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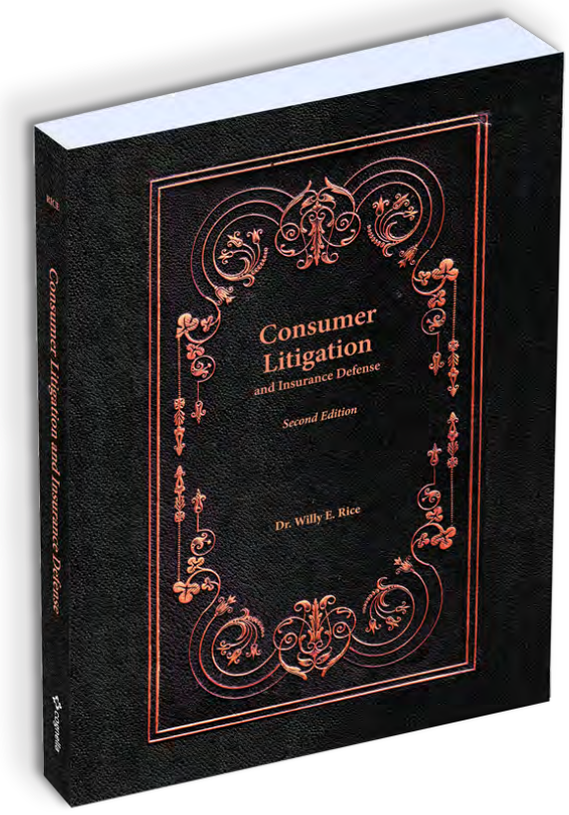

Consumer Litigation and Insurance Defense

Second Edition

By Dr. Willy E. Rice

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Consumer Litigation

and Insurance Defense

Second Edition

Willy E. Rice

cognella™
San Diego, CA

First published in the United States of America in 2011 by Cognella, a division of University Readers, Inc.

Front Cover:
Cover design by Monica Hui Hekman

13 12 11 10 09 1 2 3 4 5

Printed in the United States of America

ISBN: 978-1609279-91-2

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Introduction

Teaching Torts Without Insurance: A Second-Best Solution
45 St. Louis U. L.J. 857 (2001)
David A. Fischer and Robert H. Jerry, II

Teachers, scholars and practitioners have long appreciated the symbiotic relationship of torts and insurance. Indeed, the assertion that tort law and insurance law are intertwined is utterly unremarkable; many commentators have observed that tort law cannot be understood if the business of insurance and the law regulating it is ignored, and that insurance law cannot be understood if tort law is ignored. Several generations of law students have read casebooks, which in varying degrees pay homage to the connections between torts and insurance. Many law review articles and noteworthy books (or portions thereof) have plumbed the tort-insurance relationship.

Although one of us has taught Torts for many years but has never taught Insurance, and the other of us has taught Insurance for many years but has never taught Torts, both of us have both long believed that each of our respective principal subjects is diminished if it is studied without the rich context provided by the other's primary field. Neither of us would operate a motor vehicle, set up a business, or venture very far from home without insurance; we suggest that it is just as unwise to teach torts without insurance.

We do not dwell, however, on what is lost in torts if insurance is ignored. Rather, we examine how the study of torts is enriched when insurance concepts play a role in students' analysis. Our discussion is divided into two parts. Part I offers a "macro" perspective on the connections between tort and insurance. . . . Although many interesting points are embedded in the voluminous array of teaching materials and scholarship on the torts-insurance intersection, we underscore two particularly important ones. First, whether tort law's substantive doctrines successfully implement tort law's underlying policies cannot be assessed without considering the influence of insurance. Second, the impact of insurance on the tort litigation process is so profound as to make it impossible to understand tort litigation without understanding the structure of the liability insurance contract.

* * *

The conclusion that insurance has had — and will continue to have —a profound influence on tort theory and process seems, at least to us, beyond serious dispute. Moreover, that insurance can either further or frustrate tort law's underlying objectives is equally apparent. Sometimes the impact of insurance on tort theory or process is obvious, and at other times the impact is subtle and indirect. Sometimes, insurance takes a prominent and explicit role in a court's formulation of a substantive rule. At other times insurance considerations lurk in the background, providing the unspoken motives for many of the parties' tactical decisions, including who to sue, what claims to assert, and what strategies to employ in the litigation.

* * *

In a broader context, tort law works with a wide variety of private and public insurance mechanisms — including health, disability, and life insurance; first-party automobile insurance coverages; Medicare; Medicaid; the Social Security Disability and Social Security Income programs; Workers Compensation systems in the fifty states; and a number of federal programs, ranging from the Veterans' benefits programs, the Black Lung Benefits Program, and more — to compensate victims of loss. When the boundaries of the inquiry are defined as "loss compensation," tort law's compensatory scheme is dwarfed many times over by these other compensation mechanisms. . . .

It is, of course, naive to think that any first-year law school course can even begin to approach a meaningful study of these diverse systems of loss compensation. We suggest, however, that at some point in the torts course students should at least be alerted to the general contours of the big picture. And it is here that exploration of the tort-insurance intersection may have some of its greatest value: by insisting that first-year law students reflect upon the impact of insurance law on tort doctrine and practice, one demonstrates that acquiring an understanding of the substantive principles in a first-year course is only a first step in a life-long effort to appreciate the rich doctrinal relationships that permeate the entirety of the American legal system.

Professors Fischer and Jerry's observations are sound and their concern and interests are clear. But, a stronger statement is warranted. Simply put, too much segregation or "ghettoization" appears among law courses. However, to be fair and in light of modern necessity, law schools must segregate courses into large categories. Traditionally, "civil" and "criminal" courses comprise the two largest, primary categories. Second, within those primary categories, there are two larger subcategories — "procedural" and "substantive" courses. Third, among the "substantive civil courses," one finds more division. Law curricula contain tort-based and contract-based offerings. And, among these latter civil-law courses, one discovers large bodies of both common-law and statutory rules.

Of course, one could argue that the alleged "ghettoization" of law courses is not as pronounced as this author or Professors Fischer and Jerry suggest. Many law professors' interests, research and writings center on legal issues and conflicts that cut across all bodies of law. And, those

academicians certainly construct and offer "hybrid," "advanced" or "specialty courses. "Consumer Law" and "Insurance Law" are excellent examples of such hybrid courses.

This casebook falls into this latter category. And it has two parts and multiple chapters. Part I presents cases and materials that highlight consumers' litigation under Texas Deceptive Trade Practices Act (DTPA). And Part II covers consumers' litigation under the Texas Insurance Code. However, at best, these general descriptions of the cases and materials in Parts I and II are superficial. And the reason is not complicated.

Some consumers purchase billions of dollars worth of insurance annually under a variety of contracts. And when insurers breach those contracts, the resulting causes of action may sound in contract or in tort. For example, a tort-based cause of action is likely to occur if the insurer breaches its common-law duty of good faith and faith dealings — which is associated with "special contractual relationships." Conversely, many other consumers and sellers form trillions of transactions involving the sale of goods and services. And when conflicts arise between those buyers and sellers, consumers may commence actions sounding in tort, sounding in contract as well as actions under the DTPA and Insurance Code.

Therefore, although the materials in this text carefully review the DTPA and Texas Insurance Code, this casebook also presents even broader discussions of numerous procedural and substantive issues as well as common-law rules that appear in DTPA and insurance litigation nationwide.

One final point must be stressed. Undeniably, teaching torts, contracts or any law course without a healthy measure of insurance law is problematic and nonsensical. But consider this. The DTPA is clearly a statute; and, the causes of action that consumers may commence under the DTPA sound in tort. Therefore, teaching insurance law or the DTPA without encouraging students to understand and appreciate the extremely important interrelationship between these two bodies of laws is *prima facie* evidence of gross negligence. This text has been constructed, therefore, to prevent such negligence.

Part I

Consumer Litigation Under Uniform Deceptive Trade Practices Acts and the Common Law

Chapter One:
Proof of a Person's Standing to Sue as a Consumer

Before a plaintiff can secure damages or any other remedy under various theories of recovery, a plaintiff must establish a *prima facie case*. For example, to establish a breach-of-contract action, a plaintiff must prove 1) the existence of a valid contract; 2) consideration; 3) a material breach; and 4) proof that the breach was the cause in fact and proximate cause of an injury and damages. *Burns v. American National Ins. Co*., 280 S.W. 762, 765 (Tex. Com. App. 1926). Similarly, "a plaintiff has the burden [to prove] all elements of his cause of action under the DTPA." *Farmers & Merchants State Bank v. Ferguson,* 617 S.W.2d 918, 920 (Tex. 1981).

Section 17.50(a)(1) of the DTPA provides that a consumer may maintain an action against a defendant for the latter's violating §17.46. Section 17.46(a) outlaws any "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce." Section 17.46(b) lists significantly more unlawfully false, misleading, or deceptive violations. However, Section 17.45 (4) defines a consumer this way:

[A]n 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.

This chapter explores the various interpretations of the phrases in Section 17.45(4). To be sure, the rulings of the courts of Texas and the Court of Appeals for the Fifth Circuit's rulings are not harmonious vis-à-vis identifying the probative evidence required to prove one's "consumer" status under the DTPA.

A. Proof of the Element — An "Intent to Seek or Acquire"

Melody Home Manufacturing Company v. Barnes
741 S.W.2d 349 (Tex. 1987)

The court's opinion of June 17, 1987 is withdrawn and the following is substituted therefor.

This is a Deceptive Trade Practices-Consumer Protection Act (DTPA) implied warranty case. Lonnie and Donna Barnes sued Melody Home Manufacturing Company under the DTPA for breach of an implied warranty that repairs would be done in a good and workmanlike manner and for other DTPA violations. The jury found that Melody Home knowingly breached this implied warranty and awarded discretionary damages. The trial court rendered judgment for the Barneses and the court of appeals affirmed the judgment of the trial court. We affirm the judgment of the court of appeals.

In 1979, the Barneses ordered a modular pre-fabricated home from Melody Home. Their home was delivered in May 1980. After the Barneses moved in, they continually experienced puddles and dampness inside the house. Over two years after moving in, they discovered that a sink was not connected to the drain in one of the interior walls.

The continual leak caused severe damage to the home's sheetrock, insulation, and flooring. The Barneses told Melody Home about the problem. Workmen from Melody Home came out twice, but their efforts were unsatisfactory, and additional damages were caused by the repair. The workmen cut and tore linoleum while attempting to repair the home. Moreover, they failed to reconnect the washing machine drain, causing the house to flood with resulting damage to the floors, cabinets, and carpeting.

The Barneses then filed this DTPA implied warranty suit against Melody Home. The jury found that Melody Home failed to construct the home in a good and workmanlike manner. The jury further found that Melody Home breached its implied warranty to repair in a good and workmanlike manner and that this breach was knowing. Based on its finding that Melody Home knowingly breached the implied warranty, the jury awarded $5,000 in discretionary damages under Tex.Bus. & Com.Code Ann. § 17.50(b)(1).

Melody Home appealed the award of DTPA discretionary damages. The court of appeals held that the sale of a service carries with it the implied warranty that the service will be performed in a skillful and workmanlike manner and affirmed the judgment of the trial court.

Melody Home first challenges the Barneses' status as consumers with regard to the repairs. DTPA plaintiffs must qualify as consumers, as that term is defined in Tex.Bus. & Com.Code Ann. § 17.45(4) to maintain a private cause of action under section 17.50 of the Act. *Flenniken v. Longview Bank & Trust Co.,* 661 S.W.2d 705, 706 (Tex.1983). We have recognized at least two requirements to establish DTPA consumer status. First, the plaintiffs must have sought or acquired goods or services by purchase or lease. *Sherman Simon Enter., Inc. v. Lorac Service Corp.,* 724 S.W.2d 13,

15 (Tex. 1987); *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 539 (Tex.1981). Second, the goods or services purchased or leased must form the basis of the complaint.

It is uncontroverted that the Barneses purchased goods and thus were "consumers" when they originally bought the home. Melody Home's attempts to repair the defects in the home were, by definition, "services" under the DTPA. Section 17.45(2) defines "services" as "work, labor or service purchased ... for use including services furnished in connection with the sale or *repair* of goods." (emphasis added). Melody Home argues that the Barneses were not "consumers" with regard to the repair services because they did not purchase them with cash. The absence of a cash transfer is not determinative because DTPA plaintiffs establish their standing as consumers in terms of their relationship to a transaction, not by their contractual relationship with the defendant. *Flenniken*, 661 S.W.2d at 707. The question then is whether the Barneses "purchased" the repair services within the meaning of the Act.

In *Humber v. Morton*, 426 S.W.2d 554 (Tex.1968), this court held that a builder/vendor impliedly warrants to a purchaser that a building constructed for residential use has been constructed in a good and workmanlike manner and is suitable for human habitation. *Evans v. J. Stiles, Inc.*, 689 S.W.2d 399, 400 (Tex.1985). When the Barneses discovered the defect in their home, they had the option to immediately sue for money damages or give Melody Home the opportunity to cure the problem. The parties' choices to allow and make repairs relate back to the original purchase and were a continuation of that transaction.

The Barneses did not lose their consumer status by allowing Melody Home to attempt to correct the problem and by deferring their lawsuit. Under Melody Home's argument the Barneses would be penalized by losing their consumer status because they allowed repairs. The law encourages dispute resolution prior to litigation. *See* Tex.Bus. & Com. Code Ann. § 17.50A . Accordingly we hold that the Barneses "purchased" the repair services.

Houston Livestock Show and Rodeo, Inc. v. Hamrick
125 S.W.3d 555
(Tex. App.-Austin 2003)

Appellant Houston Livestock Show and Rodeo, Inc. (Livestock Show) appeals from a judgment awarding appellees — Leslie Hamrick and her parents, T.L. Hamrick and Connie Hamrick, Jimmy Barton and his parents, Craig Barton and Jacque Barton, and Kevin Copeland — damages . . . Appellees sued the Livestock Show and the Texas Veterinary Medical Diagnostic Laboratory (Lab) alleging breach of contract, conversion, negligence, gross negligence, defamation, intentional or reckless infliction of emotional distress, and [for violations under] the Texas Deceptive Trade Practices Act (DTPA), Tex. Bus. & Com. Code Ann. §§ 17.41-.63]

The jury returned a favorable verdict for appellees against the Livestock Show for the DTPA violations and defamation, as well as negligence and gross negligence against the Lab. The jury, however, found absence of malice as to the Livestock Show's defamatory statements. . . .The

Livestock Show brings this appeal . . . . challenging the. . . consumer status of the parents. . . We will reform the district-court judgment and, as reformed, affirm.

Factual and Procedural Background

In 1991 Leslie Hamrick, Jimmy Barton, and Kevin Copeland, all high-school students, entered farm animals they had raised in the Junior Livestock Show competition at the Livestock Show. They vied with other competitors in various animal classes for a chance at winning the contest and auction proceeds from the sale of their animals. As prescribed by Livestock Show rules, the Exhibitors were members of their schools' FFA or 4-H programs, operating under the guidance of the Texas Education Agency (the "TEA"). Their FFA and 4-H programs, and to a certain extent their parents, supervised the Exhibitors' raising of their animals. Hamrick and Barton entered lambs, and Copeland entered a steer in the Junior Livestock Show. Each won their respective class, entitling them to participate in the Livestock Show's junior auction. The competition's rules required the animals to undergo drug testing for illegal substances, commonly used to improve an animal's appearance. The drug tests revealed illegal substances in all three animals, and the Livestock Show disqualified the Exhibitors. This action arises from the drug testing procedures and the Livestock Show's actions toward appellees.

Junior Livestock Show rule 16 states that "unethically fitted livestock" are prohibited, and exhibitors showing such animals would be disqualified and "barred from future competition" at the Livestock Show. The Livestock Show instituted animal drug testing to "teach and reward 4-H and FFA students for good animal husbandry," while "endeavor[ing] to protect the public from consuming tainted meat." Moreover, the rule warned exhibitors that the Livestock Show's drug test results were final and without recourse.

Livestock Show applications and entry fees submitted by Agricultural Science Teachers and County Extension Agents included the signature of both instructor and exhibitor. The reverse side of each application included a waiver of liability and a statement notifying the signatories that the Livestock Show had the right to test the animals for medication or drugs. Below this statement, the application contained lines on which the exhibitor and the exhibitor's parent or guardian signed. The exhibitors and their parents or guardians also signed and returned a notarized form stating that they would abide by the rules, and that no unauthorized substances had been given to the animals. In the event an animal required testing, the exhibitor and his or her parent or guardian would witness the collection of a urine specimen from the animal and sign another form acknowledging that they were present for the collection. Pending a successful drug test, the prizes and auction proceeds, less the Livestock Show's commission, would be disbursed.

Appellees paid the appropriate entry fees and submitted their applications. Each won ribbons in their respective class, entitling them to participate in the auction. At auction, Hamrick's lamb brought $12,020, Barton's lamb brought $1520, and Copeland's steer brought $5060. Pursuant to its drug testing rules, the Livestock Show obtained a urine sample from Barton's lamb on February 27. The next day, the Livestock Show collected urine samples from Hamrick's lamb and Copeland's steer. The Livestock Show split the samples into two parts, with the Lab testing one half, while

the Livestock Show retained and froze the remainder. The Lab tested the specimens following the auction, and the Livestock Show retained the auction proceeds pending review of the results.

The Livestock Show selected the Lab, located at Texas A & M University, to test the urine samples. The testing procedures involved two different sets of tests: one set to detect lasix or furosemide, and another to detect clenbuterol.[FN8] Two sections of the Lab were involved in the animals' drug testing. To detect lasix, the drug testing section conducted an enzyme-linked immunosorbent assay ("ELISA") screening test, after which the toxicology section conducted a high-performance liquid chromatography ("HPLC") confirmatory test. The Lab used the ELISA test to screen a large number of samples, narrowing the field by indicating which samples required a more detailed analysis. In 1991 the Lab selected a then-existing ELISA test to screen animal urine for lasix. The ELISA tests conducted on Hamrick's and Barton's samples indicated the likely presence of lasix, which triggered the need for a confirmatory test. The toxicology section then conducted the HPLC with fluorescence. The HPLC indicated the presence of lasix in both samples.

The Lab employed a different test to screen the urine samples for clenbuterol. This test was specifically designed by the Lab and used only that year. In 1991 clenbuterol was first making an appearance in livestock show animals as a way to improve their appearance. Accordingly, the Livestock Show allocated funds to the Lab for development of a screening test capable of detecting clenbuterol. The Lab's head of toxicology, Dr. John Reagor, along with a "Dr. Spainhauer," developed a procedure utilizing the Lab's gas chromatograph with flame ionization detection to detect the presence of clenbuterol in animal urine. The procedure was represented to have been adapted from current scientific literature. This test confirmed the presence of clenbuterol in Copeland's steer.

Following the confirmatory testing, the Lab, on March 10, reported to the Livestock Show that Hamrick's lamb had tested positive. Nine days later, the Lab reported that Barton's lamb and Copeland's steer had both tested positive as well. Thereafter, the Livestock Show notified the Exhibitors and their schools that they had been disqualified because of the positive drug tests. Additionally, the Livestock Show informed appellees that they were barred from participating in Houston Livestock Shows for the remainder of their lives. . . .

The procedural history of the case spans more than ten years and the record is extensive. [But ultimately, a] jury found the following in favor of appellees: 1) $300,000 in mental anguish damages; 2) $115,000 in injury-to-reputation damages; 3) $12,020 for Leslie Hamrick's loss of prize money; 4) $190,000 in attorney's fees for trial and appeal; and 5) $630,000 in additional DTPA damages. [Defendants appealed]. . . .

The Parents as Consumers Under the DTPA

[T]he Livestock Show argues that the appellee parents are not consumers for purposes of the DTPA and that there is no evidence or factually insufficient evidence to support their status as consumers. The Livestock Show contends that "[t]he basis of [appellee parents'] complaint is the drug testing performed by the Diagnostic Lab, [and] [t]hat is not a valid basis for a claim against the [Livestock Show] under the DTPA." The Livestock Show argues that the parents sought,

acquired, or purchased nothing from the Livestock Show that could form the basis of the complaint and that they were not exhibitors in the show. This Court has previously held that all appellees were consumers under the DTPA . . . .The Livestock Show, however, argues that under the "law of the case" doctrine, this Court could not have rendered judgment on the issue as a matter of law, as appellees assert, because appellees filed no cross-motion for summary judgment on the issue.

The DTPA mandates liberal construction to promote the underlying purpose of the act. Tex. Bus. & Com.Code Ann. § 17.44 (West 2002). A "consumer" under the DTPA is defined as "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." *Id.* § 17.45(4). To qualify as a consumer, the plaintiff must meet two requirements: (1) the person must seek or acquire goods or services by purchase or lease and (2) the goods or services purchased or leased must form the basis of the complaint. *Sherman Simon Enters., Inc. v. Lorac Serv. Corp.,* 724 S.W.2d 13, 14 (Tex.1987); *see also* Tex. Bus. & Com.Code Ann. § 17.45(2) (West 2002) ("'Services' means work, labor, or service purchased or leased for use...."). The word "purchase," in the context of the DTPA, has been defined as the actual transmission of services from one person to another by voluntary act or agreement, founded on valuable consideration. *Hall v. Bean,* 582 S.W.2d 263, 265 (Tex.Civ.App.-Beaumont 1979, no writ). A plaintiff's standing as a consumer is established by its relationship to the transaction, not by a contractual relationship with the defendant. *Flenniken v. Longview Bank & Trust Co.,* 661 S.W.2d 705, 707 (Tex.1983). Whether a plaintiff is a consumer under the DTPA is a question of law for the trial court).

We need not decide whether the law-of-the-case doctrine applies because the district court determined as a matter of law that the parents were consumers, and the evidence adduced at trial supports such holding. The parents were involved in the entire animal-showing process. The parents signed waivers of liability, which approved the Livestock Show's right to test the animals for unauthorized drugs. They also signed a notarized form stating that they would abide by the Livestock Show rules and that no illegal substances had been administered to the animals.

Additionally, when an Exhibitor's animal was subjected to drug testing, an Exhibitor's parent witnessed the taking of the sample, after which the parent signed another form acknowledging that the parents witnessed the event. The parents, as well as the Exhibitors, were subject to the threat of a lifetime banishment from future shows in the event of a disqualification resulting from illegal drug use. The myriad of services that the Livestock Show provided to the Exhibitors and their parents included the use of the facilities for their children, animal judging, drug testing, and the auction. Simply stated, the Exhibitors could not have entered the competition without their parents' express joinder and participation.

We hold that the district court was correct in concluding the parties were consumers because (1) the parents did seek or acquire the services of the Livestock Show, indicated by their authorization, participation, and potential exclusion from all future shows; and (2) the services provided by the Livestock Show form the basis of the complaint. We overrule the Livestock Show's third issue. . . .

Conclusion

We reform the district court's judgment to provide that the court's award of attorney's fees on appeal is made expressly contingent upon the ultimate success of appellees. In all other respects, we affirm the district-court judgment as reformed.

B. Proof of the Element — An "Intent to Purchase or Lease"

Kennedy v. Sale
689 S.W.2d 890
(Tex. 1985)

This cause involves the definition of "consumer" under the Texas Deceptive Trade Practice-Consumer Protection Act ("DTPA"). Tex. Bus. & Com. Code Ann. § 17.45(4). The question presented is whether an employee complaining of misrepresentations of the provisions of a group insurance policy is a "consumer," though the employer alone purchased the policy. The court of appeals held that the employee was not a consumer. We reverse the judgment of the court of appeals and affirm that of the trial court.

Francis Kennedy was an employee of the Martin County Hospital District. The Board of Managers of the hospital district decided to change group insurance carriers, from Blue Cross/Blue Shield to Southwest Medical Corporation Trust. J. Woodford Sale was the insurance agent.

After the policy was accepted, but before it went into effect, Sale met with hospital employees to explain the new provisions and benefits, as well as to collect signed enrollment cards from each employee. Kennedy and other employees testified that at this meeting Sale misrepresented the preexisting condition coverage, claiming that the policy offered full coverage without qualification, when in fact the policy provided only $4000 maximum coverage during the first year. Kennedy also testified that had he been correctly informed, he would have enrolled under his wife's group plan, which provided full coverage.

Shortly thereafter, Kennedy underwent surgery for a preexisting condition. The policy paid $4,000; Kennedy brought suit against Sale for the balance of $11,338.21, alleging a violation of the DTPA and common law fraud. The jury found that Sale had misrepresented preexisting condition coverage to Kennedy, but not to the Board of Managers. The trial court rendered judgment for Kennedy on his DTPA cause of action. The court of appeals, with one justice dissenting, reversed this judgment but remanded for a new trial on the common law fraud theory.

The court of appeals held that because Kennedy did not purchase the policy benefits directly from Sale, he was not a "consumer" as defined by the DTPA. In reaching this conclusion, the court of appeals placed substantial reliance on *Delaney Realty, Inc. v. Ozuna,* 593 S.W.2d 797 (Tex.Civ. App.-El Paso), *writ ref'd n.r.e. per curiam,* 600 S.W.2d 780 (Tex.1980). This court, while refusing

writ, did not endorse the *Delaney Realty* court's reasoning. 600 S.W.2d 780 (Tex. 1980). Less than one year later, we expressly disapproved the result in *Cameron v. Terrell & Garrett, Inc.,* 618 S.W.2d 535, 539-40 (Tex.1981).

While *Cameron v. Terrell & Garrett, Inc.* is not conclusive on the question here presented, the decision is nonetheless highly instructive. The question presented in *Cameron* was whether a real estate agent could be held in violation of the DTPA where he was neither the buyer nor the seller of the property. In a unanimous opinion, we stated:

> We find no indication in the definition of consumer in section 17.45(4), or any other provision of the Act, that the legislature intended to restrict its application only to deceptive trade practices committed by persons who furnish the goods or services on which the complaint is based. *Nor do we find any indication that the legislature intended to restrict its application by any other similar privity requirement.*" 618 S.W.2d at 540-41 (emphasis added).

This court further stated:

> "The Act is designed to protect consumers from any deceptive trade practice made in connection with the purchase or lease of any goods or services.... To this end, we must give the Act, under the rule of liberal construction, its most comprehensive application possible without doing any violence to its terms."
> *Id.* at 541.

Keeping these principles in mind, we turn to an examination of the instant cause. The DTPA defines "consumer" as "an individual ... who *seeks or acquires by purchase or lease,* any goods or services." Tex.Bus. & Comm. Code Ann. § 17.45(4) (Vernon Supp.1985) (emphasis added).
The court of appeals gave two reasons why Kennedy did not qualify as a consumer. First, it was suggested that Kennedy did not "seek or acquire" the policy benefits. While Kennedy did not "seek" the benefits (since the new policy was negotiated by the hospital district's Board of Managers without his input), he most assuredly did "acquire" those benefits when he was covered by the policy's provisions.

The second rationale advanced by the court of appeals is that Kennedy did not "purchase" the policy from Sale, because he paid no consideration to Sale. While the Act's definition of "consumer" includes one who "acquires by purchase or lease," it does not necessarily follow from that language that the consumer must himself be the one who purchases or leases. For example, it could reasonably be said that Kennedy did "acquire" the policy benefits "by purchase," albeit a purchase consummated for his benefit by the hospital district's Board of Managers.

To accept the construction favored by Sale, that only direct purchasers can be consumers, would be to read additional or different language into the DTPA, in contravention of the Act's mandate of liberal construction. The legislature could easily have drafted such a restriction into the definition of "consumer," for example, by use of the words "purchaser or lessee," but did not do so. As this court stated in *Cameron:*

> "[W]e believe every word excluded from a statute must . . . be presumed to have been excluded for a reason. Only when it is necessary to give effect to the clear legislative intent can we insert additional words or requirements into a statutory provision." 618 S.W.2d at 540.

We therefore hold that, under the facts of this case, Francis Kennedy was a consumer and thus entitled to maintain a cause of action under the DTPA. As this court recently stated in *Flenniken v. Longview Bank & Trust Co.*, 661 S.W.2d 705, 707 (Tex. 1983):

> "Privity between the plaintiff and defendant is not a consideration in deciding the plaintiff's status as a consumer under the DTPA.... A plaintiff establishes his standing as a consumer in terms of his relationship to a transaction, not by a contractual relationship with the defendant. The only requirement is that the goods or services sought or acquired by the consumer form the basis of his complaint."

For the foregoing reasons, we reverse the judgment of the court of appeals and affirm the judgment of the trial court.

NOTES & QUESTIONS

1) Citing Texas common law, the Texas Supreme Court has issued a variety of rulings about privity of contract: In *Natividad v. Alexsis, Inc.*, 875 S.W.2d 695, 698 (Tex.1994), the Texas Supreme Court held: If privity of contract does not exist between a plaintiff and an insurer, a special relationship does not exist as a matter of law. Without a special relationship, the insurance company does not owe a duty of good faith and fair dealing.

2) What are the elements of a "special relationship?" In *American Centennial Ins. Co. v. Canal Ins. Co.*, 843 S.W.2d 480, 484 (Tex. 1992), the Supreme Court declared: "Under Texas law, attorneys are not ordinarily liable for damages to a nonclient, because privity of contract is absent."

3) In *Garcia v. Texas Instruments, Inc.*, 610 S.W.2d 456, 465 (Tex.1980), the Supreme court held that "privity of contract is not a requirement for a Uniform Commercial Code implied warranty action involving personal injury." *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 791 (Tex.1967) (citing Texas law and concluding that privity of contract is not required when a cause of action is based upon principles of strict liability in tort).

4) In *Garcia v. Texas Instruments, Inc.***,** 610 S.W.2d 456, 463-464 (Tex. 1980), the Texas Supreme Court discussed the difference between horizontal and vertical privity. One of the problems traditionally involved in products liability litigation has been of privity of contract—i.e., whether there could be recovery against a supplier for injuries caused by a defective product when the person who suffered the injury was not a direct party to the sale, and hence was not in privity of contract with the manufacturer or seller of a defective product. There are two types of

privity of contract. "Vertical privity" includes all parties in the distribution chain from the initial supplier of the product to the ultimate purchaser. "Horizontal privity" describes the relationship between the original supplier and any non-purchasing party who uses or is affected by the product, such as the family of the ultimate purchaser or a bystander.

Wellborn v. Sears, Roebuck & Company
970 F.2d 1420
(5th Cir. 1991)

This diversity case is a products liability action involving an automatic garage door opener manufactured by the Chamberlain Group, Inc. (Chamberlain) and distributed by Sears, Roebuck & Co. (Sears). Marilyn Wellborn (Wellborn) brought this action against Sears and Chamberlain after her son was killed as a result of the garage door opener malfunctioning. We affirm in part and certify the question—Does a decedent's cause of action under the Texas Deceptive Trade Practices — Consumer Protection Act survive under the Texas Survival Statute—to the Texas Supreme Court.

I.

In late 1986, Wellborn bought a Chamberlain automatic garage door opener from Sears. Wellborn's friend, Jerome Smith (Smith), installed it in Wellborn's garage in April or May of 1987. While installing the opener, Wellborn and Smith studied the owners' manual, and then they performed the test outlined in that manual. Testing the garage door opener, however, Wellborn and Smith used a "two by four" instead of the one-inch obstacle described in the owners' manual.

Moreover, subsequent to installing the opener in 1987, Wellborn did not perform the annual test to determine whether any further adjustments to the opener were necessary. Wellborn often worked the night shift and, on those evenings, she left her fourteen-year-old son, Bobby, at home without supervision. During the evening of November 2, 1988, Wellborn telephoned Bobby at home but he did not answer. She then telephoned Smith and, at her request, Smith went to the Wellborns' home. There, Smith found Bobby pinned underneath the garage door with his skateboard next to his feet. Smith activated the automatic garage door opener, and the garage door rose.

Investigating officers subsequently arrived at the Wellborns' and tested the garage door and the opener: They placed their hands under the door about two feet from the ground, and found that the garage door worked properly. When the officers tested the garage door in the same manner from about eight inches, however, the garage door did not reverse. An expert later determined that the garage door did not reverse because of faulty installation. The force adjustments had been set to maximum and the length of the door arm was too short.

In November of 1989, Wellborn brought this suit against Sears and Chamberlain. At trial, the parties offered evidence as to how the accident occurred. Wellborn testified that Bobby was aware of the dangers of getting beneath garage doors and that Bobby knew that the garage door opener

was a piece of machinery designed to raise and lower the garage door. One of the Wellborns' older neighbors testified that she had observed Bobby playing a "game" where he raced under the closing garage door. The investigating officer and another expert agreed that the accident's probable cause was Bobby's attempt to race the closing door on his skateboard. The defendants' experts testified that the blunt trauma to Bobby's forehead probably meant that Bobby hit his forehead on the concrete driveway and was knocked unconscious and that the garage door then struck Bobby's back, which restricted his ability to breathe. According to Wellborn's experts, Bobby struggled to free himself, and remained conscious for a minimum of three to five minutes—possibly as long as several hours. Bobby eventually lost consciousness and died.

* * *

The defendants contend that, because Bobby neither sought nor acquired the garage door opener for purchase or lease, Bobby does not meet the DTPA's definition of "consumer." Instead, the defendants argue, Bobby was a "mere incidental user of the garage door opener—he was not even licensed to drive [and therefore] he could not use the garage door opener for its primary purpose." We disagree.

The DTPA provides that a consumer is entitled to recover both actual and additional damages plus attorney fees. A "consumer" is defined as one "who seeks or acquires by purchase or lease . . . any goods or services. . . ." The Texas Supreme Court has liberally construed terms of the DTPA in order to effectuate the Act's comprehensive application. Direct contractual privity between an individual and the defendant is not a consideration in determining an individual's status as a consumer under the DTPA. Standing as a consumer is established in terms of the individual's "relationship to the transaction, not by a contractual relationship with the defendant." *Birchfield v. Texarkana Mem. Hosp*., 747 S.W.2d 361, 368 (Tex. 1987). Thus, one may acquire goods or services that have been purchased by another for the plaintiff's benefit.

In *Kennedy*, the Texas Supreme Court expressly held that one need not have been a purchaser in order to qualify for consumer status under the DTPA. *Kennedy* held that an employee covered by group insurance purchased by his employer was a consumer in that he acquired the benefits of the services of the policy due to the coverage of the policy provisions, irrespective of the fact that he did not actually purchase the policy benefits from the agent. Subsequently, the Texas Supreme Court extended consumer status to a minor who, through the efforts of her parents, acquired goods and services from the defendants. *Birchfield* held that the minor acquired goods and services, "regardless of the fact that she obviously did not contract for them."

Although Bobby did not enter into a contractual relationship with the defendants, he acquired the garage door opener and the benefits it provided. Wellborn did not purchase the garage door opener specifically for Bobby's benefit[.] [N]evertheless, Bobby lived with Wellborn and regularly used the garage door opener until . . . death. Wellborn testified that one of the reasons that she bought the garage door opener was to provide additional security for Bobby on the nights that Bobby was home by himself. Indeed, Wellborn had instructed Bobby to lock the house up at night. Because Bobby acquired the garage door opener when it was purchased for his benefit, installed in his home, and used by him, we hold that, under the facts of this case, Bobby is a consumer.

* * *

For the foregoing reasons, we AFFIRM the district court's judgment in its entirety except that we CERTIFY the following question to the Texas Supreme Court: Does a decedent's cause of action under the Texas Deceptive Trade Practices—Consumer Protection Act survives under the Texas Survival Statute?

C. Proof of the Element — "Goods or Services"

Chamrad v. Volvo Cars of North America
145 F.3d 671
(5th Cir. 1998)

James Chamrad appeals an adverse summary judgment in favor of Volvo Cars of North America which was based on the conclusion that Chamrad lacks standing as a "consumer" under the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA). Finding no error, we affirm.

BACKGROUND

In 1989, Chamrad and Nancy O'Connor, Chamrad's girlfriend, began shopping for a car for O'Connor. They made three trips to the Royal Motors Volvo dealership in San Francisco, where they then were living. They were informed that the air bags would deploy in collisions at 15 miles per hour and up, protecting the driver and passenger.

O'Connor subsequently purchased a 1989 Volvo station wagon from a Texas dealer. On December 18, 1994, Chamrad had an accident while driving O'Connor's vehicle. The airbag did not deploy and Chamrad suffered serious injuries in the accident.

Chamrad and O'Connor were married in June 1995 and in October 1995 they filed suit against the defendant in state court alleging breach of express warranties and violation of the DTPA. Volvo removed the action to federal court and was granted summary judgment as to all of the plaintiffs' claims. Chamrad appeals the district court's dismissal of his claim under the DTPA.

* * *

ANALYSIS

Under the DTPA, only a consumer may allege deceptive trade practices... Tex. Bus. & Com.Code. Ann. § 17.50. The elements of a DTPA cause of action are: 1) The plaintiff is a consumer; 2) the defendant engaged in false, misleading, or deceptive acts; and 3) these acts constituted a producing cause of the consumer's damages. Tex. Bus. & Com.Code.Ann § 17.41 *et seq.; Doe v. Boys Clubs of Greater Dallas, Inc.,* 907 S.W.2d 472 (Tex.1995). We agree with the district court's conclusion

that Chamrad failed to qualify as a "consumer," which is defined as an individual "who seeks or acquires by purchase or lease, any goods or services." Tex.Bus. & Com. Code Ann. § 17.45(4).

Chamrad claims that he is a consumer under the Act. He contends that direct contractual privity between an individual and the defendant is not a factor in determining an individual's status as a consumer, and that the appropriate focus is the individual's relationship to the transaction. Prior to the purchase of the car Chamrad and O'Connor, who were engaged to be married, shopped for a vehicle with the intentions of purchasing a safe, family car. Chamrad maintains that his relationship to the purchase of the vehicle qualifies him as a consumer. We are not persuaded. Based on the facts presented in this case, Chamrad's relationship to the transaction was tenuous and he was no more than an incidental beneficiary.

Chamrad has not established that his relationship to the transaction was significant. In *Rodriguez v. Ed Hicks Imports,* 767 S.W.2d 187 (Tex.App.-Corpus Christi 1989), the plaintiff suffered injuries when the radiator on his girlfriend's automobile exploded, spraying him with scalding liquid. Rodriguez brought a personal injury action against the seller of the automobile alleging several causes of action, including a claim under the DTPA. The Texas Court of Appeals affirmed summary judgment for the defendant on the DTPA claim, concluding that Rodriguez was not a consumer. He was not involved in the purchase of the car and therefore he did not acquire by purchase or lease any goods or services that formed the basis of the complaint. *Rodriguez,* 767 S.W.2d at 191

Although he visited several Volvo dealerships in San Francisco, Chamrad never visited the Advantage Leasing dealership in Victoria, Texas, where the subject vehicle was purchased, nor did he make logistical or financial arrangements for the purchase. O'Connor paid for the car and placed the title in her name. Chamrad had no relationship whatsoever to that transaction. Chamrad was no more than an incidental beneficiary of the purchase. In order to claim "consumer" status, the underlying transaction must be consummated with intent to benefit the claimant.

In *Arthur Andersen & Co. v. Perry Equip. Corp.,* 945 S.W.2d 812 (Tex.1997) *citing Kennedy v. Sale,* 689 S.W.2d 890 (Tex.1985), Perry Equipment sued Arthur Andersen for making a faulty audit, which Perry relied on in deciding to purchase Maloney Pipeline Systems. Arthur Andersen contended that Perry was not a consumer under the DTPA because it did not purchase the services which were the basis of the DTPA claim. The Texas Supreme Court, however, held that "the DTPA does not require the consumer to be an actual purchaser or lessor of the goods or services as long as the consumer is the beneficiary of those goods or services."

[I]n *Arthur Andersen* . . . not only was there an underlying relationship [but] the audit at issue was for the benefit of both Perry and Maloney. Arthur Andersen was aware that Perry had required the audit as a condition of sale and would rely on the accuracy of its work. In *Wellborn v. Sears Roebuck & Co.,* 970 F.2d 1420 (5th Cir.1992), we concluded that a young boy, killed when he was pinned underneath a garage door when the automatic door opener failed to reverse, was a consumer under the DTPA because he was a beneficiary of his mother's purchase of the door opener. We found that because the door was purchased for his benefit, installed in his home, and used by him; he was a consumer. *See Also, Kennedy v. Sale,* 689 S.W.2d 890, 892 (Tex.1985) (an

employee covered by group insurance, purchased by his employer, was a consumer because he acquired benefits of the services of the policy).

In this case, unlike in *Arthur Andersen* and *Wellborn,* there is no evidence to support the proposition that O'Connor, in seeking to acquire or purchase a good or service, bought the vehicle with the intent to benefit Chamrad. Neither at the time of the purchase nor the accident were Chamrad and O'Connor married. At all relevant times Chamrad owned his own vehicle. The Volvo belonged to O'Connor and was for her use. Finally, the record reflects that over approximately a five-year period Chamrad drove the vehicle on only one occasion, the night of the accident.

We are persuaded that the record does not support the claim that Chamrad had a relationship to the transaction or that he was more than an incidental beneficiary of the purchase of the car. He therefore was not a consumer under the Act and lacks standing to invoke the DTPA. The judgment appealed is AFFIRMED.

Frizzell v. Cook
790 S.W.2d 41
(Tex. App. -San Antonio 1990)

This is an appeal by Mrs. Norris N. Frizzell [appellant] . . . from an order granting . . . M.E. "Doc" Cook, Harvie D. Lindeman, E.F. Hutton & Company, Inc., and Shearson Lehman Hutton, Inc.'s [appellees'] motion for partial summary judgment. At issue . . . is whether the trial court properly rendered partial summary judgment based on appellant's pleading, and . . . whether the Texas Securities Act (TSA), Tex. Rev. Civ. Stat. Ann. art. 581-33"preempted" appellant's cause of action under the Deceptive Trade Practices Act (DTPA) Tex. Bus. & Com. Code Ann. §§ 17.41-.63

Appellant filed her original petition . . . and alleged that appellees, a national brokerage firm and its employees, engaged in tortious conduct in the course of providing her with investment and counseling services relating to the investment of the life insurance proceeds provided by her deceased husband. The unlawful acts of appellees . . . include alleged violations of 1) the DTPA, 2) Tex. Bus. & Com. Code § 27.01, 3) [Federal Securities Act of 1933, 15 U.S.C. § 77a], and 4) the common law duty of good faith and fair dealing.

II

The basis for the motion is that the DTPA does not apply to claims of misrepresentation in connection with securities actions such as alleged by the Plaintiff. The Texas Legislature has enacted The Texas Security [sic] Act which specifically affords a cause of action for alleged misrepresentations in connection with securities transactions, and this statute preempts the DTPA in this area.

Appellant, in her response to appellees' motion for summary judgment, among other statements, stated:

> As is obvious from reading of Plaintiff's Original Petition, Plaintiff's allegations of wrongs covered under the Deceptive Trade Practices Act are not limited to misrepresentations related only to specific purchases or sales of securities, as described in Art. 581-33.... Plaintiff has complained not just about such misrepresentations but about "churning" of her account and unauthorized purchases and sales, as well as an unconscionable failure of Defendants to take action after Plaintiff complained of the individual Defendants' unauthorized and wrongful conduct ... that Defendants intentionally did not provide the services advertised....

The trial court, in granting the partial summary judgment to appellees, decreed that "Plaintiff should take nothing by her cause of action under the Texas Deceptive Trade Practices Act." Thereafter, the trial court severed appellant's claims under the DTPA from her remaining claims, including claims under the TSA. The severed DTPA claims were assigned a separate number (88-CI-08905-A), and the partial summary judgment then became a final judgment, which appellant has appealed.

Appellant claims in her first point of error that "[t]he Trial Court erred in granting partial summary judgment against Appellant because the Texas Securities Act does not 'preempt' an action under the Texas Deceptive Trade Practices-Consumer Protection Act as a matter of law." We sustain the point, which makes it unnecessary for us to consider appellant's remaining points of error.

In the instant case, the trial court found . . . that the cause of action pleaded by appellant was . . . inconsistent and inapposite to the TSA. It was this finding that caused the trial court to render judgment that appellant did not have a cause of action under the DTPA.

Appellees contend that the judgment of the trial court was mandated by the holding of the Texas Supreme Court in *E.F. Hutton & Co. v. Youngblood,* 30 Tex. Sup. Ct. J. 508 (June 24, 1987), *withdrawn,* 741 S.W.2d 363 (Tex.1987) (the withdrawn opinion), and is fully supported by the holding in *Allais v. Donaldson, Lufkin & Jenrette,* 532 F.Supp. 749 (S. D. Tex.1982).

It is well settled under Texas law that an unpublished opinion of an appellate court is of no precedential value. *Berry v. Berry,* 647 S.W.2d 945, 947 (Tex.1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McCollum,* 666 S.W.2d 604, 610 (Tex.App.-Houston [14th Dist.] 1984, writ ref'd n.r.e.), *cert. denied,* 469 U.S. 1127 (1985) .

We apply that rule to the case at bar and hold that the withdrawn opinion of the Supreme Court in *Youngblood* has "no precedential value." The effect of the withdrawn opinion is to leave intact the holding of the Corpus Christi Court of Appeals in all matters relevant to the DTPA action before the court of appeals. *See E.F. Hutton & Co. v. Youngblood,* 708 S.W.2d 865 (Tex.App.-Corpus Christi 1986), *modified,* 741 S.W.2d 363 (Tex.1987) (judgment of court of appeals modified "so as to disallow recovery of attorney's fees by the Youngbloods. As modified, the judgment of the court of appeals is affirmed." We do not consider the withdrawn opinion in disposing of the appeal in the case at bar.

Hutton argued before the Corpus Christi Court of Appeals that Youngblood was not a consumer because "[a]s the investment advice was a service neither purchased or leased, that is, without

consideration. . . it was beyond the coverage of the DTPA." *E.F. Hutton & Co. v. Youngblood*, 708 S.W.2d at 868. The court of appeals rejected that argument noting:

> Appellant's branch manager testified that, as a 'full-service brokerage house,' Hutton received higher commissions than would a 'discount brokerage house,' because more *services* were provided for their customers. In the transaction sued upon, appellant was to be paid a 4% commission for assisting appellees in obtaining their securities which would accomplish a tax free rollover. The services of tax and investment counseling and assisting in the purchase of securities were inextricably intertwined. *See Knight v. International Harvester Credit Corp.,* 627 S.W.2d 382 (Tex.1982). Appellees sought and received from appellant expert tax and investment counseling as to the taxable consequences of the transaction, without which the sale of securities would not have been made. We find that the appellees were consumers of a service purchased from appellant, E.F. Hutton. *Id.* at 868-69

For summary judgment purposes, appellant . . . alleged . . . that appellant sought appellees' investment and counseling services.

* * *

The provision of the TSA at issue in the instant case was enacted in 1977. Article 581-33A(2) was then amended, effective May 25, 1979. . . . After these changes to the TSA, the DTPA was substantially amended in 1979 . . . to include, *inter alia*, the language in section 17.43 expressly stating that a violation of another statute (like the TSA) may also be a violation of the DTPA. The Legislature also reenacted the affirmative relief provisions of section 17.50, which give rise to the claim *sub judice* in this case. These amendments became effective August 27, 1979, which was after the effective date of the TSA amendments. Consequently, the later enacted DTPA provisions control.

* * *

Since the Legislature is never presumed to have done a useless act, *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex.1981), the Legislature is presumed to have intended, by making both the TSA and DTPA cumulative of each other and by amending section 17.43 of the DTPA after the enactment of article 581-33 A(2) (the "due diligence defense" of the TSA), it is apparent that actions could be brought under both acts. However, a double recovery for the same act is precluded. There is nothing in either the TSA [or] the DTPA that expressly exempts securities transactions from the scope of the DTPA. The "exemption" that appellees rely on, therefore, is an implied exemption, and the Texas Supreme Court has refused to imply exemptions or exceptions not mandated by the Legislature. *See Chastain v. Koonce,* 700 S.W.2d 579, 583 (Tex.1985) (refusing to imply intent requirement for unconscionability); *Weitzel v. Barnes*, 691 S.W.2d 598, 600 (Tex.1985) (refusing to imply reliance requirement for misrepresentation); *Smith v. Baldwin*, 611 S.W.2d 611, 616-17 (Tex.1980) (refusing to imply an intent requirement).

The Supreme Court of Texas, in *Melody Home Mfg. Co. v. Barnes,* 741 S.W.2d 349, 354 (Tex.1987), stated: The legislative history of the DTPA indicates that the Act was intended to apply to all service providers. In the case presented by this appeal, appellant . . . alleged that she contracted to "acquire" the "services" of defendants (appellees).

This Court has previously held that both the DTPA and TSA apply to securities transactions. In *Vick v. George,* 671 S.W.2d 541 (Tex.App.-San Antonio 1983), *rev'd on other grounds,* 686 S.W.2d 99 (Tex. 1984). . . . The appellant in *Vick* argued that recovery could not be had under both the TSA and the DTPA. This Court agreed, noting that while *double recovery* was precluded by the 1979 amendments to the DTPA the appellees had the right to elect whether damages would be imposed under the DTPA or the TSA based on the jury's findings. The Court held:

> Plaintiffs correctly state that recovery under either the TSA or the DTPA is not exclusive of any other rights or remedies that may exist. Article 581-33(A), and § 17.43 (amended 1979). It is axiomatic, however, that an aggrieved party is entitled to but one recovery for the same loss. *American Transfer and Storage Co. v. Brown,* 584 S.W.2d 284, 293 (Tex.Civ.App.-Dallas 1979), *rev'd on other grounds,* 601 S.W.2d 931 (Tex.1980). *Id.* at 551

* * *

In *Nottingham v. General American Communications Corp.,* 811 F.2d 873 (5th Cir.1987), *cert. denied,* 484 U.S. 854 (1987), the defendant argued that it was error for the district court to submit claims under both the DTPA and securities statutes. The court held: "It was not error to submit both claims to the jury," and further stated:

> As we recently explained in *Federal Deposit Insurance Corporation v. Munn,* 804 F.2d 860, 865 (5th Cir. 1986), *services related to the sale of a security may be services covered by the DTPA when they also are objectives of the transaction.* The contract for legal services, the Production Facilities Agreement, and the Distribution Agreement, among others, were plainly for services that were objectives of the transaction in this case. *Id.* at 878 (emphasis added).

The holding in *Nottingham* parallels the decision by this Court in *Vick,* and the holding by the Corpus Christi Court of Appeals in *Youngblood.* We hold that appellant was a consumer under the DTPA and the trial court erred in granting partial summary judgment that plaintiff (appellant) take nothing by her cause of action under the Texas Deceptive Trade Practices Act. Since both the TSA and the DTPA have cumulative remedies provisions, in our opinion the Legislature intended neither Act to "preempt" or replace the other. Therefore, we hold that the TSA does not "preempt" a cause of action under the DTPA as a matter of law, as contended by appellees. Appellant's first point of error is sustained.

The judgment of the trial court is reversed and the cause is remanded to the trial court for a trial on the merits.

Riverside National Bank v. Lewis
603 S.W.2d 169 (Tex. 1980)

This case primarily involves the question whether one who seeks a loan from a bank in order to refinance a car qualifies as a "consumer" under the Deceptive Trade Practices Act (DTPA). The trial court disallowed recovery under the DTPA, but the court of civil appeals reformed the judgment to hold the bank liable under the DTPA. Since we believe that Mr. Lewis was not a "consumer" in the instant transaction, we hold that the trial court correctly denied recovery under the DTPA. We also hold that under this record, Lewis is entitled to recover from Riverside Bank upon his cause of action for common law fraud. Further, we hold that there is some evidence to support recovery of exemplary damages for fraud. We remand the cause to the court of civil appeals to pass upon the sufficiency of the evidence as to exemplary damages.

The relevant facts are as follows: In February, 1975, Lewis purchased a new Cadillac El Dorado. Allied Bank provided almost $10,500.00 in financing. To secure the loan, Allied Bank took a security interest in the car and kept a $6,000.00 certificate of deposit as security. Lewis failed to make the first payment due on April 10, and a check that he gave a few days later was returned for insufficient funds. After these occurrences, Mr. Little, Lewis' loan officer at Allied Bank, asked Lewis to move the loan to another bank.

After two unsuccessful attempts to refinance the loan, Lewis went to Riverside Bank on May 2. Arthur Carroll, a junior loan officer, helped Lewis complete a loan application, and told Lewis that the application would have to be approved by his superiors at the Bank. At that time, Carroll called the Allied Bank loan officer, Mr. Little, and told him that Lewis had applied for the loan at Riverside Bank.

On May 6, 1975, Carroll called Little once again. During this phone conversation, Carroll informed Little that the loan had been approved, and requested Little to have Allied Bank forward a draft, the title, and the certificate of deposit to Riverside Bank. After forwarding these items, there was no communication between Little and Carroll until May 14, 1975.

On May 14, Little called Carroll in order to determine why the draft had not been paid. Carroll told Little that the draft had been held up due to a senior loan officer's questions, but that it would be paid on the next day. On May 15, Little informed Carroll that he wanted the draft paid immediately, or returned. Carroll replied that the draft had been paid, and the cashier's check was in the mail. The next day, May 16, Carroll told Little that the draft would not be paid.

During the course of these communications between Little, at Allied Bank, and Carroll, at Riverside Bank, James Means, executive vice-president at Riverside National Bank, did some investigation of Lewis' loan application. Upon calling Allied Bank, Means discovered that Lewis' application misrepresented his net income and did not disclose the fact that he had already failed to make his first, and only, payment. Thus, on May 14, Means decided that Riverside would not make the loan to Lewis.

On May 15, however, Carroll called Lewis, told him that the loan had been approved, and asked him to come to the bank to sign the necessary papers. Lewis complied with the request, signing a promissory note in the amount of $12,871.80 on May 15. This note was kept by Riverside until the time of trial, although it was never sought to be collected. As previously stated, on May 15, Carroll was also representing to Allied Bank that the loan would be taken by Riverside Bank.

After being told on May 16 that Riverside would not take the loan, Allied Bank repossessed the car and sold it at auction. The sale failed to generate sufficient money to cover the full loan at Allied, and a deficiency of $3,177.50 was deducted from Lewis' certificate of deposit, with the balance being returned to him.

Lewis sued Riverside for the losses he suffered in this transaction, claiming that Riverside, through Carroll, had (1) engaged in fraud, (2) breached its contract to loan money, (3) engaged in deceptive trade practices against him, and (4) converted his property by retaining the promissory note, yet refusing to lend him money.

After trial to a jury, the jury found that Riverside had (1) wrongfully dishonored the draft sent by Allied to Riverside, (2) committed fraud on Lewis by refusing to make the loan, and (3) violated the Deceptive Trade Practices Act by refusing to lend the money. The jury found that Lewis had suffered actual damages in the amount of $3,277.50. As a consequence of finding that Riverside had acted with malice in refusing this loan, the jury also found that $10,000.00 should be awarded as exemplary damages. The jury also found that reasonable attorney's fees would be $6,700.00.

The trial court entered judgment for Lewis in the amount of $13,277.50, representing the actual and exemplary damages under the fraud theory of action. The court also held that the DTPA was not applicable to the instant transaction, and declined to enter judgment under the theory of recovery for treble damages and attorney's fees.

* * *

RIVERSIDE'S LIABILITY UNDER THE DECEPTIVE TRADE PRACTICES ACT

The alleged deceptive acts in this case occurred during May, 1975. Accordingly, the statutory provisions that govern this case are those that were in effect at the time that the alleged deceptive acts occurred.

* * *

The Act thus differentiates between the remedies available to correct violations of the Act. A "person" may have engaged in a deceptive act by presenting any misleading information concerning any item of value. See sections 17.46(a), 17.45(6). Any person engaging in such deceptive practices may be subjected to a suit by the Consumer Protection Division of the Attorney General's Office, under section 17.47. But, one who engages in deceptive acts may not be subjected to a private suit for damages under the Act unless the aggrieved party is a consumer. Section 17.50 expressly

declares, in its caption: Relief for Consumers. Furthermore, section 17.50 provides that a consumer may maintain a cause of action if aggrieved by deceptive practices. The Legislature granted no such remedy by means of a private cause of action for any person; one must be a consumer.

It has been argued that any person ought to be permitted to sue if aggrieved by a deceptive act. This contention relies on the broad definition of "trade" and "commerce" and the liberal interpretation of the DTPA that is promoted by section 17.44. We disagree with this position for two reasons. First, the scope of "trade" and "commerce" defines the acts that are illegal ; it does not purport to say who may maintain a private cause of action. Rather, it is the definition of consumer that delineates the class of persons that may maintain a private cause of action. Second, the rule of liberal interpretation should not be applied in a manner that negates the statutory definition of the word "consumer." To ignore the Legislature's definition of "consumer," and permit any aggrieved person to maintain a private cause of action under the DTPA, ignores the well established presumption that legislative choice of words is such that every word has meaning. *See Jessen Associates, Inc. v. Bullock,* 531 S.W.2d 593 (Tex.1975).

To read the Act in such a manner that "trade" and "commerce" define the class of persons who are consumers would constitute a judicial deletion of section 17.45(4), which defines consumer in terms of a purchaser of "goods" and "services," and not in connection with "trade" and "commerce." This we cannot do. Thus, we hold that a person who brings a private lawsuit under section 17.50 must be a consumer, as defined in section 17.45(4). The other courts that have considered this issue have been in accord. *See, e. g., Hi-Line Electric Co. v. Travelers Insurance* Co., 587 S.W.2d 488 (Tex.Civ.App. Dallas 1979), writ ref'd n. r. e., 593 S.W.2d 953 (1980) (per curiam); *Russell v. Hartford Casualty Insurance Co.*, 548 S.W.2d 737 (Tex.Civ.App. Austin 1977, writ ref'd n. r. e.).

In his transaction with Riverside Bank, Lewis sought only to borrow money in an effort to avoid repossession of his car. He sought to pay for the use of money over a period of time. Other than Lewis' payment for the use of money, there was nothing else for which he paid, or which he sought to acquire. In order to determine whether Lewis was a "consumer" entitled to maintain a private cause of action under section 17.50 of the DTPA, we must determine whether, in this transaction, Lewis sought or acquired "by purchase or lease, any goods or services."

1. Lewis did not seek or acquire any "goods" in his transaction with Riverside Bank.

Section 17.45(1) of the DTPA defines goods as "tangible chattels bought for use." Since Lewis sought nothing other than the use of money from Riverside Bank, it is necessary to determine whether money was a "tangible chattel" that could be classified as a good. After examination of the appropriate statutes, we conclude that money is not such a "good."

Nowhere in the DTPA is "chattel" defined so as to specifically include or exclude "money" from the definition of "goods." A cursory examination of analogous statutes, however, demonstrates that money has not yet been included in the category of "goods" or "chattels."

The DTPA is a part of the Texas Business and Commerce Code. Accordingly, it is appropriate to look to other sections of the Code to determine the proper characterization of money. Section 1.201

of the Texas Business and Commerce Code, which sets forth the general definitions of the terms used in the Code, provides: (24) "Money " means a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency.

A specific definition of "goods" is found in section 2.105, which provides: (a) "Goods" means all things . . . which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid . . . .

Section 9.105(a)(8) similarly provides: (8) "Goods" includes all things which are movable at the time the security interest attaches or which are fixtures . . . but does not include money . . . .

Thus, consistent with these analogous statutory provisions, we hold that 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. Thus, Lewis, in arranging for the instant loan, did not seek to acquire, through purchase or lease, any "goods" as defined by the DTPA.

2. Lewis did not seek or acquire any "services" in his transaction with Riverside Bank.

Section 17.45(2) of the DTPA defines services as "work, labor, and services for other than commercial or business use, including services furnished in connection with the sale or repair of goods." Lewis contends that, in the instant transaction, he sought an "extension of credit." This extension of credit, he claims, is a service as defined by the DTPA. We disagree.

In this case, Lewis sought to borrow money : he sought nothing else. Money, as money, is quite obviously neither work nor labor. Seeking to acquire the use of money likewise is not a seeking of work or labor. Rather, it is an attempt to acquire an item of value. We hold that an attempt to borrow money is not an attempt to acquire either work or labor as contemplated in the DTPA.

"Services" was defined by this Court in *Van Zandt v. Fort Worth Press*, 359 S.W.2d 893, 895 (Tex. 1962). We defined services as: "action or use that furthers some end or purpose: conduct or performance that assists or benefits someone or something: deeds useful or instrumental toward some object." This definition described "services" in terms of "action," "conduct," performance" and "deeds." All of these synonyms demonstrate that services [include] an activity on behalf of one party by another. This characterization indicates that "services" is similar in nature to work or labor.

Accordingly, we hold that Lewis' attempt to acquire money, or the use of money, was not an attempt to acquire services.

We find support for our conclusion that the DTPA's use of the word "services" did not include the extension of credit, or the borrowing of money, in another statute: the Home Solicitations Transactions chapter of the Interest-Consumer Credit-Consumer Protection Title. In the Home Solicitations Transactions Act, the Legislature gave to "consumers," as defined in that act, certain rights with respect to contracts that had been signed as a result of a home solicitation. In that act, the

Legislature defined "consumer" as "an individual who seeks or acquires real or personal property, services, money, or credit for personal, family, or household purposes." Article 5069-13.01(2).

Interestingly enough, the Legislature enacted this statute during the same session in which the DTPA was originally enacted. The presence of the words "money or credit" within the definition of "consumer" in the Home Solicitations Act, and their corresponding absence from the analogous provision in the DTPA, indicates that the seeking of an "extension of credit" is not the seeking of a "service" as defined in the DTPA.

Obviously, the Legislature knew how to include the extension of credit and borrowing of money within the scope of coverage of protective legislation, when it intended to cover such transactions. The simple addition of the words "money or credit" within the definition of "consumer" in the DTPA would have accomplished such a purpose in the DTPA. The Legislature's exclusion of these terms from the DTPA, in light of its contemporaneous inclusion of the same terms in the Home Solicitations Transactions Act, evidences a clear legislative intent that the extension of credit was not to be covered under the DTPA.

It has also been argued that in the course of extending credit, Riverside Bank necessarily provided other services to Lewis. These services could have included such things as help in filling out his loan application, financial counseling, and the processing of his loan. It has been contended that these activities constituted "services" as defined by the DTPA, and thus made Lewis a "consumer" who could maintain a private cause of action under section 17.50. We disagree.

The evidence in this case establishes that Lewis approached Riverside Bank with one objective; he sought to acquire money. He attempted to obtain this money by promising to repay the indebtedness in the future, with interest. Put simply, he sought to exchange future amounts of money for that amount which he desired to have in the present. There is no evidence that he sought to acquire anything other than this use of money.

The argument that services existed in the lending of money, and in the process of determining whether to lend money, and were necessarily a part of the interest rate or purchase price of the loan, is not supported by the evidence adduced at trial. This argument, contained in the briefs, is merely hypothetical. There is nothing to support it in the Statement of Facts.

Additionally, Lewis' sole complaint about the transaction concerned the Bank's failure to make him the loan. He has made no complaint concerning the quality of these collateral activities that he now claims constitute a service. In the absence of a claim concerning these collateral activities, we hold that Lewis did not seek either "goods or services" as defined under the DTPA.

Accordingly, Lewis was not a "consumer" who could bring suit under section 17.50 of the DTPA.

Flenniken v. Longview Bank & Trust Company
661 S.W.2d 705
(Tex.1983)

Mr. and Mrs. James Flenniken instituted this suit against the Longview Bank & Trust Co. seeking damages for wrongful foreclosure and violation of the Deceptive Trade Practices Act, Tex. Bus. & Com.Code Ann. § 17.41 *et seq.* Based on the jury's finding that the Bank engaged in an unconscionable course of action in causing the sale of the Flennikens' property, the trial court rendered judgment that the Flennikens recover $25,974 treble damages, attorney's fees, and court costs. The court of appeals reversed the trial court's judgment in part, holding that the Flennikens were not "consumers" and were not entitled to recover treble damages or attorney's fees under the DTPA. We reverse the judgment of the court of appeals and affirm the judgment of the trial court.

On October 28, 1976, the Flennikens and Charles Easterwood entered into a mechanic's and materialman's lien contract, whereby Easterwood agreed to construct a residence on the Flennikens' property. In exchange for Easterwood's services, the Flennikens paid Easterwood $5,010 and executed a $42,500 mechanic's lien note, naming Easterwood as payee. This note was further secured by a deed of trust to the Flennikens' property, in which the Bank's vice-president, J.M. Bell, was named as trustee. On this same date, Easterwood assigned the Flennikens' note and his contract lien to the Bank in return for the Bank's commitment to provide interim construction financing.

Under the terms of the lien contract, Easterwood was to complete the Flennikens' residence by April 28, 1977. Between November 2, 1976, and January 7, 1977, the Bank made four disbursements of construction funds to Easterwood, totalling $32,000. Easterwood, however, later abandoned the contract after completing only 20 percent of the work. On December 6, 1977, after the Flennikens and the Bank failed to agree on what to do with the unfinished house, the Bank foreclosed on the property under the terms of the deed of trust.

The Bank does not challenge the jury's finding that foreclosure was an unconscionable course of action. Instead, the Bank argues that the Flennikens are not "consumers" as that term is defined in section 17.45(4) of the DTPA. We disagree.

It is clear that only a "consumer" has standing to maintain a private cause of action for treble damages and attorney's fees under section 17.50(a) of the DTPA. *Knight v. International Harvester Credit Corp.,* 627 S.W.2d 382, 388 (Tex.1982); *Cameron v. Terrell & Garrett, Inc.,* 618 S.W.2d 535, 538 (Tex.1981); *Riverside National Bank v. Lewis,* 603 S.W.2d 169, 173 (Tex.1980). Section 17.45(4) defines a consumer as "an individual ... who seeks or acquires by purchase or lease, any goods or services." Under the DTPA, goods include "real property purchased ... for use," Tex.Bus. & Com.Code Ann. § 17.45(1), and services include "services furnished in connection with the sale ... of goods." *Id.* § 17.45(2).

Section 17.45(4), however, only describes the class of persons entitled to bring suit under section 17.50; it does not define the class of persons subject to liability under the DTPA. The range of possible defendants is limited only by the exemptions provided in section 17.49. Section 17.50(a)

(3), for example, allows a consumer to "maintain an action if he has been adversely affected by ... any unconscionable action or course of action by *any person.*"

In the instant case, the court of appeals recognized that the Flennikens were consumers to the extent they sought to acquire a house from Easterwood, as well as his services. The court of appeals, however, treated Easterwood's assignment of their note to the Bank as a separate transaction in which the Flennikens did not seek or acquire any goods or services. According to the court of appeals, the Bank's unconscionable course of action did not occur in connection with the Flennikens' transaction with Easterwood, but in connection with Easterwood's transaction with the Bank. Thus, the court of appeals held that the Flennikens were not consumers as to the Bank because the purchase of the house and Easterwood's services did not form the basis of their complaint.

This holding erroneously suggests that the Flennikens were required to seek or acquire goods or services *from the Bank* in order to meet the statutory definition of consumer, a contention we rejected in *Cameron v. Terrell & Garrett, Inc., supra.* Privity between the plaintiff and defendant is not a consideration in deciding the plaintiff's status as a consumer under the DTPA. *Cameron v. Terrell & Garrett, Inc.,* 618 S.W.2d at 541; *accord Gupta v. Ritter Homes, Inc.,* 646 S.W.2d 168 (Tex.1983); *Stagner v. Friendswood Development Co.,* 620 S.W.2d 103 (Tex.1981) (per curiam). A plaintiff establishes his standing as a consumer in terms of his relationship to a transaction, not by a contractual relationship with the defendant. The only requirement is that the goods or services sought or acquired by the consumer form the basis of his complaint. *Cameron v. Terrell & Garrett, Inc.,* 618 S.W.2d at 539.

Similarly, the fact that the Bank's unconscionable course of action occurred after the Flennikens and Easterwood entered into the contract for the sale of the house does not exempt the Bank from liability under the DTPA. Under section 17.50(a)(3) there is no requirement that the defendant's unconscionable act occur simultaneously with the sale or lease of the goods or services that form the basis of the consumer's complaint. *Cf. Leal v. Furniture Barn, Inc.,* 571 S.W.2d 864, 865 (Tex.1978). If, in the context of a transaction in goods or services, any person engages in an unconscionable course of action which adversely affects a consumer, that person is subject to liability under the DTPA. Tex.Bus. & Com.Code Ann. § 17.50(a)(3); *see* D. Bragg, P. Maxwell & J. Longley, *Texas Consumer Litigation* 21 (2d ed. 1983).

The court of appeals erred in holding that the basis of the Flennikens' complaint was Easterwood's transaction with the Bank, rather than their transaction with Easterwood. From the Flennikens' perspective, there was only one transaction: the purchase of a house. The financing scheme Easterwood arranged with the Bank was merely his means of making a sale. The Bank's unconscionable act in causing the sale of the Flennikens' property and the partially built house arose out of the Flennikens' transaction with Easterwood.

The Flennikens, therefore, were consumers as to all parties who sought to enjoy the benefits of that transaction, including the Bank. *Knight v. International Harvester Credit Corp.,* 627 S.W.2d at 389. Clearly, the Bank had no greater right to foreclose on the Flennikens' property than did Easterwood. If Easterwood had foreclosed his lien under these circumstances, and if a jury had