

July 2000

**QUESTION 12**

In 1997, Byer inspected a model home in the Country Estates subdivision on the outskirts of Kerrville, Texas. The developer of the subdivision and builder of the homes was Great Homes Corporation (“GHC”).

Among the brochures handed to Byer at the model home was one promoting a state of the art security and fire warning system available as an “extra” to purchasers of the homes. The security and fire system and all its components were manufactured by Protective Products, Inc. (“PPI”). The brochure contained a statement that, “The foolproof sensing devices, which are the central feature of the PPI system, are placed in strategic locations throughout the house and instantaneously set off a silent alarm notifying the police and fire departments in case of a fire or intrusion.”

The brochure was published by PPI as a means of marketing the system and was handed to Byer at the model home by a representative of GHC.

PPI had undertaken a concerted marketing campaign, emphasizing the effectiveness of the sensing devices. PPI’s marketing campaign induced GHC to promote the PPI system as the exclusive security and fire system to be offered by GHC as an “extra” to be installed in the Country Estates subdivision at the option of purchasers of the homes.

Byer contracted to purchase one of the Country Estates homes yet to be built. Convinced by what she had seen in the brochure, she ordered the PPI system to be installed in the house. The availability of the system was a significant inducement to her in deciding to buy the house.

Byer eventually moved into the house. In March 2000, while Byer was away, a fire broke out and destroyed the house and its contents, resulting in \$200,000 fire damage. Later inspection revealed that the fire sensing devices had failed to activate the alarm. It was determined that, if the alarm had been activated, the firefighters could have responded in time to limit the damage to about \$5,000.

It was also later determined that the failure occurred because the extreme Texas summer heat had caused the sensing devices to crack and not function as designed. There is some evidence that pre-production tests of the sensing devices at PPI’s manufacturing plant had indicated that such a problem might occur.

- 1. What rights and remedies, if any, does Byer have under the Texas Deceptive Trade Practices Act against:**
  - a) Great Homes Corporation? Explain fully.**
  - b) Protective Products, Inc.? Explain fully.**
- 2. What rights and remedies, if any, does Great Homes Corporation have against Protective Products, Inc. under the Texas Deceptive Trade Practices Act? Explain fully.**

## **Question 12 - Consumer Law**

1. Limited or no discussion of indemnity rights. Section 17.555 of the Texas Deceptive Trade Practices - Consumer Protection Act ("DTPA") deals exclusively with indemnity rights under the DTPA.
2. Inadequate or non-existent discussion of "consumer" status under the DTPA. Most significantly, there was insufficient discussion regarding the status as a business consumer.
3. Failure to address the issue of "privity" under the DTPA. Specifically, there was limited discussion that the deceptive practice must occur in connection with a consumer transaction. This issue was particularly important in establishing a cause of action against PPI.
4. Inadequate discussion of damages. This was especially true as it related to a discussion of damages that result from "knowing" and "intentional" conduct. Also, many examinees failed to address the recoverability of attorney's fees.
5. Limited discussion of causation requirements under the DTPA.
6. Examinees failed to thoroughly discuss the relief available for consumers under section 17.50 of the DTPA. Examinees frequently addressed only one of the actions for which relief is available without displaying thorough knowledge of all the actions for which relief is available.

February 2001

**QUESTION 3**

In 1997, Joe and Ann Jones built a custom home in San Antonio, Texas. The home was in an area where the exclusive supplier of electrical power was Strong Power & Light Company (“Strong”).

In order to obtain electrical power, the Joneses were required to purchase from Strong an electrical meter box that met Strong’s specifications. Strong connected the electrical lines from the street to the meter box, which was attached to the outside of the house, and then from the meter box into the house. Although the meter box belonged to the Joneses, it was to be maintained by Strong and was sealed to prevent access to the internal wiring board by anyone other than Strong. Strong attached a warning tag to the meter box; the tag stated:

“WARNING - Breaking the seal or accessing this meter box other than for maintenance by Strong Power & Light is prohibited.” Strong advertized widely that its services were second to none and that its equipment was maintenance free.

In March 1999, the Joneses moved out of state, where they continue to reside at the present time. They leased their San Antonio home to Happy Schools, Inc., a nationwide nursery school entity which had total assets of approximately sixteen million dollars. Use of the home as a nursery school was a lawful use under the local zoning ordinance.

The last electricity bill paid by the Joneses was for the month of March 1999. Happy Schools contracted with Strong to start up its electrical power in April 1999 and began paying the electricity bills at that time.

In February 2000, an electrical short occurred within the meter box, resulting in a fire that destroyed the Jones’ home and forced Happy Schools to shut down its San Antonio operation. An investigation revealed that Strong had never performed any maintenance on the meter box and that the fire would not have occurred if Strong had inspected and maintained the box.

**Do the Joneses and Happy Schools have standing to assert claims against Strong under the Texas Deceptive Trade Practices Act, and, if so, what defenses might Strong reasonably assert against each? Explain fully.**

### **Question 3 - Consumer Law**

The following deficiencies were common to a substantial number of examinee's answers:

Many did not seem to understand the connection required between the parties and the transaction. That is, they failed to state that privity of contract is not required and that the misrepresentation or actionable conduct must have occurred "in connection with" the plaintiff's transaction in goods or services. Many examinees did not seem to have a thorough understanding as to what conduct on the part of a defendant is actionable under the Texas Deceptive Trade Practices Act ("DTPA".) For example, examinees seemed to lack sufficient familiarity with the "laundry list" items, breaches of warranty, unconscionable actions and violations of the insurance code as being actionable under the DTPA. A considerable number of examinees did not seem to know the requirement that the assets of a business consumer may not exceed \$25,000,000.00. Many failed to identify Happy Schools as a consumer of electricity and did not seem to understand consumer status under the DTPA. Accordingly, many failed to recognize Happy Schools as a consumer. Many examinees apparently overlooked the argument that the Joneses might have lost their consumer status when they moved from the home. Generally, examinees had difficulty explaining viable defenses that Strong may have had to a DTPA action.

July 2001

**QUESTION 7**

Fisher, a Texas resident, purchased a new 26-foot pleasure fishing boat for \$34,000 from Marina Vessels, Inc. ("MVI"). MVI customized the boat according to Fisher's specifications and installed all the latest equipment for shark fishing in the Gulf of Mexico. At the time Fisher took delivery of the boat, he insured it through Best Insurance Co. for \$34,000, its full value.

Two months later, Fisher purchased from MVI a radar system for \$4,000. He purchased this particular system because Smith, a salesperson for MVI, assured Fisher that the radar system was manufactured with materials specially designed to withstand the extraordinarily corrosive effects of the salt-water and fishing climate in the Gulf of Mexico.

As soon as the radar was installed in the boat, Fisher spoke by telephone with Agent, Best Insurance Co.'s local representative, and told him he wanted to increase the coverage in the insurance policy by \$4,000 to cover his newly installed radar. Agent told Fisher, "No problem. I'll send you the paper work, you fill it out, and send it back to me with a check for \$200." Fisher filled out the form and sent Agent the \$200 check. Agent then forwarded the form and the check to Best Insurance Co.

Four months after he bought the radar system, Fisher began experiencing radar failures, apparently caused by the effect of salt-water corrosion. Fisher repeatedly took the boat to MVI to have the radar repaired. Despite several attempts to fix it, MVI was unable to solve the problem.

At a time when the boat was docked in Fisher's berth and no one was aboard, the boat was completely destroyed by an on-board fire. It was later determined that the cause of the fire was a short circuit in the radar system wiring which had sparked and ignited a flame that spread.

Fisher filed a timely claim for the \$38,000 loss with Best Insurance Co. Agent told Fisher that Fisher's coverage was limited to \$34,000 because Best Insurance Co. says it never received from Agent the application and payment for the additional coverage for the radar.

- 1. What causes of action, if any, under the Texas Deceptive Trade Practices Act does Fisher have against MVI for the loss of the boat, and what damages, if any, might Fisher recover from MVI? Explain fully.**
- 2. What causes of action, if any, under the Texas Insurance Code does Fisher have against Best Insurance Co. for the loss of the radar system, and what damages, if any, might Fisher recover from Best Insurance Co.? Explain fully.**

## **Question 7 — Consumer Law**

In the less successful answers, a number of examinees did not identify all actionable conduct under the Texas Deceptive Trade Practices - Consumer Protection Act (“DTPA”). For example, many examinees identified breach of warranty, but they did not seem familiar with DTPA provisions concerning unconscionable acts or the DTPA “laundry list” of other actionable practices. Some examinees did not adequately discuss consumer status and standing under the DTPA; others did not address these at all. A few examinees did not discuss the standard for unfair settlement practice under Article 21.21 of the Texas Insurance Code. There was inadequate discussion of damages in a number of papers. This was especially true as to damages that resulted from “knowing” and “intentional” conduct. Also, many did not address the recoverability of attorney’s fees. Examinees failed to address (or failed to adequately address) the significance of Section 17.50(4) of the DTPA and the relationship between that section of the DTPA and the Insurance Code.

February 2002

**QUESTION 3**

Sid borrowed \$10,000 from Best Credit for the purchase of a family recreational houseboat. He went to Bank to withdraw from his savings account the \$5,000 he needed for the down payment. Unknown to Sid, his wife had withdrawn \$5,000 on the previous day, leaving a balance in the account of only \$1,000. However, Bank had not yet posted the previous day's withdrawal and, in error, paid Sid \$5,000, which he used for the down payment.

A few days later, Bank realized its error and demanded that Sid pay back the \$4,000 overpayment. Sid refused, saying that he was not responsible for Bank's mistakes. Bank's president then drafted a demand letter to Sid on a letterhead he had created on his desktop computer falsely indicating that it was from "Bank – Legal Division," and he signed his name followed by "Counsel." The letter stated that, if Sid did not repay the overpayment immediately, Bank would commence a civil action against Sid and notify other financial institutions so that, "Sid would never again be able to get a loan in the three-county area."

On the first family outing in the houseboat, Sid wrecked it beyond repair and stopped making payments on the Best Credit loan. After several months, during which the loan was in arrears, Best Credit's collection manager, Vic, undertook to collect the balance due.

Frustrated at being unable to contact Sid in person, Vic began calling on the phone. Over a 48-hour period, Vic repeatedly called Sid's work phone, cell phone, home phone, and the line in Sid's children's room, leaving increasingly angry messages. In one call, when Sid's wife answered the phone, Vic told the wife that she and her husband were guilty of fraud and theft. During two of the calls, Vic disguised his voice and claimed to be Best Credit's attorney. He said he had been talking to the county attorney about pursuing criminal charges, which would be commenced unless Sid paid the debt immediately.

- 1. Did Bank's collection efforts violate the Texas Debt Collection Act (the "Act")? Explain fully.**
- 2. Did Best Credit's collection efforts violate the Act? Explain fully.**
- 3. If Bank or Best Credit violated the Act, what civil remedies are available to Sid under the Act? Explain fully.**

### **Question 3 — Consumer Law**

This question called for familiarity with the Texas Debt Collection Act (TDCA). Some examinees correctly noted that it is not a violation of the TDCA for a collector to threaten to commence a civil action to collect the debt. Many examinees correctly stated that the TDCA generally prohibits deceptive and coercive debt collection practices, but they did not refer to specific prohibitions that the Bank may have violated. In the second section, involving Best Credit's collection efforts, most examinees stated the time restrictions on telephone contact by debt collectors, as well as the rules regarding contact at the consumer's place of employment, but failed to discuss how or whether the facts supported finding a violation of these restrictions.

In addition, while many examinees concluded that the numerous phone calls were harassing, they did not discuss whether the facts showed the debt collector's intent to harass, which is required by the statute. With respect to damages, most examinees correctly noted that a violation of the TDCA is also actionable as a violation of the Texas Deceptive Trade Practices Act (DTPA). However, some examinees only discussed remedies available under the DTPA and did not address the remedial scheme in the TDCA.

July 2002

**QUESTION 1**

The police in South Padre Island, Texas arrested and jailed Sally during spring break on charges of driving while under the influence and resisting arrest. John, Sally's elderly father, contracted with AAA, a licensed bonding company in South Padre, for a bail bond to secure Sally's release from jail. John agreed to pay AAA the face amount of the bond within 5 days of any bond forfeiture. Sally was released from jail.

Sally failed to appear for a court hearing, and AAA had to pay on the bond. Five days later, Bob, an employee of AAA, telephoned John and demanded payment under the contract with AAA. John said he was short of cash and would not be able to pay right now.

Bob told John that, if he did not pay immediately, AAA would seize and sell John's car and file a criminal action against him and that the police would arrest him the same day.

That same evening, Bob called again. Mary, John's elderly wife, answered the phone. Bob repeated to Mary what he had told John earlier in the day. John failed to pay the amount owed.

AAA retained Edgar, a lawyer, who sent a letter to John demanding immediate payment. In the letter, Edgar threatened to sue John in a civil action to collect the debt. He also stated in the letter that, "If after proper court proceedings it is determined that you have violated a criminal law of the State of Texas, the authorities might arrest you." John showed the letter to Mary.

John and Mary became so upset by the communications from Bob and Edgar that they required medical attention and special medication.

- 1. What rights, if any, under the Texas Debt Collection Practices Act does John have against**
  - a. AAA? Explain fully.**
  - b. Edgar? Explain fully.**
  
- 2. What rights, if any, under the Texas Debt Collection Practices Act does Mary have against**
  - a. AAA? Explain fully.**
  - b. Edgar? Explain fully.**

## **Question 1 — Consumer Law**

This question required familiarity with the Texas Debt Collection Practices Act (“TDCPA”).

Most examinees concluded generally that the threats were improper; however, many failed to explain how the TDCPA applied. Also, many simply concluded that AAA’s collection efforts constituted harassment without pointing to any facts that would indicate intent to harass, which is required under the statute. As to whether Edgar, an attorney, would be considered a debt collector under the TDCPA, some examinees seemed to overlook that an attorney is not considered a debt collector under the TDCPA unless he or she regularly makes contact with debtors for the purpose of collection of debts. With respect to Edgar’s conduct, some examinees failed to note that debt collectors are permitted to threaten civil lawsuits in order to collect a consumer debt. Similarly, many examinees failed to recognize that it is permissible for a debt collector to inform a debtor “that the debtor may be arrested after proper court proceedings if the debtor has violated a criminal law of the state.” Many examinees concluded that Mary’s rights under the TDCPA were dependent upon a finding that she was a debtor. They did not seem to recognize that the TDCPA permits any person to sue for violations of the Act.

February 2003

**QUESTION 9**

In February 2000, Pablo sustained personal injuries when his vehicle was rear-ended by a truck in Webb County, Texas. As a result of his injuries, Pablo lost six months from work at a local factory and incurred substantial medical bills.

In September 2000, Pablo contacted Attorney. Attorney told Pablo, who had limited education and had difficulty understanding English, that, in his opinion, Pablo had a good case. Attorney also told Pablo that he would be willing to take the case on a contingent fee basis and that he could file the suit against the other driver in a couple of weeks. Pablo agreed to hire Attorney. Pablo never signed any contract or paid Attorney any money.

Periodically, Pablo would contact Attorney's office to check on the status of his case. Attorney and his assistants always told Pablo that things were going well. At one point, Attorney told Pablo that he had already filed the lawsuit and was merely waiting to hear from the opposing lawyer to settle the case.

In September 2002, Attorney's new legal assistant told Pablo that no suit had ever been filed on his behalf and that he should contact another lawyer. Upon hearing the news, Pablo became physically ill and depressed, requiring medical treatment and hospitalization.

- 1. On what grounds, if any, might Pablo assert he is a "consumer" under the Texas Deceptive Trade Practices Act (DTPA)? Explain fully.**
- 2. Assuming Pablo is a consumer, what rights and remedies, if any, does he have against Attorney under the DTPA? Explain fully.**

## **Question 9 – Consumer Law**

The following is a list of deficiencies common to a substantial number of examinees.

These examinees:

- did not fully explain the professional exemption under the Texas Deceptive Trade Practices Act (Hereinafter “DTPA”). While examinees noted that there are exceptions to the professional exemption, they failed to explain the basis for the application of the exemption (e.g. unconscionable action).
- failed to fully explain that "consumer status" extends to those that "seek" as well as those that "acquire" goods. That is, examinees tried to find some form of consideration to support a contract for legal services rather than simply stating that the seeking of services was sufficient.
- did not demonstrate an understanding that the damages that Pablo suffered as a result of the automobile action could not be recovered under the DTPA.
- failed to address the possible need to raise an additional cause of action for legal malpractice to recover additional damages that are not recoverable under the DTPA.

July 2003

**QUESTION 8**

ABC, whose main office is on Commerce Avenue, in Bee County, Texas, is in the business of selling new and used household appliances through door-to-door salesmen.

In February 2002, a customer returned an electric water heater to ABC because its heating element malfunctioned. ABC repaired the unit for possible resale.

On March 1, 2002, Salesman, an ABC employee, put the refurbished water heater in his pickup truck and drove to Buyer's house, hoping to make a sale. Salesman told Buyer that the water heater in his pickup truck was "just like new," "had never broken down," and "had never been repaired." Buyer needed a water heater for his home and agreed to purchase the unit on the spot for \$200.

Salesman brought the water heater into Buyer's house, and Buyer handed him \$200 in cash. Buyer signed a document dated March 1, 2002, containing the purchase price, the model number of the water heater, and ABC's address. Salesman told Buyer that Buyer could cancel the transaction within 48 hours by returning the water heater to ABC's main office, but the document Buyer signed did not contain any cancellation provision, and Salesman did not give Buyer a copy of the signed document.

On March 2, 2002, Buyer called ABC seeking to return the water heater because it had failed to provide any hot water. ABC's receptionist told Buyer that all sales of used appliances were "final" and that ABC would not return Buyer's money.

On March 3, 2002, the water heater malfunctioned, resulting in a fire that destroyed Buyer's home and everything in it.

**What are Buyer's rights and remedies, if any, against ABC under the applicable Texas consumer protection laws? Explain fully.**

### **Question 8 – Consumer Rights.**

Deficiencies common to a substantial number of examinees included the failure to mention the existence or significance of tie-in statutes under the Texas Deceptive Trade Practices Act (“DTPA”), the failure to address the tie-in statute in Chapter 39 of the Texas Business and Commerce Code in its entirety, and the failure to thoroughly describe the consumer’s rights and remedies under the DTPA. For those examinees who made reference to Chapter 39, most realized the enhanced ability to recover “actual” damages under the tie-in statute. However, many examinees did not examine other elements of the tie-in statute. For example, many examinees did not seem to recognize that the salesman failed to provide the buyer with a document containing the statutory language regarding his right to cancel (or to provide a correct oral statement of his right to cancel). Although many examinees correctly stated that the receptionist’s statements regarding the return policy constituted a breach of warranty under the DTPA, few recognized that the statement was a misrepresentation of the buyer’s rights under the tie-in statute. Most examinees correctly defined “consumer status” under the DTPA and explained the significance of “knowing” and/or “intentional” behavior as it relates to damages. However, the best exams fully addressed, explained and applied causation and actionable conduct (e.g. unconscionable conduct) under the DTPA.

February 2004

**QUESTION 12**

Carlos had a personal savings account at Bank, which, according to his records, contained a balance of \$13,000. He went to Bank to withdraw the entire balance and close the savings account. Bank's teller told Carlos that the balance in the account was \$23,000 and gave him a cashier's check in that amount. Before accepting the check, Carlos asked the teller to verify the amount, because Carlos' records reflected a different balance. The teller checked and assured Carlos that \$23,000 was the correct amount.

Two days later, Bank discovered it had made a mistake and sent Carlos a letter demanding immediate return of the \$10,000 overpayment. The letter accused Carlos of having committed fraud and theft and threatened to file a criminal action unless the funds were returned within 24 hours. In addition, at the Bank's request, Bank's law firm ("Law Firm"), which ordinarily did not get involved in debt collection matters, sent Carlos a separate letter containing the identical accusations and threat contained in Bank's letter to Carlos.

Carlos was shocked and humiliated by the letters. Carlos immediately returned the \$10,000. He lost sleep. He developed an anxiety condition that required medication, which required him to take unpaid time off from his job as a dental assistant. The actions by Bank resulted in a substantial disruption of Carlos' daily routine.

**What rights and civil remedies, if any, does Carlos have under the Texas Debt Collection Act and the Texas Deceptive Trade Practices Act**

- 1. Against Bank? Explain fully.**
- 2. Against Law Firm? Explain fully.**

**Question 12 – Consumer Rights.**

*Comments are not presently available.*

July 2004

**QUESTION 2**

Paul bought a car and financed it with a loan from Bank. In connection with the loan, Paul bought a credit life insurance policy issued by Insko, an insurance company. The policy provided that, in the event of Paul's death, Insko would pay the outstanding balance on the Bank loan and hold harmless Paul's estate and heirs. Bank agreed to include the cost of the insurance in the loan to Paul.

Soon after making his first payment on the car loan, Paul was killed in an automobile accident involving a drunk driver. The police arrested the driver at the scene. They filed a report stating that the driver was drunk and that he swerved outside his lane of traffic, causing the accident. At the time of the accident, the balance still outstanding on the loan was \$20,000.

Bank and Paul's wife, Widow, filed claims against Insko for payment under the policy. Without securing a copy of the police report or conducting a thorough investigation, Insko erroneously concluded that Paul was drunk at the time of the accident. Six months after the claims were filed, Insko denied them without explanation.

Bank wrote a letter appealing Insko's denial and presented a copy of the police report to support the claim of accidental death. Insko replied that its investigation was complete and that it was denying the claims on the speculative theory that Paul was heavily in debt and committed suicide due to financial pressures.

Bank then demanded payment in full from Widow and Paul's estate. Widow became so distraught that she had to seek psychiatric care and was hospitalized for three weeks. She also had to hire an attorney to represent her.

**What are the rights and remedies, if any, of Bank and Widow against Insko under Texas consumer protection laws? Explain fully.**

## **Question 2 - Consumer Rights**

Among the less successful answers, common problems included the following:.

1. the failure to mention or explain the significance of the distinction between economic damages and actual damages and the basis for obtaining actual damages under the tie-in statute.
2. many examinees did not mention or apply the distinction between who is able to sue the insurer under the DTPA and Article 21.21.
3. many examinees did not thoroughly describe the consumer's independent rights and remedies under the DTPA (without the benefit of the tie-in statute). For example, many examinees did not explain that privity of contract is not necessary to bring a claim under the DTPA and also did not mention that Widow and/or Bank only had to be "intended beneficiaries" of the insurance policy rather than the actual purchasers of the policy.
4. while most examinees recognized that insurers have various statutory duties toward their insureds, many examinees did not elaborate on the specific duties such as the duty to promptly pay or deny claims, conduct a reasonable investigation and to provide a reasonable explanation of a denial of coverage.

February 2005

**QUESTION 6**

Sam decided to sell his house and contacted a real estate agent named David. David inspected the house. He accurately measured the square footage to be 2,900 square feet, and he found evidence of an old, inactive termite infestation. David reported this information to Sam and recommended a selling price for the house.

Sam did not like David's estimate of the recommended sales price for the house and hired real estate agent Rita instead. Rita did not go to the house, but simply accepted Sam's representation that the estimated square footage was 3,800 square feet. Rita put the 3,800 square foot estimate in the Multiple Listing Service Information Sheet ("the information sheet"), and Sam signed the information sheet, which also disclaimed any current or previous termite damage. The information about the house was added to the local computer real estate listing service.

When David saw the listing, he called Rita to advise her that the square footage for the house was wrong and that the house had had termites at one time.

Paula contacted Rita about buying Sam's house. During their walk through inspection, Rita told Paula, "This house is priced right and is a very good value." Paula noticed the termite damage but said she was not concerned because it appeared to be an old infestation.

The average sales price for houses in this area was \$75 per square foot and Paula therefore bought the house for \$285,000 (3,800 x \$75). Paula never talked with Sam before completing the purchase of the house. Six months later, Paula was shocked to learn that the actual square footage of the house was only 2,900 square feet.

Three years later, Paula decided to sell the house. Her real estate agent, Todd, confirmed to Paula that the house had only 2,900 square feet, not 3,800 square feet. Todd also told Paula that the termite damage would be an impediment to the re-sale of the house (even though the damage was old) and that it would reduce the expected price by \$9,000. Paula decided to sell the house anyway.

- 1. What are Paula's rights and remedies, if any, under the Texas Deceptive Trade Practices Act ("the DTPA") against:
  - a. Sam?
  - b. Rita?Explain fully.**
  
- 2. What DTPA defenses, if any, are available to Sam or Rita or both? Explain fully.**

## **Question 6 - Consumer Rights**

Common deficiencies in a substantial number of answers included the following:

Many examinees did not recognize a limitations issue or else seemed unfamiliar with the applicable statute of limitations.

Many examinees did not mention causation, its significance or the “producing cause” standard. Of those who did, many did not explain its application. Examinees consistently failed to address whether the defendants’ conduct must be the “sole” producing cause of damages, or merely “a” producing cause that in the natural sequence of circumstances contributed to or caused plaintiff’s damages. Only a few seemed to know the difference between proximate cause and producing cause or the significance this difference has for consumers under the DTPA.

Most examinees did not appear to understand that consumers are not required to prove privity of contract to bring a DTPA claim. Of those who mentioned privity, a substantial number concluded that it did not exist between the seller and buyer thus precluding recovery.

Many examinees did not mention the type or scope of damages recoverable under the DTPA. They also did not seem to recognize the significance of knowing and/or intentional conduct and its effect on damages.

Many examinees did not fully explain actionable conduct under the DTPA. Most examinees reiterated the facts and then stated generally that such conduct was prohibited under the DTPA. This did not explain the types of actionable conduct in the statute or relate them to the facts of the question. Few examinees distinguished DTPA claims from contract claims, explained the general significance of false or misleading statements, or addressed warranty issues and unconscionable conduct.

July 2005

**QUESTION 7**

Dan and Pat divorced. Dan immediately wrote to National Credit Card Company (NCC) instructing NCC to cancel the credit card NCC had issued in Dan's name. NCC acknowledged receipt of the letter and took steps to cancel the card.

However, before NCC could finalize the cancellation, Pat charged merchandise up to the credit card's maximum of \$10,000. Pat made no payments on the account. Under applicable Texas law, Dan had no liability for this debt.

NCC sent a letter to Dan demanding payment of the outstanding \$10,000. This was Dan's first notice of the credit card balance. Dan wrote a letter disclaiming his responsibility for the balance and explaining that Pat had, without his authorization, charged the entire amount after the divorce. Although NCC received the letter, it reported the account as a bad debt on Dan's record with the local credit reporting bureau in Dan's home town.

NCC assigned the account to Capital Collection Agency (Capital) for collection. Capital repeatedly called Dan at work and claimed he owed \$10,000 to one of its clients. Capital refused to identify the client and refused to give Dan Capital's address and phone number.

Capital sent a letter to Dan at work stating falsely that it had a judgment against him and had filed a judgment lien against him in his county's deed records. Capital told Dan's business partner that Dan was guilty of fraud and that it intended to pursue criminal charges against Dan.

As a result of Capital's assertions, Dan's partner dissolved the partnership, causing Dan to lose his livelihood. Dan had an extreme anxiety attack, saw a doctor, and had to be hospitalized. He incurred medical bills in the amount of \$10,000.

Lawyer, an attorney hired by Capital, sent a demand letter to Dan and his attorney. Dan's attorney convinced Lawyer that the alleged debt was not Dan's responsibility. Although Lawyer advised Capital and NCC that the debt was Pat's, not Dan's, NCC refused to correct the inaccuracy at Dan's local credit reporting bureau and refused to cease collection efforts against Dan.

- 1. What conduct or actions, if any, of NCC and/or Capital were violations of the Texas Debt Collection Practices Act? Explain fully.**
- 2. What remedies, if any, are available to Dan under the Texas Debt Collection Practices Act and the Texas Deceptive Trade Practices Act? Explain fully.**

## **Question 7 - Consumer Law**

Many examinees did not mention the range of damages available for the plaintiff. In particular, examinees did not address injunctive relief.

Most examinees recognized the behavior that was offensive and recounted facts stated in the question. However, many examinees did not state the specific prohibition of the Texas Debt Collection Practices Act (“TDCPA”) that was violated by the conduct.

Many examinees did not appear to recognize the distinction between the TDCPA and the corresponding federal act as they relate to the liability of a collection company. That is, the examinees did not state that under the TDCPA, a “debt collector” also includes entities that are not ordinarily in the business of collecting debts. This issue was important for establishing the liability of the direct creditor.

Most examinees recognized that damages were recoverable under the Deceptive Trade Practices Act (“DTPA”), however, many examinees did not detail damages independently available under the TDCPA. A number of examinees did not describe the tie-in between the two statutes or the full scope of damages recoverable under both the DTPA and the TDCPA.

**QUESTION 5**

Paul, a small business owner in Lubbock, Texas, contacted Jones Alarm Company (“Jones”) about the purchase and installation of a burglar and fire alarm system. Jones was an authorized sales representative of SAFE Co. (“SAFE”), a manufacturer of such alarm systems.

SAFE expressly warranted its alarm systems were designed to “use existing telephone lines to call local police directly in the event of unauthorized entry and local firefighters directly in the event of a fire.” When the Jones salesperson went to Paul’s place of business for a demonstration of how the system worked, he told Paul that it was one of SAFE’s “advanced” models. The salesperson simulated a fire and break-in and showed Paul how it called the local police and fire departments directly. In fact, the system the salesperson used for the demonstration was not manufactured by SAFE.

Paul, convinced by the demonstration that the system would produce 15- to 20-minute response times from the local police and fire departments, agreed to purchase the system. The salesperson told Paul that Jones would “stand by” the SAFE warranty and service the device. Unknown to Paul, but known to Jones’s salesperson, the SAFE alarm system actually called a telephone service center in Tulsa, Oklahoma, and the service center in turn called the local police or fire departments in the event of an unauthorized entry or a fire. Jones’s technicians came back the next day and installed a SAFE system.

One night, burglars broke into Paul’s place of business. The burglars used lighted candles so they could better see what they were doing. One of these candles tipped over and ignited supplies in the maintenance closet and a devastating fire resulted. The SAFE alarm unit detected the unauthorized entry and fire and called the service center in Tulsa. The service center failed to call the fire department and delayed calling the local police for 30 minutes. The burglars were in and out of Paul’s building within 15 minutes, taking with them a number of Paul’s computers. When the police arrived 45 minutes later, the burglars were gone and the building was on fire. Paul lost \$25,000 in stolen computers and suffered \$50,000 in fire damage.

Paul wrote letters to SAFE and Jones, explaining that Jones’s salesperson had misrepresented the capabilities of the SAFE system Jones had installed and demanding payment for his losses. SAFE replied, denying responsibility for the loss. Jones did not respond at all.

Assume that Paul is a “consumer” as defined in the Texas Deceptive Trade Practices Act (“DTPA”).

- 1. In an action by Paul against SAFE under the DTPA, what causes of action and remedies are available to Paul, what defense, if any, might SAFE assert, and what is the probable result? Explain fully.**
- 2. In an action by Paul against Jones under the DTPA, what causes of action and remedies are available to Paul, what defense, if any, might Jones assert, and what is the probable result? Explain fully.**

## **Question 5 – Consumer Law**

A substantial number of examinees had difficulty with the following:

Causation and/or its significance as a defense to the claim. Of the examinees who did recognize its significance under the facts of the question, many did not explain its application. For example, many did not address the fact that the defendants' conduct need not be the "sole" producing cause of damages, but merely "a" producing cause that in the natural sequence of circumstances contributed to or factual caused plaintiff's damages.

Whether privity of contract is not necessary to bring a claim under the DTPA. Lack of privity between Safe and Paul should have caused examinees to explain the issue. Only a limited number of examinees displayed knowledge of the benefit provided to consumers from not having to prove privity.

The type or scope of damages recoverable under the DTPA and/or the significance of knowing and/or intentional conduct and its effect on damages.

Warranties as they relate to the DTPA. For example, a relatively small number of examinees even mentioned that the DTPA does not create any warranties. Also, the best exams addressed implied as well as express warranties and detailed the applicable implied warranties.

The agency relationship between Jones and Safe and the significance that it had on Paul's claim against Safe.

Also, many examinees spent time describing consumer status under the DTPA when the question stated that examinees could assume that Paul was a consumer.

July 2006

**QUESTION 8**

Blake instructed Rob, his insurance agent, to obtain premises liability and property damage insurance on a residence and detached workshop, including the contents, on a farm that Blake owned in Texas. Rob delivered to Blake an insurance policy issued by Insurance Co. (Insko), which Rob said included liability and property damage coverage for the residence, the workshop, and the contents of each. Blake paid the premium.

The Insko policy contained premises liability coverage for both the residence and the workshop, including a provision requiring Insko to defend at its own expense all lawsuits involving claims for personal injuries arising under the policy. However, the policy only included property loss coverage for the residence and its contents and expressly excluded property loss coverage for the workshop and its contents.

When Blake noticed the exclusion of property loss coverage for the workshop and its contents, he called and explained the problem to Alice, Vice President of Marketing for Insko. Alice told Blake that Insko would issue an endorsement (i.e., an amendment) adding that coverage to the policy and advised him of an increase in the premium. Blake paid the additional premium. However, Insko never issued such an endorsement because, under the State Department of Insurance regulations, no such property loss coverage was available for detached workshops on farms. Insko never disclosed this to Blake.

A month later, a failure in the electrical wiring in the workshop caused a fire, which spread to the residence, completely destroying both structures and their contents. A firefighter who responded to the fire was severely burned by an electrical shock from the faulty workshop wiring. The firefighter sued Blake to recover for his burn injuries.

Blake submitted timely claims to Insko for the property loss to the residence, the workshop, and their contents. He also tendered the defense of the firefighter's personal injury suit to Insko.

Initially, Insko denied Blake's property loss claims, asserting that the fire was the result of arson, even though the Fire Marshal had issued a ruling that it was an accidental electrical fire. Insko also initially refused to pay for Blake's defense in the firefighter's suit, asserting that there was no coverage because the injury occurred in the workshop, not the residence.

Only after Blake hired an attorney, did Insko agree to take over and pay for Blake's defense in the firefighter's suit. However, Insko refused to reimburse the \$15,000 Blake had so far paid his attorney. Insko also agreed to pay Blake's property loss claim for the residence and its contents. However, Insko refused to pay the property loss claim on the workshop and contents, relying on the express policy exclusion of such coverage.

Assuming that Blake is a "consumer" for all purposes:

- 1. What rights and remedies, if any, does Blake have against Rob and Insko under applicable Texas consumer rights statutes? Explain fully.**
- 2. What defenses, if any, might Rob and Insko assert? Explain fully.**

## **Question 8 – Consumer Law**

Common deficiencies in a substantial number of answers included the following:

Failure to recognize and/or explain that both Rob and Insko would be jointly and severally liable

Although most examinees recognized that the Insurance Code tied into the DTPA, this is not a pure DTPA question.

Many examinees failed to mention or adequately explain the specific Insurance Code related violations such as:

- informing the insured that the insurance was available when in fact it was not (and still charging for the coverage)
- using arson as a pretext for refusing coverage
- failing to defend the firefighter's suit
- failing to conduct a reasonable investigation of the claim and failing to provide a reasonable explanation of the insurer's denial of the claim and defense

The best exams also detailed (or at least mentioned) timelines for the insurer to provide or deny coverage and the related consequences for the insurer's failure to meet such deadlines.

As a defense, many examinees failed to recognize that property loss coverage for the detached garage was not available as a matter of law and there could be no causal connection to any property loss due to a misrepresentation because the law did not allow for such coverage.

Most examinees failed to explain the effect a lack of coverage would have on proving causation regarding damages for the detached garage.