

What Is The "Deceptive Trade Practices Act"

The primary purpose of the DTPA is to protect consumers against false, misleading, and deceptive business and insurance practices, unconscionable actions, and breaches of warranty. It does so by prohibiting certain acts and practices that tend to deceive and mislead consumers.

Which Transactions Does the DTPA Apply To?

Most consumer transactions are covered by the DTPA. Although the DTPA does not cover every deceptive or unconscionable act or practice, it is quite broad. The DTPA provides that "false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." The DTPA prohibits certain acts or practices "in the conduct of any trade or commerce." This is a very broad provision. "Trade and commerce" means "the advertising, offering for sale, lease, or distribution of any good or service, or any property, tangible or intangible, real, personal, or mixed, any other article, commodity, or thing of value wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of this state." The term "goods" includes tangible things or real property purchased or leased for use. The word "service" includes work, labor, or services purchased or leased for use, including services furnished in connection with the sale or repair of goods. The DTPA does not apply to the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion or similar professional skill. "For example, an accountant can probably not be held liable for violating the DTPA if they give the wrong opinion. However, professionals can violate the DTPA by making misrepresentations of fact or breaches of warranty. For example, if an accountant lies about his qualifications to attract business, a customer probably has a DTPA claim."

The term "unconscionable" appears frequently in the DTPA, and in this handbook. The DTPA defines an "unconscionable action" as one that "takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree."

So what does this all mean? The DTPA has a very broad application. The DTPA can be used by someone that is charged for an unnecessary \$50 car repair; it can be used by someone buying a used car; it can be used by a homeowner buying a home; it can be used by a small business purchasing materials; it can be used by a business buying a \$400,000 franchise; and it can be used in all transactions in between. Simply put, the DTPA was enacted to protect consumers in small transactions and businesses in rather large transactions.

Who Is Entitled To Protection Under the DTPA?

Other than the Texas Attorney General, only consumers are allowed to file under the DTPA. The phrase "consumer" means an individual, partnership, corporation, or governmental entity who seeks or acquires by purchase or lease any goods or services. It does not cover a business consumer that has assets of \$25 million or more or that is owned or controlled by a corporation or entity with assets of \$25 million or more.

The Element of Knowledge or Intent

The DTPA makes many practices illegal without requiring proof that the defendant intended to do

something wrong or illegal. Unless the section involved requires otherwise, the consumer is not required to prove that the defendant "intentionally" or "knowingly" violated the DTPA. This makes it easier to prove a violation of the DTPA, and provides a strong incentive for sellers of goods and providers of services to refrain from engaging in the prohibited acts and practices.

Nevertheless, the DTPA provides that if a defendant acts "intentionally," the judge or jury may award the consumer "additional damages" in an amount not exceeding three times the actual damages suffered by the consumer.

What Is Included Within the "Laundry List" of Acts and Practices Made Illegal by the DTPA?

The DTPA contains a "laundry list" of specific practices that are prohibited. This laundry list is found in section 17.46(b) of the Texas Business and Commerce Code. It contains 25 acts that violate the DTPA and for which consumers may sue, if the consumers relied on the act to their detriment. The most important and reoccurring acts are described below.

(1) Passing off goods or services as those of another.

It is illegal to advertise or represent goods or services under a different company than the company in which the good or services were made.

(5) Representing goods or services that claim to have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities but do not or a person claiming to have a sponsorship, approval, status, affiliation or connection but does not.

This section has two main parts: one concerning misrepresentations about goods or services and the other concerning misrepresentations about authority.

It is illegal to represent that goods and services have sponsorship or approval when they do not. This is similar to section (2) above. It is also illegal to represent that goods and services have characteristics, ingredients, uses, benefits, or quantities that they do not. For example, it is illegal to represent that a product is made out of steel when it is really made out of aluminum. Moreover, this provision forbids a salesman from telling you that goods have features that they do not have or that the goods can do things that they cannot do.

Misrepresentations about quantities include misstating the number of acres being sold in a real estate transaction and misstating the number of items contained in a box of candy. Misrepresentations about benefits of goods or services include misrepresentations about the ailments that a medicine can cure and the effect upon one's self after only three visits to a health spa. Misrepresentations about ingredients include stating that a product contains vegetable fat when it really contains animal fat. This section also prohibits misrepresentations regarding the sponsorship, approval, status, or affiliation of an individual. It prohibits misleading and false statements about the nature and authority of a person. For example, an accountant may not claim to be a Certified Public Accountant if that person has not taken and passed the CPA exam. Also, physicians may not represent themselves as qualified specialists when they are not.

(7) Representing that goods or services are of a particular standard, quality, or grade, or that goods are

of a particular style or model, if they are of another.

This section covers statements made to induce a consumer to choose a certain item. It prohibits misrepresentations concerning certain specific quality or model designations. A very general statement, such as "this is a high quality product" or "this is a top-of-the-line model" may not violate this section, even if the good is of poor quality because the representation is too broad and too vague. But the statement that meat being sold is U.S. Choice when, in fact, it is only U.S. Good, or that certain electrical wiring or equipment has a wattage rating of 1000 when, in fact, the rating is 700, is probably a violation.

(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.

This section prohibits misrepresentations or false statements about a written contract. For example, a seller may not state that a contract contains a full warranty or a right to return the product when the contract does not have such a warranty or right. Similarly, when a person attempts to return a product based on the warranty, the seller cannot tell a consumer that the contract does not contain such a warranty. This provision is also violated when a seller sends threatening letters to a buyer claiming that the seller may repossess the property or force the forfeiture of the prior payments made for the goods when, in fact, the agreement confers no such rights. It is important to note that this section covers false statements regarding the rights conferred by the agreement or contract that are made at the time of the contract and even those statements that are made after the contract or sale has been signed or taken place.

(23) The failure to disclose information concerning goods or services known at the time of the transaction and was used to induce the consumer into a transaction whom otherwise would not have entered had the information been disclosed.

This section prohibits a seller from failing to disclose information known by the seller at the time of the transaction if such withholding of information is intended to induce the consumer into a transaction, and if the information is such that had the consumer known it at the time of the transaction, the consumer would not have made the purchases. However, if the information which is not disclosed by the seller would be unimportant to the consumer, or if the seller does not intend to induce the consumer to make the purchase by such omission, there is no violation of the statute. For example, the section may be violated by a homeowner or real estate agent who knows that the home has foundation damage but fails to disclose that to a potential buyer, or when an auto dealer knows that a car has been in a wreck and fails to disclose that to the potential buyer.

Conclusion: Laundry List

Throughout this section about the "laundry list" of prohibited acts and practices, an attempt has been made to present easily understandable examples and to restate the statutory language in plain English. The descriptions are intended only for guidance in determining whether a DTPA has occurred. But facts and circumstances vary. To determine whether you have a right to sue, consult an attorney. Even if an act or practice seems to be covered by the DTPA, and even if your attorney has advised you that the practice is covered it is possible that the court, in interpreting the DTPA, may rule against you. You should

consider and discuss this possibility with your attorney.

What Remedies Are Available Under the DTPA?

If you feel that a DTPA violation has occurred, what are your remedies?

The remedies of the DTPA are not exclusive. Instead, they are in addition to remedies provided in other laws. In fact, violations of certain other laws may also constitute violation of the DTPA. **You may not, however, recover under the DTPA and under some other law for the same alleged wrong.** In other words, you cannot recover twice for one violation.

Remedies under the DTPA may not usually be waived, and an attempt to make a consumer waive DTPA remedies is expressly made void and unenforceable unless specific requirements are met. This provision is particularly important when consumers buy goods "As Is." Often, consumers may still be able to recover under the DTPA even if the consumer buys the goods "As Is." If you have such a situation, you should seek the advice of an attorney.

Private Remedies

When consumers suffer actual damages, they **may sue under the DTPA for any of the following:**

1. violations contained in the "laundry list", so long as the consumer relied on the act to his or her detriment;
2. breach of an expressed or implied warranty;
3. **unconscionable action**; and
4. **certain violations of the Texas Insurance Code.**

What may you as a consumer expect to recover in the event you are successful in a DTPA lawsuit? First, the DTPA provides for recovery of economic damages. **If the court finds the wrongful conduct was "knowingly" committed, it may award up to three times** the amount of economic damages, in addition to damages for mental anguish. If the act was **committed "intentionally," up to three times the mental anguish damages may be awarded.** The question of whether a violation was "knowing" or "intentionally" is determined by the court or jury, after considering all the facts and circumstances relating to the transaction. Also, a consumer who prevails "shall be **awarded court costs and reasonable and necessary attorney fees.**"

Let's use an example to illustrate. Assume you prove economic damages in the sum of \$3,000. Let's further assume it was proved that the conduct of the violator was "knowingly" committed. The court or jury could then award a maximum amount of three times the economic damages. Therefore, in this example, a maximum damage recovery could be obtained in the sum of \$9,000, plus mental anguish damages, court costs and attorney's fees.

Before filing a DTPA lawsuit, a consumer must first give written notice to the alleged violator, advising the violator of the consumer's specific complaint and the amount of actual damages and expenses, including attorney fees, if any, reasonably incurred by the consumer in asserting the claim. The alleged violator has 60 days to respond; suit should not be filed during this 60-day period. But there are two exceptions: the first when it is necessary to immediately file suit in order to prevent the running of a statute of limitations, and the second when the consumer asserts the DTPA claim as counterclaim in an

existing suit.

The alleged violator may, within 60 days from receipt of such notice, offer the consumer a written offer of settlement including an offer to reimburse the consumer for the attorney's fees, if any, reasonably incurred in asserting the claim up until the date of the notice. If a prior notice is not required to be given because of one of the two exceptions described above, the alleged violation may tender such settlement offer within 60 days after the service of the suit or counterclaim.

The consumer has the option of accepting or rejecting the settlement offer. In the event the consumer takes no action for 60 days after receipt of such settlement offer, the offer is deemed to have been rejected. A rejected settlement offer may be filed with the court together with an affidavit certifying its rejection. If the court finds that the amount tendered in the settlement offer is the same or substantially the same as the actual damages found, then the consumer may not recover an amount in excess of the tendered amount or the amount of actual damages found, whichever is less. The DTPA specifically provides that a tender of a settlement offer is not an admission of guilt and may be used only to determine the reasonableness of the offer.

Mediation

After a DTPA lawsuit is filed, the consumer or the defendant may obtain a court order requiring mediation of the case. If a defendant makes a settlement offer at mediation or soon thereafter and the offer is rejected by the consumer, the court can limit the consumer's recovery at trial.

If mediation is not requested, the defendant has a second opportunity to make an offer of settlement. The defendant may make the offer up to 90 days after the answer to the consumer's suit is filed. Then, the consumer has the option to accept or reject the offer, as set forth above.

How Long Can You Wait to File a Suit?

A DTPA lawsuit generally must be filed within two years after the date on which the false, misleading, or deceptive act or practice occurred. If the deceptive act took place over a period of time, then, to be safe, you should begin suit two years from the date of the first such action. Some violations of the DTPA, by their very nature are concealed or difficult to detect. In these cases, the consumer has a longer time within which to file suit; two years after he or she discovered, or in the exercise of reasonable diligence should have discovered, the occurrence of the false, misleading, or deceptive act or practice.

Finally, there is a special provision stating that, if the consumer proves that failure to begin the lawsuit within these time limits was caused by the defendant knowingly engaging in conduct solely calculated to induce the consumer to refrain from or postpone the commencement of the suit, the right to file suit may be extended for an additional 180 days. In other words, if a violator of the DTPA strings you along by promising to make good, and does this intending to make you wait past the two-year time limit, and then "changes his or her mind" once the time limit has passed, he or she may not be able to get away with the trickery.

Questions regarding the statute of limitations or time limit for filing suit are often difficult and confusing. Consulting an attorney is strongly advised. Remember that you should make your demands for correction of the problem or violation right after you discover it. If you do not get your complaint satisfied within a reasonable period of time, and after giving the alleged violator a good faith

opportunity to make good, you should promptly contact a lawyer to protect your legal rights. In general, two years is the absolute maximum allowed for filing suit, but you should never wait to take action until the last minute, because you might be wrong, and thereby lose your legal rights.

When Should You Consult a Lawyer to Protect Your Rights?

The safest and simplest answer to this question normally is "as soon as possible." If you wait too long, you can lose all of your legal rights.

However, you generally should first make reasonable effort to have the violator correct the problem. Send a letter demanding correction of the problem and making good on the damages you have suffered. Be as clear, specific, and factual as possible. Send the letter by certified mail, return receipt requested (or hand deliver it, and get a signed receipt), and be sure to keep a copy of the letter. Talk to the appropriate people in charge, without getting angry and shouting, calmly telling them why you feel you have been treated wrongly and explaining what should be done to remedy the problem.

Give the person or business to whom you are complaining an amount of time, reasonable under the circumstances, to make good. If they flatly turn you down, or seem to be "stringing you along" without actually doing anything, then you may have no choice but to take legal action.

Individuals (but not partnerships or corporations) may represent themselves without a lawyer. For very small amounts of damages you may be able to file suit and represent yourself in the small claims court. If you do this, you should obtain a copy of the Texas Young Lawyers Association's pamphlet, *How To Sue In Small Claims Court*, by writing to the address given on the back of this handbook.

Although you have the right to represent yourself, the Texas Young Lawyers Association strongly recommends that you hire an attorney to represent you on claims filed under the DTPA because the language and procedures of the DTPA are sometimes complex and may be confusing.

In order to provide an incentive for consumers to enforce their rights under the DTPA, the Act provides that a plaintiff who wins will recover the reasonable attorney fees incurred for bringing suit. This, plus the additional damages, is intended to encourage consumers with valid cases to seek legal correction. You should never file unfounded lawsuits. Litigation is expensive and you may have to pay, at the very least, court costs.

Further, as explained above, if you bring a groundless suit in bad faith or for harassment, you may have to pay the defendant's attorney fees.