SUBJECT: Revising the Deceptive Trade Practices Act (DTPA)

COMMITTEE: State Affairs — committee substitute recommended

VOTE: 15 ayes — Seidlits, S. Turner, Alvarado, Black, Bosse, Carter, Craddick, Danburg, Hilbert, Hochberg, B. Hunter, D. Jones, McCall, Ramsay, Wolens

0 nays

WITNESSES: (*On original version*)

For — Richard Josephson and Richard W. Weekley, Texans for Lawsuit Reform; L. Minton Rosenhouse, Texas Society of Certified Public Accountants; Wade Spilman, Texas Association of Insurance Agents; Randall P. Birdwell, Texas Association of Builders; James R. Royer, Consulting Engineers Council and Greater Houston Partnership; Mike Brodie, Texas Association of Realtors; Robert F. Pierry, National Federation of Independent Business; George J. Carson; Michael Evans, Texas Society of Professional Surveyors

Against — Joe K. Longley and Philip Maxwell, Texas Trial Lawyers Association; David Bragg; Mark Allen Owings, the handicapped community; Erle Rawling III; Mark S. McQuality; Mark N. Sefein; Nigel Austin-Weeks; Thomas C. Terrell; Beverly Kennedy, United We Stand America-Texas; Jackson Walls; Reggie James, Consumers Union; Susan Pitman, The Chemical Connection; Tim Curtis, Texas Citizen Action.

BACKGROUND: Many of the consumer protection statutes in Texas law are found in Deceptive Trade Practices Act (DTPA), Business and Commerce Code secs. 17.41 to 17.61, Property Code Chapter 27 (Residential Construction Liability) and Insurance Code art. 21.21 (unfair competition and practices). These statutes allow consumers to hold sellers of goods and services strictly liable for deceptive acts. Additionally, if the sellers knowingly deceive the consumer, consumers may receive exemplary damages equal to three times the actual damage award (trebled damages).

POINT-BY-POINT ANALYSIS:

CSHB 668 would amend the DTPA, Property Code Chapter 27 and Insurance Code art. 21.21 to bring into conformity the notice requirements and provision for a plea in abatement in all three statutes. Provisions regarding the offer of settlement and requiring mediation would be made identical in the DTPA and art. 21.21.

The bill would take effect September 1, 1995, and apply only prospectively, with no procedural or substantive effect on a cause of action that arose in whole or part before the effective date.

Supporters say the changes made to these consumer protection statutes are designed to return those statutes to their role of actually protecting the consumer. These changes would stop sophisticated consumers from using these statutes as a hammer against sellers of goods and services, force consumers to more closely examine offers of settlement, allow sophisticated consumers to waive the protections of the DTPA and help to make the the three consumer protection statutes comparable.

Opponents say these consumer protection statutes were enacted because it was felt that ordinary tort law allowed a seller too many common law defenses and did not provide enough protection for consumers. The changes made to these statutes by CSHB 668 would allow defendants to delay proceedings, exclude more transactions from the protection of the DTPA, and reinstitute one of the most troublesome common law defenses, the defense of reliance, to consumer protection law.

Requirement that consumer had relied on a deceptive act

The DTPA contains a "laundry list" of acts and practices that are considered false, misleading or deceptive. If a consumer can prove that the seller committed any one of these actions, the consumer may recover damages under the act.

CSHB 668 would make a consumer’s reliance on the false, misleading or deceptive act a requirement for recovery under the DTPA.

Supporters say reliance on the act that the consumer alleges to have been deceptive is probably the single most significant change in this revision of the DTPA, and one that makes sense. Currently, a salesperson can make a number of false representations to the consumer. Many consumers would not believe these representations, but might purchase the good or service anyway based on other factors. If the good or service fails, the consumer can point to the deceptive acts of the seller and demand enhanced damages under the DTPA. CSHB 668 would merely limit relief to consumers who had actually relied on a deceptive act of the seller.

Opponents say the DTPA was designed to stop sellers from using deceptive practices. In many situations, the sellers use these deceptive practices on all of the consumers to whom they attempt to sell things. Although some consumers will rely on deceptive statements and others will not, the DTPA should be concerned with stopping sellers from engaging in such practices no matter whether the person who brings the suit actually relied on the deception.

In some cases, the only person who has the resources to bring a suit against a seller is a sophisticated consumer who had the experience or ability to see through the deceptive practice of the seller. That consumer should be seen as bringing the suit on behalf of the other consumers who did rely on the seller's deception.

The DTPA was enacted to create a strict liability standard for sellers because it was felt that the common law defenses available to sellers under tort law were defeating consumer rights. This provision of CSHB 668 would reinstitute one of these common law defenses and make it harder for a consumer to recover.

Other opponents say the DTPA under CSHB 668 would still apply to too many transactions because it does not have any intent requirement on the part of the seller. The DTPA uses essentially a strict liability standard, so no matter whether the seller has any intention to deceive or even has any way of knowing the statement is deceiving, that seller can still be subject to liability. A more reasonable way to use the protections of the DTPA would be to require the seller to have acted either knowingly or intentionally.

Changing damage awards under the DTPA

The current calculation of damages under DTPA allows consumers to recover the amount of actual damages found by the court, plus two times the amount of damages below $1,000 for any DTPA violation. Additionally, if the consumer can show that the seller committed the violation knowingly, the trier of fact may also award up to three times the amount of damages above $1,000. For example, a consumer whose damages totaled $900 would automatically receive $2,700. A consumer whose damages totaled $10,000 would automatically receive $12,000, and could receive as much as $39,000 upon proof that the violation was committed knowingly.

CSHB 668 would change the calculation of damages under the DTPA. A consumer would be entitled to the amount of economic damages plus two times the amount of economic damages under $1,000 for any violation of the DTPA. If the consumer could prove that the seller acted knowingly, the consumer could receive noneconomic damages and up to three times the damage award in excess of $1,000.

Supporters say CSHB 668 would not affect the automatic trebling of damages for violations of the DTPA, nor would it affect the standard at which the trier of fact can award treble damages over $1,000. All it would do is change the damage calculation for automatic awards to *economic* damages. The DTPA is a consumer protection statute, as such it should be concerned with economic losses. It is only reasonable to hold that for violations of the DTPA that are less than knowing, the consumer should be entitled to recover only economic losses. If the violation of the DTPA was done knowingly, the damage award would be exactly the same as it is currently.

Opponents say CSHB 668 would require that the consumer prove the seller acted knowingly before receiving any noneconomic damages. This would undermine the purpose of the DTPA as being a statute that is better for consumers than ordinary tort law. Even under ordinary tort law the consumer could receive noneconomic damages for actions that are merely negligent or reckless. To require the consumer to prove that the seller

acted knowingly before receiving part of an actual compensation awarded by the jury (not an exemplary award) is a complete reversal of standard, accepted principles of tort law.

Insurance Code art. 21.21, which is supposed to be a companion of the DTPA for insurance matters, does not make a distinction between economic and noneconomic damages. CSHB 668 would not alter that provision in art. 21.21, but in fact would create a special provision in the DTPA holding that cases that could have gone under art. 21.21 but are instead under the DTPA must award damages as art. 21.21 does.

Other opponents say CSHB 668 would still allow consumers to receive exemplary damages for actions that were not intentional. Exemplary damages should be used to punish only the most egregious offenses. Therefore, exemplary damages should only be used when the trier of fact finds that the seller used the deceptive practice with an intent to deceive the consumer.

Damage awards under art. 21.21

Art. 21.21 of the Insurance Code allows plaintiffs to receive actual damages and attorneys fees for the commission of deceptive acts (as defined by the DTPA or art. 21.21). If the plaintiff can prove that the act was committed knowingly, the court is required to award two times actual damages to the plaintiff as exemplary damages.

CSHB 668 would make the damages provision of art. 21.21 parallel the provision in the DTPA with one exception: there would be no distinction between economic and noneconomic damages.

Supporters say this change would make art. 21.21 more closely resemble the DTPA's damage requirement. Now, a consumer would receive automatic doubled damages for damages under $1,000 for all violations. CSHB 668 would also make the award of trebled damages for knowing violations discretionary with the trier of fact rather than automatic.

Opponents say that if this provision is supposed to parallel the provision of the DTPA, it should make a distinction between economic and non-economic damages. Additionally, the current version of the damage provision of art. 21.21 does not include automatic exemplary damages for damages less that $1,000. There is no reason to add this to art. 21.21 if it has functioned well without it.

Waivers under the DTPA

The DTPA specifically states that the waiver of the provisions of the DTPA by a consumer is contrary to public policy. However, the DTPA does allow waivers if the defendant who wishes to enforce the waiver can prove that the consumer was not in a disparate bargaining position, the consumer was represented by legal counsel, that the consumer and the legal counsel sign a written contract waiving the provisions of the DTPA, and that the transaction was for goods are services greater than $500,000 (other than a residence). Alternatively, a business with assets of $5 million or more may waive the provision of the DTPA by contract.

CSHB 668 would allow a consumer to waive the provisions of the DTPA so long as the waiver is in writing, the consumer is not in significantly disparate bargaining position, and the consumer is represented by legal counsel. The legal counsel must not have been directly or indirectly suggested by the defendant. The waiver must be in form prescribed by the statute.

CSHB 668 would also define waiver as any conduct or any oral or written communication that purports to extinguish, limit, or adversely affect the consumer's rights. For a waiver to be effective, it would have to meet the requirements stated above.

Supporters say the DTPA increases the cost of doing business. When the parties to a transaction are at an equal bargaining position, when both sides are represented by counsel, and when a written instrument is exchanged, the parties should be able to waive the provisions of the DTPA in order to cut the costs of doing business. Even when the parties believe that they are complying with all aspects of the law, a dissatisfied buyer could use the

DTPA to attempt to get some recovery from the seller. Many if these actions do not really adversely affect the consumer, but because of the strict interpretation of the DTPA in favor of the consumer, the sellers may be sued. The cost of defending such suits must be included into the costs of the goods and services sold.

Opponents say the DTPA is intended to protect all consumers, but allowing more and more consumers to waive the provisions of the DTPA would allow more sellers to take advantage of consumers. In certain transactions, a waiver should never apply. Imagine the auto dealer or other salesperson who states to a consumer that the price of an item could be lowered if the consumer signed a waiver of DTPA remedies. While some consumers would never agree to waive their rights in such a situation, many would rather save the money on the purchase price and worry about the consequences later.

A second question arises as to what is necessary for a defendant to prove that a plaintiff was represented by counsel. The waiver that the plaintiff must sign states in part: "After consultation with an attorney ...". Such a statement may be considered prima facie proof that the plaintiff consulted with an attorney regardless of whether that is true.

Other opponents say requiring an attorney to be consulted before waiving rights under the DTPA is problematic in that it may negate any possibility of ever having a waiver. Any attorney who is consulted about waiving rights under the DTPA would have to state that those rights should not be waived. If the attorney responds that the consumer should waive those rights, and later that consumer could have used the protection of the DTPA, that attorney could be liable for malpractice.

Excluding sophisticated transactions from the DTPA

Sophisticated transactions usually refer to those transactions in which enough money is involved that it is clear each party will take all the steps that they can in order to ensure that the other party is living up to the bargain. These steps almost always include having attorneys present and using detailed contracts that state the rights and duties of each party.

Currently, the DTPA excludes only entities with more than $25 million in assets from using the DTPA.

CSHB 668 would exclude from the DTPA any transaction involving a total consideration of more than $1 million. CSHB 668 would also exclude from the DTPA a claim based on a written contract if:

• the consideration exceeds $200,000;

• the consumer is represented by counsel;

• the consumer was not is significantly disparate bargaining position; and

• the transaction does not involve the consumer's residence.

Supporters say one of the most important considerations in reforming the DTPA is to return it to being a statute that protects small consumers in their everyday affairs and not a statute that can be used by large businesses in sophisticated transactions. Some of the proposals to achieve this result included redefining consumer as a much smaller business or simply as a single person, but it was determined that the more appropriate way was to base the protection of the DTPA on the sophistication of the transaction involved.

This protection would be very much like the waiver provision in that it would help reduce the cost of business. However, the waiver provision is something that a consumer and seller must agree to voluntarily. In many sophisticated transactions, like the ones covered in this section, the attorneys for the parties involved would advise against such waivers no matter how carefully the transactions have been reviewed. In such circumstances, it is necessary to simply stop the protections of the DTPA at a certain point. In those transactions involving between $200,000 to $1,000,000, the consumer must be represented by counsel before the DTPA could be waived. For those transactions over $1, million an attorney would not be required by the statute, but it is nearly inconceivable that anyone would enter into a $1 million transaction without an attorney.

Opponents say no matter how large the transaction is, there is still the possibility that a consumer will be deceived. There is already a sophisticated transaction limit in the DTPA in that businesses with more than $25 million in assets may not use DTPA protections. There is no need to cut more and more transactions from the protection of the DTPA. The businesses that say these restrictions are unnecessary should remember that if a consumer is satisfied, that consumer will not seek to use the DTPA.

Other opponents say the sophistication of the actual transaction is not the best basis for defining who should be able to use the DTPA; it should be based on the sophistication of the consumer. Most businesses are involved in purchases everyday and should be considered sophisticated consumers and, therefore, not be able to use the DTPA against other businesses.

Excluding professional opinions from the DTPA

CSHB 668 would exclude from the application of the DTPA any damage resulting from the rendering of a professional service. This exemption would not apply to an express misrepresentation of fact, a failure to disclose information that was intended to induce the consumer to enter into the transaction, an unconscionable action or a breach of express warranty.

Supporters say the DTPA has been increasingly used to sue professionals when the proper action should be for malpractice. The DTPA is used in these situations because of the strict standards for liability and the possibility of high damage awards.

Professionals should still be subject to the DTPA for acts that are based in fact, for misrepresentations, or express warranties, but they should not be subject to the DTPA for giving advice, judgments or opinions. These actions are inherently difficult to predict — that is why they are opinions. For example, an attorney who states that the fee for services is $100 an hour is making a statement of fact. If that attorney then charges $150 per hour, that attorney should be subject to the DTPA. On the other hand, if the attorney states "I think you will be able to recover compensation for your injuries," such a statement is an opinion. A professional should not be

subject to the DTPA for committing an allegedly deceptive act if that opinion turns out to be incorrect.

Opponents say CSHB 668 does not define what constitutes a professional service. It merely states that the essence of such a service must be to provide advice, judgment or opinion. Taking this statement very narrowly, people such as treating physicians, trial attorneys, or tax preparation accountants are not rendering professional services because the essence of the service is to complete some project. On the other hand, the definition could be taken very broadly to include just about any person who gives advice concerning a problem. For example a plumber could state an opinion about why a drain is clogged or an auto dealer might give an opinion about the safety of a car, but these should not be considered professional services.

Other opponents say that while excluding opinions and advice from the DTPA is a step in the right direction, it would not solve the problem of professionals being sued under the DTPA. Most professionals have some sort of malpractice insurance or they have a recovery fund for the profession. If the consumer can be satisfied out of these funds directly, they should not be allowed to use the DTPA as a hammer to punish professionals, who are also subject to disciplinary action by their licensing boards.

Abatement of proceedings commenced without proper notice

The DTPA, Insurance Code art. 21.21 and Property Code Chapter 27 all require a plaintiff to serve notice on a defendant before a suit is commenced. The policy behind this notice provision is that most sellers of goods and services would prefer to fix a problem than defend a lawsuit. Therefore, once the notice is served, the seller has the opportunity to try to remedy the problem. However, none these three statutes states what the remedy would be if the consumer fails to provide the seller with the notice required under this section.

The Texas Supreme Court recently stated that the proper remedy for failing to give the notice required under the Medical Liability Act was to abate the

suit until the notice can be given and the requisite time has passed (*De Checa v. Diagnostic Center Hospital, Inc*., 852 S.W.2d 935, 938 (Tex. 1993)). In order to receive an abatement of the proceedings, the defendant in the case must respond to the original complaint by filing a plea in abatement. If this plea is ruled favorably by the court, the proceedings are abated until the error can be corrected. The abatement of proceedings does not affect the statute of limitations, see *De Checa*, at 938-39.

CSHB 668 would amend the DTPA, art. 21.21 and Property Code Chapter 27 to state that a defendant who has not been properly notified of the suit may file a plea in abatement, and the court would grant such a plea for the time required to serve the defendant with adequate notice. The court could either grant the plea at a hearing or the abatement would automatically take effect if the court did not hold a hearing within 10 days after the plea was filed, if the plea was verified and not controverted by the plaintiff.

Supporters say this provision, included in all three consumer protection statutes under CSHB 668, is a way to codify a sound ruling by the Texas Supreme Court concerning such notice provisions. The notice provisions are included in the statute in order to facilitate any offers of settlement that may occur. The extra time would also give the seller the opportunity to correct any problem that the consumer might be having. However, more and more consumers are taking the offensive posture not even bothering with settlements or pursuing other remedies because they simply want to try to make some money with the trebled damages provisions of the DTPA and art. 21.21. Allowing for a plea in abatement would forces all consumers to at least listen to the offer of a defendant before proceeding with the suit.

Opponents say this provision would be used as a delaying tactic by the defense bar. The purpose of the notice is to give the defendant adequate time to offer a settlement or try to remedy the problem. This can still be accomplished without abating the suit. The defendant is placed on notice either by a notice or by having the suit filed.

Requirements for offers of settlement under DTPA, art. 21.21

The DTPA and art. 21.21 both have procedures establishing how to treat offers of settlement. An offer of settlement must be tendered within 60 days after the defendant receives notice of the claim. The offer must include an amount to compensate the consumer for the harm imposed by the deceptive practice and an amount to compensate the consumer for any attorney's fees. The consumer has 30 days to accept the offer or else it is considered rejected. Once rejected the offer may be filed with the court by the defendant. If the court finds that the offer is the same, more than or substantially the same as the actual damages found by the trier of fact, the consumer is limited to recovering only the amount of actual damages or the amount of the offer, whichever is less. Such settlement offers are not admissible against a defendant.

CSHB 668 would place identical provisions for offers of settlement in separate provisions in both the DTPA and art. 21.21; currently these provisions are included in the same sections as the notice provisions. CSHB 668 would alter the time requirements to accommodate mediation timetables. It would allow the court to determine the adequacy of the offer to pay for damages separately from the offer to pay attorney's fees. The court could determine each of these awards separately and adjust the consumer's recovery for one or both awards. CSHB 668 would also allow a court to not adjust the consumer's award if it found that the defendant could not have performed the offer of settlement at the time it was made or if it found that the offer was misrepresented.

Supporters say the offer-of-settlement provisions of the DTPA and art. 21.21 are very effective at helping to achieve a quick resolution of claims. They should not be viewed as bullying the plaintiff into accepting a settlement offer, but simply would require the plaintiff to be realistic about the claim.

The offer-of-settlement changes would help this process become even more fair. Currently, the total offer of settlement must be compared to the award given to the plaintiff, but offers and awards each have two parts: the damages incurred and the attorney's fees. CSHB 668 would allow a court to consider each of these parts separately to get a more accurate view. This

process would also avoid the practice of using attorney's fees to run up the award given to the plaintiff and thereby make the offer less than the actual award.

A second change also helps the court to determine whether the offer was made simply to avoid the trebled damages provisions of the DTPA and art. 21.21. Now, a defendant can make a very large settlement offer, one that could not be executed, but so long as the damages eventually awarded were less than or the same as that offer, the defendant would be saved any trebled damages. CSHB 668 would eliminate this deceptive practice.

Opponents say CSHB 668 would allow a defendant to more forcefully bully a consumer into a settlement. By splitting the calculation of the two awards, a defendant could agree to one that is near to what the actual award will likely be but set the other substantially lower. The plaintiff cannot accept just one part of the offer, and now must determine if each individual award will be enough rather than the award as a whole.

Requiring mediation under the DTPA and art. 21.21

Mediation is a form of alternative dispute resolution that has become increasingly popular in recent years. Unlike arbitration, mediation does not impose an agreement upon the parties.

CSHB 668 would require a court to compel mediation for DTPA claims of less than $15,000 upon the motion of a party. In these mediations, the parties would have to share the costs of mediation. If the parties could not decide on a mediator, the court could choose one. For claims less than $15,000 mediation would still be possible, but only if the party requesting the mediation agreed to pay the costs of the mediation entirely.

Supporters say mediation is a very useful tool for resolving disputes quickly and fairly. The purpose of mediation is to allow the parties to come together in a non-binding environment and discuss what things they can agree upon and where they differ. Mediators are experienced practitioners in particular areas of the law and can advise each party on the strengths and weaknesses of their claims. In most cases, mediation can

usually allow at least some claims in a case to be settled before a trial is sought. In some cases, the whole case is settled by mediation.

Opponents say the party who requests mediation should be responsible for bearing the costs of the mediation no matter how much is involved in the suit. Consumers who were deceived concerning a $20,000 purchase may have lost their entire savings on the deception, and unless their lawyer wants to front the costs of mediation, which may run thousands of dollars, the consumer would be harmed by being forced to contribute.

Adding unfair practices under art. 21.21

Section 4 of art. 21.21 is the equivalent of the laundry list of deceptive acts found in sec. 17.46(b) of the DTPA. The general list of practices considered unfair or deceptive currently includes: misrepresentation and false advertising of policy contracts, false information and advertising generally, defamation, boycott, coercion and intimidation, false financial statements, unfair stock operation and advisory board contracts, unfair discrimination, rebates, and deceptive names, symbols or slogans.

CSHB 668 would add unfair settlement practices and other misrepresentations to list of unfair and deceptive practices under art. 21.21.

Supporters say the additions to the list of what is an unfair practice deal with the time when the insurance representative is offering a settlement upon a claim and a general list of other misrepresentations. These acts are ones that nearly everyone would agree are unfair practices when trying to settle a claim.

These acts should be added to sec. 4 to ensure that insurance representatives that commit such practices are held to the high standards of art. 21.21.

Opponents say most of the practices listed under the current sec. 4 deal with obtaining and selling an insurance policy, not with the conduct of the insurance business. The matters should be left to regulation by the Department of Insurance, not art. 21.21. The new provisions relating to

unfair settlement practices would be the longest subsection of sec. 4, even though they do not relate well to the other subsections.

Miscellaneous changes to the DTPA

The DTPA currently allows a defendant to be awarded attorney's fees if the court finds that the action brought by the plaintiff was groundless *and* brought in bad faith. The DTPA also sets venue for DTPA cases.

CSHB 668 would allow a defendant to be awarded attorney's fees if the court finds that the action brought by the plaintiff was groundless *or* brought in bad faith. Venue for DTPA actions would be governed by Chapter 15 of the Civil Practices and Remedies Code.

Supporters say these two provisions allow the DTPA statute to better comport with other tort reform legislation. The provision for expanding what suits are considered frivolous more closely resembles changes that are to be made in frivolous lawsuits for all civil suits.

Allowing Chapter 15 to determine venue also makes DTPA more closely follow other civil suits. The provisions of Chapter 15 once those reforms are completed by this Legislature, will very closely resemble the current provisions in the DTPA.

NOTES:

The committee substitute to HB 668 differs from the original version in that:

• the substitute requires the consumer to not be in a significantly disparate bargaining position in order for a waiver to be effective;

• the substitute does not include a full exemption for listed professionals from the DTPA;

• the original version defined a consumer as an individual only, not a partnership, corporation or other entity;

• the original version would require the court to find that an action was committed knowingly before it can award *any* damages;

• the original version held that the DTPA would not apply to any transaction for more than $500,000;

• the original version would only award exemplary damages for intentional acts or knowing breaches of express warranties;

• the original version sets outs standards for comparative responsibility (joint and several liability) separate from Chapter 33 of the Civil Practices and Remedies Code;

• the substitute adds the provisions changing the offer of settlement, the provisions in the Property Code and art. 21.21; and the provisions regarding mediation.