

A Reprint from *Tierra Grande*

Sue Season

Tough Economy Fuels Litigation

By Judon Fambrough

Here's a sobering fact: a bad economy fuels litigation. Real estate practitioners are more apt to be sued in the next few years than they were in the last ten to 15. If they are sued, one or more claims no doubt will allege a violation of the Deceptive Trade Practices Act (DTPA).

This statute, found in the Texas Business Code, was passed in 1973 to protect consumers from false, deceptive and misleading business practices. It has influenced the practice of real estate more than any other Texas law. This article alerts practitioners to the ways the statute is most commonly violated and the legal consequences that may follow.

Key Definitions

The DTPA defines a *consumer* (potential claimant) as an individual, partnership or corporation that seeks or acquires goods or services by purchase or lease. The term excludes private entities having or being controlled by another entity with \$25 million or more in assets.

The statute does not define *false, misleading and deceptive business practices* but lists 27

prohibited practices. Consumers who bring an action for a violation must prove that:

- the defendant engaged in one or more of these practices,
- they (the consumer) relied on the practice to their detriment, and
- these practices were the *producing cause* of their economic damages.

The violations alleged most often against real estate professionals include:

- Representing that goods (including real estate) or services have . . . characteristics . . . uses . . . benefits or qualities they do not have.
- Representing that goods are original or new if they are deteriorated, reconditioned, reclaimed, used or secondhand.
- Failing to disclose information concerning goods or services that was known at the time of the transaction if such failure to

disclose . . . was intended to induce the customer into a transaction . . . the consumer would not have entered had the information been disclosed.

- Claiming an agreement confers rights, remedies or obligations that it does not.
- Alleging work or services have been performed when they have not.

The term *producing cause* is not defined by the statute. Case law defines it as the actual or substantial cause of the injury (or damages). Sometimes cases refer to it as “. . . a contributing cause that, in a natural sequence, produces the . . . injuries or damages” (*Knebel v. Port Enter Inc.*, 760 S.W. 2d 829). Foreseeability is not a requirement.

Other Ways to Violate the DTPA

In addition to a false, misleading and deceptive business practice, the DTPA may be violated by an unconscionable action or course of actions, or by a breach of warranties. Here is a brief description of each.

An *unconscionable action or course of action* is one that takes advantage of the consumer’s lack of knowledge, ability, experience or capacity to a grossly unfair degree. After 1995, the definition no longer includes instances in which there is a gross disparity between the value received and the consideration paid for the transaction.

The act does not create nor detail the *warranties* encompassed by the DTPA. Case law indicates that the DTPA is breached by a violation of an implied or express warranty described in the Uniform Commercial Code or an implied warranty declared by the courts.

Pre-Trial Settlement Offers

Before filing a lawsuit, consumers must give the potential defendant a 60-day written notice reasonably detailing the claim and including a settlement offer. The settlement offer must state by category the amount of:

- economic damages,
- damages for *mental anguish*, if any, and
- expenses, including reasonable attorneys’ fees, incurred to date.

During the 60-day period, the defendant may inspect the consumers’ goods

that are the subject of the lawsuit. If no preliminary settlement is reached, the plaintiff may pursue the claim in court.

The DTPA does not define *mental anguish*. *Economic damages*, however, are defined as monetary compensation for the loss, including costs of repair and replacement. The act excludes recoveries for exemplary (punitive) damages, damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment and loss of companionship and society. These may be recovered under other statutes but not under the DTPA.

If the defendant tenders a settlement offer for alleged damages, attorneys’ fees or both during the 60 days and the offer is rejected by the plaintiff, the offer and an affidavit certifying its rejection should be filed with the court. If the court later finds the damages sustained by the plaintiff or the attorneys’ fees incurred at the time of the offer are substantially the same as the defendant’s settlement offer, only the lesser of the two amounts per category is recoverable.

A settlement offer tendered by the defendant is not an admission of engaging in an unfair act or practice. Unless specifically granted, a settlement offer

ten-point, boldface print and entitled “Waiver of Consumer Rights.” It should read similar to the following:

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.

The written agreement may be modified to waive only specific rights under the DTPA.

In addition to the statutory waivers, the Texas Supreme Court has recognized limited “as is” sales agreements for commercial real estate transactions. Several lower Texas appellate cases have approved “as-is” agreements for residential property. For an in-depth analysis of this subject, see “As-Is” at <http://recenter.tamu.edu/pdf/1899.edu>.

Exemptions, Limitations

Initially, the DTPA exempted few commercial transactions. The 1995 amendment exempts professional services that entail providing advice, judgment, opinion or similar professional skills. Professional services that cannot be characterized as advice, judgment or an opinion are not exempted.

Another exemption important to real estate was added in 1995. Basically, a claim *arising from a written contract* is exempt if three conditions are met:

- the project or the transactions exceed \$100,000.
- the consumer is represented by legal counsel, not directly or indirectly identified, suggested or selected by the defendant or his or her agent(s); and
- the contract does not involve the consumer’s residence.

The 1995 amendment exempts all transactions, *whether or not based on a written contract*, in which the project or the transactions exceed \$500,000. The project cannot involve the consumer’s residence.

Finally, the 1995 amendment limits recovery for mental anguish in instances when the trier of fact (the jury or the

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may not be used as evidence in a subsequent trial.

DTPA Waivers

Waivers to the DTPA have undergone extensive changes. Initially, the legislation declared all waivers null, void and against public policy. This changed in 1995.

Now a written waiver is valid and enforceable if signed by the consumer. The consumer must have relatively equal bargaining power with the defendant and be represented by legal counsel not directly or indirectly identified, suggested or selected by the defendant or his or her agent(s).

The act requires the waiver to be conspicuously placed in a minimum of

judge ruling without a jury) finds the conduct was committed either knowingly or intentionally. *Knowingly* means the defendant was aware of the false, deceptive or unfair act or practice. *Intentionally* means the defendant was aware of the false, deceptive or unfair act or practice and intended for the consumer to rely on it. Either can be inferred from the circumstances.

If the act was committed intentionally, the jury or judge may award up to three times the damages for mental anguish. Remember, mental anguish is not defined by the statute.

Third-Party Defense

The third-party defense added in 1979 remains virtually unchanged. The defendant may avoid liability by proving all of the following:

- the producing cause of the alleged offense stems from information written by a third party and given to the defendant;
- the party supplying the information reasonably anticipated the information would be given to a consumer;
- the information related to the transaction in question was false or inaccurate;
- the defendant did not or could not have reasonably known of its falsity or inaccuracy and
- the defendant informed the consumer in writing prior to consummating the contract that he or she was not the originator of the information.

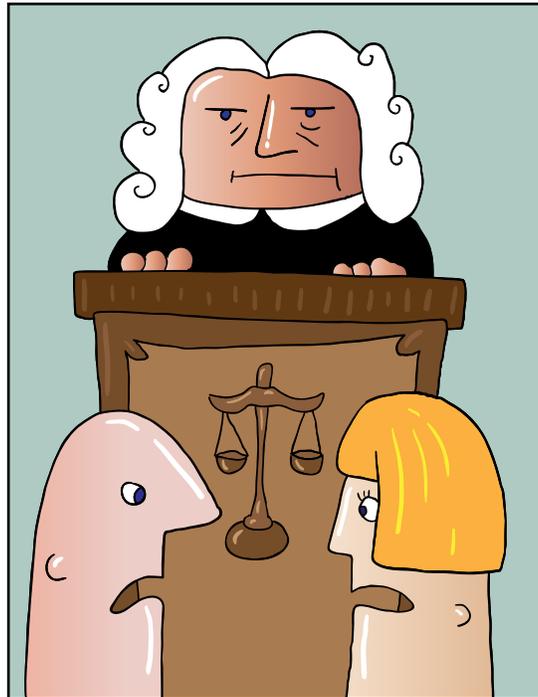
While the defendant escapes liability, the third party supplying the information can be sued even though no contract exists with the plaintiff.

An amendment to the Texas Property Code, Section 5.008, effective January 1, 1994, made the third-party defense more viable for real estate licensees. The law requires home sellers to provide a promulgated property disclosure form to prospective buyers. In rural settings, the disclosure is required only when the dwelling accounts for more than 5 percent of the sales price. The seller disclosure form enables licensees to rely more effectively on this defense.

Effective Jan. 1, 2010, the promulgated form undergoes changes regarding smoke detectors in one- to two-family dwellings. Until this date, in a notation above

the purchaser's signature, the purchaser acknowledges that the dwelling is in compliance with applicable statutory requirements. Or, if not, the buyer waives his or her rights for the seller to bring the dwelling into compliance.

After Jan. 1, 2010, the notation above the buyer's signature is deleted. In its place an explanation of the applicable smoke detector statute, found in Chapter 766 of the Texas Health Code, is added. This addition appears in Section 2 of the form where the seller must disclose whether smoke detectors have been installed in compliance with the



local building code. The three options available to the seller are "yes", "no" or "unknown." If the seller is unsure, he or she should check "Unknown."

Basically, the revised form does not require the seller to bring the dwelling in compliance with the local building code. It alerts the buyer that compliance may or may not exist. However, the buyer does not waive his or her rights to require the seller to comply as appeared in the old form.

In addition, the buyer may require the seller to install smoke detectors for the hearing impaired if:

- This is an issue with the buyer or a member of the buyer's family who will reside there.
- The buyer gives the seller written evidence of the hearing impairment from a licensed physician.
- Within ten days after the effective date, the buyer makes a written

request for the installation and specifies the locations.

The parties may agree as to the brand installed and who bears the installation costs.

The Real Estate Licensing Act, found in the Texas Occupations Code, provides a measure similar to Texas Property Code, Section 5.008. Section 1101.551 states that a licensee is not liable for the acts or omissions of a *party* or a *sub-agent* to a real estate transaction unless the licensee:

- knew of the misrepresentation or concealment and
- failed to disclose it.

Party refers to a principal in the transaction, including the prospective buyer, seller, landlord or tenant or his or her authorized representative. *Subagent*, in essence, refers to a real estate salesperson (not broker) representing a buyer or seller who is not sponsored by or associated with that buyer's or seller's broker.

In the defendant's favor, if the court finds that the case is groundless in fact or law, brought in bad faith or for the purpose of harassment, the court may award the defendant's reasonable and necessary attorneys' fees and court costs (Section 17.50[c]). Rule 13 of the Texas Rules of Civil Procedure allows similar recovery on the same grounds. Rule 13, however, allows the recovery from both the plaintiff and the plaintiff's attorney.

The 1995 amendment also altered the recoveries under the DTPA. The amount of damages less than \$1,000 is no longer automatically doubled. Instead, the prevailing plaintiff recovers economic damages — monetary compensation for the loss, including the costs of repair and replacement. If the defendant's conduct was committed knowingly or intentionally, the jury or judge may award no more than three times the economic damages.

Mental anguish is recoverable only when the conduct was committed knowingly. Up to three times that amount may be awarded for intentional conduct. The 1995 changes eliminated any recovery for bodily injuries.

The court may enjoin acts or failure to act, order the restoration of property acquired in violation of the act, appoint receivers, revoke licenses or initiate any other relief it deems proper.

Prevailing plaintiffs receive court costs as well as reasonable and necessary attorneys' fees in addition to monetary damages. However, court costs, attorneys' fees and prejudgment interest may not be considered in computing additional damages when the defendant acted knowingly or intentionally.

The 1995 amendment addressed the use of mediation. By filing a timely motion, either party may compel mediation when the claim for economic damages equals or exceeds \$15,000. The costs will be shared.

Mediation for lesser amounts may be compelled if the moving party agrees to pay all costs. The court appoints the mediator when the parties cannot agree on

one. The mediation process, for the most part, follows the procedure outlined in Chapter 154 of the Texas Civil Practice and Remedies Code.

For the past 20 years, the DTPA generated more litigation involving real estate transactions than any other statute. The 1995 changes represent more equal protection for both the plaintiff and defendant.

This article is for information only. For specific legal advice, consult an attorney. ♣

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THE TAKEAWAY

No law has affected real estate professionals more than the Deceptive Trade Practices Act, which protects consumers from false, deceptive and misleading business practices. Practitioners can protect themselves from lawsuits by understanding what violates the law, what transactions are exempt, what makes a consumer waiver enforceable, what a claimant must prove and when a third-party defense is possible.



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