Transactional Defenses to the Deceptive Trade Practices Act

By Manuel H. Newburger *

I. INTRODUCTION

There are a limited number of defenses to suits under the DTPA aside from the classic: "I didn't do it." However, the Act does offer several defenses that, if considered at the transactional state—could save a defendant in subsequent litigation. This article will explore those defenses.

II. WAIVERS

As originally enacted the DTPA contained a complete prohibition on all waivers of its provisions. However, in 1995 the Act was amended to permit waivers under very limited circumstances. Section 17.42 states:

(a) Any waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void; provided, however, that a waiver is valid and enforceable if:
  (1) the waiver is in writing and is signed by the consumer;
  (2) the consumer is not in a significantly disparate bargaining position; and
  (3) the consumer is represented by legal counsel in seeking or acquiring the goods or services.

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

(c) A waiver under this section must be:
  (1) conspicuous and in bold-face type of at least 10 points in size;
  (2) identified by the heading "Waiver of Consumer Rights," or words of similar meaning; and
  (3) in substantially the following form:

"I waive my rights under the Deceptive Trade Practices-Consumer Protection Act, Section 17.41 et seq., Business & Commerce Code, a law that gives consumers special rights and protections. After consultation with an attorney of my own selection, I voluntarily consent to this waiver."

(d) The waiver required by Subsection I may be modified to waive only specified rights under this subchapter.

(e) The fact that a consumer has signed a waiver under this section is not a defense to an action brought by the attorney general under Section 17.47.

The conditions necessary to create an enforceable waiver mean that it will be a rare case in which a waiver exists. Of course, a "try and a miss" with a waiver will give rise to potential liability under Section 12 of the DTPA's laundry list of false, misleading, or deceptive acts and practices, which prohibits "representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law." Tex. Bus. & Com. Code § 17.46(b)(12).

A section 17.42 waiver is seldom practical as competent attorneys are generally hesitant to recommend DTPA waiver at the risk of a malpractice claim. The most likely application is in transactions in which a business consumer is represented by counsel who negotiates specific remedies (e.g., liquidated damages) to replace the DTPA remedies.

III. LARGE TRANSACTIONS

The DTPA potentially exempts two tiers of large transactions. Section 17.49(f) states:

(f) Nothing in the subchapter shall apply to a claim arising out of a written contract if:
  (1) the contract relates to a transaction, a project, or a set of transactions related to the same project involving total consideration by the consumer of more than $100,000;
  (2) in negotiating the contract the consumer is represented by legal counsel who is not directly or indirectly identified, suggested, or selected by the defendant or an agent of the defendant; and
  (3) the contract does not involve the consumer's residence.

Although this section bears some similarity to the waiver provision of section 17.42, it is markedly different, as no waiver is required. As noted above, few attorneys are likely to advise a consumer to waive the rights afforded by the DTPA. But this advice is irrelevant under Section 17.49(f). All that is required is that the transaction not involve the consumer's residence, that the transaction meet the $100,000 threshold, and that the consumer is represented by an attorney who was not identified, suggested, or selected by the seller or lessor. The author has seen this occur in non-residential real estate transactions such as the purchase of rental property.

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Any time a DTPA suit involves a non-homestead transaction of more than $100,000, the defense attorney should look into whether the consumer was represented by an attorney in negotiating the transaction. But, subsection(g) of section 17.49 provides:

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

This exemption eliminates from the scope of the DTPA all transactions in excess of $500,000 that do not involve a consumer's residence. No waiver or attorney representation is required.

Professor Alderman has suggested that it might be possible to structure a project as a set of separate and distinct transactions or create separate legal entities, so that the $100,000 and $500,000 exemptions might be avoided. While the author recognizes the possibility of such an arrangement, a smart defendant is likely to argue that creative drafting cannot get around the "project, or a set of transactions relating to the same project" verbiage in Section 17.49.

More to the point, the person drafting for the seller of goods or services should be mindful of Professor Alderman's creative suggestion and ensure that the contract documents tie together what might arguably be separate transactions into a described project.

IV. PROFESSIONAL SERVICES

The DTPA also exempts certain claims based on professional services. Section 17.48 (c) and (d) provide:

(c) Nothing in this subchapter shall apply to a claim for damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill. This exemption does not apply to:
  (1) an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion;
  (2) a failure to disclose information in violation of Section 17.46(b)(24);
  (3) an unconscionable action or course of action that

cannot be characterized as advice, judgment, or opinion;
(4) breach of an express warranty that cannot be characterized as advice, judgment, or opinion; or
(5) a violation of Section 17.46(b)(26).

(d) Subsection (c) applies to a cause of action brought against the person who provided the professional service and a cause of action brought against any entity that could be found to be vicariously liable for the person's conduct.

Although case law demonstrates the fights that can be had over this part of the DTPA, these sections provide an opportunity to build the defense into a transaction. An attorney or accountant may wish to qualify a paid-for opinion with the statement that the opinion merely represents the professional advice, judgment, and opinions of the author. It might be preferable to build that limitation into a contract, having the client acknowledge that the author of the opinion is acting as a professional and that what will be provided is merely the author's professional advice, judgment, and opinion and not a warranty of outcome. While a consumer could certainly try to challenge the effectiveness of such a contract provision, including the provision might make the DTPA claim an uphill climb.

V. DISCLOSURE OF RELIANCE

The section of the DTPA that is arguably most relevant to this article has generated little case law over the history of the Act. Section § 17.506(a)–(c) of the DTPA state:

> (a) In an action brought under Section 17.50 of this subchapter, it is a defense to the award of any damages or attorneys' fees if the defendant proves that before consummation of the transaction he gave reasonable and timely written notice to the plaintiff of the defendant's reliance on:
> (1) written information relating to the particular goods or service in question obtained from official government records if the written information was false or inaccurate and the defendant did not know and could not reasonably have known of the falsity or inaccuracy of the information;
> (2) written information relating to the particular goods or service in question obtained from another source if the information was false or inaccurate and the defendant did not know and could not reasonably have known of the falsity or inaccuracy of the information; or
> (3) written information concerning a test required or prescribed by a government agency if the information from the test was false or inaccurate and the defendant did not know and could not reasonably have known of the falsity or inaccuracy of the information.
> (b) In asserting a defense under Subdivision (1), (2), or (3) of Subsection (a) of Section 17.506 above, the defendant shall prove the written information was a producing cause of the alleged damage. A finding of one producing cause does not bar recovery if other conduct of the defendant not the subject of a defensive finding under Subdivision (1), (2), or (3) of Subsection (a) of Section 17.506 above was a producing cause of damages of the plaintiff.
> (c) In a suit where a defense is asserted under Subdivision (2) of Subsection (a) of Section 17.506 above, suit may be asserted against the third party supplying the written information without regard to privity where the third party knew or should have reasonably foreseen that the information would be provided to a consumer; provided no double recovery may result.

Portions of the DTPA's laundry list that are most commonly used are strict liability sections that require neither knowledge nor intent. Consider, as examples, the following subsections of Section 17.46(b):

> (b) Except as provided in Subsection (d) of this section, the term "false, misleading, or deceptive acts or practices" includes, but is not limited to, the following acts:
> (1) passing off goods or services as those of another;
> (2) causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
> (3) causing confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another;
> (4) using deceptive representations or designations of geographic origin in connection with goods or services;
> (5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which the person does not;
> (6) representing that goods are original or new if they are deteriorated, reconditioned, reclaimed, used, or secondhand;
> (7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
> (8) disparaging the goods, services, or business of another by false or misleading representation of facts;
> (12) representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;
> (14) misrepresenting the authority of a salesman, representative or agent to negotiate the final terms of a consumer transaction;

These sections of the DTPA do not contain knowledge or intent requirements, and Section 17.50 of the Act imposes no greater burden to recover economic damages. *See* Tex. Bus. & Com. Code § 17.50(b). *See also, Pennington v. Singleton*, 606 S.W.2d 682 (Tex. 1980) (recognizing that a finding of knowledge or intent was not required to recover actual damages under the pre-1995 version of the DTPA).

Notwithstanding the correct statutory analysis of *Pennington*, Section 17.506 of the DTPA allows sellers and lessors of goods or services to avoid liability for unknown misrepresentations. If a seller or lessor makes the requisite disclosure of reliance, it has the opportunity to avoid liability for the accidental misrepresentation. The statute requires, however, that the disclosure of reliance be:

- written;
- before consummation of the transaction; and
- reasonable and timely.

An important consideration is what "timely" and "reasonable" mean. The canon against surplusage reflects "the idea that 'every word and every provision is to be given effect [and that n]one should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.'" *Nielsen v. Preap*, 586 U.S. 392 (2019) (alteration in original) (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts, 174 (2012)). The canon is not merely a creature of federal law.

Under the surplusage canon, "[i]f possible, every word

> and every provision is to be given effect (*verba cum effectu sunt accipienda*) . . . . None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 174 (2012); *cf. Columbia Med. Ctr. Of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008) ("The Court must not interpret the statute in a manner that renders any part of the statute meaningless or superfluous."); *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005) ("[C]ourts should examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless").

Paxton v. Comm'n for Law. Discipline, No. 05-23-00128-CV, 2024 Tex. App. LEXIS 2739, at *31ss–32 (Tex. App.—Dallas Apr. 18, 2024, pet .filed).

Reading "timely" to mean no more than 'before consummation" would appear to violate the surplusage canon. "Reasonable and timely" must mean more than merely before consummation. In *Featherston v. Weller*, No. 03-05-00770-CV, 2009 Tex. App. LEXIS 5110 (Tex. App.—Austin July 3, 2009, no pet.) the court found that a disclosure in an auction catalog was sufficient. Beyond that, the author has not found any cases that shine light on what is reasonable and timely. However, the author would suggest that "timely" should be presumed to mean at a time when the consumer could act without harm, and "reasonable" should be assumed to mean disclosed in a manner that is clear and conspicuous.

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VI. AS-IS SALES AND DISCLAIMERS OF RELIANCE

When goods are sold as-is, a disclaimer of reliance may be sufficient to break the chain of causation and may provide a defense to a claim for fraud. *Prudential Ins. Co. of Am. V. Jefferson Assocs.*, 896 S.W.2d 156, 162 (Tex. 1995).

There are limits of the extent to which *Prudential* can be applied.

> By our holding today we do not suggest that an "as is" agreement can have this determinative effect in every circumstance. A buyer is not bound by an agreement to purchase something "as is" that he is induced to make because of a fraudulent representation or concealment of information by the seller. *Weitzel v. Barnes*, 691 S.W.2d 598, 601 (Tex. 1985); *Dallas Farm Mach. Co. v. Reaves*, 158 Tex. 1, 307 S.W.2d 233, 240 (Tex. 1957); *see Cockburn v. Mercantile Petroleum, Inc.*, 296 S.W.2d 316, 326 (Tex. Civ. App.—Dallas 1956, writ ref'd n.r.e.). A seller cannot have it both ways: he cannot assure the buyer of the condition of a thing to obtain the buyer's agreement to purchase "as is", and then disavow the assurance which procured the "as is" agreement. Also, a buyer is not bound by an "as is" agreement if he is entitled to inspect the condition of what is being sold but is impaired by the seller's conduct. A seller cannot obstruct an inspection for defects in his property and still insist that the buyer take it "as is". In circumstances such as these an "as is" agreement does not bar recovery against the seller.

Prudential, 896 S.W.2d at 162.

Furthermore, in determining the effectiveness of an "as-is" provision a number of factors can negate the effectiveness of the buyer's disclaimer of reliance. These include:

- the nature of the transaction;
- the totality of the circumstances surrounding the agreement;
- whether the "as is" clause was an important part of the basis of the bargain and not an incidental or "boilerplate" provision; and
- whether the parties were of relatively equal bargaining position.

Id.

Prudential was decided before the 1995 amendments to the DTPA which added a reliance element to "laundry list" claims under Section 17.46(b). A disclaimer of reliance in an "as-is" transaction can also defeat a DTPA claim. *See*, *e.g.*, *Erwin v. Smiley*, 975 S.W.2d 335 (Tex. App.—Eastland 1998, pet. denied). Even so, a seller's failure to disclose "material facts which would not be discoverable by the buyer in the exercise of ordinary care and due diligence" can overcome a *Prudential* disclaimer. *Pairett v. Gutierrez*, 969 S.W.2d 512, 515 (Tex. App.—Austin 1998, pet. denied).

VI. CONCLUSION

The timely and appropriate use of transactional defenses can defeat a DTPA claim. While those who act in bad faith or who conceal material facts will likely fail in their attempts to use such defenses, the innocent sellers who run afoul of the DTPA's strict liability provisions may well escape liability by taking advantage of these defenses.

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