

Medical Professionals and the DTPA

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Introduction

Caps on noneconomic damages have frustrated medical malpractice lawyers who lament that their cases require several expert witnesses and that the costs associated with each expert witness is typically around \$100,000.¹ They argue that because of these costs, the \$250,000 cap on noneconomic damages makes medical malpractice claims simply unviable where a plaintiff cannot prove massive economic damages.² What if there were another way to recover damages from medical professionals?

Bringing a cause of action against a medical professional under the Texas Deceptive Trade Practices Act (“DTPA”)

is an attractive alternative because it allows recovery of economic damages³ and attorneys’ fees,⁴ as well as possible punitive and mental anguish damages.⁵ When Texas adopted the caps on noneconomic damages for tort claims in 2003, the legislature retained exemption in the Civil Practice and Remedies Code for physicians and other health care providers from some causes of action under the DTPA.⁶ The scope of this exemption may not, however, be as broad as some would assert. It has been argued that some claims against medical providers can escape the stranglehold that the Civil Practices and Remedies Code appears to have over “health care liability claims” and can be waged solely under a cause of action arising from the DTPA or a tie-in statute.⁷ This article identifies which claims against medical professionals are still feasible under the DTPA and provides some guidance for practitioners and the judiciary on how those claims should be handled.

A. Claims Precluded

The broadest and most confusing exemption medical professionals enjoy from DTPA claims is contained in the Texas Civil Practices and Remedies Code Chapter 74 (“Chapter 74”).⁸ Specifically, Chapter 74 states that “Sections 17.41–17.63, Business & Commerce Code [the DTPA provisions], do not apply to physicians or health care providers with respect to claims for damages for personal injury or death resulting, or alleged to have resulted, from negligence on the part of any physician or health care provider.”⁹ The term “health care provider” is defined to include registered nurses, dentists, podiatrists, pharmacists, chiropractors, optometrists, ambulatory surgical centers,



licensed assisted living facilities, emergency medical services providers, health services districts, home and community support services agencies, hospices, hospitals, hospital systems, intermediate care facilities for the mentally retarded, community-based services, waiver programs for persons with mental retardation, nursing homes, and licensed end-stage renal disease facilities.¹⁰

Chapter 74 is the protocol for bringing medical malpractice—or health care liability claims—against health care providers. The statute defines a “health care liability claim” as a:

[C]ause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant’s claim or cause of action sounds in tort or contract.¹¹

Claims that are determined to be health care liability claims carry with them the requirement of the submission of an expert report,¹² and are subject to caps on noneconomic damages.¹³ In order to avoid unnecessary expert reports and caps on noneconomic damages, those claims which may be waged under the DTPA rather than Chapter 74 should be carefully identified and appropriately—not artfully—pled.

The Texas Supreme Court has repeatedly held that plaintiffs cannot avoid Chapter 74 by recasting health care liability claims as other causes of action through artful pleading.¹⁴ In spite of its monolithic first impression, Chapter 74 carves out three circumstances where the DTPA *would* be applicable to health care providers and physicians: (1) where the cause of action is not negligence, (2) where the cause of action¹⁵ does not arise from personal injury or death, or (3) where the health care provider is a pharmacist.¹⁶

But Chapter 74 is not the only provision that deals with DTPA claims against a health care provider. An additional hurdle arises from the exemptions within the DTPA. Most significantly, the DTPA has its own exemption in section 17.49 for causes of action for bodily injury or death,¹⁷ and a claim for damages arising from the rendering of professional services where the “essence” of the service is “advice, judgment, opinion, or similar professional skill.”¹⁸ The DTPA also exempts claims where the consideration paid by the consumer is over \$500,000,¹⁹ and where, the cause of action arises from a claim where the consideration is over \$100,000 and there is a written contract.²⁰

Given the cumulative effect of these constraints, pursuing a DTPA claim that involves personal injury or death seems, at the outset, daunting if not impossible. As will be demonstrated below, such an impression is misguided—there are claims that may be successfully waged against medical professionals under the DTPA.

B. Preclusions, Exceptions, and Exemptions

1. Civil Practices and Remedies Code §§ 74.001(a)(13) & 74.004

Before its codification in the Texas Civil Practices and Remedies Code, Chapter 74 was part of the Medical Liability and Insurance Improvement Act passed by the Texas Legislature in 1977 as Article 4590i of the Texas Revised Civil Statutes (“Article 4590i”)²¹ in response to a perceived medical malpractice insurance crisis.²² In *Sorokolit v. Rhodes*,²³ the Texas Supreme Court

had its first opportunity to evaluate a DTPA claim made against a physician, which challenged Article 4590i’s scope.²⁴ When Rhodes sought Dr. Sorokolit’s services, Sorokolit directed her to select a picture of a nude model and promised that her surgically augmented breasts would look just like the ones she had selected.²⁵ After surgery, her breasts were not as Sorokolit had promised, and Rhodes brought an action under the DTPA alleging violations of the specific set of violations enumerated by the DTPA (“laundry list”²⁶); that Sorokolit had breached an express warranty; and that he had breached the implied warranty of performance of services “in a good and workmanlike manner.”²⁷ The court reasoned that Article 4590i did not preclude a DTPA claim against a physician so long as “the underlying nature of the claim” was not negligence, and that a court is not limited to the form of the pleading to make that determination.²⁸ Because the underlying nature of Rhodes’ claims was not negligence and “section 12.01(a) [of Article 4590i] . . . does not preclude suits under the DTPA for knowing misrepresentation or breach of express warranty in cases in which a physician or health care provider warrants a particular result,” Rhodes was allowed to bring her claims under the DTPA.²⁹

While *Sorokolit v. Rhodes* has continued vitality,³⁰ subsequent decisions have eroded its central holding.³¹ A year after *Sorokolit*, in *Walden v. Jeffery*³² and *Gormley v. Stover*,³³ the Texas Supreme Court tempered the principle that a cause of action against a medical professional is still viable under the DTPA, emphasizing that the underlying nature of the claim cannot be negligence. In *Walden*, the court rejected the claim of a dental patient who claimed that her dentures did not fit “as promised.”³⁴

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The court argued that Jeffery’s “ill-fitting dentures cannot be [the result of] anything other than . . . neglig[ence],” and held that her cause of action was merely an attempt to “recast her negligence claim as a DTPA claim.”³⁵ The *Walden* court reiterated the principle that, where goods are provided as an inseparable part of the rendition of medical services, no implied warranties are conveyed.³⁶ *Gormley* is a similar case, in which the court considered whether representations made by a dentist concerning his course of surgical action, the expected quality of his services, the anticipated discomfort and pain after surgery, and a referral to another dentist who would fit the plaintiff with dentures which would “fit well” could constitute a deceptive trade practice or whether they were merely claims of negligence.³⁷ The *Gormley* court characterized the plaintiff’s claims as having to do with the “selection of the surgical procedure and performance of it” and whether such selection and performance “met the standard of care for dentists in such circumstances.”³⁸ The court held that the underlying nature of such allegations was negligence and, as such, was nothing more than an attempt to recast a “malpractice claim as a DTPA action.”³⁹

The most significant interpretation of the standard articulated in *Sorokolit* was enunciated in *MacGregor Medical Association v. Campbell*.⁴⁰ In *MacGregor*, the plaintiff’s husband ingested formaldehyde, and she accompanied him to the defendant’s clinic.

One of the member-doctors of the defendant-association treated Mr. Campbell, assumed that he had vomited all of the formaldehyde out of his system, and sent him and his wife home without providing any further treatments other than to recommend that he take Maalox to relieve his discomfort. Eight months later, after experiencing continued severe problems, Campbell was treated by another physician who removed his entire stomach. In spite of two subsequent treatments, Campbell died two weeks after his stomach was removed. Mrs. Campbell brought claims under the DTPA asserting: (1) breach of express warranties MacGregor had made verbally and in HMO literature representing “that it would provide ‘qualified personnel and resources,’ ‘the best health services possible’ and emergency service ‘24 hours a day, even in a distant city;” (2) that Mr. Campbell needed immediate care, and that no doctor saw him for almost an hour; (3) that defendant misrepresented to them that Mr. Campbell was “medically fine” and needed only to take Maalox; and (4) that defendants did not advise them about risks associated with ingesting formaldehyde.⁴¹ The court distinguished between Mrs. Campbell’s claims, which it indicated were not viable, and the claims in *Sorokolit*, which were viable, by stating: “These allegations are unlike those in *Sorokolit* in which the doctor specifically guaranteed and warranted a particular result.”⁴² The court went on to indicate that “the essence of Campbell’s DTPA claim” was negligence, and that *Sorokolit* prohibits the recasting of a negligence claim as a DTPA claim.⁴³

The next contribution to this body of law came a year after the *MacGregor* decision in *Earle v. Ratliff*.⁴⁴ Ratliff sustained a back injury at work and was treated by Dr. Earle, who performed surgery and inserted AcroMed brand metal bone plates and screws.⁴⁵ The metal bone plates and screws were eventually removed and replaced, but Ratliff became unable to walk, talk, or take care of himself.⁴⁶ After Ratliff saw a television report about AcroMed instrumentation,⁴⁷ he sued Earle.⁴⁸ Among other claims, Ratliff’s DTPA cause of action alleged that Earle had represented that: he needed surgery, “he would get 95% better,” the AcroMed devices were safe, and that the pain would subside.⁴⁹ The court indicated the “gist” of Ratliff’s allegations was that Earle’s choice and performance of surgical procedures did not abide by the proper standard of care rather than that an express representation was breached.⁵⁰ Such a claim, the court concluded, “sounds only in negligence.”⁵¹

In 2003, the Texas Legislature modified health care liability laws to again address the medical crisis.⁵² Specifically, the modifications imposed tighter procedural standards: filing and maintenance requirements for professional liability lawsuits were heightened, the statute of limitations was shortened, and tolling was restricted.⁵³ The modification also imposed substantive restrictions—damages were capped.⁵⁴ The language of Article 4590i sections 1.03(a)(4) (defining “health care liability claim”) and section 12.01(a) (the exception of the DTPA provisions to physicians and health care providers with respect to personal injury or death damages resulting from negligence) were re-codified in the Civil Practice and Remedies Code⁵⁵ without substantial modification.⁵⁶ Since recodification, the Texas Supreme Court has not accepted an opportunity to review a DTPA claim against a medical professional.⁵⁷

One further Texas Supreme Court case provides an integral piece of guidance on the topic of discerning a health care liability claim from any other cause of action. In *Diversicare General Partnership v. Rubio*,⁵⁸ the court expounded upon the circumstances that lend themselves to a cause of action being characterized as a health care liability claim.⁵⁹ As defined by Chapter 74, a health care liability claim is “a cause of action against a health care provider or physician if it is based on a claimed departure from

standards for medical care, health care, or safety of the patient, whether the action sounds in tort or contract.”⁶⁰ The court clarified this definition, noting, “[a] cause of action alleges a departure from accepted standards of medical care or health care if the act or omission complained of is an inseparable part of the rendition of medical services.”⁶¹ Furthermore, reliance on expert testimony to prove a claim may be considered to determine whether a cause of action is distinct from the rendering of medical care or health care services.⁶²

More recently, the intermediate courts of appeals have had opportunities to evaluate DTPA claims against medical professionals, and most of these have been found to be health care liability claims.⁶³ At least one court, however, has been willing to entertain the idea that not all claims against physicians and health care providers are health care liability claims. In *Mills v. Pate*,⁶⁴ the El Paso Court of Appeals observed the plaintiff had produced evidence that her liposuction doctor had represented to her that, “(1) she was a suitable candidate for surgery; (2) after liposuction surgery, she would look beautiful and that she would have smooth skin without ripples, bulges, or bags.”⁶⁵ These representations were coupled with evidence that the services she received “did not conform to the character and quality of the services described” and that she had sustained injuries.⁶⁶ Such evidence, the court concluded, raised a genuine issue of material fact as to the elements of the plaintiff’s breach of express warranty claim.⁶⁷ The court held that the doctor’s representations were not inseparable from the plaintiff’s negligence claims and that the claim did not require a determination about whether the doctor failed to meet accepted standards of medical care.⁶⁸ Thus, the plaintiff’s cause of action under the DTPA was viable.⁶⁹

The above discussion shows a somewhat challenging set of impediments a cause of action under the DTPA must surmount to survive. Basically, the underlying nature of the claim, or its “gist,” cannot be negligence.⁷⁰ The act or omission complained of must not be an inseparable part of the rendition of medical services.⁷¹ With regard to warranties, the warranty itself must be express,⁷² must not relate to the selection of medical procedures or the performance thereof,⁷³ and must generally be a warranty where the health care provider or physician guarantees a particular result.⁷⁴ Furthermore, a warranty that may otherwise be actionable as it relates to goods will fail as against a health care provider or physician defendant where the goods were an inseparable part of the rendition of medical services.⁷⁵ With these principles in mind, it begins to become clear which claims survive the fatal classification under Chapter 74. As illustrated below, however, surviving Chapter 74 is not the only obstacle for a DTPA cause of action against a medical professional.

2. The DTPA Exemptions

In addition to the precluding effect Chapter 74 has over many prospective DTPA claims, the DTPA itself includes several exemptions. The DTPA exempts causes of action for bodily injury or death,⁷⁶ as well as claims for damages arising from the rendering of professional services where the “essence” of the service is “advice, judgment, opinion, or similar professional skill,”⁷⁷ claims where the consideration paid by the consumer is over \$500,000,⁷⁸ and, given certain circumstances, where the consideration is over \$100,000.⁷⁹ The plain language of these exemptions can be somewhat confusing, and it becomes worthwhile to understand precisely what is—and what is not—actionable given these exemptions.

Section 17.49(e) provides that the DTPA does not “apply to a cause of action for bodily injury or death or for the infliction of mental anguish” except as provided by sections 17.50(b) and (h).⁸⁰ Section 17.50(b) sets out the standards for assessing

damages in a DTPA action,⁸¹ and section 17.50(h) sets out the standard for damages where a “claimant is granted the right to bring a cause of action under [the DTPA] by [a tie-in statute].”⁸² In 1995, the legislature chose to exclude certain claims for death and bodily injury because “the DTPA had become an avenue for far too many lawsuits relating to a variety of claims outside the consumer-business relationship, including personal injury litigation.”⁸³ Since then, it has been suggested that “in light of the fact that 17.50(b) and (h) are the only remedial provisions in the DTPA, it is difficult to see what this exemption really applies to.”⁸⁴ It seems obvious from a plain reading of the statute and the legislative intent expressed by its authors⁸⁵ that no assessment of damages for bodily injury or death can be supported in a DTPA action, except to the extent that they may be properly characterized as economic or mental anguish damages.⁸⁶ Nevertheless, some DTPA claims inevitably involve personal injury or death where mixed with other claims.⁸⁷ There is nothing to suggest that an action may not seek recovery for violations of the DTPA and for damages for other causes of action, which may include damages for personal injury or death, so long as no such damages are sought in connection with a violation of the DTPA.⁸⁸ What then materializes is that is of paramount importance that a practitioner be able to prove and disprove economic damages, mental anguish damages, in the event the cause of action is brought pursuant to a tie-in statute actual damages,⁸⁹ as these are the only damages recoverable under the DTPA, and the basis upon which the treble damages are to be assessed.⁹⁰

Another significant pitfall within the DTPA is its exemption relating to advice or opinions. Section 17.49(c) states that “[n]othing in this subchapter shall apply to a claim for damages based on the rendering of a professional service, the essence of which is providing advice, judgment, opinion, or some similar professional skill.”⁹¹ This exemption is an affirmative defense, and a defendant wishing to invoke it must plead it “because it is a plea of confession and avoidance.”⁹² Importantly, express misrepresentations of material fact, breaches of express warranties, and unconscionable courses of conduct “that cannot be characterized as advice, judgment, or opinion” are not exempted.⁹³ The exemption also does not apply where a professional fails to disclose information that he is aware of at the time of the transaction in order to induce the consumer into a transaction the consumer otherwise would not have entered into.⁹⁴ Thus, even the provider of a professional service is liable under the DTPA for most laundry list violations, breach of warranty, and unconscionability. While it has been observed that “no physician has invoked the Professional Services Exemption, presumably because physicians need look no further than [Chapter 74],”⁹⁵ it is foreseeable that they may begin to do so if practitioners successfully employ the standards this article outlines.

The first step in applying this exemption is to determine what a professional service is and when the essence of that professional service is advice, judgment, or opinion.⁹⁶ Turning to the first question, it is clear that physicians almost always provide a professional service.⁹⁷ It is clear that there is no definition of “professional” in Texas—either in statute or in case law—and that identifying other, non-physician, medical service providers as providing a professional service can be a slippery undertaking.⁹⁸ In *Nast v. State Farm Fire & Casualty Co.*,⁹⁹ the Fourth Court of Appeals stated that a professional service is something other than an ordinary task and that, “[t]o qualify as a professional service, the task must arise out of acts particular to the individual’s specialized vocation.”¹⁰⁰ Furthermore, a professional service is more than a

service performed by a professional: the professional must utilize specialized knowledge or training.¹⁰¹

Beyond a determination of whether a service is a professional service, it is noteworthy that the exemption applies only to those professional services the essence of which is “advice, judgment, or opinion.”¹⁰² While there is little guidance on this subject, care should be exercised in ascertaining whether the professional service in question is one which requires advice, judgment, or opinion, and, if not, that the exemption does not apply.¹⁰³ Additionally, as noted above, there are numerous “exceptions” to the exemption that should permit a legitimate claim against a medical professional.¹⁰⁴

Yet another relevant set of exemptions within the DTPA are its own caps on the consideration paid by the consumer. Section 17.49(g) specifies that the DTPA shall not apply to “a cause of action arising from a transaction, a project, or a set of transactions relating to the same project, involving a total consideration by the consumer of more than \$500,000, other than a cause of action involving a consumer’s residence.”¹⁰⁵ Section 17.49(f) is more restrictive, barring a cause of action arising from a written contract if: (1) the consideration by the consumer is more than \$100,000; (2) the consumer is represented by an attorney

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who was not identified, suggested, or selected by the defendant or the defendant’s agent; and (3) “the contract does not involve the consumer’s residence.”¹⁰⁶ These figures may seem only remotely applicable to a DTPA claim against a medical professional, but, with the rising costs of health care,¹⁰⁷ these exemptions could become increasingly relevant. Neither exemption has yet received the attention of the Texas Supreme Court, and guidance from the intermediate courts of appeals is sparse.

In *Citizens National Bank v. Allen Rae Investments, Inc.*,¹⁰⁸ the Second Court of Appeals considered section 17.49(g) and whether a plaintiff who owed \$463,193.45 of a \$600,000 note involved “consideration by the consumer of more than \$500,000.”¹⁰⁹ The court observed that the exemption was added “to maintain the DTPA as a viable source of relief for consumers who encounter and are harmed by unscrupulous business practices, [while] remov[ing] from the scope of the Act [] litigation between big businesses.”¹¹⁰ The court ultimately sidestepped deciding whether “consideration” included promises to incur a detriment in the future, concluding that the consideration was already over \$500,000, because \$22,006.08 was interest paid, \$122,096.81 was paid at closing, and \$463,193.45 of principal and interest had accrued when the note holder had foreclosed.¹¹¹ The court was convinced that the consideration paid or accrued was over \$500,000, and, therefore, the DTPA could not apply.¹¹² In the Second Court of Appeals’ subsequent opinion in *East Hill Marine v. Rinker Boat Co.*,¹¹³ the court cited *Allen Rae* for the principle that “the purpose of [17.49(g)] is to maintain the DTPA as a viable source of relief for consumers in small transactions and to remove litigation between businesses over large transactions from the scope of the DTPA.”¹¹⁴

The Fourteenth Court of Appeals is, to date, the only intermediate court of appeals to consider the implications of section 17.49(f). In *Tribble & Stephens Co. v. RGM Constructors, L.P.*,¹¹⁵

the court considered whether an attorney's stipulation at deposition that a subcontract form had been prepared by an attorney could be construed to mean that a party had been represented by legal counsel in negotiating the contract.¹¹⁶ Such a suggestion, the court concluded, would give "the term 'negotiate' as used in the statute little or no meaning, recognizing the fact that most form contracts are reviewed and approved by attorneys."¹¹⁷

The exemptions limiting consideration involved are likely to touch upon only the most expensive surgeries, hospital stays, and, possibly, long-term care.¹¹⁸ It therefore becomes wise for hospitals, surgeons, and long-term care providers to implement policies that maximize their potential to fall within the exemption—a reality that may have both favorable and unfavorable consequences. For example, a long-term care provider which anticipates that a given patient may be in its care for three years or more may require that patient to be represented by legal counsel when the contract is negotiated, thereby improving the bargaining position of the patient, but at a cost. Additionally, such an exemption creates an incentive for hospitals to inflate prices beyond

interpretation that includes all warranties and representations.¹²³ This inclusive definition lies in direct contradiction with a plain reading of the statute and the definition of the term "representation."¹²⁴ Better authority states that the term indicates the nature of a contractual relationship: where "[a] physician [] contracts to effect a cure or a specific result, and is contractually liable for a breach of this undertaking."¹²⁵ The saving grace for most practitioners has been that, where a defendant wishes to invoke the statute of frauds, it must be pleaded as an affirmative defense.¹²⁶

C. Advice for the Careful Practitioner

1. Causes of Action

The careful practitioner should scrutinize a cause of action much like a court will, and both will be wary to discern valid DTPA claims from health care liability claims. From the outset, the practitioner must keep in mind that the question surrounding whether a claim is a health care liability claim or a viable DTPA claim is a question of law.¹²⁷ Obviously, an argument regarding a question of law is directed to the court, and the practitioner will need to be able to articulate the relevant case law quickly, clearly, and briefly before the court in order to prevail.¹²⁸ This section discusses the pertinent principles both for evaluating a claim to determine whether it is viable and for prevailing in an argument before a court that has taken up the question of whether a claim is a health care liability claim.

As discussed above, in the context of medical services, the DTPA provides relief for misrepresentations specifically enumerated in the laundry list,¹²⁹ breach of express warranties,¹³⁰ and unconscionable courses of conduct.¹³¹ Additionally, several statutes—known as "tie-in statutes"—provide that violations thereof constitute deceptive trade practices and entitle claimants to bring their cause of action under the DTPA.¹³²

The cases discussed above involve primarily claims for breach of express warranty and misrepresentation.¹³³ It, therefore, becomes important to be able to distinguish between representations that give rise to misrepresentation claims and express warranties that give rise to breach of warranty claims. This distinction can be precarious, as sometimes the two overlap.¹³⁴ Recognition of the ways in which the two may be created is therefore helpful.

"The concept of warranty does not lend itself to simple definition."¹³⁵ While the Uniform Commercial Code ("UCC") does not directly apply to services, the Texas Supreme Court has adopted the standards articulated for express warranties from the UCC and applied them in the services context.¹³⁶ Therefore, express warranties are affirmations of fact or promises that relate to the goods, descriptions of the services, or samples of the services that become part of the basis of the bargain.¹³⁷ Misrepresentations are assertions that are not in accord with the facts.¹³⁸ Otherwise stated, a misrepresentation is a false statement that is usually spoken or written, but may also be "inferred from conduct other than words."¹³⁹ Either way, the important characteristic of a misrepresentation is that the assertion is either false at the time it is made or is an assertion relating to future quality that does not become part of the basis of the bargain.¹⁴⁰ Express warranties, when manifested as assertions, are assertions related to the goods or services which have become part of the basis of the bargain which are not yet false and only become false when the warranty is breached. Although it is possible to distinguish warranties from misrepresentations, in many cases a statement serves as both. For example, a representation that a car has a rebuilt engine, when in fact it does not, may form the basis for an express warranty, as well as a DTPA misrepresentation.



the \$500,000 mark wherever possible in order to avoid DTPA liability.

None of these exemptions should be thought to reduce the potency of the DTPA as a means of providing redress for deceptive acts. The principles that damages can not be recovered in a DTPA action for personal injury or death¹¹⁹ and that some professional services do not form the basis of a DTPA violation serve only to support the idea that the Act is designed to provide redress only for the violations enumerated.¹²⁰ The limits on consideration paid by the consumer are straightforward, and, given the fact that only the most expensive surgeries and long-term care are affected, will not affect most DTPA claims.

3. The Statute of Frauds

In *Sorokolit*, the court noted "the possible application of the statute of frauds in [cases involving DTPA claims against health care providers or physicians] when properly raised by a defendant as an affirmative defense."¹²¹ The applicable statute requires "an agreement, promise, contract or warranty of cure relating to medical care or results thereof made by a physician or health care provider as defined in section 74.001" to be in writing and signed by the defendant or an agent of the defendant.¹²² Confining the statute to express warranties and representations, it is worth noting that Texas law does not define the term "warranty of cure." However, there is some authority that supports an

A breach of warranty also may be difficult to discern, as distinguished from a negligence claim under tort law.¹⁴¹ A contractual relationship creates duties that may sound both in contract and in tort,¹⁴² and either kind of relationship may be strictly a health care liability claim.¹⁴³ While the actions of a party may breach duties created by the common law, voluntarily assumed obligations, or both, “the nature of the injury most often determines which duty or duties are breached.”¹⁴⁴ It is important, however, to remember that Texas does not recognize an implied warranty with regard to the performance of medical services.¹⁴⁵ With regard to breach of warranty claims, the careful practitioner should: (1) decline opportunities to represent clients whose cause of action arises from any implied warranty;¹⁴⁶ and (2) recognize, as the cases demonstrate, that *only a breach of an express warranty where the medical professional warrants a particular result remains a viable breach of warranty claim* in light of Chapter 74.¹⁴⁷ Care must be exercised with regard to the warranty itself—only warranties about a particular result unrelated to the selection of incidental medical goods¹⁴⁸ and the selection of a procedure or the performance thereof¹⁴⁹ can be successful. Furthermore, the “essence” of the claim should not be negligence,¹⁵⁰ and the wrongful act or omission should be characterized as one that was not an inseparable part of the rendition of medical services.¹⁵¹ These are the keys to the proper characterization of a claim as a breach of warranty claim against a medical professional under the DTPA.

While misrepresentations may be identified more readily, only misrepresentations that are not an inseparable part of the rendition of medical services escape status as a health care liability claim, and should be pursued under the DTPA.¹⁵² Consideration of these claims should involve a high degree of assiduity, as the prevalence of puffery may work to undermine such a claim: “[m]isrepresentations, so long as they are of a material fact and not merely ‘puffing’ or opinion, are . . . actionable.”¹⁵³ What is clear is that the misrepresentations which the DTPA is designed to provide redress for are the only ones which a practitioner should agree to represent, because the DTPA already specifically enumerates the misrepresentations which would not be determined to be health care liability claims.¹⁵⁴

The major concern for one asserting a misrepresentation claim against a medical professional is the fact that damages must be proven to have been caused by the misrepresentation.¹⁵⁵ By way of example, it seems obvious that a doctor who advertised that she was board-certified in a given area of specialization but was, in fact, not board-certified would be found to have misrepresented that her skills had “sponsorship, approval, and specific characteristics” or that she had “sponsorship, approval, status, affiliation, or connection” which she did not have.¹⁵⁶ A problem could be created where, in order to prove damages, an expert is called upon to provide testimony that the misrepresentation was the producing cause of the economic damages.¹⁵⁷ If not carefully scrutinized, such evidence could inadvertently establish that a doctor failed to exercise the ordinary standard of care that an ordinary board-certified doctor would exercise—the kind of evidence more akin to a claim of negligence than to a deceptive trade practice.¹⁵⁸ However, in order to prove that the misrepresentation was the producing cause of the damages, “[expert] testimony is not required . . . where the alleged acts and injuries are plainly within the common knowledge of laymen.”¹⁵⁹ To the extent possible, expert testimony establishing causation should be avoided.¹⁶⁰ Where it cannot be avoided, the practitioner must: (1) be able to articulate the concept that the need for expert testimony, in itself, is not dispositive proof that a claim is a health care liability claim;¹⁶¹ and (2) ensure that the expert employed will not reduce the causal relationship between the misrepresentation and the injuries to a breach of any given standard of care.¹⁶²

Consider also a situation where a doctor represents that a certain result will occur or the patient will receive corrective treatment at no charge, and the doctor subsequently presents a bill for correcting the first treatment.¹⁶³ In such a situation, no expert witness will be required to testify that the reason the patient suffered economic damages *for the subsequent procedure* was because the doctor had misrepresented that the subsequent procedure would be performed at no cost. Note, however, that the representation is similar to a warranty—it is a promise. Nevertheless, recall that express warranties, when manifested as affirmations or promises, relate to the goods or services.¹⁶⁴ Characterization as a misrepresentation in this set of facts is appropriate.

When compared with claims against medical professionals for breach of warranty and misrepresentation, claims that a medical professional committed an unconscionable course of conduct are rarely undertaken.¹⁶⁵ The DTPA acknowledges a cause of action for unconscionable courses of conduct,¹⁶⁶ which it defines as an action that “takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree” to the consumer’s detriment.¹⁶⁷ To be “grossly unfair,” the conduct must have been “glaringly noticeable, flagrant, complete, and unmitigated.”¹⁶⁸ Aside from this noticeably vague language, courts have considered the vulnerability of the plaintiff to the defendant.¹⁶⁹ An “unconscionable action is more than negligent conduct.”¹⁷⁰ Additionally, before 1995, an alternative definition for “unconscionable course of action” included a price-value disparity.¹⁷¹ Although the current statute does not include that alternative definition, “gross disparity between the value received and consideration paid” may be evidence that the plaintiff has suffered from unconscionable conduct.¹⁷² While expert testimony may be required to establish that there is a gross disparity between the consideration paid by a medical patient and the value received, that expert testimony would not deal with whether or not the medical professional’s conduct was in accord with any given standard of care.¹⁷³ It, therefore, seems exceedingly likely that such claims brought as unconscionable courses of conduct could be viable as DTPA claims and not health care liability claims.¹⁷⁴

Also of interest to the careful practitioner are the provisions that are “tied” to the DTPA—the “tie-in” statutes. A violation of these statutes is a violation of the DTPA and is actionable under the DTPA provisions, save for one important distinction.¹⁷⁵ What makes these causes of actions exceptionally attractive is that a successful plaintiff whose cause of action arises from a tie-in statute is entitled to recover “actual” rather than solely “economic” damages.¹⁷⁶ The term “actual damages” has been defined to include any damages recoverable at common law.¹⁷⁷ The term generally includes mental anguish, loss of consortium, and pain and suffering.¹⁷⁸ If the defendant’s conduct was committed knowingly or intentionally, treble damages may then be assessed in an amount not exceeding three times the amount of actual damages.¹⁷⁹

There are three tie-in statutes that touch upon the medical services arena. The most notable and most relevant to a discussion about DTPA causes of action against medical professionals is Texas Occupations Code section 351.604.¹⁸⁰ That subsection provides a cause of action under the DTPA against optometrists where the optometrist practices without a license, fails to disclose that a prescription is required to buy glasses or contacts in advertising, fails to disclose whether the costs of the optometrist’s services are included in the price of the glasses or contacts, advertises glasses or contacts without limiting the time-period during which the advertised price is valid or that quantities are limited, or dispenses glasses or contacts without a valid prescription.¹⁸¹ The other two tie-in statutes relating to the present conversation are Texas Occupations Code section 401.501, which

provides that speech-pathologists and audiologists who practice without licenses are liable under the DTPA,¹⁸² and Chapter 74 itself which allows recovery under the DTPA when physicians or health care providers compel their patients to execute arbitration agreements regarding health care liability claims without requisite statutory verbiage.¹⁸³

Understanding the causes of action provided for by the DTPA is fundamental to bringing a claim against a medical professional. The ability to distinguish between express warranties which warrant a particular result¹⁸⁴ and the misrepresentations enumerated by the Act which are not an inseparable part of the rendition of medical services¹⁸⁵ ensures that a practitioner is able to efficiently evaluate a client's cause of action and determine whether it will be actionable. The rarely pursued claim that a medical professional has engaged in an unconscionable course of conduct is another powerful tool at the disposal of the practitioner in an area of law that is still developing. Finally, tie-in statutes and their allowance for actual damages¹⁸⁶ are a welcome retreat from DTPA violations that are confined to economic and mental anguish damages.¹⁸⁷

Conclusion

Although litigants may not recast health care liability claims as a violation of the DTPA through artful pleading,¹⁸⁸ where the gist of a DTPA cause of action is not negligence,¹⁸⁹ and where the cause of action does not arise from personal injury or death,¹⁹⁰ claims may be asserted against health care providers without implicating Chapter 74. The cause of action will be viable as long as it arises from a misrepresentation enumerated in the laundry list which is not an inseparable part of the rendition of medical services,¹⁹¹ an express warranty where the health care provider warrants a particular result,¹⁹² an unconscionable course of conduct which cannot be characterized as a breach of the standard of care,¹⁹³ or a violation of one of the DTPA's tie-in statutes.¹⁹⁴

The obstacles presented in the form of exemptions within the DTPA likewise may be avoided. The exemption contained in section 17.49 for causes of action for bodily injury or death¹⁹⁵ is of little consequence in light of the violations the Act it is designed to provide a remedy for. The DTPA's professional services exemption should not affect a DTPA claim because claims actionable under the DTPA will fit with the statute's "exceptions to the exemption," and also may not involve a service the "essence" of the service is "advice, judgment, opinion, or similar professional skill."¹⁹⁶ Finally, the DTPA's exemptions regarding consideration paid by the consumer¹⁹⁷ is straightforward, and, considering the cost of most medical procedures, should only affect medical services at the highest price points.

It has thus been observed that a careful practitioner, invoking the principles outlined in this article, should be able to wage successful DTPA claims against medical professionals. Admittedly, the unique set of peculiarities involved with bringing such a cause of action requires a high degree of concentration. However, avoiding caps on noneconomic damages, unnecessary expert witnesses, and miscategorization or neutralization of legitimate consumer claims are legitimate justifications for such a weighty undertaking.

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1. Terry Carter, *Tort Reform Texas Style*, 92-OCT A.B.A. J., 2006, at 30, 31 available at http://www.abajournal.com/magazine/article/new_laws_and_med_mal_damage_caps_devastate_plaintiff_and_defense_firms_alik.

2. Rachel Zimmerman and Joseph T. Hallinan, *Life Values: As Malpractice Caps Spread, Lawyers Turn Away Some Cases*, WALL ST. J., Oct. 8, 2004 at A1.

3. See TEX. BUS. & COM. CODE ANN. § 17.46(11) (West 2002) (defining economic damages as "compensatory damages for pecuniary loss, including costs of repair and replacement" but not including "exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship or society").

4. Successful DTPA plaintiffs are entitled to recover "reasonable and necessary attorneys' fees." TEX. BUS. & COM. CODE ANN. § 17.50(d) (West 2002). For a general discussion of the DTPA, see, RICHARD ALDERMAN, *THE LAWYER'S GUIDE TO THE TEXAS DECEPTIVE TRADE PRACTICES ACT 2d* (2010); see also Richard M. Alderman, *The Texas Deceptive Trade Practices Act 2005 Still Alive and Well*, 8 J. TEX. CONSUMER L. 74, 84 (2005), available at <http://www.jtexconsumerlaw.com/V8N2pdf/V8N2deceptive.pdf> (interpreting that "[b]y using the word 'shall' this section makes it clear that the award of attorneys' fees to a prevailing plaintiff is not optional . . . even if the consumer's entire recovery of damages is offset by a claim of the defendant").

5. The Texas Deceptive Trade Practices Act is codified as TEX. BUS. & COM. CODE ANN. § 17 (West 2002). As shall be discussed, the DTPA allows for recovery of economic damages (defined as "compensatory damages for pecuniary loss . . . not includ[ing] exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society"). TEX. BUS. & COM. CODE ANN. § 17.45(11) (West 2002). If a deceptive trade act or practice is committed knowingly, the plaintiff may recover mental anguish damages and punitive damages in an amount not to exceed three times the economic damages; if it is committed intentionally, the punitive award may increase to up to three times the combined amount of economic and mental anguish damages. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (West 2002).

6. TEX. CIV. PRAC. & REM. CODE ANN. § 74.004 (West 2005). But see Richard M. Alderman, *The Business of Medicine—Health Care Providers, Physicians, and the Deceptive Trade Practices Act*, 26 HOUS. L. REV. 109, 141 (1989) (expressing, at an early stage, doubt that this exception would impact many DTPA claims). Professor Alderman explained:

[B]y its terms the DTPA is concerned with "false, misleading, or deceptive acts or practices," "breach of warranty" and "any unconscionable action or course of action." Theoretically, a DTPA action should never be one "resulting from negligence." In fact, this provision may not affect any legitimate claims of those DTPA cases which would be brought against a physician or health care provider.

Richard M. Alderman, *The Business of Medicine—Health Care Providers, Physicians, and the Deceptive Trade Practices Act*, 26 HOUS. L. REV. 109, 141 (1989).

7. See Richard M. Alderman, *Texas Consumer Law*, 62–67 (2009–2010 Ed.).

8. Glen M. Wilkerson, et al, *Analysis of Recent Attempts to Assert Medical Negligence Claims "Outside" Texas's Article 4590i*, 20 REV. LITIG. 657, 671 (2001) ("The burdens and prohibitions of [what is

now Chapter 74 of the Texas Civil Practices and Remedies Code] are onerous and apply to any allegation that falls within [the] definition of a “health care liability claim . . . [I]f the underlying nature of the plaintiff’s claim is in reality a health care liability claim, then [Chapter 74] applies—regardless of the legal theory pleaded by the plaintiff”).

9. TEX. CIV. PRAC. & REM. CODE ANN. § 74.004 (West 2005).

10. TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(12) (West 2005).

11. TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13) (West 2005).

12. See TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (West 2005) (detailing that an expert report must be served on all parties no later than 120 days after the original petition is filed and describing the standards for expert status and the requirements which the report must include).

13. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.301, 74.303 (West 2005) (setting the caps on noneconomic damages at \$250,000 per claimant unless more than one health care institution is involved, and then capping noneconomic damages at \$500,000 per claimant; in the event of death, all non-medical expenses are capped at \$500,000).

14. *Diversicare Gen. P’ship, Inc. v. Rubio*, 185 S.W.3d 842, 845 (Tex. 2005); *Murphy v. Russell*, 167 S.W.3d 835, 839 (Tex. 2005); *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 546 (Tex. 2004); see also *Scientific Image Ctr. Mgmt., Inc. v. Brewer*, 282 S.W.3d 233, 237 (Tex. App.—Dallas 2009, pet. denied) (citing *Diversicare, Murphy*, and *Garland* for the proposition that “plaintiffs cannot, through artful pleading, avoid the strictures now codified in chapter 74 by recasting health care liability claims as other causes of action”).

15. See Glen M. Wilkerson, et al, *Analysis of Recent Attempts to Assert Medical Negligence Claims “Outside” Texas’s Article 4590i*, 20 REV. LITIG. 657, 664 (2001) (arguing that the two main ways a plaintiff can avoid classification under Chapter 74 are where the cause of action is not negligence and does not arise from personal injury or death). To account for these first two propositions, Wilkerson states that:

There are two basic arguments that plaintiff’s counsel can assert to show that a claim does not fall within the purview of Article 4590i [which has, since this article was written, been recodified as Chapter 74] and thus is not subject to this article’s procedural and substantive requirements. First, a plaintiff’s counsel can assert that the entity or person sued is not a “health care provider” or a “physician” as defined [by Chapter 74]. Second, a plaintiff’s counsel could assert that, although a plaintiff has made a claim against a physician or health care provider, the claim is not a “health care liability claim” as defined by [Chapter 74], and therefore is not governed by the statute’s requirements.

Glen M. Wilkerson, et al, *Analysis of Recent Attempts to Assert Medical Negligence Claims “Outside” Texas’s Article 4590i*, 20 REV. LITIG. 657, 664 (2001).

16. TEX. CIV. PRAC. & REM. CODE ANN. § 74.004(b) (West 2005) (“This section does not apply to pharmacists”).

17. See TEX. BUS. & COM. CODE ANN. § 17.49(e) (West 2002) (indicating that “except as specifically provided by Subsections (b) and (h), section 17.50, nothing in this subchapter shall apply to a cause of action for bodily injury or death or for the infliction of mental anguish”). Professor Alderman, however, argues that:

A plain reading of this provision makes it clear that a claim for personal injury is within the scope of the

DTPA, as long as it is within the provisions of section 17.50(b) or (h). In other words, only those claims that are outside of section 17.50(b) and (h) are exempt from the Act. In light of the fact that sections 17.50(b) and (h) are the only remedial provisions in the DTPA, it is difficult to see what this exemption really applies to. In fact, the exemption serves just one important purpose. The exemption makes it clear that recoverable damages arising out of a personal injury claim are limited to those specifically authorized by the language of the Act.

Richard M. Alderman, *The Texas Deceptive Trade Practices Act 2005 Still Alive and Well*, 8 J. TEX. CONSUMER L. 74, 77 (2005), available at <http://www.jtexconsumerlaw.com/V8N2pdf/V8N2deceptive.pdf>. It then becomes worthwhile, since many DTPA claims are initiated by a decedent’s estate, to acknowledge that there exists a decades-old split of authority among the courts of appeals about whether a DTPA claim survives the death of the consumer. See *Launius v. Allstate Ins. Co.*, No. 3:06-CV-0579-B, 2007 WL 1135347, at *3 (N.D. Tex. Apr. 17, 2007) (recognizing the split of authority). In 1982, the First Court of Appeals announced, without explanation, that a DTPA cause of action survives to both the consumer’s heirs and the representative of the estate. *Mahan Volkswagen, Inc. v. Hall*, 648 S.W.2d 324, 333 (Tex. App.—Houston 1982, writ ref’d n.r.e.). Two years later, in *First National Bank of Kerrville v. Hackworth*, the Fourth Court of Appeals held that DTPA actions do not survive the death of the consumer because the representative of an estate is not a “consumer,” the DTPA does not expressly provide for survival actions, and because the punitive nature of the DTPA’s treble damages are purely personal, and, at common law, such actions did not survive the death of the aggrieved party. *First Nat’l Bank of Kerrville v. Hackworth*, 673 S.W.2d 218, 220–21 (Tex. App.—San Antonio 1984, no writ). The Second Court of Appeals adopted the alternative view four years later in *Thomas v. Porter*, where, the court held that DTPA claims survive death on that basis that the Act should “be liberally construed,” contract and fraud claims survived death at common law, and because “[t]o hold otherwise would be to ignore the intent of the legislature in enacting the DTPA and to allow violators to escape the intent just because their victims had the misfortune of dying.” *Thomas v. Porter*, 761 S.W.2d 592, 594 (Tex. App.—Fort Worth 1988, no writ). The Fourth Court of Appeals was unconvinced that the holding in *Thomas* was correct, and has rejected it twice. See *Mendoza v. American Nat’l Mut. Ins. Co.*, 932 S.W.2d 605, 609 (Tex. App.—San Antonio 1996, no writ) (echoing the court’s holding in *Hackworth*); *Lukasik v. San Antonio Blue Haven Pools, Inc.*, 21 S.W.3d 394, 402 (Tex. App.—San Antonio 2000, no pet.) (declining to adopt *Thomas*, stating that “we find no compelling reason to now overrule *Mendoza*”). The Texas Supreme Court has withheld judgment on this issue twice. See *PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P’ship*, 146 S.W.3d 79, 91 (Tex. 2004) (stating that “[b]ecause only an assignment is before us, we do not decide whether DTPA claims survive to a consumer’s heirs”); *Shell Oil Co. v. Chapman*, 682 S.W.2d 257, 259 (Tex. 1984) (reserving “to another day discussion of survival of DTPA damages.”). In 1992, in *Wellborn v. Sears, Roebuck & Co.*, the Fifth Circuit certified the question to the Texas Supreme Court, 970 F.2d 1420, 1427 (5th Cir. 1992), but “the Texas Supreme Court has not yet put forward an answer.” *Launius v. Allstate Ins. Co.*, No. 3:06-CV-0579-B, 2007 WL 1135347, at *3 (N.D. Tex. Apr. 17, 2007) (concluding, via an *Erie* guess, that the Texas Supreme Court “would find that a consumer’s cause of action under the DTPA does not survive the death of the consumer and cannot be brought by a representative of the consumer’s estate.”).

The bulk of available authority, however, suggests that DTPA actions do not survive the death of the consumer. See Kirby v. B.I. Inc., No. 4:98-CV-1136-Y, 2003 U.S. Dist. LEXIS 16964, at *46 (N.D. Tex. Sept. 26, 2003) (agreeing with *Lukasik, Mendoza, and Hackworth* that a DTPA claim does not survive the death of the consumer). This conclusion is in keeping with the rule that, in the absence of a statute, the test most commonly used to determine survivability is whether or not the cause of action may be assigned. *Harding v. State Nat'l Bank of El Paso*, 387 S.W.2d 768, 769 (Tex. Civ. App.—El Paso 1965, no writ). It is well settled that DTPA claims are not generally assignable. *PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 92 (Tex. 2004).

18. TEX. BUS. & COM. CODE ANN. § 17.49(c) (West 2002). The professional services exemption, however, does not apply in several very significant circumstances as will be discussed in detail later in this article. See generally David Skeels, *The DTPA's Professional Services Exemption: Let 'Em be Doctors and Lawyers and Such*, 55 BAYLOR L. REV. 783, 821–26 (2003) (discussing how the five DTPA exceptions allow plaintiffs to circumvent the professional services exemption in some circumstances).

19. TEX. BUS. & COM. CODE ANN. § 17.49(g) (West 2002).

20. TEX. BUS. & COM. CODE ANN. § 17.49(f) (West 2002). In order to qualify for this exemption, the consumer must have paid less than \$100,000 in consideration, been represented by legal counsel not “identified, suggested or selected by the defendant,” and the contract must not involve the consumer’s residence.

21. Act of Aug. 29, 1977, 65th Leg., ch. 817, 1977 Tex. Gen. Laws 2039, repealed by Acts 2003, 78th Leg., ch. 204, § 10.01, eff. Sept. 1, 2003.

22. Glen M. Wilkerson, et al, *Analysis of Recent Attempts to Assert Medical Negligence Claims “Outside” Texas’s Article 4590i*, 20 REV. LITIG. 657, 657 (2001).

23. *Sorokolit v. Rhodes*, 889 S.W.2d 239 (Tex. 1994).

24. *Id.* See Glen M. Wilkerson, et al, *Analysis of Recent Attempts to Assert Medical Negligence Claims “Outside” Texas’s Article 4590i*, 20 REV. LITIG. 657, 671 (2001) (indicating that *Sorokolit* was the Texas Supreme Court’s first opportunity to address an assertion that a claim was outside the scope of article 4590i).

25. *Id.* at 240.

26. The laundry list is a codified part of the DTPA. TEX. BUS. & COM. CODE ANN. § 17.46(b)(1–27) (West 2002).

27. *Sorokolit v. Rhodes*, 889 S.W.2d 239, 240 (Tex. 1994). In particular, Rhodes alleged that *Sorokolit* had violated TEX. BUS. & COM. CODE ANN. §§ 17.46(b)(5), (7), and (20) (West 2002) amidst her claim for breach of express and implied warranties pursuant to TEX. BUS. & COM. CODE ANN. § 17.50(a)(2) (West 2002). *Sorokolit v. Rhodes*, 889 S.W.2d 239, 240 (Tex. 1994). Rhodes did not appeal the intermediate court’s determination that her breach of implied warranty claim was barred, and it is highly unlikely that she would have prevailed on that basis. *Sorokolit v. Rhodes*, 889 S.W.2d 239, 241 (Tex. 1994). This is because, as Texas law has developed, the judiciary has refused to recognize an implied warranty of performance of professional services in a good and workmanlike manner. See *Murphy v. Campbell*, 964 S.W.2d 265, 268 (Tex. 1997) (acknowledging that “Texas law does not recognize a cause of action for breach of an implied warranty of professional service”); *Dennis v. Allison*, 698 S.W.2d 94, 96 (Tex. 1985) (“It is not necessary to impose an implied warranty theory as a matter of public policy because the plaintiff patient has adequate remedies to redress wrongs committed during treatment.”). Furthermore, where products are provided as an inseparable part of a medical service, implied warranties do not apply. *Walden v. Jeffery*, 907 S.W.2d 446, 448 (Tex. 1995). If Texas did recognize an implied warranty to perform services

in a good and workmanlike manner in the medical services arena, the ramifications would be startling—the standard which would be imposed upon medical professionals under a theory of implied warranty of professional services is indistinguishable from the standard which would be imposed under a negligence claim. Compare *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 352–54 (Tex. 1987) (stating that the standard for an implied warranty to perform services in a good and workmanlike manner is that those services must be performed with a minimum standard of care as would a generally proficient professional in similar circumstances), with *20801, Inc. v. Parker*, 249 S.W.3d 392 (Tex. 2008) (indicating the standard in negligence cases is “the doing of that which a person of ordinary prudence would not have done under the same or similar circumstances, or the failure to do that which a person of ordinary prudence would have done under the same or similar circumstances”). Note, however, that Texas law *does* recognize an implied warranty of good and workmanlike performance of services where those services involve the modification of “existing tangible goods.” See *Rocky Mountain Helicopters, Inc. v. Lubbock Cnty. Hosp. Dist.*, 987 S.W.2d 50, 52–53 (Tex. 1998) (stating that an implied warranty is recognized for services when those services relate to the “repair or modification of existing tangible goods or property” and may also arise “under the common law when public policy mandates”); *Archibald v. Act III Arabians*, 755 S.W.2d 84, 85 (Tex. 1988) (“In [*Melody Home*], we recognized that an implied warranty of good and workmanlike performance applies to services involving the repair or modification of existing tangible goods or property”); *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 354 (1987) (holding that “an implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner is available to consumers suing under the DTPA”). But see *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 361 (Tex. 1987) (Gonzales, J., concurring) (“What I fear the court has done under the name of public policy is convert an otherwise simple contract or negligence claim into an indefinite implied warranty claim which will make every trial . . . a battle of conflicting experts.”).

28. *Sorokolit v. Rhodes*, 889 S.W.2d 239, 242–43 (Tex. 1994).

29. *Id.* at 243.

30. See, e.g., Richard M. Alderman, *The Texas Deceptive Trade Practices Act in Context: Not All That Bad*, CTR. CONSUMER L. (Friday, October 23, 2009), at *11 available at <http://www.law.uh.edu/peopleslawyer/consumer-law-basics/presentations/RichardAlderman-paper.pdf>. (citing *Sorokolit v. Rhodes* for the proposition that “a physician who makes a misrepresentation of fact is not exempt” from liability under the DTPA).

31. See Glen M. Wilkerson, et al, *Analysis of Recent Attempts to Assert Medical Negligence Claims “Outside” Texas’s Article 4590i*, 20 REV. LITIG. 657, 672–74 (2001) (examining the lineage of cases subsequent to *Sorokolit v. Rhodes*).

32. *Walden v. Jeffery*, 907 S.W.2d 446 (Tex. 1995).

33. *Gormley v. Stover*, 907 S.W.2d 448 (Tex. 1995).

34. *Walden v. Jeffery*, 907 S.W.2d 446, 447 (Tex. 1995).

35. *Id.* at 448.

36. *Id.*

37. *Gormley v. Stover* 907 S.W.2d 448, 449 (Tex. 1995).

38. *Id.* at 450.

39. *Id.*

40. *MacGregor Med. Ass’n v. Campbell*, 985 S.W.2d 38 (Tex. 1998).

41. *Id.* at 40.

42. *Id.*

43. *Id.* at 41.

44. *Earle v. Ratliff*, 998 S.W.2d 882 (Tex. 1999).

45. *Id.* at 884.

46. *Id.*

47. *Id.* For an example of the type of negative attention AcroMed had attracted at the time Ratliff began his litigation, see Milt Freudenheim, *\$112 Million Offered to End Legal Claims on Spine Pins*, N.Y. TIMES, Dec. 10, 1996, at A20 (reporting that AcroMed had agreed to a settlement with thousands of patients who claimed their back pain worsened after insertion of AcroMed products).

48. *Earle v. Ratliff*, 998 S.W.2d 882, 884 (Tex. 1999).

49. *Id.*

50. *Id.* at 892–93.

51. *Id.*

52. See *Diversicare Gen. P'ship, Inc. v. Rubio*, 185 S.W.3d 842, 846 (Tex. 2005) (memorializing that the legislature had responded to a crisis which “had a material effect on the delivery of medical and health care in Texas”).

53. *Id.* at 846–47.

54. *Id.*

55. TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.001(a)(13); 74.004 (West 2005). The definition of “health care liability claim” under § 74.001(a)(13) was modified to include “or professional or administrative services directly related to health care” among the list of accepted standards of care, and section 74.004 was modified only grammatically. Compare Act of Aug. 29, 1977, 65th Leg., R.S., ch. 817, 1977 Tex. Gen. Laws 2039 secs. 1.03(a)(4), 12.01(a) (defining health care liability claim without reference to “or safety or professional or administrative services directly related to health care,” and stating that “no provisions [of the DTPA] shall apply to physicians or health care providers as defined in section 1.03(3) of this Act”) with TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.001(a)(13); 74.004 (West 2005) (defining health care liability claim by including “or safety or professional or administrative services directly related the health care,” and stating that “[the DTPA provisions] do not apply to physicians or health care providers”).

56. *Diversicare Gen. P'ship, Inc. v. Rubio*, 185 S.W.3d 842, 846 n.1 (Tex. 2005); TEX. CIV. PRAC. & REM. CODE ANN. § 74 (West 2005).

57. *But see* *Murphy v. Russell*, 167 S.W.3d 835, 839 (Tex. 2005) (noting that because plaintiffs' allegations all had to do with whether administration of anesthetic met the applicable standard of care, plaintiffs' DTPA claims were health care liability claims). The *Murphy* court predicated its holding by disclaiming that it was “not called upon to determine whether section 12.01 of former article 4590i bars the applicability of the DTPA to these claims.” *Murphy v. Russell*, 167 S.W.3d 835, 839 (Tex. 2005). The court evaluated the plaintiff's claims in terms of whether a pretrial expert report was required pursuant to article 4590i. *Murphy v. Russell*, 167 S.W.3d 835, 839 (Tex. 2005). The conclusion of the court impliedly acknowledges the possibility that a cause of action may be both a health care liability claim and a DTPA claim—a possibility that lies in direct contradiction with TEX. CIV. PRAC. & REM. CODE ANN. § 74.002 (West 2005), which states that Chapter 74 prevails where there are conflicts of laws, and the court's subsequent holdings. See *Diversicare Gen. P'ship v. Rubio*, 185 S.W.3d 842, 848–49 (Tex. 2005) (indicating that where the facts which give rise to a bona fide health care liability claim are the same as those which give rise to another claim, the claim is a health care liability claim, and what is now Chapter 74 prevails). Additionally, the DTPA's cumulative recovery provision makes it clear that a plaintiff may not seek recovery for both a DTPA violation and the violation of another law stemming from “same act or practice.” TEX. BUS. & COM. CODE ANN. § 17.43 (West 2002). To the extent that *Murphy* is inconsistent with *Diversicare*, *Murphy* should be disregarded; such a limitation is appropriate, and was suggested by disclaiming what the court was not called upon to decide in *Murphy*. *But see* *Hunsucker v.*

Fustok, 238 S.W.3d 421, 429 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (“*Murphy* clarified that health care liability claims and claims under some other theory, such as the DTPA or breach of contract, are not mutually exclusive; meaning that claims may be both.”). Assuming that one allegedly culpable act can not be both a DTPA claim and a health care liability claim, it seems clear that a DTPA claim can arise from a series of facts and coexist with a health care liability claim. See Richard M. Alderman, *The Business of Medicine—Health Care Providers, Physicians, and the Deceptive Trade Practices Act*, 26 HOUS. L. REV. 109, 143 (1989) (anticipating, at an early stage, that article 4590i would not preclude health care liability claims from coexisting with other claims). Professor Alderman contends that:

The bottom line to physician/health care provider liability under the DTPA is that if the DTPA has been violated, liability should lie, *unless* it is clear that the *sole producing cause* of the patient's injuries was the negligence of the defendant. In other cases, for example, where there is a misrepresentation and a negligent act, DTPA liability should not be precluded and damages that were ‘produced’ by the DTPA violation should be recoverable.

Richard M. Alderman, *The Business of Medicine—Health Care Providers, Physicians, and the Deceptive Trade Practices Act*, 26 HOUS. L. REV. 109, 143 (1989) (emphasis at original).

58. *Diversicare Gen. P'ship, Inc. v. Rubio*, 185 S.W.3d 842 (Tex. 2005).

59. *Id.* at 848.

60. *Id.*

61. *Diversicare Gen. P'ship, Inc. v. Rubio*, 185 S.W.3d 842, 848 (Tex. 2005).

62. *Id.* See also *San Antonio Extended Med. Care, Inc. v. Vazquez*, No. 04-09-00546-CV, 2010 WL 2099213, at *2 (Tex. App.—San Antonio May 26, 2010, no pet. h.) (quoting *Diversicare Gen. P'ship, Inc. v. Rubio*, 185 S.W.3d 842, 848 (Tex. 2005); *Murphy v. Russell*, 167 S.W.3d 835, 838 (Tex. 2005)). In *Vazquez*, the Fourth Court of Appeals articulated that:

A cause of action against a health care provider is a health care liability claim . . . if it is based on a claimed departure from an accepted standard of medical care, health care, or safety of the patient, whether the action sounds in tort or contract. A cause of action alleges a departure from accepted standards of medical care or health care if the act or omission complained of is an inseparable part of the rendition of medical services. The necessity of expert testimony from a medical or health care professional may be a factor in determining whether a claim is an inseparable part of the rendition of medical or health care services. However, the fact that expert testimony may not ultimately be necessary to support a verdict does not necessarily mean the claim is not a health care liability claim.

San Antonio Extended Med. Care, Inc. v. Vazquez, No. 04-09-00546-CV, 2010 WL 2099213, at *2 (Tex. App.—San Antonio May 26, 2010, no pet. h.) (Internal citations omitted).

63. See, e.g., *Parker v. Simmons* 248 S.W.3d 860, 864 (Tex. App.—Texarkana 2008, no pet.) (determining that dentist's recommendation and fabrication of “snap-on dentures” was a health care liability claim); *Lee v. Boothe*, 235 S.W.3d 448, 451–52 (Tex. App.—Dallas 2007, pet. denied) (noting that Interlasik patient had a health care liability claim in spite of doctor's express

representations that procedure would be “virtually pain free,” and would cost nothing if 20/20 vision did not result); *Hunsucker v. Fustok*, 238 S.W.3d 421, 429 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (finding plaintiff’s claims that a doctor had breached an express representation not to perform a course of action were health care liability claims because such a claim was inseparable from the rendering of health care services).

64. *Mills v. Pate*, 225 S.W.3d 277 (Tex. App.—El Paso 2006, no pet.). In *Mills*, the plaintiff sought relief for breach of an express warranty without associating it with the DTPA. *Mills v. Pate*, 225 S.W.3d 277, 283 (Tex. App.—El Paso 2006, no pet.). She was, however, entitled to bring her cause of action under the DTPA. See TEX. BUS. & COM. CODE ANN. § 17.50(a)(2) (West 2002) (providing relief to consumers for breach of express warranties). *Mills* chose to pursue a cause of action for breach of an express warranty outside the DTPA probably because she believed she could recover personal injury damages as relief for the breach. Plaintiff’s Fifth Amended Petition at 4, *Mills v. Pate*, No. 2003-297 (346th Dist. Ct., El Paso County, Tex., Sept. 6, 2007), 2007 WL 4774491. Additionally, it is possible that *Mills* worried that her claim would not survive the DTPA’s two-year statute of limitations, and elected to pursue a contract claim—subject to a four-year statute of limitations—because she began treatment in November of 1999 and filed suit on January 23, 2002. *Mills v. Pate*, 225 S.W.3d 277, 281–83 (Tex. App.—El Paso 2006, no pet.).

65. *Mills v. Pate*, 225 S.W.3d 277, 289 (Tex. App.—El Paso 2006, no pet.).

66. *Id.* at 289–90.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Sorokolit v. Rhodes*, 889 S.W.2d 239, 243 (Tex. 1994); *MacGregor Med. Ass’n v. Campbell*, 985 S.W.2d 38, 41 (Tex. 1998); *Earle v. Ratliff*, 998 S.W.2d 882, 892–93 (Tex. 1999). See also *Latham v. Castillo*, 972 S.W.2d 66, 69 (Tex. 1998) (distinguishing the plaintiff’s DTPA claim from what the defendant argued was a negligence, in the context of a DTPA claim against an attorney). In *Latham*, the court acknowledged that the distinction of paramount consequence was that the complaint alleged deceptive conduct rather than negligent conduct. *Latham v. Castillo*, 972 S.W.2d 66, 69 (Tex. 1998).

71. *Diversicare Gen. P’ship, Inc. v. Rubio*, 185 S.W.3d 842, 848 (Tex. 2005).

72. *Murphy v. Campbell*, 964 S.W.2d 265, 268 (Tex. 1997).

73. *Gormley v. Stover* 907 S.W.2d 448, 450 (Tex. 1995).

74. *Sorokolit v. Rhodes*, 889 S.W.2d 239, 243 (Tex. 1994).

75. *Walden v. Jeffery*, 907 S.W.2d 446, 448 (Tex. 1995).

76. TEX. BUS. & COM. CODE ANN. § 17.49(e) (West 2002).

77. TEX. BUS. & COM. CODE ANN. § 17.49(c) (West 2002).

78. TEX. BUS. & COM. CODE ANN. § 17.49(g) (West 2002).

79. TEX. BUS. & COM. CODE ANN. § 17.49(f) (West 2002).

80. TEX. BUS. & COM. CODE ANN. § 17.49(e) (West 2002). The term “economic damages” is defined by the DTPA as “compensatory damages for pecuniary loss . . . not includ[ing] exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.” TEX. BUS. & COM. CODE ANN. § 17.45(11) (West 2002). The term “mental anguish” is not defined by the DTPA, and the Texas Supreme Court has indicated that:

The term “mental anguish” implies a relatively high degree of mental pain and distress. It is more than mere disappointment, anger, resentment or embarrassment, although it may include all of these. It includes a mental sensation of pain

resulting from such painful emotions as grief, severe disappointment, indignation, wounded pride, shame, despair and/or public humiliation.

Parkway Co. v. Woodruff, 901 S.W.2d 434, 444 (Tex. 1995). In order to satisfy evidentiary requirements to support a mental anguish damages award, a plaintiff must describe “the nature, duration, and severity of their mental anguish, thus establishing a substantial disruption in the plaintiff’s daily routine.” *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995). If no direct evidence is available, a court applies traditional “no evidence” standards in determining whether there is any evidence of “‘a high degree of mental pain and distress’ that is ‘more than mere worry, anxiety, vexation, embarrassment, or anger to support the mental anguish award.’” *Latham v. Castillo*, 972 S.W.2d 66, 70 (Tex. 1998) (quoting *Parkway v. Woodruff*, 901 S.W.2d 434, 444). Furthermore, successful DTPA litigants may recover mental anguish damages without first being entitled to economic damages. *Latham v. Castillo*, 972 S.W.2d 66, 69 (Tex. 1998).

81. TEX. BUS. & COM. CODE ANN. § 17.50(b) (West 2002). Section 17.50(b) provides that successful plaintiffs may recover economic damages and, where the trier of fact finds that the violation was committed knowingly, the plaintiff may also recover mental anguish damages plus up to three times the amount economic damages; and, where the trier of fact finds that the violation was committed intentionally, the plaintiff may recover mental anguish damages plus up to three times the combined amount of economic damages and mental anguish damages. TEX. BUS. & COM. CODE ANN. § 17.50(b) (West 2002).

82. TEX. BUS. & COM. CODE ANN. § 17.50(h) (West 2002).

83. Teel Bivins et al., *The 1995 Revisions to the DTPA: Altering the Landscape*, 27 TEX. TECH. L. REV. 1441, 1448 n.33 (1996).

84. Richard M. Alderman, *The Texas Deceptive Trade Practices Act 2005 Still Alive and Well*, 8 J. TEX. CONSUMER L. 74, 77 (2005), available at <http://www.jtexconsumerlaw.com/V8N2pdf/V8N2deceptive.pdf>.

85. Senate Comm. on Economic Dev., Bill Analysis, Tex. H.B. 668, 74th Leg. R.S. (1995) (indicating that “the DTPA has become an avenue for numerous lawsuits, making the application of the DTPA inconsistent with the original intent.”).

86. See *Last v. Quail Valley Country Club, L.P.*, No. 01-08-00759-CV, 2010 WL 1253782, at *7 (Tex. App.—Houston [1st Dist.] March 25, 2010, pet. denied) (affirming denial of personal injury damages to a plaintiff who brought a DTPA action where he had been thrown off a mechanical bull); *Akin v. Bally Total Fitness Corp.*, No. 10-05-00280-CV, 2007 WL 475406, at *4 (Tex. App.—Waco March 27, 2007, pet. denied) (holding that defendant’s motion for summary judgment was improperly granted where plaintiff’s estate sought recovery under the DTPA for lost wages and mental anguish where plaintiff drowned in a pool at a health spa). Bringing a cause of action under the DTPA through a tie-in statute generally allows for recovery of “actual damages,” which, at least theoretically, includes pain and suffering and loss of consortium. TEX. BUS. & COM. CODE ANN. § 17.50(b) (West 2002). See generally Richard M. Alderman, *The Texas Deceptive Trade Practices Act 2005 Still Alive and Well*, 8 J. TEX. CONSUMER L. 74, 77 (2005), available at <http://www.jtexconsumerlaw.com/V8N2pdf/V8N2deceptive.pdf>. (arguing, by way of example, that if a claimant’s cause of action arises from a tie-in statute, that claimant is entitled to “actual damages” and may then pursue damages for pain and suffering and loss of consortium in addition to those damages characterized by the DTPA as “economic damages.”). In practice, however, courts have reached surprising conclusions. See, e.g., *DiGangi v. 24 Hour Fitness USA, Inc.*, No. 05-04-01119-CV, 2005 WL 1367945, at *3 (Tex. App.—Dallas

June 10, 2005, no pet.) (rejecting personal injury damages to a plaintiff pursuing recovery under a tie-in statute on the basis that the statute was intended to prevent misleading advertising).

87. See, e.g., *Earle v. Ratliff*, 998 S.W.2d 882, 884 (Tex. 1999) (describing that the plaintiff sued for negligence, fraudulent concealment, strict liability, and DTPA violations); *MacGregor Med. Ass'n v. Campbell*, 985 S.W.2d 38, 39 (Tex. 1998) (reciting that the plaintiff brought negligence and DTPA claims); *Gormley v. Stover*, 907 S.W.2d 448, 449 (Tex. 1995) (stating that the plaintiff brought negligence and DTPA causes of action); *Sorokolit v. Rhodes*, 889 S.W.2d 239, 240 (Tex. 1994) (indicating that the plaintiff claimed relief for medical malpractice and DTPA violations).

88. The DTPA's cumulative recovery provision states that the redress afforded by the DTPA is not exclusive, and is "in addition to any other procedures or remedies provided for in any other law." TEX. BUS. & COM. CODE ANN. § 17.43 (West 2002). The only restriction placed upon the plaintiff is that she may not pursue damages both under another law and the DTPA "for the same act or practice." TEX. BUS. & COM. CODE ANN. § 17.43 (West 2002).

89. *But see DiGangi v. 24 Hour Fitness USA, Inc.*, No. 05-04-01119-CV, 2005 WL 1367945, at *3 (Tex. App.—Dallas June 10, 2005, no pet.) (denying the personal injury portion of an actual damages award to a plaintiff pursuing recovery under a tie-in statute on the basis that the statute was intended to prevent misleading advertising). Since *DiGangi* has not been significantly cited by any court in Texas, it is yet unclear whether the plain language of the section 17.50(h), which seems to clearly state—without reservation—that a plaintiff whose cause of action arises from a tie-in statute is entitled to all actual damages, will prevail over the Fifth Court of Appeals' interpretation of the general intent of the Health Spa Act. *But see Hartford Lloyd's Ins. Co. v. Apothecure, Inc.*, No. 3:08-CV-0228-P, slip op. at 6 (N.D. Tex. Jan. 20, 2010) (citing *DiGangi* for the principle that in order "to bring a DTPA action for bodily injury, there must be another law that (1) authorizes suit under the DTPA, [] and (2) the tie-in statute affords a right of action for bodily injury").

90. TEX. BUS. & COM. CODE ANN. § 17.50 (West 2002).

91. TEX. BUS. & COM. CODE ANN. § 17.49(c) (West 2002).

92. See TEX. R. CIV. P. 94 (requiring defendants to plead affirmative defenses and avoidances); *Finger v. Ray*, No. 01-09-00404-CV, 2010 WL 3061673, at *11 (Tex. App.—Houston [1st Dist.] Aug. 5, 2010, no pet. h.) (stating that "the professional services exemption 'is properly characterized as an affirmative defense that must be pleaded because it is a plea of confession and avoidance.") (quoting *Head v. U.S. Inspect DFW, Inc.*, 159 S.W.3d 731, 740 (Tex. App.—Fort Worth 2005, no pet.)). If not pleaded, however, an affirmative defense may still serve as a basis for summary judgment where it is raised in a summary judgment motion and the opposing party does not object to lack of proper pleadings either in a written response or before the rendition of judgment. *Roark v. Stallworth Oil & Gas, Inc.* 813 S.W.2d 492, 494 (Tex. 1991).

93. TEX. BUS. & COM. CODE ANN. § 17.49(c)(1), (3) (West 2002).

94. See TEX. BUS. & COM. CODE ANN. § 17.49(c)(2) (West 2002) (stating that "this exemption does not apply to . . . a violation of section 17.46(b)(24)."). Section 17.46(b)(24) is in the laundry-list, and states that "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" is a deceptive trade practice. TEX. BUS. & COM. CODE ANN. § 17.46(b)(24) (West 2002).

95. David Skeels, *The DTPA's Professional Services Exemption: Let 'Em be Doctors and Lawyers and Such*, 55 BAYLOR L. REV. 783, 809 (2003).

96. *Id.* at 803–17.

97. See Richard M. Alderman, *The Texas Deceptive Trade Practices Act 2005 Still Alive and Well*, 8 J. TEX. CONSUMER L. 74, 77 (2005), available at <http://www.jtexconsumerlaw.com/V8N2pdf/V8N2deceptive.pdf>. (stating that "[a]lthough most transactions will have to be individually evaluated[,] . . . it is expected that most services provided by . . . physicians . . . will be classified as 'professional' within the scope of this exemption."); see also David Skeels, *The DTPA's Professional Services Exemption: Let 'Em be Doctors and Lawyers and Such*, 55 BAYLOR L. REV. 783, 806–07 (2003) (indicating that physicians were specifically mentioned by the legislators who enacted this exemption); *In re R & C Petroleum*, 236 B.R. 355, 361 (Bankr. E.D. Tex. 1999) (observing that "the Texas Deceptive Trade Practices Act, as supported by the case law, clearly excludes professional services providers such as . . . doctors . . .").

98. For an interesting approach, see David Skeels, *The DTPA's Professional Services Exemption: Let 'Em be Doctors and Lawyers and Such*, 55 BAYLOR L. REV. 783, 813 (2003). Skeels advocates adopting the federal standard then elucidated in the federal Fair Labor Standards Act ("FLSA") of 1938, which used a set of standards to determine whether a given individual is a professional. David Skeels, *The DTPA's Professional Services Exemption: Let 'Em be Doctors and Lawyers and Such*, 55 BAYLOR L. REV. 783, 813 (2003). The standards that Skeels advocates for no longer appear in the FLSA. 29 U.S.C. §§ 201–219 (2010).

99. 82 S.W.3d 114 (Tex. App.—San Antonio 2002, no pet.).

100. *Nast v. State Farm Fire & Cas. Co.*, 82 S.W.3d 114, 122 (Tex. App.—San Antonio 2002, no pet.) (quoting *Atlantic Lloyd's Ins. Co. v. Susman Godfrey, LLP*, 982 S.W.2d 472, 476 (Tex. App.—Dallas 1998, pet. denied).

101. *Nast v. State Farm Fire & Cas. Co.*, 82 S.W.3d 114, 122 (Tex. App.—San Antonio 2002, no pet.).

102. TEX. BUS. & COM. CODE ANN. § 17.49(c) (West 2002).

103. Richard M. Alderman, *The Texas Deceptive Trade Practices Act 2005 Still Alive and Well*, 8 J. TEX. CONSUMER L. 74, 77 (2005), available at <http://www.jtexconsumerlaw.com/V8N2pdf/V8N2deceptive.pdf>. Professor Alderman argues, by way of example, that a real estate agent who is hired to perform property valuation and sales recommendations would be exempt, and a real estate agent who is hired merely to add a listing to a listing service and advertise a home for sale would not be exempt. Richard M. Alderman, *The Texas Deceptive Trade Practices Act 2005 Still Alive and Well*, 8 J. TEX. CONSUMER L. 74, 77 (2005), available at <http://www.jtexconsumerlaw.com/V8N2pdf/V8N2deceptive.pdf>. Like-minded advocates may wish to recount the sentiment of section 17.44, which states that the DTPA should be "liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure protection." TEX. BUS. & COM. CODE ANN. § 17.50(a)(1)(A) (West 2002).

104. Richard M. Alderman, *The Texas Deceptive Trade Practices Act 2005 Still Alive and Well*, 8 J. TEX. CONSUMER L. 74, 77 (2005), available at <http://www.jtexconsumerlaw.com/V8N2pdf/V8N2deceptive.pdf>. Indeed, Alderman goes so far as to conclude that "[a] general malpractice claim, based entirely on a professional's failure to follow a reasonable standard of performance, is exempt [but] [c]laims based on a misrepresentation of fact, unconscionability, or failure to disclose[] are still subject to the DTPA regardless of whether the actor is a professional." Richard

M. Alderman, *The Texas Deceptive Trade Practices Act 2005 Still Alive and Well*, 8 J. TEX. CONSUMER L. 74, 77 (2005), available at <http://www.jtexconsumerlaw.com/V8N2pdf/V8N2deceptive.pdf>.

105. TEX. BUS. & COM. CODE ANN. § 17.49(g) (West 2002).

106. TEX. BUS. & COM. CODE ANN. § 17.49(f) (West 2002).

107. Compare Mark A. Hall, *Patients as Consumers: Courts, Contracts, and the New Medical Marketplace*, 106 MICH. L. REV. 643, 660–67 (2008) (observing that doctors and hospitals exercise an indiscriminate amount of price power over patients, and substantiating that claim by noting that hospital costs have more than doubled since the 1990s) with Reed Abelson, *In Health Care, Cost Isn't Proof of High Quality*, N.Y. TIMES, June 14, 2004, at A1 (reporting that, when hospitals that charged the most for a given surgery were compared with those that charged the least, there was no significant difference in the quality of services provided, and observing that “For most consumers, the fact that there is no connection between quality and cost is one of the dirty secrets of medicine”).

108. 142 S.W.2d 459 (Tex. App.—Fort Worth 2004, no pet.).

109. *Citizens Nat'l Bank v. Allen Rae Invs., Inc.*, 142 S.W.2d 459, 473 (Tex. App.—Fort Worth 2004, no pet.).

110. *Citizens Nat'l Bank v. Allen Rae Invs., Inc.*, 142 S.W.2d 459, 473 (Tex. App.—Fort Worth 2004, no pet.) (quoting Teel Bivins et al., *The 1995 Revisions to the DTPA: Altering the Landscape*, 27 TEX. TECH. L. REV. 1441, 1447 (1996)). The court acknowledges that Bivins and his co-authors were “[Texas] Senate and House co-sponsors of the bill resulting in” section 17.49(g). *Citizens Nat'l Bank v. Allen Rae Invs., Inc.*, 142 S.W.2d 459, 473 (Tex. App.—Fort Worth 2004, no pet.).

111. *Citizens Nat'l Bank v. Allen Rae Invs., Inc.*, 142 S.W.2d 459, 474 (Tex. App.—Fort Worth 2004, no pet.).

112. *Id.*

113. 229 S.W.3d 813 (Tex. App.—Fort Worth 2007, pet. denied).

114. *East Hill Marine v. Rinker Boat Co.*, 229 S.W.3d 813 (Tex. App.—Fort Worth 2007, pet. denied).

115. 154 S.W.3d 639 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

116. *Tribble & Stephens Co. v. RGM Constructors, L.P.*, 154 S.W.3d 639, 660 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

117. *Id.* at 661.

118. See *Lists: Most Expensive Medical Procedures*, THE PLAIN DEALER (Cleveland, OH), Sept. 12, 2010, at D4. (reporting that intestine transplants are the most expensive surgery (\$1.12M), followed by heart transplants (\$788,000), bone marrow transplants (\$677,000), double lung transplants (\$658,000), then liver transplants (\$523,000)). See generally Texas Hospital Association, Texas PricePoint, <http://www.txpricepoint.org> (last visited Jan. 1, 2011) (providing consumers with a searchable database for retrieval of price data for common inpatient services, quality data, and other information about specific Texas hospitals); U.S. Department of Health and Human Services, *National Clearinghouse for Long-Term Care Information*, <http://www.longtermcare.gov> (open “Paying for LTC” menu, select “Overview,” then scroll down and click on the picture of the State of Texas) (last visited Jan. 1, 2011) (reporting that the state average costs per month in assisted living is \$2,991).

119. TEX. BUS. & COM. CODE ANN. § 17.49(e) (West 2002).

120. Richard M. Alderman, *The Texas Deceptive Trade Practices Act 2005 Still Alive and Well*, 8 J. TEX. CONSUMER L. 74, 77 (2005), available at <http://www.jtexconsumerlaw.com/V8N2pdf/V8N2deceptive.pdf>.

121. *Sorokolit v. Rhodes*, 889 S.W.2d 239, 243 n.5 (Tex. 1994).

122. TEX. BUS. & COM. CODE ANN. § 26.01(b)(8) (West 2002).

123. See *Smith v. Elliot*, 68 S.W.3d 844, 847 (Tex. App.—El Paso 2002, pet. denied) (reasoning that, by “reading the statutes and *Sorokolit* together, [] where a defendant physician in a DTPA case raises the affirmative defense of statute of frauds and plaintiff fails to prove a writing, signed by defendant, which contains the representation or promise relied upon, the DTPA claim fails.”).

124. See RESTATEMENT (SECOND) OF CONTRACTS § 159 (1981) (defining “misrepresentation” as an assertion that is not in accord with the facts).

125. 23 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 62:14 (4th ed. 2010).

126. TEX. R. CIV. P. 94. For whatever reason, many defendants show up in court without having first plead the statute of frauds. See, e.g., *Sorokolit v. Rhodes*, 889 S.W.2d 239, 243 n.5 (Tex. 1994) (hinting that, had the defendant plead statute of frauds as an affirmative defense, he would have been successful); *Mills v. Pate*, 225 S.W.3d 277, 290 (Tex. App.—El Paso 2006, no pet.) (rejecting the defendant’s argument that the plaintiff had the burden to produce a writing as an element of her breach of express warranty claim, indicating that it was the defendant’s burden to plead the defense). Even if not pleaded, however, an affirmative defense may still serve as a basis for summary judgment where it is raised in a summary judgment motion and the opposing party does not object to lack of proper pleadings either in a written response or before the rendition of judgment. *Roark v. Stallworth Oil & Gas, Inc.* 813 S.W.2d 492, 494 (Tex. 1991).

127. *Lee v. Boothe*, 235 S.W.3d 448, 451 (Tex. App.—Dallas 2007, pet. denied).

128. *But see* TEX. R. CIV. P. 269(d) (enunciating the standards for arguing a question of law to the court). Texas Rule of Civil Procedure 269(d) is instructive:

Arguments on questions of law shall be addressed to the court, and counsel should state the substance of the authorities referred to without reading more from books than may be necessary to verify the statement. On a question on motions, exceptions to the evidence, and other incidental matters, the counsel will be allowed only such argument as may be necessary to present clearly the question raised, and refer to authorities on it, unless further discussion is invited by the court.

TEX. R. CIV. P. 269(d).

129. TEX. BUS. & COM. CODE ANN. § 17.50(a)(1)(A) (West 2002).

130. TEX. BUS. & COM. CODE ANN. § 17.50(a)(2) (West 2002).

131. TEX. BUS. & COM. CODE ANN. § 17.50(a)(3) (West 2002).

132. See Richard M. Alderman, *The Texas Deceptive Trade Practices Act 2005 Still Alive and Well*, 8 J. TEX. CONSUMER L. 74, 85 (2005), available at <http://www.jtexconsumerlaw.com/V8N2pdf/V8N2deceptive.pdf>. Alderman points out that:

Since the enactment of the DTPA, the legislature has chosen to incorporate its provisions into many other statutes dealing with consumer-related issues . . . by making a violation of those statutes a violation of the DTPA. Because these statutes tie them to the DTPA, they are generally referred to as “tie-in statutes.”

Richard M. Alderman, *The Texas Deceptive Trade Practices Act 2005 Still Alive and Well*, 8 J. TEX. CONSUMER L. 74, 85 (2005), available at <http://www.jtexconsumerlaw.com/V8N2pdf/V8N2deceptive.pdf>.

133. See generally *Earle v. Ratliff*, 998 S.W.2d 882 (Tex. 1999)

(considering plaintiff's misrepresentation claims); *MacGregor Med. Ass'n v. Campbell*, 985 S.W.2d 38 (Tex. 1998) (considering plaintiff's breach of express warranty and misrepresentation claims); *Gormley v. Stover*, 907 S.W.2d 448 (Tex. 1995) (considering plaintiff's breach of express warranty claim); *Sorokolit v. Rhodes*, 889 S.W.2d 239 (Tex. 1994) (considering plaintiff's breach of express warranty claim); *Mills v. Pate*, 225 S.W.3d 277 (Tex. App.—El Paso 2006, no pet.) (considering plaintiff's breach of express warranty claim).

134. *See* 27 COCHRAN Tex. Prac., Consumer Rights & Remedies 3d § 2.4 (2009) (“Misrepresentations involving the characteristics or the quality of a product or service obviously overlap with those involving warranty.”).

135. 27 COCHRAN Tex. Prac., Consumer Rights & Remedies 3d § 3.3 (2009).

136. *See* Sw. Bell Tel. Co. v. FDP Corp., 811 S.W.2d 572, 575–76 (Tex. 1991) (stating that because the UCC codified common law warranty principles, especially with regard to express warranties, the law relating to express warranties in the UCC was instructive in the services context, and concluding that “[n]o sound reason exists to apply a different standard when the contract is for services instead of goods.”).

137. TEX. BUS. & COM. CODE ANN. § 2.313(a) (West 2009).

138. RESTATEMENT (SECOND) OF CONTRACTS § 159 (1981).

139. *Id.* at cmt. a.

140. *See* *Smith v. Baldwin*, 611 S.W.2d 611, 615–16 (Tex. 1980) (“It would be contradictory [to the DTPA’s liberal construction principle of section 17.44] to hold that consumers who have been misled by misrepresentations on future quality are not entitled to protection from the specific provisions on goods and services.”).

141. *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 617–18 (Tex. 1986) (“Although the principles of contract and tort causes of action are well settled, often it is difficult in practice to determine the type of action that is brought. We must look to the substance of the cause of action and not necessarily the manner in which it was pleaded.” (citing *Int’l Printing Pressmen & Assistants’ Union of N. Am. v. Smith*, 198 S.W.2d 729 (Tex. 1946))). It has been advised that:

Any statement, in order to be considered an express warranty for a specific result or cure, must be clear and unambiguous, and no recovery will be allowed where the physician’s statement was merely an expression of opinion or hope, or a “therapeutic reassurance” to the patient, was so vague as not to constitute a basis for a contract, or was impossible of performance. Mere statements of opinion regarding the result of a medical procedure will not impose [] liability.

23 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 62:14 (4th ed. 2010).

142. *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986) (citing *Montgomery Ward & Co. v. Scharrenbeck*, 204 S.W.2d 508 (Tex. 1947)).

143. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13) (West 2005) (stating that a cause of action may be a health care liability claim irrespective of “whether the claimant’s claim or cause of action sounds in tort or contract”).

144. *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986).

145. *Murphy v. Campbell*, 964 S.W.2d 265, 268 (Tex. 1997).

146. *Id.*

147. *Sorokolit v. Rhodes*, 889 S.W.2d 239, 243 (Tex. 1994); *MacGregor Med. Ass’n v. Campbell*, 985 S.W.2d 38, 40 (Tex. 1998).

148. *Walden v. Jeffery*, 907 S.W.2d 446, 448 (Tex. 1995).

149. *Gormley v. Stover*, 907 S.W.2d 448, 450 (Tex. 1995).

150. *MacGregor Med. Ass’n v. Campbell*, 985 S.W.2d 38, 41 (Tex. 1998).

151. *Diversicare Gen. P’ship, Inc. v. Rubio*, 185 S.W.3d 842, 848 (Tex. 2005).

152. *Id.*

153. *Autohaus, Inc. v. Aguilar*, 794 S.W.2d 459, 462 (Tex. App.—Dallas 1990, writ denied) (quoting *Pennington v. Singleton*, 606 S.W.2d 682, 686 (Tex. 1980)). “Puffing” is not specifically mentioned by the DTPA, but the Texas Supreme Court has indicated that such a defense exists. *Pennington v. Singleton*, 606 S.W.2d 682, 687 (Tex. 1980). In *Pennington*, however, the supreme court concluded that a seller’s representations that a boat was in “excellent,” “perfect,” and “just like new” condition were *not* merely opinion or puffing. *Pennington v. Singleton*, 606 S.W.2d 682, 689 (Tex. 1980). Courts consider three variables to determine whether a statement is puffing: (1) the specificity of the statement; (2) knowledge of the buyer compared with the seller; and (3) “whether the representation pertains to a past or current event or condition, or to a future event or condition.” *Hedley Feedlot, Inc. v. Weatherly Trust*, 855 S.W.2d 826, 839 (Tex. App.—Amarillo 1993, writ denied) (citing *Autohaus, Inc. v. Aguilar*, 794 S.W.2d 459, 463–64 (Tex. App.—Dallas 1990, writ denied)); *see also* *Staev v. Azouz*, No. 05-04-00546-CV, 2005 WL 1111423, at *1, 4 (Tex. App.—Dallas May 11, 2005, no pet.) (overruling Appellant’s point of error based on lack of evidence where plaintiff claimed that the doctor had misrepresented that appellant/defendant was the “best plastic surgeon in the Dallas area”; the court did not categorize that claim as a health care liability claim as it did plaintiff’s other claims).

154. *See* TEX. BUS. & COM. CODE ANN. §§ 17.46(b)(5), (7) (West 2002) (providing a cause of action under the DTPA for misrepresentations regarding the standard, quality, benefits, etc. of services); *see also* Richard M. Alderman, *The Texas Deceptive Trade Practices Act 2005 Still Alive and Well*, 8 J. TEX. CONSUMER L. 74, 79 (2005), available at <http://www.jtexconsumerlaw.com/V8N2pdf/V8N2deceptive.pdf>. There, professor Alderman explains that:

Although the laundry list consists of twenty-five provisions, most reported decisions are based on just four, subsection (5), (7), (12), and (23). This is because these are the most general provisions, and the easiest to establish. Basically, subsections (5) and (7) apply to any misrepresentation regarding goods or services[.] ... To constitute a violation of subsection (5) or (7), it is only necessary that the actor make a representation of fact regarding goods or services that is inaccurate or false.

Richard M. Alderman, *The Texas Deceptive Trade Practices Act 2005 Still Alive and Well*, 8 J. TEX. CONSUMER L. 74, 79 (2005), available at <http://www.jtexconsumerlaw.com/V8N2pdf/V8N2deceptive.pdf>.

155. *See* TEX. BUS. & COM. CODE ANN. § 17.50(a)(1) (West 2002) (providing that “[a] consumer may maintain an action where” the misrepresentation enumerated in the laundry list “constitutes a producing cause of economic damages or damages for mental anguish” and was “relied on by a consumer to the consumer’s detriment”).

156. Such actions would violate TEX. BUS. & COM. CODE ANN. § 17.46(b)(5) (West 2002).

157. *See* TEX. BUS. & COM. CODE ANN. § 17.50(a) (West 2002) (“a consumer may maintain an action where any of the following [including § 17.46(b)(5)] constitute a producing cause of economic damages or damages for mental anguish”). Producing cause is different from proximate cause, but both “require proof of causation in fact.” *Alexander v. Turtur & Assocs., Inc.*, 146 S.W.3d 113, 117 (Tex. 2004). Cause in fact “requires proof that

an act or omission was a substantial factor in bringing about injury which would not otherwise have occurred.” Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd., 896 S.W.2d 156, 161 (Tex. 1995).

158. *Cf.* Earle v. Ratliff, 998 S.W.2d 882, 885, 892–93 (Tex. 1999) (rejecting plaintiff’s DTPA claim where it was accompanied with a negligence claim and an affidavit by an expert witness indicating that the physician had deviated from a given standard of care which caused the plaintiff’s injuries); TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(6) (West 2005) (defining the “expert report” required for all health care liability claims as the embodiment of the expert’s opinions about the applicable standards of care, the deviation from those standards, and the causal relationship between the deviation and the damages sought).

159. Chapman v. Paul R. Wilson, Jr., D.D.S., Inc., 826 S.W.2d 214, 220 (Tex. App.—Austin 1992, writ denied). In *Chapman*, the Third Court of Appeals concluded that the plaintiff’s allegation that a dentist had misrepresented that he was an expert in pulling wisdom teeth was a valid cause of action under the DTPA, and no expert testimony was required to prove that such a representation was the producing cause of her injuries because “[a] layman could, without the aid of expert testimony, determine whether [the defendant’s] alleged misrepresentations were a producing cause of the ‘great pain’ that Chapman claims to have suffered during the extractions.” Chapman v. Paul R. Wilson, Jr., D.D.S., Inc., 826 S.W.2d 214, 219–20 (Tex. App.—Austin 1992, writ denied).

160. *But see* San Antonio Extended Med. Care, Inc. v. Vazquez, No. 04-09-00546-CV, 2010 WL 2099213, at *2 (Tex. App.—San Antonio May 26, 2010, no pet. h.) (“[T]he fact that expert testimony may not ultimately be necessary to support a verdict does not necessarily mean the claim is not a health care liability claim”).

161. *See* San Antonio Extended Med. Care, Inc. v. Vazquez, No. 04-09-00546-CV, 2010 WL 2099213, at *2 (Tex. App.—San Antonio May 26, 2010, no pet. h.) (“[t]he necessity of expert testimony from a medical or health care professional *may be a factor* in determining whether a claim is an inseparable part of the rendition of medical or health care services”) (emphasis added).

162. *See* Bush v. Green Oaks Operator, Inc., 39 S.W.3d 669, 674 (Tex. App.—Dallas 2001, no pet.) (Dodson, J., dissenting) (arguing, contrary to the holding of the majority, that because “the claims in this case are of the type that would require expert testimony *as to the appropriate standard of care*,” those claims were health care liability claims) (emphasis added). The Texas Supreme Court subsequently expressed disapproval with the majority in *Bush*. Diversicare Gen. P’ship, Inc. v. Rubio, 185 S.W.3d 842, 856–61 (Tex. 2005).

163. This set of facts is nearly identical to *Lee v. Boothe*, except that there the plaintiff did not elect to either undergo a corrective procedure or have her money refunded. *Lee v. Boothe*, 235 S.W.3d 448, 450 (Tex. App.—Dallas 2007, pet. denied). The doctor’s administrative staff agreed to a full refund, but, when the plaintiff received a release form in lieu of a check, she initiated litigation. *Id.* at 450.

164. TEX. BUS. & COM. CODE ANN. § 2.313(a) (West 2009).

165. *But see* Parker v. Simmons, 248 S.W.3d 860, 864 (Tex. App.—Texarkana 2008, no pet.) (deciding that plaintiff’s unconscionable course of conduct claim, among her other claims, was a health care liability claim); *Boothe v. Dixon*, 180 S.W.3d 915, 918 (Tex. App.—Dallas 2005, no pet.) (indicating that plaintiff’s claim that doctor had unconscionably represented to him that medical procedures would be available in the future to correct his vision which deteriorated after laser eye surgery was a health care liability claim); *Stae v. Azouz*, No. 05-04-00546-CV, 2005 WL 1111423, at *4 (Tex. App.—Dallas May 11, 2005,

no pet.) (overruling plaintiff’s claim of unconscionable course of conduct because it was a health care liability claim); *Trevino v. Christus Santa Rosa Healthcare Corp.*, No. 04-01-00764-CV, 2002 WL 31423711, at *4 (Tex. App.—San Antonio Oct. 3, 2002, no pet.) (noting that, where mother birthed her child in hospital’s restroom, plaintiff’s claim for unconscionable billing failed because she did not establish that the hospital had charged her “fully”); *Macurak v. Doyle*, No. 05-01-00823-CV, 2002 WL 1263900, at *4 (Tex. App.—Dallas June 7, 2002, pet. denied) (ruling that a father’s claim was a health care liability claim where he complained that a psychologist and a psychiatrist had committed an unconscionable course of conduct where they had, allegedly detrimentally, subjected his son to special education and psychotropic drugs); *Gomez v. Diaz*, 57 S.W.3d 573, 577 (Tex. App.—Corpus Christi 2001, no pet.) (deciding that patient’s claims that doctor’s failure to help her expose her previous doctor’s malfeasance by repeating his alleged initial evaluation that her hysterectomy had been performed poorly was a health care liability claim).

166. TEX. BUS. & COM. CODE ANN. § 17.50(a)(3) (West 2002).

167. TEX. BUS. & COM. CODE ANN. § 17.45(5) (West 2002).

168. *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 451 (Tex. 1997).

169. *See, e.g.*, *Bennett v. Bailey*, 597 S.W.2d 532, 535 (Tex. App.—Eastland 1980, writ ref’d n.r.e.) (concluding that plaintiff, a “lonely widow who lacked the knowledge, ability, experience, or capacity to withstand the premeditated attention lavished upon her,” had suffered from the defendants’ unconscionable course of conduct where they “purposely took advantage of her vulnerability to a grossly unfair degree”).

170. *Ballesteros v. Jones*, 985 S.W.2d 485, 498 n.5 (Tex. App.—San Antonio 1998, pet. denied).

171. *See* *Ketter v. ETC Med. Systems, Inc.*, 169 S.W.3d 791, 800 n.6 (Tex. App.—Dallas 2005, no pet.) (“Before September 1, 1995, the DTPA defined ‘Unconscionable action or course of action’ [to include acts or practices which] ... result[] in a gross disparity between the value received and consideration paid”).

172. *Ketter v. ETC Med. Systems, Inc.*, 169 S.W.3d 791, 801 (Tex. App.—Dallas 2005, no pet.).

173. *See* *Bush v. Green Oaks Operator, Inc.*, 39 S.W.3d 669, 674 (Tex. App.—Dallas 2001, no pet.) (Dodson, J., dissenting) (arguing, contrary to the holding of the majority, that because “the claims in this case are of the type that would require expert testimony *as to the appropriate standard of care*,” those claims were health care liability claims) (emphasis added).

174. It is of some importance to observe that the DTPA protects against “unconscionable courses of conduct” rather than “unconscionable contracts.” TEX. BUS. & COM. CODE ANN. § 17.50(a)(3) (West 2002); TEX. BUS. & COM. CODE ANN. § 17.45(5) (West 2002). Texas, via the UCC, affords a contract remedy for parties who have suffered an unconscionable contract or clause of a contract. *See* TEX. BUS. & COM. CODE ANN. § 2.302 (West 2009) (acknowledging that if a contract or a clause of a contract is found, as a matter of law, to be unconscionable, a court can refuse to enforce the entire contract, or it may excise the unconscionable clause and enforce the remainder of the contract so “as to avoid any unconscionable result.”); *see also* Mark A. Hall, *Patients as Consumers: Courts, Contracts, and the New Medical Marketplace*, 106 MICH. L. REV. 643, 675–78 (2008) (arguing that medical patients are in a unique position to suffer procedural and substantive unconscionability because they generally in a disadvantaged and vulnerable bargaining position, and that this phenomenon makes them strong candidates for contract litigation related to unconscionable contracts or contract clauses).

175. Richard M. Alderman, *The Texas Deceptive Trade Practices Act 2005 Still Alive and Well*, 8 J. TEX. CONSUMER L. 74, 85 (2005), available at <http://www.jtexconsumerlaw.com/V8N2pdf/V8N2deceptive.pdf>.
176. See TEX. BUS. & COM. CODE ANN. § 17.50(h) (West 2002) (stating that “if a claimant is granted the right to bring a cause of action under this subchapter by another law, the claimant is not limited to recovery of economic damages only, but may recover any actual damages incurred ... without regard to whether the conduct of the defendant was committed intentionally”).
177. Richard M. Alderman, *The Texas Deceptive Trade Practices Act 2005 Still Alive and Well*, 8 J. TEX. CONSUMER L. 74, 86 (2005), available at <http://www.jtexconsumerlaw.com/V8N2pdf/V8N2deceptive.pdf>. See also *Brown v. American Transfer and Storage Co.*, 601 S.W.2d 931, 939 (Tex. 1980) (providing that, in the DTPA context, “[a]ctual damages means those recoverable at common law”). It is noteworthy to acknowledge that prior to 1995, the DTPA did not limit plaintiffs to recovery of economic damages; instead, it provided recovery for actual damages. Richard M. Alderman, *The Texas Deceptive Trade Practices Act 2005 Still Alive and Well*, 8 J. TEX. CONSUMER L. 74, 84 (2005), available at <http://www.jtexconsumerlaw.com/V8N2pdf/V8N2deceptive.pdf>.
178. Richard M. Alderman, *The Texas Deceptive Trade Practices Act 2005 Still Alive and Well*, 8 J. TEX. CONSUMER L. 74, 84 (2005), available at <http://www.jtexconsumerlaw.com/V8N2pdf/V8N2deceptive.pdf>. But see *DiGangi v. 24 Hour Fitness USA, Inc.*, No. 05-04-01119-CV, 2005 WL 1367945, at *3 (Tex. App.—Dallas June 10, 2005, no pet.) (rejecting personal injury damages to a plaintiff pursuing recovery under a tie-in statute on the basis that the statute was intended to prevent misleading advertising).
179. TEX. BUS. & COM. CODE ANN. § 17.50(h) (West 2002).
180. TEX. OCC. CODE ANN. § 351.604 (West 2004).
181. TEX. OCC. CODE ANN. § 351.604 (West 2004). Subsection 604 makes it clear that violations of subsections 351.251, 351.403, 351.408, 351.409, or 351.607 are deceptive trade practices actionable under the DTPA. TEX. OCC. CODE ANN. § 351.604 (West 2004). Therefore, a person who practices optometry or therapeutic optometry without a license is liable under the DTPA. TEX. OCC. CODE ANN. §§ 351.251, 351.409 (West 2004). Violations of the standards of advertising for optometrists and therapeutic optometrists are also deceptive trade practices actionable under the DTPA. TEX. OCC. CODE ANN. § 351.403 (West 2004). It is also a deceptive trade practice to dispense contact lenses “by mail or otherwise” to a patient who does not have a prescription; and violation of this subsection also carries criminal liability. TEX. OCC. CODE ANN. § 351.607 (West 2004). In light of the subject of this article, subsection 408 is inapplicable—it “prevents manufacturers, wholesalers, and retailers of ophthalmic goods from controlling or attempting to control the business practice of an optometrist.” TEX. OCC. CODE ANN. § 351.408 (West 2004).
182. TEX. OCC. CODE ANN. § 401.501 (West 2004). Note also that speech-pathologists and audiologists are not “health care providers” as defined by Chapter 74. TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(12) (West 2005). An action against a speech-pathologist or audiologist is a good example of a claim against a medical professional where the plaintiff will avoid the “health care liability claim” headache unless the speech-pathologist or audiologist is also a physician. See Glen M. Wilkerson, et al, *Analysis of Recent Attempts to Assert Medical Negligence Claims “Outside” Texas’s Article 4590i*, 20 REV. LITIG. 657, 664 (2001) (stating that ruling out that a defendant is a “health care provider” or a “physician” is one of the principal ways in which a plaintiff may avoid characterization of her claim as a health care liability claim).
183. TEX. CIV. PRAC. & REM. CODE ANN. § 74.451 (West 2005) The required statutory verbiage operates to diffuse arbitration agreements in the event that the patient is not represented by legal counsel:
- UNDER TEXAS LAW, THIS AGREEMENT IS INVALID AND OF NO LEGAL EFFECT UNLESS IT IS ALSO SIGNED BY AN ATTORNEY OF YOUR OWN CHOOSING. THIS AGREEMENT CONTAINS A WAIVER OF IMPORTANT LEGAL RIGHTS, INCLUDING YOUR RIGHT TO A JURY. YOU SHOULD NOT SIGN THIS AGREEMENT WITHOUT FIRST CONSULTING WITH AN ATTORNEY.
- TEX. CIV. PRAC. & REM. CODE ANN. § 74.451(a) (West 2005).
184. *Sorokolit v. Rhodes*, 889 S.W.2d 239, 243 (Tex. 1994); *MacGregor Med. Ass’n v. Campbell*, 985 S.W.2d 38, 40 (Tex. 1998).
185. *Diversicare Gen. P’ship, Inc. v. Rubio*, 185 S.W.3d 842, 848 (Tex. 2005).
186. TEX. BUS. & COM. CODE ANN. § 17.50(h) (West 2002).
187. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (West 2002).
188. *Diversicare Gen. P’ship, Inc. v. Rubio*, 185 S.W.3d 842, 845 (Tex. 2005); *Murphy v. Russell*, 167 S.W.3d 835, 839 (Tex. 2005); *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 546 (Tex. 2004)); see also *Scientific Image Ctr. Mgmt., Inc. v. Brewer*, 282 S.W.3d 233, 237 (Tex. App.—Dallas 2009, pet. denied) (citing *Diversicare*, *Murphy*, and *Garland* for the proposition that “plaintiffs cannot, through artful pleading, avoid the strictures now codified in chapter 74 by recasting health care liability claims as other causes of action”).
189. *Sorokolit v. Rhodes*, 889 S.W.2d 239, 243 (Tex. 1994); *MacGregor Med. Ass’n v. Campbell*, 985 S.W.2d 38, 41 (Tex. 1998); *Earle v. Ratliff*, 998 S.W.2d 882, 892–93 (Tex. 1999).
190. TEX. CIV. PRAC. & REM. CODE ANN. § 74.004 (West 2005).
191. *Diversicare Gen. P’ship, Inc. v. Rubio*, 185 S.W.3d 842, 848 (Tex. 2005).
192. *Sorokolit v. Rhodes*, 889 S.W.2d 239, 243 (Tex. 1994).
193. TEX. BUS. & COM. CODE ANN. § 17.50(a)(3) (West 2002); *Ballesteros v. Jones*, 985 S.W.2d 485, 498 n.5 (Tex. App.—San Antonio 1998, pet. denied).
194. TEX. BUS. & COM. CODE ANN. § 17.50(h) (West 2002).
195. TEX. BUS. & COM. CODE ANN. § 17.49(e) (West 2002).
196. TEX. BUS. & COM. CODE ANN. § 17.49(c) (West 2002). See also David Skeels, *The DTPA’s Professional Services Exemption: Let ‘Em be Doctors and Lawyers and Such*, 55 BAYLOR L. REV. 783, 821–26 (2003) (discussing how five exceptions allow plaintiffs to circumvent the professional services exemption in some circumstances).
197. TEX. BUS. & COM. CODE ANN. §§ 17.49(f), (g) (West 2002).