EXHIBIT E

APPENDIX OF NON-FEDERAL AND UNPUBLISHED FEDERAL AUTHORITIES CITED IN DEFENDANT DELL INC.'S REPLY IN SUPPORT OF ITS MOTION FOR ORDER DISMISSING PLAINTIFFS' SECOND AMENDED COMPLAINT WITH PREJUDICE AND STRIKING PLAINTIFFS' CLASS ACTION ALLEGATIONS

Supreme Court of Texas.

Bruce BRADFORD, et al., Petitioners,
v.
Roell VENTO, et al., Respondents.

No. 99-0966.

Argued on Oct. 4, 2000.
Decided April 26, 2001.
Rehearing Overruled Aug. 2, 2001.

Purported buyer of store in shopping mall filed action against seller, mall manager, and mall owners, asserting claims of civil conspiracy, fraud, tortious interference with prospective contractual relations, intentional infliction of emotional distress, violations of Deceptive Trade Practices Act (DTPA), breach of fiduciary duty, and breach of contract. The 357th District Court, Cameron County, Rogelio Valdez, J., entered judgment holding all defendants jointly and severally liable and awarding actual and exemplary damages. Mall manager and owners appealed. The Corpus Christi Court of Appeals, 997 S.W.2d 713, affirmed in part and reversed and rendered in part. Buyer, manager, and owners all petitioned for review. The Supreme Court, Abbott, J., held that: (1) manager's statements to buyer that he would "take care of" buyer's long-term lease concerns in a few months did not amount to fraud for his failure to disclose upcoming rent increase or procedures for obtaining new lease; (2) manager's statements to police during investigation of disturbance at store that seller, not buyer, owned store did not amount to interference with buyer's prospective business relations with store's customers; (3) such statements were not "extreme and outrageous," as required for claim of intentional infliction of emotional distress; and (4) buyer did not state a claim under the DTPA.

Affirmed in part and reversed and rendered in part.

West Headnotes

[1] Appeal and Error 930(1)
30k930(1)
In reviewing a "no evidence" point, the appellate court must view the evidence in a light that tends to support the finding of the disputed fact and disregard all evidence and inferences to the contrary.

[2] Appeal and Error 215(1)
30k215(1)
Absent an objection to the jury charge, the sufficiency of the evidence is reviewed in light of the charge submitted.

[3] Fraud 13(2)
184k13(2)
There was no evidence that shopping mall manager knew that putative buyer of store either was ignorant of existing lease terms or had no equal opportunity to discover them, and thus manager's assurances that he would "take care of" buyer's long-term lease concerns in a few months did not amount to fraud for failing to disclose upcoming rent increase under existing lease or procedures for obtaining new lease, where buyer never asked manager about terms of existing lease and never asked for assignment of lease; manager could have reasonably assumed that buyer knew lease terms before contracting to buy store.

[4] Fraud 16
184k16
As a general rule, a failure to disclose information does not constitute fraud unless there is a duty to disclose the information.

[5] Fraud 16
184k16
Silence may be equivalent to a false representation only when the particular circumstances impose a duty on the party to speak and he deliberately remains silent.

[6] Fraud 64(1)
184k64(1)
For purposes of fraud, whether a duty exists to disclose information is a question of law.

[7] Torts 242
379k242
(Formerly 379k12)
No evidence supported finding that shopping mall manager, by refusing to allow putative store owner to enter store with a prospective buyer unless owner signed release of claims against mall, tortiously interfered with prospective contractual relations, in light of prospective buyer's testimony that he would

not have bought store had it been in disarray and lack of any evidence that store's inventory was intact when owner and buyer tried to gain access.

[8] Torts 241
379k241
(Formerly 379k27)

[8] Torts 262
379k262
(Formerly 379k27)
Shopping mall manager's statements to police during investigation of disturbance at mall store that putative seller of store still owned it and that manager wanted to file criminal trespass charges against putative buyer did not amount to evidence that manager acted with intent to harm buyer's prospective business relations with store's customers, but buyer's inability to do business with customers was a mere incidental result of manager's legitimate conduct in trying to protect mall property, even though manager had two days earlier congratulated buyer on purchase, where there was no evidence that sale was finalized, and seller whose name was on lease told manager that he still owned store. Restatement (Second) of Torts § 766B, comment.

[9] Damages 57.39
115k57.39
(Formerly 115k50.10)
Preventing disturbances on shopping mall property was a managerial function that was necessary to the ordinary operation of the business organization, and thus, mall manager's statements to police during investigation of mall disturbance that putative seller of store still owned it and that manager wanted to file criminal trespass charges against putative buyer, without more, were not "extreme and outrageous," as required for claim of intentional infliction of emotional distress, even if manager could have given police more information about ownership dispute.

[10] Damages 208(6)
115k208(6)
Whether a defendant's conduct is extreme and outrageous, as required for claim of intentional infliction of emotional distress, is a question of law.

[11] Damages 57.22
115k57.22
(Formerly 115k50.10)
The mere fact that a defendant's conduct is tortious or otherwise wrongful does not, standing alone, necessarily render it extreme and outrageous, as required for claim of intentional infliction of emotional distress; instead, to be "extreme and outrageous," conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

[12] Antitrust and Trade Regulation 198
29Tk198
(Formerly 92Hk8 Consumer Protection)
Shopping mall manager's response when putative buyer of mall store asked about a long-term lease that he would "take care of" buyer's concerns in a few months, which buyer understood to mean they would work out a lease at that time, was too vague to provide a standard for the jury to use to measure the accuracy of the representation, and thus, it was therefore nonactionable under provisions of Deceptive Trade Practices and Consumer Protection Act (DTPA) governing a defendant's representations that goods, services, agreements, or persons had characteristics that they did not in fact have. V.T.C.A., Bus. & C. § 17.46(b)(5, 12).

[13] Antitrust and Trade Regulation 144
29Tk144
(Formerly 92Hk8 Consumer Protection)
There was no evidence of any "transaction" between shopping mall manager and buyer of mall store, and thus, manager could not be liable to buyer under the Deceptive Trade Practices and Consumer Protection Act (DTPA) for failing to disclose information in order induce buyer into a transaction; buyer had already purchased store at time he discussed possibility of long-term lease with manager, rent he paid was due under existing lease, and buyer and manager did not negotiate a new lease. V.T.C.A., Bus. & C. § 17.46(b)(23).

[14] Antitrust and Trade Regulation 162
29Tk162
(Formerly 92Hk34 Consumer Protection)
Provision of Deceptive Trade Practices and Consumer Protection Act (DTPA) governing a defendant's failure to disclose known information concerning goods or services requires that information known at the time of the transaction

must be withheld for the purpose of inducing the consumer into a transaction which the consumer would not have entered had the information been disclosed. V.T.C.A., Bus. & C. § 17.46(b)(23).

[15] Antitrust and Trade Regulation 198
29Tk198
(Formerly 92Hk8 Consumer Protection)
There was no evidence that shopping mall manager took advantage of buyer of mall store to a grossly unfair degree by stating he would "take care of" buyer's long-term lease concerns in a few months or by telling police, during investigation of subsequent disturbance at mall between buyer and former owner, that former owner still owned store, and thus, buyer's allegation that manager's actions were "unconscionable" did not state a claim under the Deceptive Trade Practices and Consumer Protection Act (DTPA), even though manager did not disclose terms of existing lease and police forced buyer to leave mall because he could not prove ownership. V.T.C.A., Bus. & C. §§ 17.45(5), 17.50(a)(3).

[16] Antitrust and Trade Regulation 136
29Tk136
(Formerly 92Hk4 Consumer Protection)
Unconscionability under the Deceptive Trade Practices and Consumer Protection Act (DTPA) is an objective standard for which scienter is irrelevant. V.T.C.A., Bus. & C. §§ 17.45(5), 17.50(a)(3).

[17] Antitrust and Trade Regulation 135(1)
29Tk135(1)
(Formerly 92Hk4 Consumer Protection)
To prove an unconscionable action or course of action, a plaintiff bringing a claim under the Deceptive Trade Practices and Consumer Protection Act (DTPA) must show that the defendant took advantage of his lack of knowledge and that the resulting unfairness was glaringly noticeable, flagrant, complete and unmitigated. V.T.C.A., Bus. & C. §§ 17.45(5), 17.50(a)(3).

***751** Roger Townsend, Russell S. Post, Hogan Dubose & Townsend, Houston, Douglas Laycock, William Powers, Jr., University of Texas School of Law, Austin, Rex N. Leach, Daniel G. Gurwitz, McAllen, for Petitioners.

Donald B. Edwards, Craig S. Smith, Smith & Edwards, Corpus Christi, Felipe Garcia, Jr., Catherine W. Smith, Law Offices of Ramon Garcia, Edinburg, for Respondents.

Justice ABBOTT delivered the opinion of the Court.

In this case, Roell and Debra Vento sued the defendants alleging various causes of action--including fraud, tortious interference with prospective contractual relations, intentional infliction of emotional distress, DTPA violations, and civil conspiracy--arising out of their attempted ***752** purchase of a sports memorabilia store. We must decide whether legally sufficient evidence supports the jury's verdict against Bruce Bradford, Simon Property Group, and Golden Ring Mall Company. The trial court rendered judgment on the verdict, holding the defendants jointly and severally liable for $1,274,000 in actual damages and $6,500,000 in exemplary damages. The court of appeals affirmed in part and reversed in part, holding the defendants jointly and severally liable for $864,000 in actual damages and $2,520,000 in exemplary damages. 997 S.W.2d 713. We hold that no evidence supports any of the jury's liability findings, and we affirm in part and reverse in part the court of appeals' judgment and render judgment that the Ventos take nothing from Bradford, Simon, and Golden Ring.

I. Background

Tom Taylor operated Tom's Sports Cards in the Valle Vista Mall in Harlingen, Texas. He signed successive leases with the mall, each for a two or three month period. These leases required written consent from the mall before they could be assigned. In addition, Taylor paid a percentage of sales revenues to the mall.

Roell Vento, who had been interested in sports cards and sports memorabilia for several years, established a business relationship with Taylor and began selling items on consignment at the store. Sometime in early or mid-1994, Taylor and Vento became partners and the name of the business was changed to Collector's Choice. Taylor continued to negotiate and sign leases with the mall for Collector's Choice; Vento never personally signed a lease with the mall.

Once he became a partner in Collector's Choice,

Vento moved much of his collection, along with several display cases, into the store. In August 1994, Taylor went out of town for several weeks and left Vento in charge. According to Vento, he and Taylor had agreed that Taylor would sell the store to Vento when he returned. Before he left, Taylor signed a new lease with the mall for the months of September and October. According to Vento, Taylor sold his share of the business to the Ventos on September 15, 1994 for $7,000, and signed a contract to that effect. But after the alleged sale on September 15, Taylor continued to go to the store and wait on customers, which seemed "odd" to Vento.

On October 4, Vento went to Bradford's office and paid him the October rent with a $770 cashier's check, which the mall required because Taylor had written some bad checks. According to Vento, he told Bradford that he had bought the store and showed Bradford a written contract signed by Taylor that indicated the Ventos' intent to purchase the store. Vento then asked Bradford about a long-term lease. Bradford congratulated Vento and mentioned that he already knew that Vento was purchasing the store. Bradford then consulted his files, told Vento that the store's space "should" rent for $2,700, and that $770 was a "decent deal." He also said that a long-term lease was a bad idea because sports card stores generally do not do well in malls, and said he would "take care of"Vento in January.

That afternoon, Vento questioned Taylor about his continued presence at the store. Taylor denied that he had sold the store to Vento, contending that the $7,000 was merely a reimbursement for losses Vento caused when Taylor was away. They had an altercation in the mall, prompting Vento to call the police. Taylor left before the police arrived, and Vento never told Bradford about the dispute. Either on October 5 or early on October 6, Taylor approached Bradford and informed him that he still owned the store and that there could be ***753** trouble with Vento. Bradford alerted the mall's security guard and directed him to remain near the store.

On October 6, Taylor and Vento had a second confrontation in the mall. Taylor and his wife were waiting outside the store when Vento arrived. The mall's security officer was at the store, and Bradford was nearby. When Vento unlocked the store, he, the Taylors, and Bradford entered, and there was a heated discussion between Vento and Taylor. Either Taylor or Taylor's wife called the police, who soon arrived. The police questioned Bradford, and accounts differ whether they asked him who owned the store or whose name was on the lease. According to Vento, Bradford told the police that Taylor owned the store. The police officers offered different versions of what they asked and what Bradford said. According to one officer, Bradford told him that Taylor owned the store and that he did not want Vento in the mall since he was causing a scene. According to the other officer, Bradford said that Taylor was on the lease, and that he wanted to file criminal trespassing charges against Vento if he returned. Eventually, the police asked Vento to leave because he could not prove his ownership. Taylor later changed the store's name back to Tom's Sports Cards and, on October 17, signed a new lease with the mall for November and December.

On November 8, the Ventos filed suit for damages against Taylor, Bradford, and the mall, and sought a temporary restraining order, a temporary injunction, and an accounting. On November 23, Vento obtained a temporary injunction restoring the business to him, and thereafter resumed operation of the store. Vento testified that the value of the merchandise in the store was $35,000 to $40,000 less than it had been on October 6.

In December, Vento paid the usual monthly rent of $770, but failed to pay either the holiday increase of $1,430, which was required by the lease, or the store's past-due amounts, both of which together totaled over $4,000. When Taylor's lease expired on December 31, Vento remained in the mall but did not obtain a new lease. After posting the appropriate notices, the mall changed the locks on January 19.

Soon after being locked out, Vento made arrangements for another man, Louis Martin, to buy the business for between $6,000 and $9,000. Martin agreed to use part of the purchase price to pay the store's outstanding debts. But Martin wanted to see an inventory of the business before closing the deal. Martin, accompanied by Vento, went to the mall office with a check to pay the past-due amounts and asked to view the store. Vento testified that a mall employee told him that the only way they would be allowed in the store was for Vento to sign a statement releasing the mall from all liability. [FN1]

Vento refused, and he and Martin left. A few days later, Martin returned to the mall, and Bradford permitted him to enter the store and view its contents. After seeing the merchandise, Martin declined to go through with the deal. Soon after, Vento was allowed in the store to recover his property without signing a release.

FN1. Vento testified that he was told, "You have to release your lawsuit and every claim that you ever had against the mall for this."

The Ventos proceeded to trial against Taylor, Bradford, Simon, and Golden Ring on their claims of fraud, intentional infliction of emotional distress, DTPA violations, tortious interference with prospective contractual relations, and civil conspiracy. The jury returned a verdict ***754** favorable to the Ventos on each issue. Bradford, Simon, and Golden Ring filed several post-trial motions contending that the evidence was legally insufficient to support the jury's verdict. The trial court overruled the motions and rendered judgment on the verdict against Bradford, Simon, Golden Ring, and Taylor, jointly and severally, for $1,274,000 in actual damages and $6,500,000 in exemplary damages. Bradford, Simon, and Golden Ring appealed; Taylor did not.

The court of appeals affirmed in part and reversed in part. 997 S.W.2d 713. Specifically, the court of appeals found no evidence of civil conspiracy, but otherwise affirmed the jury's liability findings, and held Bradford, Simon, Golden Ring, and Taylor jointly and severally liable based on the single injury rule. After correcting a mathematical error regarding punitive damages, the court of appeals rendered judgment for the Ventos against Taylor, Bradford, Simon, and Golden Ring, jointly and severally, for $864,000 in actual damages and $2,520,000 in exemplary damages.

Bradford, Simon, and Golden Ring filed a petition for review challenging, among other things, the legal sufficiency of the evidence supporting the jury's verdict on fraud, intentional infliction of emotional distress, tortious interference with prospective contractual relations, and DTPA violations. [FN2] The Ventos filed a petition for review challenging the court of appeals' judgment as to the civil conspiracy claim. We granted both petitions for review.

FN2. Taylor did not file a petition for review.

II. Standard of Review

[1][2] In reviewing a "no evidence" point, we must view the evidence in a light that tends to support the finding of the disputed fact and disregard all evidence and inferences to the contrary. Weirich v. Weirich, 833 S.W.2d 942, 945 (Tex.1992). Because Bradford, Simon, and Golden Ring did not object to the jury charge, we review the sufficiency of the evidence in light of the charge submitted. See Wal-Mart Stores, Inc. v. Sturges, 2001 WL 228139 (Tex.2001); City of Fort Worth v. Zimlich, 29 S.W.3d 62, 68 (Tex.2000).

III. Fraud

[3] Bradford, Simon, and Golden Ring first contend that the court of appeals erred in upholding the jury's fraud finding. The trial court submitted the following issue to the jury without objection:

QUESTION NO. 1

Did any of the defendants commit fraud against Roell Vento? Answer Yes or No for each defendant:

...

Fraud occurs when--

a. a party makes a material misrepresentation

b. the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion,

c. the misrepresentation is made with the intention that it should be acted on by the other party, and

d. the other party acts in reliance on the misrepresentation and thereby suffers injury.

Fraud may also occur when--

a. a party conceals or fails to disclose a material fact within the knowledge of that party,

b. the party knows that the other party is ignorant of the fact and does not have an equal opportunity to discover the truth,

***755** c. the party intends to induce the other party to take some action by concealing or failing to disclose the fact, and

d. the other party suffers injury as a result of acting without knowledge of the undisclosed fact.

The Ventos contend that their fraud claim arises out of the conversation between Vento and Bradford on October 4, when Vento paid the October rent due

under the existing lease and attempted to secure a new lease for himself. Under the evidence most favorable to the Ventos, during that conversation Bradford made the following statements: (1) he congratulated Vento on the purchase and said he "knew all about it"; (2) he told Vento "not to worry" about a long-term lease until January and to come back in January and he would "take care of" him; and (3) he said that the space should rent for $2700 and the $770 rent under the current lease was a "decent deal."

None of Bradford's statements amounts to an actionable affirmative misrepresentation. Vento himself testified that he understood Bradford's statements to mean only that he would have to "work out" a lease in January. But, under the submitted jury instruction, Bradford could nevertheless be liable if, with the intent to induce Vento into some action, he failed to disclose material facts with the knowledge that Vento was ignorant of those facts and did not have an equal opportunity to discover the truth. The court of appeals held that "Bradford's assurance that he would 'take care of' Vento's long-term lease concerns in January and his failure to disclose pertinent information regarding the procedures for obtaining a new lease constituted a partial disclosure which conveyed a false impression." 997 S.W.2d at 725. The court reasoned that Bradford's "partial disclosure" conveyed the false impression that any rent increase would not occur until January at the earliest, and that executing a new lease was a mere formality. Id. at 725-26. This impression was arguably false because Bradford did not advise Vento that the lease was non-assignable, that additional rent would be due for December, or that Vento would be required to apply for a new lease.

[4][5][6] Bradford contends that he did not owe a duty to disclose information to Vento in their arm's-length transaction because there is no evidence that Bradford knew Vento was ignorant of the lease terms or that he did not have an equal opportunity to discover them, as required by the jury charge. As a general rule, a failure to disclose information does not constitute fraud unless there is a duty to disclose the information. Ins. Co. of N. Am. v. Morris, 981 S.W.2d 667, 674 (Tex.1998). Thus, silence may be equivalent to a false representation only when the particular circumstances impose a duty on the party to speak and he deliberately remains silent. SmithKline Beecham Corp. v. Doe, 903 S.W.2d 347, 353 (Tex.1995); Smith v. Nat'l Resort Communities, Inc., 585 S.W.2d 655, 658 (Tex.1979). Whether such a duty exists is a question of law. Ralston Purina Co. v. McKendrick, 850 S.W.2d 629, 633 (Tex.App.--San Antonio 1993, writ denied).

Several courts of appeals have held that a general duty to disclose information may arise in an arm's-length business transaction when a party makes a partial disclosure that, although true, conveys a false impression. See, e.g., Hoggett v. Brown, 971 S.W.2d 472, 487 (Tex.App.--Houston [14th Dist.] 1997, no writ); Ralston Purina, 850 S.W.2d at 636. The Restatement (Second) of Torts section 551 also recognizes a general duty to disclose facts in a commercial setting. RESTATEMENT (SECOND) OF TORTS § 551 (1977). In such cases, ***756** a party does not make an affirmative misrepresentation, but what is said is misleading because other facts are not disclosed. We have never adopted section 551. SmithKline Beecham, 903 S.W.2d at 352. But even if we were to adopt such a general duty, there is no evidence to support the jury's liability finding under the submitted jury charge.

The charge required Vento to show that Bradford knew that Vento was ignorant of the facts and did not have an equal opportunity to discover the truth. The court of appeals concluded that "Vento's questions to Bradford about the lease were sufficient to show Vento's ignorance about the lease and Bradford's knowledge that Vento lacked such information." 997 S.W.2d at 725. We conclude that there is no evidence that Bradford knew either that Vento was ignorant of the lease terms or that he did not have an equal opportunity to discover them.

Although Vento purportedly purchased the store, he never asked Bradford or any other mall personnel for a copy of the lease. And during their discussion on October 4, Vento never asked Bradford about any terms of the existing lease or about rent for November or December. He never asked for the existing lease to be assigned to him. In fact, there is no evidence that Vento asked about anything other than obtaining a long-term lease for himself. Accordingly, contrary to the court of appeals' conclusion that "Vento's questions to Bradford about the lease were sufficient to show ...

Bradford's knowledge that Vento lacked ... information," id., there is no evidence that Vento's single question regarding the possibility of a long-term lease affirmatively indicated to Bradford that Vento was ignorant of the lease terms.

In addition, there is no evidence that Bradford knew that Vento had not obtained or could not obtain the information from other sources, such as Taylor, from whom Vento was buying the store. Bradford was aware that Vento knew that rent had to be paid by cashier's check, which would have indicated that Vento had obtained at least some information about the lease arrangement from Taylor. Bradford could have reasonably assumed that Vento had obtained a copy of the lease from Taylor, and that he would have inquired about the lease's terms and the store's expenses before contracting to buy the store. This is merely the type of information that a buyer would be expected to discover by ordinary inquiry. See RESTATEMENT (SECOND) OF TORTS § 551 cmt. k (1977) ("The defendant may reasonably expect the plaintiff to make his own investigation, draw his own conclusions and protect himself...."). Although Vento had in fact asked Taylor for a copy of the lease and never received it, there is no evidence that Bradford knew this. Thus, there is no evidence that Bradford knew that Vento lacked information and did not have "an equal opportunity to discover the truth." Accordingly, the Ventos' fraud claim against Bradford fails. For the same reasons, the Ventos' fraud claim against Simon and Golden Ring--which was based on Bradford's allegedly fraudulent acts--also fails.

IV. Tortious Interference with Prospective Contract

[7] Bradford next challenges the jury's verdict that he tortiously interfered with Vento's prospective contractual relations. The Ventos contend that Bradford tortiously interfered with the prospective contract to sell the business to Louis Martin by demanding that Vento release the mall from liability before permitting Vento and Martin to enter the store. The court of appeals held that there was no evidence ***757** that Bradford's demand for a release interfered with Vento's contract with Martin because Martin testified that he would not have bought the store had it been in disarray, [FN3] and there was no evidence that the store's inventory was intact when Vento and Martin tried to gain access to the store. 997 S.W.2d at 731-32. We agree with the court's analysis and conclusion on that issue.

> FN3. Specifically, Martin testified that, even if he had been allowed to go into the store on the first occasion, he probably would have passed on the deal to buy the store's contents.

The Ventos also contend that, by telling police that Taylor owned the store and effectively ousting Vento, Bradford interfered with Vento's prospective contractual relations with the store's customers. The court of appeals held that there was legally and factually sufficient evidence that Bradford interfered with the Ventos' prospective contracts with potential customers. Id. at 732. Bradford challenges that conclusion on legal sufficiency grounds.

The jury was instructed that "a party wrongfully interferes with a contract when there was a reasonable probability that Roell Vento would have entered into contractual relationships and any [defendant] intentionally prevented the contractual relationship from occurring with the purpose of harming Roell Vento." Bradford contends that there is no evidence that he intended to interfere with Vento's prospective business relations. Specifically, Bradford argues that there is no evidence that he told police that Taylor owned the store for the purpose of interfering with Vento's prospective sales to potential future customers. In fact, Bradford contends that taking such action would have been contrary to his own interests because the mall received a percentage of the store's sales revenues. Vento responds that there is evidence that Bradford intended to interfere with his potential contractual relations because Bradford was " 'substantially certain' that his conduct would interfere with Vento's relations." Specifically, Vento argues that "Bradford falsely informed the police that Taylor owned Collector's Choice, asked them to divest Vento of his property, and gave it to Taylor" and that these facts, taken together, constitute legally sufficient evidence that Bradford knew his conduct would interfere with Vento's contractual relations.

Under the Restatement (Second) of Torts, interference is intentional "if the actor desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result." RESTATEMENT (SECOND) OF TORTS § 766B

cmt. d (1979). But the Restatement further provides that "[i]f [the actor] had no desire to effectuate the interference by his action but knew that it would be a mere incidental result of conduct he was engaging in for another purpose, the interference may be found to be not improper." Id.

[8] The evidence shows that the police, in attempting to quell the disturbance in the mall, asked Bradford either who was on the lease or who owned the store. Under Vento's version of the facts, Bradford replied that Taylor owned the store and threatened to file criminal trespassing charges against Vento if he returned. But this is not evidence that Bradford acted with the intent to harm Vento's business relations. Although Vento contends that Bradford knew Vento owned the store because Bradford congratulated him on October 4, that does not mean that Bradford was lying two days later when he told police Taylor owned the store. Vento showed Bradford the contract for sale, but the contract indicated only that Taylor wished to sell his share of the store to ***758** Vento, stating that "Roell and Debra Vento have signed below stating their intent to purchase the additional 50% of Collector's Choice from Tom Taylor." Although Bradford indicated that he knew Vento was purchasing the store, there is no evidence that he knew that the sale had been finalized. And, on October 5 or 6, Taylor--with whom Bradford had had previous dealings as owner of the store and whose name was on the lease--told Bradford that he still owned the store despite Vento's claim to ownership. Thus, the evidence shows at most that Bradford knew that there was a dispute over ownership. [FN4]

> FN4. Although Bradford accepted October rent from Vento, this was not an assignment of the lease to Vento because the rent was due under the existing lease with Collector's Choice, which was owned by both Vento and Taylor.

Further, the evidence shows that Bradford was responding to police questioning in an attempt to end the disturbance and protect mall property. In order to resolve the situation immediately, the police asked Bradford for a judgment call regarding who owned the store. There is no evidence that Bradford was intending to prevent Vento from dealing with prospective future customers when he told police that Taylor owned the store. When Bradford responded to police questioning, the fact that Vento would not be able to do business with customers was "a mere incidental result of conduct [Bradford] was engaging in for another purpose." Id. Thus, the interference was at most only an incidental result of Bradford's legitimate conduct. Accordingly, there is no evidence to support the jury's finding that Bradford tortiously interfered with the Ventos' prospective contractual relations.

V. Intentional Infliction of Emotional Distress

[9] The jury found that Bradford intentionally inflicted emotional distress on the Ventos and awarded them $100,000 in damages. The jury was correctly charged that intentional infliction of emotional distress occurs when: (1) a person acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3) the person's actions caused another person's emotional distress; and (4) the emotional distress suffered by the other person was severe. See GTE Southwest, Inc. v. Bruce, 998 S.W.2d 605, 611 (Tex.1999). The Ventos' intentional infliction of emotional distress claim rests on Bradford's behavior on October 6-the date of the second altercation in the mall. Bradford contends that, as a matter of law, his conduct was not extreme and outrageous.

[10][11] Whether a defendant's conduct is "extreme and outrageous" is a question of law. Brewerton v. Dalrymple, 997 S.W.2d 212, 216 (Tex.1999). The mere fact that a defendant's conduct is tortious or otherwise wrongful does not, standing alone, necessarily render it "extreme and outrageous." See id. Instead, to be "extreme and outrageous," conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." GTE, 998 S.W.2d at 611.

As noted, Bradford told police that Taylor owned the store and threatened to file criminal trespassing charges against Vento if he returned. In taking these actions, Bradford was trying to quell the disturbance in the mall--which he was within his legal rights to do. Just like investigating reasonably credible allegations of employee dishonesty, preventing disturbances on mall property is "a managerial function that is necessary to the ordinary operation ***759** of a business organization." Randall's Food Markets, Inc. v.

Johnson, 891 S.W.2d 640, 644 (Tex.1995). Business managers must have latitude to exercise their rights in a permissible way in order to properly manage their business, even though it may not always be pleasant for those involved. Cf. GTE, 998 S.W.2d at 612 (holding that an employer must be able to exercise its rights in a permissible way even though emotional distress results).

Although Bradford could certainly have given the police more information than he did, his failure to do so was not extreme and outrageous. By responding to the police officer's question, Bradford was merely exercising his rights as mall manager in a permissible way; without more, his behavior does not amount to extreme and outrageous conduct. See Wornick Co. v. Casas, 856 S.W.2d 732, 735 (Tex.1993) (holding that an employer's having a terminated employee escorted from the premises by a security guard is not extreme and outrageous as a matter of law).

VI. DTPA

The DTPA applies to transactions in goods or services, and defines "goods" as "tangible chattels or real property purchased or leased for use." tex. Bus. & Com.Code § 17.45(1). The Ventos contend that, by his conduct during the October 4 conversation with Vento regarding a lease, Bradford violated the DTPA by causing confusion or misunderstanding, see tex.Bus. & Com.Code § 17.46(b)(2),(3), committing misrepresentations, see id. § 17.46(b)(5), (8), (12), concealing information, see id. § 17.46(b)(23), and engaging in unconscionable conduct, see id. § 17.50(a)(3). Bradford contends that there is no evidence to support liability under any of these provisions.

A. DTPA "laundry list"

Vento submitted instructions under subsections 17.46(b)(2), (3), (5), (8), (12), and (23). Vento offers no evidence, and none appears in the record, to support a finding under subsection (b)(2), which involves "causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services." Id. § 17.46(b)(2). Subsection (b)(2) deals with deception in the origin, source, or endorsement of goods and services. See Potere, Inc. v. Nat'l Realty Serv., 667 S.W.2d 252, 257 (Tex.App.--Houston [14 Dist.] 1984, no writ). The record contains no evidence that any action by Bradford caused such confusion. Similarly, there is no evidence to support Bradford's liability under subsection (b)(3), which involves "causing confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another." tex. Bus. & Com.Code § 17.46(b)(3). And the record contains no evidence to support a finding that Bradford violated subsection (b)(8) by "disparaging the goods, services, or business of another by false or misleading representation of facts." Id. § 17.46(b)(8).

[12] Subsections (b)(5) and (b)(12) involve a defendant's representations that goods, services, agreements, or persons have characteristics that they do not in fact have. Id. § 17.46(b)(5), (12). But the only possible misrepresentation that Bradford made was that he would "take care of" Vento in January. Vento testified that he understood this to mean that he would have to "work out" a lease in January. Bradford's statement is simply too vague to provide a standard for the jury to use to measure the accuracy of the representation; it is therefore nonactionable. See Douglas v. Delp, 987 S.W.2d 879, 886 (Tex.1999).

[13][14] Last, the jury was asked whether Bradford "fail[ed] to disclose information ***760** concerning goods or services that was known at the time of the transaction, if such failure to disclose such information was intended to induce a person into a transaction which he would not have entered had the information been disclosed." As in the instruction, subsection (b)(23) requires that "information known at the time of the transaction must be withheld for the purpose of inducing the consumer into a transaction which the consumer would not have entered had the information been disclosed." Doe v. Boys Clubs, Inc., 907 S.W.2d 472, 479 (Tex.1995) (emphasis added); see also tex. Bus. & Com.Code § 17.46(b)(23). But there is no evidence that Bradford intended to induce Vento into a transaction by his actions on October 4. Bradford could not have intended to induce Vento into paying October rent because that rent was already due under the existing lease with Collector's Choice. Bradford and Vento did not engage in any other transaction in goods or services at that time. [FN5] They did not negotiate a lease, and nothing Bradford said or did on October 4 could have been intended to induce Vento to purchase the store

because Vento had already purchased the store in September. Because a defendant's deceptive trade act or practice is not actionable under the DTPA unless it was committed in connection with the plaintiff's transaction in goods or services, Vento's claim under subsection (b)(23) is not actionable. See Amstadt v. U.S. Brass Corp., 919 S.W.2d 644, 649-50 (Tex.1996).

FN5. Although Vento did pay the December rent, he could not have been induced into paying that rent by Bradford's conduct on October 4 because he paid that rent after the events on October 6 and after he had already sued Bradford.

B. DTPA unconscionable action

[15][16][17] Section 17.50(a)(3) of the DTPA provides that a consumer may recover actual damages for "any unconscionable action or course of action" that is the producing cause of damages. tex. Bus. & Com.Code § 17.50(a)(3). The DTPA defines an "unconscionable action or course of action" as "an act or practice, which ... takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree." Id. § 17.45(5). Unconscionability under the DTPA is an objective standard for which scienter is irrelevant. Ins. Co. of N. Am. v. Morris, 981 S.W.2d 667, 677 (Tex.1998). To prove an unconscionable action or course of action, a plaintiff must show that the defendant took advantage of his lack of knowledge and " 'that the resulting unfairness was glaringly noticeable, flagrant, complete and unmitigated.' " Id. (quoting Chastain v. Koonce, 700 S.W.2d 579, 583 (Tex.1985)).

For the same reasons that support our conclusion that the Ventos' claims for fraud, intentional infliction of emotional distress, and tortious interference with prospective contractual relations must fail, there is no evidence that Bradford took advantage of Vento to a grossly unfair degree. Accordingly, the Ventos' claim under section 17.50 also fails.

VII. Civil Conspiracy

In their petition for review, the Ventos contend that there is some evidence that Taylor, Bradford, Simon, and Golden Ring engaged in a civil conspiracy. The Ventos argue that Bradford and Taylor conspired to oust Vento from the store so that Taylor could sell Vento's property at the mall, and that Simon, Golden Ring, and Bradford later conspired to extort a release of liability from Vento. The court of appeals held that the evidence was legally insufficient to support a finding that Bradford and Taylor conspired to oust Vento from the store and ***761** that there was legally insufficient evidence to support a finding that Bradford knew the November-December lease with Taylor was for an unlawful purpose. With regard to the alleged conspiracy among Simon, Golden Ring, and Bradford to extort a release of liability, the court of appeals held that the Ventos failed to produce any evidence that Simon and Golden Ring were separate entities, and accordingly, Bradford, Simon, and Golden Ring could not have conspired because Bradford was the agent of Simon and Golden Ring. 997 S.W.2d at 726-29. We agree with the court of appeals' analysis and judgment on this issue.

* * * * * *

In sum, we hold that the evidence is legally insufficient to support a finding that Bradford, Simon, and Golden Ring committed fraud or engaged in a civil conspiracy. We further hold that the evidence is legally insufficient to support a finding that Bradford committed tortious interference with the Ventos' prospective contractual relations or violated the DTPA, and that, as a matter of law, Bradford's conduct was not extreme and outrageous. Accordingly, we affirm in part and reverse in part the court of appeals' judgment and render judgment that the Ventos take nothing from Bradford, Simon, and Golden Ring.

48 S.W.3d 749, 44 Tex. Sup. Ct. J. 655

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EXHIBIT F

APPENDIX OF NON-FEDERAL AND UNPUBLISHED FEDERAL AUTHORITIES CITED IN DEFENDANT DELL INC.'S REPLY IN SUPPORT OF ITS MOTION FOR ORDER DISMISSING PLAINTIFFS' SECOND AMENDED COMPLAINT WITH PREJUDICE AND STRIKING PLAINTIFFS' CLASS ACTION ALLEGATIONS

Court of Appeals of Texas,
Corpus Christi-Edinburg.

FIDELITY AND GUARANTY LIFE INSURANCE COMPANY, Appellant,
v.
Rebecca PINA, Francisca Morales and Rosa G. Cortez, Appellees.

No. 13-04-008-CV.

April 28, 2005.
Rehearing Overruled July 14, 2005.

Background: Teachers brought action against issuer of annuities under the Texas Deceptive Trade Practices Act and the California Legal Remedies Act. The 139th District Court, Hidalgo County, Leticia Hinojosa, J., certified a class action, and, after Judge Hinojosa resigned from the bench without entering further orders, the 370th District Court, Noe Gonzalez, J., issued findings of fact and conclusions of law as well as a trial plan. Issuer brought an interlocutory appeal.

Holdings: The Court of Appeals, Valdez, C.J., held that: (1) successor judge did not abuse his discretion when he entered findings of fact and conclusions of law without hearing evidence in support of final class certification order issued by judge who had resigned, and (2) proposed class representatives failed to show that common issues predominated.

Reversed and remanded.

West Headnotes

[1] Parties 35.35
287k35.35
In a class certification proceeding, the trial court must perform a rigorous analysis to determine whether all the prerequisites to class certification have been met and how the claims will be tried.

[2] Judges 32
227k32
Successor judge did not abuse his discretion and violate the rigorous analysis rule applicable to class actions when he entered findings of fact and conclusions of law without hearing evidence in support of final class certification order issued by judge who had resigned, where successor judge thoroughly reviewed the record from the proceedings presided over by predecessor judge, and successor judge did not expand or limit in any way class certification order; rule of civil procedure allowed successor judges to dispose of unresolved matters and enter various orders so long as the successor judges did not render judgment without hearing evidence, and under Remedies Code the successor of a deceased judge could enter findings of fact and conclusions of law for cases pending at the death of his predecessor. Vernon's Ann.Texas Rules Civ.Proc., Rule 18.

[3] Appeal and Error 949
30k949
Court of Appeals' review of an interlocutory appeal from a class certification order is limited to determining whether the trial court's order constituted an abuse of discretion.

[4] Appeal and Error 913
30k913
On class certification issues, an appellate court is not bound by the presumption in favor of a trial court's ruling and must independently determine whether the requirements of the class action rule have been fully satisfied. Vernon's Ann.Texas Rules Civ.Proc., Rule 42.

[5] Parties 35.17
287k35.17
The predominance requirement is one of the most stringent prerequisites to class certification. Vernon's Ann.Texas Rules Civ.Proc., Rule 42(b)(3).

[6] Parties 35.17
287k35.17
In evaluating whether common issues predominate when deciding whether to issue a class certification order, courts must identify the controlling substantive issues of the case and assess which issues will predominate to determine whether those issues are in fact common to the class. Vernon's Ann.Texas Rules Civ.Proc., Rule 42(b)(3).

[7] Parties 35.17
287k35.17
In evaluating whether common issues predominate when deciding whether to issue a class certification order, courts must determine whether common or

individual issues will be the object of most of the efforts of the litigants and the court. Vernon's Ann.Texas Rules Civ.Proc., Rule 42(b)(3).

[8] Parties 35.17
287k35.17
If there are some common questions of law or fact, but the focus of the litigation will be mainly on individual issues, a court cannot certify a class on the basis that common issues predominate. Vernon's Ann.Texas Rules Civ.Proc., Rule 42(b)(3).

[9] Parties 35.85
287k35.85
Proposed class representatives failed to show that common issues predominated, on motion to certify class action against issuer of annuities who allegedly violated Texas Deceptive Trade Practices Act and California Legal Remedies Act by attracting annuitants with promises of high initial interest rates without disclosing that after first year a much lower interest rate would be applied to annuitants' deposits, where each proposed class representative's reliance on the misrepresentations was highly individualized; establishing liability under both Statutes required a finding that a consumer relied on a misrepresentation, two of the proposed representatives indicated that the interest rate could have been different or temporary without affecting their purchase, and there was no evidence demonstrating class-wide uniform reliance by all purchasers. V.T.C.A., Bus. & C. § 17.50(a); West's Ann.Cal.Civ.Code § 1770; Vernon's Ann.Texas Rules Civ.Proc., Rule 42(b)(3).

[10] Antitrust and Trade Regulation 138
29Tk138
(Formerly 92Hk4 Consumer Protection)
Reliance, for purposes of a consumer fraud action, is a thought process or one step in a larger thought process, and can be shown only by demonstrating the person's thought processes in reaching the decision.

[11] Antitrust and Trade Regulation 161
29Tk161
(Formerly 92Hk4 Consumer Protection)
Proof of reliance or lack of reliance in a consumer fraud action necessarily requires an individualized determination because, under all the same facts and circumstances, one person may have relied on the misrepresentation in reaching a decision while another did not rely on it in reaching the same decision.

[12] Parties 35.71
287k35.71
When attempting to certify a class action on the basis that common issues predominate in a case in which purchasers' reliance on alleged misrepresentations made by a defendant is an issue, it is not enough to demonstrate that a defendant wanted purchasers to rely on its misrepresentations in choosing or staying with a particular product; instead there must be evidence that the purchasers actually did rely on the misrepresentations so uniformly that common issues of reliance predominate over individual issues. Vernon's Ann.Texas Rules Civ.Proc., Rule 42(b)(3).

***418** Jaime Saenz, Brownsville, L. Joseph Loveland, Atlanta, GA, Michael W. Youtt, Kevin D. Mohr, Houston, for Appellant.

G. Wade Caldwell, Martin, Drought & Torres, Inc., Cori R. Conner, San Antonio, David N. Calvillo, McAllen, for Appellee.

Before Chief Justice VALDEZ and Justices CASTILLO and GARZA.

OPINION

Opinion by Chief Justice VALDEZ.

Appellant, Fidelity and Guaranty Life Insurance Company ("F & G"), brings this interlocutory appeal from an order of the trial court certifying a class action in a consumer fraud case. Because appellees, Rebecca Pina, Francisca Morales, and Rosa G. Cortez, have failed to provide evidence of class-wide reliance on F & G's misrepresentation regarding the characteristics of its annuities, we reverse and remand.

The Maximus Annuities

Appellees are teachers at the Edcouch-Elsa Independent School District in Texas. They each individually purchased 403(b) fixed annuities known as "Maximus" annuities which were sold by F & G as retirement investments. [FN1] The Maximus annuities were fixed deferred annuities with an

accumulation phase and a payout phase. During the accumulation phase, a policyholder would contribute money either through a lump sum or periodic deposits. During the payout or "annuitization" phase, the policyholder begins to draw payments from the annuity. The Maximus annuities were specifically intended as a retirement supplement for employees of public schools; the teachers would typically pay regular amounts from their paychecks into the annuity over a period of many years. This would generate interest and grow into a more significant amount which could be drawn from upon the teachers' retirement.

FN1. F & G sold five different types of Maximus annuities to the class members: Maximus I, Maximus II, Maximus X, Maximus XV, and Maximus SP. The overall design and basic features of these annuities were all the same and any differences between them were irrelevant for purposes of this litigation.

F & G, an insurance company, entered the 403(b) market in the early 1990s, establishing an exclusive "Agency and Distribution Agreement" with R.W. Durham & Company. In exchange for supplying customers for its annuities, F & G would pay Durham various amounts according to a ***419** schedule of commissions. The commissions paid to Durham for its services were allegedly on the "high end" of industry practice, and F & G was consequently required to design an annuity product with a high profit margin.

F & G ultimately designed the Maximus annuities with a high front-loaded interest rate. All money deposited into the Maximus account would be assigned the "current money interest rate" for the first year it was held in the account. This rate was to be higher than the industry standard and therefore attract a large amount of customers, and was sometimes referred to as the "teaser" rate. After the first year, however, all deposits would be considered "old money" and assigned a different, much lower rate of interest. Statements sent by F & G to customers did not disclose the exact old money interest rate, but included the following statement: "THE CURRENT INTEREST RATE ON NEW MONEY IS: 7.25% [example]. Current interest rates declared for new premiums include some bonus interest during the first twelve months. A different rate may be credited after the first twelve months." [FN2] The interest rate on new money for the named plaintiffs averaged around 7.25%; the old money rates were typically between 3.5 and 4%. The Maximus annuities also had substantial long-term surrender penalties, in order to retain customers once deposits began.

FN2. Before 1997, statements read "A different rate will be credited after the first twelve months" (emphasis added).

The Maximus annuities were sold to teachers in Texas, California, Connecticut, New Jersey and Oklahoma for several years. In 1998, however, Durham signed a new distribution agreement with another company, and F & G terminated its arrangement with Durham and withdrew from the 403(b) market in December of 1999.

The Class Certification Hearing

The named plaintiffs all purchased their annuities through Durham agents. It was allegedly not disclosed to them at any point that the high introductory interest rates paid on their money would decline after the first year. Upon discovering the new money/old money-design of their annuity, they filed suit against F & G under various provisions of the Deceptive Trade Practices Act, Texas Insurance Code, and common law claims of fraud and misrepresentation. They also requested class certification of all purchasers of the Maximus annuities pursuant to Texas Rule of Civil Procedure 42(a) and (b)(3). See Tex.R. Civ. P. 42. The named plaintiffs alleged that they should be permitted to sue on behalf of all Maximus purchasers because (1) the class was so numerous that joinder of all members in an individualized basis was impracticable, (2) there were questions of law or fact common to the class, (3) the claims of the representative policyholder parties were typical of the claims of the class, and (4) the representative parties would fairly and adequately protect the interests of the class.

Judge Leticia Hinojosa of the 139th District Court conducted a two-day hearing on the class certification issue. On December 19, 2003, Judge Hinojosa entered an order certifying the class, defining the class as "All fixed annuities sold by F & G through [Durham] under the trade names Maximus I, Maximus II, Maximus X, Maximus

XV, and Maximus SP." [FN3] The class was certified ***420** with respect to the claims arising under the consumer protection statutes and insurance codes of Texas, California, Connecticut, New Jersey and Oklahoma. [FN4] The request to certify the fraud and negligent misrepresentation claims were denied.

FN3. The order excluded from the class the following parties: (1) any annuity sold by Durhan agents to employees of private schools or other private employers, who would not be governed under the governmental plan exemption under ERISA; (2) all present or former officers or directors of F & G since January 1, 1993; (3) all persons who surrendered their annuities (a) more than four years before the suit was filed for policyholders in Texas, (b) more than three years before the suit was filed for policyholders in California, Connecticut and Oklahoma, and (c) more than six years before the suit was filed for class members in New Jersey; (4) all persons who, while represented by an attorney, have signed a release of F & G for the claims made in this suit; (5) all policyholders who have died and F & G had paid a death benefit under the annuity; and (6) any group contract holder where the annuities were sold through individual certificates.

FN4. Claims based on consumer protection statutes were certified as follows. Texas: Texas Business and Commerce Code § 17.46(b)(5), (7), and (24) and § 17.45(5); Texas Insurance Code article 21.21. California: California Civil Code (Consumers Legal Remedies Act) § 1770(a)(5), (7), and (14) Connecticut: Connecticut General Statute, § 42-110b(a) and applicable regulations established under § 42-110b(c). New Jersey: New Jersey Statutes §§ 56:8-2, 56:8-2.2 and 56:8-19. Oklahoma: 15 Oklahoma Statutes §§ 751, 752(14), and 753(5), (7) and (20).

Judge Hinojosa's order of certification did not include legal or factual findings, nor did it include a trial plan. On January 8, 2004, Judge Hinojosa resigned from the bench without entering any further orders. The case was then transferred by the local administrative judge to Judge Noe Gonzalez of the 370th District Court. Judge Gonzalez indicated that he would review the paper record from the hearing. After conducting this review, Judge Gonzalez issued findings of fact and conclusions of law as well as a trial plan. The trial plan contemplated five sets of jury instructions in order to handle the claims arising from five different states.

F & G now appeals from the certification order in three issues: (1) because individual issues of causation, reliance, and the discovery rule predominate over common issues, the trial court abused its discretion in certifying a consumer fraud class; (2) a class action is not superior to other available methods for the fair and efficient adjudication of the controversy, and the trial court therefore abused its discretion in certifying a class; and (3) because the trial court that entered the trial plan did not hear the evidence presented at the class certification hearing, the trial court failed to perform a rigorous analysis of the requirements for class certification, and thus abused its discretion in certifying a class.

Successor Judges

[1] We first address F & G's third issue, which asserts that the required rigorous analysis of the class certification request was not performed. In a class certification proceeding, the trial court must perform a rigorous analysis to determine whether all the prerequisites to class certification have been met and how the claims will be tried. See Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425, 435 (Tex.2000).

[2] F & G complains that under the rigorous analysis rule, Judge Gonzalez should not have entered findings of fact and conclusions of law in support of Judge Hinojosa's class certification order without hearing evidence. F & G cites to the rules of civil procedure for support of its contention, arguing that although Texas Rule of Civil Procedure 18 allows the successor to a retired or deceased judge to hear and determine undisposed motions and to approve ***421** "statements of facts," the rule does not allow a successor judge to enter findings of fact and conclusions of law without hearing evidence. See Tex.R. Civ. P. 18. F & G also cites to W.C. Banks, Inc. v. Team, Inc., 783 S.W.2d 783, 784 (Tex.App.-Houston [1st Dist] 1990, no writ) and Bexar County Ice Cream Co., Inc. v. Swensen's Ice Cream Co., 859 S.W.2d 402, 404 (Tex.App.-San Antonio 1993, writ denied), overruled on other grounds by Barraza v. Koliba, 933 S.W.2d 164, 167

(Tex.App.-San Antonio 1996, writ denied), in support of its claim that successor judges are prevented from issuing findings and conclusions in cases initiated by their predecessors without hearing evidence.

We disagree with F & G's interpretation of the law. Rule 18 allows successor judges to dispose of unresolved matters and enter various orders so long as the successor judge does not render judgment without hearing evidence. See Tex.R. Civ. P. 18. Although findings of fact and conclusions of law are not specifically discussed in this rule, rule 18 operates in conjunction with section 30.002 of the remedies code, which allows the successor of a deceased judge to enter findings of fact and conclusions of law for cases pending at the death of his predecessor. See Tex. Civ. Prac. & Rem.Code Ann. § 30.002(b) (Vernon 1997). While neither of these rules addresses this exact situation in which a judge resigns from the bench and the case is transferred, both of them imply that so long as an order has been entered, successor judges may enter findings of fact and conclusions of law. This conclusion is strongly supported by the holding in Lykes Bros. Steamship Co., Inc. v. Benben, 601 S.W.2d 418, 420 (Tex.Civ.App.-Houston [14th Dist.] 1980, writ ref'd n.r.e.), in which the Houston appellate court found no error when a successor judge entered findings of fact and conclusions of law after the predecessor judge had resigned from the bench.

Furthermore, the cases cited by F & G as support are not on point, as neither of them involved a case in which judgment had already been fully rendered. In W.C. Banks, after a hearing presided over by the original judge, a successor judge signed the final judgment without hearing evidence. See W.C. Banks, 783 S.W.2d at 786. The appellate court ruled this was impermissible. Id. Likewise, in Swensen's Ice Cream, the original judge pronounced judgment orally from the bench but then died before the judgment was reduced to writing. See Swensen's Ice Cream, 859 S.W.2d at 404. The successor judge not only entered final judgment but also expanded on the earlier pronounced judgment without hearing any additional evidence. Id. The appellate court, noting that "a judge who has heard no evidence cannot rule on a case," simply treated the additional terms of the judgment entered by the successor as a nullity, relying only on the oral pronouncement from the deceased judge. Id.

Here, Judge Hinojosa resigned from the bench after duly entering a final order of class certification. Judge Gonzalez then thoroughly reviewed the record from the proceedings presided over by Judge Hinojosa and entered findings of fact and conclusions of law in support of the previously rendered judgment. Judge Gonzalez did not expand or limit in any way Judge Hinojosa's ruling or the class certification order. Although this situation is not directly addressed by the rules of civil procedure, Judge Gonzalez's actions were a reasonable interpretation and application of the rules so as to avoid unnecessary relitigation of already resolved issues. See Sharp v. International Business Machines Corp., 927 S.W.2d 790, 795 (Tex.App.-Austin 1996, writ denied) (allowing relaxation of strict procedural requirements in the interests of judicial efficiency). We therefore ***422** conclude that it was not an abuse of discretion for the trial court to enter its findings of fact and conclusions of law without hearing additional evidence, and we accordingly overrule this issue on appeal.

Class Certification

We now turn to F & G's primary contention on appeal: whether the trial court erred in granting the order to certify the consumer class.

[3] Our review of an interlocutory appeal from a class certification order is limited to determining whether the trial court's order constituted an abuse of discretion. Ford Motor Co. v. Ocanas, 138 S.W.3d 447, 451 (Tex.App.-Corpus Christi 2004, no pet.); see also Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675, 690-91 (Tex.2002). Although we discuss the propriety of the class certification in light of the claims asserted by the named plaintiffs (i.e., misrepresentation of the design of the Maximus annuities), we are in no way evaluating the merits of these claims. See Intratex Gas Co. v. Beeson, 22 S.W.3d 398, 404 (Tex.2000) ("Deciding the merits of the suit in order to determine its maintainability as a class action is not appropriate.").

[4] Typically under this standard of review, the appellate court must indulge every presumption favorable to the trial court's ruling. See Graebel/ Houston Movers, Inc. v. Chastain, 26 S.W.3d 24,

29 (Tex.App.-Houston [1st Dist.] 2000, pet dism'd w.o.j.). On certification issues, however, the appellate court is not bound by this presumption and must independently determine whether the requirements of rule 42 have been fully satisfied. See Ford Motor Co., 138 S.W.3d at 451; see also Henry Schein, 102 S.W.3d at 691; Bernal, 22 S.W.3d at 435 (determining that actual compliance with rule 42 "must be demonstrated; it cannot be presumed").

Under rule 42(a), every class action must satisfy four threshold requirements: numerosity, commonality, typicality, and adequacy of representation. See Tex.R. Civ. P. 42(a). Then, in addition to satisfying these four requirements, the class certification must also satisfy at least one of the subparts of rule 42(b). See Tex.R. Civ. P. 42(b). In their motion for class certification, appellees alleged that their motion for class certification was maintainable pursuant to rule 42(b)(3), which permits class actions when common questions of law or fact predominate and a class action is superior to other forms of adjudication. See id.

[5][6][7][8] F & G contests the adequacy of the class's compliance with the 42(b)(3) requirement of predominance and superiority. We first consider the predominance requirement because it is one of the most stringent prerequisites to class certification. See Ford Motor Co., 138 S.W.3d at 452. In evaluating whether common issues predominate, courts must identify the controlling substantive issues of the case and assess which issues will predominate to determine whether those issues are in fact common to the class. Snyder Communications, L.P. v. Magana, 142 S.W.3d 295, 300-01 (Tex.2004). Courts must therefore determine whether common or individual issues will be the object of most of the efforts of the litigants and the court. Id. at 301. If there are some common questions of law or fact, but the focus of the litigation will be mainly on individual issues, the court cannot certify the class under rule 42(b)(3). Id. We therefore must identify the major issues which will be the focus of the litigation.

[9][10][11] Under the Deceptive Trade Practices Act in Texas, a consumer may maintain an action for economic damages or damages for mental anguish against a ***423** party who has used or employed a false, misleading or deceptive act or practice relied on by a consumer to the consumer's detriment. See Tex. Bus. & Com.Code Ann. § 17.50(a) (Vernon 2002). In California, a consumer may maintain an action under the Consumers Legal Remedies Act if the consumer suffered damages as a result of reliance upon another party's misrepresentation regarding the quality or characteristics of goods or products. See Cal. Civ.Code § 1770 (Deering 2005); see also Wilens v. TD Waterhouse Group, Inc., 15 Cal.Rptr.3d 271, 120 Cal.App.4th 746, 755 (Cal.App.2003). Establishing liability in both these states under the consumer protection laws requires that there be a finding that the consumer relied on the misrepresentation. An overwhelming majority of the class membership hails from these two states (88%), indicating that reliance will be a major focus of the litigation. Accordingly, this Court must determine if reliance will be a common and predominant issue, justifying class certification, or an individual issue. See Snyder Communications, 142 S.W.3d at 301. It is particularly difficult to establish commonality and predominance of reliance in a group setting because, as one court noted:

> Reliance is a thought process or one step in a larger thought process; ... [it] can be shown only by demonstrating the person's thought processes in reaching the decision. Proof of reliance or lack of reliance necessarily requires an individualized determination because, under all the same facts and circumstances, one person may have relied on the misrepresentation in reaching a decision while another did not rely on it in reaching the same decision.

Grant Thornton, L.L.P. v. Suntrust Bank, 133 S.W.3d 342, 355 (Tex.App.-Dallas 2004, pet. filed) (emphasis added).

[12] In the Henry Schein opinion, the Texas Supreme Court severely limited the ability of potential plaintiffs to form a class when the issue of reliance is of importance to the resolution of the class claim. According to the holding in Henry Schein, reliance upon misrepresentations made to consumers must be proved with class-wide proof; class-wide proof requires the existence of class-wide evidence. See Schein, 102 S.W.3d at 693. Class-wide evidence requires that there be no differences in how individual members of the class relied on the misrepresentation. Id. at 693 ("Inescapably individual differences cannot be concealed in a throng."). The court did not entirely preclude class

actions in which reliance was an issue, but it did make such cases a near-impossibility:

> If a plaintiff could prove reliance in an individual action with the same evidence offered to show class-wide reliance, then the issue is one of law and fact common to the class. The question the court must decide before certifying a class, after rigorous analysis and not merely a lick and a prayer, is whether the plaintiffs have demonstrated that they can meet their burden of proof in such a way that common issues predominate over individual ones.

Id. at 694. Under this standard, it is not enough to demonstrate that a defendant wanted purchasers to rely on its misrepresentations in choosing or staying with a particular product; instead there must be evidence that the purchasers actually did rely on the misrepresentations "so uniformly that common issues of reliance predominate over individual issues." Id. In the case of Henry Schein, there was "significant evidence that purchasers relied on recommendations from colleagues and others rather than any statements made directly or indirectly by [the defendant]." Id.

***424** The Henry Schein test for class-wide reliance was applied by this Court in the Ford Motor Co. opinion, in which the named plaintiffs attempted to certify a class of all consumers who had purchased F-150 trucks with a Class III towing package. Ford Motor Co., 138 S.W.3d at 450. The Class III package was advertised as including a special, larger radiator but actually was sold with only the base radiator. Id. The trial court certified a class consisting of all purchasers of the F-150 with the Class III towing package; however, relying on Henry Schein, we reversed and remanded the certification order because there was no evidence presented showing that all purchasers actually relied uniformly on Ford's promise of a larger radiator in making their purchase. Id. at 453. Despite the fact that the misrepresentation clearly occurred and the purchases were then made by all class members, the class also had to show that every purchaser relied on the misrepresentation in making the purchase. Id.

In the current case before us, the three named plaintiffs all provided deposition testimony regarding their reasons for purchasing the Maximus annuity. Rebecca Pina, when questioned as to her reasons for purchasing the Maximus annuity, replied "Because I liked the 7.2 [percent interest rate]. When I saw that number, I said, it's earning pretty good interest." Rosa Cortez, when asked the same question, said "Well, it was the interest rate, the 7.25 that caught my eye. I purchased it." When questioned further on what she would have done if she had realized at the time that the introductory interest rate would only apply to new money, Ms. Cortez answered, "I don't know what I would have done back then." Francisca Morales was asked by counsel: "The representation made to you that you were going to get 7.25 percent was what you relied on in deciding to buy the product, correct?" She replied "Correct." During the same deposition, however, Ms. Morales noted that had the interest rate been 6 percent instead of 7.25, that rate "was just as good as 7, in my opinion." Although all of the named plaintiffs noted that the new money interest rate presented to them was the reason they initially invested in the Maximus annuity, none of them specifically stated that they actually relied on the interest rate to both remain constant and apply to all monies deposited.

Here, the named plaintiffs provided some evidence that they all relied on the new money interest rate when making their purchases. Each individual's reliance, however, was highly personalized; two of the plaintiffs indicated that the interest rate could have been different or temporary and this may not have affected their purchase. Furthermore, there was no evidence demonstrating class-wide uniform reliance by all purchasers. The trial court's findings of fact and conclusions of law noted that "there was class-wide evidence that Class members purchased annuities primarily due to the initial interest rate;" however, there was no discussion of what that class-wide evidence may have been, and appellees do not direct us to any such evidence in the record. Instead, appellees re-direct us to the above-mentioned testimony of the three named plaintiffs, each of which display differences and do not indicate how or whether other members of the class may have weighed the importance of the new money interest rate in making their investment decision. Indeed, it is difficult to imagine what could possibly qualify in this case as class-wide evidence of reliance on F & G's misrepresentations. Furthermore, we question whether there is any way, given the individualized nature of reliance, that a Deceptive Trade Practices Act-based claim premised on misrepresentation could ever ***425** be certifiable as a class action under

the rule enunciated in Henry Schein. Although Henry Schein appears to hold open the possibility, there is yet to be a case that has reached the courts of appeals in Texas since the Henry Schein opinion that has encountered a situation in which class-wide proof of reliance could be found.

Conclusion

We do not say that "no class can be certified in this case; that matter must be decided by the trial court in the first instance." Henry Schein, 102 S.W.3d at 701; Ford Motor Co., 138 S.W.3d at 454. We limit our conclusion to holding only that appellees failed to show that individualized determinations of reliance would not predominate over common questions of law or fact. Ford Motor Co., 138 S.W.3d at 454.

Given our holding on this issue, we decline to address appellant's remaining issues on appeal. See Tex.R.App. P. 47.1. We reverse the judgment of the trial court and remand for further proceedings.

165 S.W.3d 416

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EXHIBIT G

APPENDIX OF NON-FEDERAL AND UNPUBLISHED FEDERAL AUTHORITIES CITED IN DEFENDANT DELL INC.'S REPLY IN SUPPORT OF ITS MOTION FOR ORDER DISMISSING PLAINTIFFS' SECOND AMENDED COMPLAINT WITH PREJUDICE AND STRIKING PLAINTIFFS' CLASS ACTION ALLEGATIONS

Court of Appeals of Texas,
San Antonio.

GUNN BUICK, INC., Appellant,
v.
Frank A. ROSANO & Elizabeth Rosano, Appellees.

No. 04-94-00307-CV.

Decided Aug. 16, 1995.
Rehearing Denied Sept. 15, 1995.

Car purchasers sued car dealer for violations of Texas Deceptive Trade Practices-Consumer Protection Act and Texas Consumer Credit Code. The County Court at Law No. 5, Bexar County, Shay Gebhardt, J., entered judgment on jury verdict for purchasers, and appeal was taken. The Court of Appeals, Chapa, C.J, held that: (1) reviewing court had no authority to substitute judgment on credibility of witnesses; (2) there was sufficient evidence in record to support finding that dealer violated Consumer Protection Acts; and (3) jury charge traced contentions of claimants using relevant statutes and pattern jury charge and was valid despite failure to include car dealer's requested question.

Affirmed.

Green, J., filed dissenting opinion.

West Headnotes

[1] Appeal and Error 930(3)
30k930(3)
In considering no evidence or legal insufficiency point, reviewing court will consider only evidence and reasonable inferences favorable to decision of trier of fact and disregards all evidence and inferences to the contrary.

[2] Appeal and Error 999(2)
30k999(2)

[2] Appeal and Error 1003(7)
30k1003(7)
In considering factual insufficiency point, reviewing court does not substitute its judgment for that of jury but rather assesses all evidence and will reverse for new trial only if challenged finding is so against great weight and preponderance of evidence as to be manifestly unjust, shock the conscience, or clearly show bias.

[3] Appeal and Error 999(1)
30k999(1)

[3] Appeal and Error 1002
30k1002
If question of witness credibility is clearly before jury, reviewing court has no authority to substitute its judgment on the credibility of witnesses, assignment of weight to be given to witness testimony, or resolution of any conflicts or inconsistencies in testimony. V.T.C.A., Bus. & C. § 17.41; Vernon's Ann.Texas Civ.St. art. 5069-7.02.

[4] Antitrust and Trade Regulation 369
29Tk369
(Formerly 92Hk39 Consumer Protection)
Witness testimony supported finding that automobile dealer violated Deceptive Trade Practices Act (DTPA) by failing to include promised rebates and discounts in car purchase price, even though there was witness testimony that rebates and discounts were included in trade-in value given purchasers for their vehicle. V.T.C.A., Bus. & C. § 1.101; Vernon's Ann.Texas Civ.St. art. 5069-7.02.

[5] Appeal and Error 916(1)
30k916(1)
Absent special exceptions, reviewing court liberally construes petition in favor of pleader. Vernon's Ann.Texas Rules Civ.Proc., Rule 45.

[6] Pleading 48
302k48
Petition is sufficient if it gives fair and adequate notice of facts on which pleader bases claim.

[7] Appeal and Error 1001(1)
30k1001(1)
Where car dealer found no need to file special exceptions during consumer fraud action brought by car purchaser and was well-prepared to defend limited issues involved during trial, record supported finding that dealer was properly notified by pleadings of allegations against which it was to defend.

[8] Trial 182

388k182

[8] Trial 349(2)
388k349(2)
Trial court has wide discretion in determining proper issues and instructions to submit to jury.

[9] Trial 230
388k230

[9] Trial 251(1)
388k251(1)
It is error to burden jury with excess instructions which emphasize extraneous factors to be considered in reaching verdict.

[10] Appeal and Error 1067
30k1067
Judgment should not be reversed because of failure to submit other various phases or different shades of same question in jury instructions.

[11] Appeal and Error 1062.2
30k1062.2

[11] Appeal and Error 1067
30k1067

[11] Trial 219
388k219
Which explanations and definitions of legal terms may be necessary to enable jury to answer each issue is within sound discretion of trial court so that reversal will not lie because requested issue or instruction is refused, absent showing of clear abuse of discretion.

[12] Appeal and Error 946
30k946
Test for abuse of discretion is not whether, in opinion of reviewing court, facts present appropriate case for trial court's action but, rather, trial court abuses discretion if it reaches decision so arbitrary and unreasonable as to amount to clear and prejudicial error of law. V.T.C.A., Bus. & C. § 17.41.

[13] Antitrust and Trade Regulation 364
29Tk364
(Formerly 92Hk36.1 Consumer Protection)

[13] Trial 260(5)
388k260(5)
In action involving Texas Consumer Credit Code and Deceptive Trade Practices-Consumer Protection Act, charge which was broad form, simple, and traced contentions of claimants using relevant statutes and pattern jury charge was not abuse of discretion despite refusal to give car dealer's requested question, which was merely "different shade" of same question already in charge. V.T.C.A., Bus. & C. § 17.41 et seq.; Vernon's Ann.Texas Civ.St. art. 5069-7.02.

***630** Jonathan Yedor, San Antonio, for Appellant.

Peter Torres, Jr., Law Office of Peter Torres, Jr., P.C., San Antonio, for Appellees.

Before CHAPA, C.J., and STONE and GREEN, JJ.

CHAPA, Chief Justice.

Appellant, Gunn Buick, Inc., appeals an adverse judgment in favor of appellees Frank A. Rosano and Elizabeth Rosano, based on alleged violations of the Texas Deceptive Trade Practices-Consumer Protection Act [FN1] and the Texas Consumer Credit Code. [FN2] The issues before this court are whether:

FN1. Tex.Bus. & Com.Code Ann. § 17.41 et seq. (Vernon 1987 & Supp.1995).

FN2. Tex.Rev.Civ.Stat.Ann. art. 5069-7.02 (Vernon 1987 & Supp.1995).

(1) there is legally insufficient evidence to sustain the jury findings of violations of the Deceptive Trade Practice Act or the Texas Consumer Credit Code;
(2) there is factually insufficient evidence to sustain the jury findings of violations of the Deceptive Trade Practice Act or the Texas Consumer Credit Code;
(3) the trial court committed reversible error in submitting question no. 1 to the jury over appellant's timely objection that it was not supported by appellees' pleadings; and
(4) the trial court committed reversible error in failing to submit appellant's tendered question.

Initially, appellant contends that there is legally and factually insufficient evidence to sustain the jury findings of violations of the Deceptive Trade Practices Act or the Texas Consumer Credit Code.

[1] In considering a "no evidence" or legal insufficiency point, we consider only the evidence and reasonable inferences favorable to the decision of the trier of fact and disregard all evidence and inferences to the contrary. Davis v. City of San Antonio, 752 S.W.2d 518, 522 (Tex.1988); Garza v. Alviar, 395 S.W.2d 821, 823 (Tex.1965).

[2] In considering a factual insufficiency point, we may not substitute our judgment for that of the jury, but must assess all the evidence and reverse for a new trial only if the challenged finding is so against the great weight and preponderance of the evidence as to be manifestly unjust, shocks the conscience, or clearly demonstrates bias. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex.1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex.1986). "In considering an 'insufficient evidence' point, we must remain cognizant of the fact that it is for the jury, as the trier of fact, to judge the credibility of the witnesses, to assign the weight to be given their testimony, and to resolve any conflicts or inconsistencies in the testimony." Commonwealth Lloyd's Ins. Co. v. Thomas, 678 S.W.2d 278, 289 (Tex.App.--Fort Worth 1984, writ ref'd n.r.e.); Texas Employers Ins. Ass'n v. Jackson, 719 S.W.2d 245, 249-50 (Tex.App.--El Paso 1986, writ ref'd n.r.e.).

The record reflects that in 1992, appellees went to the appellant seeking to purchase a new car based on an advertisement they had seen in the newspaper. According to the appellees, the advertisement indicated that the appellant was offering to sell new cars with a $2,500.00 discount and a $1,000.00 rebate. Extended and difficult negotiations took place with appellant's salesman Maurice Andrade that reflected appellees' insistence in obtaining all discounts and rebates they were entitled to. As a result, appellees purchased a 1992 Buick Century automobile and traded in their 1987 Buick LeSabre. Thereafter, upon receiving their copy of the Retail Installment Contract through the mail, appellees discovered that no mention was made of the discount and/or rebate in any of the documents. Upon confronting Andrade, appellees were told that they would have to discuss the matter with the general manager, which they did. Appellees were advised by the general manager that the custom was merely to include any rebates and/or discounts in the trade-in figure without any further designation in the Retail Installment Contract, and that their rebates and discounts had already been included in the trade-in figure. Because appellees insisted ***631** they were never told at the time of the sale that the discounts and/or rebates were included in the $6,486.00 trade-in credit, they contacted an attorney. This lawsuit followed.

Appellees further testified that the car they traded in had been purchased from appellant a few years before for approximately $8,000.00, and that it was worth around $6,000.00 at the time of the disputed sale, which resulted in the $6,486.00 trade-in figure in the Retail Installment Contract. On the other hand, appellant's employees conceded during the trial that no discount and/or rebate appears in any of the documentation of the sale, but explained that the $6,486.00 trade-in figure included $3,986 for the vehicle traded in, a $1000.00 rebate, and a $1,500.00 discount. However, these amounts do not appear in the Retail Installment Contract introduced into evidence. [FN3] Moreover, during the trial, appellant's salesman Andrade admitted that when testifying in deposition under oath, he had agreed that he had made a representation to the appellees "that the $6,486 was going to be the amount of his trade-in." He also stated, however, that the statement in the deposition had been a mistake on his part.

FN3. The dissent contends that there is "no evidence" that appellants did not receive the discount. The contract, the sole documentary evidence pertaining to the sale, unequivocally states:

2. A.	Cash downpayment	$ N/A	
B.	Trade-in (Net)	$6,486.00	
C.	Manufacturer's Rebate	$ N/A	
D.	Total Downpayment (A + B + C)		$6,486.00

Surely this contract between seller and buyer, which on its face indicates that the value of the trade-in is $6,486.00, which amount is the only amount credited against the sale price of the car, and which fails to disclose a "discount" credited against the sale price, cannot be dismissed as "no evidence."

[3] The question of credibility was clearly before this jury, and this court has no authority to substitute its judgment on the credibility of the witnesses, the assignment of weight to be given to their testimony, or the resolution of any conflicts or inconsistencies in the testimony. Commonwealth, 678 S.W.2d at 289. There is justification for this doctrine, for where this court deals with a cold-blooded record of words, the jury has the advantage of not only hearing the testimony, but also seeing the witnesses and all the surrounding circumstances that play a part in the processes of determining credibility. Considering the standard of review for both legal and factual insufficiency points and the deference that must be paid to the fact finders, we cannot conclude that there is no evidence to sustain the jury finding of violations of the Deceptive Trade Practices Act or the Texas Consumer Credit Code. Davis, 752 S.W.2d at 522. We further cannot conclude that the findings as to the violations are so against the great weight and preponderance of the evidence as to be manifestly unjust, shock the conscience, or clearly demonstrate bias. Pool, 715 S.W.2d at 635. The points are rejected.

Appellant next complains that the trial court erred in submitting Question No. 1 to the jury over appellant's timely objection that it was not supported by appellees' pleadings. [FN4]

> FN4. Question No. 1 asked: Do you find that Defendant, Gunn Buick, Inc., through its agents, servants, and employees, failed to state to Plaintiffs the true cash sale price of the vehicle sold to Plaintiffs in the retail installment contract? "Cash Price" means the price at which a creditor, in the ordinary course of business, offers to sell for cash the property or service that is the subject of the transaction. At the creditor's option, the term may include the price of accessories, services related to the sale, service contracts and taxes and fees for license, title, and registration. The term does not include any finance charge. Please answer "YES" or "NO". We, the Jury, answer: YES.

[4][5] In the absence of special exceptions, we must liberally construe a petition in favor of the pleader. Roark v. Allen, 633 S.W.2d 804, 809 (Tex.1982); see Tex.R.Civ.P. 45. The petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim. Roark, 633 S.W.2d at 810.

[6][7] In view of the fact that appellant failed to file special exceptions to the pleadings ***632** of the appellees, we must liberally construe appellees' pleadings. Roark, 633 S.W.2d at 809. Appellant's objection stems from taking one sentence from the pleadings out of context without regard to the totality of the pleadings. A review of the entire pleadings of the appellees reveals that they gave clear, fair, and adequate notice to appellant of the facts upon which the appellees based their claim. Id. at 810. Moreover, the fact that appellant found no need to file special exceptions and was obviously well prepared to defend the limited issues involved during trial also justifies our conclusion that appellant was properly notified by the pleadings of the allegations against which it was to defend. The point is rejected.

Finally, appellant contends that the trial court erred in failing to submit appellant's tendered question. [FN5]

> FN5. The record reflects that appellant submitted the following handwritten requested question to the court, which was denied: Question____ Did Frank & Elizabeth Rosano receive the $2,500 discount as advertised by Gunn Buick? Answer: Yes or No Answer:____

[8][9][10] The trial court has wide discretion in determining the proper issues and instructions to be submitted to the jury. Scott v. Ingle Bros. Pacific, Inc., 489 S.W.2d 554, 557 (Tex.1972); see Royal Ins. Co. v. Goad, 677 S.W.2d 795, 800-01 (Tex.App.--Fort Worth 1984, writ ref'd n.r.e.). Broad-form submission is encouraged. Rule 277 of the Texas Rules of Civil Procedure provides in pertinent part: "In all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions. The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict." Tex.R.Civ.P. 277; see Island Recreational Dev. Corp. v. Republic of Texas Sav. Ass'n, 710 S.W.2d 551, 555 (Tex.1986); Lemos v. Montez, 680 S.W.2d 798, 801 (Tex.1984). Simplicity in the jury charge must be an overriding concern. Lemos, 680 S.W.2d at 801. The Pattern Jury Charge is an invaluable guide in the preparation of special issues and instructions. See Texas Employers Ins. Ass'n v. Duree, 798 S.W.2d 406, 413 (Tex.App.--Fort Worth 1990, writ denied). "[I]t is error to burden

the jury with excess instructions which emphasize extraneous factors to be considered in reaching a verdict." First Int'l Bank v. Roper Corp., 686 S.W.2d 602, 605 (Tex.1985). "A judgment should not be reversed because of a failure to submit other and various phases or different shades of the same question." Sheldon L. Pollack Corp. v. Falcon Indus., Inc., 794 S.W.2d 380, 383 (Tex.App.--Corpus Christi 1990, writ denied); see Tex.R.Civ.P. 278.

[11] Therefore, which explanations and definitions of legal terms may be necessary to enable the jury to answer each issue is within the sound discretion of the court. Consequently, reversal will not lie because a requested issue or instruction is refused, in the absence of a showing of a clear abuse of discretion.

[12] "The test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action." Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241 (Tex.1985), cert. denied, 476 U.S. 1159, 106 S.Ct. 2279, 90 L.Ed.2d 721 (1986); see Smithson v. Cessna Aircraft Co., 665 S.W.2d 439, 443 (Tex.1984). Rather, a trial court abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. See Downer, 701 S.W.2d at 241-42. In ascertaining whether the trial court abused its discretion, the reviewing court must determine if the trial court acted without reference to any guiding rules and principles. Morrow v. H.E.B., Inc., 714 S.W.2d 297, 298 (Tex.1986).

[13] Appellees' pleadings alleged violations of the Texas Consumer Credit Code and the Deceptive Trade Practices-Consumer Protection Act. During trial, appellees contended that appellant violated the Credit Code by failing to state the true cash sales price in the Retail Installment Contract, and the Deceptive Trade Practices Act by their actions and inactions related to the advertised discounts and/or rebates. The court's charge was broad form, simple, and traced the contentions of the claimants utilizing the ***633** relevant statutes and the Pattern Jury Charge. Lemos, 680 S.W.2d at 801; Texas Employers Ins. Ass'n, 798 S.W.2d at 413. Appellant's requested question was merely "a different shade[ ] of the same question" already in the charge, which does not require reversal. Sheldon L. Pollack Corp., 794 S.W.2d at 383. We cannot agree that the trial court acted without reference to any guiding rules or principles. Morrow, 714 S.W.2d at 298. Appellant has failed to show an abuse of discretion. The point is rejected.

The judgment is affirmed.

GREEN, J., dissents.

GREEN, Justice, dissenting.

I respectfully dissent. The Rosanos failed to establish that they were damaged as a result of any conduct on the part of Gunn Buick in the sale to the Rosanos of a new automobile. Accordingly, the judgment should be reversed and rendered in favor of appellant.

The trial of this case centered on whether or not the Rosanos received a $2500 discount on the purchase of their new Buick Century automobile as promised by Gunn Buick in its advertising. Indeed, virtually all of the evidence introduced in trial was directed to that issue. The answer to that question thereupon determines whether or not the Rosanos sustained damages entitling them to a recovery in this case. The jury was not asked to resolve that controlling question directly; rather, the case was submitted broadly. [FN1]

FN1. The case was submitted to the jury on two liability theories. In Question No. 1, the jury was asked if Gunn Buick failed to state to the Rosanos the "true cash sale price" of the vehicle sold to them. This question relates to the Rosanos' claim under Tex.Rev.Civ.Stat.Ann. art. 5069-7.02(6)(a) (Vernon 1987 & Supp.1995), a provision of the Texas Consumer Credit Code regulating motor vehicle installment sales contracts. To recover under this provision, the Rosanos were required to prove that they suffered an "actual economic loss" as a result of its violation by appellant. Tex.Rev.Civ.Stat.Ann. art. 5069-8.01(b)(1) (Vernon 1987 & Supp.1995). Question No. 2 asked the jury if Gunn Buick engaged in any false, misleading, or deceptive act or practice that was a producing cause of damages to the Rosanos. This relates to the Rosanos' claim under the Texas Deceptive Trade Practices Act (DTPA). Tex.Bus. & Com.Code Ann. § 17.46, et seq. (Vernon 1987).

In its first point of error, appellant raises legal and factual sufficiency challenges to the jury's finding of damages. The majority erroneously reduces the evidentiary analysis to a question of the credibility of the witnesses. The relevant question before this Court, however, is not whether the jury was entitled to believe the testimony of the Rosanos above that of appellant's witnesses; it is whether there is competent evidence in the record to support the Rosanos' claim of damages.

It should be pointed out that this case is not about whether the amount of the discount given was as advertised--the Rosanos make no claim that they received a smaller discount than the advertised amount. They contend instead that they received no discount at all. If it is true they received no discount, their damages are established at $2500; however, if they did receive the discount, the Rosanos have not been damaged. For our legal and factual sufficiency review, then, the issue is whether there is sufficient evidence in the record that the Rosanos did not receive the advertised discount.

When considering a legal sufficiency, or "no evidence", challenge, we may consider only the evidence and reasonable inferences favorable to the decision of the trier of fact and disregard all evidence and inferences to the contrary. Garza v. Alviar, 395 S.W.2d 821, 823 (Tex.1965). Utilizing this standard, the record reveals no competent evidence that the Rosanos were deprived of the advertised $2500 discount.

Mr. Rosano testified that he did not receive the discount. But his testimony is based solely on the fact that the discount was not specifically identified in the installment contract. The testimony is conclusory and is not probative on the question of whether the discount was, or was not, actually given. Mr. Rosano's subjective belief does nothing more than create a mere surmise or suspicion and, in legal effect, constitutes no evidence. See Haynes & Boone v. Bowser Bouldin, Ltd., 896 S.W.2d 179, 182 (April 1, 1995); Kindred v. Con/Chem, Inc., 650 S.W.2d 61, 63 (Tex. ***634** 1983). Mrs. Rosano's testimony was also of no assistance--she did not know, one way or the other, whether she and her husband received the discount. No other evidence was offered that the Rosanos did not receive the advertised discount.

Finding the evidence legally insufficient to support the Rosanos' damages finding, I would sustain appellant's first point of error and would reverse and render the judgment in favor of appellant.

907 S.W.2d 628

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EXHIBIT H

APPENDIX OF NON-FEDERAL AND UNPUBLISHED FEDERAL AUTHORITIES CITED IN DEFENDANT DELL INC.'S REPLY IN SUPPORT OF ITS MOTION FOR ORDER DISMISSING PLAINTIFFS' SECOND AMENDED COMPLAINT WITH PREJUDICE AND STRIKING PLAINTIFFS' CLASS ACTION ALLEGATIONS

Court of Appeal, Fourth District, Division 3, California.

Monica HARRIS, Plaintiff and Appellant,
v.
HSN LP et al., Defendants and Respondents.

No. G036938.
(Super.Ct.No. 05CC00006).

Jan. 10, 2007.

Appeal from an order of the Superior Court of Orange County, Thierry Patrick Colaw, Judge. Affirmed.

Mark Boling for Plaintiff and Appellant.

Seyfarth Shaw, Daniel M. Blouin; Kenneth L. Wilton and Geoffrey S. Long for Defendants and Respondents.

Bill Lockyer, Attorney General, Tom Greene, Chief Assistant Attorney General, Albert Norman Shelden Assistant Attorney General, Ronald A. Reiter and Kathrin Sears, Deputy Attorneys General as Amicus Curiae.

OPINION

MOORE, J.

***1** Monica Harris sued the Home Shopping Network (HSN) after purchasing two items. She alleges that HSN uses a reference price structure that falsely creates the impression consumers are receiving a bargain by purchasing at HSN prices. She appeals from the order denying her motion to certify the action as a statewide class action for violations of the Consumer Legal Remedies Act (Civ.Code, § 1781), the unfair competition law (Bus. & Prof.Code, § 17200), and for breach of contract and unjust enrichment. Finding no abuse of discretion in the trial court's decision to deny certification, we affirm.

I
FACTS

HSN is a seller of consumer products through both its television channel and Web site. According to HSN, it sells in excess of 30,000 unique items to approximately 495,000 California residents each year. Plaintiff Monica Harris watched programming on HSN and visited its Internet Web site in November 2004.

Harris alleges that HSN generally uses a three-tiered system for listing prices. The prices listed are "Retail Value," (the highest price) "HSN Price" (lower than retail value) and "Sale Price" (the lowest price), which is the actual selling price for the product. Sometimes a two-tiered system is used, listing "Retail Value" and "HSN Price," which is the actual selling price.

Harris claims that she expected, among other things, that the "Retail Value" price reflected the actual price at HSN's competitors and that the actual retail value of the items she planned to purchase were correctly reflected by HSN's "Retail Value ." She also expected that she was getting a bargain by buying at the "Sale Price." She therefore purchased two items, a men's ring and a gemstone pendant.

On January 12, 2005, Harris filed her initial complaint. Her first amended complaint, filed on March 25, 2005, alleged breach of contract, unjust enrichment, and statutory claims under the unfair competition law (Bus. & Prof.Code, § 17200, et seq.) (UCL) the Consumer Legal Remedies Act (Civ.Code, § 1750 et seq.) (CLRA). In sum, Harris alleged the "Retail Value" is not factually substantiated and is therefore illusory and deceptive, and the only real price is the "Sale Price" (or "HSN Price").

The first amended complaint (the complaint) further sought class action status. Harris filed her motion for class certification in late 2005. She proposed a definition of the class as "All persons who purchased [consumer products], not for resale, from HSN's TV programming at HSNtv and/or HSN'S internet website at www.hsn.com that was

advertised simultaneously with a higher reference price designated as a 'Retail Value' and another lower and actual sales price at anytime from January 13, 2001 ... throughout California...." In her reply brief, Harris proposed, for the first time, certifying two subclasses--a "liability" subclass or a subclass of consumers who purchased the ring, pendant, or both. After full briefing and a hearing, the court denied the motion, and the order was entered on April 7, 2006.

II
DISCUSSION

A. The Trial Court's Order

***2** The court enumerated three reasons for denying certification, set forth as follows:

"A. Plaintiff has failed to meet her burden to show the existence of a well-defined community of interests among any putative class. Common issues would not predominate where more than thirty thousand different items were sold to different customers based upon different sales presentations and a host of other differentiating factors.

"B. Common issues would not predominate even if the putative class were limited to ... one or both of the items Plaintiff purchased--[a Pendant and a Ring]. The admissible evidence, in particular the evidence in [HSN's] declarations, shows that Defendants made multiple differentiated representations regarding the Pendant and the Ring during presentations on various dates and times both on the television presentations and on the internet presentations. Determining whether or not Defendants' retail value representations were material will require individual analysis of each presentation made to each putative class member/ customer. Finally, determining whether each putative class member incurred an injury in fact would require individual analysis.

"C. Certification of a 'Liability' subclass is neither feasible nor manageable in this case. The evidence establishes that the sales presentation likely varied from customer to customer. This presents insurmountable problems in assessing whether there was any inaccurate representation and whether any such representation, if it existed, would have caused the purchaser actual injury. Simply stated, the Plaintiff has not established that proceeding as a class or as a subclass would be manageable, let alone superior."

B. Propriety of Class Certification--CLRA

The CLRA (Civ.Code, § 1750 et seq.) is a consumer protection statute. It enables a consumer to bring a class action on behalf of himself or herself and other consumers similarly situated if the consumer has suffered "any damage" from the use or employment of any of 23 enumerated acts or practices. (Civ.Code., §§ 1780, subd. (a), 1781, subd. (a).) It is limited to transactions "intended to result or which results in the sale or lease of goods or services to any consumer...." (Civ.Code., § 1770, subd. (a).) Consumers in a CLRA class action may recover actual damages or a statutory minimum in addition to injunctive relief, restitution, attorney fees and any other relief. (Civ.Code, § 1780, subds.(a), (d).)

In this case, Harris alleges three violations of the CLRA: 1) "Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have...." (Civ.Code, § 1770, subd. (a)(5)); 2) "Advertising goods or services with intent not to sell them as advertised." (Civ.Code, § 1770, subd. (a)(9)); 3) "Making false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions." (Civ.Code, § 1770, subd. (a)(13).) On behalf of the alleged class, she seeks injunctive relief, restitution, actual and punitive damages, costs, and attorney fees.

***3** The CLRA has specific requirements for class certification: (1) the impracticability of bringing all members of the class before the court; (2) questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members; (3) the claims of the class representative are typical of the class; (4) the class representatives will fairly and adequately protect the interests of the class. (Civ.Code, § 1781, subd. (b).) The trial court has discretion to determine whether these factors have been met, but may not consider any other factors. If the four enumerated factors are present, the court is required to certify the class. (Hogya v. Superior Court (1977) 75 Cal.App.3d 122, 135-136.)

The primary issue reflected in the trial court's order is whether common questions of law and fact predominate over individual questions. The predominance requirement "means 'each member must not be required to individually litigate numerous and substantial questions to determine his [or her] right to recover following the class judgment; and the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the class action advantageous to the judicial process and to the litigants.' [Citation]" (Washington Mutual Bank v. Superior Court (2001) 24 Cal.4th 906, 913-914.)

Harris essentially sought certification of three alternative classes--everyone who purchased any item from HSN during a specified timeframe, a "liability only" subclass, and a subclass consisting of those who purchased the same items as Harris. The trial court found that for any of these potential classes, individual issues would predominate. Harris essentially argues that common issues predominate because the CLRA does not require actual damage, only that a violation of the statute has occurred.

In support of this proposition, she cites to a case that does not address whether damages are required to recover, but whether a class representative who had settled her individual claim had standing to represent the class. (Kagan v. Gibralter Sav. and Loan Assn. (1984) 35 Cal.3d 582, 592-593.) We do not construe Kagan to stand for the proposition that an alleged violation of the CLRA, without any harm actually befalling the consumer, is actionable. Taken to its logical conclusion, such a rule would mean, for example, that any viewer of a television advertisement containing a false representation would be a potential class member in a case seeking damages against the advertiser--regardless of whether the consumer took any action based on the ad or suffered any harm as a result. We reject such a broad-based rule and find that some form of pecuniary damage is required based on the plain language of the statute, which states that "damage as a result" of violating the CLRA is required. (Civ.Code, § 1780, subd. (a); see Wilens v. TD Waterhouse Group, Inc. (2003) 120 Cal.App.4th 746, 755.)

***4** Differences in the amount of damage suffered are insufficient to deny class certification, but "differences in the actual existence of damages or in the manner of incurring damages are appropriate considerations." (Caro v. Procter & Gamble Co. (1993) 18 Cal.App.4th 644, 665.) Thus, we ask whether establishing the fact of damage at all will result in the predominance of individual over common questions. Indeed, there is substantial evidence that it would do so.

For example, if the broadest possible class was certified, the trial would require consideration of each of the items allegedly sold under HSN's reference pricing scheme. If the advertised "retail price" could be substantiated for a particular item, the consumers who purchased that item did not suffer any damage, and are not entitled to recover. This is true for a "liability only" class as well as for a class entitled to actual damages.

Even for a narrower class, considering only the same items Harris purchased, the fact of damage will nonetheless require considerable individual proof. If some purchasers did not buy the item because of the purported savings between the retail price and the HSN price, but for convenience, for example, they did not suffer damage.

In Caro v. Proctor & Gamble Co., the court affirmed the trial court's denial of class certification of similar claims, including violation of the UCL and CLRA, breach of contract, and unjust enrichment. (Caro v. Procter & Gamble Co., supra, 18 Cal.App.4th at pp. 651-652.) The defendant was alleged to have falsely advertised its orange juice as "fresh." (Id. at p. 652 .) The court found that individual issues regarding what potential class members read on the label and was material in their purchasing decision would predominate over common issues. (Id. at p. 668.)

This case is similar, as it is not a case which lends itself to the presumption that all potential class members were damaged by virtue of the purported violation. Only those who bought the ring or pendant based on the difference between the allegedly unsubstantiated retail price and the HSN price arguably suffered damage. The trial court found that making this determination meant that individual issues predominated, and we find there was substantial evidence to support this conclusion. Thus, because the requirement of predominance was not met, the trial court did not err by concluding

class action certification should be denied for the CLRA claim.

C. Propriety of Class Certification--UCL

1. The Statutory Framework

The UCL is codified in Business and Professions Code section 17200 et seq. The UCL prohibits any "unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising" and any act prohibited by section 17500 et seq. Business and Professions Code section 17500, in turn, prohibits "untrue or misleading" advertising.

"Because Business and Professions Code section 17200 is written in the disjunctive, it establishes three varieties of unfair competition--acts or practices which are unlawful, or unfair, or fraudulent." (Podolsky v. First Healthcare Corp. (1996) 50 Cal .App.4th 632, 647.) The three prongs of the law have different thresholds. Under its "unlawful" prong, "the UCL borrows violations of other laws ... and makes those unlawful practices actionable under the UCL." (Lazar v. Hertz Corp. (1999) 69 Cal.App.4th 1494, 1505.) Thus, a violation of another law is a predicate for stating a cause of action under the UCL's "unlawful" prong. In a consumer case, determining whether a business practice is "unfair" involves balancing the utility of the defendant's conduct against the gravity of the alleged victim's harm. (Smith v. State Farm Mutual Automobile Ins. Co. (2000) 93 Cal.App.4th 700, 718-720.) A "fraudulent" practice under the UCL requires showing that members of the public are likely to be deceived. (Olsen v. Breeze, Inc. (1996) 48 Cal.App.4th 608, 618.) Traditional tort requirements, however, such as intent or actual reliance, are inapplicable to the UCL. (Cortez v. Purolator Air Filtration Products Co. (2000) 23 Cal.4th 163, 173-174.)

***5** A major distinguishing feature of the UCL is that it does not provide a private action for damages or other legal remedies. Instead, the UCL provides an equitable means to prevent unfair practices in the future and restore money or property to victims of those practices. (Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 180.) Thus, remedies are limited to injunctive relief and restitution. [FN1]

FN1. In November 2004, California voters adopted Proposition 64, which added a standing requirement to the UCL. Prior to Proposition 64, "any person" could bring an action under the UCL on behalf of the general public. This, unfortunately, led to abuses which Proposition 64 was intended to remedy. Proposition 64 added language to Business and Professions Code section 17203 (section 17203), stating that private individuals "may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure...." In turn, Business and Professions Code section 17204 was amended to state that an action under the UCL could be brought only by a person "who has suffered injury in fact and has lost money or property as a result of such unfair competition." In the trial court, HSN argued that the standing requirement in Proposition 64 applies to all potential class members, not just the class representative. Although it is not completely clear, there is language in the trial court's order which apparently accepts HSN's argument. This question is now under review before the California Supreme Court. (In re Tobacco II Cases (2006) 142 Cal.App.4th 891, review granted, Nov. 1, 2006, S147345.) The trial court's order, however, provides other, independent grounds for denying class certification, even assuming, for the sake of argument, the issue is decided in the manner most favorable to Harris. Therefore, we offer no opinion on the standing issue.

In this case, Harris asserts claims under all three prongs of the UCL, alleging that violation for the CLRA and the federal FTC act provide the basis for claims under the "unlawful" prong. She also claims that HSN's discount pricing system is unfair and deceptive. She seeks injunctive relief and restitution on behalf of the alleged class.

2. Class Action Certification Requirements

As noted in the UCL, Code of Civil Procedure section 382 (section 382) sets forth the requirements for certifying class actions. Under that section, a class action is authorized when "the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court...." The party seeking class certification must establish the existence of both an ascertainable class and a

well-defined community of interest among the class members. (Washington Mutual Bank v. Superior Court (2001) 24 Cal.4th 906, 913; Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 435; Richmond v. Dart Industries, Inc. (1981) 29 Cal.3d 462, 470.)

The community of interest requirement involves three factors: "(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (Richmond v. Dart Industries, Inc., supra, 29 Cal.3d at p. 470.) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing. [Citation.]" (Linder v. Thrifty Oil Co., supra, 23 Cal.4th at p. 435.)

3. Standard of Review

"Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification." (Linder v. Thrifty Oil Co., supra, 23 Cal.4th at p. 435.) "[B]ecause group action also has the potential to create injustice, trial courts are required to ' "carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts." ' [Citations.]" (Ibid.)

"[I]n the absence of other error, a trial court ruling supported by substantial evidence generally will not be disturbed 'unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation]' [Citation.]" (Id. at pp. 435-436.) "Any valid pertinent reason stated will be sufficient to uphold the order. [Citation.]" (Caro v. Procter & Gamble Co., supra, 18 Cal.App.4th at p. 656.) Thus, under section 382, "[o]ur task on appeal is not to determine in the first instance whether the requested class is appropriate but rather whether the trial court has abused its discretion in denying certification." (Osborne v. Subaru of America, Inc. (1988) 198 Cal.App.3d 646, 654.)

4. Predominance of Common Issues

***6** Again, we consider whether the trial court erred by failing to certify any of Harris's three alternative classes--everyone who purchased any item from HSN during a specified timeframe, a "liability only" subclass (not especially relevant here) and a subclass consisting of those who purchased the same items as Harris. The criteria for predominance under section 382 is essentially identical to the CLRA's requirement, and we need not repeat it here.

The key difference between the UCL claim and the CLRA claim is that under the UCL, damage to the members of the proposed class may not be required, if we accept, for the sake of argument, the argument most favorable to the plaintiff about the effect of Proposition 64. Thus, if damages are not an issue, can examining liability only be determined by a predominance of common issues? The trial court found it could not, and we find substantial evidence to support that conclusion.

With respect to the broadest proposed class, even establishing only a violation of the UCL would require determining whether each item had its retail value substantiated. At over 30,000 items, this would obviously require individual proof on the part of each class member or group of class members who purchased each item. There was also evidence that the presentations differed and that the actual price of the items changed over time. Thus, it was not a simple matter to determine the accuracy of the retail price for the entire subclass.

With respect to the ring and pendant only, the trial court had evidence that potential class members had the opportunity to see a variety of presentations regarding the ring and pendant, some of which barely noted the difference between the retail price and HSN price. While damage is not required, the potential class members had to at least be aware of this difference in order for it to have any effect on their decision; if they were not even aware of it, the representation could not properly be considered unlawful or unfair. Thus, it would still require individual proof of substantial issues involved in the case.

We therefore find that the trial court did not abuse its discretion in denying certification of the UCL claim. "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of

reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court. [Citations.]" (Shamblin v. Brattain (1988) 44 Cal.3d 474, 478-479.)

D. Propriety of Class Certification--Breach of Contract and Unjust Enrichment

We need review these two claims only briefly. The same standards for the class certification for the UCL claim under section 382 apply to these claims. The same standard of review, abuse of discretion, also applies.

To establish liability for breach of contract, the plaintiff must establish the well-known elements of the existence of the contract, plaintiff's performance, defendant's breach, and damages. (Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 Cal.App .3d 1371, 1388.) Unjust enrichment, Harris's final cause of action, is a quasi-contractual cause of action. It requires receipt of a benefit and unjust retention of the benefit at the expense of another. (Lectrodryer v. SeoulBank (2000) 77 Cal.App.4th 723, 726.)

***7** Breach of contract, like the CLRA claim, requires proof of damage. For the same reasons, the court was within its discretion in determining that common issues did not predominate. Unjust enrichment requires the wrongful receipt of a benefit, and like damage under the CLRA and breach of contract claim, the court was within its discretion in concluding that individual issues predominated over common ones. The trial court, therefore, did not error.

III
DISPOSITION

The order is affirmed. HSN is entitled to its costs on appeal.

WE CONCUR: O'LEARY, Acting P.J. and IKOLA, J.

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