Judicial Activism And The DTPA

How Should Courts Compensate for a Poorly Drafted Statute?

By Steven R. Selsberg

Enacted in 1973, the Texas Deceptive Trade Practices Act ("DTPA") is intended to "protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection."[1] The DTPA is a complex statute. Compounding the difficulty in analyzing a DTPA claim is the DTPA's evolving nature. Since 1973 the statute has undergone eight amendments.[2]

Several of the amendments have added provisions that leave key questions unresolved and that trigger some intriguing arguments. This article will discuss unresolved issues relating to plaintiff status under the DTPA. The reason these issues exist is because the relevant DTPA provisions are not precisely drafted, leaving important provisions subject to different interpretations. This article will examine how the courts have addressed these issues, how the commentators have suggested they be resolved and, because such authority is scant, will offer the author's own analysis of the predicament courts face when analyzing poorly drafted provisions.

The Definition of "Consumer"

The DTPA provides a private cause of action only to "consumers." The plaintiff bears the burden of establishing "consumer" status.[3] Whether the plaintiff is a "consumer" is determined by the court, as a question of law.[4]

Section 17.45(4) of the DTPA defines "consumer" as follows:

> "Consumer" means an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services . . . .

Under this definition, the class of "consumers" is explicitly limited to individuals, partnerships, corporations, the State of Texas and its subdivisions and agencies. Although this definition is broad enough to include most potential plaintiffs, it certainly does not include all potential plaintiffs. Most significantly, a literal application of this definition would exclude entities such as joint ventures, unincorporated associations, other state governments or the federal government.

No Texas court has directly addressed whether these entities should be excluded from consumer status. This is probably because defendants have not yet

exploited this gap in the statute. In *Zachry-Dillingham v. American President Lines, Ltd.*,[5] for example, the court noted that the plaintiff was a joint venture,[6] but addressed only the defendant's contention that the plaintiff's DTPA claim was preempted by federal law. The court reversed the trial court's summary judgment in favor of the defendant on the preemption issue and remanded the case, without addressing whether the plaintiff qualified as a DTPA consumer. In all likelihood, the court did not address the issue because the defendant failed to assert it as a defense.

Other authorities also have not analyzed the issue in any detail. Only one commentator, a leading authority on the DTPA, has observed, in passing and without supporting authority, that any "entity" that otherwise fits the definition of "consumer" qualifies as a plaintiff.[7]

One argument to support the position that the DTPA's definition of consumer should be liberally construed to include entities excluded by a strict application of the definition, such as joint ventures and unincorporated associations, is that it seems illogical for the Texas legislature to differentiate between a partnership and a joint venture in a way that would entitle one to consumer status and the other not. Nevertheless, the legislature, whether intentionally or unintentionally, left the door open for defendants to make such arguments. Only those who advocate judicial activism would maintain that courts are not restricted to applying the plain language of the statute.

Plaintiffs arguing for a broader interpretation of the definition of consumer would point out that the statute itself directs a liberal construction of its provisions. Section 17.44 of the DTPA, entitled "Construction and Application," states that the DTPA "shall be liberally construed and applied to promote its underlying purposes. . . ."[8] It is true that such a construction weighs in favor of a broader class of plaintiffs. Certainly, if a partnership that satisfies the other elements of the definition of "consumer" can assert a DTPA claim, then a liberal construction would dictate that a joint venture that similarly satisfies the other requisites of the definition of "consumer" should be able to assert a DTPA claim.

There are, however, strong counterarguments. Those who oppose judicial activism would argue courts are bound to apply the definition of "consumer" as it is plainly written, and if the legislature does not like the result it must alter the statute. Moreover, the DTPA's definition of "person," which defines the class of defendants, is all-inclusive. Under Section 17.45(3) of the DTPA, a "person" is an individual, partnership, corporation, association, *or other group, however organized*" (emphasis added). Thus, the legislature defined a more precise, less restrictive class of litigants within the same statute. Therefore, it is a bold step for courts to rely on a vague instruction to "liberally construe the statute," and ignore what is plainly contained therein. It is more appropriate for jurists to apply the statute as it is written, and assume that the legislature purposefully limited the definition of "consumer."[9]

As previously noted, the State of Texas, and its agencies

and subdivisions, explicitly qualify as DTPA consumers. Strict application of the DTPA's definition of "consumer" would, however, prevent other states or the federal government from plaintiff status under the DTPA. While this distinction justifiably permits the State of Texas to police commercial activity within the state, it also allows the State of Texas to pursue DTPA remedies when the state is acting as a private citizen, for example, as a purchaser of goods or services from a Texas entity. Other states and the federal government, though, are seemingly precluded from pursuing DTPA remedies when similarly acting as a private citizen. While no authorities have discussed this distinction, the discriminatory impact the DTPA's definition of consumer has against other states and the federal government may very well raise Constitutional issues.

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The Role of "Business Consumer"

Beginning with the DTPA's 1983 amendments, the statute excludes from plaintiff status certain "business consumers." Only 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," is excluded.[10] This provision is frequently referred to as the "business consumer exclusion." The purpose of this provision is to exclude from DTPA plaintiff status entities that are too sophisticated to merit the protection the DTPA provides to consumers.

The business consumer exclusion is an affirmative defense. Thus, a defendant must raise the issue by special exception and the defendant bears the burden of establishing the exclusion.[11]

Section 17.45(10) of the DTPA defines a "Business Consumer" as

> an individual, partnership, or corporation who seeks or acquires by purchase or lease, any goods or services for commercial or business use. The term does not include this state or a subdivision or agency of this state.

This definition of business consumers raises at least two issues. First, because the definition of "consumer" does not explicitly mention entities such as joint ventures, the definition of "Business Consumer," which is a subset of consumers, likewise

does not explicitly include such entities. No doubt a joint venture can be as sophisticated as a partnership; thus, while no authorities have examined the issue, it is likely that if a joint venture or unincorporated association can be a consumer, it could also be a business consumer.

Second, as previously noted, the business consumer exclusion denies plaintiff status only to business consumers with over $25 million in assets. The statute, however, provides no guidance as to how courts applying the business consumer exclusion should measure assets — is the standard gross assets or net assets? With respect to this issue, courts simply are not able to apply the literal language of the statute; there is an ambiguity in the statute that courts are forced to resolve.

The majority of authorities addressing this issue have found that gross assets are the appropriate standard. In *Eckman v. Centennial Savings Bank,*[12] the plaintiffs were a group of individuals operating as a joint venture, but suing in their individual capacities (perhaps to avoid raising the issue of whether a joint venture was a proper plaintiff under the limited definition of "consumer"). The individuals' financial statements were part of the trial court record. Although the Texas Supreme Court decided the case on the basis that defendant had neither pled the business consumer exclusion as an affirmative defense nor established the exclusion through sufficient evidence, the court, in a footnote, tabulated the individuals' assets using the financial statements, and compared the total to $25 million.[13] In doing so, the court examined gross assets, not net assets.[14] Although the footnote is dicta, it may be persuasive to other Texas courts or a federal court addressing this issue without Texas precedent.[15]

The other authorities that have discussed this issue have likewise supported the position that courts should examine gross, rather than net, assets. Although there are no committee or legislative reports providing insight as to whether the legislature intended that courts examine gross or net assets, the tapes of the legislative debates over the amendment indicate the legislature intended "assets" to mean "gross assets."[16] A leading authority reasons that the gross assets approach would exclude from consumer status a large business, with holdings over $25 million, regardless of the corporation's amount of indebtedness, thus serving the statute's objective of excluding sophisticated businesses from consumer status.[17]

In *Alliance Savings and Loan Association v. Tri-State Insurance Co., et al.*,[18] however, the court appeared to apply a net assets standard in determining whether the business consumer exclusion barred plaintiff's DTPA claim. In Alliance, the trial court had instructed a verdict for defendants on plaintiff's DTPA claim, ruling that plaintiff did not have consumer status. The court of appeals addressed all three of defendants' contentions that plaintiff did not qualify as a DTPA consumer. In rejecting one of defendants' arguments, that the business consumer exclusion disqualified plaintiff from consumer status, the court relied on the fact that "Alliance was in receivership and had a negative *net* worth...." (emphasis added). Although the court affirmed the trial court's ruling on other grounds, it is noteworthy that the court appeared to apply a "net worth" standard in evaluating the business consumer exclusion.

Conclusion

The Texas legislature must continue to refine the DTPA. Courts confronting DTPA interpretation issues will have to deliberately ignore the statute's language to reach the result the legislature probably intended, arguably exceeding the authority granted to the judiciary. Moreover, courts continue to bear the burden of resolving ambiguity in the statute. The judicial process would be well served if the Texas legislature enacted more precise DTPA provisions, including those relating to plaintiff status under the DTPA. ■

ENDNOTES

1. Tex. Bus. & Com. Code §17.44 (Vernon 1987).
2. Only the 1989 amendments provided that the amended version applied to all suits filed after the 1989 amendments' September 1, 1989 effective date, even if the unlawful acts occurred before the effective date. Texas courts have universally held that, except as to the 1989 amendments, because the Texas legislature did not specifically provide that a set of amendments would apply to acts occurring before the amendments' effective date, the amendments would not be applied retroactively. *See, e.g., Woods v. Littleton,* 554 S.W.2d 662, 666 (Tex. 1977) (holding that statute in effect at time of act complained of governs the claim, and allowing plaintiff to recover under 1973 version of the DTPA for acts occurring after 1973). *See also* Gold and Quesada, *Personal Injury Actions Under the DTPA,* 21 St. Mary's L.J. 711, 712-13 (1990) (citing *Woods* and discussing the cases which hold that the pre-1989 DTPA amendments do not apply retroactively). Thus, to analyze a DTPA claim one must apply the version of the statute in effect when the unlawful conduct occurred, ignoring all subsequent amendments, except the 1989 amendments.
3. *See Farmers & Merchants State Bank of Krum v. Ferguson,* 617 S.W.2d 918 (Tex. 1981) (holding that plaintiff failed to meet his burden of proof of establishing consumer status because plaintiff failed to establish that he was using services for a personal, not business purpose, which was a prerequisite to establishing consumer status at the time of the decision).
4. *See Netterville v. Interfirst Bank,* 718 S.W.2d 921 (Tex. App.—Beaumont 1986, no writ) (holding that "consumer" status is a question of law for the court, and reversing summary judgment in favor of defendant on the grounds that defendant's evidence was insufficient to determine, as a matter of law, that plaintiff was not a consumer).
5. 739 S.W.2d 420 (Tex. App.—San Antonio 1987, writ den. n.r.e.), cert. den. 488 U.S. 1218 (1988).
6. 739 S.W.2d at 420.
7. *See* Alderman, *The Texas Deceptive Trade Practices Act* §2.03 (1990).
8. *See* also *Cameron v. Terrell & Garett, Inc.,* 618 S.W.2d 535, 541 (Tex. 1981).
9. *See,* e.g., *Calvert v. Coke,* 458 S.W.2d 913 (Tex. 1970).
10. *See* Tex. Bus. & Com. Code §17.45(4) (Vernon 1992).
11. *See Eckman v. Centennial Savings Bank,* 784 S.W.2d 672 (Tex. 1990) (supreme court reversed the lower court's grant of defendant's J.N.O.V. motion, holding that it is defendant's burden to raise and prove the business consumer exclusion).
12. 784 S.W.2d 672 (Tex. 1990).
13. 784 S.W.2d at 673 n.3.
14. Accord In re Conticommodity Services, Inc., 753 F. Supp. 1555, 1577 (N.D. Ill. 1990).
15. *See Fireman's Fund Ins. Co. v. Murchison,* 937 F.2d 204 (5th Cir. 1991) (appearing to apply a gross assets standard).
16. *See* Wolfram, *DTPA Update,* Advanced DTPA-Consumer Law Course K-53 (State Bar of Texas 1990). The author has also reviewed these tapes.
17. *See* Alderman, *The Texas Deceptive Trade Practices Act* §2.04 (1990).
18. No. C14-90-00057-CV (Tex. App.—Houston [14th Dist.] June 13, 1991, writ denied) (not designated for publication) 1991 Tex. App. LEXIS 1475.

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