

## PUBLICATION UPDATE

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# The Lawyer's Guide to the Texas Deceptive Trade Practices Act

Publication 82587

Release 26

December 2024

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## HIGHLIGHTS

**The Lawyer's Guide to the Texas Deceptive Trade Practices Act** by Richard Alderman has been updated through September 2024 for release 26. Highlights include:

- All statutes and cases have updated, outdated material has been removed. All chapters contain updated or new material with many new opinions.

### Discussion

#### CHAPTER 1 THE TEXAS DECEPTIVE TRADE PRACTICES—CONSUMER PROTECTION ACT

The Deceptive Trade Practices Act (DTPA), Tex. Bus. & Com. Code §§ 17.41–17.63, is a significant law

enacted in Texas in 1973 to protect consumers against false, misleading, and deceptive business practices. It provides efficient and economical procedures for consumers to secure protection, including the ability to recover multiple damages and attorney's fees. The Act is to be liberally construed and applied to promote its underlying purposes.

*Selva Kumar v. Panera Bread Co.*, 2024 U.S. App. LEXIS 6780 (5th Cir. 2024) (in federal court, a complaint alleging violations of the DTPA is subject to the requirements of Federal Rule of Civil Procedure 9(b). See § 1.01.

*Gore v. LexisNexis Risk Sols., Inc.*, 2023 U.S. Dist. LEXIS 213909 (N.D. Tex. 2023) (plaintiff did not qualify as a “consumer” under the DTPA and

therefore cannot bring a DTPA claim). See § 1.04.

## **CHAPTER 2 PROPER PARTY PLAINTIFF: WHO IS A CONSUMER?**

To be a “consumer” under the Texas Deceptive Trade Practices Act (DTPA), an individual, partnership, corporation, or state entity must “seek or acquire by purchase or lease, any goods or services” and must meet four requirements: 1) seek or acquire, 2) by purchase or lease, 3) goods or services, and 4) for use. The definition has been expanded over time through amendments to the DTPA.

In *Wallrich v. Samsung Electronics*, 106 F.4th 609 (7th Cir. 2024), the Court of Appeals reversed the decision of the U.S District Court requiring the defendant Samsung to arbitrate the dispute and to pay damages in the form of unpaid fees of \$4.125 million. The Seventh Circuit held that once an arbitrator terminates an arbitration proceeding for one party’s failure to pay their initial filing fees, arbitration is complete, and courts may not order the parties to pay their portion of the fees when that issue is delegated to the arbitrator—even if the nonpaying party is financially capable of payment. Thus the coercive effect of the “mass arbitration” was eliminated. See 2.071 Class Actions and Arbitration.

## **CHAPTER 3 PROPER PARTY DEFENDANT: WHOM CAN YOU SUE?**

The DTPA allows consumers to sue any non-exempt entity that com-

mits an act that damages the consumer and fits within one of the four categories of section 17.50(a). There is no privity requirement under the DTPA. Once consumer status is established, the defendant’s act must be committed “in connection with” the consumer’s transaction.

Under section 17.49(c)(1) misrepresentations made by a “professional” may not be actionable if they can be characterized as advice, judgment, or opinion. *Wells v. Saumier L. Firm PC*, 2023 Tex. App. LEXIS 8847 (Tex. App.—Dallas 2023, no pet. h.) (dispute regarding unpaid legal fees, court did not err by granting a directed verdict on appellant’s claim that appellee’s statement regarding the division of marital property was a violation under Tex. Bus. & Com. Code Ann. § 17.45(6) because the statement was neither an express misrepresentation nor an unconscionable action) See 3.051[A][2].

**CHAPTER 4 THE LAUNDRY LIST** discusses the “laundry list” of prohibited practices under the Texas Deceptive Trade Practices Act (DTPA). The laundry list contains over 30 specific acts or practices that are deemed false, misleading, or deceptive.

**CHAPTER 5 BREACH OF WARRANTY** discusses breach of warranty claims under the Texas Deceptive Trade Practices Act (DTPA). It explains that the DTPA does not establish any warranties, but allows consumers to bring claims for breach of existing warranties.

A plaintiff can recover on a claim for breach of express warranty for services if: the defendant sold services to the plaintiff; (2) the defendant made a representation to the plaintiff about the characteristics of the services by affirmation of fact, by promise, or by description; (3) the representation became part of the basis of the bargain; (4) the defendant breached the warranty; (5) the plaintiff notified the defendant of the breach; and (6) the plaintiff suffered injury. *One Time Constr. Tex., LLC v. Snow*, 2023 Tex. App. LEXIS 7109 (Tex. App.—Fort Worth 2023, no pet. h.). See 5.092 Common-Law Express Warranties.

Whether a claim is a breach of contract or a breach of warranty, “[T]he critical factor in whether the buyer has a breach of contract or breach of warranty claim is whether the buyer has finally accepted the goods.” *Mark on 287 Owner, LLC v. Croft, LLC*, 2024 U.S. Dist. LEXIS 148493 (N.D. Tex. 2024). See § 5.11 Breach of Warranty: Contract or Tort.

**CHAPTER 6 UNCONSCIONABILITY** discusses the concept of unconscionability under the Texas Deceptive Trade Practices Act (DTPA). It explains that unconscionability was a rarely used legal doctrine before the DTPA but has become a viable cause of action under the Act. The DTPA originally did not define unconscionability but later defined it in two ways: procedural unconscionability (taking advantage of a consumer’s lack of knowledge,

ability, experience, or capacity) and substantive unconscionability (a gross disparity between value received and consideration paid).

To determine whether a consumer was taken advantage of to a grossly unfair degree, we must examine the entire transaction and not simply inquire whether a defendant actually intended to take advantage of the consumer. A determination that an action takes advantage of a consumer “to a grossly unfair degree thus requires a showing that the resulting unfairness was glaringly noticeable, flagrant, complete and unmitigated.” *One Time Constr. Tex., LLC v. Snow*, 2023 Tex. App. LEXIS 7109 (Tex. App.—Fort Worth 2023, no pet. h.). See § 6.03 DTPA Definition.

**CHAPTER 7 THE INSURANCE CODE** discusses the relationship between the Texas Insurance Code and the Texas Deceptive Trade Practices Act (DTPA). It explains how consumers can bring claims under the DTPA for violations related to insurance practices.

*Tex. Windstorm Ins. Ass’n v. Kelly*, 680 S.W.3d 632 (Tex. App. 2023) (Tex. App.—Beaumont no pet. h.), wherein the court stated: “[we] hold that since the Insurance Code limits a claimant’s recovery to a remedy under their policy, the Act necessarily prohibits insureds, like the Kellys, from suing TWIA on claims alleging a breach of the duty of good faith and fair dealing and violating the DTPA when the Legislature did not expressly authorize claimants to bring those types of claims against TWIA

under the Act.” § 7.01 Introduction.

*Thomison v. Meridian Sec. Ins. Co.*, 2024 U.S. Dist. LEXIS 64459 (W.D. Tex. 2024) (at the time Meridian reviewed, investigated, and ultimately assessed its liability on the Thomisons’ insurance claim, it had a reasonable basis for delaying payment as a matter of law due). See § 541.060 Unfair Settlement Practices.

*Sliepcevic v. Am. Family Connect Prop. & Cas. Ins. Co.*, 2024 U.S. Dist. LEXIS 106268 (W.D. Tex. 2024) (absent evidence of a valid insurance contract, the plaintiffs’ extra-contractual DTPA claims also fail as a matter of law). See § 541.060 Unfair Settlement Practices.

**CHAPTER 8 DEFENSES** provides an overview of the defenses available under the DTPA. It discusses statutory defenses such as notice and settlement, common law defenses, limitations, preemption, arbitration and forum selection, the Residential Construction Liability Act (RCLA), and products liability under Chapter 82 of the Civil Practice and Remedies Code.

**CHAPTER 9 REMEDIES** discusses the various remedies available to consumers under the Texas Deceptive Trade Practices Act (DTPA), including economic damages, mental anguish damages, multiple damages, injunctive relief, restitution, rescission, and attorneys’ fees.

A demonstration of “causation” is required for breach of contract,

DTPA, and fraud claims. Unlike the claim for damages, the question of whether the roof damage was present prior to closing or whether it resulted from an after-closing storm did not require expert testimony. A seller cannot have it both ways: he cannot assure the buyer of the condition of a thing to obtain the buyer’s agreement to purchase “as is,” [sic] and then disavow the assurance which procured the “as is” agreement. Also, a buyer is not bound by an “as is” agreement if he is entitled to inspect the condition of what is being sold but is impaired by the seller’s conduct. *Cantu v. Bravo*, 2024 Tex. App. LEXIS 6180 (Tex. App. Aug. 22, 2024). See 9.032 Definition and Application of Producing Cause.

*Chotani v. Mohammad Khan*, 2024 Tex. App. LEXIS 5232 (Tex. App.—Tyler 2024, no pet. h.) (appellees lacked standing to bring a Deceptive Trade Practices Act claim against appellants because appellees were not consumers under Tex. Bus. & Com. Code Ann. § 17.50(a)(1)). See 9.043 Damages for Mental Anguish.

## **CHAPTER 10 INTERACTION WITH OTHER LAWS: CUMULATIVE RECOVERY**

The DTPA allows for cumulative recovery of damages and penalties when there are separate acts producing separate damages. However, if the damages are the same, only a single recovery of actual damages should be awarded. The DTPA also permits cumulative recovery of exemplary damages under tort law and additional damages under the DTPA,

provided they are based on separate acts or practices.

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