

# **DTPA FORMS and PRACTICE GUIDE**

**David G. Tekell**



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**DTPA FORMS  
and  
PRACTICE GUIDE**

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Mr. Tekell is a practicing trial lawyer and an Adjunct Professor at Baylor University School of Law where he teaches Consumer Protection. He has over 25 years of experience handling consumer law cases on both sides of the docket. After interning with Chief Judge Walter S. Smith, Jr. of the United States District Court for the Western District of Texas, Waco Division during his last semester of law school in 1986, Mr. Tekell worked with Waco's largest defense firm, trying cases in both federal and state courts. In 1987, Mr. Tekell defended one of the first "vanishing premium" life insurance fraud cases filed in Texas. In 1990, he began handling "vanishing premium" life insurance fraud cases from the plaintiff's side. In 1995, he represented the plaintiffs in the landmark case of *Ferguson v. Crown Life Insurance Company*, which resulted in one of the largest consumer law verdicts ever issued in Travis County at the time. That case was subsequently appealed and reported as *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000).



From 1996 to 2005, Mr. Tekell served as co-lead class counsel in several national class actions against life insurance companies for "vanishing premium" life insurance sales practices and lead class counsel against other national companies for deceptive trade practices. He has been a frequent author and speaker on life insurance sales practices and class action litigation. Throughout his career, Mr. Tekell has maintained an active docket of individual consumer law cases, trying many of them to jury verdicts. He is board certified in Consumer and Commercial Law (2004) and in Personal Injury Trial Law (2004) by the Texas Board of Legal Specialization. Currently, Mr. Tekell is managing partner of the law firm Tekell & Atkins, L.L.P. in Waco, Texas.

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For eight years, Mr. Bragg served as an Assistant Attorney General of Texas and then Chief of the Attorney General's Consumer Protection and Antitrust Division. Mr. Bragg was a co-author of Texas Consumer Litigation (1st and 2nd Editions). In addition to authoring numerous articles on various legal subjects and three State Bar video tapes on trial practice, Mr. Bragg has served as Chairman of the State Bar's Consumer Law Section and is a former President of Texas Consumer Association. In 1991, Mr. Bragg was appointed by Governor Ann Richards to be her "Citizen Trustee" on nursing homes and authored a report entitled, *Make Texas A Good Place to Grow Old*. Mr. Bragg frequently serves as a faculty member of the State Bar of Texas and University of Texas Continuing Legal Education programs and lectures throughout the State on subjects related to trial strategy, nursing home abuse and neglect and deceptive trade practices litigation. Mr. Bragg has been in private practice since 1981 and is a member of the firm of Bragg Chumlea McQuality, with offices in Austin and Dallas.

### MICHAEL CURRY

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Following graduation from law school, Mr. Curry served as a briefing attorney for the Supreme Court of Texas. He was then appointed an Assistant Attorney General of Texas in the Consumer Protection and Antitrust Division until he entered private practice in 1979. Mr. Curry has served as Chairman of the State Bar of Texas Consumer Law Section, and as an Adjunct Professor of Law at the University of Texas School of Law since 1985. Mr. Curry was the Editor of TEXAS CONSUMER LITIGATION (2nd Edition), has authored numerous law review and continuing legal education articles on subjects related to deceptive trade practices, Insurance Code litigation, negotiation and ADR.

Mr. Curry, a full-time professional mediator, has mediated over 2,000 cases across the State, including complex personal injury, construction, DTPA, malpractice, insurance, employment and regulatory disputes. He has been recognized as an AAM Certified Advanced Mediator. He is a member of the Association of Attorney-Mediators and the Association for Conflict Resolution. He is a Fellow of the Center for Public Policy Dispute Resolution. He is on the approved mediator lists for the federal district courts in the Western District of Texas (Austin, San Antonio, El Paso, Waco) and for the state district courts in Austin and San Antonio. He maintains a web site at [www.mcmediate.com](http://www.mcmediate.com).

## Introduction

In 1989, the Consumer Law Section of the State Bar of Texas conducted a survey of thirty-four counties to obtain data on jury trials involving the *Texas Deceptive Trade Practices—Consumer Protection Act* (DTPA).<sup>1</sup> The survey found, among other things, that of the 5,466 jury trials conducted in a three year period in the survey area, 695 of the trials involved claims under the DTPA. In other words, the DTPA was involved in 13% of all jury trials. When the vast number of other causes of action are considered, this result was and is astounding. Clearly, if an attorney was involved in litigation and had not handled a DTPA case yet, it was only a matter of time before a DTPA client knocked on the door.

The 74th Texas Legislature, meeting in Regular Session until it was gavelled to a close in May 1995, enacted sweeping changes in many laws which were designed to provide a remedy for victims of wrongful conduct. The proponents of the tort reform movement held the belief that these laws favored plaintiffs to such a degree that the defendants in such lawsuits were denied a “level playing field.” The opponents of tort reform, who uniformly insisted on putting the words “tort reform” in quotes, were of the opinion that the playing field not only was level, but that changes in the Justices on the Supreme Court in recent years had tilted the field very much in favor of defendants.

The DTPA and Article 21.21 of the Insurance Code were among those laws that the proponents of tort reform sought to change. Political power clearly had shifted in favor of the proponents with the election of a Governor who ran on a tort reform platform as well as the defeat in the legislature of several of its more outspoken consumer advocates. Early in the legislative session, it was clear that there would be changes in the DTPA and Article 21.21; the only question was how extensive the changes would be.

The Lieutenant Governor and Speaker of the House convened an ad hoc committee of members of the House and Senate, business community and consumer advocates to discuss and debate proposed changes to both the DTPA and Article 21.21. The authors were participants in many of the numerous meetings that were held. Although some compromises were reached, on balance, the final product of the committee’s work, and then that of the legislature, was an amendments package that imposes significant new requirements and limitations on those who are victims of deception or unfairness in consumer transactions.

The language of the 1995 amendments to the DTPA and Article 21.21 reflect the give and take of negotiations between lobbyists, advocates and members of the legislature. The effect of the amendments is immediate. The new venue rules already are in effect, as of September 1, 1995; and all of the amendments apply to all causes of action that accrue after September 1, 1995, as well as all lawsuits that are filed after September 1, 1996, regardless of when the causes of action accrued.

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<sup>1</sup> Survey of Jury Trials Under the Deceptive Trade Practices Act, Consumer Law Section, State Bar of Texas, March 21, 1989.

It is also clear that the changes in existing law are extensive. The amendments touch nearly every aspect of DTPA and Insurance Code litigation, from the content of the initial pre-filing notice letter and its response, to the type and amount of damages a jury may award. The amendments even include an entirely new section in both the DTPA and Article 21.21 on mediation. The amendments change features of the DTPA which, since its enactment in 1973 have been sacrosanct, e.g. the DTPA can now be *waived* in specified circumstances; if a transaction exceeds \$500,000, the DTPA no longer applies; and “professionals” (undefined) are given special status and protection against DTPA lawsuits.

The purpose of this volume is to provide an up-to-date, handy source book for handling DTPA litigation whether as a plaintiff or a defendant. It would be impossible for any single volume to contain all one needs to know about handling a DTPA case. The forms and practice guides provide the basics, thereby allowing additional time for more creative thinking about each case.

There are many individuals who deserve special mention by the authors. Many of the ideas and concepts in this book are not original but have been gathered through the years from countless attorneys with whom the authors have come in contact. These individuals must, of necessity, go nameless for to list each and every person whose professional skills have influenced our writing would require a separate volume. We must, however, give special thanks to our families because it would be impossible to write any book, especially a law book, without their support. We also wish to thank Darlene B. Ellison, whose pleasant attitude and tireless work has enable us not only to publish this book, but also maintain a fulltime trial and mediation practice as well.

Throughout this book, two citations are presented in abbreviated form: First, TEX. BUS. & COM. CODE §17.41 *et seq.*, the *Deceptive Trade Practices-Consumer Protection Act*, is cited as “DTPA.” Second, Bragg, Maxwell, Longley, TEXAS CONSUMER LITIGATION 2D (1983) is cited as “TEXAS CONSUMER LITIGATION 2D.”

David F. Bragg

Michael Curry

April 1996

Austin, Texas

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