**Spring 2016 – Texas Consumer Law**

**Chapter 1**

# Introduction

* **§17.41** - Texas Business & Commerce Code.
* **§17.50**

**(1) The right to safety** --to be protected against the marketing of goods which are hazardous to health or life.

**(2) The right to be informed**--to be protected against fraudulent, deceitful, or grossly misleading information, advertising, labeling, or other practices, and to be given the facts he needs to make an informed choice.

**(3) The right to choose**--to be assured, wherever possible, access to a variety of products and services at competitive prices; and in those industries in which competition is not workable and Government regulation is substituted, an assurance of satisfactory quality and service at fair prices.

**(4) The right to be heard**--to be assured that consumer interests will receive full and sympathetic consideration in the formulation of Government policy, and fair and expeditious treatment in its administrative tribunals.

* DTPA changed the world from caveat emptor to caveat venditor (let the seller beware)
* Consumer law is not good guy – bad guy. Consumer law is based on the notion that a seller is in a better position to bear the risk than a buyer.
* 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.

# Benefits of DTPA

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

# Benefits of Business

* Certainty enabling business to act properly
* Notice & settlement provisions allowing prompt and efficient settlements and punishing frivolous or overly aggressive claimants
* Attorney’s fees for Ds when claims are groundless brought in bad faith, or for the purpose of harassment.

# 5 Ways “In” to Sue – Actions that May be Actionable Under the DTPA

1. **False Misleading, Deceptive Act –** Texas Business Commercial Code **17.46(a)**
* **17.46(b) Laundry List**
* **27 Different ones, only a few require knowledge.**
* Failure to disclose information – failure to inform something wrong or peculiar about the product.
* Reliance – whoever is suing has to show that they relied on the false misleading acts of the seller.
1. “**Unconscionable Act”**
* Taking advantage of someone because of lack of education, ability or experience of a person that is grossly unfair.
* Very subjective.
* Before 1955, unconscionable act was something that the value paid and the value received was grossly unfair. It changed to what it is now.
1. **Breach of Warranty**
* Any breach of warranty is actionable (not in DTPA but can be used as a vehicle for a cause of action).
* Act does NOT warranties, it is somewhere else.
* Hypo: why bring an action of warranties? Because of damages.
1. **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.
* Suppose an insurance agent makes a misrepresentation. Use DTPA to make a claim under 1 and 2, and then you can use Chapter 541 to get another claim under 4.
1. **Tie-In Statute**
* Another law. Back of index (40 of them). Violation of a statute contains a DTP actionable claim.
* Actual damages for this section, so you do not need to get to the intentional stage.
* Most common is DTPA with debt collection.

# Damages

* **Economic Damages** – same thing as punitive?
* If violation was done “Knowingly” you obtain treble (3x) damages and (1x) mental anguish. Knowingly – actual awareness.
* If violation was done “intentionally” you get treble(3x) damages on economic damages, and treble(3x) damages for mental anguish. Intentionally – actual awareness and intent.
* You can also get attorney fees.

# What is a Consumer? §17.45

* **Consumer**

1) “Seek or acquire”

2) “Purchase or lease”

3) “Goods or services” (includes business consumers with less than $25 million in assets)

* Causation – producing cause of damages.
* Whether or not a person is a consumer is always in dispute, b/c if the P is not a consumer the case ends immediately.
* A consumer can be an individual or business; however, if it is a business it has to have less than $25M in assets. State of Texas (NOT OTHER STATES) & partnerships, (P), subdivision of this state.
* (D) – Anybody who violates the act. No privity is required for the Ds.
* **§17.45(4)** "Consumer" means an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of $25 million or more, or that is owned or controlled by a corporation or entity with assets of $25 million or more.
* **Martin v. Lou Poliquin Enterprises, Inc.:** Lou Poliquin, president of the appellee modeling school, sought to place an advertisement in the 1980 Houston Yellow Pages through the services of The Glenn Martin Agency, a national advertising firm specializing in the placement of such ads. When the ad failed to appear in the Houston directory, Lou Poliquin Enterprises sued Glenn Martin under the DTPA. If a D seller in a DTPA action challenges the P buyer's status as a consumer, the buyer must be prepared to offer proof of (1) a good-faith intention to purchase and (2) the capacity to purchase the goods or services in question.

# How Does the Court Define Seek?

* Good faith initiating purchase process
* Occurs when present self to Seller with subjective objective to purchase
* Possess some credible indicia of capacity to consume transaction
* **TEST –** A DTPA consumer is one who in good faith initiates the purchasing process.

**1.** The buyer must be prepared to offer proof of *a good-faith intention to purchase* and

2. The *capacity to purchase* the goods or services in question.

- Proof: It has been purchased in the past.

* An individual initiates the purchasing process when he:

(1) Presents himself to the seller as a willing buyer with the subjective intent or specific "objective" of purchasing, and

(2) Possesses at least some credible indicia of the capacity to consummate the transaction.

- Proof: It has been purchased elsewhere. Otherwise look at salary, bills, etc.

* If you did not inform the seller you wanted to purchase, you then become NOT a consumer because you had to present yourself to seller.
* If you fail to qualify for a mortgage, then you have no capacity to consummate the transaction.
* **Holeman v. Landmark:** Landmark Chevrolet ran an advertisement on a radio station that, among other things, stated all offers would be accepted and that new trucks would be sacrificed, "regardless of loss." Appellants went to Landmark Chevrolet and made offers to purchase vehicles for amounts ranging from $50.00-200.00.

**Rule:** Reasonableness of buyer’s intentions go to good faith – if seller contests consumer status, buyer must demonstrate good faith intent and capacity.

# Structure for Pretrial Proof or Getting to Jury

* If no actual purchase, D can raise issue
* P must offer proof of Good Faith intention to purchase and capacity
* D can rebut
* Then to jury
* Court’s conception of good faith is based on 🡪 “*Honesty in Fact”* per UCC 1-201(19)

- “*Good Faith”:* except as otherwise provided in Article 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing.

* There is NO good faith requirement in the DTPA statute.

# Purchase or Lease

* **Kennedy v. Sale**: Kennedy was employed by the Martin County Hospital District. The Board of Managers of the hospital decided to change health insurance carriers, and worked out a plan for all employees with Southwest Medical Corporation Trust. Kennedy enrolled in the insurance program and underwent surgery for a preexisting condition. The insurance only covered $4,000 in expenses, leaving Kennedy to pay over $11,000. **Rule:** there is no requirement that the consumer himself be the one who pays for the purchase or lease of a good or service. Payment may be made by a third person or entity, so long as the “consumer” is the one who acquires the goods or services.
* **Wellborn v. Sears:** Wellborn purchased a garage door for use in her home. Bobby, the son, was killed during operation of the garage door. D, Sears, argued that Bobby was not a consumer under the DTPA since he did not contract for the good. **Holding:** Bobby acquired the good (garage door opener) when it was purchased for his benefit, installed in his home, and used by him, even though he did not contract for it. **Rule:** Direct contractual privity between an individual and a defendant is not a consideration in determining status as a “consumer”. One may acquire goods or services that have been purchased by another for the P’s benefit.

**- TEST THAT ESTABLISHES RELATIONSHIP TO TRANSACTION:**

* + If you are an *intended beneficiary* you acquire when you use it. (Includes minors)
* If you are an *incidental beneficiary* you do not acquire it.
* **Exxon v. Dunn:** Dunn took his car to get gasoline and the battery charged. Dunn got the car back and it was overheating and the a/c wasn’t working. Exxon made attempts to fix the a/c and never charged nor billed the repairs and attempts to repair. Dunn brought an action for a DTPA violation for failing to repair the car's a/c. **Holding**: Dunn neither was paid for nor **charged** for the repair of the a/c.  Without either the **"purchase or lease"** of the "goods or services" do not occur. Dunn cannot be considered a "consumer" under the DTPA. **Rule: If the bad service is just incidental to the goods or services being paid for, then ≠ consumer.**
* **E.F. Hutton v. Youngblood:** Youngblood participated in an employee’s savings plans whereby he allocated a part of each paycheck to a retirement fund and, in return his employer contributed an additional sum. Company’s contributions are not taxed to the employee when made, only when withdrawn. Youngblood sought advice from Hutton and the IRS about withdrawing money from the pension fund. Hutton advised that withdrawal of the contributions would be a tax-free rollover. Hutton later discovered that the withdrawal was taxable. **Holding: Rule**: DTPA does not apply when application would be inconsistent with the TSA. Said DTPA didn’t apply b/c another, more specific statute, dealt with securities and so trumps the DTPA. Case is no longer good law.

# Goods or Services

* **Hennessey v. Skinner:** Hennessey and Skinner agreed that Hennessey would pay 10% interest of Skinner’s cattle. Skinner sold his cattle but did not pay Hennessey for any of the profits of the sale. **Holding:** The purchase of the interest in cattle constitute goods for “use” covered by DTPA. Court said he did not buy a partnership interest which would be considered an intangible, but rather he was purchasing a number of cows thus a “good” **Rule:**
* For use – includes for purely resale reasons.
* For use – includes as breeding stock.

**Intangibles**

* Attorney can always sue, versus private cause of action under DTPA.
* Terms “tangible chattels” and “real property” include nearly everything except “intangibles.”
* Intangible property is that which has no intrinsic value but is merely the representative or evidence of value.
* Thus the act has been held not to apply to:
* Money,
* Accounts receivable,
* Stock,
* Option contracts,
* Certificates of deposit,
* The proceeds of an insurance policy,
* Trade marks,
* A limited partnership interest, or
* A lottery ticket
* Foreign Currency Purchase = a good.
* **Riverside National Bank v. Lewis:** Riverside Bank said it would give loan officer another loan to pay off old loan at Allied Bank. **Holding:** Lewis was not a “consumer” in the instant transaction. Trial court correctly denied recovery under the DTPA. **Rule:** Money is NOT a tangible chattel or “goods” as defined by the DTPA. Rather Money is properly characterized as a currency of exchange that enables the holder to acquire goods. Lewis did NOT seek or acquire any “services” in his transaction with Riverside Bank. An attempt to borrow money is NOT an attempt to acquire either work or labor as contemplated in the DTPA.
* **Flenniken v. Longview Bank & Trust Co.:** Flennikens had a lien contract for construction of their home by Easterwood.   Mechanics (Easterwood's) lien was assigned to the bank.  Basically bank was financing the construction.  However, Easterwood abandoned the construction.  Bank and Flennikens got in a dispute about unfinished work, Bank foreclosed.   Flennikens sought damages against their bank for wrongful foreclosure and violation of DTPA. **Holding:** Flennikens are consumers. A customer is defined by its relationship to the transaction; all parties who enjoy the benefits of the transaction can be part of the DTPA complaint. **Rule:** Consumer seeks or acquires goods.  Goods are described as including "real property purchased." P establishes standing as a consumer in terms of his relationship to the transaction, not by his relationship with the D.   Flennikens are consumers to all parties who sought to enjoy the benefits of the transaction, including the bank.
* **Walker v. FDIC**: Walker was trying to get a loan from FDIC. Walker asserted FDIC promised but never delivered on the money. Walker sued FDIC. FDIC moved for a motion to dismiss the case because Walker was not a consumer. **Holding:** Court held that Walker sought to use the money for the construction as opposed to seeking to acquire the hotel, and therefore they do not qualify as consumers under DTPA. **Rule:** The court held that the consumer must be complaining about what he sought or acquired.
* **Big H Auto Auction, Inc. v. Saenz Motors**: Saenz Motors bought two cars form Big H at an auction. At the sale, Big H said the original titles had been lost, and provided certified copies of the original titles. Saenz resold the cars, but the new owners were refused certificates of title, because the automobiles had been stolen. Saenz Motors requested Big H to return its money, but Big H refused. Saenz Motors sued for treble damages, attorneys’ fees, and costs under the DTPA. **Holding: Saenz is a consumer.** The purchase by Saenz Motors for two vehicles from Big H Auto Auction, Inc., for resale is a “use” within the meaning of the Act. Sale and representation by Big H of stolen vehicles was a deceptive business practice and an unconscionable action. **Rule:** Purchase for resale, is a “use” within the meaning of the DTPA.

# Business Consumers, §17.45(10)

* DTPA includes business consumers with assets of less than $25 MM.
* **Eckman v. Centennial Savings Bank**: Eckman Group asserts that the COA erred in holding that Ps had the burden to plead and prove they did not have assets of $25M or more in order to qualify as a “business consumer” under DTPA. Centennial asserts that the Eckman group should be required to show that they did not have assets of $25M or more as part of the proof required to establish consumer status. **Holding:** Treating the $25M exception as an affirmative defense promotes efficiency in DTPA litigation. **Rule: D** has the burden to plead and prove the applicability of the $25M exception to business consumer status as an affirmative defense.

# Waiver §17.42

* Any waiver of the DTPA is void and unenforceable.
* Consumer waiver valid if
* In writing and signed
* Not in disparate bargaining position
* Represented by an attorney in seeking or acquiring the goods (note, **not** when signing the waiver)
* *Ineffective* Waiver: A waiver is not effective if the consumer’s legal counsel was directly or indirectly identified, suggested, or selected by the defendant or an agent of the defendant.
* *May waive only specific rights:* The waiver may waive limited specified rights under the DTPA. Can you explain some instances?

 (a) Any waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void; provided, however, that a waiver is valid and enforceable if:

(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.

(b) A waiver under Subsection (a) is not effective if the consumer's legal counsel was directly or indirectly identified, suggested, or selected by a defendant or an agent of the defendant.

(c) A waiver under this section must be:

(1) Conspicuous and in bold-face type of at least 10 points in size;

(2) Identified by the heading "Waiver of Consumer Rights," or words of similar meaning; and

(3) In substantially the following form:

"I waive my rights under the Deceptive Trade Practices-Consumer Protection Act, Section 17.41 et seq., Business & Commerce Code, a law that gives consumers special rights and protections. After consultation with an attorney of my own selection, I voluntarily consent to this waiver."

(d) The waiver required by Subsection (c) may be modified to waive only specified rights under this subchapter.

(e) The fact that a consumer has signed a waiver under this section is not a defense to an action brought by the attorney general under Section [17.47](http://www.statutes.legis.state.tx.us/GetStatute.aspx?Code=BC&Value=17.47&Date=12/11/2015).

* *AG is always a residual remedy:* The fact that a consumer has signed a waiver under this section is not a defense to an action brought by the attorney general under section 17.47.

Sec. 17.47. RESTRAINING ORDERS. (a) Whenever the consumer protection division has reason to believe that any person is engaging in, has engaged in, or is about to engage in any act or practice declared to be unlawful by this subchapter, and that proceedings would be in the public interest, the division may bring an action in the name of the state against the person to restrain by temporary restraining order, temporary injunction, or permanent injunction the use of such method, act, or practice.

# Statutory Exemptions to the DTPA §17.49

* **17.49(c)** – Rendering of **Professional Services**, the **essence** of which is the providing of advice, judgment, opinion, or similar professional skill
* Summary: you cannot sue a professional unless they violate the DTPA (this exemption is essentially meaningless)
* Service specific, not profession specific (i.e. the question is what do they do, not what is their job title)
* Ex. Real estate agent hired to do a property evaluation and let sellers know approximate selling rate – professional service
* Ex. Seller contacts real estate agent and they list property on HAR – not a professional service b/c not particularly difficult
* **EXCEPTIONS** to the exemption
* Express misrepresentation of a material fact
* Failure to disclose information
* Unconscionable (as defined in §17.45) action or course of action
* Breach of an express warranty
* **17.49(e)** – **Except** as provided in **17.50 (b) and (h)**, no cause of action for **bodily injury** or death or the infliction of mental anguish
* Summary: as in (c), basically does not mean anything, because (b) and (h) are the only two ways to sue under the DTPA anyway
* 17.50(b): General damage provision
* May recover economic damages
* “Knowingly” – may recover for mental anguish, treble economic damages
* “Intentionally” – mental anguish, treble mental anguish and economic damages
* Ex. if a mechanic says it is “good as new,” you could get hospital bills, lost income, rehab, and mental anguish. Could not get pain and suffering, loss of consortium, disfigurement, etc.
* 17.50(h): Tie-In damage provision
* If you can sue under another statute (like Health Spa Act), you can recover actual damages
* “Knowingly” - treble damages
* Significant for those plaintiffs who have no economic damages. What damages are described under 17.50
* **17.49(f) and (g)** – **Large Transactions** ($100K and $500K)
* Summary: huge change in the law
* (f): transaction, project, or set of transactions related to the same project involving total consideration by **the** consumer of more than **$100,000**. DTPA does not apply if
* Written contract
* Consumer represented by counsel while negotiating contract
* K does not involve consumer’s residence
* (g): transaction, project, or set of transactions related to the same project involving total consideration by **the** consumer of more than **$500,000**. DTPA does not apply if
* Absolute exemption (other than consumer’s residence)
* …Consideration by “**the**” consumer. Who is “**the**” consumer?
* Ex. Jones Corp buys land for $2MM. OJones Corp builds a building for $1.5MM (in big cases like this, usually get a performance bond). Smith Corp operates. SC, a separate entity, is “**the**” consumer.
* **17.45(11)** Economic Damages: Economic damages means compensatory damages foe pecuniary, 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.
* **17.45(9)** Defines Knowingly
* "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 consumer's claim or..
* in [warranty] action, actual awareness of the act, practice, condition, defect, or failure constituting the breach of warranty,
* actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.
* **17.45 (13)** Defines “Intentionally”
* "Intentionally" means actual awareness of the falsity, deception, or unfairness of the act or practice, or the condition, defect, or failure constituting a breach of warranty giving rise to the consumer's claim, coupled with …
* the specific intent that the consumer act in detrimental reliance on the falsity or deception or in detrimental ignorance of the unfairness.

**17.49 Exemptions.**

a) Nothing in this subchapter shall apply to the owner or employees of a regularly published newspaper, magazine, or telephone directory, or broadcast station, or billboard, wherein any advertisement in violation of this subchapter is published or disseminated, unless it is established that the owner or employees of the advertising medium have knowledge of the false, deceptive, or misleading acts or practices declared to be unlawful by this subchapter, or had a direct or substantial financial interest in the sale or distribution of the unlawfully advertised good or service. Financial interest as used in this section relates to an expectation, which would be the direct result of such advertisement.

(b) Nothing in this subchapter shall apply to acts or practices authorized under specific rules or regulations promulgated by the Federal Trade Commission under Section 5(a)(1) of the Federal Trade Commission Act [15 U.S.C.A. 45(a)(1)]. The provisions of this subchapter do apply to any act or practice prohibited or not specifically authorized by a rule or regulation of the Federal Trade Commission. An act or practice is not specifically authorized if no rule or regulation has been issued on the act or practice.

(c) EXCEPTIONS TO EXEMPTIONS Nothing in this subchapter shall apply to a claim for damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill. This exemption does not apply to:

(1) An express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion;

(2) A failure to disclose information in violation of Section [17.46](http://www.statutes.legis.state.tx.us/GetStatute.aspx?Code=BC&Value=17.46&Date=12/11/2015)(b)(24);

(3) An unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion;

(4) Breach of an express warranty that cannot be characterized as advice, judgment, or opinion; or

(5)A violation of Section [17.46](http://www.statutes.legis.state.tx.us/GetStatute.aspx?Code=BC&Value=17.46&Date=12/11/2015)(b)(26).

(d) Subsection (c) applies to a cause of action brought against the person who provided the professional service and a cause of action brought against any entity that could be found to be vicariously liable for the person's conduct. Vicarious Liability Legal doctrine that holds a person responsible for the actions of another person. Person A can be held legally responsible for the harm caused by person B’s negligent actions even though Person A did not directly cause that harm.

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

(f) Nothing in the subchapter shall apply to a claim arising out of a written contract if: (b) and (h) are damages provision.

(1)The contract relates to a transaction, a project, or a set of transactions related to the same project involving total consideration by the consumer of more than $100,000;

(2) In negotiating the contract the consumer is represented by legal counsel who is not directly or indirectly identified, suggested, or selected by the defendant or an agent of the defendant; and

(3)The contract does not involve the consumer's residence.

(g)Nothing in this subchapter shall apply to a cause of action arising from a transaction, a project, or a set of transactions relating to the same project, involving total consideration by the consumer of more than $500,000, other than a cause of action involving a consumer's residence.

(h) A person who violates Section [17.46](http://www.statutes.legis.state.tx.us/GetStatute.aspx?Code=BC&Value=17.46&Date=12/11/2015)(b)(26) is jointly and severally liable under that subdivision for actual damages, court costs, and attorney's fees. Subject to Chapter 41, Civil Practice and Remedies Code, exemplary damages may be awarded in the event of fraud or malice.

(i) Nothing in this subchapter shall apply to a claim against a person licensed as a broker or salesperson under Chapter 1101, Occupations Code, arising from an act or omission by the person while acting as a broker or salesperson. This exemption does not apply to:

(1) An express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion;

(2) A failure to disclose information in violation of Section [17.46](http://www.statutes.legis.state.tx.us/GetStatute.aspx?Code=BC&Value=17.46&Date=12/11/2015)(b)(24); or

(3) An unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion.

* **Retherford, Jr. v. Castro**: Court found that the professional services exemption applied and no exceptions to that exemption were met, the judgment of the trial court was reversed and remanded for a new trial on the issue of negligent representation. Retherford was hired to perform a home inspection of a residence. Retherford completed the inspection and noted that there was water damage in the house. He noted it was not a serious issue in the report. First rain damaged the roof badly, so Castros got a second opinion from a different inspector and proceeded to repair the damages. Castros sued Retherford and alleged violations of the DTPA. **Holding:** Professional services exemption applies to the report of professional real estate inspectors.R’s qualifications and how he performed the inspection cannot be pursued as a DTPA claim, but are claims for breach of contract, which is NOT actionable under the DTPA. **Rule:**
* **Professional Defined:** (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. A real estate inspector fits these qualifications.
* ***Cameron v. Terrell & Garrett***:Camerons purchased a house. Sellers (not a party in this suit), listed the house for sale with Terrell & Garrett, a real estate brokerage and agency firm. T&G listed the house in MLS guide. **Camerons** found the house in question, their realtor showed them in the MLS that it contained 2400 square feet. Camerons agreed to purchase the house for $52,957.04 in reliance on the statement. After the purchase, Camerons had it measured and found out that it only contained 2245 square feet of heated air and a/c space. **Holding:** Plaintiffs are consumers under the DTPA:

(1) They sought or acquired goods or services for purchase or lease. and

(2) Those goods or services form the basis of the compliant.

(No privity required – Legislature did not define “consumer” in a way including a privity requirement). While the Ds did not sell anything directly to the plaintiffs, the defendant’s representations of the house size was deceptive. Even though the defendants only listed what information they were provided …representation was false. Regarding 17.49(a) … [Media] ……they had direct or substantial financial interest in the sale.

* ***Amstadt v. US Brass Corp.***:Three separate actions brought by homeowners: (1) Homeowners sued General Homes (homebuilder), U.S. Brass, Shell and Celanese Corporation after experiencing problems with their plumbing. U.S. Brass designed and manufactured the plumbing system with raw material supplied by Celanese and Shell. (2) Homeowners sued General Homes, Buckner Boulevard Plumbing (plumbing contractor), Celanese, Shell, U.S. Brass, and Vanguard. They asserted claims for negligence, strict liability, and misrepresentation and unconscionability under the DTPA based on the defendants' representations about the characteristics of the plumbing systems to homebuilders. **Holding:** The plumbing systems that Plaintiffs purchased are goods and form the basis of the Plaintiffs’ complaint…

... but only D’s whose conduct occurred in connection with the P’s purchase of their homes can be held liable under the DTPA. **Rule:** Consumers cannot recover under the DTPA because the manufacturer’s alleged DTPA violations did not occur “in connection with” the homeowner’s purchase of their homes.To establish that a violation of the DTPA occurred “in connection with” the consumer’s purchase, the P must establish a connection between the P, ‘s purchase or lease, and the D’s conduct (representation)

* ***PPG Industries v. JMB. Houston Centers Partners:*** JMB purchased a building (One Houston Center) with many defective windows from HCC. JMB was assigned warranty claims by HCC. JMB brought a DTPA suit against PPG based on the assigned warranty claims. PPG manufactured windows. HCC builder of the One Houston Center. HCC had specific requirements about windows, and its construction. A couple years after, ¼ of them went bad, and were replaced. A few years later, HCC sold to JMB and windows were bad again. JMB tried to bring an action against PPG.**JMB** was assigned the warranty claims from seller HCC against PPG. **Holding:** The court stated that the intent behind the DPTA was to “encourage aggrieved consumer to seek redress and to deter unscrupulous sellers.” The first line of reasoning given looked at the legislative intent behind the DPTA. Court noted that the legislature restricted a “consumer,” when a qualified business party, to below $25 million in assets. The court used this as a sign that the legislature intended to restrict the availability of DPTA claims to specific persons. Court distinguished between claims that are property-based and remedial vs. claims that are personal and punitive. The court gave that the main line of evidence for distinguishing DPTA claims as personal and punitive is the nature of damages that the DPTA gives to plaintiffs. **Reasoning on assignments:** The court is concerned that assignment would distort or increase litigation and the court noted that it has prohibited assignment where it has found those concerns. The court is concerned with potential collusion between adverse parties against third parties. The court responds to the dissent by giving the difficulties that allowing assignment would bring into the litigation process.
* ***Miller v. Keyser:*** Keyser worked as a sales agent for D.B Interests, Inc., a Texas corporation doing business as The Homemaker. Miller and several other homeowners bought Homemaker homes from Keyser. Lots were subject to a drainage easement by the Brazoria County on the back of 20 feet of each lot. Keyser represented to the homeowners that the Homemaker lots were oversized and that they were in fact larger than other lots. Homeowners paid a premium for these “oversized” lots. After homeowners built their homes, the County sent them a letter telling them all fences in the easement must be removed at their own expense. Homeowners claim that Keyser misrepresented the size of the lots and where the fencing could be placed at the back of the lots. Homeowners sought to recover damages for the fence and landscaping repairs and return of the excess charges paid for the lots. **Issue:** Can a corporate agent be held liable for passing along false representations made in the course and scope of his employment? **Holding:** Keyser is a “person” under the language of the DTPA. Keyser: sold every home to the homeowners, personally made representations about the size of the lots, the location of the fences and was the only person with whom the homeowners had any contact. **Rule:** Plain language of the DTPA provides that agents may be held personally liable for their own violations for the DTPA.

# Class Actions

* Very unlikely any class certification will be upheld on appeal.
* Reliance element of DTPA is usually enough to defeat a class action.
* **TRCP 42**

**(1)** The class is so numerous that joinder of all members is impracticable,

**(2)** There are questions of law or fact common to the class,

**(3)** The claims or defenses of the representative parties are typical of the claims or defenses of the class, and

**(4)** The representative parties will fairly and adequately protect the interests of the class

* **FRCP 23**
* **BOTTOM LINE:** it appears there is NO Texas case that has found such class-wide evidence, and in fact, reliance is always defined as an individual matter.
* **In Re Alford Chevrolet – Geo, Et Al.:** Envo-Tech, Inc., filed a class-action lawsuit against 636 Texas Motor Vehicle Dealerships, alleging that the dealerships committed fraud, conspiracy, and DTPA violations by passing on their inventory taxes to consumers as an itemized charge in addition to the advertised or negotiated purchase price. Ps did NOT send the required DTPA notices before filing suit. **Holding:** P’s DTPA notices, which demanded settlement on behalf of the entire putative class, were proper. Relators did not clearly distinguish class and merits discovery, Relators are NOT entitled to an order bifurcating the two. **Rule:** Before filing a DTPA claim, a consumer must timely advise the D “in reasonable detail of the consumer’s specific complaint and the amount of economic damages, damages for mental anguish, and expenses, including atty’s fees, if any, reasonably incurred by the consumer in asserting the claim against the D. Upon receipt of the notice, a D may establish as a defense to the suit as a matter of law by tendering the full amount of damages claimed plus a reasonable amount for fees and expenses
* **Laundry List 17.46(b) –** ***Class 6 PP***
* **Reliance Required –** in 1995 the DTPA was amended to add a reliance element to a claim under the laundry list. It is important to note that reliance must be by “a” consumer to “the” consumer’s detriment.
* **Pennington v. Singleton:** Singleton sold his used boat, motor and trailer to Pennington. Singleton had never sold a boat before and was not in the business of selling boats. S made oral statements to Pennington to the effect that boat, motor and trailer had just had $500 worth of work done, making the boat and motor in “excellent condition” These statements were made as statements of fact and not as merely opinion or puffing. These statements were false because the gear housing of the motor had been cracked and inadequately repaired. Singleton did not know the statements were false, nor did he make the statements recklessly because he had not experienced any difficulty with the boat after it was repaired. P relied on the statements and would not have purchased without them. **Holding:** Court held that §17.46(b)(5) prohibits representing that a good has characteristics, uses, or benefits that it does NOT have. The boat sold to Pennington was represented to have the characteristics of a “new” boat or a boat in “excellent” condition. Boat did not have these characteristics because of the cracked gear housing. Because of the cracked gear housing the boat could not produce those benefits. **Rule:** When a good does not have the characteristics it is represented to have, or perform as represented, the injury to the consumer is the same. There is no justification for excluding some misrepresentations and including others on the basis of the reason for their falsity. ***There is a violation regardless of the reason.***
* **Puffery:** comes in at least two possible forms:

**(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 it can be understood as nothing more than a mere expression of opinion.

* **First Title Co. of Waco v. Garrett:** Garretts contracted to purchase 9 acres of land from Jenkins and Dameron for use as an automobile salvage yard. J&D had obtained the land a year earlier by a deed containing a restrictive covenant; it provided that the land could not be used for any “noxious or offensive activity, which by example only, would include junk yard or auto salvage yard and all similar activities. **Holding:** Gs acted reasonably in viewing the quoted paragraph as a representation of the state of the property’s title, thereby causing the damages they suffered. The title companies’ argument that there is no evidence to support the jury’s findings is without merit. The clause purporting to waive the Garretts’ DTPA protection from affirmative misrepresentations actually causing the damages suffered and neither First Title Co. nor Alamo Title defined the title reports as being for a limited purpose. **Rule:** Under Texas law, when a seller makes an affirmative representation, the law imposes a duty to know whether the statement is true. In the context of title insurance, this principle requires that a title insurer be held responsible for an affirmative representation that is the “producing cause” of damages to the party purchasing the insurance.

# Unconscionability

* Definition of unconscionability employed by the common law and incorporated into §2.302 is found in *Walker-Thomas. “…* includes the absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party.”
* **TEST**
* Absence of meaningful choice, and
* Terms unreasonably favorable to the other party

1. “***Procedural Unconscionability”*** bargaining naughtiness, and

2. “***Substantive Unconscionability”*** overly harsh terms.

* **Chastain v. Koonce:** Purchasers here are complaining of conduct occurring during the transaction, which resulted in the purchase of lots. Koonce and Stroud made representations calculated to induce these purchasers to buy the lots and which enhanced the desirability of the property. Thus, the purchasers are complaining about an aspect of the lots purchased and the transaction involved. **Holding:** Four couples who purchased land from Koonce and Stroud to be consumers within the meaning of the DTPA. Purchasers failed to show any disparity between the value received and the consideration paid in the transaction. Record is devoid of any expert testimony relating to the value of the property at the time of the purchase. **Rule:** Unconscionable action or course of action is defined by statute to describe an act which:

**A.** Takes advantage of the lack of knowledge, ability, or capacity of a person to a grossly unfair degree; or

- MUST prove (1) grossly unfair, AND (2) detrimental to consumer

 **B.** Results in a gross disparity between the value received and the

consideration paid in a transaction involving the transfer of consideration.

* Taking advantage of a consumer’s lack of knowledge to a grossly unfair degree thus requires a showing that the resulting unfairness was glaringly noticeable, flagrant, complete and unmitigated.
* **Latham v. Castillo**: Castillo, prematurely gave birth to twin daughters. Born with birth defects, the girls were transferred to another hospital where they underwent surgery. Sara died approximately one week later. Castillos then filed a medical malpractice suit against Hospital on Sara’s behalf and received a $6M judgment. Later, their attorney, Rene Rodriguez, settled the case for $70k. . While Latham settled the legal malpractice claim against Rodriguez for $400k, the state of limitations ran on the Castillos’ medical malpractice claim. **Holding:** Castillos depended on Latham to file suit against the hospital for Kay’s death. Record reveals, and Latham’s atty conceded at oral argument before the Court, that there is some evidence that Latham told the Castillos he had filed the medical malpractice claim when in fact he had not. Although he affirmatively represented to them that he was actively pursuing the claim, Latham never did file the suit and limitations ran. As a result, the Castillos lost the opportunity to prosecute their claim against the hospital for Kay’s death. **Rule: §17.45**

# Assignee Liability

* Means someone is transferring commercial paper.
* **HIDC** [***Holder in Due Course] –*** if you get a negotiable instrument
* Take for value,
* Good faith,
* Without notice of claim
* If you are HIDC, you take the instrument free of most defenses
* **FTC Rule**
* Requires a notice in contracts
* Rule 433
* It is beneficial to understand why the rule was necessary, and the consequences of the holder in due course rule, without Rule 433.
* Liability of the assignee under the Rule is limited to the amounts paid. But defenses may be raised against any further liability.
* **Home Savings Association v. Guerra:**

Guerra and Modern Builders entered into a retail installment contract, which contained a notice provision required the FTC. Under the contract, MB agreed to add rock siding to Guerra’s home and make repairs to the existing structure for $7,700. Guerra executed a 10-year promissory note, which included a time-price differential payable in monthly installments of $125.69. MB assigned the note and the retail installment contract to Home Savings in exchange for $7,700.00. Thereafter, the rock siding crumbled, and Guerra brought suit against MB and Home Savings, as assignee, alleging DTPA violations. **Holding:** Court held that a creditor’s derivative liability for seller misconduct under the FTC rule is limited to the amount paid by the consumer under the credit contract. In the absence of evidence and jury findings that Guerra was adversely affected by a false, misleading, or deceptive act or unconscionable action on the part of Home Savings, Home Savings has no liability under the DTPA.  **Rule:** Although a consumer suing under the DTPA need not establish contractual privity with the D, he must show that the D has committed a deceptive act which is the producing cause of the consumer’s damages. DTPA does not attach derivative liability to a D based on an innocent involvement in a business transaction. To hold a creditor liable in a consumer credit transaction, the creditor must be shown to have some connection either with the actual sales transaction or with a deceptive act related to financing the transaction.

* **Derivative v. Direct Liability:** FTC rule applies to derivative liability being asserted based on the misconduct of another. The assignee itself may have independent liability for violation of the DTPA. Not a theory of recovery. It is a way of establishing consumer status against a particular D or avoiding the application of the HIDC.
* **Qantel Business Systems, Inc. v. Custom Controls Co.:** Computer Results sued Custom Controls on a sworn account. CC a business consumer, then filed a separate suit against CR, the retailer/distributor of a Qantel computer system. CC also sued Mohawk Data Services Corp, and Qantel Corp, the alleged manufacturers of the computer system. CC alleged Ds had committed a breach of warranty and engaged in false, misleading and deceptive practices or representations under the DTPA. **Holding:** Court held that DTPA does not recognize or envision the expansion of common law theories of vicarious liability to include “inextricably intertwined” or the mere existence of a “relationship” between the parties. **Rule:** “Inextricably Intertwined” – is NOT an additional theory of vicarious liability under the DTPA. DTPA does NOT attach derivative liability to its Ds based on innocent involvement in a business transaction. COA was incorrect to the extent it implied that the term “inextricably intertwined” is an additional source of derivative liability.

**Chapter 2**

# Warranty

* Different from contracts because it deals with promises and warranties deal with factual statements, or terms by operation of law.
* **LaSara Grain Co. v. First National Bank of Mercedes:** La Sara Grain Company, a corporation, hired Jones as general manager and opened a checking account with First National Bank of Mercedes in 1975. La Sara filed with the bank a corporate resolution naming 4 officers of the corporation as authorized signatories and providing that any 2 of them could sign checks for the corporation. Jones was one of the officers named in this resolution. La Sara fired Jones. An audit revealed that Jones had embezzled over $300k. July of 1979, La Sara filed suit against J to recover the amounts embezzled. La Sara thereafter amended its petition to join as Ds Fidelity & Deposit Company of Maryland and the FNof Mercedes. **Holding:** Court held that bank’s implied promise that it will not pay checks on an unauthorized signature is not a warrant but only an implied term of the contract. A mere breach of contract is not a violation of the DTPA. This case, does not involve a failure to disclose, the bank sent La Sara notice of all transactions. Although the bank’s conduct may have been in bad faith under the UCC, it was not false, misleading or deceptive.
* **§2.102 *Scope***
* **Predominate Factor Test**
* **UCC Warranties: 3 Types**
* **Title: §2. 312**
* **Express: §2. 313**
* **Implied: Merchantability §2.314 and Fitness §2.315**
* **Waiver or disclaimer Section §2.316**
* **Parol Evidence §2.202**
* **Limitation of Damages §2.719**
* **A warranty is created when:**
* The manufacturer selling to the wholesaler,
* Wholesaler selling to the retailer,
* Retailer selling to the consumer
* **Who May assert Warranty?**
* Question of privity
* **Willoughby v. Ciba-Geigy Corp.:** Coleman manager of Ag Supplies’ plant in Batesville, discussed with appellant Willoughby Jr, the condition of appellants’ corn field with reference to the weeds, seedlings, and Jonson grass growing within appellant’s corn field. Coleman applied the Evik to approximately 600 acres of appellant’s 1974 corn crop. Coleman had seen literature, but it contained no instructions or warnings with reference to spraying Evik within 3 weeks prior to tasseling. Within a week or 10 days after the Evik was sprayed, appellants observed problems with the corn. Leaves were burned, and the corn was “starting to deteriorate on the ends in places.” Nothing in this pamphlet warning that Evik should not be applied to corn after it had been planted for 6 or 7 weeks or should not be applied within 3 weeks before tasseling. **Holding:** Court held that the disclaimer relied upon by appellees was ineffective to relieve appellees of liability. Evidence clearly shows the disclaimer of warranty was NEVER disclosed or brought to the attention of appellants, who had not, at any time, come into possession of the container. Appellants did NOT see the disclaimer; the container upon which the disclaimer appeared was never in their possession, and it was not called to their attention by Coleman.
* **Plas-Tex, Inc. v. US Steel Corporation:** Fiberex is a manufacturer of fiberglass swimming pools. During 1980, and 1981, Fiberex purchased polyester resins used in manufacture of these pools from Plas-Tex, resin distributor. Most of the resins were manufactured by US Steel. Beginning in the latter part of 1980, pools manufactured by Fiberex began delaminating. **Rule:** Proof of a defect is required in an action for breach of implied warranty of merchantability under §2.314(b)(3). The word “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. To make a prima facie case of a defect based solely on circumstantial evidence, Fiberex must present evidence that it handled and applied the resin properly. Evidence of proper use of the goods together with a malfunction may be sufficient evidence of a defect. P has burden of proving the goods were defective at the time they left manufacturer’s or seller’s possession. Circumstantial evidence of proper use of the goods and a malfunction may suffice.

# Common Law

* **Real Estate**
* **Humber v. Morton:** Widow Humber brought suit against Morton, alleging that Morton was in the business of building and selling new houses; that she purchased a house from him which was not suitable for human habitation in that the fireplace and chimney were not properly built and because of such defect, the house caught fire and partially burned the first time a fire was lighted in the fireplace. Morton defended upon two grounds: (1) an independent contractor, Johnny Mays, had constructed the fireplace and he, Morton, was not liable for the work done by the Mays and that “caveat emptor” applied to all sales of real estate. **Holding:** Court held that Morton built the house and then sold it as a new house, thereby he impliedly warrant that such house was constructed in a good workmanlike manner and was suitable for human habitation. Under such circumstances, the law raises an implied warranty. **Rule:** Court dismisses caveat emptor as the rule and imposes a pair of warranties in the sale of a new house by a vendor-builder:

**(1)** The implied warranty of habitability, and

**(2)** The implied warranty of good workmanship

A builder-vendor who built and conveyed a house impliedly warranted that the house was constructed in a good workmanlike manner and was suitable for human habitation.

* **G-W-L, Inc. v. Robichaux:** Robichaux contracted with Goldstar for the construction of a house. Contract said Goldstar would design, build, and provide the materials for the house. Goldstar completed construction but the roof of the house had a substantial sag in it. R sued for breach of express and implied warranties. Jury found that no express warranties were breached, but found that Goldstar had failed to construct the roof in a good workmanlike manner and that the house was not merchantable at the time of completion. R were awarded damages under DTPA + atty fees. **Holding:** Court held that the contract in this case provided that Goldstar would “build, construct and complete… and furnish and provide all labor and material to be used in the construction and erection thereof.” Clearly, the “essence” or “dominant” factor of the transaction was the furnishing of labor and the performance of work required for constructing the house. Language must be “clear and free from doubt” TEST.
* **Davidow v. Inwood North Professional Group**: Inwood contends that the defense of material breach of the covenant to repair is insufficient as a matter of law to defeat a LL claim for unpaid rent. In Texas, Courts have held that the LL covenant to repair the premises and the Ts covenant to pay rent are independent covenants. **Holding:** there is 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. If however, the parties to a lease expressly agree that the T will repair certain defects, then the provisions of the lease will control. **Rule:** A T is still under a duty to pay rent even though his LL has breached his covenant to make repairs. LL as permanent owner of the premises, should rightfully bear the cost of any necessary repairs. A commercial T desires to lease premises suitable for their intended commercial use. A commercial LL impliedly represents that the premises are in fact suitable for that use and will remain in a suitable condition. T’s obligation to pay rent and the LL’s implied warranty of suitability are therefore mutually dependent. Whether there has been a breach of this warranty are: (1) nature of the defect, (2) its effect on the T’s use of the premises, (3) length of time the defect persisted; (4) age of the structure; (5) amount of the rent; (6) the area in which the premises are located; (7) whether the T waived the defects; and (7) whether the defect resulted from any unusual or abnormal use by the T.

# Implied Warranties

# Services

* **Melody Home v. Barnes:** Lonnie and Donna Barnes sued Melody Home Manufacturing Company under the DTPA for breach of an implied warranty that repairs would be done in good workmanlike manner and for other DTPA violations. Barneses ordered a modular pre-fabricated home from Melody Home. Over 2 years after moving in, they discovered that a sink was not connected to the drain in one of the interior walls. Continual leak caused severe damage to the home’s sheetrock, insulation, and flooring. Barneses told Melody Home about the problem. Workmen from Melody came out twice, but their efforts were not satisfactory, and additional damages were caused by the repair. They failed to reconnect the washing machine drain, causing the house to flood with resulting damage to the floors, cabinets and carpeting. **Holding:** Court held that Barneses “purchased” the services. Barneses purchased goods and thus were “consumers” when they originally bought the home. Melody Home’s attempt to repair the defects in the home were by definition “services” under DTPA. Absence of a cash transfer is NOT determinative because DTPA Ps establish their standing as consumers in terms of their relationship to a transaction, not by their contractual relationship with the D. Barneses did not lose their consumer status by allowing Melody Home to attempt to correct the problem and by deferring their lawsuit. **Rule:** An implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner is available to consumers suing under the DTPA.
* A breach of an implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner is actionable under §17.50(a)(2) of DTPA.
* Warranty of good and workmanlike performance – quality of work performed by one who has the knowledge, training or experience necessary for the successful practice of trade or occupation and performed in a manner generally considered proficient by those capable of judging such work.
* **Centex Homes v. Buecher:** Sales contract provided that the builder’s express limited warranty replaced all other warranties, including these 2 implied warranties. Buecher and other homeowners purchased new homes built by Centex Homes. Each homeowner signed a standard form sales agreement prepared by Centex. Homeowners allege that the agreement contained a one-year limited express warranty in lieu of and waiving the implied warranties of habitability and good and workmanlike construction. After Buecher and other Ps purchased their homes, they sued Centex alleging fraud, misrepresentation, negligence and violation of the DTPA. **Holding: :** Implied warranty of habitability cannot be waived except under limited circumstances but not implicated here. **COURT HELD** that the implied warranty of good workmanship may be disclaimed by the parties when their agreement provides for the manner, performance or quality of the desired construction. The warranty of habitability may NOT be disclaimed generally. It only extends to defects that render the property so defective that it is unsuitable for its intended use as a home. Implied warranty of habitability extends only to latent defects. Does NOT include defects, even substantial ones that are known by or expressly disclosed to the buyer. **Rule:** When the parties’ agreement sufficiently describes the manner, performance or quality of construction, the express agreement may supersede the implied warranty of good workmanship. Implied warranty of good workmanship attaches to a new home sale if the parties’ agreement does NOT provide how the builder or the structure is to perform. Only in unique circumstances, such as when a purchaser buys a problem house with express and full knowledge of the defects that affect its habitability, should a waiver of this warranty be recognized. Implied warranty of good workmanship, however, defines the level of performance expected when the parties fail to make express provision in their contract. It functions as a gap-filler whose purpose is to supply terms that are omitted but necessary to the contract’s performance.
* Habitability generally may not be disclaimed. 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.
* **Gonzales v. Southwest Olshan Foundation Repair:** Gonzales hired a plumber to repair water leaks under her foundation and hired Southwest Olshan to repair the foundation problems the water leak has caused. Foundation repair contract included a life-time, transferrable warranty on the work requiring that Olshan “perform all the necessary work in connection with this job…in a good workmanlike manner.” Gonzales noticed doors not locking, windows not opening, and new cracks appearing in previously repaired walls. G noticed more cracking. She hired engineer to inspect the home. **Holding:** Parties’ agreement here specifies that the service provider would perform foundation repair in good and workmanlike manner and adjust the foundation for the life of the home due to a settling, the express warranty sufficiently describes the manner, performance, or quality of the services so as to supersede the *Melody Home* implied warranty. *NO* implied warranty exists under the facts of this case. **Rule:** Implied warranty of good and workmanlike repair of tangible goods or property attaches to a contract if the parties’ agreement does NOT provide for the quality of the services to be rendered or how much services are to be performed. An express warranty in their contract can fill the gaps covered by the implied warranty and supersede it if the express warranty specifically describes the manner, performance, or quality of the services. DTPA does NOT create any warranties.

# Real Estate

* **Gym N-1 Playgrounds, Inc. v. Snider:** Caddell and Finn bought a playground business from Snider.  They had worked at the business prior to their purchase.  Additionally, they leased the building from Snider.  Fire code requires sprinklers in all buildings larger than 20,000 sqft. Bonnie and Patrick knew the building did not have sprinklers. They did not inspect the building because they knew it so well.  The lease terms were that the building was leased as is and they obtain insurance to cover fire-related loss.  They never positively renewed the lease over the next four years after it expired but continued paying on its terms. There was a fire and the building was destroyed.   They sued for violation of implied warranty of suitability. **Holding:** As-is provision continued month to month, because the lease terms actually said if they continued month-to-month, it would continue under the terms and provisions of this Lease, which included the as-is provision (2) Yes, the warranty was disclaimed. Compare to Davidow:  Davidow was a doctor and had to move out of a building because it had so many issues with having a medical malpractice, there was a warranty of habitability already recognized in a commercial lease.  But establishes that there is a commercial implied warranty of suitability (not just for personal habitation) and that agreement can alter that warranty.  Did not speak to a waiver.

         ○ Compare to Prudential:  In this case it was a purchase, rather than lease, with an as-is provision.  As-is negated causation element for a cause of action for issues with the sale (asbestos).  As is made the buyer rely on his own appraisal of the bargain and accept the risk.  This was allowed (absent fraud), the lease expressly can disclaim a warranty with an as-is provision.***TPC §92.006(e). IWS can be waived.***

* Implied warranty of Habitability was replaced by the Texas Property Code Chapter **92.051-92.062**. **§92.006(e)** deals with waiving repair duty of residential LL.
* **TRCCA Overview**
* NOT in effect. CL warranties apply.
* Act applied to builders when there was a construction defect. **§401.003**.
* Builders had to register
* Created a Commission to promulgate regulations
* Created administrative procedure required before a lawsuit
* Warranties created by statute
* **Archibald v. Act III Arabians:** Plaintiff sent 4 horses to Act III to have them trained. One of the horses proved to be too hard to train and was put through a different training program then the others in order to break it. Due to this training, the horse became difficult and had to be put down. P then filed this action with the court. **Holding:** The Supreme Court found that horse training does carry an implied warranty. Under the rule from Melody Homes, the warranty applies as long as you repair or modify an existing tangible good. The Court reasoned that a horse is a tangible good and the training of a horse is a modification of the horse, because you seek to destroy bad habits that they possess, and instill in them new, better habits and capabilities, and to enhance the horse’s ability to respond to commands.
* **Producing Cause:** an efficient, exciting or contributing cause which is a continuous and unbroken sequence in connection with any other cause or causes producing the event resulting in injury.
* **Proximate Cause:** adds element of “foreseeability.”
* **Rocky Mountain Helicopter, Inc. v. Lubbock County Hospital:** UMC and Lubbock Methodist Hospital created an emergency patient transport program called CareLink. Both hospitals entered into a contract with Rocky Mountain to furnish operational and technical support, maintenance, pilots, and mechanics for two helicopters; Rocky Mountain was responsible for the refueling of helicopters. Kitterman, an EE of Rocky Mountain, caused a fuel spill on UMC property, requiring $300,000 worth of clean up. Kitterman had never used the refueler, and had minimal training in its use. University Medical Center sued Rocky Mountain Helicopter, Inc. and others for negligence and DTPA violations. **Holding:** The evidence is legally insufficient to support the jury’s finding that Rocky Mountain violated the DTPA. Rocky Mountain preserved its argument that no implied warranty arose under the circumstances of this case. Rocky Mountain’s failure to perform was no more than a breach of contract, which, without more, is not a DTPA violation. Texas law does not recognize an implied warranty that services incidental to helicopter maintenance will be performed in a good workmanlike manner. Therefore, the jury’s findings cannot be sustained under the DTPA breach of warranty theory. **Rule:** Implied warranties are created by common law or statute, are grounded more in tort than contract, and require the services relate to the repair or modification of existing tangible goods or property. Normally, implied warranties that services will be performed in a good and workmanlike manner may arise when public policy demands, and when there are no other adequate remedies available to the consumer.
* **TEST:**
* Public Policy need; when other remedies not available
* Court seems to think there is not a warranty for services and that this case is asking to create an entirely new warranty.
* ***Incidental Services:*** every service transaction involves aspects that may be described as directly related to the service and those “incidental to it.”
* Only those direct aspects of the service transaction are subject to the implied warranty of good and workmanlike performance.

# Establishing a Warranty

* Code makes it simple because when there is a sale of goods, there are rules to tell us when a warranty arises.
* **Southwestern Bell v. FDP Corporation:** Prasek president of FDP Corporation, met with Williams, a Southwestern Representative to discuss advertising in the next edition of the Yellow Pages. The display was not included. Bell nevertheless billed FDP for all the items. Underprotest, FDP made several installment payments. Bell finally realized its mistake and returned the sums previously paid by FDP for the omitted display. FDP filed suit, alleging negligence and violation of the DTPA. **Holding: UCC** recognizes that breach of contract and breach of warranty are NOT the same cause of action. No sound reason exists to apply a different standard when the contract is for services instead of goods. Bell’s argument is rejected. **Rule: Bell’s** omission of the display was a defect in the performance of its advertising contract. FDP purchased a package of advertising service; Bell delivered most of the services it agreed to provide, but by omitting a critical item, it delivered an incomplete package. FDP had no alternative but to accept the advertising package Bell delivered, even though it was different from and less desirable than what Bell had in essence agreed to sell. There is some evidence to support the jury’s finding that the defect in Bell’s performance constituted a breach of its warranty to publish FDP’s advertising correctly.
* **Medical City Dallas v. Carlisle:** Medical and Carlisle had a contract in which Carlisle issued several express warranties. Medical city contends that an express warranty is like a contract and therefore, attorney’s fees will be awarded. **Holding:** Medical City was entitled to atty fees when it prevailed. **Rule:** a claim based on express warranty is a contract action and therefore the parties are entitled to attorneys fees. Texas law permits recovery of attorney’s fees for acclaim based on an oral or written contract. A party who prevails in a lawsuit is entitled to recover attorney’s fees only if permitted by the statute or by contract. The UCC governs express warranty claim. However the UCC sections dealing with remedies for breach of warranty, adopted verbatim in Texas, are silent on the issue of attorney’s fees. If a state has a special statute that allows recover of attorneys fees in an action based upon a contract relating to the sale of goods, it would be appropriate to award attorney’s fees to a winning warranty plaintiff under such statute. §38.001. ***Atty fees cannot be recovered under UCC as consequential damages. Breach of warranty = creature of K thus they get atty fees.***
* **JCW Electronics v. Garza:** Montez, was arrested for public intoxication and placed in the Port Isabel jail. After his arrest, Montez used a JCW collect-only telephone to call his mother, , which was installed under a 1998 contract with the Port Isabel Police Department. Devastatingly, after that call, he was found dead in his cell, hanging from the telephone cord. Garza sued the City of Port Isabel and subsequently joined JCW. The jury ultimately found 60% of the liability to Montez, 25% to the City of Port Isabel, and 15% to JCW, where thereafter, JCW moved for judgment claiming that the 60% fault barred Garza’s recovery on all pleaded claims under Chapter 33. **Holding:** When the claiminvolves death, as here, “claimant” is defined to include not only the party seeking damages, but also the decedent. Because the jury found the decedent, Montez, negligent and apportioned him 60% of the responsibility for his death, his contributory negligence bars recovery in this case. The Court claimed that there was no indication that the Legislature intended to restrict the scope of Chapter 33, in the 1995 amendment, by explicitly removing implied warranties. Rather, the amendments expanded Chapter 33’s scope by not excluding anything specifically and by its initial broad pronouncement of applying to *any* cause of action based in tort. The Court also analyzed that the breach of implied warranty was a claim that could be in tort, based upon common law and an examination of Chapter 33 as a whole. **Rule:** Chapter 33 of the Texas Civil Practice and Remedies Code apportions responsibility among those responsible for damages in “any cause of action based in tort.”
* **Head v. US Inspect DFW, Inc.:** Head was the sole beneficiary of a trust. The trustee contracted to purchase a home in which Head could live. rior to the purchase of the home, four inspections were conducted, including one conducted by U.S. Inspect DFW, Inc. Head signed a contract with U.S. Inspect DFW, Inc. that stated the inspection would be a visual one, conducted by a “licensed real estate inspector,” and no warranties – express or implied – were included. Following the inspection, the inspector gave Head a report with only his signature, and not the apprentice inspector’s signature as well. The report includes information that there are some problem areas on the roof, but Head says the inspector never informed her of such. Head filed suit, asserting claims for violations of the DTPA and fraud against the sellers, & breach of contract, breach of warranty, negligence, and DTPA violations against the inspector & U.S. Inspect DFW, Inc. **Holding:** The inspection report did not misrepresent “facts,” rather than opinions. After all, the inspection agreement stated that appellees would provide an inspection that would “contain the opinion of the Inspector.” Moreover, the underlying nature of Head’s misrepresentation claim is breach of contract and negligence. Failure to have a licensed real estate inspector perform the inspection is based upon a term in the inspection agreement. Hence, Head’s claim is a claim that Appellees failed to fulfill a term of the contract, which is not a DTPA claim. **§17.31(c)(1)**
* **Express Misrepresentations**
* Court says to look to the underlying nature of the claim, which is breach of contract and negligence.
* “Failure to perform a term of a contract is simply not a violation of the DTPA.”
* Thus, Head’s claim is not actionable as a claim of misrepresentations under the DTPA.
* **Failure to Disclose**
* To prove a claim for failure to disclose, the P must show:

**(1)** A failure to disclose information concerning goods or services,

**(2)** Which was known at the time of the transaction

**(3)** If such failure was intended to induce the consumer into a transaction,

**(4)** Which the consumer would not have entered had the information been disclosed

- A mere nondisclosure of material information is not enough to establish an actionable DTPA claim.

* **Breach of an Express Warranty**
* To prove a breach of an express warranty under the DTPA, a P must prove:

**(1)** He or she is a consumer,

**(2)** A warranty was made,

**(3)** The warranty was breached, and

**(4)** As a result of the breach, an injury resulted

**Chapter 3**

# Remedies

* **Post-1995:** gives economic damages.
* **§17.50(b)(1):** each consumer may obtain economic damages found by the trier of fact. Knowingly or intentionally.
* **§17.505: INSPECTION**: during the 60-day period a written request to inspect, in a reasonable manner and at a reasonable and place, the goods that are the subject of the consumer’s action or claim may be presented to the consumer.
* Practical effect of the notice provisions is that Ds should always get out for less than 100 cents on the dollar, but consumers should be promptly compensated, avoiding the time and expense of a lawsuit.
* D has 30 days after Answer to file a plea in abatement if no notice.
* **§1**7.**505(b): SOL or COUNTERCLAIM:** if written notice is rendered impracticable by reason of the necessity of filing suit in order to prevent the expiration of the statute of limitations or if the consumer’s claim is asserted by way of counterclaim, the notice… is not required… may be within 60 days after service of the suit or counterclaim.
* **§17**.**505(c): PLEA IN ABATEMENT:** a person against whom a suit is pending who does not *receive* written notice, as required by (a) may file a plea in abatement not later than the 30th day after the date the person files an original answer in the court in which the suit is pending.
* **§17**.**505(d): ABATEMENT:** court shall abate the suit if the court, after a hearing, finds that the person is entitled to an abatement because notice was not provided as required by this section.
* **Richardson v. Foster & Sear, LLP:** R’s father, hired Foster & Sear to represent him for a personal injury claim resulting from asbestos exposure. R’s father died before resolution of the claim. R sued Foster & Sear for “negligence, professional breach of warranty, breach of contract and gross negligence.” R alleged that F&S settled the asbestos claim without his approval and withheld settlements proceeds from him. F&S asserted that R had failed to serve Presuit notice of his claim under the DTPA. F&S later filed a motion to abate, and the TC abated the suit. **Holding:** although the DTPA does not expressly provide for dismissal when a P fails to serve the D with post-suit notice when the suit is abated for that purpose, dismissal is appropriate in some circumstances. **Rule:** DTPA notice must advise the D in reasonable detail of (1) the consumer’s specific complaint and (2) the amount of economic damages, damages for mental anguish, and expenses, including atty fees, if any, reasonably incurred by the consumer in asserting the claim against D.
* Requirement is simply that the D be specifically informed of the consumer’s complaint.
* A D who wishes to settle at this time, without the need for litigation, has the opportunity to contact the consumer for further information if necessary.
* **§17.5052:** **Offers of Settlement:** a person who receives notice under §17.505 may tender an offer of settlement at any time during the period beginning on the date the notice is received and ending on the 60th day after that date.

**-** D can propose a settlement twice under §17.5053(a) and once under (b)/(c).

* **§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.
* **Chapter 42/ Rule 167:** the only time a D will use this rule is when it already is subject to atty fees if it loses. Rule 167 should be used in all DTPA cases to propose a settlement near the time of trial. It does not disrupt the notice and settlement provisions of the DTPA, it does, however, supplement them.

# Actual Damages

* Until 1995, the general damages standard under the DTPA was “actual damages.”
* Courts considering the meaning of the term have uniformly held that it means those damages recoverable at common law. Actual damages are those designed to compensate the consumer, distinguished from nominal or exemplary damages, which are designed to make a point.
* Actual Damages = CL Remedy that affords consumer greatest recovery.
* ***Out of Pocket Rule:*** difference between what paid and MV of what you got at time of delivery.
* ***Benefit of the Bargain:*** measure the difference between the value as represented and the value received. If made a good deal, get the value of the deal. K price is a minimum not a maximum amount of recovery.

# Economic Damages

* **§17.45(11) –** compensatory damages for pecuniary(monetary) 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.
* **Luna v. North Star Dodge:** Luna sought to purchase a 1980 Dodge Omni from North Star Dodge. A 30-day/1000 mile “money back guarantee” was offered to new car purchasers. Luna took delivery of the car and while driving it home noticed a constant vibration and rattling with the steering wheel. Luna took the car back to NSD and asked salesman to refund her purchase money. NSD offered to fix the car. Luna claimed it was never fixed. Luna returned to NSD several times with the car. Eventually, Luna left the car where it remained at the time of the trial. **Holding:** mental anguish damages were recoverable because the refusal to refund purchase money was done “knowingly”. The court relied on section 17.45(9) of the DTPA which defines knowingly as the actual awareness of falsity, deception, or unfairness, of the act or practice giving rise to the consumer’s claim and noted that actual awareness was inferred.
* **Mental Anguish**
* Before, actual damages includes damages for mental anguish.
* Texas SC has made it clear that proof of physical injury is not necessary for mental anguish; however, there is still a high degree of proof required. To the extent common law rules are followed to award damages under the DTPA, the common law requirements must be met.
* CURRENT LAW, damages for mental anguish are recoverable only if the consumer shows the defendant acted knowingly.
* **Parkway Co. v. Woodruff:** Ws home flooded and was damaged due to the D/Contractor’s negligence in building it in a floodplain. Woodruffs challenge the COA deletion of their award for mental anguish based on legal insufficiency. **Test:** high degree of mental pain and distress. It is more than mere disappointment, anger, resentment or embarrass although it may include all of these. MA recoverable when Ps have “direct evidence of the nature, duration, and severity of their mental anguish, thus establishing a substantial disruption in the P’s daily routine. If no evidence, the record must reveal any evidence of a high degree of mental pain and distress that is more than mere worry, anxiety, vesation and embarrassment. In the present case, the Woodruffs only stated statements of being upset mainly describing emotions, but not showing high degree of mental pain and distress. COA deletion of MA damages affirmed.
* Notes
1. Pecuniary loss is defined as a loss of the care, maintenance, support, services, advise, counsel, and reasonable contributions of a pecuniary nature.
* **Latham v. Castillo:** Latham argues that the Castillos’ DTPA claim is essentially a dressed-up legal malpractice claim. He asserts that Castillos must prove that they would have won the medical malpractice case for Kay’s death in order to recover. **Holding:** DTPA does not require and the Castillos need not prove the “suit within a suit” element when suing an attorney under the DTPA. The Castillos have presented some evidence of unconscionable action. Latham’s unconscionable action must have been the producing cause of actual damages. Latham’s conduct caused the Castillos a “high degree of mental pain and distress” that a jury could consider. Trial judge will instruct the jury to differentiate between the mental anguish the Castillos suffered because of their daughters’ deaths, which is not compensable in this suit, and that they may have suffered because of Latham’s actions, for which the Castillos may be compensated. §**17.43.**
* Question: Can a party recover mental anguish damages arising out of an economic loss? Some courts have focused on the nature of the injury of the economic loss. Economic recovery alone would not make the person whole again because of the personal nature of the inury. Economic loss due to loss of property? No MA allowed because the plaintiff will become whole when he recovers the property cost.
* **Strickland v. Medlen:** Avery, a mixed-breed dog owned by the Medlens, escaped the family’s backyard and was promptly picked up by Fort Worth animal control. Jeremy went to retrieve Avery but lacked enough money to pay the required fees. Shelter hung a “hold for owner” tag on Avery’s cage to alert employees that Medlens were coming for Avery and ensure he was not euthanized. Shelter worker, Strickland, mistakenly placed Avery on the euthanasia list, and he was put to sleep. **Holding:** Court held that loss-of-consortium damages are available only for a few especially close family relationships, and to allow them in lost pet cases would be inconsistent with these limitations. Court rejected the emotion-based liability and prohibit recovery for loss of the human-animal bond.Pet-death actions compensating for such harm, while they can be legislated are NOT something Texas common law should enshrine. **Rule:** Pets are property in the eyes of the law, and no permit non-economic damages rooted solely in an owner’s subjective feelings. Term “property” is a legal descriptor, and its use should not be misconstrued as discounting the emotional attachment that pet owners undeniably feel. Nevertheless, under established legal doctrine, recovery in pet-death cases is, barring legislative reclassification, limited to loss of value, not loss of relationship. Where a dog’s market value is unascertainable, the correct damages measure is the dog’s “special or pecuniary value” – the economic value derived from its “useful and services,” not value drawn from companionship or other non-commercial considerations.
* ***Loss of Companionship***
* Component of loss of consortium
* Loss of “love, affection, protection, emotional support, services companionship, care and society.”
* **Finger v. Hugh M. Ray III:** Client sued her lawyer, alleged wrongful acts arising from his representation of her during bankruptcy litigation. Causal connection between the alleged wrongful conduct and any actual damages sustained in this case is not within the common understanding of jurors, the law requires expert testimony to establish proximate and producing cause. **Holding:** Court held that the causal connection between the conduct alleged and any injury is not within a jury’s common understanding, and thus the TC properly ruled that expert testimony was necessary to show that the lawyer’s acts caused the client actual damages.
* ***Tie-in Statute:*** If a claimant is granted the right to bring a cause of action under this subchapter by another law, the claimant is not limited to recovery of economic damages only, but may recover any actual damages incurred by the claimant, without regard to whether the conduct of the defendant was committed intentionally. A violation of those statutes actionable through DTPA. Better to sue on tie-in through DTPA instead of straight DTPA because you get actual damages. Example: a consumer bringing a DTPA tie in claim is not limited to economic damages and damages for mental anguish, rather, the consumer may recover actual damages, and up to three times actual damages if the defendant acted knowingly.



* **Digangi v. 24 Hour Fitness USA, Inc.:**

DiGangi was injured while using a fitness machine manufactured by Bodymaster’s at 24 Hour Fitness USA. According to Digangi, he was using the machine correctly when the cable broke, allowing a bar to hit him in the head and mouth. **Holding:** There is nothing to indicate that poor maintenance caused DiGangi’s accident or that 24 Hour was responsible for that maintenance. DiGangi has NOT shown a compelling need for the judicial imposition of such an implied warranty. **Rule:** Economic damages normally include compensatory damages for pecuniary loss, including costs of repair and replacement but NOT exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society. An implied service warranty will only be imposed when there is a compelling need and there are no other remedies available to the consumer.

* Notes
1. Can a debtor owing her American express credit card bring a suit under the TDCPA and the DTPA? TDCPA is a tie in statute and allows to bringa suit under the DTPA as well. However, in order to do that, you still need to be a consumer under the DTPA. If a person tries to bring a claim complaining about the collection agency in regards to the line of credit, she is not going to qualify as a consumer because a line of credit does not qualify as a good.
* ***Proving Damages 269:*** In order for a property owner to qualify as a witness to the damages to his property, his testimony must only show that it refers to market, rather than intrinsic or some other value of the property.P can testify to value of car if it refers to market value.

# Additional Damages

* One of the most important aspects of the DTPA is the possible recovery of additional (punitive) damages.
* **Jim Walter Homes, Inc. v. Valencia:** Jim Walter Homes’ contention that there is NO evidence to support the jury’s finding that Jim Walter Homes “knowingly” violated the DTPA. JWH argues that the alleged misrepresentations were made to the Valencias at the time they entered the contract and that in order for JWH to have violated the DTPA “knowingly.” The Valencias would have to show JWH did NOT intend to build the house in compliance with the contract from the outset. **Holding:** Court held that under §17.50(b)(1), the maximum amount of damages recoverable in a suit in which actual damages resulting from a knowing violation of the DTPA exceed $1000 is three times the first $1000 of actual damages + three times the actual damages in excess of $1000. That amount is equal to a trebling of actual damages. **Rule:** Purpose of allowing multiple recoveries is two-fold: to encourage consumers to initiate litigation and to deter sellers from violating the DTPA. Record contains evidence from which the jury could have inferred that JWH knew that the house was defective at the time of construction. From this and other evidence in the record the jury could have inferred that JWH committed a knowing violation of the DTPA.
* Under the current statute, the consumer recovers economic damages.
* If the jury finds the D acted knowingly, the jury may award damages for mental anguish and up to three times economic damages. Example: C wins a judgment of 10,000 economic damages. Since D acted knowingly, his judgment would be 30,000 instead and if they find mental anguish, the C will be awarded mental anguish damages as well.
* If the jury finds the D acted intentionally, it may award damages for mental anguish and up to three times economic damages and damages for mental anguish. Example, if D acted intentionally, economic damages were 10,000 and MA were 1,000. So the total damages would be 30,000 ED + 3,000 MA= 33,000
* If consumer prevails in a DTPA claim, jury may award “economic damages.”
* DTPA & Another law Exception
* If a claimant is granted the right to bring a cause of action under the DTPA by another law, the claimant is not limited to economic loss and may recover all “actual damages” including damages for mental anguish. To get these damages, the C does not have to show that D acted intentionally. For purposes of additional damages, all that must be shown is that the defendant acted knowingly.
* **Tony Gullo Motors v. Chapa:**  Chapa averred that she had distinct claims and then later suggested that the claims were intertwined and should be allowed attorney’s fees for 100% of the Attorney’s work. The “American rule” is that each side pays their own fees unless specifically authorized by statute. In this case some claims authorized attorney’s fees and others did not. **Rule:** if any atty fees relate solely to a claim for which such fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees. Intertwined facts do not make tort fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated.

# Attorney’s Fees

* 17.50(c) The DTPA has authorized the award of attorneys fees to a successful consumer. Additionaly, the act has permitted the award of attorneys fees to a defendant, if the action was groundless, and brought in bad faith or for the purpose of harassment. Attorney’s fees often are a substantial part of the economics of any lawsuit.
* Attorney’s fees are not recoverable for tort
* ***Texas Rule:*** grievance for “unconscionable” fee.
* **§1.04**
* **McKinley v. Drozd:** Drozd, a general contractor, brought suit against McKinleys to recover the balance due on a construction contract on the McKinley’s new home, and to recover atty fees. McKinleys counterclaimed against Drozd alleging conversion, breach of contract, and several violations of the DTPA. McKinleys also sought atty fees under the DTPA in connection with contractual claim.
* M--->D 24,836
* D--->M 11,650
* So since the the Mckinleys ended up paying D 13,186. And the COA said that since M’s recovery was 0, they were not entitled to attorneys fees.
* **Holding:** A consumer who is awarded actual damages under the DTPA should also be awarded atty fees, even though the damage award is entirely offset by an opposing claim and the DTPA consumer receives no net recovery. So in this case, Mckinleys were awarded actual damages but were offset by the damages they owed to the Drizd. However the court stated that hey still qualify for attorneys fees. **Rule:** Allowing consumers to recover atty fees under §17.50(d) of DTPA incurred in the successful prosecution of a claim for damages under the Act, even though the claim might be entirely offset by a claim of an opposing party. The more sensible meaning of the word “prevail” is to prevail in a claim under the Act, rather than to obtain a net recovery on all claims joined in one lawsuit.
* **Arthur Andersen & Co. v. Perry Equipment Corporation (contingency fee atty’s fees case):** Maloney Pipeline Systems hired the accounting firm Arthur Andersen & Co. to perform an audit of its company. Perry Equipment Corporation (PECO) relied on the audit to move forward with the purchase of Maloney Pipeline Systems. Soon after the purchase, Maloney Pipeline Systems files for bankruptcy. PECO alleges that Arthur Andersen & Co. performed a faulty audit because the audit favorably reported Maloney’s financial condition when, in fact, the company was suffering substantial losses. PECO sues Arthur Andersen & Co. on many tort grounds, including violations of the DTPA. The trial court ruled for PECO and Arthur appeals alleging that the trial court erred in awarding PECO attorneys fees by shifting contingency fee without considering the attorney’s fees reasonableness factors. **Holding:** an attorney’s fees award as a percentage of recovery is not a proper measure of attorney’s fees under the DTPA. The jury or fact finder may consider contingency fee but the award cannot be based solely on that. To recover attorney’s fees under the DTPA, the plaintiff must prove that the amount of fees was both reasonably incurred and necessary to the prosecution of the case at bar, not as a percentage of the judgment.
* **8 Factors**

**(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 the judgment will be, and may only speculate about whether a percentage of that unknown recovery will represent a reasonable and necessary fee in that case.
* Notes
1. The Court has held before that reasonably fee included the percent of the contingency fee agreement. But of course it is not the only way to determine attorneys fees because we also need to consider the 8 factors.
2. Remember that under section 17.5052(h) attorneys’ fees may be limited based on the reasonable settlement offer.
3. What happens when the amount of attorney’s fees is changed on appeal? In *Baker v. Eckman* the court held that even when the court of appeals reduced the attorneys fees, the case must have to be remanded to the jury to make the correct determination of the attorney’s fees because COA review would mean that they would have to look at factual factors that the COA is not supposed to.
* **Keeton v. Wal-Mart Stores, Inc.:**  Keeton won a suit against Walmart. In a prejudgment motion, Keeton requested an increase in the attorneys fees because the court only awarded 3,0001.85. He states that his attorney was entitled to an award of 14,525 (100 per hour x 145.25 hours). Walmart challenges that award arguing that Plaintiff failed to segregate the negligence and DTPA claims and also argues that because the verdict was less than what was offered in the settlement, that the current award is correct. The issue is how courts calculate attorneys fees in DTPA claim along with a federal claim?
* **Federal court attorneys fees**

The federal standard for attorney fees is

1. lodestar calculation (reasonable number of hours expended on the case x reasonably hourly rate);
2. lodestar is adjusted depending on the 12 factors
3. time and labor required for litigation
4. novelty and difficulty of the question presented
5. skill required to perform legal services properly
6. preclusion of other employment by attorney due to acceptance of the case
7. customary fee
8. whether fee is fixed or contingent
9. time limitaitons imposed by client or the circumstances
10. amount involved and the restul obtained
11. experience, reparation and ability of attorneys
12. udesirebility of the case
13. nature and length so the professional relationship with the client
14. awards in similar cases.

Under the federal standard, using the lodestar calculation and the adjustment (12 factors) the court concluded that attorneys fees would be 3,000.

* **Texas attorney’s fees**

Since there was a settlement, this triggered the DTPA mechanisms for calculating attorneys fees. The amount that Wal-mart offered during settlement was 2,500 in attorneys fees. The offer was reasonable under the circumstances and under Texas Law the award would result in 2500.

Holding: The ultimate award of a reasonable attorney fee is clouded by uncertainty as to which law governs. Therefore, since the two calculations produced a reasonable result, the attorney fee award will be $2750.

* Question: In a Texas case, does the court needs to consider the contingency fee agreement to determine attorney’s fees? Robertson County v. Wymola said no. The court held that if a party did not want to submit the contingency fee agreement into evidence so that the court could calculate attorneys fees, the court could still calculate attorneys fees under Andersen Co v. Perry. The court therefore used standard in Andersen without considering the contingency fee agreement and it was okay to do so.
* Note
1. 17.50(c) states that a defendant is entitled to reasonable attorneys fees if an action is brought in bad faith of for the purposes of harassment. Attorneys fees have to be in relation to the amount of work expended and court costs.
* **Zak v. Parks**: The Zak’s appeal the trial court’s ruling that Zak’s brought a lawsuit or the purpose of harass the parks and also Zak’s appeal to challenge attorneys fees awarded to the Parks. Zak’s bought a home from the Parks’. Soon after, the Zak’s sent a DTPA demand letter complaining that the Parks’ concealed sheet rock fractures and foundation cracks by plastering and repainting the walls, removed certain equipment they had agreed to leave in the home, and failed to flooding propensity. When the Parks’ did not comply with the demand letter, the Zak’s filed suit. The Parks’ countersued for attorney’s fees, claiming that the Zak’s suit was groundless and brought in bad faith or for the purpose of harassment. The Parks’ claim was based on evidence that the Zak’s discovered the foundation cracks during an inspection and agreed to limit the Parks’ liability for foundation repairs to $2,300; that the Zak’s demand letter did not suggest a good-faith effort to negotiate because it included. **Holding:** we see no realistic basis for the claims of the Zaks against the Parks and find sufficient evidence in the record to support the jury’s findings that the suit was brought in bad faith or for the purposes of harassments. As such, Parks met both prongs of 17.50(c) and the trial court did not err in awarding attorney’s fees to the Parks.
* **Donwerth v. Preston II Chrysler-Dodge, Inc.:** Donwerths purchased a Chrysler from Preston II Chrysler Dodge, Inc. Donwerth expressed concern regarding the brakes of the car with Bob White of Preston II who said that it was a good car and there was nothing wrong with the brakes. Donwerths had several problems with the car so they did checked the car’s ownership history which revealed the car had been sold several times. Prestons brought suit for defamation against the Donwerths, who alleged the sign falsely implied that an agent or EE of Preston had rolled back the odometer mileage when the Ds knew that a prior dealer was responsible for the alteration. Ds counterclaimed, alleging various DTPA violations. **Holding:** Court held that there is some evidence to support the jury verdict, that the determination of whether to assess atty fees against a DTPA claimant is entirely for the court, and that the consumers’ cross-points were properly reserved. Court agrees that there is some evidence that the brakes were excessively worn and defective at the time of the sale, thus supporting the jury finding that Preston II represented the car was of a particular standard, quality or grade when it was of another. **Rule:** Ds may recover their atty fees when *the court* finds the DTPA action was groundless and brought in bad faith or was brought for the purposes of harassment. In this case, the court held that even if the court did not find the claim was groundless, it could still award attorneys fees if the court find that the claim was brought for purposes of harassment. Court, NOT the fact-finder, must determine the existence of groundlessness, bad faith and harassment under §17.50(c).

# Cumulative Recovery

* **§17.43** “No recovery shall be permitted under both this subchapter and another law of both actual damages and penalties for the “same act or practice.”
* **Mayo v. John Hancock Mutual Life Insurance Co.:** Mr. Mayo’s employer’s health insurance was provided by John Hancock Mutual Life Insurance Company. Policy: Covered maternity benefits. Would end if employment terminated. Except if those covered had total disability. Would cover until end of disability/ Mrs. Mayo was pregnant when her husband was terminated. John Hancock was denied maternity benefits. **Holding:** Supreme Court of Texas: § 17.43 of the DTPA. The provisions of this subchapter are not exclusive. The remedies provided in this subchapter are in addition to any other procedures or remedies provided for in any other law; provided, however, that no recovery shall be permitted under both this subchapter and another law of both actual damages and penalties for the same act or practice.§ 17.43 only prevents recovering under one law and then recovering for the very same act under the DTPA. “One” and “Two” are different causes of action (failure to pay within 30 days vs. deceptive acts).
* **Bliskey v. Berry Property Management:** A townhome resident brought a negligence and DTPA action after the property manager of the townhomes refused to provide deadbolt lock of keyless night latches. As a result, the townhome resident was sexually assaulted. **The** jury awarded $3,000,000 for DTPA actual damages plus both punitive damages (common law damages and statutory damages). No recovery of both actual damages and penalties for the same act or practice shall be permitted under both the DTPA and another law. Thus the DTPA limits a plaintiff from recovering actual and punitive damages for the very same act under the provisions of the DTPA. In order to determine the acts, we look at what happened during trial. During trial, the jury was asked 2 questions: 1) whether compensation from damages resulted from the incident.; 2) whether the management engaged in an unconscionable act or in a deceptive practice relating to Resident’s request for a second door lock. As a result, the jury received two separate and distinct damage questions on both the negligent acts and the deceptive acts. This court finds that damages were based on separate jury findings upon separate acts and therefore the trial court correctly assessed damages for each. The court concluded that Resident received one injury and should receive one recovery for her compensatory damages. (DTPA) and two punitive damages for the two acts in which the defendant engaged. ***One Satisfaction Rule:*** only one satisfaction for injuries; must pick remedy. If one injury, only get one recovery.
* ***Chapter 41:*** applies to exemplary damages in tort. **§41.004**: Factors that preclude recovery. When there are different damages in tort Chapter 41 says that it does not preclude multiple damages and it does not apply to the DTPA.

**Chapter 4**

# Defenses

* **§17.42 : Waivers:** any waive by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void.
* **§17.5051: Mediation:** a party may not later than the 90th day after the date of service of a pleading in which relief under this subchapter is sought, file a motion to compel mediation of the dispute in the manner provided by this section.
* **Note** the requirement that the party seeking to compel mediation must pay the costs if the amount is less than $15,000. This is to prevent a D from requiring a consumer to spend a great deal of $ mediating a small claim.
* **DTPA** SOL is 2 years, 2 years for tort, and 4 years for contracts.

# Limitations

* **§17.565: Limitation:** all actions brought must be commenced within two 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 false, misleading, or deceptive act or practice.
* Test under **§17.565** is “knew or should have known of the act or practice.”
* Some claims are not within the scope of this section.
* An action based on *breach of warranty* is apparently unaffected by this section. This conclusion is consistent with the approach the courts itself take with respect to warranty claims.
* As the court noted in ***La Sara Grain v. First National Bank,*** the DTPA does not create any warranties. Similarly, the applicable limitations period should be determined from sources other than the DTPA. The DTPA merely allows a consumer with an existing warranty claim to pursue that claim through the 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.
* **P has to discover:**
* Statute says deceptive act, but courts say injury
* KPMG case says when discovery injury done by wrongful act
* 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
* **In the case of injury, once the plaintiff knows, or in the exercise of reasonable diligence should have known of the injury, the limitations clock is running even if the claimant does not yet know: the specific cause of the injury, the party responsible or the chances of avoiding it.**
* The SOL is an affirmative defense. If the D does not raise it, the case proceeds.
* Under the discovery rule, an action accrues, not when injury becomes certain, but when the claimant should know of his injury. Atkins v. Crosland.
* SOL for breach of an express of implied warranty is 4 years from the date of sale.
* Test should be the “reasonably prudent person in the same circumstances as the consumer.”
* **Sorokolit v. Rhodes:** Rhodes sued Sorokolit, MD for medical malpractice, breach of implied and express warranties, and knowing misrepresentation. Rhodes first saw Dr. Sorokolit for a breast augmentation surgery, he guaranteed and warranted the results of the surgery. He instructed Rhodes and husband to select a picture of a nude model from a magazine, promising that, following surgery, her breasts would look just like those in the picture she selected. Result was not as guaranteed. Rhodes subsequently dropped all allegations of negligence and proceeded solely on the warranty and misrepresentation claims under the DTPA. **Holding:** 12.01 preclude DTPA suits founded on a breach of the accepted standard of medical care (negligence), but does not preclude suits under DTPA for knowing misrepresentation or breach of express warranty incases in which a physician or health care provider warrants a particular result
* Note: sections 17.41-17.63 do not apply to physicians or health care providers with respect to claims for damages for personal injury or death resulting, or alleged to have resulted from negligence on the part of any physician or health care provider.
* This section does NOT apply to pharmacists.
* In Sorokolit, the court cautions “under Texas common law, a physician is not presumed to warrant a cure or a particular result, but a physician may enter into such an agreement. Concerns that a physician’s reassurances may be mistaken for a guarantee may properly lead courts to hesitate in concluding that such contract was created or that a guarantee was offered.

# RCLA – TCCA

* Both statutes apply to all claims, not just DTPA claims.
* **Residential Construction Liability Act**
* **Scope:** it covers contractors and construction defects. Some provisions refer to contractor, which is the same as builder, while others refer to only a construction defect.
* **§27.001:** Contractor = builder
* **§27.004 Notice:** since TRCCA no longer applicable, must give 60 days notice prior to suit. Contractor has 45 days from notice or TRCCA notice to make an offer of settlement for repairs.
* **§27.0042: Conditional Sale**
* **Ch. 27 RCLA §27.001** Definitions.
* **§27.002** Application of Chapter.
* **§27.003 Liability**
* **§27.0031** Frivolous Suit; Harassment
* **§27.004** Notice and Offer of Settlement
* **§27.0042** Conditional Sale to Builder
* **§27.005** Limitations on Effect of Chapter
* **§27.006** Causation
* **R. Bruce v. Jim Walters Homes:** Bruce, filed suit against appellee, Jim Walter Homes, Inc., for damages resulting from alleged defects in a house built pursuant to a contract between the Bruces and JWH. Specifically, the Bruces asserted causes of action for common law fraud, breach of contract, breach of warranty and negligence. The Bruces sought additional damages under the RCLA. **Holding:** Damages available under a fraud cause of action are separate and distinct from those available under the RCLA. There is no conflict between the two. As a result, the P can seek damages for both, fraud and the RCLA claims. The other claims (breach of contract) do conflict with RCLA and summary judgment for that part is granted for defendant. The fraud cause of action is reversed and remanded. RCLA bars claims of negligence, breach of K, and breach of warranty claims.
* The preemptive language of the RCLA is not triggered when both fraud and the RCLA are pleaded. Accordingly, the trial court erred in granting SJ on appellant’s common law causes of action are in conflict with the RCLA, SJ on those COA was proper.
* **Sanders v. Construction Equity, Inc:** Sanders purchased a home from Construction Equity, Inc. and initially sued Construction for monetary damages arising out of a defective fireplace and gas logs that did not work properly. Sanders filed their second amended petition, to add construction defect complaints. Sanders’ amended petition asserts cause of action based on the following theories of liability; violations of the DTPA, fraud, breach of contract, negligence, breach of various type of warranties. **Holding:** *Negligence-* **§27.003** a contractor is not liable for any percentage of damages caused by negligence… *Fraud-* if the alleged fraud pertains to a “matter concerning the design, construction, or repair of a new residence, the statute expressly governs the claim. *DTPA –* RCLA prevails over this subchapter to the extent of any conflict. Negligence & DTPA claims are barred by SOL, breach of K, fraud and breach of warranty are 4 year statutes of limitations and are not barred. None of the asserted cause of action are barred by their entirety by RCLA, although the claims are governed by RCLA.

Common Law Defenses

* **Smith v. Baldwin**: Baldwin, builder, contracted to build a house for Smith. On the same day, Smith executed to Baldwin a promissory note($31, 300) payable within 180 days. Baldwin agreeing to pay all interim interest. Baldwin assigned the note to Mutual in order to obtain interim financing. House remained uncompleted and unapproved by the VA and Smith, who had previously occupied the house, ordered Baldwin to leave the premises. Baldwin attempted to obtain VA approval but this was refused on the basis of construction defects and a final VA inspection report and approval was not obtained. The court of appeals held that substantial performance precluded application of the DTPA. We reverse. **Holding:** The doctrine of substantial performance is not relevant to the statutory cause of action under the DTPA asserted by Smith. The judgment for damages to Smith under the DTPA is not based on the findings of a contract breach, rather it is based on the misrepresentation of Baldwin as to the quality and standard of the goods and services in building the house, that the house when completed would qualify for V.A. approval so that Smith could obtain permanent financing. Smith wins.
* **Weitzel v. Barnes**: Weitzels signed a contract (“as-is”) to purchase a remodeled home from Barnes. Written contract of purchase gave the Ws the right to inspect, among other things, the plumbing, and a/c system in the house. If Ws were dissatisfied they were entitled to reject the contract, force Barnes to make repairs up to $1000 or consummate the purchase and make all repairs themselves. When they found the equipment did not function properly they brought suit for damages under the DTPA. **Holding:** Oral misrepresentations, which were made both before and after the execution of the agreement, constitute the basis of this cause of action, so traditional contractual notions do not apply. The Parol evidence rule and the statute of frauds, ordinarily applicable to a representation concerting the sale of land, do not apply to a DTPA claim. The court held that oral representations are admissible and can serve as the basis of a DTPA action even when a written K contains an AS IS clause.
* **Prudential Ins. Co. of America v. Jefferson Associates, LTD.:** Goldman bought the Jefferson Building. Goldman discovered the building contained asbestos fireproofing. He then filed this suit against Prudential. Gist of Goldman’s complaint is that Prudential misrepresented the condition of the building to him and failed to disclose that it contained asbestos, which impaired its value. Prudential’s best argument is that Goldman is not entitled to damages because he bought the building “as is.” Case involves an “as is PLUS(no reliance language)” clause. **Holding:** Goldman had to prove that Prudential caused the damages, and the evidence satisfies the requirement of actual causation in fact. Goldman’s agreement to buy the property “as is” precludes him from proving that Prudential’s conduct caused him any harm. His contract left no doubt exactly what he agreed to. Prudential had NO reason to think that Goldman was not fully informed on the subject of Asbestos. Absent any specific knowledge of asbestos in the Jefferson Building Prudential was not obliged to raise the subject. Buchanan statements were not misrepresentations of material fact but merely “puffing” or opinion, and thus could not constitute fraud.
* When the court uses the phrase “as is” provision, and a “no reliance” provision, it is important to the decision that both were there.
* **Rule:** By buying something “as is,” a buyer agrees to make his or her own appraisal of the bargain and to accept the risk that he may be wrong. Seller gives no assurances, express or implied, concerning the value or condition of the thing sold.
* As-Is PLUS (No reliance) Clause will not be effective when:

***1)*** When there is fraudulent inducement or concealment

***2)*** In light of the “totality of the circumstances.”

* **Erwin v. Smiley:** Smiley, purchaser of residence, filed action under the DTPA against the Erwins, vendors, for failure to disclose material information and misrepresentations. Before buying the house, Smiley inspected the house on several occasions. On one of those occasions, he asked the Erwins whether there were any termite problems. They responded that there had been, but the issue had been repaired. Six months after buying the house, Smiley has a termite infestation. No proof that the house had previously been treated for termite infestation. House was infested for 5-10 years. **Holding:** COA found that the evidence showed that the Erwins and Smiley were situated parties and that the sale was an arm’s length transaction. Additionally, they were both represented by counsel and the “as is” provision was freely negotiated. It was held that the “as is” agreement negated the causation element to recovery.
* **TEST:** Validity of the “as is” agreement is determined in ***(1)***  light of the sophistication of the parties, ***(2)*** the 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 misrepresentation or concealment of a known fact.
* **Pairett v. Gutierrez:** Pairetts purchased a home with a defective foundation, but the contract did not contain unambiguous language that made it clear that it was an “as is” purchase. **Holding:** The contract is silent on the issue of reliance. It does not contain the phrase “as is” at all in relation to the foundation or overall condition of the house. The SJ evidence raises an inference that the sellers were in fact aware of problems with the foundation, yet made an affirmative representation that they knew of no such problems. There is SJ evidence that the Pairetts relied on the sellers’ representation in purchasing the house. By purchasing a residence “as is,” a buyer agrees to make his own evaluation of the bargain and to accept the risk that he could be wrong. Hence, any reliance upon representations made by the seller is disavowed. However, a buyer is not bound by an “as is” agreement if proof of fraudulent misrepresentation or concealment of information by the seller is shown. In such a case, the buyer is not precluded from recovery against the seller.
* **Larsen v. Langford:** SJ evidence shows that Langford and the Larsens conducted the transaction at arm’s length. Further, both Langford and the Larsens were similarly knowledgeable and sophisticated parties in the real estate business. Langford served as the seller’s broker and Larsen acted on his own behalf as a real estate/agent sales person, by and through his then employer. Thus, the record supports the conclusion that the contract was negotiated by parties of equal bargaining strength in an arm’s length transaction. Larsens explicitly agreed they would accept the property in its present condition without requiring any repairs by the seller, that they had made their own inspection and further relinquishing Langford, of any liability for the repairs known or unknown by the seller. Relevant contract provisions clearly and unambiguously demonstrated the Larsen’s agreement to rely solely upon themselves, their own inspections or inspectors they chose. Agreements satisfy the requirements set forth in *Prudential. “As* is clauses conclusively negate the reliance element which is essential to recovery on all the theories that the Larsens assert. Larsen’s agreement to buy the house “as is” affirmatively negates the element of each claim that Langford’s conduct caused them any harm. Statement was NOT a misrepresentation of material fact but merely “puffing” or “opinion, and thus could not constitute fraud. Larsens have presented no evidence that the house if “fixed up,” would not make a nice B&B. Larsens did not produce SJ evidence to establish each element of their claim that they were fraudulently induced, and thus, the exception in *Prudential* does NOT apply.
* **Schlumberger v. Swanson:** Swansons and Schlumberger were engaged in a sea-diamond project. The Swansons allege that Schlumberger made several affirmative misrepresentations to them during their negotiations over the withdrawal of Sedswan from the joint venture. Schlumberger represented to the Swansons that the project was neither technologically feasible nor commercially viable, and that the project had a negative value and Sedswan would be lucky to get out with its costs. The Swansons claim to have relied on these representations in their decision to sell their interest at a low price; however, during the settlement, the Swansons had signed a release that disclaimed reliance on the representations made my Schlumberger. The issue here is whether this disclaimer precludes, as a matter of law, the Swansons from recovering damages against Schlumberger for fraudulently inducing them to settle. **Holding:** In this particular situation, a disclaimer of reliance may preclude recovery for fraudulent inducement. There is a policy concern that parties should have the ability to fully and finally resolve disputes between them, and that parties should be able to bargain for and execute a release barring all further dispute. This principle necessarily contemplates that parties may disclaim reliance on representations, and where the parties’ intent is clear and specific, that disclaimer should be effective to negate a fraudulent inducement claim. However, a disclaimer of reliance or merger will not always bar a fraudulent inducement claim; it depends on the contract and the circumstances surrounding its formation to determine whether the disclaimer of reliance is binding. In this case, the parties were attempting to put an end to their deal and had become involved is a dispute over feasibility and value of the project. In addition, in negotiating the release, both parties were represented by able and competent legal counsel, and both parties were knowledgeable and sophisticated business players. Further, the clear language of the release states that each part was “relying on his or her own judgment” and because courts are to assume that the parties intended every contractual provision to have some meaning, the court must presume that the parties contemplated that the Swansons would not rely on any representations of Schlumberger about the commercial feasibility and value of this project. Therefore, the disclaimer of reliance is binding and, as a matter of law, precludes the Swansons’ claim that they were fraudulently induced to sell their interest in the sea-diamond project. A release that clearly expresses the parties’ intent to waive fraudulent inducement claims, or one that disclaims reliance on representations about specific matters in dispute, can preclude a claim of fraudulent inducement.
* Court said you can contractually negate fraudulent inducement in a release. This is an “as-is plus plus” clause. You can have an “as-is” ***plus*** no reliance on statements, ***plus*** no reliance regarding inducement clause.
* **Warehouse Associates v. Celotex:** An environmental report provided by Ds indicated that there had been asbestos issues relating to the buildings on the property. The parties agreed that, Ds specifically disclaimed any representations of any kind. On Appeal, Warehouse Inc., (“Appellant”) argued that under the Schlumberger analysis, the two *Prudential* exceptions stood and because *Schlumberger* did not apply here, the two *Prudential* exceptions provided the legal standard. **Holding:** COA was dealing with a new standard set by *Schlumberger*. Celotex Corp (“Appellee”) argued that even if the *Schlumberger* factors were present the contract in dispute is still enforceable. Court rejected the argument finding because the contract’s purpose was not to definitively end a dispute. Since it did not meet on of the factors set out in *Schlumberger* the *Prudential* fraud-inducement exception provided the legal standard. **Rule:** A waiver-of-reliance provision may be enforced even though the party in question fraudulently induced the other parties to enter into the contract containing the clause if these factors are present: (1) an arm’s length transaction between sophisticated parties represented by counsel, (2) waiver-of-reliance language that clearly and unequivocally covers the specific representations on which the complaining party allegedly relied, and (3) the parties are in a contract whose purpose is to definitively end a dispute in which the contracting parties have been embroiled.
* **Italian Cowboy Partners, LTD v. Prudential Insurance Company of America**: Secchi, owners and operators of a restaurant, Italian Cowboy, terminated the restaurant’s lease because of a persistent sewer gas odor. In a suit against the LL, ***Prudential,*** Secchis sought to rescind the lease and recover damages for fraud and breach of the implied warranty of suitability. Lease had a clause that stated that there had been no representations with respect to the site other than what is included in the signed agreement. **Holding:** Court held that the contract language in this case does not disclaim reliance or bar a claim based on fraudulent inducement. The language contained in the lease agreement at issue did not negate the reliance element of Italian Cowboy’s fraud claim. **Rule:** Parties must use clear and unequivocal language to disclaim reliance. This helps ensure that parties to a contract understand that the contract’s terms disclaim reliance, such that the contract may be binding even if it was induced by fraud.
* **Ojeda de Toca v. Wise:** Ojeda de Toca purchased a home from Wise. After the purchase the city of Houston demolished the house pursuant to an order, which had previously been filed in the Harris County deed of records. Toca filed suit against the developer alleging deceptive trade practices, fraud in a real estate transaction, and negligence. Wise argued that she should have known through imputed notice. **Holding:** imputed notice is not a defense to a deceptive trade practice. Court cannot find any intent of the legislature to bar fraud or DTPA claims because an examination of county records would have disclosed the deception. The purpose of recording statutes is to protect intending purchasers from any encumbrances. If there is an innocent purchaser, having no notice of liens or adverse claims not disclosed by the records in the manner prescribed by the statute, will hold land as against such claims and liens.
* **Rule:** A good faith purchaser should not lose title to real estate when he has exercised diligence to verify the seller’s ownership. Texas courts have never held that a purchaser’s failure to search the deed records would bar fraud action against the seller
* **Kennemore v. Bennett:** Builder Bennet brought suit seeking injunctive relief, judicial foreclosure of mechanics' lien, and recovery of contract price under contract to build home on property owned by Ds, and Ds counterclaimed under the DTPA alleging builder failed to construct the house in a good workmanlike manner. Trial court found that Bennett won on the grounds that the Kennemores waived their claims that the house contained defects when they took possession of the house and paid B’s demands and were thereby estopped from asserting either a contractual or DTPA action. This court reverses **Holding:** (1) no waiver or estoppel arose with respect to claims under the Act by reason of homeowner's taking possession of home and paying amounts demanded, and (2) evidence was sufficient for jury to find breach of implied warranty, false, misleading or deceptive act or practice, or unconscionable act or course of action. **Rule:** The remedies under the Act are available to any consumer, and they are not waived merely because the consumer accepts the allegedly defective performance. Nothing in the language or policy of the Act requires the consumers to withhold performance themselves in order to allege violations against the other party.

# Defenses: Arbitration

* Most consumer contracts now include an arbitration issue
* These clauses are always written by the business and presented to the consumer on a “take it or leave it “ basis.
* This gives the business the ability to determine whether arbitration will be used, to what it will apply and where and under what procedures will it be conducted.
* ***See*** Alderman – ***Future of Consumer Law in the US***
* Rationales for arbitration – less expensive, more efficient, more flexible.
* **Mercedes Homes v. Colon:** these clauses become more brazenly loaded to the detriment of the consumer. Drafters have every incentive to load these clauses with such onerous provisions in favor of the seller because the worst that ever happens, if the consumer has the resources to go to court, is that the offending provisions are severed.
* **Anglin v.Tipps:** Anglin Company, agreed to build an earthen dam. Contract contained an arbitration clause. Following a mudslide on the downstream side of the dam, the City discovered that excessive moisture had weakened the dam. After remedial work was performed, a dispute arose between the parties over the expenses incurred for such work. The city claimed damages for extra engineering work and loss of water; Anglin claimed damages for extra work and the balance of the contract price. City filed this suit for breach of contract and negligence. Anglin filed an application to compel arbitration and stay court proceedings asserting that all of City’s claims were subject to arbitration pursuant to the contract and must be arbitrated under the Federal Act. **Holding: DTPA claims are arbitrable pursuant to the parties’ agreement and shall be arbitrated under the Federal Act.** Trial court may summarily decide whether to compel arbitration on the basis of affidavits, pleadings, discovery and stipulations. However, if the material facts necessary to determine the issues are controverted by an opposing affidavit or otherwise admissible evidence, the TC must conduct an evidentiary hearing to determine the disputed material facts. Must accept as true the clear, direct and positive evidence of an undisputed affidavit even of a party’s agent. The undisputed evidence presented to the TC thus established the applicability of the Federal Act.
* **Buckeye Check Cashing v. Cardegna:** Borrowers received cash in exchange for a personal check in the amount of the cash plus a finance charge. For each transaction, they were required to sign an agreement that included arbitration provisions. The borrowers brought a class action in Florida state court alleging that Buckeye charged usurious interest rates and that the agreement violated the various FL lending and consumer-protection laws. Borrowers claimed the contract as a whole (including the arbitration provision) was invalidated by the usurious finance charge. **Holding:** Supreme Court ultimately held that because the borrowers challenged the agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. This challenge should be considered by an arbitrator and not a court. The Supreme Court cited to Prima Paint and Southland to establish three propositions.
1. An arbitration provision is severable from the remainder of the contract.
2. Unless the challenge is to the arbitration clause itself, the issue of the contract’s validity is considered by the arbitrator in the first instance.
3. The arbitration law applies in state as well as federal courts.
* **In Re Weekley Homes:** Vernon Forsting contracted with Weekley Homes for construction of a home to live with his daughter and her family. Although the daughter, Patricia, negotiated directly with Weekley on numerous issues regarding the home’s construction, only Vernon signed the financing and closing documents on the home, which included the arbitration clause. The home was transferred to the family’s Trust. The family experienced numerous problems with the home, eventually suing Weekley Homes. Vernon and the Trust filed claims for negligence, breach of contract, statutory violations, and breach of warranty. Patricia filed a claim for personal injuries, alleging Weekley’s negligent repairs caused her to develop asthma. **Holding:** Weekley Homes may compel Patricia to arbitrate her claims because she exercised contractual rights created by the contract and acted as a party to the contract in all communications with Weekley Homes, thereby subjecting herself to the contract’s terms. The court, however, holds that a nonparty may be compelled to arbitrate “if it seeks, through the claim, to derive a direct benefit from the contract containing the arbitration provisions.”
* Arbitration agreements may be challenged on the same basis as any other contract provision. Most common grounds for attacking arbitration agreements is unconscionability.
* Who is bound by arbitration clauses?
* Strongest case: 2 signatories suing on breach of K.
* Nonsignatories can be bound (even if both parties are not signatories).
* **\*Green Tree Corp. v. Randolph:** Randolph bought a home from Better Cents Home Builders and financed the purchase through Green Tree Financial. Green Tree’s Manufactured Home Retail Installment Contract and Security Agreement required that Randolph buy the Vendor’s Single Interest insurance and that all disputes arising from the contract would be resolved by binding arbitration.

Randolph sues Green Tree alleging: 1) violation of the Truth in Lending Act, by failing to disclose as a finance charge the Vendor’s Single Interest insurance requirement; and 2) violation of the Equal Credit Opportunity Act by requiring her to arbitrate her statutory causes of action. **Holding:** Randolph did not meet the burden of showing the likelihood of incurring costs and fees.

* The record does not show that the P will bear the costs of arbitration and the risk of prohibitive costs is too speculative to hold the arbitration agreement unenforceable---P has to show likelihood of incurring expensive arbitration costs.
* Party seeking to avoid arbitration has to show that the claims at issue are unsuitable for arbitration and that Congress intended to prevent arbitration of the claims at issue.
* **Arbitration r**eally is costly compared to court
* **Although** most small claims courts provide a jury and for less than $100, the costs of arbitration far exceed this amount.
* **Olshan v. Ayala:** Appellees contracted with Olshan for the installation of foundation stabilization to their home. Soon after, Appellees filed a DTPA suit against Olshan alleging violations of the DTPA, breach of contract, fraud, and negligence. Olshan filed a motion to compel arbitration of the matter, pursuant to an arbitration agreement they had with the Appellees. TC granted this motion, and the parties were ordered to arbitrate. The Appellees soon discovered that the cost of arbitration was approximately $63,670.00, and they were responsible for paying half of that amount (over $33,000). The Appellees objected to arbitration, arguing that their inability to pay the cost of arbitration effectively barred them from pursuing their claim, and the arbitration agreement was therefore unconscionable. **Holding:** While there is a strong policy favoring arbitration agreements, they may be found unconscionable if the cost of arbitration is so high as to preclude a litigant from vindicating her rights, and she can prove the likelihood of incurring such costs. Appellee’s produced an invoice from the American Arbitration Association, proving that they would be charged over $33,000.00 to arbitrate their claim, and this evidence was not disputed by Olshan. This fee was equivalent to 45% of Mr. Ayala’s annual gross income and 28% of the Ayalas’ combined annual gross income. When asked if he would be able to pursue his claim through arbitration, Mr. Ayala answered that he didn’t have the money to do so. In addition, the cost of arbitration was almost three times the cost of the underlying contract between the Ayala’s and Olshan. The court held this disparity was so large that the trial court acted within its discretion when it ruled the arbitration agreement unconscionable. The fact that both parties were required to pay half of the arbitration cost does not somehow make the amount owed fair, reasonable, or conscionable.
* **Perry v. Cull:** Culls bought a house from Perry Homes for $233, 730. They also bought a warranty from Home Owners Multiple Equity. Warranty agreement included a broad arbitration clause providing that all disputes the Culls might have against Perry Homes or the warranty companies were subject to the Federal Act and would be submitted to the AAA or another arbitrator agreed upon by the parties. Home suffered several serious structural and drainage problems. Ps vigorously opposed arbitration in their pleadings and in open court; then they requested hundreds of items of merits-based information and conducted months of discovery under the rules of court; finally only 4 days before the trial setting they changed their minds and decided for arbitration. Ps argue that sending them back to the TC not only deprives them of a substantial award but also wastes the time and money spent in arbitration. **Holding: Arbitrator properly disclosed information that might indicate bias before the arbitration began.** Arbitrator disclosed that he knew a lot of they attys in Perry Homes’ trial counsel’s firm, that he had represented clients in which Perry’s trial counsel’s firm represented the opposing party, and that he did not know the attys in this case. He disclosed that he had litigated residential construction cases for about 15 years so a number of the witnesses were familiar to him or he had heard of them. He further disclosed that one of the witnesses did a report on his client’s property and that another witness did a foundation analysis on the client’s home and was being paid by the builder. **TEST:** must disclose facts that “create a reasonable impression of the arbitrator’s partiality to an objective observer.” (Evident Partiality)
* If a neutral arbitrator exhibits “evident partiality” an award must be vacated. A neutral arbitrator selected by the parties or their representatives exhibits evident partiality to an objective observer. Information regarding a relationship with a party – such as representation or familial or close social ties – should be disclosed but a neutral arbitrator need not disclose relationships or connections that are trivial.
* ***Manifest disregard of the law*** – judicially created ground for vacating arbitration awards. More than mere error or misunderstanding with respect to the law. Under this standard, the *arbitrator clearly* recognizes the applicable law, but chooses to ignore it. ~~Party seeking to vacate an arbitration award bears the burden of demonstrating the arbitration panel acted in manifest disregard of the law.~~
* **\*Citigroup Global MKs v. Bacon:** Bacon’s husband withdrew funds from her Citigroup Individual Retirement Accounts by forging her signature. Bacon submitted a claim in arbitration against Citigroup seeking reimbursement for the unauthorized withdrawals. The arbitration panel granted Bacon $210K in damages and $38K in attorney’s fees. Citigroup requesting vacate of the award. **Holding:** *Hall Street* restricts the grounds for vacatur to those set forth in of the Federal Arbitration Act and consequently, manifest disregard of the law is NO longer an independent ground for vacating arbitration awards under FAA.
* **\*AT&T v.** **Concepcion:** Concepcion (P) contracted with AT&T Mobility LCC (AT&T) (D). When they found that they had to pay tax on phones advertised by the company as being free, they filed a case, which became a class action. The contract included a provision that all claims were to be settled through arbitration, and also prohibited class arbitration. AT&T(D) moved court for an order compelling arbitration as per the contract. The Concepcions (P) opposed the action by AT&T on the grounds that the executed contract was unacceptable in law and illegal in California law because it did not allow class arbitration. **Holding:** FAA displaces state law that prohibits contracts, which do not allow for class action arbitration. The rule stated in the Discover Bank case which makes the enforceability of arbitration conditional on the availability of class action arbitration, even if the parties to the contract have agreed to disallow it, interferes with the nature of arbitration process and is inconsistent with the FAA. Even more, the fear that the claim in the present suit will not be resolved unless it is made part of a class action suit is not justified, since the arbitration offers the Concepcions more than the award in a class action suit would. The decision is therefore reversed and the case remanded. Since the arbitration contract in this case was uniformly declared to be fair to all concerned, by all courts, the decision may have to be viewed in this light. An agreement which is not so fair to the consumer might evoke a different decision, and an unfair agreement which profits only one party to the contract may be revoked as unconscionable on its own merits, regardless of the presence or otherwise of a class action waiver. It deals only with contracts which allow arbitration as a means of settling disputes, and does not give any guidance as to whether class action may be disallowed in contracts which allow litigation to be the means of resolving disputes.

# Limiting Liability

* **Disclaimers and Limitation of Damages**
* **§17.42** generally prohibits waiver of DTPA. Including any attempt to limit or disclaim damages.
* **Alvarado v. Bolton**: Bolton, as general partner in a limited partnership, and others purchased 50 acres of land. In the deeds conveying the land, Bolton received title to ½ of the oil, gas and other minerals. Bolton, as trustee, then subdivided a portion of the land into 26 tracts and conveyed certain tracts to Alvarado and other buyers. Some of the contracts were silent regarding Bolton’s outstanding ½ mineral interest and some stated that the conveyance was subject to Bolton’s ½ mineral interest. Title which was conveyed to the Plaintiffs specifically reversed ½ of the mineral interest to Bolton, Grantor, and were made subject to all outstanding mineral interests of record in Fort Bend County for the other ½ of the minerals. After oil was discovered in the land, Ps learned of Bolton’s reservation of mineral interest and brought suit against Bolton for reformation of the deeds and for damages under the DTPA. **Holding:** 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. Not good law, but not overruled.
* ***Merger Doctrine:*** earnest money K merged into deed when deed delivered and deed becomes controlling document.
* **\*SW Bell v. FDP Corp.:** Prasek, President of FDP Corporation, met with Williams, a Southwestern Bell representative to discuss advertising in the next edition of the Houston Yellow Pages. Prasek complained that a previous ad contained an error in its text. Williams assured Prasek that the new ad would be published correctly. When the ad was published, there were a few errors. Under protest, FDP made several installment payments. Bell finally realized its mistake and returned the sums previously paid by FDP for the omitted display. FDP’s atty made a written demand hat Bell reimburse FDP for lost profits allegedly caused by Bell’s failure to publish the ad. When Bell did not meet the demand, FDP filed suit, alleging negligence and DTPA violation. **Holding:** Limitation clause was part of the warranty upon which the buyer’s claim is based and it therefore limits his recovery. Bell gave a limited warranty. Jury failed to find that the limitation of Bell’s liability was unconscionable or that Bell violated the DTPA. Under these circumstances, the COA erred in failing to enforce the parties’ agreement to limit Bell’s liability.
* **Rule:** A liability limitation would be invalid under §17.42 insofar as it purported to waive liability for an act defined as deceptive under §17.46(b). Unlike, a “laundry list” claim, however, an action for breach of warranty is not a creation of the Act. K NOT LL violation.
* **\*Rinehart v. Sonitrol of Dallas, Inc.:** Rinehart purchased a security system from Sonitrol for his home. In the contract was a clause, determined to be a “performance warranty” that Sonitrol would warrant the system’s failure after 7 days. They also guaranteed that the system would alert any intrusion, and that if it did not they would pay for any repair or replacement up to $5,000 for a contractual breach. **Holding:** No, the $5000 limit only limits Sonitrol’s contractual liability not their DTPA liability. The Court states that the contract in question contained an express promise that the system will work a certain way, and that it guaranteed that it would detect certain intrusions. The court held that this is a warranty under §2.313 of the code because it is a promise that relates to the system and was made during the bargaining process. The Court then held that the contractual limitation of $5000 does not apply here because the DTPA treble damage provision is not a contractual liability that falls under their contract.

**Chapter 5**

# Products Liability

* **Warranty, Negligence and 402A**
* Most common products claims are: negligence, strict products liability (402A) and warranty
* **402A –** one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) seller is engaged in the business of selling such a product, and (b) expected to and does reach the user or consumer without substantial change in the condition which it is sold
* Not a statute and must be adopted by the SCOTUS to be law in Texas
* 402A does not address privity
* **Darryl v. Ford Motor**: Voyles bought a new truck from authorized Ford dealer, Stout. A collision occurred. The truck only had 600-700 miles on it, with most of that mileage occurring within the 72 hours prior to the accident. No repairs from the date of purchase to the time of the collision; the brakes functioned perfectly until the accident. On the day of the accident, Voyle was driving behind Darryl. When Darryl attempted to stop or turn, Voyle pressed the brakes which malfunctioned and the push rod bent. Voyles rear-ended Darryl’s car. That night, the bent push rod was removed from Voyles’ tuck and replaced. No brake fluid was added. The next morning, Voyle had no trouble with the brakes. It was stipulated that the braking system was inoperative after the accident. Evidence conclusively shows that the push rod bent either when Voyles applied the brakes or as a result of the collision. **Holding:** There was some evidence to support the jury findings; petitioners made their case for strict liability in tort. Recovery under the strict liability doctrine is not limited to users and consumers. No recovery against Voyles is affirmed. Judgment in favor of Darryl against Ford is affirmed. The braking system was defective since the push rod bent upon application of the brakes; it reached Voyles without substantial change in the condition in which it was sold, and nothing was done that would change its properties or characteristics after it was delivered. The braking system was unreasonably dangerous. Ford had a duty to the Darryls, who were not users or consumers of the product; no reason to deny non-users and non-consumers protection from dangerous products. Buyer not injured, but whom he crashed with. Court found no reason not to extend strict liability to bystanders or others.
* **Nobility Homes of Texas v. Shiver:** Shivers sued Nobility Homes of Texas, the manufacturer of a mobile home. Shivers purchased the home from Marvin Hurley, an independent retail dealer who is now out of business and is not joined as a party to this suit. Shivers’ purchase contract was only with Hurley; Shivers was NOT in privity with Nobility Homes. **Holding:** Shivers may NOT recover his economic loss under 402A, but may recover such loss under the implied warranties of the UCC and the theory of common law negligence. Strict liability does not apply to economic losses. There is no finding in this case that the product was unreasonably dangerous to Shivers or caused physical harm to Shivers or his property. Privity is not a requirement for a UCC implied warranty action for economic loss. §2.315 furnishes the consumer his second implied warranty protection. Implied warranty only arises “where the seller at the time of contracting has reason to know any particular use 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…” Unless the manufacturer has this specific knowledge, he is not liable upon an implied warranty of fitness for a particular purpose. In the absence of personal injuries, an action for economic loss may not be maintained under a theory of strict liability in tort but must be brought under the UCC because the Code was drafted specifically to govern commercial losses and obviously provides the proper remedies to recover such losses.
* **NOTE:** 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.
* *Strict liability*  does NOT apply to economic losses. §402A requires the defective product be “unreasonably dangerous to the user or consumer or to his property” and that the product cause “physical harm to the ultimate user or consumer, or to his property.”
* For the most part, the requirement of privity has been abolished in strict liability tort actions. Privity should also be abolished in implied warranty actions for economic loss because it is unfair to allow a consumer to recover for his physical loss against a manufacturer with whom he is not in privity but to deny the same right to a consumer who suffers economic injury.
* Economic loss is direct and consequential. Court says that economic loss is not “physical harm” to the user or his property.
* **Garcia v. Texas Instruments:** Texas Instruments, respondent, sold and delivered various quantities of concentrated sulfuric acid to the Mostek Corporation, employer of, petitioner, Garcia. Garcia was moving cartons of acid from one location to another. The cartons, constructed of fiberboard, each contained 4 one-gallon glass containers. While carrying one of the cartons, Garcia tripped, and fell, breaking a container and suffered severe acid burns. Approximately, three years after the accident, Garcia instituted suit against Texas Instruments for damages for personal injuries alleging a breach of the implied warranty of merchantability under §2.314 of the UCC arising out of the sale of acid. **Holding:** Privity of contract is not a requirement for a UCC implied warranty action for personal injuries. Therefore, the implied warranty action of Garcia, filed approximately three years and 8 months after the sale of the sulfuric acid, is NOT barred by limitations, it is governed in its entirety by the UCC including the four year SOL.

# CRPC Chapter 82

* Limits when an action may be brought against the seller.
* **Texas Process Plastics v. Gray Enterprises**: Pursuant to an oral agreement, appellee Dumond, Inc. purchased from appellant Texas Processed Plastics, Inc. approximately 192,000 pounds of polyethylene plastic material. Dumond, Inc. sold this material to appellee Gray Enterprises, Inc. and then Gray Enterprises, Inc. sold the material to appellee B & D Molded Products, Inc. The appellant (Texas Processed Plastics) shipped the material directly to B & D Molded Products, Inc.; Dumond, Inc. and Gray Enterprises, Inc. acted as independent buyers and sellers of the plastic material. Prior to the agreement, Dumond has purchased material from the appellant and send it to Gray Enterprises and a small portion B &D Modeled Products. Then B &D purchased some of the same material from Gray Enterprises, based on the sample portion that they had received. The purchase did not conform to the sample. **Holding:** No, privity of contract must exist. In order for appellee B&D to recover under a theory of breach of express warranty from appellant, privity of contract must exist between the parties. Strict liability in tort does not apply to situations involving economic loss only but rather the principles of the law of sales under the UCC should be applied in such cases. Thus, the rule has evolved that in situations involving solely economic loss based upon breach of express warranty, privity of contract between the parties is required.

# Damages

* Different types of damages resulting from a defective product
* Damage to the product itself
* Damage to the consumer’s other property
* Other economic loss
* Injury to the consumer,
* Injury to others
* Damage to property of others
* Issue is which of these damages may be recovered under which cause of action.
* **MidContinent Aircraft Corp. v. Curry County Spraying Service:** petitioner sold a re-conditioned airplane to respondents. The contract of sale stated that the purchase of the plane was “as is.” The plane crashed, due to an internal defect. Only the plane, itself, was damaged as a result of the crash (not anyone or any other property). **Holding:** Respondent took on the entire risk as to the quality of the airplane and the resulting loss. Petitioner made no representation of quality performance of the plane, which would give rise to an express warranty under the UCC. Section 2.316(c)(1) of the UCC provides for the exclusion of the implied warranties of merchantability and fitness with an “as is” disclaimer. With such a disclaimer, petitioner effectively eliminated the implied warranties involved in the sale of the plane. Court held when damage is to product itself it is a breach of warranty, not a tort. Therefore, disclaimer is effective.
* **Signal Oil v. Universal Oil:** Signal sued UOP for property damage and economic loss resulting from an explosion and fire at Signal’s Houston’s Refinery. Signal sued UOP, in strict liability and negligence for defects in the manufacturer, design and/or installation of an isomax reactor charge heater. **Holding:** Signal has properly alleged a cause of action in strict liability based upon its allegations of property damages. However, Signal failed to acquire favorable jury findings in order to support recovery under this theory of strict liability. This case does not present a fact situation wherein the buyer’s negligence or fault was the sole cause of the consequential damages sustained. Rather, the jury found that the property damages were caused by several concurring proximate, causes the breaches of warranty by Alcorn and Procon, as well as the negligence of Signal. Collateral property damage is recoverable. When product itself is damaged such damage constitutes economic loss recoverable only as damages for breach of an implied warranty under the code. Signal alleged property damages in the form of damages to the product itself, as well as to other surrounding property.
* Buyers may recover only those consequential damages proximately caused by the breach of warranty; he may not recover for those consequential damages proximately caused by the owner’s own negligence or fault.
* Several categories of damages
* Pure economic loss – warranty
* Personal injury – tort – warranty
* Property damage case-tort / warranty
* Mixed economic loss-tort / warranty
* **SW Bell v. Delanney**: DeLanney had been advertising his real estate business in the Yellow Pages for several years. For the following year’s directory, he again contracted with Bell for an advertisement in the Yellow Pages. At the time, DeLanney had several phone lines, and when he canceled one of his single lines, his advertisement was automatically deleted from the directory due to Bell’s internal procedures. When the advertisement was not published as promised, DeLanney sued Bell for negligence and violation of the DTPA. The issue is whether DeLanney may recover on a tort theory when the damages sought stem from a breach of duty created under contract. **Holding:** When the injury is only the economic loss to the subject of a contract itself, the action sounds in contract alone. Bell’s failure to publish the advertisement was not a tort. In determining whether the plaintiff may recover on a tort theory, it is instructive to examine the nature of the plaintiff’s loss. Typically, when the only loss or damage is to the subject matter of the contract, the plaintiff’s action is ordinarily on contract alone. When the injury is only the economic loss to the subject of a contract itself, the action sounds in contract alone. Bell’s duty to publish the advertisement arose solely from the contract and DeLanney’s damages were only for the economic loss caused by Bell’s failure to perform. Bell sought to recover the benefit of the contract with a tort cause of action, which is not acceptable. However, DeLanney did not request jury instructions for breach of contract, so he waived any claim for breach of contract.
* Look to see whether the action would give rise to liability only because it breaches the parties’ agreement. If that is the basis for liability, it is only in contract.
* In determining whether the P may recover on a tort theory, it is also instructive to examine the nature of the P’s loss. When the only loss or damage is to the subject matter of the contract, P’s action is ordinarily on the contract.
* **Formosa Plastics v. Presidio:** Presidio brought a claim, alleging it was fraudulently induced into entering a contract. Formosa asserts that Presidio’s claim cannot be maintained because Presidio’s losses were purely economic losses related to the performance and the subject matter of the contract. Formosa claims that courts must follow the decision in ***SW Bell v. Delanney*** to examine the substance of Presidio’s tort claim to determine whether the claim is, in reality, a re-packaged breach of contract claim. **Holding:** Presidio has a viable fraud claim that it can assert against Formosa. 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. **Rule:** a party is not bound by a contract procured by fraud. Moreover, it is well established that the legal duty not to fraudulently procure a contract is separate and independent from the duties established by the contract itself.

# Causation

* In **Archibald v. Act III,** the consumer prevailed under a producing cause standard but lost under proximate cause.
* **Ford Motor v. Ledesma –** “Producing cause,” means a substantial factor in bringing about an injury, and without which the injury would not have occurred.

# Comparative Liability

* **Cressman Tubular Products Corp. v. Kurt Wiseman Oil:** Wiseman owns a working interest in the Gerdes No.1. Wiseman ordered tubing string from Cressman and specified that the components were met a particular standard set by API. Tubing string failed and there was a sudden dramatic loss of pressure. Mud entered the formation so that a mixture of fracture fluid, proppant and mud were mixed with the condensate that flowed from the well. Production stopped when Wiseman found mud inside the tubing string. When a crew attempted to remove it, tubing string parted and two couplings were found to have split. Split couplings did not meet API P110 standards. Resulted in $500k worth of damages. **Holding:** Court held that *express warranty* claims sound in contract. TC 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. Court held that *implied warranty* claims sound in tort.

# Exemplary Damages

* Chapter 21 (CPRC) controls when exemplary damages may be awarded. Chapter 41 does not apply to DTPA.
* Chapter 41 also adopts the Nabour’s requirement of damages and does NOT allow a double recovery of exemplary damages.
* **Nabours v. Longview Savings & Loan: Nabours** purchased home from Burke. It was subject to a lien deed of trust held by Longview. Nabours intended to finance the purchase of the house with a “wrap-around” mortgage rather than with an assumption of the obligation currently existing against the home. They requested Longview’ s consent. Longview posted foreclosure notices and filed statements of record. Nabours obtained a temporary injunction to prevent a forced sale of the house and this suit followed. Longview sought to foreclose on a vendor’s lien it held on the Nabours’ home. Nabour sued to prevent the foreclosure and to recover damages. **Holding:** Punitive damages must bear a reasonable proportion to actual damages. No set ratio may be established to govern in all cases. It is only one of several factors to be considered in the determination of the appropriateness and reasonableness of an award of punitive damages. Ratio serves as one gauge of the effect of bias, prejudice and passion on the jury. Punitive damages are recoverable only after proof of a distinct, willful tort. Applies equally to actions arising out of tort or contract, or those seeking equitable relief.
* Exemplary damages must bear a reasonable relation to actual damages. As 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. It is not necessary that there be a judgment for actual damages but they must be established.
* A consumer may NOT recover atty fees unless they are awarded statutory damages. Under DTPA, a consumer must “prevail,” and the damages could be equitable. Although exemplary damages are permitted for intentional torts, more common situation involves “gross negligence.”
* **Jim Walter Homes, Inc. v. Reed:** Reed sued JWH seeking damages related to the construction of a home. Jury found that JWH breached the warranty of good workmanship and that it was grossly negligent in supervising the construction. The appeal had to do with the issuance of punitive or exemplary damages arising out of the sale and construction of house. **Holding:** P’s injury was that the house they were promised and paid for was not the house they received. Breach of contract (because injury was only the economic loss to the subject of a contract itself). Breach of contract cannot support recovery of exemplary damages. Gross negligence in the breach of K will NOT entitle an injured party to exemplary damages and there were no other injuries found by the jury other than loss of the benefit of the bargain.
* To support an award of exemplary damages, P must prove a distinct tortious injury with actual damages.
* ***Tort/K Economic Loss Rule***: despite the fact that the jury found builder was “grossly negligent” in supervising construction, there was no independent tort. You need a “distinct tortuous injury with actual damages.”
* **BMW v. Gore:** DGore, purchased a black BMW sports dealer sedan from an authorized BMW dealer. After 9 months, Gore took the car to an independent detailer, to make it look snazzier. Slick, the proprietor, detected evidence that the car had been repainted. Convinced that he had been cheated, Gore brought suit against BMW seeking compensatory and punitive damages (actual damages of $4000 less value of car).

***Degree of Reprehensibility 🡪*** the record in this case discloses no deliberate false statements, acts or affirmative misconduct, or concealment of evidence of improper motive***.*** Conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages, does not establish the high degree of culpability that warrants a substantial punitive damages award. Because this case exhibits none of the circumstances ordinarily associated with egregiously improper conduct, BMW’s conduct was NOT sufficiently reprehensible to warrant imposition of a $2M exemplary damages award. ***Ratio 🡪*** ratio to the actual harm inflicted on the P. A general concern of reasonableness properly enters into the constitutional calculus. Ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis. ***Sanctions for Comparable Misconduct 🡪*** Sanction imposed in this cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve the goal. Fact that a multimillion-dollar penalty prompted a change in policy sheds no light in whether a lesser deterrent would have adequately protected the interests of Alabama consumers.

- The grossly excessive award imposed in this case transcends the constitutional limit. Whether the appropriate remedy requires a new trial or merely an independent determination by the ASC of the award necessary to vindicate the economic interests of Alabama consumers is a matter that should be addressed by the state court in the first instance.

* **State Farm v. Campbell:** Campbell was driving with wife when he decided to pass 6 vans traveling ahead of them on a two-lane highway. Ospital who was driving a small car approaching from the opposite direction. To avoid a head-on collision with Campbell, who by then was driving on the wrong side of the highway and toward oncoming traffic, Ospital swerved onto the shoulder, lost control of his automobile and collided with another vehicle. Ospital was killed, and Slusher was rendered permanently disabled. Campbell’s escaped unscathed. **Campbell’s** insurance company State Farm decided to contest liability and declined offers by Slusher and Ospital’s estates to settle the claims for the policy limit of $50,000. **Campbell** obtained his own counsel. During the pendency of the appeal, Campbell’s reached an agreement whereby Slusher and Ospital agreed not to seek satisfaction of their claims against the Campbell’s. In exchange, Campbell’s agreed to pursue a bad faith action against State Farm and to be represented by their atty. **Holding:** A more modest punishment for this reprehensible conduct could have satisfied the State’s legitimate objectives, and the Utah courts should have gone no further. The case was used as a platform to expose, and punish, the perceived deficiencies of State Farm’s operations throughout the country. Utah’s SC opinion makes explicit that State Farm was being condemned for its nationwide policies rather than for the conduct direct toward the Campbell’s. Gore’s application would justify a punitive damages award at or near the amount of compensatory damages. Punitive award of $145M was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the D. Proper calculation of punitive damages under the principles should be resolved in the Utah courts.
* **Phillip Morris v. Williams:** Death of Williams, a heavy cigarette smoker. Repondent, Williams’ widow, represents his estate in this state lawsuit for negligence and deceit against Phillip Morris, manufacturer of Marlboro, brand that Williams favored. A jury found that smoking caused Williams’ death; that Williams smoked in significant part because he thought it was safe to do so and that Morris knowingly and falsely led him to believe that this was so. Jury ultimately found that Morris was negligent (as was Williams) and that Morris had engaged in deceit. It awarded compensatory damages for about $821,000 (about $21k economic and $800k noneconomic) along with $79.5M in punitive damages. Trial judge reduced it to $32M. Oregon Court of Appeals restored the $79.5M in punitive damages. **Holding: s**uch an award would amount to a taking of “property” from the D without due process. The court held that the Due Process Clause forbids a state to use punitive damages award to punish a defendant for injury that it inflicts upon non parties who are not involved in the lawsuit.  This is because the due process clause prohibits a state from punishing someone without first providing that person with an opportunity to be heard, or defend themselves. Here, the court felt that too much was left for the jury to speculate – how many people were harmed by Philip Morris and how seriously were they injured? What were the circumstances? The court found this too arbitrary and uncertain, and does not provide the defendant with the notice they need to properly defend themselves. While a jury may use instances of past harm to determine reprehensibility, the jury may not punish on harm done to individuals not present.
* These three cases establish the Due Process Clause standard for exemplary damages. Court’s recognized that some damage awards, such as mental anguish, already include an element of punitive damages.
* **Bunton v. Bentley:** Bunton, a TV host, accused Bentley, a local district judge, of being corrupt, a criminal, engaging in judicial misconduct, etc. Bentley filed a defamation claim. Bunton ordered to pay Bentley in $150K for past and future loss of character and reputation, $7 mil for past mental anguish, and $1 mil in exemplary damages. **Holding:** Legally sufficient evidence supports the court of appeals’ judgment as to the compensatory damages of $150. However, although the court of appeals suggested a remittitur of compensatory damages, it didn’t reevaluate the exemplary damages and stated that Bunton had waived any claim as to the exemplary damages when he failed to complain on appeal. A complaint that arises from the court of appeals’ judgment itself may be raised either in a motion for rehearing in the court of appeals or in a petition for review with the Supreme Court. Therefore, Bunton had not waived his right. A claim that the exemplary damages are grossly disproportionate can arise any time the compensatory damages are significantly adjusted. Therefore, Bunton is entitled to raise this claim even though he did not initially appeal the award.
* **Tony Gullo Motors v. Chapa:** Chapa bought a Toyota Highlander from Gullo Motors for $30, 207.34. They disagree with the model of the car. After a 2-day trial, the six jurors answered 15 questions concerning breach of contract, fraud, and the DTPA in Chapa’s favor. They also found a difference in value of the two models of $7,213 mental anguish damages for $21, 639, exemplary damages of $250,000 and atty fees of $20, 000. **Holding:** Chapa could assert her claim in several forms, but disagreed that she could recover in all of them. ***Election of Remedies –*** for breach of contract, Chapa, could recover economic damages and atty fees, but not mental anguish or exemplary damages. For fraud, she could recover economic damages, mental anguish and exemplary damages, but not additional damages beyond $21, 639 (3x her economic damages). ***Mere Breach of Contract –*** Chapa proved more than mere breach of contract, so she was entitled to assert fraud and DTPA claims as well. - ***Exemplary Damages –*** Texas Rules of Appellate Procedure provide for remittitur orders by the courts of appeals, but make no similar provision for the court. Amount awarded by the COA exceeded the constitutional limitations on exemplary damages, remanded to the court for determining a constitutionally permissible remittitur. GM conduct merited exemplary damages, but the amount assessed by the COA exceeded constitutional limits. Under either fraud or the DTPA, Chapa is entitled to $7213 in economic damages and $21, 639 in mental anguish. COA must reassess her exemplary damages, and a jury must reassess her atty fees. No rule establishing which should go first, but for practical reasons remanded
* ***Remember***: DTPA has lowest standard for the award of punitive damages: “knowingly” and, if “intentionally” is established authorizes recover of up to 3x mental anguish.

**Chapter 6**

# Wrongful Debt Collection

* **Federal Debt Collection Practices Act**: enacted in 1977 – state law is deemed not to be inconsistent with the FDCPA if it affords the consumer greater protection.
* Legislative history indicates that independent debt collectors are the prime source of egregious collection practices. Original creditors, are generally restrained by the desire to protect their goodwill when collecting past due accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer’s opinion of them.
* **Analytical Questions**:

1. Whether the D is a proper D?

2. Is the transaction covered?

* **Elements to FDCPA case:**

1. Debt Collector?

2. Debt Collection?

3. Prohibited Act

# Common Law

* **Duty v. General Finance:** Petitioners, as Ps, alleged that various Ds acting in conspiracy and individually conducted a course of harassment and excessive and wrongful collection efforts against them from the first time they missed a payment on any of their loan transactions until after they had filed this suit. Daily Telephone called Mr. and Mrs Duty, which extended to great length threatening to blacklist them with the Credit association, accusing them of spending money in other ways than in payments on the loan transaction; threatening to cause Ps to lose their jobs unless they made the demanded payments. **Holding:** Ps made sufficient allegations to entitle them to a trial of the case on the merits. Fear is not well founded. NO such business concerns or ethical professional men will ever be guilty of such outrageous conduct as that described in the petition in this case. Court held that resort to every cruel device which his cunning can invent in order to enforce collection when that course of conduct has the intended effect of causing great mental anguish to the debtor, resulting in physical injury and causing his loss of employment, renders the creditor liable to respond in damages.
* Wrongful debt collection cases are dealt with under the state or federal debt collection law.
* Although the state law (TDCA) comprehensively deals with debt collection. It expressly provides that it does not affect any existing common law remedies.

# Statutory Regulation

* Federal law applies to only third party debt collectors
* Texas law applies to anyone, including attys. Third party debt collectors need to post a bond.
* **Miller v. McCalla:** P bought a house in ATL and took out a mortgage. He lived in the house until he accepted a job in Chicago, from then on, he rented the house. He received the dunning letter from one of the D law firms on behalf of the mortgage. By this time, renting the property to strangers, the P was making a business use of the property and so the mortgage loan was financing a business rather than a consumer debt. P (debtor) claims that the Ds violated the Act by failing to state “the amount of the debt” in the dunning letter of which he complains. They reply that they did state the amount and that anyway the letter is outside of the scope of the Act because they were trying to collect a business debt rather than a consumer debt, and the Act is limited to the collection of consumer debts. **Holding:** if a borrower for a personal use were to assign the loan that financed that use to a business, the debt would then arise out of the assignment, rather than out of the original loan and so the act would b inapplicable – rightly so since the recipient of the dunning letter would be a businessman not a consumer. Court says relevant time is when a loan is made, so this is consumer debt. **Rule:** Debt is defined as “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. Original creditor is more likely to know whether the debt was personal or commercial at its incipience than either the creditor or the debt collector is to know what current use the debtor is making of the loan (in this case, P is using the loan, in effect to generate income from the house that secures the loan.)
* **Heintz v. Jenkins:** P, Jenkins, borrowed money from the Gainer Bank in order to buy a car. She defaulted on her loan. Bank’s law firm then sued Jenkins in state court to recover the balance due. As part of an effort to settle the suit, a lawyer with the firm, Heintz, wrote to Jenkin’s Lawyer. His letter, in listing the amount she owed under the loan agreement included $4,713 owed for insurance, bought by the bank because she had not kept the car insured as she had promised to do. Jenkins then brought this Act suit against Heintz and his firm. **Holding:** Under TDCA, attys are debt collectors, but not a third-party debt collector. 3rd party does NOT include an atty collecting a debt as an atty on behalf of and in the name of a client, unless the atty has non-atty EEs who are either regularly engaged to solicit debts for collection or regularly make contact with debtors for the purpose of the collection or adjustment of debts.
* **Jerman v. Carlisle:** Respondents in this case are the Carlisle Law Firm. Carlisle filed a complaint on behalf of a client seeking a foreclosure of a mortgage held by Countrywide in real property owned by petitioner Jerman. The complaint was served on Jerman and stated that the mortgage would be assumed to be valid unless Jerman disputed it in writing. Jerman’s lawyer sent a letter disputing the debt and Carlisle sought verification from Countrywide. When countrywide acknowledged that the debt was paid in full, Carlisle withdrew the foreclosure lawsuit. Jerman then filed her own lawsuit seeking class certification and damages under the FDCPA, contending that Carlisle violated section 1692g by stating that her debt would be assumed valid unless she disputed it in writing. **Holding:** bona fide error defense does not apply to the debt collector mistaken interpretation of the law. Parties disagree about whether a violation occurred when Carlisle misinterpreted the legal requirements of the FDCPA even if such action was non-intentional under 1692k(c). Bona fide errors in 1692k(c) do not include mistaken interpretation of the FDCPA. The broad statutory requirement of procedures is designed to avoid any bonafide error indicates that the relevant procedures that the statute provides defense for is for clerical or factual mistakes, but not for legal reasoning.
* **Goldstein v. Hutton, Ingram, Yuzek:** Goldstein leased a Manhattan apartment from Stahl York Avenue Co. A number of disputes arose between Stahl and Goldstein concerning alleged lease violations and rent arrears. D-appellee Hutton, Ingram, Yuzeck, Gainen, Carrell and Bertolottie, a New York City law firm, represented Stahl in connection with the LL-T matters. Ended with the settlement of allegations relating to illegal subletting and altercations but did not resolve issues concerning back rent, Hutton prepared, and caused Goldstein to be served with, a “3 day notice” pursuant to the NY State Real Property Actions and Proceedings Law, demanding that all outstanding rent be paid within 3 days, or possession of the apartment relinquished within that period, and threatening summary dispossession proceedings in the event of noncompliance. Hutton commenced a summary proceeding a week later, G filed the complaint in the FDCPA action a little more than 5 weeks thereafter. **Holding:** Decision should have focused on the regularity of Hutton’s debt collection activity rather than principally on the proportion its business devoted to debt collection. No contention here that the debt collection was a principal purpose of Hutton’s business.
* ***P*** *in a FDCPA action* bears the burden of proving the Ds debt collector status. **FDCPA** has two alternative predicates for “debt collector” status – engaging in such activity as the “principal purpose” of the entity’s business and “regularly” engaging in such activity.
* Case by case 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

* **Zimmerman v. HBO Affiliate:** Affiliates undertook a campaign to prevent signal “piracy” in their service area. Affiliates published in PA area newspapers various advertisements, which showed a picture of a police van with message. HBO Affiliate Group entered into an agreement with C&W, under which C&W was to develop and effectuate the campaign subject to the supervision of the Affiliate Group. Zimmerman and other members of the putative class received in the mail a letter which the P alleges was drafted by C&W, and approved by the Affiliate group. Approx. 5600 people received the letter although only 200-300 homes had actually been electronically monitored and 1/3 had produced no reading or data of any kind. Ds collected approximately $150,000 from recipients of the letter. **Holding:** Legislative history indicates clearly that it is exactly such a person, i.e., one who has contracted for goods or services and is unable to pay for them, that Congress intended to protect. Ps arguments can be interpreted as a claim that once a harassing, deceptive or unfair collection attempt is instigated, a D is estopped to claim that the asserted obligation is not a “debt.” There is no named P who claims to have paid any money or otherwise changed his position in reliance on the Ds characterization of the asserted obligation in connection with its collection efforts. An estoppel cannot lie. The complaint failed to state a claim under the FDCPA. Insofar as the Ds may have overreached in their accusation and efforts to collect money in settlement of their claims, the P’s remedy is elsewhere than under the FDCPA. Tort liability is not a debt.
* **Bass v. Stolper, Koritzinsky, Brewster:** P had a joint-checking account with another individual. The other person on P’s account wrote a check to the local supermarket for payment of groceries. After the bank dishonored the check, the supermarket retained defendant law firm for collection of the check. The first three collection letters were addressed solely to the check writer. The fourth letter was also addressed to P. The letter was signed by D employee of D law firm. Although D stated in her letter that she drafted and filed lawsuits in collection matters, she was not an atty. P brought an action for statutory damages for defendants' failure to comply with the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C.S. § 1692 et seq. The court held that an offer or extension of credit was not required for a payment obligation to constitute a "debt" under the FDCPA. **Holding:**  collection of a dishonored check was subject to the Fair Debt Collection Practices Act (FDCPA) because an offer or extension of credit was not required for a payment obligation to constitute a "debt" under the FDCPA. Absolute language of “any obligation to pay” includes check which is an obligation to pay and does NOT limit to only debts arising out of the extension of credit.
* **Swanson v. Southern Oregon Credit Service**: Swanson owed 262.20 to Cascade Community hospital. The hospital referred collection to the debt to Southern Oregon. Southern Oregon sent various notices to Swanson and made an indeterminate number of telephone calls in an attempt to collect the debt. Swanson sued Oregon alleging that Oregon’s debt practices violated the Federal Act and the Oregon Act, specifically alleging that the first notice stated that if Swanson did not pay within 10 days, his name would be placed in a mater file and he would lose his most valuable asset. I: Whether the notice that Swanson received gave him enough notice to the least sophisticated debtor.

**Holding**: Not enough notice. Southern Oregon’s initial communication violated section 1692g of the Federal Act. R: If the language in the notice is confusing enough to mislead the least sophisticated debtor, the notice would violate the Fair Debt Collection Practices Act. **Analysis:** The language in the notice is confusing as it can be interpreted as a threat that if he did not pay, he would lose his most valuable asset. Section 1692g provides that alleged debtors have 30 days to question and respond to the initial communication but not necessarily to collect all payments owed.

* Notes
1. The FDCPA requires “Mini Miranda” warnings, that is, that the collector has to advise the debtor that the collector is attempting to collect debt and that the information will be used for purposes of collecting debt.
2. Under 1692e, a debt collector may not use any “false, deceptive, or misleading representations or means in connection with the collection of any debt. The 16 subsections of 1692e set forth a non-exhaustive list of deceptive debt collection practices that prevent collectors from doing.
* **Blum v. Fisher and Fisher**: P Blum claims that Fisher’s collection letter is false, deceptive and misleading. P alleges that the language in letter did not say that he was supposed to answer the letter or that he was given any other alternatives such as contesting the foreclosure. Letter contains the message: foreclosure could result in the mortgage lender taking title of your property in 7 months. During that time, you will be allowed to stay in the house rent-free. You can save your house by paying your loan off or refinancing. The letter also indicated that a lawsuit had been filed. **Issue:** The language that the debtor is allowed to stay may create inconsistency that misleads an unsophisticated consumer. However, whether an unsophisticated consumer would understand that the collector’s letter was interested only in collecting debt and or suing him or foreclosing the house. **Holding:** whether Fisher misrepresents its interest in the foreclosure proceeding in a way that is false, misleading, unfair, or unconscionable is not going to be solved by summary judgment because an issue of fact is still disputed.
* **TEST**: UNSOPHISTICATED CONSUMER TEST: If the language is confusing enough to mislead, confuse an unsophisticated consumer, the language of the notice violates the act.
* Note: Debt collection letters should be written to insure that consumers receive the required disclosure sin a meaningful manner. The following decision thoroughly analyses several letters to determine if the content, taken as a whole, overshadows the required disclosures.
* **Jenkins v. Union Corporation**: Jenkins and Terrafino filed an action against the collector Transworld Systems alleging they violated the FDCPA. Jenkins bought a car from Montell and stopped paying her car because it was defective. Montell transferred the debt to Transworld Systems. Terrafino owed money to Glenoaks Medical Center and his debt was transferred to Transworld. Plaintiffs allege that Transworld sent collection letters contained visual overshadowing and overshadowing and misrepresenting the validation period allowed by the act (30 days to respond).
* Jenkins argues that
1. First letter was overshadowed because the notice was printed in a smaller typeface. Her first letter also contained the words “immediate payment” Court said smaller type did not violate the act but the proximity of the words “immediate payment” would confuse the unsophisticated consumer
* Terrafino argues that
1. Terrafino’s first letter starts with the words “URGENT” and follows “”this was assigned to our agency for IMMEDIATE ACTION”. Court held that the proximity of these two words would confuse the unsophisticated consumer.
* **Holding**: Defendant’s summary judgment on this claim is reversed in part and granted in part.

**Section Three: Prohibited Conduct**

* Note: Section 1692c(b) generally prohibits a debt collector from communicating with anyone other than the debtor. The major exception is subsection 1692b, which allows the debt collector to communicate with others in an attempt to locate the consumer. In many cases, the debt collectors communicate with consumer through telephone.
* **Zortan v. J.C. Christensen and Assocs:** Christina Zortan brings action against Christensen and Associates alleging a violation of the Fair Debt Collection Practices Act. Zortan incurred a consumer debt with Chase bank. The bank transferred the debt to Christensen. Christensen left voice messages disclosing Plaintiff’s debt and plaintif alleges that such disclosure caused her to suffer emotional distress, embarrassment, and humiliation. Christensen files a motion for summary judgment on Zortan’s pleading. Issue: Whether disclosing Ps debt collection issue to a third party violates the FDCPA? **Holding:** Christensen alleges that the complaint needs to be dismissed because Zortan did not plead that Christensen had an intent to disclose. FDCPA is a strict liability statue that includes an intent element when required, a P does not need to plead deliberate or purposeful disclosure to third parties to state a claim under 1692c(b). **Rule:** Intention of disclosure is irrelevant when the collector disclosed to third party. Disclosure to a third party violated the act.
* **Brown v. Oaklawn Bank:** Bank told Brown that they would take 7150 from his account due to a court order of garnishment of a separate proceeding. The balance after that withdrawal was supposed to be about 2000. Brown then went to the bank to close his account and he was surprised when the bank gave him 9350 when he closed his account because he was only supposed to receive the remaining 2000. Brown told the bank that there was a mistake and the bank reiterated that the amount was correct. The next day, the bank wrote a letter to Brown saying that the bank did a mistake and that they were prepared to bring criminal charges against him. Brown filed an action alleging that the bank violated the Texas Debt Collection Act. Issue: Whether the collector can attempt to collect debt by threats or coercion of criminal prosecution. **Holding:** Our constitution adheres to the fundamental principle that a person is presumed innocent until proven guilty. The collector assured that Brown was criminally liable without doing the correct legal proceedings. The Browns incurred damages and harm because of the Collectors threats of criminal prosecution. **Rule**: No. The Texas Debt Collection Act prohibits threatening a person with criminal prosecution from an unpaid debt. .
* **Romea v. Heiberger & Associates**: Law firm sent letter to Romea saying that her rent was past due w/o validation information and files an action against the law firm. The law firm is arguing that rent is not bad debt and therefore they do not qualify as collectors and cannot be sued under the FDCPA. Defendants argue that back rent is not debt because it is not a prepaid amount and since there was no such thing in the lease, the rent is not a transaction. **Holding:** Back rent is debt under the act because rent is an obligation to pay and qualify as a debt when it is not pay timely. It is also a transaction because if it the tenant fails to pay rent, the lease does not break but still tenant has to pay rent and every time the tenant pays rent, a transaction occurs. This is a debt collection under the FDCPA.
* Note: What happens when Federal Law and NY contradicts in regards to evictions and late rent? FDCPA trumps.
* **Wilson v. Draper & Goldberg**: Wilson had a mortgage debt. The law firm Draper was retained to obtain debt. The law firm contacted the consumer a couple of times but then the law firm contacted her attorney. Issue: Whether the consumer’s attorney can be contacted by the collectors and sued under the FDCPA ? **Holding**: Yes, the collector can contact the debtor’s attorney. **Rule:** Law firm is the central fiduciary and its duty is not incidental. As such, they qualify as the collectors and can be sued under the FDCPA for unfair practices.
* **Shorty v. Capital One bank**: Debt collector sent validation but debt could not be enforced due to SOL. Consumer sues under the FDCPA claiming that sending validation to recover debt after the SOL period expired was a violation of the act. **Holding**: the collector has an obligation to not falsely misrepresent the legal status of a debt. In this case the debtor did not falsely represent the debtor because the debts are still valid and alive even if court remedy is no longer possible, it just forecloses judicial remedy. Additionally, SOL is an affirmative defense so if debtor does not raise it, it is waived. The Letter did not threaten a lawsuit.
* **Randolph v. IMBS:** Collector demanded immediate payment when the debtor was in bankruptcy. FDCPA only requires negligent to collect debt during Bankruptcy (b/c automatic stay). Bankruptcy requires willful violations of automatic stay. Issue: Does the bankruptcy law preempt FDCPA? **Holding**: No, one federal law can’t preempt another. These do not conflict.. Bankruptcy covers more and gives more damages. FDCPA applies to people outside Bankruptcy.
* **Tinsley v. Integrity Financial Partners:** After being dunned for a debt, Tinsely retained a lawyer who requested all further communications come to the lawyer’s office. Debt collector Financial Partners ceased contacting Tinsley directly but made further demands through communications with the attorney.
* Issue: Do the debt collector’s demands for payment communicated to Tinsley’s Attorney constitute a violation of the Fair Debt Collection Practice Act as an indirect communication to the debtor? **Holding:** No. Section 1692 tells us that a debt collector who knows that a consumer is represented by an attorney must communicate only with the lawyer. Replacing the word “attorney” with “consumer” in this subsection renders the subsection meaningless, because the subsection (a)(2) distinguishes between a consumer and his attorney and thus impliedly indicates that the debt collector may communicate with the attorney but not the principal, i.e. the consumer.
* **O’Rourke v. Palisades Acquisition XVI**: O’Rourke had a large outstanding balance on his credit card, which was acquired by Palisades. Palisades sued O’Rouke in state court. Attached to Palisade’s complaint was an exhibit that closely resembled a credit card statement listing the balance owed by O’Rourke. O’Rourke sued in federal court, claiming that this exhibit violated the FDCPA because the exhibit was meant to mislead the **state court judge.** Issue: Whether the protections of FDCPA extend to state court Judges, when the language is vague and not specifically limited to consumers? **Holding/Rule:** No. The FDCPA regulates communications directed at consumers, which does not extend to communications that are intended to mislead a judge in a state court action.

**Section Four: 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 $1000 for individual or 1% of net worth for class
* Attorneys fees

 \* Defendant gets attorney fees if bad faith and purpose of harassment

* **Nancy McHugh v. Check Investors**.: Nancy received a letter from Check investors in which she was told that she had a debt when one of her checks bounced. She called the number on the letter and she was told by an agent that if she did not pay by 5pm she was going to face criminal prosecution. Check investors asked her what belongings did she have at home and said that they needed that information to anticipate any problems that the authorities find if she resisted arrest. Nancy suffered extreme distress, especially because she knew she did not owe the amount she was told. When she asked Check Investors for detailed information about the bounced check, they refused to give that information and she worried even more. Nancy sued Check investors for violations under FDCPA AND Check investors failed to appear in court and lost by default judgment. The only issues in this case are the damages she is entitled to under the FDCPA claim. **Holding:** The FDCPA protects consumer and awards injured consumers for Actual damages, attorneys Fees, Statutory damages b/c conduct so bad.
* **Ahmet Hepsen v. J.C. Christensen and Associates :** This case challenges the award of attorney’s fees under the FDCPA. Hepsen won a FDCPA action but is challenging the amount of attorney’s fees he was awarded under the FDCPA, because the judge reduced his amount of attorney’s fees. **Issue:** Whether the magistrate judge abused his discretion in reducing the amount of the attorneys fees? **Holding/ Rule:** No abuse by the judge. The judge calculated attorneys fee using the lodestar formula (multiplying the reasonably expended hours by the reasonably hourly rate). The judge however, observed that the billing from the attorney contained vague, and excessive time entries and as a result reduced the amount by 10 percent based on the results obtained. If the result was partial or limited success, then the lodestar must be reduced to an amount that is not excessive. In this case, Hepsen only received partial success because although he sought statutory, actual, and punitive damages, he ultimately only recovered a portion of the statutory damages sought. As a result, the judge did not abuse his discretion in reducing the amount by 10%.

The debt collection act supplements the common law as is a “tie in statute” Wrongful conduct by a debt collector may also directly violate the Deceptive Trade Practices Act.

* **Watson v. Citimortgage Inc**. Watsons had mortgage with Citimortgage. They declared bankruptcy. After they declared bankruptcy, upon defendant’s request, they applied for another loan to try to relieve the mortgage but they did not qualify. Defendant sent P a notice of acceleration of the mortgage and stated that P would receive help to pay their mortgage and that the help would come from another trustee. Plaintiffs did not receive any documentation clarifying the same. Defendants called plaintiffs and informed that they approved a three month trial payment plan but did not receive any documentation about it. Plaintiffs anticipated foreclosure and filed a suit for a temporary restraining order so that their house was not foreclosed. In their petition, Ps asset breach of contract against defendant, violation of the Texas debt collection practices act, and violation of the Texas deceptive trade practices act (DTPA). Defendant files a motion to dismiss plaintiff’s claims. **Issue:** Whether defendant breached contract and violated TDCA and DTPA. **Holding:** Defendants did not breach their contract. However, plaintiffs TDCPA claims are actionable against defendant because the defendant stated that the plaintiff loan was being modified and foreclosure was being postponed and still defendant assessed penalties to plaintiffs. Plaintiffs cannot allege DTPA claims because even though the TDCA is a tie in statute and you can bring a DTPA claim, the plaintiff still has to prove that he is a consumer under the DTPA in order to bring an action. In the present case, the plaintiff is not a consumer because lending money does not constitute acquisition of good or service and therefore plaintiffs do not qualify as consumers.