What is the DTPA?

The Deceptive Trade Practices Consumer Protection Act (DTPA) is the primary consumer protection statute in Texas. The purpose of the DTPA is to protect consumers from false, misleading or deceptive business practices, unconscionable actions and breaches of warranty. The statute prohibits a list of trade practices deemed to be false, misleading or deceptive. The DTPA gives consumers the right to sue for economic damages.

DTPA's Importance for Real Estate Brokers

The DTPA was created to protect consumers, and a DTPA action is one of the most commonly used causes of action by plaintiffs against real estate agents and brokers. The DTPA is intended to “make consumers whole” when any false, misleading or deceptive act or statement is the producing cause of damages to the consumer. The DTPA is frequently used by buyers of residential properties claiming to have been the victim of deception, abuse, fraud, or other injury by real estate agents, sellers, or inspectors.

A Typical Claim Under the DTPA

Plaintiffs often rely upon the following provisions in the DTPA:

* representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities they do not have;
* representing that goods are original or new when they are deteriorated, reconditioned, reclaimed, used or secondhand;
* representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, when they are not; and
* failing to disclose information about goods or services that was known at the time of the transaction if the failure to disclose was intended to induce the consumer into the transaction that the consumer would not have entered into if the information had been disclosed.

Most of the above claims stem from a representation. In the context of residential real estate transactions, this usually relates to the condition of the property and usually comes from

* the seller’s disclosure notice,
* the multiple listing service, and
* advertising fliers left at the property.

Therefore, it is important that when a listing agent enters information into the MLS or creates an advertisement, the information is accurate. If the information is inaccurate, it is possible a DTPA claim will be made.
What Is Recoverable Under the DTPA?

Consumers who prevail under the DTPA are entitled to recover their attorney’s fees, and if they show the person acted knowingly, they can receive up to three times their economic damages. Economic damages are compensation for the pecuniary loss sustained by the plaintiff. Examples of economic damages include

* costs of repair,
* loss of use during repairs or due to damage,
* diminution in value, and
* out-of-pocket expenses.

Additionally, a prevailing plaintiff may recover mental anguish damages.

Typical Use of DTPA in a Claim Related to a Residential Transaction

Common DTPA claims typically involve a dissatisfied buyer who alleges the seller or listing agent failed to disclose material information or misrepresented information about the house, its condition, the neighborhood, repairs, damage or other material facts. The claim is typically made against the seller, listing agent, and real estate inspector. If one of these parties fails to disclose material information to the buyer, or if they misrepresented facts about the property, then the DTPA provides the buyer with a possible claim.

Defenses to DTPA

Defenses to DTPA claims include the statute of limitations, contributory negligence and lack of consumer status, among many others. The statute of limitations for a claim under the DTPA is two years from the date that the violation occurred or two years from the date the plaintiff discovered or should have discovered the violation.

Recent Updates to DTPA Law

In the 2013 legislative session, the DTPA was amended to clarify a liability exemption for real estate brokerage. The amendment clarified a 16-year-old professional services exemption to the DTPA by expressly adding real estate brokerage to the list of professions not subject to liability under the act, as long as the agent or broker has not committed a misrepresentation of material facts, an unconscionable act, or a failure to disclose.

Specifically, the code states:

A plaintiff cannot sue a real estate broker or salesperson under the DTPA for an act or omission committed by the person while acting as a broker or salesperson. A plaintiff can sue a broker or salesperson under the DTPA for

* express misrepresentations of material fact that cannot be characterized as advice, judgment or opinion
* failure to disclose known information in violation of Texas Business & Commerce Code 17.46(b)(24), or
* unconscionable actions or courses of action that cannot be characterized as advice, judgment or opinion.

Therefore, to make a successful claim against a real estate broker under the DTPA, the plaintiff must establish the broker conduct falls into one of the three exceptions referenced above. Texas Association of REALTORS® (TAR) has drafted a model response letter members can use to answer a DTPA demand letter. TAR members can access the letter on TAR’s website.
The majority of DTPA claims against real estate brokers stem from alleged misrepresentations regarding a defect with the property. If a real estate agent receives specific information about a property from another source, the agent can be protected from a DTPA claim if the agent takes certain steps when passing on that information to a potential buyer. Texas Business & Commerce Code, Section 17.506 provides a defense for a defendant who relied on information from other sources relating to the particular good or service in question.

In an action brought under Section 17.50 of this subchapter, it is a defense to the award of any damages or attorney’s 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 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.

This provision can be helpful to listing agents when communicating information about the property to potential buyers. One very important factor to note is that the notice must be in writing.

TAR 2502 Notice of Information from Other Sources is a helpful tool and may be utilized by TAR members when communicating with potential buyers about property conditions or information from other sources.

For example, the seller of a home sends an email to his listing agent saying that he had a specific type of new metal roof put on his home three years prior. Using a form like TAR form 2502 gives notice to the potential buyer that the agent is not asserting that the home has a new metal roof, but that he has received this information from the seller. By using the form, the agent is not accepting or denying the possibility that the home has a specific type of new metal roof; he is only passing on the information.

**Puffing**

Misrepresentations that are merely puffing or opinion are not actionable under the DTPA [Texas Business & Commerce Code 17.46 (b)(5) and (b)(7)]. An example of a statement found to be puffing and therefore not actionable under the DTPA is the statement, “the property is super fine.” In other words, general adjectives describing the property may be too general to support a DTPA claim. However, as a practice note, it is best to avoid making these statements as there is no guarantee a court will conclude all general statements as puffing.

**As-Is Contract**

An as-is clause might bar claims brought under the DTPA. Texas courts have consistently held that the One-to-Four Family Residential Real Estate Contract is an as-is contract. The Broker Lawyer Committee recently amended the contract to ensure the courts will continue to treat the contract as such.

**Rescission under the DTPA**

The DTPA is generally viewed as a way for a wronged party to recover damages, but the DTPA also contains a lesser used remedy: rescission. Rescission means the contract is canceled and the parties are restored legally and financially to the position they were in before entering the contract.

Although a real estate broker is not a party to the One-to-Four Family Residential Real Estate Contract, the broker may be ordered to rescind the contract in some limited circumstances. In other words, the broker may be ordered to purchase the property from the buyer for the same price the buyer paid the seller.
In some instances, the DTPA allows for recovery of damages and rescission of the contract. However, case law limits the damages to those necessary to restore plaintiffs to the economic positions they held prior to the contract, such as reimbursement of loan application fees or the cost of a survey.

**Real Estate Agent Disclosure and the DTPA**

A broker or real estate agent may be liable to third-party purchasers of property pursuant to the DTPA where the broker or agent’s failure to disclose certain facts constitutes a deceptive trade practice.

Mere nondisclosure of material information is not enough to establish an actionable claim under the DTPA. In order to recover damages under the DTPA for the failure to disclose material information, the plaintiff must show that the information was withheld with the intent of inducing the consumer to engage in a transaction.

**Specific Examples**

1. A buyer of a condominium, who could not maneuver her vehicle into the parking garage, brought a DTPA claim against her broker. She did not prevail because she did not demonstrate that her broker failed to disclose material information with the intent of inducing the purchaser to purchase the condominium. This proof is required to establish a DTPA claim, but there was no record evidence that the broker or the broker’s agent knew that the buyer’s vehicle could not be parked in the garage. In addition, there was no evidence that the broker or broker’s agent withheld any information with the intent to induce the purchaser to purchase the condominium.

2. The buyer of a home with an illegal bulkhead brought fraud and DTPA claims against the real estate broker after the State removed the bulkhead and the house subsided into the ocean. The court found that the broker did not make any affirmative misrepresentations to the purchaser concerning the illegal bulkhead by allegedly stating that he did not know whether there was an erosion problem, that there was not an erosion problem in a town 15 miles away, and that bulkheads are nice to have.

**Notice of a DTPA Claim**

A consumer wishing to pursue a DTPA claim must provide 60 days written notice before filing suit. A broker who receives a notice of a DTPA claim will want to promptly contact a lawyer to discuss a response to the claim as the DTPA provides certain benefits to a defendant who promptly and reasonably responds to a DTPA demand letter. Specifically, under certain circumstances a defendant who makes a timely offer of settlement may limit the amount of attorneys’ fees recoverable by the plaintiff. Depending upon the facts of the case, this may be a substantial savings.

**House Bill 2590**

*Adds Business & Commerce Code Section 27.015*

*Effective September 1, 2015*

*Relating to providing a remedy for fraud committed in certain real estate transactions.*

Makes a violation of the fraud in real estate transactions statute that involves the transfer of title to real estate a false, misleading, or deceptive act or practice under DTPA. Requires city attorneys to lend the consumer protection division of the attorney general’s office any reasonable assistance requested in the commencement and prosecution of these types of fraudulent activities and gives city attorneys authority to institute or prosecute such an action to the same extent and in the same manner as a district or county attorney. Requires 75 percent of any penalty recovered in an action brought by a district, county, or city attorney to be deposited in the general fund of the county or municipality in which the violation occurred.