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Consumer Legislation in Texas: 1989 Amendments to the Texas Deceptive Trade Practices—Consumer Protection Act and the Texas Property Code

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I. Introduction

Sixteen years ago the Texas legislature created the Texas Deceptive Trade Practices—Consumer Protection Act ("the DTPA").[1] The DTPA, also referred to as Texas' mini-F.T.C. Act, is broad in its scope and application. Like many of the consumer protection laws enacted at the time, it provides remedies for fraud and deception in the marketplace through the Texas Attorney General's Office.[2] The DTPA also embodies the most effective tool for day-to-day consumer protection, namely private causes of action for consumers who are damaged due to another's misrepresentation, breach of warranty, unconscionable conduct, or unfair insurance practice.[3] The first part of this article describes the relief afforded Texas consumers under the DTPA and analyzes the 1989 amendments to the DTPA which became effective September 1, 1989.[4]

In Texas, as in most states, the law has long recognized implied warranties of habitability and good construction which accompany the sale of a new home.[5] These warranties are breached upon proof that the home was not built in a good and skilled manner or that it is not suitable for habitation.[6] In such instances, an aggrieved homebuyer is entitled to recover his or her actual damages that resulted from the breach. In Texas, the rights and remedies of the homebuyer and the homebuilder were dramatically altered by recent amendments to the Texas Property Code which became effective September 1, 1989. The second part of this article describes these amendments and their primary areas of impact on consumers.[7]

II. The Texas Deceptive Trade Practices—Consumer Protection Act

The DTPA creates a private cause of action for any consumer who has been damaged by another person's proscribed conduct. Some of the requirements and limitations of bringing a lawsuit under the DTPA fall into the following categories: standing, pre-suit notice, unlawful conduct, prospective defendants, causation, and damages. These requirements and limitations are discussed below.

Standing. A "consumer" is defined as any individual, partnership, corporation, or the State of Texas, its subdivisions and agencies, who seeks or acquires by purchase or lease any goods or services. An individual, partnership or corporation that has assets of $25 million or more (or is

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owned or controlled by a corporation or entity with assets of $25 million or more) and who seeks or acquires by purchase or lease goods or services for commercial or business use are excluded from this definition.[8] The DTPA declares that waivers by consumers of the provisions of the act are contrary to public policy and unenforceable.[9] However, the 1989 amendments to the DTPA carve out an exception to the prohibition against waivers which allows waivers for certain large transactions. This exception is addressed in Section III, *infra*.

Pre-Suit Notice. Prior to filing suit a consumer must give the defendant notice of the complaint and an accounting of damages and attorney fees incurred.[10] Prior to the 1989 amendments, this notice had to include the consumer's specific complaint and be delivered at least thirty days before the suit was filed. In addition, if the limitations period would have expired within the thirty-day pre-suit notice period, then the notice need not be sent to the defendant prior to filing suit.

A defendant may tender settlement after receipt of the notice and possibly avoid exposure to the treble damages aspect of the DTPA. The DTPA also provides that if the defendant tenders a settlement which is rejected, and if the court subsequently finds that the amount of the rejected offer is substantially the same as the actual damages found by the trier of fact, then the consumer may recover either the amount of the rejected offer, or the actual damages, whichever is less.

Unlawful Conduct. There are four causes of action available to a consumer under the DTPA. These include: (1) a violation of the so-called "laundry list" of misconduct set forth in Section 17.46 of the DTPA; (2) a breach of an express or implied warranty; (3) an unconscionable action or course of action; and (4) a violation of Article 21.21 of the Texas Insurance Code (dealing with unfair and misleading practices in the business of insurance), or the rules and regulations promulgated by the Texas State Board of Insurance.[11] The list of misconduct set forth in section 17.46 prohibits twenty-four specific acts, including misconduct that causes confusion or misunderstanding as to the source, sponsorship or approval of goods or services. Section 17.46 also prohibits misrepresentations concerning the characteristics, uses, benefits, or quantities of goods or services in question, as well as misrepresentations concerning the rights, remedies or obligations involved in the agreement between the buyer and the seller.

"Unconscionable action" is specifically defined as that action which takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree, or which results in a gross disparity between the value received and the consideration paid by a consumer in a particular transaction.[12]

Prospective Defendants. Any "person" who engages in one of the four types of prohibited conduct described above is subject to being sued under the DTPA.[13] The term "person" is broadly defined to include an individual, partnership, corporation, association, or other group, however organized.[14] Privity with the plaintiff is not necessary in order for the defendant to be subject to liability.[15] Thus, once a plaintiff fits the definition of a "consumer" under the DTPA (see *Standing, supra*), he or she can sue any "person" who engages in prohibited conduct which causes damage to the plaintiff.[16]

Causation. Producing cause, or cause in fact, is the causation standard for suits under the DTPA.[17] This standard is less strict than the proximate cause standard. Under the producing cause standard, there is no requirement that the consequence of the actor's conduct be foreseeable, as required under the proximate cause standard. So long as the conduct was a producing cause of the damages, liability will attach to the defendant.

Damages. A successful consumer is entitled to recover his or her "actual damages." In addition, there is a mandatory doubling of the first $1,000 in damages and the trier of fact may, in its discretion, award up to three times the amount of damages in excess of $1,000 if the conduct is found to have been knowingly committed.[18] As originally passed, the DTPA required that all damages be trebled. Today, the jury is allowed to set the amount of exemplary, or punitive, damages, so long as the total damages do not exceed three times the amount of actual damages. In addition to recovering actual damages, a successful consumer may be entitled to an injunction, restitution in the form of a court order, or any other relief which the court deems proper. Such relief may include the appointment of a receiver where a judgment remains unsatisfied for more than three months.[19]

Because it applies to *all* transactions involving the sale of goods and services, the DTPA has had a substantial impact on litigation in Texas. The DTPA has been applied not only to the sale of goods and services, but also to the sale of goods and services in a commercial context, for exam-

ple, between a manufacturer and a retailer. The DTPA also applies to professional services such as those provided by lawyers, engineers, and architects. DTPA litigation has become commonplace in the consumer, commercial, and personal injury fields.

Perhaps as a consequence of its broad application, the DTPA has been amended by every legislative session since its original enactment in 1973. The 1989 session proved to be no exception when companion bills were introduced in both the Texas House of Representatives and Senate. As introduced, these bills sought to make major revisions to the DTPA and, if passed as written, would have eliminated many of the procedural and substantive protection afforded to Texas consumers. Despite well-organized lobbying by business and professional interest groups, the bill which ultimately passed affected only two procedural issues and two limited substantive issues under the DTPA.

III. The 1989 Amendments to the DTPA

Pre-Suit Notice. A consumer must now give a defendant written notice of the lawsuit at least sixty days before the suit is filed. The amendments provide that during this sixty-day period, the defendant is allowed to request a reasonable inspection of the goods or services in question at a reasonable time and place.[20] Refusing to allow this inspection results in a forfeiture of the mandatory doubling of the first $1,000 of any damages ultimately awarded to the consumer. (See *Damages, supra.*). The amendments also clarify some ambiguity in the notice provision by requiring that the description of the damages suffered by the plaintiff be given in reasonable detail.[21]

Tender of Settlement. The amendments declare that any tender, or offer, of settlement is not admissible as evidence.[22] They also state that where the amount of the tender of settlement is the same as, substantially the same as, or more than the amount of actual damages found by the trier of fact, the consumer shall recover the lesser of the tender of settlement or the actual damages.[23]

Waiver By Consumers. As noted in Section II, *supra*, any waiver of the provisions of the DTPA has heretofore been contrary to public policy and unenforceable. The 1989 amendments carved out a narrow exception to this policy. A consumer may now waive the provisions of the DTPA where five conditions are met: (1) the waiver is set forth as an express provision in a written contract signed by both the consumer *and* the consumer's lawyer; (2) the consumer was represented by legal counsel during the transaction; (3) the transaction did not involve the purchase or lease of a family residence; (4) the transaction involved consideration in excess of $500,000; and (5) the consumer was not in a significantly disparate bargaining position.[24] The amendments also make clear that waiver is an affirmative defense, so the defendant must plead and prove all five of the above conditions. Moreover, in proving that the consumer was not in a significantly disparate bargaining position, evidence of the consumer's financial position relative to other parties to the contract, or of written contract clauses stating that the consumer is in an equal bargaining position, are insufficient.[25] The last part of this provision makes it more difficult for a defendant to win a summary judgment motion based solely on the defendant's net worth in relation to the consumer, or on a small print provision in a contract between the parties that confesses equality of bargaining positions.

Comparative Responsibility Defenses. Finally, the 1989 amendments include certain so-called "tort reform" defenses where the consumer's claim involves either wrongful death, personal injury other than mental anguish, or damage to property other than what was involved in the consumer transaction.[26] Where the cause of action involves one or more of these claims, the amendments provide that the defendant is entitled to allege defenses under the Texas comparative responsibility scheme.[27] Generally, this allows the defendant to submit to the jury issues dealing with the plaintiff's responsibility for the damages. The jury's findings may, depending on the respective percentages of responsibility found attributable to the plaintiff and the defendant, deprive the plaintiff of a recovery. This comparative responsibility scheme is otherwise inapplicable to claims under the DTPA.[28]

IV. The Texas Property Code

The Texas Property Code applies to all actions to recover damages for residential construction defects "except an action for personal injury, survival, or wrongful death or for damage to goods."[29] Recoverable damages include the cost of repairing the structure, any residual loss of value to the home due to the stigma associated with certain major structural defects, and any mental anguish suffered by the consumer.[30] At common law, there was no requirement that the homebuyer afford the builder an opportunity to repair the defects. Most homebuyers do not want the builder to perform major repairs be-

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cause they believe that if the builder did not properly build the home in the first place then the builder is incapable of properly repairing the home.

The recent amendments to the Texas Property Code dramatically alter the rights of consumers and contractors. These amendments primarily impact two areas. First, the amendments provide new defenses to homebuilders and contractors. Second, they require homebuyers to give homebuilders notice and an opportunity to repair.

V. The 1989 Amendments to the Texas Property Code

The 1989 amendments to the Texas Property Code are set forth in chapter 27 of the Texas Property Code. Chapter 27 ("the Act") is titled "Residential Construction Liability."

Defenses to Liability. The Act expressly provides defenses to liability "for damages, or any percentage of damages, caused by" four specific matters:[31]

"(1) negligence of a person other than the contractor or an agent, employee, or subcontractor of the contractor;"[32]

"(2) failure of a person other than the contractor or an agent, employee, or subcontractor of the contractor, to take reasonable action to mitigate the damages;"[33]

"(3) normal wear, tear, or deterioration; or"[34]

"(4) normal shrinkage due to drying or settlement of construction components within the tolerance of building standards."[35]

The term "normal" as used above is not defined in the Act. It is clear, however, that the purpose of these provisions of the Act is not to excuse defective construction. There is nothing "normal" about a cracked foundation that results from a contractor's failure to take into account the soil conditions under a house. Similarly, bowed walls could not be considered "normal" when they result from the use of improperly cured lumber. Instead, these provisions are intended to protect homebuilders who use good homebuilding practices and the conditions giving rise to the homebuyer's complaint exist nonetheless. In addition, these four limitations on liability are not intended to limit other defenses that may be applicable to a specific case.[36]

Notice and Opportunity to Repair. Generally, the Act requires notice sixty days before suit is filed.[37] Moreover, the contractor must be given an opportunity to inspect the home for the alleged defects within twenty-one days of receiving notice of the lawsuit.[38]

The pre-filing notice letter must specify the claimed defects in "reasonable detail."[39] The reasonableness of the detail contained in the notice letter should be examined in light of the relative positions of the parties. That is, a homebuilder presumably has levels of skill, knowledge and sophistication with respect to construction that are greater than those of the ordinary homebuyer. Cracked sheetrock may raise suspicions of a foundation failure to an ordinary builder. A homebuyer, however, may be unaware that cracked sheetrock frequently is a symptom of serious structural problems. The adequacy of the pre-filing letter, therefore, should be tested by determining whether the information provided is sufficient to put the builder on notice that defects in construction exist.

Within thirty-one days after receiving notice, the prospective defendant may make an offer to repair or to pay for the repair of the defects in the home.[40] The offer to repair must specify "in reasonable detail" the repairs which will be made.[41] The reasonableness of the detail in the contractor's letter making an offer to repair or to pay for repairs should be tested by determining whether sufficient information is presented to enable a homebuyer, *with expert assistance*, to determine whether the repairs will be effective. If a contractor's offer to repair is accepted, the repair work must be completed within forty-five days after the date on which the homebuilder received the homebuyer's acceptance of the offer to repair.[42]

When a suit is filed before the notice provisions have been satisfied, the defendant may file a motion asking the court to abate the lawsuit. Such abatement allows the defendant an opportunity to inspect the home and, should the defendant choose, to make an offer to repair the alleged defects.[43] If a homebuilder fails to make an offer to repair, or to properly and timely perform the offered repairs, or if the homebuyer reasonably rejects an offer to repair, then the limitations on damages provided by the Act do not apply.[44] If a homebuyer "unreasonably rejects" an offer to repair or to pay for repairs or, when a settlement offer has been accepted and the homebuyer subsequently does not permit the contractor to repair the defects, then the homebuyer may not recover damages in excess of the reasonable cost of repairs plus attorneys' fees incurred before the offer was rejected.[45]

When a contractor makes repairs by satisfying all of the requirements of the Act, a homebuyer may not recover any damages, attorneys' fees or

court costs arising from the defects unless the trier of fact finds that the attempt to repair was not made in good faith and did not cure the defects in question.[46] This provision appears to unjustifiably forfeit the homebuyer's right to recover damages for any residual loss of value to the home.

Finally, when the defects in a home create "an imminent threat to the health or safety of the inhabitants," the Act requires the contractor to "take reasonable steps to cure the defect as soon as practicable."[47] If the contractor fails to respond promptly, the homebuyer may have the defect cured and recover from the homebuilder the cost of the repairs, attorneys' fees and court costs, as well as any other damages to which the homebuyer may be entitled.[48]

VI. Conclusion

The recent amendments to the DTPA require consumers to give sixty days notice to prospective defendants and to allow defendants to inspect the goods or services in question. The amendments also prohibit any offers of settlement from being presented as evidence to the jury. Finally, the amendments allow consumers to waive the protections of the DTPA under certain limited conditions and provide for the application of "tort reform" defenses under other limited conditions.

The recent amendments to the Texas Property Code set forth in the Act substantially alter the rights of homebuilders and homebuyers. One significant amendment is the requirement that the homebuyer permit the homebuilder an opportunity to cure the defects. Another significant amendment is the disallowance of any recovery of other damages (e.g., damages for stigma) if the repairs are properly performed. Only time will tell what effect the amendments to the DTPA and the Texas Property Code will have on Texas consumers.

1. TEX. BUS. & COM. CODE ANN. §§ 17.41-17.826 (Vernon 1987).
2. *Id.* at § 17.47—17.48, 17.58, 17.60, 17.62.
3. *Id.* at § 17.50.
4. For an in depth analysis of the DTPA and its history, see, Bragg, Longley & Maxwell, *Texas Consumer Litigation*, 2d ed., Texas Law Institute, 1979 (Supp. 1988).
5. Humber v. Morton, 426 S.W.2d 554 (Tex. 1968); Evans v. J. Stiles, Inc., 689 S.W.2d 399 (Tex. 1985).
6. *Id.*
7. TEX. PROP. CODE ANN. §§ 27.001-27.005 (Vernon 1987).
8. TEX. BUS. & COM. CODE ANN. §§ 17.45(4)-(10) (Vernon 1987).
9. *Id.* at § 17.42.
10. *Id.* at § 17.505.
11. *Id.* at § 17.50(a)(1)-(a)(4).
12. *Id.* at § 17.45(5).
13. *Id.* at § 17.50.
14. *Id.* at § 17.45(3).
15. Cameron v. Terrel & Garrett, Inc., 618 S.W.2d 535, 541 (Tex. 1981).
16. *Id.*; *See also* Flenniken v. Longview Bank and Trust Co., 661 S.W.2d 705, 706-07 (Tex. 1983).
17. TEX. BUS. & COM. CODE ANN. § 17.50(a) (Vernon 1987).
18. *Id.* at § 17.50(b)(1).
19. *Id.* at § 17.50(b)(2)-(b)(4).
20. 1989 Tex. Sess. Law Serv. 380 (Vernon) (to be codified at TEX. BUS. & COM. CODE ANN. § 17.505(a)).
21. *Id.*
22. 1989 Tex. Sess. Law Serv. 380 (Vernon) (to be codified at TEX. BUS. & COM. CODE ANN. § 17.505(d)).
23. *Id.*
24. 1989 Tex. Sess. Law Serv. 380 (Vernon) (to be codified at TEX. BUS. & COM. CODE ANN. § 17.42).
25. *Id.*
26. 1989 Tex. Sess. Law Serv. 380 (Vernon) (to be codified at TEX. BUS. & COM. CODE ANN. § 17.50).
27. TEX. CIV. PRAC. & REM. CODE ANN. § 33.001-33.003 (Vernon 1987).
28. *Id.* at § 33.002.
29. TEX. PROP. CODE ANN. § 27.002 (Vernon 1987).
30. *See e.g.*, Roy E. Thomas Construction Co. v. Arbs, 692 S.W.2d 26 (Tex. Ct. App. 1985); Ludt v. McCollum, 762 S.W.2d 575 (Tex. 1988); Miller v. Dickenson, 677 S.W.2d 253 (Tex. Ct. App. 1984).
31. TEX. PROP. CODE ANN. § 27.003(a) (Vernon 1987).
32. *Id.* at § 27.003(a)(1).
33. *Id.* at § 27.003(a)(2).
34. *Id.* at § 27.003(a)(3).
35. *Id.* at § 27.003(a)(4).
36. *Id.* at § 27.003(b).
37. *Id.* at § 27.004(a).
38. *Id.* at § 27.004(a). Different provisions apply if the limitations period will expire within the pre-suit notice period, or when the claim is asserted as a counterclaim. *See id.* at § 27.004(c).
39. *Id.* at § 27.004(a).
40. *Id.* at § 27.004(b).
41. *Id.*
42. *Id.*
43. *Id.* at § 27.004(c). ("If, while a suit....is pending, the statute of limitations...would have expired and...the [notice] provisions...of the section were not properly followed, the suit shall be abated for up to 75 days in order to allow compliance....").
Cf. Metro Ford Truck Sales, Inc. v. Davis, 709 S.W.2d 785 (Tex. Ct. App. 1986) (court held failure to give notice required by DTPA requires abatement).
44. TEX. PROP. CODE ANN. § 27.004(e) (Vernon 1987).
45. *Id.* at § 27.004(d).
46. *Id.* at § 27.004(f).
47. *Id.* at § 27.004(j).
48. *Id.*