

**Information or instructions: Deceptive trade practices act**

**PREVIEW**

1. The purpose of the following form is to comply with the notice requirements contained in the Texas Deceptive Trade Practices-Consumer Protection Act (Tex Bus & Comm Code §§ 17.41-17.63), which require a consumer to notify (in writing, by certified mail-return receipt requested) the seller of the goods of his or her complaint and afford the seller a reasonable length of time to resolve the matter.
2. Under an action for breach of warranty, the Uniform Commercial Code requires similar notice. Without proper notice the cause of action based on breach of warranty will be barred.
3. Failure to provide notice in a Deceptive Trade Practice-Consumer Protection Act case will bar the client from a recovery of treble damages.
4. The following form is predicated upon a breach of warranty and misrepresentations under the Deceptive Trade Practices-Consumer Protection Act. It was used in a residential real estate purchase. This form may, however, be used for any other similar consumer matter.
5. The procedure is to send the letter by certified mail-return receipt requested.

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**Information or instructions: Statutory update**

The deceptive trade practices act has been amended effective September 1, 1995 as follows:

1. Transactions that may be considered deceptive trade actions.
  - a. Dollar Amount Exclusion:
2. The new DTPA does not apply to transactions involving consideration by the consumer of more than \$500,000.00 or claims based on a written contract involving total consideration of over \$100,000.00 if the consumer was represented by independent counsel in the course of the negotiations. The counsel cannot be referred to the consumer by the merchant or the merchant's attorney.
3. The attorney will need to consider the implications of representing consumers in transactions involving \$100,000.1 to \$500,000.00. Will the attorney's advice benefit the client sufficiently for the possibility or consequences of losing protection of the deceptive trade practices act due to the attorney's representation.
4. Personal Injuries: Section 17.49 (e0)
  - a. The DTPA does not apply to a cause of action for bodily injury or death or the affliction of mental anguish, that would mean personal injuries.

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b. Personal injury actions are taken out of the deceptive trade practices act under Section 17.49 and 17.50.

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5. Professional Services: Section 17.4

a. Professional services are no longer considered subject to deceptive trade practices. The new DTPA does not apply to rendering of a professional service, the essence of which is the providing of advice, judgment, opinion or similar professional skill.

6. There are four exceptions to the above definition:

a. an express misrepresentation of material fact that cannot be called advice, judgment, or opinion,

b. a failure to disclose information in violation of number section 17.46 (b) 23 of the laundry list,

c. an unconscionable action or course of action that is not considered advice, judgment or opinion and, (Section 17.45(5))

d. a breach of an express warranty that is not advice, judgment or opinion.

7. Economic Damages under 17.45 (11)

a. Economic damages are compensatory damages for pecuniary loss including cost of repair and replacement. Economic damages do not include exemplary damages, damages for physical pain and mental anguish, damages for loss of consortium, damages for disfigurement, damages for physical impairment, or damages for loss of companionship and society.

b. Section 17.50 (b) provides for a recovery of economic damages in all cases and mental anguish only for knowing and intentional violations.

c. The new law reverts from recovery of actual damages to economic damages. The first \$1,000.00 of damages are no longer automatically trebled. Economic damages and mental anguish damages may be trebled, if the defendant commits intentional violations of the act.

8. Definition of Knowingly

a. It has been redefined to mean actual awareness at the time the act or practice was complained of. Section 17.41 (9)

9. Definition of unconscionability:

a. The term unconscionability has been replaced with gross disparity between the consideration paid and the value received.

10. Excessively Charged Druggies and Insurer

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11. The laundry list has been increased by adding a new violation which will make a defendant liable for taking advantage of a disaster when a disaster is declared by the governor by selling or leasing necessities at an exorbitant or excessive price (17.46 (b)).

12. Causation:

a. The new law has an important change in the area of causation. Under the prior law only a showing of producing cause was required. The new act requires reliance by the consumer. This new change could have a significant effect on product liability cases.

13. Waivers:

a. The amendments also changed the validity of waivers in the deceptive trade practice act. Under the current law, DTPA rights may only be waived for transactions greater than \$500,000.00.

b. Under the amendments a consumer may waive the DTPA rights in all transactions if the consumer is not in a disparate bargaining position. If consumer is represented by independent counsel, if the waiver follows the language specifically set out in the statute, if the waiver is conspicuous in writing and if it is signed by the consumer.

14. Mediation:

a. In cases where economic damages are claimed to be \$15,000.00 or greater either party may request a mediation prior to the 90 day after the date of service.

15. Joint and several liability:

a. The amendment also changes the joint and several liability rules for DTPA; claims under the current law all defendants were jointly and severally liable for the consumer's damages.

b. The new amendments are subject to the new joint and several liability statutes. This change may encourage DTPA defendants to join as many potential defendants as possible driving up the total cost of litigation in hopes of reducing their proportionate share of liability.

c. Comparative responsibility, the plaintiff if over 50 percent will bar recovery in all types of cases. Joint and several liability threshold for a defendant is over 50 percent. Toxic and environmental threshold a defendant is equal to or greater than 5 percent. Commercial premises owners liability to contractors and their employees in order to be liable must exercise some degree of control and be aware of dangerous conditions on the premises.

16. Venue

a. General venue will be in the defendant's principal office of a company where the cause of action arose or in a county where the defendant or in which the agent solicited the transaction), the plaintiff's residence or where a substantial part of the claim arose.

17. Article 2121 of the Texas Insurance Code

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a. This has been amended to specifically make unfair claims handling practices actionable and a violation of the deceptive trade practices act.

## Information or instructions: DTPA Statutory update-Deceptive Actions Against Elderly Consumers

1. See Section 17.47 of the Texas Business Commerce Code for increased civil penalties under the Deceptive Trade Practice Act for violations of the act against elderly people.

2. This action may be brought by the consumer protection division.

3. The fine may be up to \$10,000 per violation not to exceed \$100,000.

4. The consumer must be 65 years or older.

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