

By: Davis of Harris

H.B. No. 2898

A BILL TO BE ENTITLED

AN ACT

relating to certain procedures, civil penalties, and remedies under the Deceptive Trade Practices-Consumer Protection Act.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Sections 17.45(9) and (13), Business & Commerce Code, are amended to read as follows:

(9) "Knowingly" means actual awareness, at the time of the act or practice complained of, of the falsity, deception, or misleading nature [~~unfairness~~] of the act or practice giving rise to the consumer's claim or, in an action brought under Subdivision (2) of Subsection (a) of Section 17.50, actual awareness of the act, practice, condition, defect, or failure constituting the breach of warranty, but actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

(13) "Intentionally" means actual awareness, at the time of the act or practice complained of, of the falsity, deception, or misleading nature [~~unfairness~~] of the act or practice giving rise to the consumer's claim [~~7~~] or the condition, defect, or failure constituting a breach of warranty giving rise to the consumer's claim, coupled with the specific intent that the consumer act in detrimental reliance on the act, practice, condition, defect, or failure [~~falsity or deception or in detrimental ignorance of the unfairness~~]. Intention may be inferred from objective manifestations that indicate that the

1 person acted intentionally or from facts showing that a defendant  
2 acted with flagrant disregard of prudent and fair business  
3 practices to the extent that the defendant should be treated as  
4 having acted intentionally.

5 SECTION 2. Sections 17.47(a), (b), (c), and (d), Business &  
6 Commerce Code, are amended to read as follows:

7 (a) Whenever the consumer protection division has reason to  
8 believe that any person is engaging in, has engaged in, or is about  
9 to engage in any act or practice declared to be unlawful by this  
10 subchapter, and that proceedings would be in the public interest,  
11 the division may bring an action in the name of the state against  
12 the person to restrain by temporary restraining order, temporary  
13 injunction, or permanent injunction the use of such ~~[method,~~  
14 act~~]~~ or practice.

15 Nothing herein shall require the consumer protection  
16 division to notify such person that court action is or may be under  
17 consideration, provided~~[.——Provided]~~, however, the consumer  
18 protection division shall, at least seven days prior to instituting  
19 such court action, contact such person to inform him ~~[in general]~~ of  
20 the alleged unlawful conduct. ~~[Cessation of unlawful conduct after  
21 such prior contact shall not render such court action moot under any  
22 circumstances, and such injunctive relief shall lie even if such  
23 person has ceased such unlawful conduct after such prior contact.]~~

24 Such prior contact shall not be required if, in the opinion of the  
25 consumer protection division, there is good cause to believe that  
26 such person would evade service of process if prior contact were  
27 made or that such person would destroy relevant records if prior

1 contact were made, or that such an emergency exists that immediate  
2 and irreparable injury, loss, or damage would occur as a result of  
3 such delay in obtaining a temporary restraining order.

4 (b) An action brought under Subsection (a) of this section  
5 which alleges a claim to relief under this section may be commenced  
6 in the district court of the county in which the person against whom  
7 it is brought resides or[7] has his principal place of business[7  
8 ~~has done business,~~] or in the district court of the county where the  
9 transaction occurred, or, on the consent of the parties, in a  
10 district court of Travis County. An action brought under  
11 Subsection (a) is subject to the procedural and evidentiary rules  
12 applicable to any other civil action filed in a district court. The  
13 court may issue temporary restraining orders, temporary or  
14 permanent injunctions to restrain and prevent violations of this  
15 subchapter and such injunctive relief shall be issued without bond.

16 (c) In addition to the request for a temporary restraining  
17 order[7] or permanent injunction in a proceeding brought under  
18 Subsection (a) of this section, the consumer protection division  
19 may request[7, ~~and the trier of fact may award,~~] a civil penalty to  
20 be paid to the state. If the consumer protection division requests  
21 a civil penalty, the trier of fact shall determine the number of  
22 violations that the person committed, whether the person acted  
23 knowingly or intentionally, and the amount of economic harm caused  
24 by the act or practice that is the subject of the proceeding. The  
25 trier of fact may then award a civil penalty to be paid to the state  
26 in an amount of:

27 (1) not more than \$20,000 per violation, not to exceed

1 a total of the lesser of \$50,000 or the amount of economic harm  
2 caused by the act or practice that is the subject of the proceeding,  
3 unless the person acted intentionally, in which case the trier of  
4 fact may award a civil penalty in an amount of not more than the  
5 greater of \$250,000 or the amount of economic harm caused by the act  
6 or practice that is the subject of the proceeding; and

7 (2) if the act or practice that is the subject of the  
8 proceeding was calculated to acquire or deprive money or other  
9 property from a consumer who was 65 years of age or older when the  
10 act or practice occurred, an additional amount of not more than  
11 \$50,000 [~~\$250,000~~].

12 (d) The court may make such additional orders or judgments  
13 as are necessary to compensate identified [~~identifiable~~] persons  
14 for actual damages or to restore money or property, real or  
15 personal, that was [~~which may have been~~] acquired by means of any  
16 unlawful act or practice. An award under this subsection [~~Damages~~]  
17 may not include any damages incurred, or money or property  
18 acquired, more than [~~beyond a point~~] two years prior to the  
19 institution of the action by the consumer protection division.  
20 Orders of the court may also include the appointment of a receiver  
21 or a sequestration of assets if a person who has been ordered by a  
22 court to make restitution, including by returning money or  
23 property, under this section has failed to comply with the court's  
24 order [~~do so~~] within three months after the order [~~to make~~  
25 ~~restitution~~] has become final and nonappealable.

26 SECTION 3. Section 17.60, Business & Commerce Code, is  
27 amended to read as follows:

1           Sec. 17.60. REPORTS AND EXAMINATIONS. (a) Whenever the  
2 consumer protection division has reason to believe that a person is  
3 engaging in, has engaged in, or is about to engage in any act or  
4 practice declared to be unlawful by this subchapter, or when it  
5 reasonably believes it to be in the public interest to conduct an  
6 investigation to ascertain whether any person is engaging in, has  
7 engaged in, or is about to engage in any such act or practice, an  
8 authorized member of the division may:

9           (1) serve a directive that states the alleged  
10 violation and:

11                   (A) requires [~~require~~] the person to file with  
12 the division, on the prescribed forms, a statement or report in  
13 writing, under oath or otherwise, as to all the facts and  
14 circumstances concerning the alleged violation [~~and such other data~~  
15 ~~and information as the consumer protection division deems~~  
16 ~~necessary~~];

17                   (B) requires the person to submit to an  
18 examination [(2) ~~examine~~] under oath about the [~~any person in~~  
19 ~~connection with this~~] alleged violation; or

20                   (C) requires the person to produce for inspection  
21 [~~(3) examine any~~] merchandise or samples [~~sample~~] of merchandise  
22 relating to the alleged violation [~~deemed necessary and proper~~];

23 and

24           (2) [(4)] pursuant to an order of the appropriate  
25 court, impound any sample of merchandise that is produced in  
26 accordance with this subchapter and retain it in the possession of  
27 the division until the completion of all proceedings in connection

1 with which the merchandise is produced.

2 (b) Unless authorized by a court order, the consumer  
3 protection division may not require a person to comply with a  
4 directive for action under Subsection (a)(1) before the 31st day  
5 after the date the person is served the directive.

6 (c) Before the 31st day after the date a person is served a  
7 directive for action under Subsection (a)(1), the person may file a  
8 petition, stating good cause, to extend the period in which the  
9 person must comply with the directive or to modify or set aside the  
10 directive. The petition may be filed in the district court in the  
11 county where the person resides, if the person is an individual, or  
12 where the person's principal place of business in this state is  
13 located, if the person is not an individual, or a district court of  
14 Travis County. The period in which a person may file the petition  
15 may be extended by a court order or by a written agreement between  
16 the person and the consumer protection division.

17 (d) An action brought under Subsection (c) to modify or set  
18 aside a directive is subject to the procedural and evidentiary  
19 rules applicable to any other civil action filed in a district  
20 court.

21 (e) A person who files a petition as provided by Subsection  
22 (c) shall comply with the directive as ordered by the court.

23 SECTION 4. Section 17.61, Business & Commerce Code, is  
24 amended by amending Subsections (b), (c), and (g) and adding  
25 Subsection (g-1) to read as follows:

26 (b) Each demand shall:

27 (1) state the statute and section under which the

1 alleged violation is being investigated, and the [~~general~~] subject  
2 matter of the investigation;

3 (2) describe the class or classes of documentary  
4 material to be produced with reasonable specificity so as to fairly  
5 indicate the material demanded;

6 (3) prescribe a return date not later than the 30th day  
7 after the demand has been served within which the documentary  
8 material is to be produced, unless an extended return date is  
9 authorized by a court order; and

10 (4) identify the persons authorized by the consumer  
11 protection division to whom the documentary material is to be made  
12 available for inspection and copying.

13 (c) A civil investigative demand may not contain any [~~a~~]  
14 requirement, including a requirement for the [~~or~~] disclosure of  
15 documentary material, which would not be discoverable under the  
16 Texas Rules of Civil Procedure in a civil action brought by the  
17 consumer protection division under this subchapter.

18 (g) At any time before the return date specified in the  
19 demand, or within 30 [~~20~~] days after the demand has been served,  
20 whichever period is longer [~~shorter~~], a petition to extend the  
21 return date for, or to modify or set aside any aspect of the demand,  
22 stating good cause, may be filed in the district court in the county  
23 where the party who is served with the demand resides [~~parties~~  
24 ~~reside~~], or, on consent of the parties, a district court of Travis  
25 County. The period in which a person may file the petition may be  
26 extended by a court order or by a written agreement between the  
27 person and the consumer protection division. A person who files a

1 petition under this subsection shall comply with the demand as  
2 ordered by the court.

3 (g-1) A petition to modify or set aside any aspect of the  
4 demand is subject to the procedural and evidentiary rules  
5 applicable to any other civil action filed in a district court.

6 SECTION 5. (a) The changes in law made by this Act to  
7 Sections 17.45 and 17.47, Business & Commerce Code, apply only to a  
8 violation of the Deceptive Trade Practices-Consumer Protection Act  
9 that occurs on or after the effective date of this Act. A violation  
10 of the Deceptive Trade Practices-Consumer Protection Act that  
11 occurs before the effective date of this Act is governed by the law  
12 in effect on the date the violation occurred, and the former law is  
13 continued in effect for that purpose. For purposes of this  
14 subsection, a violation occurs before the effective date of this  
15 Act if any element of the violation occurs before that date.

16 (b) The changes in law made by this Act to Sections 17.60 and  
17 17.61, Business & Commerce Code, apply only to a directive served  
18 under Section 17.60, Business & Commerce Code, and a civil  
19 investigative demand served under Section 17.61, Business &  
20 Commerce Code, on or after the effective date of this Act. A  
21 directive or civil demand served before the effective date of this  
22 Act is governed by the law in effect on the date the directive or  
23 demand was served, and the former law is continued in effect for  
24 that purpose.

25 SECTION 6. This Act takes effect September 1, 2015.