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# The Way Out

## Contract Rescission Under the DTPA

By Judon Fambrough

**M**ention the Deceptive Trade Practices Act (DTPA) and real estate licensees immediately conjure up images of lawsuits filed by dissatisfied buyers. Most of these cases center on whether the seller or broker failed to disclose an essential fact about the property.

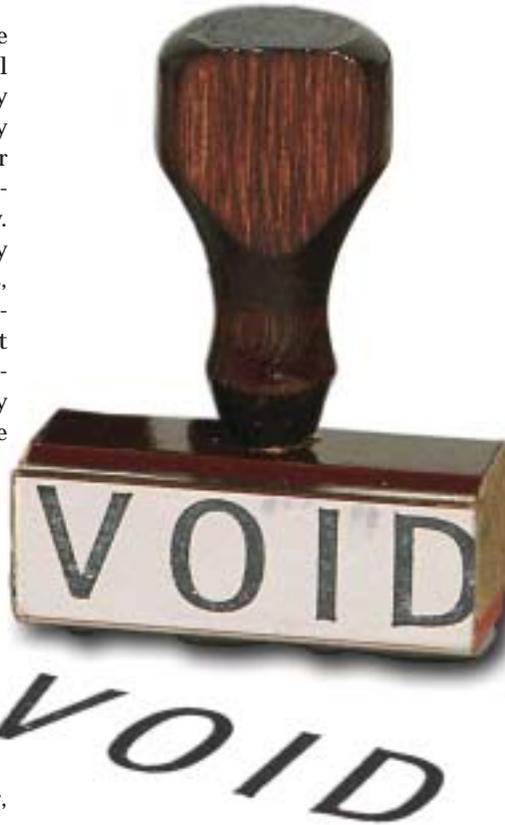
The DTPA is generally viewed as a way for a wronged party to recover damages, but the act also contains a less-known, less-used remedy — contract rescission. Contract rescission refers to the rescinding or canceling of the contract. It is an effective way for a buyer to get out of a real estate sales contract when guile and deceit is evident.

Consider the following scenario. The buyer finds an attractive property for sale. The listing broker is familiar with the property, having listed and sold it to the present owners. The buyer and seller enter a contract, and the buyer places \$5,000 in escrow. The transaction moves smoothly until the buyer attempts to purchase insurance.

As it happens, a couple of years earlier, the property suffered extensive hail damage. The current owners received monetary payment from the insurance company for a new roof. Instead of making the repairs, the owners pocketed the money and did not tell the current buyer. The failure to replace the roof rendered the property uninsurable unless the buyer was willing to replace the roof at his own expense. The broker also remembered that the current owners experienced \$20,000 in flood damage in another incident but does not know what the owners did with the insurance proceeds.

When the buyer confronts the sellers with these nondisclosures, they do not deny the allegations. They state that the roof never leaked, so they saw no need to disclose. As to the previous flooding, they say those damages were remedied, and there was no need to disclose that the property was prone to flooding.

The buyer wants out of the contract and the escrow money returned. The sellers feel they have done nothing wrong and demand the buyers close.



This situation is a good illustration of when the DTPA can be used to rescind the contract before closing. Rescinding the contract after closing is possible, but it is more practical to do so before closing. The buyers could also close and then sue for damages under the DTPA.

Contract rescission cancels marred contracts. The contract is cancelled, but more importantly, the plaintiffs are restored legally and financially to the position they maintained before entering the contract. Both parties must return any property received and the value of any benefits derived from the contract.

**B**oth common law and statutory law recognize contract rescission, but there are procedural differences. Under either, the mere breach of contract is insufficient to support rescission (*Jim Walter Homes v. Samuel*, 701 SW2d 351). More must be proven.

Under common law, the plaintiff must prove something that would render the

contract voidable, such as fraud, undue influence, mutual mistake of fact, illegality of the subject matter, failure of consideration or lack of mental capacity. The statute of limitations is four years. The plaintiff cannot recover damages and rescind the contract; the two remedies are mutually exclusive. Generally, the plaintiff must offer to restore to the defendant any property received before filing the suit or offer to do so in the petition filed with the court.

The DTPA modifies the common-law rules. To sue under the DTPA, the plaintiff (the buyer in this scenario) must prove three things.

- The plaintiff is a consumer as defined by the DTPA.
- The defendant (the sellers) employed a false, misleading or deceptive act or practice; breached an express or implied warranty; or pursued an unconscionable action in the sale of the property.
- The defendants' (sellers') actions were the procuring cause of the plaintiff's (buyer's) economic damages or mental anguish. (For more information on each of these elements, see Center publication 1114, "The DTPA Protects Consumers and Defendants.")

Under the DTPA, plaintiffs face a two-year statute of limitations. Also, a strict reading of the statute allows recovery of damages along with rescission of the contract. Section 17.50 of the act lists recoveries in the following order:

- damages (triple damages in some cases),
- injunction (to keep the defendant from repeating the practice) **and** (not "or")
- contract rescission.

The DTPA apparently allows the three remedies in the same lawsuit. Thus, damages and rescission are not mutually exclusive remedies under the DTPA. However, case law limits the damages to those necessary to restore plaintiffs to the economic positions they held prior to the contract.

In two cases the court allowed limited recovery of damages for reimbursement of

expenses incurred because of the contract (*Ridco Inc. v. Sexton*, 623 SW2d 792, and *LaChalet Inc. v. Nowick*, 787 SW2d 101). This was needed to fully restore the plaintiffs financially. In the present scenario, if the contract is rescinded, the plaintiff needs reimbursement for the loan application fees, inspection fees, the cost of the survey, and other costs related to the transaction to be fully restored financially.

Another case limited the circumstances in which contract rescission can be granted even if all requirements of the DTPA are met (*Schenck v. Ebby Halliday Real Estate, Inc.*, 803 SW2d 361). In this case, the contract gave buyers 15 days after the contract was signed to investigate whether any of the property lay in the floodplain. If any did, the contract could be terminated. The buyers did not investigate the issue, and the contract closed.

Later, when the buyers attempted to resell the property, they discovered that part

of the property was in the floodplain. They sued the seller and broker to rescind the contract for failing to disclose this fact.

While the court granted the buyers certain damages, rescission was denied. All parties appealed the denial. The appellate court upheld the trial court, stating that contract rescission cannot be granted if the plaintiffs have "unclean hands," meaning rescission cannot be granted when the plaintiffs are at least partly at fault. Had the plaintiffs investigated the floodplain issue during the 15 days allocated in the contract, the lawsuit would not have occurred.

The DTPA generally requires a 60-day notice before filing a lawsuit. This notice is required only if the lawsuit is for damages (Section 17.505 [a]). It does not apply to rescissions.

Can plaintiffs recover attorney fees under the DTPA when the court grants a contract rescission? Section 17.50(d) states,

"Each consumer who prevails shall be awarded court costs and reasonable and necessary attorneys' fees." Apparently, court costs and attorney fees are recoverable when the contract is rescinded.

Contract rescission is not a popular remedy, perhaps because aggrieved buyers are more attracted to the possible triple damages the DTPA offers. Perhaps buyers are not aware of this remedy because attorneys do not promote it. Or perhaps they become aware of the remedy after closing, when it is less attractive than before closing. But contract rescission under the DTPA should not be overlooked by purchasers who were deceived or misled and want to get out of a contract before closing. 📌

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*Fambrough (judon@recenter.tamu.edu) is a member of the State Bar of Texas and a lawyer with the Real Estate Center at Texas A&M University.*

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