

**COMMENT: The DTPA's Professional Services Exemption: Let 'em Be Doctors and Lawyers and Such\*, \* The Author would like to thank Professor Melissa Essary, Baylor Law School, for her invaluable assistance in writing this Comment, and Megan, for her enduring patience.**

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**Reporter**

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**Author:** David Skeels\*\*

\*\* J.D., Baylor Law School, May 2003; B.A., History and Spanish, University of Arkansas, Fayetteville, 1995. Upon graduation, the Author will practice civil litigation and sports management with the law firm of Whitaker, Chalk, Swindle & Sawyer in Fort Worth, Texas.

## **Text**

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**[\*785]**

### I. Introduction

Mack is a professional auto mechanic. Owen owns a Ford Pinto that has brake problems, so he takes his car to Mack. Mack inspects the car and advises Owen that Owen simply needs new brake pads, rather than a more extensive brake replacement. <sup>1</sup> Owen consents and pays Mack to replace the brake pads. One week later, Owen's brakes fail on a country road. Owen runs off the road and into a ditch, causing \$ 5,000 of damage to the car. Subsequent investigation reveals that Mack installed the brake pads properly. However, Mack failed to recognize obvious problems with the brakes and, in fact, should have replaced the brakes.

Owen sues Mack the mechanic for economic damages under the Deceptive Trade Practices Consumer Protection Act (DTPA), <sup>2</sup> alleging that he (Owen) detrimentally relied on Mack's false and misleading information. According to

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<sup>1</sup> A similar hypothetical fact pattern initially appeared in David F. Bragg & Michael Curry, DTPA Forms & Practice Guide, 1995 Special Legislative Supp. at 5. More recent versions of the publication have retained the hypothetical. See David F. Bragg & Michael Curry, DTPA Forms & Practice Guide 2.02.01 (2001) [hereinafter The Bragg Practice Guide].

The Exemption's drafters analyzed the same hypothetical in: Teel Bivins, John T. Montford, Todd A. Hunter, Rob Junell, Robert L. Duncan, and Brian D. Shannon, The 1995 Revisions to the DTPA: Altering the Landscape, [27 Tex. Tech L. Rev. 1441, 1451 n.47 \(1996\)](#) [hereinafter 27 Tex. Tech L. Rev.]. Five members of the 1995 Texas Legislature contributed to the article, including four of the sponsors of House Bill 668; a Texas Tech law professor also contributed.

Finally, the auto mechanic hypothetical was analyzed in Richard M. Alderman, The Lawyer's Guide to the Texas Deceptive Trade Practices Act 3.051 (2d ed. Dec. 2001) [hereinafter The Alderman Practice Guide].

This Comment will cite these three sources frequently.

<sup>2</sup> See generally [Tex. Bus. & Com. Code Ann. 17.41-17.63](#) (Vernon 2002) (found at Title 2, subchapter E).

Owen, Mack represented his automotive services to be of a high quality and competent standard when, in truth, Mack's services and diagnostic skills were of a low quality and incompetent standard. <sup>3</sup> Mack admits that he gave bad advice, that his **[\*786]** judgment was poor, and that his diagnostic opinions were erroneous. However, Mack asserts that he is exempt from DTPA liability under section 17.49(c) because he was "rendering ... a professional service, the essence of which [was] the providing of advice, judgment, [and] opinion." <sup>4</sup> Can Mack successfully invoke the DTPA's Professional Services Exemption and thereby escape DTPA liability?

This Comment examines the DTPA's Professional Services Exemption (the "Exemption" <sup>5</sup>), which the Texas Legislature added as part of the 1995 amendments to the DTPA. <sup>6</sup> The amendment's sponsors advertised the **[\*787]** Exemption as an effort to remove legal and medical malpractice claims from the DTPA. <sup>7</sup> However, closer scrutiny indicates that the Exemption may have a much wider scope, because the legislature adopted an amorphous standard and failed to articulate a framework for application of the statute. <sup>8</sup> In particular, the legislature did not specify which professions or professionals qualify for the Exemption's protections. <sup>9</sup> Rather, the statute refers generally to "the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill." <sup>10</sup> This Comment seeks to answer two questions: (1) Is the focus of the inquiry on the nature of the individual's profession, or on the nature of the conduct involved? and (2) Can the Exemption be applied consistently, predictably, and in conformity with its intended purposes?

The Exemption's impact on current law will depend, in large part, on how the language is interpreted. If construed broadly, as the language arguably suggests, the Exemption creates a sizeable loophole in the DTPA through which potential defendants may escape liability. <sup>11</sup> However, such a broad construction of the Exemption would create a tension between the Exemption and the DTPA's overarching mandate: "[The DTPA as a whole] shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices ... and to provide efficient and economical procedures to secure such protection." <sup>12</sup> Consider that under a plain **[\*788]** reading of the statute, the mechanic described in the above hypothetical could conceivably escape DTPA liability because he was "rendering a professional service, the

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<sup>3</sup> Assume that Owen alleged DTPA violations under sections 17.46(a), (b)(5) and (7). Subsection (b)(7) defines "false, misleading, or deceptive acts or practices" to include: "representing that ... services are of a particular standard, quality, or grade ... if they are of another." Id. 17.46(b)(7). Similarly, subsection (b)(5) classifies the following as a deceptive trade practice: "representing that ... services have ... characteristics ... [or] benefits ... which they do not have ... ." Id. 17.46(b)(5).

<sup>4</sup> Id. 17.49(c).

<sup>5</sup> This Comment will refer to the Professional Services Exemption of 1995 as the Exemption, with a capital "E." The reader should not confuse this with various exceptions to the Exemption, which this Comment will discuss in detail, but will never capitalize.

<sup>6</sup> This Comment takes a close look at the 1995 legislative history of Texas House Bill 668. This bill introduced the Professional Services Exemption, which was subsequently discussed, debated, and eventually adopted. For the benefit of the reader, all of the relevant citations to the legislative history are consolidated here in a single footnote. The author abbreviates subsequent references to the legislative history and refers back to this footnote.

Tex. H.B. 668, 74th Leg., R.S. (1995), available at <http://www.capitol.state.tx.us> [hereinafter Tex. H.B. 668].

Tex. H.B. 668, 74th Leg., R.S. (1995), available at <http://www.capitol.state.tx.us> (introduced version).

Tex. H.B. 668, 74th Leg., R.S. (1995), available at <http://www.capitol.state.tx.us> (engrossed version).

Tex. H.B. 668, 74th Leg., R.S. (1995), available at <http://www.capitol.state.tx.us> (enrolled version).

Tex. H.B. 668, 74th Leg., R.S. (1995), available at <http://www.capitol.state.tx.us> (signed by Governor).

House Comm. on State Affairs, Committee Report, Tex. H.B. 668, 74th Leg., R.S. (1995), available at <http://www.capitol.state.tx.us>.

essence of which was the providing of advice, judgment, or opinion." <sup>13</sup> Conversely, an otherwise qualified "professional," such as a lawyer or accountant, could nevertheless incur DTPA liability where his conduct could not be characterized as "advice, opinion, or judgment." To resolve these potential difficulties, one must have a framework within which to interpret and apply the Exemption.

Part II of this Comment examines the Exemption within the larger context of the DTPA, provides a brief history of the events that gave rise to the Exemption's enactment, and discusses the Exemption's underlying policy and purposes. Part III.A looks at the structure and grammar of the Exemption's statutory language. Part III.B analyzes the Exemption's first problematic clause: "the rendering of a professional service." <sup>14</sup> Part III.C examines the Exemption's other problematic clause: "the essence of which is the providing of advice, judgment, opinion, or similar professional skill." <sup>15</sup> Part III.D proposes a test that defendants should have to satisfy to invoke the Exemption's protections. Part III.E discusses the exceptions to the Exemption (i.e., those types of conduct that trigger DTPA liability regardless of professional status, such as express misrepresentations and unconscionable actions). Part IV reviews the proposed test, recommends a course of action for the legislature and courts, and offers some final tips for practitioners.

## II. Background

The DTPA's Professional Services Exemption, codified at [section 17.49\(c\) of the Texas Business and Commerce Code](#), provides:

(c) Nothing in [the DTPA] shall apply to a claim for damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill. This exemption does not apply to:

(1) an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion;  
**[\*789]**

An Act Relating to Civil Remedies for Deceptive Trade Practices and Certain Related Consumer Claims: Hearing on Tex. H.B. 668 Before the House Comm. on State Affairs, 74th Leg., R.S. (Mar. 6, 1995) (tapes and a transcript of minutes available from House Committee Coordinator) [hereinafter House Hearing on Tex. H.B. 668, March 6, 1995].

An Act Relating to Civil Remedies for Deceptive Trade Practices and Certain Related Consumer Claims: Hearing on Tex. H.B. 668 Before the House Comm. on State Affairs, 74th Leg., R.S. (Apr. 19, 1995) (tapes available from House Committee Coordinator) [hereinafter House Hearing on Tex. H.B. 668, Apr. 19, 1995].

Debate on Tex. H.B. 668 on the Floor of the House, 74th Leg., R.S. (1995) (May 3, 1995) (tapes available from House Committee Coordinator).

An Act Relating to Civil Remedies for Deceptive Trade Practices and Certain Related Consumer Claims: Hearing on Tex. H.B. 668 Before the Senate Comm. on Econ. Dev., 74th Leg., R.S. (May 9, 1995) (tapes or transcript available from Senate Staff Services Office) [hereinafter Senate Hearing on Tex. H.B. 668, May 9, 1995].

An Act Relating to Civil Remedies for Deceptive Trade Practices and Certain Related Consumer Claims: Hearing on Tex. H.B. 668 Before the Senate Comm. on Econ. Dev., 74th Leg., R.S. (May 11, 1995) (tapes or transcript available from Senate Staff Services Office) [hereinafter Senate Hearing on Tex. H.B. 668, May 11, 1995].

Debate on Tex. H.B. 668 on the Floor of the Senate, 74th Leg., R.S. (May 17, 1995) (tapes or transcript available from Senate Staff Services Office).

<sup>7</sup> 27 [Tex. Tech L. Rev.](#), *supra* note 1, at 1442-43.

<sup>8</sup> 27 [Tex. Tech L. Rev.](#), *supra* note 1, at 1442-43, 1447, 1449-52 (admitting that they, the drafters, acquiesced to the adoption of vague language in order to maintain the necessary support needed for the amendment's passage).

<sup>9</sup> See [Tex. Bus. & Com. Code Ann. 17.49\(c\)](#) (Vernon 2002).

<sup>10</sup> *Id.*

- (2) a failure to disclose information in violation of Section 17.46(b)(23);<sup>16</sup>
- (3) an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion;
- (4) breach of an express warranty that cannot be characterized as advice, judgment, or opinion; or
- (5) a violation of Section 17.46(b)(26).<sup>17</sup>

On its face, the section does not appear to present any convoluted academic questions. A cursory reading could yield this simple summary: DTPA claims for damages do not apply to professional services rendered, with some exceptions. But this seemingly unremarkable proposition ignores significant questions such as: Who qualifies as a professional? What constitutes a professional service? What is meant by "the essence of which?" What constitutes "advice, judgment, or opinion?"

To address these inherent uncertainties, the Exemption should be analyzed within an interpretive framework that incorporates (A) the Exemption's statutory context, (B) the history leading up to the Exemption's enactment, and (C) the stated purposes and policy behind the Exemption. This framework is necessary because the Exemption's ambiguous language requires that one resort to extraneous indicators of the drafters' intent.

#### A. The Exemption in Context: A Brief Look at the DTPA

The Exemption's meaning, scope, and function must be analyzed within the larger context of the DTPA's statutory scheme.<sup>18</sup> One cannot understand the purpose of the Professional Services Exemption, or any of the other DTPA exemptions, without understanding why, or from what, a professional might seek to be exempt.

### **[\*790]**

#### 1. The Basics of the DTPA

The Deceptive Trade Practices-Consumer Protection Act<sup>19</sup> protects Texas consumers from four types of conduct: (1) false, misleading or deceptive acts or practices,<sup>20</sup> (2) breaches of express or implied warranties,<sup>21</sup> (3)

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<sup>11</sup> See, e.g., The Alderman Practice Guide, *supra* note 1, 3.051(A)(1) n.66b; see also The Alderman Practice Guide, *supra* note 1, 3.051(A)(1) n.66a (suggesting that an overly broad construction of the Exemption could essentially eviscerate the DTPA).

<sup>12</sup> [Tex. Bus. & Com. Code Ann. 17.44\(a\)](#) (Vernon 2002).

<sup>13</sup> *Id.* 17.49(c).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> The continuing reference to (b)(23) represents a legislative oversight. Because of an unrelated addition to the laundry list, the former 17.46(b)(23) is now codified at [Tex. Bus. & Com. Code Ann. 17.4b\(b\)\(24\)](#) (Vernon 2002).

<sup>17</sup> [Tex. Bus. & Com. Code Ann. 17.49\(c\)](#) (Vernon 2002).

<sup>18</sup> The precise impact of the Exemption upon the rest of the DTPA and its function within the DTPA has proved to be confusing. See, e.g., David J. Beck, *Legal Malpractice in Texas: Second Edition*, [50 Baylor L. Rev. 761, 768 \(1998\)](#) (erroneously asserting that, because of the Exemption, a failure to disclose is the only provision of the laundry list that presently applies to attorneys).

<sup>19</sup> See generally [Tex. Bus. & Com. Code Ann. 17.41-17.63](#) (Vernon 2002).

<sup>20</sup> *Id.* 17.44(a), 17.50(a)(1); see also The Bragg Practice Guide, *supra* note 1, 1.02.

<sup>21</sup> *Id.* 17.44(a), 17.50(a)(2); see also The Bragg Practice Guide, *supra* note 1, 1.02.

unconscionable actions or courses of action,<sup>22</sup> and (4) violations of [Article 21.21, section 16 of the Insurance Code](#).<sup>23</sup> The Act applies to the provision of both goods and services.<sup>24</sup> Section 17.50(a) states: "A consumer may maintain an action where any of the [above-mentioned acts or practices] constitute a producing cause of economic damages or damages for mental anguish."<sup>25</sup> Thus, section 17.50(a) provides the statutory authority to carry out the Act's purposes.

The DTPA may be understood in light of some of the DTPA issues that are frequently litigated. DTPA disputes frequently involve questions such as: Who is a consumer? What constitutes goods or services? Who may be sued? These questions arise even though the terms are defined, because litigants frequently argue about whether or not an individual fits that definition. Typically, a consumer avails himself of the DTPA by invoking one or more of the "laundry list" violations codified in section 17.46(b).<sup>26</sup> The non-exhaustive laundry list sets out a number of different acts or types of conduct that constitute unfair or deceptive acts.<sup>27</sup>

The DTPA effectuates its purposes through its damages provisions. Section 17.50(b)(1) provides the framework for the calculation of damages and authorizes treble damages upon a finding of knowing or intentional conduct by the defendant.<sup>28</sup> Remedies under the DTPA are cumulative<sup>29</sup> (i.e., they are intended to be in addition to other remedies provided by **[\*791]** law).<sup>30</sup> Section 17.50(d) provides that the prevailing party shall be awarded court costs and reasonable and necessary attorney's fees.<sup>31</sup>

Of particular significance, section 17.44(a) of the DTPA provides: "[The DTPA] shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection. n32"

Section 17.44(a) sets out the DTPA's unyieldi<sup>9</sup> mandate: to construe the DTPA liberally for the benefit of consumers. This provision implicitly mandates a logical corollary: to construe any DTPA exemptions narrowly, so that potential defendants may not easily escape liability, to the detriment of consumers. These two propositions-that the DTPA must be construed liberally, and that any DTPA exemptions should be construed narrowly-guide the analysis and conclusions in this Comment.

## 2. The DTPA's Exemptions

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<sup>22</sup> Id. 17.44(a), 17.50(a)(3); see also The Bragg Practice Guide, *supra* note 1, 1.02.

<sup>23</sup> Id. 17.44(a), 17.50(a)(4); see also The Bragg Practice Guide, *supra* note 1, 1.02.

<sup>24</sup> See [Tex. Bus. & Com. Code Ann. 17.46\(a\)](#) (Vernon 2002) (declaring any trade or commerce subject to DTPA liability) and 17.46(b) (making reference to both goods and services); see also 27 [Tex. Tech L. Rev., supra](#) note 1, at 1450.

<sup>25</sup> [Tex. Bus. & Com. Code Ann. 17.50\(a\)](#) (Vernon 2002).

<sup>26</sup> Id. 17.46(b).

<sup>27</sup> These are merely a few explanatory examples of the DTPA's frequently litigated issues. An in-depth discussion of these issues is beyond the scope of this Comment.

<sup>28</sup> Id. 17.50(b)(1).

<sup>29</sup> Id. 17.43.

<sup>30</sup> For example, it may be appropriate to bring both a legal malpractice claim and a claim under the [DTPA, Gibson v. Ellis, 58 S.W.3d 818, 824](#) (Tex. App. - Dallas 2001, no pet.).

<sup>31</sup> [Tex. Bus. & Com. Code Ann. 17.50\(d\)](#) (Vernon 2002).

<sup>9</sup> Id. 17.44(a).

The DTPA contains a number of exemptions, codified in section 17.49, which limit the range of possible DTPA defendants.<sup>33</sup> Prior to 1995, litigants seldom invoked the DTPA's exemptions.<sup>34</sup> However, the 1995 legislative amendments added some significant exemptions.<sup>35</sup> Specifically, the 1995 amendments spawned the Professional Services Exemption, codified at section 17.49(c). As mentioned above, the legislature's directive for a broad construction of the DTPA implicitly suggests a narrow construction of these exemptions.

## B. Political and Legislative History of the Exemption

The Exemption's history and legislative process help explain why the legislature chose the statutory language that it did. This section briefly [\*792] summarizes the legislative developments before 1995 to demonstrate that proponents of a professional services exemption faced resistance. Next, this section describes the 1995 political climate to show how that climate affected the 1995 legislative debates over proposed DTPA amendments. Finally, this section chronicles the voyage of House Bill 668, which included a professional services exemption, through the 1995 legislature to show how the bill's eventual passage required compromise by its proponents and modifications by its drafters.

### 1. Pre-1995 Attempts to Adopt a Professional Services Exemption

Proposed DTPA amendments are not unusual. The Texas Legislature considers proposed DTPA amendments nearly every session,<sup>36</sup> and has amended the DTPA nearly every session since 1973.<sup>37</sup> Prior to 1995, various groups, such as bankers and lawyers, pushed for a professional services exemption.<sup>38</sup> Ultimately, none of these efforts was successful.

### 2. The 1995 Political Atmosphere that Gave Rise to House Bill 668

In 1995, the timing was right for a professional services exemption and it was therefore included as one of the amendments in House Bill 668.<sup>39</sup> Bolstered by public backlash from outrageous and well-publicized jury verdicts, Governor George W. Bush and the Texas Legislature took advantage of a political atmosphere ripe for tort reform.

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<sup>33</sup> [Flenniken v. Longview Bank & Trust Co.](#), 661 S.W.2d 705, 706 (Tex. 1983) ("The range of possible defendants is limited only by the exemptions provided in section 17.49.").

<sup>34</sup> See The Alderman Practice Guide, *supra* note 1, at 3-25.

<sup>35</sup> *Id.* ("Unlike the seldom used exemptions for media owners and conduct authorized by the FTC, the new provisions are expected to apply to a substantial number of transactions. The new exemptions apply to professional services, personal injury claims, and large transactions." (emphasis added)).

<sup>36</sup> See, e.g., 27 [Tex. Tech L. Rev.](#), *supra* note 1, at 1441, 1442 (explaining in 1996 that the last substantial effort to reform the DTPA met with limited success in 1989).

<sup>37</sup> 27 [Tex. Tech L. Rev.](#), *supra* note 1, at 1443 n.12.

<sup>38</sup> See, e.g., Ray E. Dittmar, Letter to the Editor: DTPA Bill Mislabeled, *Tex. Lawyer*, June 7, 1993, at 2 (discussing the professional service exemptions that were proposed in 1989, 1991, and 1993); see also [DeBakey v. Staggs](#), 605 S.W.2d 631, 633 (Tex. Civ. App. - Houston [1st Dist.] 1980, writ ref'd n.r.e.) ("An amendment to the Act, which would have exempted all professional services, was tabled."); see also H.J. of Tex., 63rd Leg., R.S. 2114-15 (1973) (rejecting proposals to amend DTPA to exempt insurance agents, brokers, and licensed professionals from coverage of Act).

<sup>39</sup> Tex. H.B. 668, 74th Leg., R.S. (1995), available at <http://www.capitol.state.tx.us>; [Simmons v. Johnson, Curney & Fields, P.C.](#) (*In re Simmons*), 205 B.R. 834, 848 n.32 (Bankr. W.D. Tex. 1997) (providing helpful note on legislative history).

<sup>40</sup> Additionally, some commentators suggest that judicial activism led to this atmosphere. [\*793] In a 1996 law review article, the Exemption's drafters voiced their displeasure with a judiciary that had gone too far by making clear that House Bill 668 represents a legislative correction to a substantial expansion "beyond this original intent."

<sup>41</sup> Indeed, the political climate was so accommodating that the legislature passed an exemption more sweeping than previously defeated proposals.

### 3. House Bill 668 and Its Journey Through the 1995 Legislature

The 1995 Exemption's original ("introduced") version, sponsored and proposed by Representative Rob Junell, <sup>42</sup> would have shielded any and all professionals from DTPA liability, even for their deceptive acts. It read as follows: "[The DTPA] does not apply to a cause of action against an individual arising out of the provision of professional services by the individual." <sup>43</sup> The Exemption included no additional provisions, modifiers, or exceptions. This version did not survive the opposition's scrutiny.

The Texas Trial Lawyer's Association resisted. Bill Whitehurst, then-president, pointed out that "the bill, as originally proposed, would have, for all practical matters, in our opinion, done away with the DTPA bill as an effective consumer rights [statute]." <sup>44</sup> Shortly before voting on a modified version of House Bill 688, Whitehurst commented on the improvements made to the original version: "We have done what we feel like is extensive damage control in trying to get back in, over in the House [of Representatives], some of the ... protections ... for consumers. We did not get them all back in ... ." <sup>45</sup>

In fact, the bill's opposition succeeded in making significant changes to the original version. The House Committee on State Affairs added four consumer-friendly exceptions to Representative Junell's original language. <sup>46</sup> These four exceptions <sup>47</sup> modified the statutory language to a [\*794] form substantially similar to the present-day statute. Part III, section E, *infra*, discusses these exceptions in detail.

After the legislature added these exceptions they made only one significant change to the language of section 17.49(c). They modified the explanation of "professional services" from "the essence of which is the providing of advice, judgment, or opinion," to "the essence of which is the providing of advice, judgment, opinion, or similar

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<sup>40</sup> See, e.g., 27 *Tex. Tech L. Rev.*, *supra* note 1, at 1441, 1442 (describing factors, such as "the election of a Republican Governor, a more conservative Texas Senate, and a more conservative approach to government nationwide," that contributed to the political climate).

<sup>41</sup> 27 *Tex. Tech L. Rev.*, *supra* note 1, at 1443.

<sup>42</sup> Representative (D), District 72, State of Texas; B.S. 1969, Texas Tech University; M.A. 1974, University of Arkansas; J.D. 1976, Texas Tech University.

<sup>43</sup> Tex. H.B. 668, 74th Leg., R.S. (1995), available at <http://www.capitol.state.tx.us> (introduced version).

<sup>44</sup> *Senate Hearing on Tex. H.B. 668, May 11, 1995*, *supra* note 6.

<sup>45</sup> *Senate Hearing on Tex. H.B. 668, May 11, 1995*, *supra* note 6.

<sup>46</sup> See House Comm. Report on State Affairs, Committee Report, Tex. H.B. 668, 74th Leg., R.S. (1995), available at <http://www.capitol.state.tx.us>.

<sup>47</sup> A fifth exception was added in 2001 and became effective on June 1, 2002 (codified at *Tex. Bus. & Com. Code Ann. 17.49(c)(5)* historical note (Vernon 2002) [Act of June 15, 2001, 77th Leg., R.S., ch. 1229, 28, 2001 Tex. Gen. Laws 1229] (adding to the laundry list the exploitation of a natural disaster)).

professional skill."<sup>48</sup> This small addition may not appear too significant, but the change further broadened an already sweeping definition.

Representative Junell, the bill's sponsor, downplayed the Exemption's sweeping scope when he was questioned about the potential impact. He emphasized the Exemption's impact on doctors: "We do provide (and I think this is one of the most important things of this bill) ... a claim based [on] the rendering of a professional service, which is already covered by medical malpractice or negligence... ." <sup>49</sup> He continued, "[Such a claim] is exempted if the essence of that claim is the providing of advice, judgment, opinion, or for similar professional skill." <sup>50</sup> Of course, this reference to doctors was potentially misleading; i.e., even a narrow interpretation of the Exemption reveals that the Exemption applies to professionals other than doctors.

Representative Todd A. Hunter, <sup>51</sup> in an attempt to answer the same question about the Exemption's potential impact, undermined Rep. Junell's attempt at finesse. Representative Hunter proclaimed that the Exemption would contribute to "extreme, significant changes" in the DTPA. <sup>52</sup> He assured his pro-tort reform colleagues that the amended DTPA would be "a tougher, tighter, leaner, meaner statute, and a statute that does work and brings the pendulum back to where it should be." <sup>53</sup> The sponsors of the [\*795] bill, in a subsequent publication, wrote, "House Bill 668 represents a substantial overhaul of the Texas DTPA ... ." <sup>54</sup>

Throughout the legislative process, different legislators characterized the Exemption in different ways. For example, contrast Representative Hunter's assertions in the House, discussed above, with those of Senator Teel Bivins, the Senate sponsor for H.B. 668, from a debate in the Senate: "Overall, big picture of the bill, [H.B. 668] leaves the DTPA alone." <sup>55</sup> Interestingly, Senator Bivins earlier acknowledged that a major goal of his was to "get at the issue of using the DTPA against a professional ... in a situation where I don't believe it was ever originally intended to be used." <sup>56</sup> These conflicting defenses of the bill are not surprising in a political setting; but they do reveal the linguistic gymnastics that were required to secure the bill's passage.

#### 4. House Bill 668 Becomes Law

Chairman Seidlits provided the best summary of the efforts that led to the bill's passage: "I don't like everything in the bill, ... but I think it's a collaborative effort by a lot of members, ... the Governor's office, senators, Speaker's

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<sup>48</sup> Tex. H.B. 668, 74th Leg., R.S. (1995), available at <http://www.capitol.state.tx.us> (engrossed version) (emphasis added).

<sup>49</sup> Debate on Tex. H.B. 668 on the Floor of the House, 74th Leg., R.S. (May 3, 1995) (tapes available from House Committee Coordinator).

<sup>50</sup> *Id.*

<sup>51</sup> Representative, District 32, State of Texas; B.A. 1975, University of Kansas; J.D. 1978, Southern Methodist University.

<sup>52</sup> Debate on Tex. H.B. 668 on the Floor of the House, 74th Leg., R.S. (May 3, 1995) (tapes available from House Committee Coordinator); see also 27 *Tex. Tech L. Rev.*, *supra* note 1, at 1484 ("House Bill 668 represents a substantial overhaul of the Texas DTPA ... .").

<sup>53</sup> Debate on Tex. H.B. 668 on the Floor of the House, 74th Leg., R.S. (May 3, 1995) (tapes available from House Committee Coordinator); see also 27 *Tex. Tech L. Rev.*, *supra* note 1, at 1447 ("House Bill 668 has substantially narrowed the range of cases in which DTPA claims will be allowed." (emphasis added)) (emphasis added).

<sup>54</sup> See 27 *Tex. Tech L. Rev.*, *supra* note 1, at 1484.

<sup>55</sup> Debate on Tex. H.B. 668 on the Floor of the Senate, 74th Leg., R.S. (May 17, 1995) (tapes or transcript available from Senate Staff Services Office).

<sup>56</sup> *Senate Hearing on Tex. H.B. 668, May 11, 1995*, *supra* note 6.

office, to come to a resolution of [an] issue that, in my opinion, probably has gone away from the initial intent." <sup>57</sup> He continued, "but it still preserves a lot of actions and we can still call it a consumer protection act and take care of those ... who the Act was designed for." <sup>58</sup> These statements reveal that competing factions argued, negotiated, and labored over each of the controversial provisions, including the professional services exemption. Indeed, the legislature chose the Exemption's final language carefully; they did not simply draft the Exemption in a haphazard fashion.

**[\*796]** Senator Bivins endorsed the amendments and asserted that the amended DTPA promised to represent the best of all worlds: "[The amended DTPA] is still a very effective, if not the most effective consumer protection legislation ... in the United States." <sup>59</sup> He added, "I think this is a balanced approach, it's fair ... . I believe that with these reforms ... we will cure the abuses of the DTPA and still have one of the best consumer protection laws on the books... ." <sup>60</sup>

In his final remarks, Senator Bivins addressed some lingering criticisms:

The only causes of action that have been cut off to Texans under this reform would be causes of action under this statutory consumer protection law. In any other instance, for example, bodily injury or death, there are other remedies, other causes of action that are far more appropriate than this consumer protection statutory cause of action. So I wanted to make it clear that Texans are not being deprived of their rights to bring actions for all types of torts, but what we have done is narrowed the focus of this Consumer Protection Act to just those types of causes of action that result from consumer transactions. <sup>61</sup>

Governor George W. Bush signed House Bill 668 into law on June 8, 1995 <sup>62</sup> (effective September 1, 1995). <sup>63</sup> Yet, in 2003, the Exemption's **[\*797]** scope and significance is still unclear. The 1995 amendments have attracted many commentators, but few have addressed the Professional Services Exemption. <sup>64</sup> Similarly, only one supreme

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<sup>57</sup> Debate on Tex. H.B. 668 on the Floor of the House, 74th Leg., R.S. (May 3, 1995) (tapes available from House Committee Coordinator). Sponsors of the bill echoed this notion in a subsequent publication, making specific reference to the definition of professional: "This approach is the end result of numerous drafts involving struggles to reach consensus on a workable definition of "professional." 27 *Tex. Tech L. Rev., supra* note 1, at 1451.

<sup>58</sup> Debate on Tex. H.B. 668 on the Floor of the House, 74th Leg., R.S. (May 3, 1995) (tapes available from House Committee Coordinator).

<sup>59</sup> Debate on Tex. H.B. 668 on the Floor of the Senate, 74th Leg., R.S. (May 17, 1995) (tapes or transcript available from Senate Staff Services Office).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* (responding to Sen. Barrientos, who spoke in opposition to the DTPA amendments); see also 27 *Tex. Tech L. Rev., supra* note 1, at 1447 ("These changes were part of lawmakers' efforts to maintain the DTPA as a viable source of relief for consumers who encounter and are harmed by unscrupulous business practices, but to remove from the scope of the Act personal injury law, professional malpractice, and litigation between big businesses." (emphasis added)).

<sup>62</sup> Tex. H.B. 668, 74th Leg., R.S. (1995), available at <http://www.capitol.state.tx.us> (signed by Governor).

<sup>63</sup> The amendments, however, had a provision that delayed enactment of the amendment and grandfathered all cases that were brought prior to September 1, 1996. See *Tex. Bus. & Com. Code Ann. 17.56* historical note (Vernon 2002) [Act of June 8, 1995, 74th Leg., R.S., ch. 414, 20 (a), (b), 1995 Tex. Gen. Laws 2988, 3004]; see *Tex. Bus. & Com. Code Ann. 17.56* historical note (Vernon 2002) [Act of May 18, 1995, 74th Leg., R.S., ch. 138, 7, 1995 Tex. Gen. Laws 978, 981]; see also *Tex. Bus. & Com. Code Ann. 17.42* historical note (Vernon 2002) [Act of June 8, 1995, 74th Leg., R.S., ch. 414, 20 (a), (b), 1995 Tex. Gen. Laws 2988, 3004]; see also *In re Simmons*, 205 B.R. 834, 848 n.32 (*Bankr. W.D. Tex. 1997*) (helpful note on legislative history).

<sup>64</sup> But see generally The Alderman Practice Guide, *supra* note 1, and The Bragg Practice Guide, *supra* note 1.

court case has addressed the Exemption in any meaningful way.<sup>65</sup> Inevitably, creative litigants will test the Exemption's scope and application, and will force courts and commentators to take a closer look at the Exemption.

### C. The Exemption's Purpose and Policy

The Professional Services Exemption plays a specific role within the DTPA. The general purpose of the DTPA is to "provide plaintiffs a remedy where the common law fails."<sup>66</sup> The legislature passed the 1995 amendments to curb perceived abuses of the DTPA. In short, "the 74th Legislature's objective in passing House Bill 668 was to reestablish the original intent of the DTPA to protect genuine consumers facing unscrupulous parties who are either more sophisticated or in a better bargaining position."<sup>67</sup> The Exemption was designed primarily to take professional malpractice claims out of the DTPA, based in part on the idea that such claims do not resemble typical consumer transactions, and on the theory that parties may remedy such claims through other legal avenues.<sup>68</sup> Professionals sought the Exemption because they did not want the recipient to sue them every time they gave advice that did not work out well, or every time they made a judgment call that turned out to be wrong.<sup>69</sup> Many professionals argued that the DTPA was never intended to cover these types of professional malpractice claims.

To understand what the Exemption accomplishes, one must understand the damages framework of the DTPA. When one examines the Exemption in light of the damages framework, one will see that the Exemption's protections apply primarily to damage claims based on a simple finding of liability, as opposed to knowing or intentional conduct. Under **[\*798]** section 17.50(b)(1), the DTPA assigns liability for false, misleading, or deceptive acts or practices, with increasing levels of penalties for (1) a simple finding of liability, (2) conduct that was committed knowingly, and (3) conduct that was committed intentionally. This breakdown is potentially confusing. When one thinks of a deceptive practice, one may assume that the wrongdoer committed a knowing or intentional act. Certainly, the DTPA authorizes penalties for knowing and intentional acts. This perception of deceptive practices, however is incomplete if it fails to recognize that the DTPA also authorizes recovery based on a simple finding of liability. Such a finding might be based on negligence, ignorance, carelessness, or even a well-reasoned, good faith belief that turns out to be wrong.

However, the Exemption does not eliminate all professional liability. The exceptions listed in section 17.49(c)(1)-(5), discussed more fully in Part III.E, demonstrate that, even after the Exemption's adoption, professionals and professional service providers may still incur DTPA liability for knowing and intentional acts. In other words, the Exemption has no impact on knowing and intentional acts—two of the three categories of wrongful conduct contemplated by the DTPA's damages scheme. Thus, one can see by process of elimination that the drafters designed the Professional Services Exemption to exclude from the DTPA professional malpractice claims based on a simple finding of liability.<sup>70</sup> Simply stated, the drafters designed the Exemption to shield professionals from DTPA liability in situations where the professional did nothing more than give advice, judgment, or opinions that turned out to be incorrect.

### III. Analysis

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<sup>65</sup> See generally [Latham v. Castillo, 972 S.W.2d 66 \(Tex. 1998\)](#).

<sup>66</sup> [Id. at 69](#) ("The legislative intent in enacting the DTPA was to provide plaintiffs a remedy where the common law fails.") (citing [Woo v. Great Southwestern Acceptance Corp., 565 S.W.2d 290, 298](#) (Tex. Civ. App. - Waco 1978, writ ref'd n.r.e.)).

<sup>67</sup> 27 [Tex. Tech L. Rev., supra](#) note 1, at 1484.

<sup>68</sup> 27 [Tex. Tech L. Rev., supra](#) note 1, at 1447, 1451.

<sup>69</sup> 27 [Tex. Tech L. Rev., supra](#) note 1, at 1443 ("Among House Bill 668's reforms are provisions intended to (1) limit ... claims against professionals relating to their advice." (emphasis added)).

<sup>70</sup> For example, a malpractice claim might be based on an innocent and unknowing misrepresentation, where such misrepresentation supports a simple finding of liability but does not support a finding of knowing or intentional conduct.

The words of section 17.49(c) must be scrutinized in order to reach an interpretation faithful to the adopted language, the drafters' intent, and the Exemption's purposes.<sup>71</sup> Such an analysis must precede any proposed test that would suggest the proper application of the Exemption, because the language must guide any test. The Exemption provides:

**[\*799]**

(c) Nothing in [the DTPA] shall apply to a claim for damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill. This exemption does not apply to:

- (1) an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion;
- (2) a failure to disclose information in violation of section 17.46(b)(23);<sup>72</sup>
- (3) an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion;
- (4) breach of an express warranty that cannot be characterized as advice, judgment, or opinion; or
- (5) a violation of section 17.46(b)(26).<sup>73</sup>

Most of the analysis in Part III focuses on the first sentence of the Exemption. More specifically, Parts III.A, III.B, and III.C focus on two consecutive clauses in the Exemption's first sentence: "the rendering of a professional service," and "the essence of which is the providing of advice, judgment, opinion, or similar professional skill." Part III.A analyzes the Exemption's grammatical structure. Part III.B takes a substantive look at the phrase "the rendering of a professional service," and endeavors to establish a working definition of "professional." Part III.C takes a substantive look at the clause "the essence of which is the providing of advice, judgment, opinion, or similar professional skill," and examines the extent to which conduct, rather than profession, should be the focus of the Exemption. Part III.D synthesizes the above analysis and proposes a three-part test that defendants should have to satisfy in order to invoke the Exemption's protections. Part III.E discusses the second sentence of the Exemption, which enumerates five "exceptions" to the Exemption; (i.e., Part III.E discusses certain types of conduct that cannot escape DTPA liability) regardless of one's professional status.

**[\*800]**

#### A. The Exemption's Grammatical Structure<sup>74</sup>

As with any statutory analysis, one must begin with the actual language.<sup>75</sup> A difficult case of statutory interpretation deserves close grammatical scrutiny, since the intent of the lawmaker is to be found in the language he uses.<sup>76</sup> As such, the order, function, and meaning of those words are critical.<sup>77</sup> This part, III.A, looks at the

<sup>71</sup> [Matrix, Inc. v. Provident Am. Ins. Co., 658 S.W.2d 665, 667](#) (Tex. App. - Dallas 1983, no writ) (pointing out that resolution of an issue of statutory construction must begin with an analysis of the statute).

<sup>72</sup> Because of an unrelated addition to the laundry list, the former 17.46(b)(23) is now codified at (b)(24). The continuing reference to (b)(23) is a legislative oversight.

<sup>73</sup> [Tex. Bus. & Com. Code Ann. 17.49\(c\)](#) (Vernon 2002) (emphasis added).

<sup>74</sup> The reader should have a copy of the statute readily available to assist in reading this section. The Exemption is printed in its entirety at the beginning of Part III of this Comment.

<sup>75</sup> See [Cail v. Serv. Motors, Inc., 660 S.W.2d 814, 815 \(Tex. 1983\)](#).

<sup>76</sup> [United States v. Goldenberg, 168 U.S. 95, 102-03 \(1897\)](#).

<sup>77</sup> [Lake County v. Rollins, 130 U.S. 662, 670 \(1889\)](#).

order and function of five key words, and then analyzes the two clauses that contain those words. This part will explain that (1) the antecedent of the second clause is "professional service," and (2) the second clause restricts, or limits, the first.

#### 1. A Grammatical Look at Five Words: "Rendering," "Professional," "Service," "Essence," and "Which"

Courts will need to properly construe each word if they intend to properly apply the statute as a whole. <sup>78</sup> The Exemption's first sentence has five words that deserve attention. The first sentence provides: "Nothing in [the DTPA] shall apply to a claim for damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill." <sup>79</sup> In this sentence, "rendering" serves as a noun <sup>80</sup> and is modified by the prepositional phrase "of a professional service." Within that prepositional phrase, "professional" is an adjective that modifies the noun "service." These two words form a noun clause: "professional service."

The next clause, "the essence of which," creates much of the statute's ambiguity because it does not define the antecedent. Here, "essence" is a noun, and "which" is a relative pronoun in a clause that defines, or provides additional information about, the antecedent. The clause begs an important question: What is the antecedent of the clause? Theoretically, the clause could mean one of four things: (1) the essence of the "rendering," (2) the essence of a "professional," (3) the essence of a "service," or (4) the essence of a "professional service." However, since **[\*801]** "which" is a pronoun, its antecedent must be a noun (or a noun clause), leaving us with three options: "rendering," "service," or "professional service." Thus, one thing is grammatically certain: "which" does not refer to "professional." This is significant because, as this Comment will explore later, the grammatical structure suggests that the analytical focus should not be on "professional."

Upon close inspection, the author believes that "the essence of which" refers back to the noun clause "professional service," since that is the most logical and common sense construction. In other words, the antecedent of "which" is "professional service." In summary, the court's job when applying this statute will be to determine when the essence of the "professional service" (as opposed to "the essence of the profession") is "the providing of advice, judgment, opinion, or similar professional skill."

#### 2. A Grammatical Look at Two Clauses: "the rendering of a professional service," and "the essence of which is the providing of advice, judgment, opinion, or similar professional skill"

After identifying and examining five potentially problematic words, one must examine the two clauses in which those words are found. This Comment primarily is concerned with these two clauses: (1) "the rendering of a professional service," and (2) "the essence of which is the providing of advice, judgment, opinion, or similar professional skill." Both clauses serve a function. <sup>81</sup>

The second clause has multiple parts. It begins with the following language: "the essence of which." This is a relative clause and is guided by a relative pronoun: "which." As a grammatical rule, the second clause is either (a) restrictive or (b) nonrestrictive; i.e., the second clause (a) may serve to limit or restrict the antecedent (professional service), or it (b) may describe or provide additional information about the antecedent (professional service). <sup>82</sup>

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<sup>78</sup> Id.

<sup>79</sup> [Tex. Bus. & Com. Code Ann. 17.49\(c\)](#) (Vernon 2002).

<sup>80</sup> Technically, "rendering" is a gerund-a verb form serving the function of a noun. *Tex. L. Rev.*, *Manual on Style & Usage* 2 (8th ed. 1995).

<sup>81</sup> E.g., [United States v. Nordic Village, Inc., 503 U.S. 30, 36 \(1992\)](#) (stating that the court, if possible, must construe the statute in such a fashion that every word has some operative effect); see also [Reiter v. Sonotone Corp., 442 U.S. 330, 339 \(1979\)](#) (stating that the court, in construing a statute is obligated, when possible, to give effect to every word Congress used).

<sup>82</sup> The Chicago Manual of Style 5.29, 5.36 (The University of Chicago Press ed., 13th ed. 1982).

One must determine the role of the second clause to see how it affects the first. If the second clause merely provides additional information about the first (i.e., if the second clause is non-restrictive), then the second clause **[\*802]** serves a role of minimal importance and even could be omitted without altering the meaning of the main clause.<sup>83</sup> Under that interpretation, a court could determine that the conduct in question constituted a professional service, without any reference to the second clause ("the essence of which is the providing of advice, judgment, opinion, or similar professional skill"). The second clause would only come into play if the court was unable to determine whether the conduct constituted a professional service.

On the other hand, if the second clause limits or restricts "professional service" (i.e., if the second clause is restrictive),<sup>84</sup> any application of the Exemption would need to focus on this second clause ("the essence of which is the providing of advice, judgment, opinion, or similar professional skill") to determine whether the conduct in question may be characterized by the providing of advice, the rendering of an opinion, or the exercise of judgment. Such an interpretation (that the second clause restricts "professional service") would be significant because it would shift the analytical focus off of the nature of the profession and onto the nature of the conduct giving rise to the claim.

The DTPA's unyielding directive, when considered with its inseparable corollary, solves the problem. The mandatory directive states, "[The DTPA] shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers ... ." <sup>85</sup> A necessary (albeit implied) corollary of this liberal construction requires that the courts construe any exemptions narrowly so as to make it more difficult for defendants to escape liability. These two corollaries convince the author that the second clause ("the essence of which is the providing of advice, judgment, opinion, or other similar skill") restricts, or limits,<sup>86</sup> the *first* clause ("the rendering of a professional service").<sup>87</sup>

A purely grammatical analysis would suggest that the second clause is nonrestrictive, especially when one considers the placement of the comma **[\*803]** between the two clauses.<sup>88</sup> But where traditional grammar clashes with statutory construction, a purely grammatical analysis must yield to well-established canons of construction. Here, the language of the second clause was specifically discussed and consciously chosen by the legislature. The second clause is essential to a proper understanding and application of the Exemption and should therefore be treated like a restrictive clause.

To summarize: (1) the antecedent of the second clause is "professional service," and (2) the second clause restricts, or limits, the first. "Professional service" must be the antecedent of the second clause because that is the only construction that makes sense. The court should read the second clause to restrict the first because that interpretation is consistent with the DTPA's overarching mandate to construe the statute broadly and to construe exemptions narrowly.

B. A Substantive Look at the First Problematic Clause: "the rendering of a professional service"

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<sup>83</sup> Id. at 5.29

<sup>84</sup> Id. at 5.29, 5.36.

<sup>85</sup> [Tex. Bus. & Com. Code Ann. 17.44\(a\)](#) (Vernon 2002).

<sup>86</sup> The Alderman Practice Guide, *supra* note 1, at 3-26.

<sup>87</sup> The Bragg Practice Guide, *supra* note 1, at 60. Bragg suggests that "the scope of the [Exemption] is defined by the [second clause]." The Bragg Practice Guide, *supra* note 1, at 60 (emphasis added). Even though he uses the word "define[.]", he refers to defining the scope, which is another way of saying that the second clause restricts the first and is essential to the Exemption's meaning.

<sup>88</sup> The Chicago Manual of Style, *supra* note 82, at 5.29, 5.

The most ambiguous clause is: "the rendering of a professional service." This section will analyze the clause by asking two questions: (1) Who is a professional?<sup>89</sup> and (2) What is a professional service?<sup>90</sup>

### 1. Who Is a Professional?

It is easy to muse over the benefits of life as a "professional;" it is more difficult to articulate a definition of "professional." Willie Nelson offered these words:

Mamas, don't let your babies grow up to be cowboys.

Don't let 'em pick guitars and drive them old trucks.

Let 'em be doctors and lawyers and such.<sup>91</sup>

Willie Nelson never defined the catchall phrase: and such. The Texas legislature suggested that the Exemption would protect doctors and lawyers, but, like Willie Nelson, it expressly declined to define **[\*804]** "professional." In fact, the legislature resisted overtures to specifically exempt certain professions. It did so because it could not agree on a definition of "professional,"<sup>92</sup> not because the definition is unimportant. Indeed, the definition is essential. The court will have difficulty applying the Professional Services Exemption in a uniform fashion without knowing who qualifies as a professional. Therefore, because of the legislature's failure to forge a working definition, judges and lawyers will have to determine who is, and who is not, a professional.<sup>93</sup> This determination of professional status must be made before one can properly apply the Exemption. Those attempting to define "professional" or "professional service" may glean direction from standard dictionary definitions, the legislative history, case law, and from the definition of "Professional Employees" in the Fair Labor Standards Act.

#### a. Dictionary Definitions of "Professional"

For a definition of "professional," the dictionary is always a good place to start. The American Heritage Dictionary defines a "professional" as one who "[is] engaged in a specific activity as a source of livelihood," or "[has] great skill or experience in a particular field or activity."<sup>94</sup> The common definition is so broad that the Exemption "would easily swallow the statute if the term 'professional' is used to define the scope of the [Exemption]."<sup>95</sup> Black's Law Dictionary defines a "professional" as "a person who belongs to a learned profession or whose occupation requires a high level of training and proficiency."<sup>96</sup> This reference to "learned professions," though somewhat anomalous, appears to be consistent with the basic goals of the Exemption. Courts would be well-served to keep the Black's definition in mind.

#### b. Legislative Attempts to Define "Professional Services"

Even though the record reveals that no one could offer a satisfactory definition of "professional services," the legislative history provides useful guidance. Indeed, the legislative history confirms that the drafters **[\*805]**

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<sup>89</sup> See The Alderman Practice Guide, supra note 1, at 3-26 n.66b ("In most cases the determination that the defendant is a professional is only the beginning of the application ...").

<sup>90</sup> See The Alderman Practice Guide, supra note 1, at 3-26 n.66b ("It appears that until the supreme court clarifies the definition of a professional service, defendants will liberally assert the exemption ...").

<sup>91</sup> Willie Nelson, Mamas Don't Let Your Babies Grow Up to be Cowboys, on The Very Best of Willie Nelson (MCA Records 1974) (emphasis added).

<sup>92</sup> See Part II.B, supra.

<sup>93</sup> See The Alderman Practice Guide, supra note 1, at 3-26 n.66b ("It appears that until the Supreme Court clarifies the definition of a professional service, defendants will liberally assert the exemption ...").

<sup>94</sup> American Heritage Dictionary 989 (2d College ed. 1985); see also The Bragg Practice Guide, supra note 1, at 60.

<sup>95</sup> The Bragg Practice Guide, supra note 1, at 60.

<sup>96</sup> Black's Law Dictionary 1226 (7th ed. 1999).

intentionally opted for flexible language that did not name specific professions.<sup>97</sup> Nevertheless, one can gather helpful information by considering (1) the legislature's dialogue concerning the definition of "professional services," and (2) the specific professions that were discussed or referenced during the course of the legislative process.

i. The Legislature's Dialogue Concerning the Definition of "Professional Services"

A number of legislators were unsatisfied with the proposed language of the Exemption. The most vocal member, Representative Debra Danburg,<sup>98</sup> pressed for a more concrete definition. Representative Danburg twice questioned Representative Curtis L. Seidlits, Jr.,<sup>99</sup> Chairman of the House Committee on State Affairs, about the chosen language: once during a public hearing on April 19, 1995,<sup>100</sup> and again during a debate on the House floor, May 3, 1995.<sup>101</sup> In both cases, she settled for a less than satisfactory answer.

For example, during the public hearing, Representative Danburg asked whether an exterminator who gives an erroneous quote to a consumer could invoke the Exemption, simply by characterizing the misrepresentation as one that could be characterized as professional advice, judgment, or opinion.<sup>102</sup> Representative Danburg stated, "That's not what most people would consider to be a professional opinion."<sup>103</sup> The answer should have been easy; an exterminator should not be able to invoke the Exemption. Nevertheless, when presented with this quizzical example, Chairman Seidlits stated that it "would ... probably [be] determined by the court if the termite [sic] is a professional service [provider]."<sup>104</sup>

**[\*806]** The discussions did not clear up the ambiguity. At one point, Chairman Seidlits tried to clarify the language, but merely presented a circular argument: "The reason we drafted it this way ... is that we want to attempt to draw a line between what truly is professional advice, opinion, or judgment... ." <sup>105</sup> He continued, "If I'm a lawyer, or accountant, or whatever professional, giving opinions, advice, much the same as in ... a course of employment-type situation, then that would be exempted. But it has to be advice and opinion growing out of the profession."<sup>106</sup> This, of course, begs the question: Which profession(s)?

When Representative Danburg pressed the issue a little further. Chairman Seidlits finally provided some helpful guidance, even though it conflicted somewhat with his earlier assessment that an exterminator could potentially qualify as a professional. Chairman Seidlits stated: "You can't just hide behind the cover of the "advice, opinion, or

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<sup>97</sup> It appears that the actual language chosen was derived, at least in part, from [Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 353-54 \(Tex. 1987\)](#); see also 27 [Tex. Tech L. Rev., supra](#) note 1, at 1450 (citing the language from Melody Home).

<sup>98</sup> Rep. (D), District 137, State of Texas; B.A., J.D., University of Houston.

<sup>99</sup> Rep. (R), District 62, State of Texas; B.A., J.D., Baylor University.

<sup>100</sup> [House Hearing on Tex. H.B. 668, April 19, 1995, supra](#) note 6 ("There is no specific exemption for any particular profession such as realtors, CPAs or anybody else, such as in the original. How have you, ah, defined, ah, professional services?").

<sup>101</sup> Debate on Tex. H.B. 668 on the Floor of the House, 74th Leg., R.S. (May 3, 1995) (tapes available from House Committee Coordinator) ("What is that term "that cannot be characterized as advice, judgment, or opinion"? How does that fit in there?").

<sup>102</sup> [House Hearing on Tex. H.B. 668, Apr. 19, 1995, supra](#) note 6.

<sup>103</sup> [House Hearing on Tex. H.B. 668, Apr. 19, 1995, supra](#) note 6.

<sup>104</sup> [House Hearing on Tex. H.B. 668, Apr. 19, 1995, supra](#) note 6.

<sup>105</sup> Debate on Tex. H.B. 668 on the Floor of the House, 74th Leg., R.S. (May 3, 1995) (tapes available from House Committee Coordinator).

<sup>106</sup> *Id.*

judgment' [language]. It has to be as a result of your professional license, degree, or your employment, your profession." <sup>107</sup> Although Chairman Seidlits's statements are helpful, they did not provide a precise definition.

ii. Specific Professions Discussed or Referenced in the Legislative Record

The legislature resisted a precise definition of "professional," but it did consider input from various lobbies and specifically discussed a number of professions. In fact, the legislative record reflects a consensus for at least a few "learned professions": lawyers, <sup>108</sup> doctors, <sup>109</sup> and accountants. No one questioned or challenged the Exemption's applicability as to those professions. On numerous occasions, members specifically mentioned lawyers. <sup>110</sup> The same is true for doctors, <sup>111</sup> and accountants (CPAs). <sup>112</sup> **[\*807]** Thus, one may assume that the Exemption contemplates lawyers, doctors, and accountants.

Additionally, the record suggests that the legislature drafted the Exemption with realtors in mind. <sup>113</sup> Specifically, Representative Danburg made reference to a "realtor [who] is giving professional advice." <sup>114</sup> Again, nobody questioned or challenged the assumption that realtors were professionals in the sense contemplated by the Exemption.

The legislative record references a number of other professions, but most of those references were not made in reference to the Exemption. Rather, legislators referenced these other professions during various discussions of the

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<sup>107</sup> Id.

<sup>108</sup> For an in-depth look at legal malpractice in Texas, plus a good overview of the effects of the Professional Services Exemption on such claims, see David J. Beck, *Legal Malpractice in Texas: Second Edition*, [50 Baylor L. Rev. 547, 761-68 \(1998\)](#).

<sup>109</sup> For an in depth look at claims against physicians, with a brief discussion of the effects of the Professional Services Exemption on DTPA causes of action against physicians, see Darrell L. Keith, *The Court's Charge in Texas Medical Malpractice Cases*, [48 Baylor L. Rev. 675, 749-51 \(1996\)](#).

<sup>110</sup> Lawyers were mentioned approvingly numerous times during the legislative discussions. See, e.g., Debate on Tex. H.B. 668 on the Floor of the House, 74th Leg., R.S. (May 3, 1995) (tapes available from House Committee Coordinator) (comments by Chairman Seidlits and Rep. Danburg).

<sup>111</sup> Doctors were also mentioned approvingly during the legislative discussions. See, e.g., Debate on Tex. H.B. 668 on the Floor of the House, 74th Leg., R.S. (May 3, 1995) (tapes available from House Committee Coordinator) (comments by Reps. Junell and Danburg). Additionally, William Swan, M.D., representing the Texas Medical Association, registered for the bill without providing public testimony. [House Hearing on Tex. H.B. 668, Mar. 6, 1995, supra](#) note 6. Doctors, already protected by 12.01(a) of the Medical Liability and Insurance Improvement Act, were not opposed to an extra layer of protection.

1995 tort reform package. In some cases, representatives from those professions testified in favor of the tort reform package.<sup>115</sup>

**[\*808]** The legislative record does not provide a helpful definition of "professional," but it does highlight a few important points. First, the legislature intentionally opted for flexible, vague language. Second, the legislature fully anticipated that courts would help interpret this language. Third, the legislature did not design the Exemption to protect every person who gives advice, offers an opinion, or exercises judgment; i.e., the Exemption is not a giant shield behind which any creative litigant may hide. Fourth, the legislature designed the Exemption to protect doctors, lawyers, CPAs, and probably realtors, among others.

c.

#### "Professional" as Discussed in Case Law

Since the Exemption's adoption in 1995, relatively few cases have addressed, and none has resolved, the issue of professional status under the DTPA. Nevertheless, the DTPA cases that do exist are helpful. Additionally, at least one non-DTPA case offers a helpful reference to "professional services."

DTPA case law confirms that the legislature designed the Exemption to shield lawyers, doctors, and accountants.<sup>116</sup> Lawyers have successfully invoked the Exemption in a number of cases, and courts have consistently ruled that lawyers are protected by the Exemption.<sup>117</sup> Additionally, at least **[\*809]** one court has confirmed that the Exemption covers physicians.<sup>118</sup> In fact, it appears that the DTPA's Professional Services Exemption overlaps with the protection provided by section 12.01 of the Medical Liability and Insurance Improvement Act; at publication,

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<sup>112</sup> The accounting profession likewise received approving mention during the hearings and debates. Debate on Tex. H.B. 668 on the Floor of the House, 74th Leg., R.S. (May 3, 1995) (tapes available from House Committee Coordinator) (comments by Chairman Seidlits); [House Hearing on Tex. H.B. 668, March 6, 1995, supra](#) note 6 (testimony from L. Minton Rosehouse, representing the Texas Society of Certified Public Accountants).

<sup>113</sup> Realtors and the real estate industry were referenced numerous times during the legislative process. Debate on Tex. H.B. 668 on the Floor of the House, 74th Leg., R.S. (May 3, 1995) (tapes available from House Committee Coordinator) (comments by Chairman Seidlits and Rep. Danburg); [House Hearing on Tex. H.B. 668, Mar. 6, 1995, supra](#) note 6 (testimony from Mike Brodie representing the Texas Association of Realtors).

<sup>114</sup> Debate on Tex. H.B. 668 on the Floor of the House, 74th Leg., R.S. (May 3, 1995) (tapes available from House Committee Coordinator).

<sup>115</sup> The following professions, or a representative thereof, favored passage of H.B. 668 and, in the author's opinion, may be able to invoke the Exemption: independent insurance agents, [House Hearing on Tex. H.B. 668, Mar. 6, 1995, supra](#) note 6 (testimony by Wade Spillman, representing the Texas Association of Insurance Agents, House); stockbrokers, Debate on Tex. H.B. 668 on the Floor of the House, 74th Leg., R.S. (May 3, 1995) (tapes available from House Committee Coordinator) (comments by Chairman Seidlits); see also Ray A. Dittmar, Letter to the Editor: DTPA Bill Mislabeled, Tex. Lawyer, June 7, 1993, at 2 (referencing stock brokers); stock analysts, [House Hearing on Tex. H.B. 668, Mar. 6, 1995, supra](#) note 6 (Nolan J. "Buzz" Robnett, representing Dean Witter & Co., registered for the bill without providing public testimony); surveyors, [House Hearing on Tex. H.B. 668, Mar. 6, 1995, supra](#) note 6 (testimony from Michael Evans, representing the Texas Society of Professional Surveyors); and consulting engineers, [House Hearing on Tex. H.B. 668, Mar. 6, 1995, supra](#) note 6 (testimony from James R. Royer, representing the Consulting Engineers Council and the Greater Houston Partnership).

no physician has invoked the Professional Services Exemption, presumably because physicians need look no further than section 12.01.<sup>119</sup> Finally, case law confirms that the Exemption protects accountants.<sup>120</sup>

**[\*810]** The basic purposes and policy of the Exemption suggest that the Exemption should cover realtors, bankers, and financial service providers. Case law, however, is unclear. The legislative history, discussed *supra*, strongly suggests that the Exemption covers realtors, although no case law has yet confirmed this. In fact, some contrary authority exists.<sup>121</sup> A few courts have indicated that the Exemption covers bankers and financial services providers.<sup>122</sup>

Courts have provided comment on a few other professions within a DTPA context. One court addressed funeral services and reached a surprising result.<sup>123</sup> The Corpus Christi Court of Appeals determined that funeral services are professional services. The court, however, neglected a thorough analysis of the matter, presumably because one of the exceptions to the Exemption (an unconscionable course of action) prevented the defendant from escaping DTPA liability.<sup>124</sup> Texas courts have considered **[\*811]** the professional status of an insurance agent<sup>125</sup> and a salesperson.<sup>126</sup> In both cases, however, the court decided the case on other grounds and did not resolve the question of professional status.<sup>127</sup> For example, in *Cole v. Central Valley Chemicals, Inc.*, a customer received erroneous "professional" advice from a salesman at a garden supply store.<sup>128</sup> The salesman was also an agronomist (i.e., he had a college degree in agronomy).<sup>129</sup> The court did not say whether the agronomist was a professional. Rather, the court held that professional advice from an agronomist/salesman did not constitute professional services for purposes of the Exemption.<sup>130</sup>

A few non-DTPA case offers some helpful references. In *McCamish v. F.E. Appling Interests*,<sup>131</sup> the court considered whether an attorney owes a duty to a third party, absent privity, and whether a third party could sue **[\*812]** *McCamish's* law firm on a negligent misrepresentation theory (as opposed to a legal malpractice theory).<sup>132</sup> The Texas Supreme Court determined that [section 552 of the Restatement \(Second\) of Torts](#) authorized a negligent misrepresentation cause of action against professionals, including attorneys.<sup>133</sup> In support of its conclusion, the court cited to a string of cases.<sup>134</sup> Those cases addressed a variety of "professionals," including

The following professions, or a representative thereof, testified in favor of H.B. 668, but, in the author's opinion, should not be able to invoke the Exemption: auto dealers, [Senate Hearing on Tex. H.B. 668, May 11, 1995, \*supra\*](#) note 6 (comments by Sen. Bivins); retailers, [Senate Hearing on Tex. H.B. 668, May 11, 1995, \*supra\*](#) note 6 (comments by Sen. Bivins); builders, [House Hearing on Tex. H.B. 668, Mar. 6, 1995, \*supra\*](#) note 6 (testimony from Randall P. Birdwell, representing the Texas Association of Insurance Agents); independent businessmen, [House Hearing on Tex. H.B. 668, Mar. 6, 1995, \*supra\*](#) note 6 (Bob Pierry and Robert Howden, representing the National Federation of Independent Business, registered for the bill without providing public testimony); restaurant management, [House Hearing on Tex. H.B. 668, Mar. 6, 1995, \*supra\*](#) note 6 (Larry N. Forehand, representing the Texas Restaurant Association, registered for the bill without providing public testimony).

See Part III, section D, *infra*, for the analysis and test that the author believes should be applied to each of these professions.

<sup>116</sup> See, e.g., [Pipkin v. Henry & Peters, P.C. \(In re R & C Petroleum, Inc.\), 236 B.R. 355, 361 \(Bankr. E.D. Tex. 1999\)](#) ("[The Exemption] clearly excludes professional service providers such as attorneys, doctors, and accountants, among other licensed professionals.").

<sup>117</sup> *May v. Atkins*, No. 6:01-CV-067-C, 2001 U.S. Dist. LEXIS 21343, at 4-5 (N.D. Tex. Dec. 21, 2001); [Pipkin, 236 B.R. at 361](#); *Cadle Co. v. Sweet & Brousseau, P.C.*, No. 3:97-CV-0298-G, 1998 U.S. Dist. LEXIS 2632 at 3 (N.D. Tex. Mar. 3, 1998); [Stafford v. Lunsford, 53 S.W.3d 906, 910](#) (Tex. App. - Houston [1st Dist.] 2001, no pet.); *Hoover v. Larkin*, No. 14-00-00427-CV, 2001 Tex. App. LEXIS 6313, at 20 (Tex. App. - Houston [14th Dist.] Sept. 13, 2001, no pet.) (not designated for publication).

<sup>118</sup> [Pipkin, 236 B.R. at 361](#); see also Darrell Keith, The Court's Charge in Texas Medical Malpractice Cases, [48 Baylor L. Rev. 675, 749-51 \(1996\)](#). For an excellent pre-1995 discussion of a DTPA claim against a physician, see [Sorokolit v. Rhodes, 889 S.W.2d 239 \(Tex. 1994\)](#). No DTPA case has addressed psychiatric services, but one of the seminal cases in the area of implied warranty law dealt with such services. See [Dennis v. Allison, 698 S.W.2d 94, 96 \(Tex. 1995\)](#) (holding it unnecessary to extend a cause of action for breach of an implied warranty to a patient physically abused by her psychiatrist because she had other adequate causes of action available to her).

auditors, physicians, real estate brokers, securities placement agents, accountants, surveyors, and title insurers.<sup>135</sup> This list is helpful because it deals with a ground of recovery-negligent misrepresentation by a professional-that resembles claims that arise under the DTPA.

The Texas Supreme Court has suggested that the existence of a formal code of ethics governing the conduct of practitioners may distinguish a particular occupation as a profession; however, the court has made no effort to impose this as an absolute requirement or to otherwise define "professional."<sup>136</sup> The Eastland Court of Appeals has suggested that a professional: (1) engages in work involving mental or intellectual rather than physical labor, (2) requires special education to be used on behalf of others, and (3) earns profits dependent mainly on these considerations.<sup>137</sup>

To summarize, the legislature designed the Exemption to protect lawyers, doctors, physicians, and realtors. Additionally, a strong case may be made for coverage of bankers, stockbrokers, stock analysts, and other financial service providers. Other professions such as independent insurance agents, surveyors, and consulting engineers may be able to make a case, but they will not find support in case law<sup>138</sup> or in the legislative record. Finally, the Exemption should not cover certain professions including salesmen and funeral service providers. In many cases, courts will have to make independent determinations. Where the legislative [\*813] record gives little indication, and where the courts have not yet spoken, courts and litigants in Texas will be forced to look elsewhere for guidance.

#### d. The Fair Labor Standards Act and its Definition of "Professional Employees"

Texas litigants are not constrained to Texas law, because the DTPA expressly authorizes courts to look elsewhere: "In construing [the DTPA] the court shall not be prohibited from considering relevant and pertinent decisions of courts in other jurisdictions."<sup>139</sup> This provision presumably refers to consumer-related case law from other jurisdictions. However, nothing in the statute precludes courts from looking to other fields of law as well. One can make a strong case that professional service providers under the DTPA should resemble "Professional Employees" under the Fair Labor Standards Act (FLSA).<sup>140</sup> The FLSA attempts to draw a line between those who are truly

<sup>119</sup> See [Tex. Rev. Civ. Stat. Ann. art. 4590j](#), 12.01(a) (Vernon Supp. 2003); [Sorokolit v. Rhodes](#), 889 S.W.2d 239, 242 (Tex. 1994) (holding that Article 4590i precludes negligence claims from being recast as DTPA claims, but emphasizing that if the alleged DTPA claim is not based on the physician's breach of the accepted standard of care, but is instead based on some other cause of action, such as knowing breach of express warranty or knowing misrepresentation, then the DTPA action is not precluded by Article 4590i); see also [Earle v. Ratliff](#), 998 S.W.2d 882, 892 (Tex. 1999) (holding that the "gist" of plaintiff's DTPA claim against physician alleged that the doctor "did not hold to the applicable standard of care" and that therefore the DTPA claim was barred by Article 4590i); [MacGregor Med. Ass'n v. Campbell](#), 985 S.W.2d 38, 39 (Tex. 1998) (holding DTPA claim against emergency medical clinic barred by Article 4590i); [Gormley v. Stover](#), 907 S.W.2d 448, 450 (Tex. 1995) (per curiam) (holding that plaintiff's claim against dentist was simply a negligence action recast as a DTPA claim and thus barred by Article 4590i); [Walden v. Jeffery](#), 907 S.W.2d 446, 448 (Tex. 1995) (per curiam) (same). For a pre-Exemption discussion of physician liability under the DTPA, see [Birchfield v. Texarkana Mem'l Hosp.](#), 747 S.W.2d 361, 368 (Tex. 1987) (ruling that nothing in the pre-1977 DTPA illustrated a legislative intent to exempt health care providers from liability under the DTPA, notwithstanding the enactment of Article 4590i).

<sup>120</sup> [KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.](#), 988 S.W.2d 746, 749 (Tex. 1999) (assuming without further analysis that the Exemption applies to accounting and auditing services); [Murphy v. Campbell](#), 964 S.W.2d 265, 268-69 (Tex. 1997) (applying Exemption to accounting services); [Arthur Andersen & Co. v. Perry Equip. Corp.](#), 945 S.W.2d 812, 815 (Tex. 1997); [Chemd, Inc. v. KPMG Peat Marwick](#), No. 05-00-00816-CV, 2001 Tex. App. LEXIS 5402, at 19 (Tex. App. - Dallas Aug. 9, 2001, pet. denied) (not designated for publication) (applying the Exemption to accountants and holding that mere professional negligence is not actionable); see also [Pipkin](#), 236 B.R. at 361.

<sup>121</sup> See [Smith v. Herco, Inc.](#), 900 S.W.2d 852, 858 (Tex. App. - Corpus Christi 1995, writ denied). In this pre-Exemption case, the court assessed DTPA liability where a real estate agency made affirmative representations, both oral and written, of its ability to convey clear title when, unknown to the agency, it could not. Of course, the real estate lobby may have been reacting to this very case when it testified in favor of the 1995 amendments. Another pre-Exemption case featured a real estate agent who misrepresented the number of square feet in a house. [Cameron v. Terrell & Garrett, Inc.](#), 618 S.W.2d 535, 537-41 (Tex. 1981).

"professionals" and those who are not. This is the same type of line-drawing that the Texas legislature was trying to accomplish when it drafted the Professional Services Exemption. Indeed, the FLSA definition of "Professional Employees" fits perfectly within the Exemption's analytical framework because it is informed by scholars who debated this very specific term.

The FLSA prescribes a two-part test (Salary Basis Test and Job Duties Test) to determine whether an employee may properly be classified as an exempt employee so that the employer does not owe the employee overtime compensation. An in-depth look at the FLSA test is beyond the scope of this Comment, but the FLSA's definition of "Professional Employee" provides a useful guide for purposes of the DTPA's Professional Services Exemption. The FLSA divides professional employees into four categories: learned professions, artistic fields, educators, and computer skills. The category of learned professions is germane to this Comment.

(12) The term "professional employee" means -

(a) any employee engaged in work

(i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work;

**[\*814]**

(ii) involving the consistent exercise of discretion and judgment in its performance;

(iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time;

(iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning ... , as distinguished from a

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Assuming that Realtors are professionals, the Exemption would likely shield this type of negligent misrepresentation from DTPA liability.

<sup>122</sup> See, e.g., *Shands v. Tex. State Bank*, No. 04-00-00133-[CV, 2001 Tex. App. LEXIS 109, at 28-30](#) (Tex. App. - San Antonio Jan. 10, 2001, no pet.) (not designated for publication) (classifying banking services as professional services, where bank served as trustee of an estate).

<sup>123</sup> *Serv. Corp. Int'l Mgmt. Corp. v. Galvan*, No. 13-99-468-[CV, 2001 Tex. App. LEXIS 747, at 15](#) (Tex. App. - Corpus Christi Jan. 18, 2001, no pet.) (not designated for publication).

<sup>124</sup> *Id.* at 15-16. The author believes that this determination constitutes unpersuasive dicta. The court appears to have relied upon the meaning of "professional service" as that term is loosely used in the context of implied warranty law.

*Melody Home Manufacturing Co. v. Barnes* is a seminal case in Texas implied warranty law; it provides insight for the phrase, "professional services." [741 S.W.2d 349, 354 \(Tex. 1987\)](#). In *Melody Home*, the court addressed "professional services;" but these were professional services of a different variety. *Id.* In fact, the court specifically declined to address "services in which the essence of the transaction is the exercise of professional judgment by the service provider." *Id.* The defendants were not "professionals" in the sense contemplated by the Professional Services Exemption. *Id.* *Melody Home* involved modular homebuilders and workmen who caused damage to a modular home. [Id. at 351](#). The court discussed service providers in the broadest sense, referring simply to the "professional judgment of service providers." [Id. at 354](#) (emphasis added). Looking closely at the word order, one should note that the court did not say, "the judgment of professional service providers." One should recognize the distinction between "a service provider" and "a professional service provider." Every worker, laborer, or professional exercises some form of judgment. This does not, ipso facto, convert every worker into a professional.

<sup>125</sup> [Frazer v. Tex. Farm Bureau Mut. Ins. Co., 4 S.W.3d 819, 822-23](#) (Tex. App. - Houston [1st Dist.] 1999, no pet.). One court addressed the DTPA liability of insurance agents prior to the [Exemption. Celtic Life Ins. Co. v. Coats, 885 S.W.2d 96, 99-100 \(Tex. 1994\)](#) (holding that under common law principles of agency, an insurance company is liable for the misrepresentations of its agent if the agent is acting within the scope of his authority at the time of making the representations, even if the company did not authorize the specific misrepresentation made). The legislative record also contains two brief references to independent

general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes.<sup>141</sup>

Simply stated, the Department of Labor uses this definition to distinguish between "professional" workers and "hourly" workers. Thus, certain minimum wage and maximum hour requirements do not apply to "professionals." By adopting the FLSA definition as part of the test for the DTPA's Professional Services Exemption, the courts could limit the Exemption's use to those who engage in work that (1) is predominantly intellectual and varied in character, (2) involves the consistent exercise of discretion and judgment, and (3) requires knowledge of an advanced type acquired by a prolonged course of specialized intellectual instruction and study.

## 2. What is a Professional Service?

Two recent DTPA cases have attempted to clarify the meaning of "professional service." In *Nast v. State Farm Fire & Casualty Co.*, the San Antonio Court of Appeals stated: "To perform a professional service, a professional must perform more than an ordinary task. To qualify as a professional service, the task must arise out of acts particular to the [\*815] individual's specialized vocation."<sup>142</sup> The court continued: "an act is not a professional service merely because it is performed by a professional; rather, it must be necessary for the professional to use his specialized knowledge or training."<sup>143</sup> In *Omni Metals, Inc. v. Poe & Brown of Texas, Inc.*, the Houston Court of Appeals added, "[A] 'professional service' is more than an act flowing from mere employment."<sup>144</sup>

The practitioner may glean additional guidance from Texas commentary on professional service contracts. For example, one finds a helpful discussion of professional service contracts in chapter 56 of Dorsaneo's Texas Transaction Guide.<sup>145</sup> This practice guide synthesizes numerous Texas statutes and regulations by listing the types of education, degrees, training, certificates, etc. required for particular professions. Chapter 56, entitled "Professional Services," is helpful because it "presents information about professionals in general ... and about specific occupations that courts are likely to consider professions under a variety of criteria."<sup>146</sup> However, it does

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insurance agents. [House Hearing on Tex. H.B. 668, Mar. 6, 1995, supra](#) note 6 (testimony by Wade Spillman, representing the Texas Association of Insurance Agents, House); [Senate Hearing on Tex. H.B. 668, May 11, 1995, supra](#) note 6 (comments by Sen. Ellis).

<sup>126</sup> [Cole v. Cent. Valley Chems., Inc., 9 S.W.3d 207, 210](#) (Tex. App. - San Antonio 1999, pet. denied).

<sup>127</sup> [Frazer, 4 S.W.3d at 823](#) (finding it unnecessary to resolve the question of professional status, where defendant asserted that an insurance agent was an exempt professional); [Cole, 9 S.W.3d at 210](#) (holding that professional advice from an agronomist-working as a salesman in an agricultural products store-did not constitute professional services for purposes of the Exemption; the court did not rule on whether the salesperson was a professional, but instead found that the consumer's complaint was based on the purchase of the product, not the rendering of advice).

<sup>128</sup> [9 S.W.3d at 210.](#)

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* Although the court did not clear up the issue of professional status, the ruling supports two important principles. First, salesmen of consumer products, in the ordinary course of business, are not professional service providers, even if they might be professional service providers in some other context. To hold otherwise would shield every retail transaction from DTPA liability if the salesman happened to be a professional. Second, one is not transformed into a professional simply by virtue of obtaining a college degree.

<sup>131</sup> [991 S.W.2d 787, 788 \(Tex. 1999\).](#)

<sup>132</sup> [Id. at 788, 791-92.](#)

<sup>133</sup> [Id. at 791.](#)

<sup>134</sup> *Id.*

not "attempt to limit who may come under [the] heading [of professional services]." <sup>147</sup> In other words, it does not attempt to define the scope of professional services. Chapter 56 discusses professions such as accountants, auctioneers, business consultants, engineers, private investigators and security professionals, attorneys, appraisers, doctors, insurance professionals, and life and health insurance counselors. <sup>148</sup> It also discusses some of the agencies that regulate those professions such as the Appraisal Certification and Licensing Board, the Department of Insurance, or the Texas Commission on Private Security. <sup>149</sup> By looking to the law of professional services contracts, one sees that a professional service may be defined, in part, as a service provided by one in a regulated profession.

**[\*816]**

C. A Substantive Look at the Second Problematic Clause: "the essence of which is the providing of advice, judgment, opinion, or similar professional skill"

An informed interpretation of the Exemption demands an analysis of this language to determine the clause's meaning and relative significance within the Exemption. As discussed in III.A supra, the author believes that this second clause ("the essence of which ...") restricts the previous clause ("the rendering of a professional service"); i.e., the second clause does not define the first. This section analyzes how the second clause restricts the first by closely scrutinizing the words in this second clause.

1.

"the essence of which"

The most amorphous word in the statute is "essence;" therefore, it must be fleshed out. The American Heritage Dictionary defines "Essence" as "the intrinsic or indispensable properties that serve to characterize or identify something;" "the most important ingredient; crucial element." <sup>150</sup> Both of these definitions are helpful. Using this

<sup>135</sup> Id. (citations omitted).

<sup>136</sup> See [Dennis v. Allison, 698 S.W.2d 94, 95-96 \(Tex. 1985\)](#); see also 10 [Tex. Transaction Guide \(MB\) 56.20](#) (2002).

<sup>137</sup> See [Duncanville Diagnostic Ctr., Inc. v. Atlantic Lloyd's Ins. Co., 875 S.W.2d 788, 790](#) (Tex. App. - Eastland 1994, writ denied); [Md. Cas. Co. v. Crazy Water Co. 160 S.W.2d 102, 104-05](#) (Tex. Civ. App. - Eastland 1942, no writ).

<sup>138</sup> *Omni Metals, Inc. v. Poe & Brown of Tex., Inc.*, No. 14-00-01081-CV, 2002 [Tex. App. LEXIS 4334, at 25](#) (Tex. App. - Houston [14th Dist.], June 13, 2002, no pet.) (not designated for publication) ("There is very little case law interpreting the professional services exemption.").

<sup>139</sup> [Tex. Bus. & Com. Code Ann. 17.46\(c\)\(2\)](#) (Vernon 2002).

<sup>140</sup> [29 U.S.C. 201-219](#) (2000). The exemption from overtime compensation requirements is located at 213.

<sup>141</sup> Congress codified this definition in a definitions section that precedes the FLSA. Id. The definition applies to a number of different acts throughout the Labor Code, including the FLSA. It applies to the FLSA in the following provision entitled "Exemptions" under 213(a), "Minimum wage and maximum hour requirements The [minimum wage and maximum hour requirements of [29 U.S.C. 206, 207](#)] shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, or professional capacity ... ."

The definition has been expanded and incorporated into the Code of Federal Regulations and used by the Department of Labor in the regulation of wage and hour laws. [29 C.F.R. 541.3 \(2002\)](#).

<sup>142</sup> [82 S.W.3d 114, 122](#) (Tex. App. - San Antonio 2002, pet. denied) (citations omitted).

second definition, the Exemption should only apply to the rendering of a professional service that has advice, judgment, or opinion as its most important ingredient or as a crucial element. Under the first definition, the Exemption should only apply to the rendering of a professional service that is characterized by advice, judgment, opinion, or similar professional skill.

One may better understand what the "essence" is by understanding what it is not. A service that is not characterized by advice, judgment or opinion consists of conduct that is inconsistent with and a legitimate offer of advice, judgment or opinion. For example, an engineer who gives an "opinion" that a house is structurally sound, when in fact he has not examined the house, could not claim the benefit of the Exemption because he has misrepresented a material fact (i.e., that the foundation is sound).<sup>151</sup> The false representation falls outside the Exemption because "the rendering of an opinion by an engineer without any basis for the opinion is not within the 'essence' of the professional service provided."<sup>152</sup>

**[\*817]**

2.

"advice, judgment, opinion, or similar professional skill"

The language of section 17.49(c) emphasizes the required presence of mental faculties before one can invoke the Exemption.<sup>153</sup> So, even where a professional provides a service, that service nevertheless falls outside the Exemption's scope if one cannot characterize the service as advice, judgment, opinion, or similar professional skill.<sup>154</sup> For example, even though an attorney is a professional, the attorney may commit some act that one cannot characterize as advice, judgment, or opinion. A few examples of professional advice, judgment, or opinion may be instructive.

An attorney gives advice when he recommends filing suit based on the factual situation presented by the client. Such recommendation would constitute the rendering of a professional service under the DTPA. On the other hand, an attorney who says that he has already filed suit, when in fact he has not, is not "giving advice."<sup>155</sup> Such conduct would not fall under the DTPA's Professional Services Exemption.<sup>156</sup>

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<sup>143</sup> Id.

<sup>144</sup> No. 14-00-01081-[CV, 2002 Tex. App. LEXIS 4334, at 26](#) (Tex. App. - Houston [14th Dist.] June 13, 2002, no pet.) (not designated for publication).

<sup>145</sup> 10 [Tex. Transaction Guide \(MB\) 56.20](#) (2002).

<sup>146</sup> Id.

<sup>147</sup> Id.

<sup>148</sup> Id.

<sup>149</sup> Id.

<sup>150</sup> American Heritage Dictionary 465 (2d College ed. 1985).

<sup>151</sup> The Bragg Practice Guide, *supra* note 1, at 6.5.

<sup>152</sup> The Bragg Practice Guide, *supra* note 1, at 6.5.

<sup>153</sup> [Tex. Bus. & Com. Code Ann. 17.49\(c\)](#) (Vernon 2002).

<sup>154</sup> Id.

<sup>155</sup> See, e.g., [Latham v. Castillo, 972 S.W.2d 66 \(Tex. 1998\)](#).

<sup>156</sup> Id.

Similarly, a structural engineer exercises professional judgment when he evaluates the stability of a home. But, if an engineer falsely represents that he "has examined the foundation of a house and is of the opinion that the house is structurally sound, he could not claim the benefit of the Exemption because of his misrepresentation of two material facts; namely that he has examined the house, and that the foundation is sound."<sup>157</sup> One cannot characterize material misrepresentations-by an engineer concerning the structural soundness of a house-as the exercise of professional judgment.

A stockbroker gives a professional opinion when he suggests that mutual funds are a better option than technology stocks. However, the stockbroker strays from the realm of opinion when he represents that technology stocks are a sure thing. Professor Alderman clarifies the scope of the Exemption in this regard: "Under the [Exemption,] misrepresentations generally must be factual to be actionable. Opinion cannot form the basis of a claim because an opinion cannot be false. Claims against professionals must, therefore, be based on either a misrepresentation, a breach of warranty, or unconscionable action."<sup>158</sup>

### **[\*818]**

#### 3. The Function of the Clause as a Whole

One must next ask whether the "advice, judgment, or opinion" language refers to: (a) the professional, (b) the nature of the professional service generally, or (c) the specific professional service rendered on that particular occasion.<sup>159</sup> In fact, the "advice, judgment, or opinion" language refers to, and modifies, all three. For example, the "advice, judgment, or opinion" language modifies "professional" by restricting eligible individuals to those who provide advice, judgment, or opinion as a major component or crucial ingredient of their profession. Additionally, the "advice, judgment, or opinion" language refers to a specific service rendered on a specific occasion and requires that one pay special attention to the nature of the conduct in question. Consider, for example, a psychologist whose entire job consists of providing advice, judgment, or opinion. That psychologist could nevertheless incur DTPA liability by giving his client bad advice about the stock market. This example demonstrates the simple proposition that, even when one attains professional status, he may not invoke the Exemption when the services in question fall outside the scope of the professional's qualifications and training.

#### D. Formulating a Test

The above academic discussions are only useful if synthesized into a practical framework or test. The analysis up to this point suggests that (1) one must make a threshold determination of professional status. Then, (2) the focus of the inquiry should turn to conduct; more specifically, one must look to see whether he can characterize the professional service in question as advice, judgment, opinion, or similar professional skill. Then, (3) one must examine the services rendered to determine whether any of the statutory exceptions apply.

As the above analysis suggests, a professional service necessarily presupposes a professional. This logical inference seems obvious, but it is useful because it provides a sequence for the test. In applying this test, conduct (the professional service) is the main focus. However, one cannot reach that point in the application process until he has made a threshold finding that the actor is a professional.<sup>160</sup> This approach finds support in **[\*819]** the legislative history: "You can't just hide behind the cover of the 'advice, opinion, or judgment' [language]. It has to be

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<sup>157</sup> The Bragg Practice Guide, *supra* note 1, at 6.5.

<sup>158</sup> The Alderman Practice Guide, *supra* note 1, at 3-28.

<sup>159</sup> The Alderman Practice Guide, *supra* note 1, at 3-28.

<sup>160</sup> See The Alderman Practice Guide, *supra* note 1, at 3-26 n.66b ("In most cases the determination that the defendant is a professional is only the beginning of the application ...").

as a result of your professional license, degree, or your employment, your profession." <sup>161</sup> With this sequence in mind, courts would be well-served by a flexible, three-pronged test.

### 1. Step One: Professional Status

The threshold question asks: Should the courts consider the individual a professional? Even though the Legislature explicitly rejected a focus on professions and opted for language that focuses on conduct, the language itself makes reference to professional service and professional skill. <sup>162</sup> Therefore, the Exemption demands an initial determination of professional status. This step focuses on the nature of the services performed by the profession generally. In many cases, this will be the crucial step in the analysis. The FLSA definition of "Professional Employees" would serve as a good starting point. <sup>163</sup>

The FLSA definition should serve as the initial filter for the step one inquiry into professional status. The most relevant portions of subsection (12)(a) should be emphasized such that one gains professional status only when he engages in work (1) predominantly intellectual and varied in character, as opposed to routine mental, manual, mechanical, or physical work, (2) involving the consistent exercise of discretion and judgment in its performance, and (3) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes. <sup>164</sup>

This definition would be very helpful as an initial guide, but it should not be dispositive. That is to say, one who satisfies this definition should not automatically attain professional status under the test. Conversely, one who cannot satisfy this definition is not automatically precluded from invoking the Exemption, but should be subjected to greater scrutiny before he is allowed to invoke the Exemption's protections. For example, most realtors would not satisfy the FLSA definition of "professional [\*820] employees." Nevertheless, realtors would likely constitute an exception to this test's general rule that defendants should satisfy the FLSA definition, because other factors (such as legislative intent) preponderate in favor of protection for realtors. <sup>165</sup>

In addition to using this flexible test, the court could consider related questions such as: Does the profession require any sort of professional license or certification from the State of Texas or from any agency therein? Is the profession traditionally subject to malpractice claims? Is the primary function of the profession to provide advice, judgment, or opinion? Does the profession require a post-graduate degree? Does the profession require completion of a rigorous curriculum or proficiency on a comprehensive exam? Do consumers typically pay members of this profession for advice, judgment, or opinion without paying for any corresponding work, labor, or service to be done?

### 2. Step Two: Nature of the Services Provided

This element of the test asks: Can the specific service rendered be characterized as advice, judgment, opinion, or similar professional skill? This step focuses on the nature of specific services rendered by a specific individual on a specific occasion. One must characterize the nature of the services because of the reality that a professional may be exempt in some situations and yet liable in others. Before this question can be answered, one must know who is

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<sup>161</sup> Debate on Tex. H.B. 668 on the Floor of the House, 74th Leg., R.S. (May 3, 1995) (tapes available from House Committee Coordinator) (comments by Chairman Seidlits).

<sup>162</sup> [Tex. Bus. & Com. Code Ann. 17.49\(c\)](#) (Vernon 2002).

<sup>163</sup> [29 U.S.C. 152](#)(12)(a) (2000).

<sup>164</sup> *Id.*

<sup>165</sup> Debate on Tex. H.B. 668 on the Floor of the House, 74th Leg., R.S. (May 3, 1995) (tapes available from House Committee Coordinator).

making the characterization. <sup>166</sup> Professor Alderman suggests a reasonable person test: "Could a reasonable person characterize the representation, warranty, or unconscionable action as opinion, advice or judgment? If the answer is yes, the DTPA does not apply. However, if the conduct could not reasonably be characterized as advice, judgment or opinion, then it remains actionable under the DTPA." <sup>167</sup> However, a better test would be to consider a reasonable professional in the field, because a reasonable person or juror may not know whether a specific act by a specific professional is appropriate. A reasonable professional in the field standard would make it more difficult for professionals to invoke the Exemption, and would thus be consistent with the overarching principle that the DTPA be liberally construed to protect consumers. <sup>168</sup>

## [\*821]

### 3. Step Three: The Exceptions

Finally, one must ask: Has the defendant affirmatively demonstrated that none of the exceptions apply? <sup>169</sup> This step focuses on the five statutory exceptions codified at section 17.49(c)(1)-(5). <sup>170</sup> If any of them apply to the conduct in question, DTPA liability may be assessed, notwithstanding professional status. These exceptions are discussed in detail in the next section. For now, suffice to say that, if the services in question satisfy step two of the analysis, they will likely pass step three as well. Conversely, if the conduct in question triggers one of the exceptions, such that step three prevents the defendant from invoking the Exemption, it is likely that such conduct would not have satisfied the step two analysis.

#### E. The Exemption's exceptions <sup>171</sup>

No individual is absolutely exempt from DTPA claims. <sup>172</sup> Professionals still face exposure to DTPA claims for certain conduct. Section 17.49 lists five exceptions, each of which provides a different basis upon which a service provider may incur DTPA liability, notwithstanding his [\*822] professional status. <sup>173</sup> The Exemption's aim was "to remove the DTPA as a vehicle for professional malpractice claims [because] current negligence law remains

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<sup>166</sup> The Alderman Practice Guide, *supra* note 1, at 3-28.

<sup>167</sup> The Alderman Practice Guide, *supra* note 1, at 3-26 n.66b.

<sup>168</sup> [\*State Farm Mut. Auto. Ins. v. Traver\*, 980 S.W.2d 625, 632 \(Tex. 1998\)](#).

<sup>169</sup> The Alderman Practice Guide, *supra* note 1, at 3-26 n.66b. By connecting the dots in Alderman's analysis, one can see that he contemplated most of this framework, including a final inquiry into whether the exceptions apply: "Even if one concludes that [an individual] is a professional providing a service, further inquiry must be made as to the nature of the services at issue." The Alderman Practice Guide, *supra* note 1, at 3-28. Alderman continues, "In most cases the determination that the defendant is a professional is only the beginning of the application of section 17.49(c). It still must be determined whether any of the very broad exceptions to the exemption apply." The Alderman Practice Guide, *supra* note 1, at 3-28. Alderman simply failed to make a clear distinction between step one and step two, and he did not propose a method for making a step one analysis.

<sup>170</sup> [\*Tex. Bus. & Com. Code Ann. 17.49\(c\)\*](#) (Vernon 2002).

<sup>171</sup> *Id.* 17.49(c)(1)-(5). These exceptions constitute a significant component of the Exemption by specifying certain types of conduct that do not qualify for the Exemption's protections, such as express misrepresentations and unconscionable action. Therefore, these exceptions deserve analytical commentary. However, Part III addresses them last because their analysis threatens to distract the reader from the key question considered in this Comment, to wit: Which professionals and which types of conduct do qualify for the Exemption's protections? With this caveat in mind, this Comment addresses each exception so as to give the reader a complete and well-rounded understanding of the entire statute. For a good discussion of the effect that the exceptions have on the Exemption, see The Alderman Practice Guide, *supra* note 1, at 3-27 to 3-29.

<sup>172</sup> Indeed, some courts have failed to grasp this concept. See, e.g., [\*Guest v. Cochran\*, 993 S.W.2d 397, 407 n.8](#) (Tex. App. - Houston [14th Dist.] 1999, no pet.) (where the court erroneously implied that lawyers are absolutely exempt from DTPA claims); see also The Alderman Practice Guide, *supra* note 1, at 3-27 n.66c.

adequate for such suits." <sup>174</sup> The drafters intended to exempt professional advice and opinions growing out of the course and scope of professional employment situations, but not to insulate fraudulent misrepresentations by professionals. <sup>175</sup> The exceptions make up the second sentence of section 17.49(c):

This exemption does not apply to:

- (1) An express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion;<sup>176</sup>
- (2) A failure to disclose information in violation of Section 17.46(b)(23);<sup>177</sup>
- (3) An unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion;<sup>178</sup>
- (4) Breach of an express warranty that cannot be characterized as advice, judgment, or opinion;<sup>179</sup> or
- (5) A violation of Section 17.46(b)(26).<sup>180</sup>

**[\*823]** According to a subsequent publication by some of the bill's sponsors, "these types of actions or statements [do not] constitute the rendering of advice, judgment, or opinion."<sup>181</sup> One case suggested that a defendant who establishes status as a professional services provider must affirmatively show that none of these exceptions apply.<sup>182</sup> This section briefly addresses each exception.<sup>183</sup>

#### 1. The (c)(1) exception: Express Misrepresentation

Professional service providers expose themselves to liability when they make express misrepresentations of material fact. For example, attorneys who "overpromote their areas of specialization ... may be exposed to DTPA liability."<sup>184</sup> Representative Seidlits offered a brief defense of the Professional Services Exemption during the legislative debates by referencing this exact type of misrepresentation: "[The Exemption] preserves the right of the

<sup>173</sup> Throughout this Comment, the Professional Services Exemption of 1995 has been referred to as the Exemption, with a capital "E." This should not be confused with various exceptions to the Exemption, which are discussed here, but are not capitalized.

<sup>174</sup> 27 [Tex. Tech L. Rev.](#), *supra* note 1, at 1451.

<sup>175</sup> Debate on Tex. H.B. 668 on the Floor of the House, 74th Leg., R.S. (May 3, 1995) (tapes available from House Committee Coordinator) (comments by Chairman Seidlits); see also 27 [Tex. Tech L. Rev.](#), *supra* note 1, at 1451.

<sup>176</sup> [Tex. Bus. & Com. Code Ann. 17.49\(c\)\(1\)](#) (Vernon 2002).

<sup>177</sup> Id. 17.49(c)(2). This provision indicates that a professional service provider forfeits his protection under the Exemption if he fails "to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed." Id. Because of an unrelated addition to the laundry list, the former 17.46(b)(23) is now codified at (b)(24). The continuing reference to (b)(23) is a legislative oversight.

<sup>178</sup> Id. 17.49(c)(3).

<sup>179</sup> Id. 17.49(c)(4).

<sup>180</sup> Id. 17.49(c)(5). When read in conjunction with 17.46(b)(26), 17.49(c)(5) explains that a professional service provider loses his protection under the Exemption if he takes "advantage of a disaster declared by the governor under Chapter 418, Government Code, by: (A) selling or leasing fuel, food, medicine, or another necessity at an exorbitant or excessive price; or (B) demanding an exorbitant or excessive price in connection with the sale or lease of fuel, food, medicine, or another necessity." Id. at 17.46(b)(26).

<sup>181</sup> See 27 [Tex. Tech L. Rev.](#), *supra* note 1, at 1451.

consumer [when a professional] makes a misrepresentation... ." <sup>185</sup> He continued by explaining that "[if someone says something like], 'I'm the best lawyer. I can get you \$ 200 million in your lawsuit,' [or] if I misrepresent a fact to you, if I misrepresent my ability as a professional, then yes - the [misrepresentation] is actionable. I can take advantage of [the DTPA] against a professional... ." <sup>186</sup>

In *Sorokolit v. Rhodes*, the supreme court addressed an express misrepresentation by a doctor. <sup>187</sup> In that case, Ms. Rhodes sought out Dr. Sorokolit for a breast augmentation procedure. <sup>188</sup> Dr. Sorokolit guaranteed and warranted the results of the surgery. <sup>189</sup> In fact, he represented that her [\*824] breasts would look just like those in the picture of a nude model she selected. <sup>190</sup> The result did not live up to the surgeon's guarantee. <sup>191</sup> She sued Dr. Sorokolit for medical malpractice, breach of implied and express warranties, and knowing misrepresentation under the DTPA. <sup>192</sup> Dr. Sorokolit offered a defense under section 12.01(a) of the Medical Liability and Insurance Improvement Act, <sup>193</sup> arguing that a physician cannot be sued under the DTPA for conduct arising from the provision of professional medical services. <sup>194</sup> Ultimately the court held that Article 4590i precludes negligence claims from being recast as DTPA claims, but emphasized that if the alleged DTPA claim is not based on the physician's breach of the accepted standard of care, but rather on a separate cause of action, such as knowing breach of express warranty or knowing misrepresentation, then the DTPA action is not precluded by Article 4590i. <sup>195</sup>

## 2. The (c)(2) exception: Failure to Disclose

Similarly, professionals cannot escape DTPA liability if they fail to disclose information in violation of section 17.46(b)(24). <sup>196</sup> A failure to disclose information about services known at the consummation of a transaction creates a cause of action for false, misleading, or deceptive acts under the DTPA, if such concealment was intended to induce the consumer to enter into a transaction that the consumer would not have entered had the information been disclosed. <sup>197</sup> For example, attorneys who "fail to advise a prospective client of facts that may be

<sup>182</sup> *May v. Atkins*, No. 6:01-CV-067-C, 2001 U.S. Dist. LEXIS 21343, at 5-6 (N.D. Tex. Dec. 21, 2001) (defendant proved that he was subject to the Professional Services Exemption but failed to show that none of the exceptions applied).

<sup>183</sup> For another helpful discussion of the exceptions to the Exemption, see David J. Beck, *Legal Malpractice in Texas: Second Edition*, 50 *Baylor L. Rev.* 547, 763-68 (1998).

<sup>184</sup> *Id.* at 769.

<sup>185</sup> Debate on Tex. H.B. 668 on the Floor of the House, 74th Leg., R.S. (May 3, 1995) (tapes available from House Committee Coordinator).

<sup>186</sup> *Id.*

<sup>187</sup> [889 S.W.2d 239 \(Tex. 1994\)](#).

<sup>188</sup> [Id. at 240](#); see also *The Alderman Practice Guide*, supra note 1, at 3-28 (discussing how this pre-1995 case effectively demonstrates many of the principles embodied in the Exemption).

<sup>189</sup> [Sorokolit](#), 889 S.W.2d at 240.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> [Tex. Rev. Civ. Stat. Ann. art. 4590i](#), 12.01(a) (Vernon Supp. 2003). The protection offered to physicians under 12.01(a) overlaps with the protection offered under the DTPA's Professional Services Exemption. In light of 12.01(a), the DTPA protection for physicians is unnecessarily duplicative; i.e., physicians would be shielded from DTPA liability even without the Professional Services Exemption.

germane to the client's attorney retention decision may be exposed to DTPA liability." <sup>198</sup> The real [\*825] estate industry could also be a fertile field in which such nondisclosure might arise. <sup>199</sup>

### 3. The (c)(3) exception: Unconscionable Action

The DTPA defines "unconscionable action or course of action" as "an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience or capacity of the consumer to a grossly unfair degree." <sup>200</sup> Professor Alderman aptly points out that "it is difficult to imagine an act that satisfies this definition, which could be classified as advice, judgment, or opinion. Therefore, it may be that all unconscionable conduct by a professional is actionable under section 17.49(c)," <sup>201</sup> rendering unnecessary the final words of section 17.49(c)(3). <sup>202</sup>

To date, the Texas Supreme Court's only in-depth discussion of the Professional Services Exemption dealt with the unconscionable action of a lawyer. <sup>203</sup> In *Latham v. Castillo*, the Castillos' attorney, Mr. Latham, affirmatively represented to them that he had filed and was actively [\*826] litigating a medical malpractice claim against the hospital for the wrongful death of their daughter, when in fact he had allowed the statute of limitations to run. <sup>204</sup> The Castillos subsequently sued Latham for legal malpractice and unconscionable action under the DTPA. <sup>205</sup>

Latham argued that the Castillos' DTPA claim was "a dressed-up legal malpractice claim." <sup>206</sup> Latham asserted that the Castillos were required to prove they would have won the underlying medical malpractice suit in order to recover in the DTPA suit, <sup>207</sup> or to "prove the "suit within the suit." <sup>208</sup> The court distinguished "between negligent conduct and deceptive conduct" and disagreed with Latham: "Recasting the Castillos' DTPA claim as merely a legal malpractice claim would subvert the Legislature's clear purpose in enacting the DTPA-to deter deceptive business

<sup>194</sup> [Sorokolit, 889 S.W.2d at 241.](#)

<sup>195</sup> [Id. at 242.](#)

<sup>196</sup> [Tex. Bus. & Com. Code Ann. 17.46\(b\)\(24\)](#) (Vernon 2002).

<sup>197</sup> See, e.g., [Kahlig v. Boyd, 980 S.W.2d 685, 690](#) (Tex. App. - San Antonio 1998, pet. denied).

<sup>198</sup> David J. Beck, *Legal Malpractice in Texas: Second Edition*, [50 Baylor L. Rev. 547, 769 \(1998\)](#).

<sup>199</sup> See generally, e.g., *Rader v. Danny Darby Real Estate, Inc.*, No. 05-97-01927-CV, [2001 Tex. App. LEXIS 6198](#) (Tex. App. - Dallas Sept. 10, 2001, no pet.) (not designated for publication) (addressing alleged non-disclosure by real estate agent in sale of a house).

<sup>200</sup> [Tex. Bus. & Com. Code Ann. 17.45\(5\)](#) (Vernon 2002).

<sup>201</sup> The Alderman Practice Guide, *supra* note 1, at 3-28 n.66e.

<sup>202</sup> [Tex. Bus. & Com. Code Ann. 17.49\(c\)\(3\)](#).

<sup>203</sup> [Latham v. Castillo, 972 S.W.2d 66 \(Tex. 1998\)](#). Actually, the unconscionable conduct in *Latham* occurred in 1990, making the court's discussion of the Exemption dicta. [Id. at 67](#). Nevertheless, the analysis is unimpeachable and constitutes highly persuasive dicta. Numerous lower courts have addressed the unconscionable action of professionals. *Bellows v. San Miguel*, No. 14-00-00071-CV, [2002 Tex. App. LEXIS 3164, at 21-27](#) (Tex. App. - Houston [14th Dist.] May 2, 2002, pet. filed) (not designated for publication) (addressing the allegedly unconscionable action of a lawyer); [James V. Mazuca & Assocs. v.](#)

practices." <sup>209</sup> The court ruled that "the DTPA does not require and the Castillos need not prove the "suit within a suit" element when suing an attorney under the DTPA." <sup>210</sup>

#### 4. The (c)(4) exception: Breach of Express Warranty

Texas courts have never addressed the breach of an express warranty by a professional service provider in the context of the Exemption. Of course, express warranty situations are more straightforward than implied warranty cases and therefore less likely to reach the appellate level in litigation. The exception speaks for itself: a professional service provider may be held liable under the DTPA if he breaches an express warranty.

#### 5. The (c)(5) exception: Taking Advantage of a Natural Disaster

This exception was added in 2000 and gives rise to DTPA liability where a professional takes advantage of a natural disaster. This could conceivably arise where, for example, a doctor charges an exorbitant or excessive price in connection with the provision of medical services during a natural disaster. At publication, no case law has addressed this exception.

**[\*827]**

### IV. Conclusion

The wording of the DTPA's Professional Services Exemption is unwieldy and difficult to apply. A cursory reading of the statute suggests a broad construction that could potentially vitiate the DTPA. However, a more thorough look at the history, context, and language of the Exemption reveals that it can be interpreted in a manner faithful to the adopted language, the drafters' intent, and the Exemption's purposes. Therefore, this Comment has proposed a simple and workable test to be used in applying the Exemption.

#### A. Recommendations for the Legislature and the Courts

The Texas Legislature is unlikely to reach a consensus on the Exemption's scope and application. Nevertheless, the Texas Legislature should resolve to clarify the ambiguities. It should define "professional," "professional services" and/or "professional services provider." It should re-word the first sentence of 17.49(c), eliminating the comma and creating a true restrictive clause: Nothing in [the DTPA] shall apply to a claim for damages based on

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Schumann, 82 S.W.3d 90, 97 (Tex. App. - San Antonio 2002, pet. filed) (confirming that an attorney may be held liable for an unconscionable act, provided that the act cannot be characterized as advice, judgment, or opinion); Service Corp. Int'l Mgmt. Corp. v. Galvan, No. 13-99-468-CV, 2001 Tex. App. LEXIS 747, at 15 (Tex. App. - Corpus Christi Jan. 18, 2001, no pet.) (not designated for publication) (refusing to overturn a jury finding that the conduct of a funeral services company constituted an unconscionable course of action); Ballesteros v. Jones, 985 S.W.2d 485 (Tex. App. - San Antonio 1998, pet. denied) (finding sufficient evidence of unconscionable action by attorney and discussing the Exemption, even though the conduct in question took place in 1990 and was not governed by the Exemption). For pre-Exemption rulings, see generally, e.g., Chastain v. Koonce, 700 S.W.2d 579 (Tex. 1985); DeBakey v. Staggs, 605 S.W.2d 631 (Tex. Civ. App. - Houston [1st Dist.] 1980, writ denied) (finding, in a pre-Exemption context, that an attorney unconscionably took advantage of a client to a grossly unfair degree when the attorney knowingly failed to obtain in a timely manner a name change for the client's minor child).

<sup>204</sup> 972 S.W.2d at 67.

<sup>205</sup> Id.

<sup>206</sup> Id. at 69.

<sup>207</sup> Id.

<sup>208</sup> Id.

<sup>209</sup> Id.

<sup>210</sup> Id.

the rendering of a professional service that is characterized as advice, judgment, opinion, or similar professional skill.

Additionally, the legislature recognized that the courts would take an active role in the Exemption's interpretation. Therefore, Texas courts should seize the opportunity by adopting a test that can be applied consistently, predictably, and in conformity with the Exemption's intended purposes.<sup>211</sup> The courts should do this because clarity in the Exemption would provide a substantial benefit to the effective administration of justice, and because the legislature expressly deferred to the courts on this matter.

#### B. Summary of the Test

The test should ask three questions: (1) Should the individual be considered a professional? (2) Can the specific service rendered be characterized by advice, judgment, opinion, or similar professional skill? And (3) Has the defendant demonstrated that none of the statutory exceptions apply? In the first step, one should use the FLSA's definition of "Professional Employees" as a filter, and then refine the analysis with **["\*828]** additional questions designed to maintain a narrow definition of "professional."<sup>212</sup> In the second step, one should focus on the specific service rendered and consider whether that particular service falls within the scope of the profession. In the third step, one should examine the statutory exceptions to see if any of them apply.

#### C. Final Advocacy and Pleading Tips

Plaintiffs should be aware that, in some cases, both a malpractice claim and a DTPA claim may lie.<sup>213</sup> Defendants should test the scope of the Exemption until the courts adopt a narrower definition of "professional."<sup>214</sup> Also, defendants should note that the Exemption likely constitutes an affirmative defense that must be pleaded and proved; otherwise, it is probably waived.<sup>215</sup>

#### D. Owen's Pinto

The hypothetical proposed at the beginning of this Comment suggested that Mack the mechanic might successfully invoke the Professional Services Exemption. If one ignores legislative intent and applies an ill-defined, amorphous standard of interpretation, this may be true. However, if this Comment's recommended test is applied to the facts, Mack will not survive step one of the analysis (i.e., Mack is not a "professional"). Therefore, Mack cannot invoke the Professional Services Exemption to avoid DTPA liability. Perhaps his mama should have taken Willie Nelson's advice.

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<sup>211</sup> See The Alderman Practice Guide, *supra* note 1, at 3-26 n.66b ("It appears that until the supreme court clarifies the definition of a professional service, defendants will liberally assert the exemption ...").

<sup>212</sup> [29 U.S.C. 152](#)(12)(a) (2000).

<sup>213</sup> [Streber v. Hunter, 221 F.3d 701, 728 \(5th Cir. 2000\)](#) (finding in a pre-Exemption case that plaintiff had both a legal malpractice claim and a DTPA claim).

<sup>214</sup> See Eve L. Pouliot, Deceptive Trade Practices and Consumer Protection Act, [49 SMU L. Rev. 871, 895 \(1996\)](#) (making reference to "creative pleading").

<sup>215</sup> Tex. R. Civ. P. 94; see [Celotex Corp. v. Tate, 797 S.W.2d 197, 207](#) (Tex. App. - Corpus Christi 1990, no writ) (explaining the need to plead and prove an affirmative defense in order to avoid waiver); see also [Eckman v. Centennial Sav. Bank, 784 S.W.2d 672, 674-75 \(Tex. 1990\)](#) (holding that defendant had burden to plead and prove-as an affirmative defense-the applicability of the \$ 25,000,000 exception to business consumer status, which was in force at that time).

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