s claim, **coupled with** the specific intent that the cons. Act in detrimental reliance on the falsity or deception or in detrimental ignorance of the unfairness.

***Actual Awareness:*** means a person knows that what she is doing is false, deceptive or unfair. **§17.45(13)**

**Mental Anguish-**Plaintiff must proof predicate of either a “knowingly” or “intentionally” (1) finding; MA=Substantial disruption of daily routine; some evidence that the amount compensates the loss.

- In CL to recover mental anguish damages as actual damages you must show physical injury, or culpable mental state.

***What is the test for mental anguish?(pre-1995)* Parkway Co. v. Woodruff**

-High degree of mental pain and distress.

-Court requires “direct evidence of the nature, duration, and severity of their mental anguish, thus establishing a substantial disruption in the P’s daily routine.” No difference today, same answer.

- P does not have to first prove economic damages to recover mental anguish damages.

**Mental Anguish Post 1998\* Avery**

-Dogs should be classified as personal property for damages purposes, not as something giving rise to personal-injury damages.

***The “True rule” in TX for damages has two elements:* Strickland v. Medlen**

1) Market value, if the dog has any; or

2) Usefulness or service of dog value (economic value not emotional value)

***Loss-of-consortium*** damages are available only for a few especially close family relationships (such as husband-wife and parent-child) and to allow them in loss pet cases would be inconsistent with these limitations. Pets are property in the eyes of the law and recovery in pet-death cases is limited to the loss of value, not loss of relationship.

-***Loss of companionship*** is a component of loss of consortium and it equals loss of “love, affection, protection, emotional support, serv. companionship, care and society.”

**Tie-In Statutes: Violation** of those statutes actionable thru DTPA: Better to sue under tie-in because you get *actual* damages: economic, plus if knowingly then MA damages, and 3Xs the ED.

**No requirement to send pre-suit notice for tie-in claim. P must prove C status under tie-in.**

**Digangi v. 24 Hr Fitness:** gym. No tie-in that would allow C to recover damages for PI.

***How the court computes damages?***

 -It is important to emphasize that although everyone talks about “treble damages,” the total recovered is trebled, not the additional. If the damages are $10,000, the total may not exceed $30,000.

**Additional Damages:** possible recovery of punitive damages.

**Attorneys’ Fees ( Not Recoverable for Tort) §17.50(c)**

-Reasonable and necessary attorney’s fees available to a **prevailing plaintiff.** Plaintiff prevails even where her entire recovery is offset by the D’s counterclaim. To prevail means to prevail in a claim under the DTPA, rather than obtain a net recovery.

***TX*** ***Rule***: Grievance for unconscionable fee.

-**The DTPA requires the determination of a reasonable and necessary dollar amount**, not a percentage of the recover (not solely based on contingency fee, look @ other factors)

***8 Factors for Reasonable Fee***

**(1)** Time and labor required, novelty and difficulty of the questions involved, and skill required to perform the services properly;

**(2)** The likelihood… that the acceptance of the particular employment will preclude other employment by the lawyer

**(3)** Fee customarily charged for similar services

**(4)** Amount involved and results obtained

**(5)** Time limitations imposed by the client or circumstances

**(6)** Nature and length of the relationship with the client

**(7)** Experience, reputation, and ability of lawyer performing the services; and

**(8)** Whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

- P cannot ask for an award of a percentage of the judgment without some evidence of these factors. Jury is not informed what the total amount of judgment will be, and may only speculate about % of the unknown recovery.

**To recover atty fees**: P must prove that amount of fees was both reasonably incurred and necessary to the prosecution of the case at bar, not as a percentage of judgment. **Andersen v. Perry.**

**D’s liability for atty fees:** limited so as not to exceed the amount offered in the settlement

**Segregation of Fees:** Multiple claims: When there are multiple claims and some settle, the fee seeking party must segregate his atty fees so the remaining parties aren’t charged for fees they are not responsible for or fees already paid. Where there are multiple claims, the attorney must segregate hours worked on the case.

**Exception:** Segregation is not required when claims arise out of the same transaction and are so interrelated that the proof is essentially the same.

**Defendants Attorney’s Fees**: Reasonable and necessary amount is recoverable by the D where the claim was “ Groundless in fact or law, or was brought in bad faith, or was brought for the purpose of harassment.” **Zak v. Parks.**

**Donwerth v. Preston II Chrysler:** Even if groundless claim, court may award atty fees if the court finds claim was brought for harassment.

**Federal Method for Calculating AF:** lodestar (reasonable hours x reasonable fee, then adjust per 12 Johnson factors).

**Defenses**

**Cumulative Recovery**

*Cumulative recovery of actual damages should be permitted only when the actual damages produced are separate and distinct. Can recover actual damages and penalty damages if different acts. If different acts caused same damages you can only get actual damages.*

Cumulative recovery should be permitted for multiple acts in all cases that are not “for the same act or practice,” even if the multiple acts which are the basis of the C’s complaint produced the same actual damages.

DTPA limits a P from recovering actual and punitive damages for the very same act under the DTPA. **Bliskey v, Berry Property:** sexually assaulted girl.

***One Satisfaction Rule:*** only one satisfaction for injuries; must pick one.

**Mayo v. Hancock Life Insurance:** fired and wife was pregnant. Separate acts(one- failure to pay within 30 days, and two- deceptive acts) that violates two laws.

**Chapter 41:** applies to exemplary damages in tort. Factors that preclude recovery. When there are different damages in tort, Ch. 41 says that it does not preclude multiple damages and it does not apply to DTPA.

Remember, once a tort is established, the C may be entitled to exemplary damages under Chapter 41.

**Statutory Defenses**

**Mediation §17.5051:** A party may, within 90 days of notice, file a motion to compel mediation and the court may grant it. Mediation shall be held within 30 days after the date the order is signed. A party my not compel mediation if the economic damages claimed are less than $15k. (unless they agree to pay for mediation). This is to prevent a D from requiring a C to spend a great deal of money mediating a small claim.

**Statute of Limitations**- **§17.565** All actions under the DTPA must be commenced within 2 years after the date on which the false, misleading, or deceptive act or practice occurred or within 2 years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the DTPA. The P pleads discovery rule SOL and the D has the burden to prove the regular statute should apply. The SOL may be extended by 180 days if the P proves the failure to timely file the action was caused by the D’s knowingly engaging in conduct solely calculated to induce the P to refrain from the commencement of the action. **Test:** knew or should have known of the act or practice. 2 years (tort) & 4 years (contract).

***BOW:*** an action based on BOW is apparently unaffected by this section. As noted in ***La Sara*** DTPA does not create any warranties. Similarly, the applicable SOL period should be determined from sources other than DTPA. DTPA merely allows a C with an existing warranty claim, to pursue that claim through DTPA.

***Discovery Rule:*** deferral of accrual is an exception to the general rule under which a cause of action accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred. **Note:** not always applicable; held inapplicable to contract claim. Accrual is deferred comprises those cases in which nature of injury is inherently undiscoverable and evidence of injury is objectively verifiable.

-P has to discover: statute says deceptive act, courts say injury. Do NOT need to know WHO did it, do NOT need to know the EXTENT of damage, do NOT need to know LEGAL THEORY on which you can sue.

**-Court** must determine whether the case falls into one of the categories of cases to which the discovery rule applies, based on whether the policy reasons behind the rule are served by applying the rule in that category of case: medical malpractice cases, fiduciary, accountancy malpractice, nonobvious injury to land.  **If** there is no injury and just a deceptive act, it accrues when should have known of injury, even if injury isn’t certain

***Test*** should be the “reasonably prudent person in the same circumstances as the consumer.”

***Affirmative Defense,*** NEED TO BRING IT. If not, then case will proceed.

***Medical Liability – Defense Healthcare Providers:* Sorokolit v. Rhodes:** boob job. There can be NO DTPA claim against physician or healthcare provider for damages for PI or death if the damages result from physician’s negligence. §12.01 does NOT preclude suits under DTPA for knowing misreps or BOW in cases in which a physician or healthcare provider warrants a particular result. Look at underlying nature of claim to determine whether **§12.01** prevents suit of DTPA.

**RCLA- TRCCA (TRCCA** sunset in 2009) ***(Residential Construction Liability Act)*** (Just a prerequisite to filing suit)

As originally enacted it provided that “The total damages awarded in a suit subject to this subchapter **may not exceed the claimant’s purchase price for the residence.”**

***TRCCA*** (Sunset in 2009)

-Must notify builder of dispute within 30 days. Cons. must pay fees. Builder may be ordered to reimburse all or part of fees.

***RCLA***: covers contractors and construction defects. Some provisions refer to contractor, which is the same as builder, while others refer to only a construction defect.

Construction defect is any physical damage to the residence, any appurtenance, or the real property on which the residence and appurtenance are affixed proximately caused by a construction defect.

-Must give 60-day notice prior to suit. Contractor has 45 days from notice or TRCCA notice to make an offer of settlement for repairs. If reasonable offer is rejected, claimant is limited to FMV of settlement offer and AF.

-Prior to 2003 no notice=abatement

-2003- no notice= dismissal

-2007- no notice= abatement

Damages Recoverable under RCLA are reasonable economic damages such as repairs, damaged Gs, engineering fees, temporary housing, reduction in FMV, and AF’s.

**§27.002 Application:** prevails over DTPA, breach of K, BOW, negligence EXCEPT FRAUD.

Contractor is not liable for a percentage of damages caused by:

 **(A)§27.003 Liability** Negligence of a person other than the contractor or an agent, employee, or subcontractor of the contractor; (B) failure of a person other than the contractor or an agent, employee, or subcontractor of the contractor to:

**§27.003 Frivolous Suit; Harrasment** A party who files a suit under this chapter that is groundless and brought in bad faith or for purposes of harassment is liable to the defendant for reasonable and necessary attorney's fees and court costs.

**§27.0041 Mediation** a) If a claimant files suit seeking from a contractor damages arising from a construction defect in an amount greater than $7,500, the claimant or contractor may file a motion to compel mediation of the dispute. The motion must be filed not later than the 90th day after the date the suit is filed.

(b) Not later than the 30th day after the date a motion is filed under Subsection (a), the court shall order the parties to mediate the dispute. If the parties cannot agree on the appointment of a mediator, the court shall appoint the mediator.

**§27.006 Causation** In an action to recover damages resulting from a construction defect, the claimant must prove that the damages were proximately caused by the construction defect.

*DTPA:* DTPA itself expressly provides that RCLA “prevails over this subchapter to the extent of any conflict.” **Sanders v. Construction Equity, Inc.**

Substantial performance is not a defense to DTPA.

**Common Law Defenses**

 DTPA liberal construction. Substantially performance is a defense to K claim, not a misrp. Claim. **Smith v. Baldwin**

Mere BOK is not a violation of the DTPA.

Delivering the wrong color refrigerator is a BOW.

***Parole Evidence*** is admissible in a DTPA case where a written K exists. It doesn’t apply in an oral misrp. **Weitzel v. Barnes.** When oral misrepresentations constitute basis of a cause of action in DTPA cases, PER is not applicable

*Does PER apply to misrp?*No because not based on contract. The statements are not being used to prove a breach of K - but instead to prove a misrp.

***AS is clause*** prevents causation because it says sell. gives no assurances of value. A buyer agrees to make his or her own appraisal of the bargain and to accept the risk that he may be wrong. S gives no assurances, express or implied, concerning value or condition of the thing sold.

“***AS is Plus”-*** As is clause, plus a no reliance clause. (D says you cannot rely on me)  *What two situations did the court discuss that the clause would not be effective?* 1.When there is fraudulent inducement or concealment. 2.In light of the “totality of the circumstances.” **Prudential Ins. Co. v. Jefferson Associates.**

**TEST:** Validity of “as is” agreement is determined in a residential home transaction(1) light of sophistication of parties, (2) terms of the “as is” agreement, (3) whether the “as is” clause was freely negotiated, (4) whether it was an arm’s length transaction, and (5) whether there was a knowing misrep. Or concealment of a known fact. **Erwin v. Smiley.** (Termite case)

***“AS is plus plus clause*** =“as is” plus no reliance on statements, plus no reliance regarding inducement clause. It negates everything. **Schlumberger v. Swanson.** Fraudulent concealment was precluded. (VERY NARROW APPLICATION, CAREFUL)

-Parties must use ***clear and unequivocal language*** to disclaim reliance. Helps ensure parties understand contracts’ terms disclaim reliance so contract may be binding even if it was induced by fraud. If language unclear, reliance negated/disclaimed. **Italian Cowboys v. Prudential** (Restaurant)

**Imputed knowledge** – imputed notice on deeds of records is NOT a defense to a DTPA. **Ojeda de Toca v. Wise-** demolished house.

Remedies under DTPA are available to consumer, and are NOT waived even if C accepts defective performance. **Kennemore v. Bennett.**

**ARBITRATION**: Less expensive, more efficient, more flexible. Gives business ability to determine whether arbitration will be used, to what it will apply and where and under what procedures will it be conducted.

-Myths of arbitration is that it is voluntary and widely used by businesses.

-Always written by the business and presented to the consumer on a “take it or leave it,” basis.

-*If D challenges court proceeding on basis of arbitration clause, what does trial court have to do?* Make summary determination using affidavits(must accept as true clear, direct evidence). **Anglin v. Tipps 🡪**broken dam.

-*Misrepresentations* = (1) different than CONTRACT, but FAA preempts so misreps are covered by arbitration clause (2) Factually intertwined with CONTRACT so ok to arbitrate them

* Waiver preempted in favor of FAA

-*Severability Doctrine -* Arbitration clause is severable from the rest of K. AC still can be enforced unless you prove that the AC was fraudulently induced. It may be challenged if it is unconscionable. If the clause is too one sided, preprinted form, C pays all fees, only C bound because D could keep earnest money. AC unconscionable because the costs were three times the amount in dispute, and the C’s share was 28% of gross income. **Olshan v. Ayala.**

* Effect: (1) deprive them of justice (2) amount too small in relation to arbitration costs.

*When might bind non-signers?* AC may be alleged by non-signer, but will be enforceable through K. **In Re Weekley Homes** : daughter bound.

*Cost? –*may invalidate AC. Party seeking to avoid AC has to show that the claims at issue are unsuitable for arbitration and that Congress intended to prevent arbitration of the claims at issue. **Green Tree v. Randolph.** Could not prove it was costly.

Challenging Arbitration determinations is tough. Evident Partiality-***TEST***Must disclose facts that “create a reasonable impression of the arbitrator’s partiality to an objective observer”.

*Manifest Disregard –(kick out arbitrator)* Have a manifest disregard for the law. The arbitrator must clearly recognize applicable law and choose to ignore it.(this is no longer an independent ground for vacating arbitration awards under the FAA, limited to what is allowed by FAA ONLY).

The use of arbitration is used as a means of precluding class actions. FAA preempts state law on class actions. **AT&T v. Concepcion.**

**Disclaimers and Limitation of Damages:**

**What is the effect of a disclaimer of warranty or limitation on warranty damages when the claim is brought through the DTPA?** the limitation clause was part of the warranty upon which the buy.’s claim is based and it therefore limits his recovery.

*Merger Doctrine* – earnest $ K merged into deed when delivered and deed becomes controlling document. Doctrine of merger may not be applied to defeat a cause of action under the DTPA for breach of an express warranty made in an earnest money contract and breached by deed. **Alvarado v. Bolton**

Limitation only affects K claims, not DTPA claims. Waiver prevents L from limiting DTPA damages. **Under DTPA, D cannot try to limit liability. If other claim (BOW, BOK) D can try to limit its liability.** **Rinehard v. Sonitrol**

**PRODUCTS LIABILITY AND THE DTPA-**

**402(a):** Strict Liability is not limited to users and Cs and it can be applied to bystanders or others. If (a) seller is engaged in the business of selling such a product, and (b) expected to and does reach the user or C without substantial change in the condition which it is sold. **Darryl v. Ford Motor** (did not own car, but was hit by owner, defective vehicle)

*Whether a remote manufacturer is liable for the economic loss his product causes a C with whom the manufacturer is not in privity?* A manufacturer can be responsible, without regard to privity, for the economic loss, which results from his breach of the UCC’s implied warranty of merchantability.

-SL does not apply to economic losses it only applies to physical harm to the user and his property.

-The court holds privity is not a requirement for a UCC implied warranty action for personal injuries. **Garcia v. TX Instruments.**

-Economic loss is direct and consequential. Ct says that economic loss is not “physical harm” to the user or his property, SL DOES NOT APPLY to economic losses. **Nobility Homes v. Shiver**

*- PPG* limits DTPA implied warranty claims against a manufacturer.

- **CH. 82** – LIMITS when an action may be brought against a S.

-Solely economic loss based upon BOW, privity of contract between parties is required. **Texas Process Plastics v. Gray Enterprises** (sample was not the same as final product)

- When damage is to product itself, it is a BOW not a tort. Therefore, disclaimer is effective. **MidContinent Aircraft v. Curry Spraying Service.** (as is clause in place, but crashed)

- **Signal Oil v. Universal Oil:** Buyers may recover only those consequential damages proximately caused by the BOW; he may not recover for those consequential damages proximately caused by the owner’s own negligence or fault.

- Cuts off producing cause and reliance and the statement is no longer a producing cause of the injury. No proof that the misrepresentation was the cause of the harm. Kills warranty and unconscionability claim, LL since there is no reliance.

-Exception to where the “as is: clause is ineffective

1) Fraudulent inducement: S must make a knowingly false representation; (2) Concealment- seller must actively hide infor; 3) Hindering the inspection (obstruction) Where the seller prevents the buyer from inspecting the property; Buyer has BOP.

-Tort damages are recoverable for a fraudulent inducement claim irrespective of whether the fraudulent representations are later subsumed in a contract or whether the P only suffers an economic loss related to the subject matter of the contract. Allowing the recovery of fraud damages sounding in tort only when a P suffers an injury that is distinct from the economic losses recoverable under a breach of contract claim is inconsistent with this well-established law, and also ignores the fact that independent legal duty, separate from the existence of a contract itself, precludes the use of fraud to induce a binding agreement. **Formosa v. Presidio**

**Cressman v. Wiseman** Does a breach of an express warranty sound in tort when the breach causes damage to or loss of use of property other than what is the subject of the contract? Express warranty claims sound in contract. The trial court did not err in granting Wiseman's request to disregard the jury's proportionate-responsibility finding in connection with the breach of an express warranty claim.

* The court holds when damage is to product itself it is a BOW, not a tort.

**Cressman v. Wiseman** Did the trial court err in failing to disregard the jury’s proportionate responsibility finding that 2 defendants were not responsible for any part of the damages arising from their breach of implied warranties? The Court held that implied warranty claims sound in tort .The trial court didn’t err in applying the jury’s proportionate responsibility finding to those damages.

**Exemplary Damages**

-**Nabours v. Longview Savings & Loan:** Exemplary damages must bear a reasonable relation to actual damages.

-As the court notes, a finding of actual damages is a prerequisite to receipt of exemplary damages. In this case, no actual damages were found and only equitable relief was awarded. As the court notes, it is not necessary that there be a judgment for actual damages but they must be established.

- A C may not recover atty fees unless they are awarded statutory damages.

- *Tort/K Economic Loss Rule:* To support an award of exemplary damages, P must prove a distinct tortious injury with actual damages. **Jim Walter Homes v. Reed.**

The DTPA has the lowest standard for the award of punitive damages:

“knowingly” and, if “intentionally” is established authorizes recover of up to 3x mental anguish.

**Tie-Statutes:** If you violate a TIS then it’s a DTPA violation and DTPA. 17.50(H): The recovery is actual damages and not economic without regard if it was committed **intentionally.** To get treble damages, the claimant must prove the **knowingly predicate.**

**Establish consumer standing**

**Personal Injury or WDC:** Do not have to prove knowingly under a negli. COA to mental Anguish damages. Cannot have DTPA for tort.

**Parol Evidence**: Overidden by the DTPA are the Parol Evidence rule: The P **can** bring evidence of an oral misrepresentation that does not appear in the L.

**Mitigation Rule still applies:**

-An offer by the D that would make the P’s damages less severe but not eliminate the P cause of action.

**Producing Cause v. Proximate Cause**

-Producing cause = an efficient, exciting, or contributing cause which is a continuous and unbroken sequence in connection with any other cause producing the event resulting in jury. Proximate cause adds “foreseeability.”

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**DEBT COLLECTION –Violations of the TDCA is a tie in violation of DTPA.** Elements of COA: (1) Debt, (2) Debt Collector(3) Violations: (4) Abusive conduct , 5. Remedies

- State law is deemed not to be inconsistent with FDCPA if it affords consumer greater protection.

The legislative history indicates that independent debt collectors are the prime source of egregious collection practices.

Original creditors, are gen. restrained by the desire to protect their goodwill when collecting past due accounts, independent collectors are likely to have no future contact with the C. and often are unconcerned with the C's opinion of them.

Furthermore, collection agencies gen. operate on a 50% commission - this has too often created the incentive to collect by any means

Basically there are 3 elements to FDCPA case: Usually a third party: A debt collect someone who is collecting debts of another.

1. Debt collector?

2. Debt collection?

3. Prohibited act?

Analytical Qs, (1) whether the D is a proper D? and (2) is the transaction covered?

**Common Law**

**-TX-** Wrongful collection is a tort.

*What is necessary to prove this tort?*

**Duty v. General Finance** implied you need a physical injury to establish the tort and mental anguish damages alone are not sufficient.

In light of more recent Texas decisions dealing with the recovery of damages for mental anguish, the physical injury requirement may no longer apply.

Once tort is established, C may be entitled to exemplary damages under CRPC Ch. 41.

- Although TDCA deals with debt collection, it expressly provides that it does NOT affect any existing CL remedies.

**Statutory regulation**

Federal law applies to only *third party debt collectors.*

Texas law applies to *anyone, including attorney*s. Third party debt collectors need to post a bond.

**Miller v. McCalla:** house used for rent after he lived in it for a while, moved to Chitown. ***Court says relevant time is when loan is made.***

-To be a debt collector you must be in the *business or regularly* collect debts

-Lawyers are considered debt collector because they are collecting debts in litigation, no longer in an exception for attorneys in statute

Under TDCA, attorneys are debt collectors, but not a third-party debt collector. Unless atty has non-atty EEs either regularly engaged to solicit debts for collection or make contact with debtors for purpose of collection or adjustment of debts. **Heintz v. Jenkins** defaulted on car loan.

**D** cannot rely on mistake of law under **§1692(k)(c)? Jerman v. Carlisle** No because…

(1) can intend to do act without intending to break law. Don’t have to intend to break law.

(2) can’t have procedures adapted to avoid legal errors as k(c) requires

(3) FDCPA has provision saying excused for mistakes on law caused by reliance on FTC

(4) TILA provision like FDCPA and courts say just clerical acts

Note after *Heintz* discusses a specific prohibited conduct involving an attorney (*Miller*): you can’t send a letter saying it is from a lawyer if it is not from a lawyer.

**Debt Requirement:** **FDCPA:** Debt must be a personal, family or household purpose debt. Business debts are NOT covered by FDCPA. Debt is any obligation or alleged obligation to pay money arising out of a transaction (consensual transaction) in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family or household purposes. Applies to businesses whose: (1) primary purpose is debt collection; or (2) who ***regularly*** engage in debt collection.

 **TDCA** Consumer debt is an obligation or alleged obligation primarily for personal, family, household purposes and arising out of a transaction. Tort/ criminal remedies/ damages are not a debt (not consensual), but a bad/dishonored checks are for TDCA.

*Who has the burden to prove D is a debt collector?* P has the burden to prove D = debt collector. **Goldstein v. Hutton** LL-T case. Case by cases basis should determine if business regularly collects debts:

1) # of communications, 2) frequency of communications, 3) personnel devoted to it, 4) contractors set up to do it, 5) ongoing client relationships, 6) market self as debt collector.

**Debt Collector Requirement:**

**FDCPA:** Any person who uses any instrumentality of interstate commerce or the mail in any business which the principal purpose of which is debt collection or who regularly engage, directly or indirectly, in the collection of debts owed or due to another. It does not include any officer or employee of a creditor.

**TDCA**: Two categories are debt collectors and third party debt collectors.

-Debt collector is any person who directly or indirectly engages in debt collection.

-Third Party debt collector is a debt collector who uses any instrumentality of interstate commerce or mail, principal purpose of the business is debt collection or they regularly collect debts owed or due to another.

-They must post a surety bond of 10K before engaging in debt collection, correct the debt information with the credit bureau if its accuracy is disputed by the consumer and provide a ***mini Miranda warning***: State during the initial communication its attempt to (1) collect a debt, and (2) any info will be used for that purpose. During subsequent conversation must say it is with a debt collector.

-Tort liability is NOT a debt.

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**Federal Requirements—Communication and Notice:**

* **-Notice:** large enough to be easily read and sufficiently prominent to be noticed and cannot be contradicted by other language. Note that the Act also requires that the communications disclose that it is made to collect a debt and any information obtained will be used for that purpose. Mini-Miranda. - Debt collector required to send a validation notice which explains to the Debtor that they have 30 days to dispute validity of their debt.

 Must in initial communication tell debtor (1) trying to collect debt and (2) will use information for that purpose)

**TEST 1:**  to determine whether the notice is effectively conveyed is the least sophisticated C. (objective standard).

Below average sophistication or intelligence and are uniformed, naïve and trusting.The *"least sophisticated C."* refers to “the ignorant, the unthinking, and the credulous."

**TEST 2:** The *unsophisticated consumer* is the uninformed, the naïve, and the trusting. If language is confusing enough to mislead, confuse an unsophisticated consumer, language of the notice violates the act.

 When exactly do collection agencies overshadow the required validation notices of **§ 1692(g)?**

* The unsophisticated C. is to be protected against confusion, whatever form it takes **Jenkins v. Union Corporation:** punitive class action regarding letters. CT. said notice was proper in some notices. When proximity of words requiring immediate action since D has thirty days to dispute.
* The debt collector must adequately explain how its right to seek collection *coexists* with the debtor’s validation rights
* Debt collectors run afoul of the FDCPA if they create an unexplained contradiction between collection efforts and the validation period which confuses the unsophisticated debtor.
* Acquisition of location information:A debt collectors may communicate with third parties only for the limited purpose of acquiring location information about the C.
* Must identify himself as DC, state that he is confirming or correcting location info concerning the C, and only if requested identify that they are with collection agency. They shall also not state that such cons. owes any debt. Not communicate with the person more than once. Not communicate by post card. Communicate only with attorney once they know.
* Communication with the C without the consent of the C or the court the debt collector may not communicate with a C in connection with the collection of a debt.
* **Zortan v. JC Christensen and Associates:** intention of disclosure is irrelevant when the collector disclosed to 3rd party. Disclosure to a 3rd party violated the act.
* Communicate only from 8am to 9pm local time at the C’s location
* No communication at the C’s place of employment, if the DC knows or has reason to know that the employer prohibits such communication.
* No communication after the C notifies the debt collector in writing that the C refuses to pay the debt or wishes the DC to cease further communication except in limited situations such as to (1692)
* - FDCPA is a strict liability statute that explicitly includes an intent element when required.

**TDCA definition of Debt:** **C debt means an obligation, or an alleged obligation, primarily for personal, family, or household purposes and arising from a transaction or alleged transaction. Does not include obligation “to pay money”.**

***TDCA: Prohibited Conduct***

* **Some sections of harassment include INTENT;**
* **Exclusive List**
* **No profane language,.**
* **Must disclose name,.**
* **Can’t incur fees,.**
* **No letting phone ring**

***FDCPA:* Prohibited Conduct**

* **No intent required**
* **Nonexclusive**
* **No using criminal means**
* **No profane language**
* **No publishing lists**
* **Can’t sell to coerce payment**
* **No repeated phone ringing,**
* **Say name**

**-§1692(e)(2)(A)** Misrepresenting the character or amount of a debt.

-Threatening to take action that is not intended or that is prohibited by law.

- using profane, obscene, or abusive language.

-making repeated calls for the purpose of harassment

- Reporting disputed debt to credit bureau without disclosing that it is disputed.

-Reporting a "stale" debt to a credit bureau.

-Suing on a time-barred debt

-Continuing to collect without first complying with a verification request.

-Comm improperly with a 3rd party.

-Communicating with a C. who is known to be represented by counsel.

-Communicating with a cons. at improper hours or at a time or place known to be inconvenient.

-Filing suit in improper venue.

Whether there is an actionable claim for a violation of FDCPA, 15 U.S.C. **§ 1692c(b)**, for disclosing a debt to a third party when the disclosure was not done deliberately or purposefully? FDCPA is a strict liability statute and it explicitly includes intent element when required. Therefore there could be a violation.

-Defendant, debt collector, was entitled to summary judgment on the cons.'s claim that the voicemail messages left on her cellular phone violated the FDCPA where the messages at issue did not identify a cons., did not identify a debt, and conveyed no more information than would have been obvious in caller ID or could have been acquired in a simple Internet search for the caller's phone number.

**Whether a creditor who believes the cons. has acted criminally may make such threats?** You are innocent until proven guilty, so no threat of arrest may be made prior to proper legal proceedings. Violation of Threats or Coercion. No intent required. **TDCA – Brown v. Oaklawn Bank**

Rent is a debt because it is a breach/obligation to pay so you have a debt.

Communication = convey info about debt, so this qualifies even if it is also a letter required by law for eviction.

**FDCPA trumps any state law Romea v. Heiberger & Associates.** Back rent is debt under the act because rent is an obligation to pay and qualify as debt when it is not paid timely.

*Whether law firm who is collecting a debt qualifies as a collector?* Law firm is the central fiduciary and its duty is not incidental. As such, they qualify as collectors and can be sued under FDCPA for unfair practices. **Wilson v. Draper & Goldberg.**

*When does debt collector have to cease collection?* If cons. disputes within 30 days in writing, until debt collector obtains verification or debt and sends to cons.

*What does ceasing mean? Does it require you to prevent lien from being recorded?* Just requires no action – don’t have to take action to stop things already started. If debt collector already filed lien, does not have to act to prevent it from being recorded. But, can’t file lien after cons. disputes.

*Is there any Texas provision that stops communications from debt collector?* No

*What could sending such a validation violate?* Obligation to not falsely misrepresent the legal status of a debt

*What is court’s conclusion?* Not false representation because:

* Debts are valid even if can’t use court
	+ Just forecloses judicial remedy
	+ SOL is an affirmative defense so if debtor does not raise it, it is waived
	+ Letter did not threaten a law suit

**Shorty v. Capital One Bank**: Debt collector sent validation but debt could not be enforced due to SOL.

* Validation letter never deceptive

***Does* Bankruptcy *code preempt FDCPA?***No, one fed law can’t preempt another. These do not conflict. **Randolph v. IMBS**

[if conflicted, implied repeal.]

* Bankruptcy covers more and gives more damages.
* FDCPA applies to people outside Bankruptcy.

**Penalties**

**TDCA**:

* Injunctive relief
* Actual damages
* Attorneys fees
* Defendant gets attorney fees if bad faith and purpose of harassment

 **FDCPA**:

* Actual damages
* Additional damages of 1k for individual or 1% of net worth for class
* Attorneys fees
* Defendant gets attorney fees if bad faith and purpose of harassment
* Whether the preparation and filing of liens and settling of claims by debt collector constitutes the unauthorized practice of law? Yes the use of legal skill and knowledge and secured individuals’ legal rights with respect to certain claims, and as such fall under the court’s definition of the unauthorized practice of law.

**TDCPA**

DTPA prohibits entities engaged in commerce from engaging in “false, misleading, or deceptive acts or practices.” Because DTPA is a tie-in statute and violation of the TDCPA is a deceptive trade practice under DTPA, a TDCPA violation is actionable under DTPA. To meet DTPA standing requirement, a complaining party must plead and prove that he or she is a “consumer” as defined in DTPA. TX Cts have consistently held that borrowing money does NOT constitute the acquisition of a good or service. **Watson v. Citimorgage Inc.**