PROFESSIONAL SERVICES UNDER THE TEXAS DECEPTIVE TRADE PRACTICES ACT (DTPA): EXEMPT OR NOT?

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I. INTRODUCTION

A. The Texas **Deceptive** Trade Practices - **Consumer** Protection Act

In some jurisdictions, including Texas, an accountant may be held liable under the state's deceptive trade practices act. State deceptive trade practice statutes vary widely and go under various names, including "consumer protection acts." The Texas Deceptive Trade Practices - Consumer Protection Act (DTPA), in particular, is widely misunderstood. It is not merely a "consumer" protection statute because it applies in business-to-business transactions; and it does not require findings of "deception" in order to establish a Defendant's liability. Because of tort reform amendments which were effective September 1, 1995, many CPAs have wrongly assumed that they are immune from DTPA exposure. The exemption does not apply to every professional liability scenario. This presentation will overview both suing and defending under the DTPA, with special emphasis on professional liability considerations which have emerged from the interstices of the statute and caselaw which has developed since passage of the professional exemption provision.

B. Liberal construction

§ 17.44. Construction and Application

(a) This subchapter shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection.

C. Multiple bites at the apple

§ 17.43. Cumulative Remedies

The provisions of this subchapter are not exclusive. The remedies provided in this subchapter are in addition to any other procedures or remedies provided for in any other law; provided, however, that no recovery shall be permitted under both this subchapter and another law of both damages and penalties for the same act or practice . . . .

D. Non-waiver

§ 17.42(a) Waivers: Public Policy

(a) Any waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void . . . .

II. SUING

A. Who can sue? Just about anybody!

§ 17.45(4) Definitions

(4) "Consumer" means 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 . . . .

Absence of contractual privity does not prevent Plaintiffs from stating a claim. Because there is no express privity requirement in the statute, a court may not require that the Plaintiff purchase or receive the services directly from the accountant in order to be considered a consumer of those services.

B. What can they complain about? Just about anything!

§ 17.50(a) Relief for Consumers

(a) A consumer may maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish:

(1) the use or employment by any person of a false, misleading, or deceptive act or practice that is:

(A) specifically enumerated in a subdivision of Subsection (b) of Section 17.46 of this subchapter; and

(B) relied on by a consumer to the consumer's detriment;

(2) breach of an express or implied warranty;

(3) any unconscionable action or course of action by any person; or

(4) the use or employment by any person of an act or practice in violation of Article 21.21, Insurance Code.

1. The Laundry List

2. Favorite Laundry List provisions

§ 17.46(b)(2), (5), (7), and (24) Deceptive Trade Practices Unlawful

(b) Except as provided in Subsection (d) of this section, the term "false, misleading, or deceptive acts or practices" includes, but is not limited to, the following acts:

(2) causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

(5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not

have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not;

(7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(24) failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed.

3. Express warranty

4. Implied warranty

5. Unconscionability

§ 17.45(5) Definitions

(5) "Unconscionable action or course of action" means an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree.

C. What can they recover?

§ 17.50(b)(1) and (d) Relief for Consumers

(b) In a suit filed under this section, each consumer who prevails may obtain:

(1) the amount of economic damages found by the trier of fact. If the trier of fact finds that the conduct of the defendant was committed knowingly, the consumer may also recover damages for mental anguish, as found by the trier of fact, and the trier of fact may award not more than three times the amount of economic damages; or if the trier of fact finds the conduct was committed intentionally, the consumer may recover damages for mental anguish, as found by the trier of fact, and the trier of fact may award not more than three times the amount of damages for mental anguish and economic damages.

(d) Each consumer who prevails shall be awarded court costs and reasonable and necessary attorneys' fees.

1. Economic damages

§ 17.45(11) Definitions

(11) "Economic damages" means compensatory damages for pecuniary loss, including costs of repair and replacement. The term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.

2. Mental Anguish

3. Knowingly

§ 17.45(9) Definitions

(9) "Knowingly" means actual awareness, at the time of the act or practice complained of, of the falsity, deception, or unfairness of the act or practice giving rise to the consumer's claim or, in an action brought under Subdivision (2) of Subsection (a) of Section 17.50, actual awareness of the act, practice, condition, defect, or failure constituting the breach of warranty, but actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

4. Intentionally

§ 17.45(13) Definitions

(13) "Intentionally" means actual awareness of the falsity, deception, or unfairness of the act or practice, or the condition, defect, or failure constituting a breach of warranty giving rise to the consumer's claim, coupled with the specific intent that the consumer act in detrimental reliance on the falsity or deception or in detrimental ignorance of the unfairness. Intention may be inferred from objective manifestations that indicate that the person acted intentionally or from facts showing that a defendant acted with flagrant disregard of prudent and fair business practices to the extent that the defendant should be treated as having acted intentionally.

III. DEFENDING

A. Does the DTPA apply?

§ 17.49(c), (f), and (g) Exemptions

(c) Nothing in this subchapter shall apply to a claim for damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill. This exemption does not apply to:

(1) an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion;

(2) a failure to disclose information in violation of Section 17.46(b)(24);

(3) an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion;

(4) breach of an express warranty that cannot be characterized as advice, judgment, or opinion; or

(5) a violation of Section 17.46(b)(26).

(f) Nothing in the subchapter shall apply to a claim arising out of a written contract if:

(1) the contract relates to a transaction, a project, or a set of transactions related to the same project involving total consideration by the consumer of more than $100,000;

(2) in negotiating the contract the consumer is represented by legal counsel who is not directly or indirectly identified, suggested, or selected by the defendant or an agent of the defendant; and

(3) the contract does not involve the consumer's residence.

(g) Nothing in this subchapter shall apply to a cause of action arising from a transaction, a project, or a set of transactions relating to the same project, involving total consideration by the consumer of more than $500,000, other than a cause of action involving a consumer's residence.

1. Qualified professional exemption

A. Caselaw Concerning DTPA Professional Liability and Exemption:

(1) ***Arthur Anderson v. Perry Equipment Corp.***, 945 S.W.2d 812 (Tex. 1997)

In this accounting malpractice case, Perry Equipment Corporation ("PECO") sued the accounting firm of Arthur Anderson for a faulty audit. Arthur Anderson was hired by Maloney Pipeline Systems, whom PECO was contemplating purchasing but would not do so until a thorough audit had been conducted regarding Maloney's fiscal status. Arthur Anderson was aware that PECO would rely on the audit in making a decision to purchase the company. The Anderson audit was favorable to Maloney and it appeared that the company was a viable business worth investing in when, in fact, the company was suffering substantial losses. PECO paid close to $4.1 million for Maloney Stock to the entity which owned Maloney, Ramteck II, Inc. After PECO spent an additional $1.3 million in an effort to salvage Maloney, the defunct company was forced to file bankruptcy fourteen months after the purchase. PECO put on three experts to testify at trial regarding the inadequacy of the Arthur Anderson audit. Those experts concluded that the audit contained serious errors and failed to follow accepted accounting principles and audit standards. The jury found Arthur Anderson 51 percent at fault and PECO 49 percent at fault. The jury further found that Arthur Anderson had committed fraud, DTPA violations, and breach of warranty. The Texas Supreme Court remanded the case for a new trial because the jury charge failed to instruct the jury on the proper measure of direct damages, but in the original case the jury awarded to PECO a total of **$9,297,601.20** in damages, prejudgment interest, DTPA augmented damages, attorney's fees, and costs. This case amply demonstrates the "teeth" found in the DTPA and the protection for professionals that DTPA § 17.49(c) has imperfectly attempted to provide.

(2) ***Nast v. State Farm Fire and Cas. Co.***, 82 S.W.3d 114 (Tex. App.—San Antonio 2002, no pet.)

In *Nast,* State Farm Agent Daniel G. Clark, who had been the Plaintiffs' insurance agent for a period of 18 years, told Plaintiffs that they were ineligible to participate in the National Flood Insurance Program ("FEMA") when Plaintiffs inquired about the insurance following their nearby neighbors' home being flooded with approximately 18 inches of water as a result of torrential rains. Agent Clark told Plaintiffs that they did not live in a flood zone and that flood insurance they would likely never use would run about $2,500.00 per year. When the Nasts asked Clark why others in their area were paying $400.00 per year for flood insurance, *i.e.* "FEMA rates," Clark's response was that a "shyster" had been selling flood insurance in the Nasts' neighborhood at those rates and that he hoped the Nasts' neighbors would not have to try to collect on the insurance. Based on the comments made by Clark, the Nasts decided not to purchase the cost-prohibitive $2,500.00 annual flood policy; shortly thereafter the Nasts' home flooded and they brought suit under the DTPA for the damage caused to their home inasmuch as they contended that they relied on Clark's representations in not purchasing coverage. The trial Court granted summary judgment in favor of State Farm and Clark and the Court of Appeals affirmed in part, reversed in part, and remanded the case to the trial Court. The Court of Appeals held, among other things, that Clark's statements to the Nasts ***were facts***, and thus, the insureds' [Nasts'] DTPA claim was not precluded on the ground that the statements constituted professional advice or opinion. The Court pointed out that the DTPA does not "apply to a claim for damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill." TEX. BUS. & COM. CODE § 17.49(c). The Court further states that: **(1)** to perform a professional service, which would not be covered by the DTPA, a professional must perform more than an ordinary task; **(2)** the task must arise out of acts particular to the individual's specialized vocation; and **(3)** an act is not a professional service merely because it is performed by a professional, rather, it must be necessary for the professional to use to use his or her specialized training. State Farm and Clark contended on appeal that Clark's comments constituted professional advice and opinion which precluded a claim for damages under the exception set forth above. The San Antonio Court of Appeals did not agree. The Court distinguished, in this instance, between fact and opinion. The Court held that whether or not the Nasts were eligible for FEMA flood insurance was a fact and could not be characterized as professional advice or opinion. Thus, the Court found Clark's statements to the Nasts to be an express misrepresentation of material fact actionable under the DTPA.

(3) ***Shooshtari v. Sweeten***, No. 13-01-00850-CV, 2003 Tex. App. WL21982225 (Corpus Christi Aug. 21, 2003, no pet. h.)(not designated for publication).

In *Sweeten*, former clients brought an action against accountants who gave them business start-up advice, alleging breach of fiduciary duty, negligence, and violations of the DTPA, after the accountants formed a similar business and began competing against the clients. The trial Court entered summary judgment in favor of the accountants and the clients appealed. With respect to § 17.49(c)'s exception for professional service which amounts to advice or opinion, the Corpus Christi Court of Appeals pointed out that absent evidence that the accountants' conduct resulted in unfairness that ***was glaringly noticeable, flagrant, complete, and unmitigated,*** the clients could not recover under the DTPA. *See Ins. Co. Of N. Am. v. Morris*, 981 S.W.2d 667,674 (Tex. 1998). The Court found that even though Sweeten had prepared Shooshtari's personal taxes from 1994 to 1997 and then later consulted for a start-up internet services company owned in part by Shooshtari did not rise to the level of unfairness that was noticeable, flagrant, complete, and unmitigated, which would subject Sweeten to damages under the DTPA.

(4) ***Head v. U.S. Inspect DFW, Inc.***, 159 S.W.3d 731 (Tex. App.—Fort Worth 2005, no writ).

In 1998 the FTW Living Trust purchased a home in Fort Worth for the benefit of the sole beneficiary of the Trust, Jacqueline Head. Head had several different inspections conducted on the home prior to purchase, one of them being an inspection of the roof by U.S. Inspect DFW, Inc. ("U.S. Inspect"). U.S. Inspect concluded that even though there was some evidence of visible water penetration, the roof was "performing its function as intended at this time." The Fort Worth Court of Appeals in *Head* found that the inspection report did not misrepresent "facts," rather than opinions, which entitled U.S. Inspect to invoke the professional services exemption found in DTPA § 17.49(c). The Court concluded that reports which characterize the fitness and/or condition of a particular thing can only be characterized as "opinion" and not "facts" within the meaning of the exemption. The Court further held that Head's complaint that U.S. Inspect was negligent in rendering erroneous opinions based upon an apprentice's unsupervised inspection, upon which she relied in purchasing the home, was an unsuccessful attempt to characterize the rendering of such services as an express misrepresentation of existing "fact." The Court agreed with U.S. Inspect that Head failed to raise a fact issue within the meaning of the exception for misrepresentations not constituting "judgment, advice, or opinion."

(5) ***Brennan v. Manning***, No. 07-06-0041-CV, 2007 Tex. App. WL1098476 (Amarillo April 12, 2007, no pet. h.)(not designated for publication).

The Appellant in *Brennan* hired Appellee and his law firm in 1995 to represent her in a divorce proceeding against an attorney specializing in personal injury litigation. Brennan's attorney, Manning, advised her that she was not entitled to an interest in any contingent or referral legal fees owed to her husband. Brennan contended on appeal that this erroneous legal advice resulted in her receiving an inadequate share of the marital estate. The Amarillo Court of Appeals thoroughly reviewed the current state of the law pertaining to the professional service exemption found in DTPA § 17.49(c). The Court pointed out that the professional services exemption found in the DTPA does not apply to: (1) an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion; (2) a failure to disclose information in violation of § 17.46(b)(24); (3) an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion; (4) breach of an express warranty that cannot be characterized as advice, judgment, or opinion; or (5) a violation of § 17.46(b)(26). The *Brennan* Court concluded that Appellant's claims were clearly based upon legal services provided to her by her attorney. The Court points out that conduct simply showing the failure to exercise that degree of care, skill, and diligence that an attorney of ordinary skill and knowledge would have exercised under the same or similar circumstances ***does not*** equate to an unconscionable act in violation of the DTPA, but instead, should be properly characterized as simple negligence. The Court upheld the trial court's ruling that Brennan's DTPA causes of action were barred by the professional services exemption.

(6) ***United Genesis Corp. v. Brown***, No. 04-06-00355-CV, 2007 Tex. App. WL1341358 (San Antonio May 9, 2007, no pet. h.)(not designated for publication).

United Genesis Corp. became interested in purchasing a fast food restaurant in the San Antonio area and hired the real estate brokerage firm of Bradfield Properties, Inc. ("Bradfield") to assist them. Bradfield located a restaurant called The Pizza Kitchen and United's president and Bradfield's agent met with Mohammad Rohim Qureshi, who claimed to be the owner of the restaurant through Qureshi Enterprises, Inc. Bradfield recommended that the parties use the Appellee (Brown) as escrow agent and closing attorney. Brown prepared a document titled "Escrow Instructions," a bill of sale, a non-competition agreement, an escrow money contract, a promissory note, and a security agreement. Brown did conduct a general index

search on the name of the purported seller and it revealed that there were no existing liens on any equipment in the restaurant. The day after the closing United realized that inventory was short, a computer was missing, and the overall appearance of the restaurant was poor. Shortly thereafter United began receiving collection letters and telephone calls and it became apparent that Qureshi had disappeared. At United's request Bradfield's agent performed a lien search in the name of Kazi & Qureshi Enterprises, Inc. after receiving mail at the restaurant listing that entity as the addressee. The lien search did reveal that a lien was secured by the Pizza Kitchen's equipment and further research revealed that Qureshi Enterprises, Inc. had forfeited its existence and lost its certificate of good standing. United contended in its lawsuit against Brown that he committed legal malpractice and violated the DTPA. The trial court granted Brown's no-evidence motion for summary in the malpractice issues and granted his traditional motion for summary judgment on United's DTPA claims. United appealed and the San Antonio Court of Appeals affirmed the trial court's ruling. With respect to the claims urged under the DTPA, the Court agreed with Brown that United's claims were barred by the exception found in § 17.49(c) of the TEX. BUS. & COM. CODE because the allegations against Brown were based on actions he *failed to take* in his rendition of professional services. In essence, the Court held that ***omissions*** are not express misrepresentations of material facts, but are arguably acts that Brown's legal knowledge or training should have prompted him to undertake. The Court further agreed with Brown that United's complaints were clearly based on omissions that required Brown to utilize his professional judgment and skill thereby rendering them professional services not subject to DTPA liability.

B. Implications of Professional Standards (such as the Statement on Standards for Consulting Services which became effective January 1, 1992, and the new Statement on Standards for Valuation Services to be effective January 1, 2008)

What if an accountant failed to comply with standards after affirmatively representing that services would be in accordance with such standards? Would this be an express warranty that cannot be characterized as advice, judgment, or opinion?

Texas requires a CPA publicizing a license to comply with applicable AICPA standards:

(1) Texas Occupations Code § 901.156. RULES OF PROFESSIONAL CONDUCT.

The board shall adopt rules of professional conduct to: (1) establish and maintain high standards of competence and integrity in the practice of public accountancy; and (2) ensure that the conduct and competitive practices of license holders serve the purposes of this chapter and the best interest of the public.

(2) Texas State Board of Public Accountancy Rule 501.62:

A certificate or registration holder in the performance of consulting services, accounting and review services, any other attest service, or tax services shall conform to the professional standards applicable to such services. For purposes of this section, such professional standards are considered to be interpreted by:

(1) Statements on Standards on Consulting Services (SSCS) issued by the American Institute of Certified Public Accountants;

(2) Statements on Standards for Accounting and Review Services (SSARS) issued by the American Institute of Certified Public Accountants;

(3) Statements on Standards for Attestation Engagements (SSAE) issued by the American Institute of Certified Public Accountants;

(4) Statements on Standards for Tax Services issued by the American Institute of Certified Public Accountants; or

(5) similar pronouncements by other entities having similar generally recognized authority.

Even without an express representation that services would be in accordance with AICPA standards, could failure to comply with such standards (because they are required by law) be an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion?

2. $100,000 exemption

3. $500,000 exemption

4. Bodily injury/death exemption

B. Is the Plaintiff really a consumer?

§ 17.45(4) Definitions

(4) "Consumer" means 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, 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.

C. Has the DTPA been validly waived?

§ 17.42(a) and (b) Waivers: Public Policy

(a) Any waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void; provided, however, that a waiver is valid and enforceable if:

(1) the waiver is in writing and is signed by the consumer;

(2) the consumer is not in a significantly disparate bargaining position; and

(3) the consumer is represented by legal counsel in seeking or acquiring the goods or services.

(b) A waiver under Subsection (a) is not effective if the consumer's legal counsel was directly or indirectly identified, suggested, or selected by a defendant or an agent of the defendant.

D. 60-day Notice, Inspection, Abatement

§ 17.505(a) and (c) Notice; Inspection

(a) As a prerequisite to filing a suit seeking damages under Subdivision (1) of Subsection (b) of Section 17.50 of this subchapter against any person, a consumer shall give written notice to the person at least 60 days before filing the suit advising the person in reasonable detail of the consumer's specific complaint and the amount of economic damages, damages for mental anguish, and expenses, including attorneys' fees, if any, reasonably incurred by the consumer in asserting the claim against the defendant. During the 60-day period a written request to inspect, in a reasonable manner and at a reasonable time and place, the goods that are the subject of the consumer's action or claim may be presented to the consumer.

(c) A person against whom a suit is pending who does not receive written notice, as required by Subsection (a), may file a plea in abatement not later than the 30th day after the date the person files an original answer in the court in which the suit is pending.

E. Can the consumer prove the case?

F. Are defensive attorneys' fees recoverable?

§ 17.50(c) Relief for Consumers

(c) On a finding by the court that an action under this section was groundless in fact or law or brought in bad faith, or brought for the purpose of harassment, the court shall award to the defendant reasonable and necessary attorneys' fees and court costs.

G. Mediation/Settlement

1. Mediation

§ 17.5051(a), (b), (c), (d), (e), and (f) Mediation

(a) A party may, not later than the 90th day after the date of service of a pleading in which relief under this subchapter is sought, file a motion to compel mediation of the dispute in the manner provided by this section.

(b) The court shall, not later than the 30th day after the date a motion under this section is filed, sign an order setting the time and place of the mediation.

(c) If the parties do not agree on a mediator, the court shall appoint the mediator.

(d) Mediation shall be held within 30 days after the date the order is signed, unless the parties agree otherwise or the court determines that additional time, not to exceed an additional 30 days, is warranted.

(e) Except as agreed to by all parties who have appeared in the action, each party who has appeared shall participate in the mediation and, except as provided by Subsection (f), shall share the mediation fee.

(f) A party may not compel mediation under this section if the amount of economic damages claimed is less than $15,000, unless the party seeking to compel mediation agrees to pay the costs of the mediation.

2. Tenders of settlement

§ 17.5052(a), (b), (c), and (d) Offers of Settlement

(a) A person who receives notice under Section 17.505 may tender an offer of settlement at any time during the period beginning on the date the notice is received and ending on the 60th day after that date.

(b) If a mediation under Section 17.5051 is not conducted, the person may tender an offer of settlement at any time during the period beginning on the date an original answer is filed and ending on the 90th day after that date.

(c) If a mediation under Section 17.5051 is conducted, a person against whom a claim under this subchapter is pending may tender an offer of settlement during the period beginning on the day after the date that the mediation ends and ending on the 20th day after that date.

(d) An offer of settlement tendered by a person against whom a claim under this subchapter is pending must include an offer to pay the following amounts of money, separately stated:

> (1) an amount of money or other consideration, reduced to its cash value, as settlement of the consumer's claim for damages; and
>
> (2) an amount of money to compensate the consumer for the consumer's reasonable and necessary attorneys' fees incurred as of the date of the offer.

3. Minimizing damages

§ 17.5052(g) Offers of Settlement

(g) If the court finds that the amount tendered in the settlement offer for damages under Subsection (d)(1) is the same as, substantially the same as, or more than the damages found by the trier of fact, the consumer may not recover as damages any amount in excess of the lesser of:

(1) the amount of damages tendered in the settlement offer; or

(2) the amount of damages found by the trier of fact.

IV. CONCLUSION

The DTPA is a treacherous, pro-plaintiff cause of action that gives consumers multiple bites at the apple and a potent opportunity to expose professionals such as CPAs to potential treble damage recoveries for misstatements or breaches of warranty, in spite of the so-called "professional exemption." The defenses are very limited and often unavailable entirely in many typical transactions. Since defensive attorneys' fees are almost always a sunk cost, early mediation and/or settlement can make a great deal of sense.

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