TRUST, BUT VERIFY: RELIANCE, PRODUCING CAUSE, AND WHY INDEPENDENT INVESTIGATION DOES NOT INEVITABLY BAR ACTION UNDER THE DTPA'S LAUNDRY LIST

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I. INTRODUCTION

"Huh? Do I trust him? Well, he's a personable gentleman, but I cited to him a Russian proverb—I'm not a linguist, but I at least learned that much Russian—and I said to him, 'Doveryai, no proveryai.' It means, 'Trust, but verify.'"[1]

A. The Need to Verify

Experience has taught many consumers that things are rarely as they appear.[2] First-time homebuyers find that their new house is smaller than their realtor told them.[3] Others discover that the foundation of their recently purchased home needs substantial work, contrary to the seller's assurances that there were no problems with the house.[4] Still others learn that the car their salesman declared to be in perfect condition previously suffered major damage in an accident.[5] Such encounters make it difficult

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[1] *The President in Venice: Economics, Contra Aid and the Gulf*, N.Y. TIMES, June 12, 1987, at A12 (President Ronald Reagan commenting on his discussions with Russian General Secretary Gorbachev).

[2] *See, e.g.*, Fernandez v. Schultz, 15 S.W.3d 648, 650 (Tex. App.—Dallas 2000, no pet.) In *Fernandez*, a real estate agent, knowing of termites inside the house he was preparing to sell, hired contractors to perform cosmetic repairs to cover evidence of the termite infestation. *Id.* He then gave the eventual buyers a tour through a newly painted and carpeted house. *Id. See also* Chrysler-Plymouth City, Inc. v. Guerrero, 620 S.W.2d 700, 705 (Tex. App.—San Antonio 1981, no writ); Pleasant v. Bradford, 260 S.W.3d 546, 550 (Tex. App.—Austin 2008, pet. denied); Bernstein v. Thomas, 298 S.W.3d 817, 822 (Tex. App.—Dallas 2009, no pet.).

[3] *See Pleasant*, 260 S.W.3d at 550; *see also* Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535, 537 (Tex. 1981) (addressing facts similar to those in *Pleasant*).

[4] *See Bernstein*, 298 S.W.3d at 822.

[5] *See Guerrero*, 620 S.W.2d at 703–05 (The salesman represented that "it was one of the best

for consumers to trust in any representations made or assurances received in future transactions.[6] Indeed, consumers may feel a need to personally verify every claim a seller makes.[7]

B. The Conflict Between Reliance and Independent Investigation

According to some recent Texas decisions, however, the mere fact that a buyer undertakes an independent investigation of a seller's representations could kill any claim to recovery that the buyer may have under the Texas Deceptive Trade Practices—Consumer Protection Act (DTPA).[8] At least one court has held that evidence of an independent investigation negates the element of reliance in a consumer's fraud claim as a matter of law, even if the consumer failed to discover the falsity of the seller's representations.[9] Because the DTPA includes reliance as an essential element of a consumer's cause of action under section 17.50(a)(1), some courts could find that the choice to investigate bars a claim under that section as a matter of law as well.[10]

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cars on the lot and that he was driving the car himself; that if he had been able to afford the car he would have bought it himself; and that it was a perfect car and was in perfect condition." Evidence at trial revealed that the "car had sustained major damage in a previous accident . . . [and] was covered with Bondo, or body filler, over about 90 percent of its surface.").

[6] Such a lack of confidence in a seller's representations may be warranted. *See, e.g.*, *Bernstein*, 298 S.W.3d at 819–20 ("Several months after listing the house, the [sellers] contacted Bedrock Foundation Repair. According to the [sellers], several prospective purchasers had commented on the sloping of the home's floor and they wanted an estimate of how much it would cost to 'correct the slope.'" The inspector included an estimate of the costs and recommended actions, and he testified the house needed a "fairly significant amount of foundation work" and "further opined that the recommendations he made were not just for 'cosmetic appeal.'" The sellers executed a new seller's disclosure notice following this inspection. In response to the inquiry about whether the seller was aware of any "defects" or "malfunctions" in various parts of the property, including the foundation, the sellers "indicated they were not aware of any."); *see also Guerrero*, 620 S.W.2d at 705.

[7] *See, e.g.*, Dubow v. Dragon, 746 S.W.2d 857, 858–60 (Tex. App.—Dallas 1988, no writ).

[8] *See* Bartlett v. Schmidt, 33 S.W.3d 35, 41 (Tex. App.—Corpus Christi 2000, pet. denied) (holding that the buyer's subsequent investigation and reliance on a title commitment was sufficient as a matter of law to negate the producing cause element of his DTPA claim although he did not discover the existing restrictions on the property). The Austin Court of Appeals chose not to address the vitality of the rule stated in *Bartlett* that "the very decision to undertake an investigation can indicate that the person is not relying on the" seller's representations. *See Pleasant*, 260 S.W.3d at 554.

[9] *Bartlett*, 33 S.W.3d at 38.

[10] *See* TEX. BUS. & COM. CODE ANN. § 17.50(a)(1)(B) (West 2002); *see also Pleasant*, 260

Admittedly, evidence that the consumer performed his own investigation of the facts asserted by the seller conflicts with a subsequent claim that the consumer relied on the seller as his source of information concerning the facts asserted.[11] For instance, it appears inconsistent for a consumer to claim he relied solely on a statement that the seller knew of no termite damage or previous termite treatment to a house when the prospective purchaser hired an inspector who found termites on the house's exterior.[12] But what if the seller prevented the inspector from discovering termites inside the house by covering up evidence of termite damage?[13] In such a case, the consumer has undertaken an independent investigation, but still fails to discover the presence of termites inside the house.[14] Does the fact that the consumer sought to verify the truth of the seller's representations preclude him from ever claiming he relied upon those representations? Or can that consumer truthfully maintain that he relied upon both the seller's representations and the inspector's findings?

This comment answers these questions in the context of the DTPA. Subpart II outlines the elements of a private cause of action under section 17.50(a)(1) of the Act. Subpart III provides an overview of how courts found reliance implicit in the element of producing cause under section 17.50(a)(1) before it included detrimental reliance as an independent element of a cause of action. Subpart IV then addresses the legislature's addition of detrimental reliance and summarizes the approaches different courts have taken to determine whether consumers' independent investigations negate the statutory element of reliance. Because some courts' opinions suggest that reliance under the DTPA does not differ from reliance in common law fraud, Subpart V reviews how courts have strictly construed the element of reliance in fraud. Subpart VI then explains why courts should recognize that a consumer's independent investigation does

S.W.3d at 555 (recognizing no distinction between the element of reliance in the context of fraud and under the DTPA).

[11] *See Dubow*¸ 746 S.W.2d at 858–60 (The sellers assured the buyers that the house was a "good house with no problems," while the buyers hired professional inspectors to inspect the "plumbing, electrical system, roof, foundation, sprinkler system, heating and air conditioning, the cellar and all other visible areas" of the house. The buyers then renegotiated the sales contract for the house based on the defects they discovered. Based on these facts, the court held that the buyers own conduct constituted a new and independent basis for their injury.).

[12] *See* Fernandez v. Schultz, 15 S.W.3d 648, 650–51 (Tex. App.—Dallas 2000, no pet.).

[13] *See id.* at 651–52.

[14] *See id.* at 650–53 (noting that if "[the seller] informed the [buyers] about the termites, they could have required their inspector to look more deeply for signs of termite damage").

not negate the statutory element of reliance as a matter of law in all instances, and articulates a joint-causation framework that courts should adopt when considering a consumer's efforts to verify a seller's claims.

II. THE DTPA'S LAUNDRY LIST

Since its inception, the DTPA has expressly protected "consumers against false, misleading, and deceptive business practices" and has provided "efficient and economical procedures to secure such protection."[15] Its terms create a private cause of action outside of common law fraud against sellers who engage in deceptive business practices and make it possible to hold sellers liable without proving their knowledge of wrongdoing or intent to induce action.[16] The DTPA also contains a "laundry list" that gives consumers a ready reference of actionable claims.[17] Though this list does not purport to cover every possible deceptive act or practice in which a seller could engage, a consumer's private cause of action under section 17.50(a)(1) is limited to the twenty-seven deceptive acts or practices listed.[18] Such acts or practices include passing off goods or services as those of another, representing that goods are original or new when they are deteriorated or used, representing that goods are of a particular standard if they are of another, and representing that goods have approval or characteristics which they do not.[19]

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[15] *See* Act of May 10, 1973, 63rd Leg., R.S., ch. 143, § 1, 1973 Tex. Gen. Laws 322, 322–23; TEX. BUS. & COM. CODE ANN. § 17.44 (West 2002).

[16] Eagle Props., Ltd. v. Scharbauer, 807 S.W.2d 714, 724 (Tex. 1990) (explaining that a defendant may be held liable for deceptive acts or practices despite not knowing that his representations were false and not intending to deceive anyone). However, certain false, misleading, or deceptive acts or practices included in the laundry list do require a showing of either knowledge or intent. *See* TEX. BUS. & COM. CODE ANN. § 17.46(b)(9), (10), (13), (24). Common-law fraud has long required plaintiffs to establish that the defendant made false representations, that the defendant knew were false at the time he made them, and that the defendant made them with the intention that they should be acted upon. *See* Lord v. Goddard, 54 U.S. 198, 199 (1852) (including intent to defraud as an element of fraud); Trenholm v. Ratcliff, 646 S.W.2d 927, 930 (Tex. 1980); Archer v. Griffith, 390 S.W.2d 735, 740 (Tex. 1964) ("Actual fraud usually involves dishonesty of purpose or intent to deceive.").

[17] *See* TEX. BUS. & COM. CODE ANN. § 17.46; Checker Bag Co. v. Washington, 27 S.W.3d 625, 634 (Tex. App.—Waco 2000, pet. denied) ("The Deceptive Trade Practices Act contains a list, commonly referred to as the DTPA 'laundry list,' of actions declared to constitute false, misleading, or deceptive acts.").

[18] TEX. BUS. & COM. CODE ANN. § 17.46(d).

[19] *See id.* § 17.46(b).

A cause of action from this laundry list cannot stand without proof that the consumer relied on the seller's deceptive act or practice, and that the reliance on the act or practice caused "economic damages or damages for mental anguish."[20] Thus, a consumer may maintain a cause of action under section 17.50(a)(1) only if he or she establishes three elements.[21] First, the laundry list contains the deceptive act or practice of which the consumer complains.[22] Second, the deceptive act or practice was a producing cause of economic damages or mental anguish.[23] And third, the consumer relied to his or her detriment on the deceptive act or practice.[24]

III. NO SEPARATE ELEMENT OF RELIANCE BEFORE THE 1995 AMENDMENTS

A. Pre-1995 Laundry-List Claims

Though reliance now holds its own place within the DTPA, consumers have not always had to specifically prove the element of reliance to maintain a cause of action under section 17.50(a)(1).[25] The statutory language did not include reliance as an independent element of a cause of action based on the DTPA's laundry list until 1995.[26] Before that time,

[20] *Id.* § 17.50(a) ("A consumer may maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish: (1) the use or employment by any person of a false, misleading, or deceptive act or practice that is: (A) specifically enumerated in a subdivision of Subsection (b) of Section 17.46 of this subchapter; and (B) relied on by a consumer to the consumer's detriment.").

[21] *See id.* A plaintiff must also establish consumer status, which is a prerequisite to bringing any action under the DTPA. *See id.*; *see also Checker Bag*, 27 S.W.3d at 634; Perez v. Hung Kien Luu, 244 S.W.3d 444, 446 (Tex. App.—Eastland 2007, no pet.).

[22] TEX. BUS. & COM. CODE § 17.50(a)(1)(A).

[23] *Id.* § 17.50(a).

[24] *Id.* § 17.50(a)(1)(B).

[25] *See* Weitzel v. Barnes, 691 S.W.2d 598, 600 (Tex. 1985) ("The court of appeals has erred by reading into the DTPA a requirement of proof of reliance on the misrepresentation before a consumer can recover," and "the legislature specifically rejected reliance as an element of recovery."); *see also* Celtic Life Ins. Co. v. Coats, 885 S.W.2d 96, 99 (Tex. 1994) (declining to overrule *Weitzel*); Dubow v. Dragon, 746 S.W.2d 857, 859–60 (Tex. App.—Dallas 1988, no writ) (noting that "'producing cause' and not 'reliance' is the ultimate standard"); *but see* Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd., 896 S.W.2d 156, 164 (Tex. 1995) (describing the statements in *Weitzel* as dicta).

[26] *See* Act of May 19, 1995, 74th Leg., R.S., ch. 414, § 5, sec. 17.50(a), 1995 Tex. Gen. Laws 2988, 2992 ("SECTION 5. Section 17.50, Business & Commerce Code, is amended to read as

producing cause—not reliance—was the ultimate standard.[27]

B. Producing Cause Inherently Requires Some Reliance

Nevertheless, it is almost impossible to separate the concept of reliance in consumer fraud cases from the legal causation standard embodied in the definition of producing cause.[28] To prove the element of producing cause, a consumer must establish that the defendant's actions constituted an "efficient, exciting, or contributing cause" of the injury alleged.[29] The Texas Supreme Court has also held that "producing cause requires that the acts be both a cause-in-fact and a 'substantial factor' in causing the injuries."[30] Both of these definitions necessarily implicate reliance on a seller's representations if such representations form the basis of a consumer's claim.[31]

1. The Dallas Court of Appeals

A case governed by the pre-1995 version of the DTPA from the Dallas Court of Appeals illustrates the inherent connection between reliance and producing cause.[32] Harry and Susan Dubow entered into a contract to purchase a home in 1984.[33] The terms of the contract gave the Dubows a "right to inspect the house," and they took advantage of this contractual

follows: Sec. 17.50. RELIEF FOR CONSUMERS. (a) A consumer may maintain an action where any of the following constitute a producing cause of *economic* [~~actual~~] damages *or damages for mental anguish*: (1) the use or employment by any person of a false, misleading, or deceptive act or practice that is*: (A)* specifically enumerated in a subdivision of Subsection (b) of Section 17.46 of this subchapter; *and (B) relied on by a consumer to the consumer's detriment.*").

[27] *Weitzel*, 691 S.W.2d at 600.

[28] *See Prudential*, 896 S.W.2d at 165 (Gonzalez, J., concurring) (stating that "a consumer's reliance on a representation is a necessary aspect of producing cause," and that the court "necessarily recogniz[ed] reliance as an integral element of producing cause in a DTPA cause of action based on a representation.").

[29] *See* Tex. Indem. Ins. Co. v. Staggs, 134 Tex. 318, 324, 134 S.W.2d 1026, 1028 (1940); Haynes & Boone v. Bowser Bouldin, Ltd., 896 S.W.2d 179, 182 (Tex. 1995); Brown v. Bank of Galveston, 963 S.W.2d 511, 514 (Tex. 1998).

[30] *Brown*, 963 S.W.2d at 514 (quoting Union Pump Co. v. Allbritton, 898 S.W.2d 773, 775 (Tex. 1995).

[31] *See Prudential*, 896 S.W.2d at 165 (Gonzalez, J., concurring).

[32] *See* Dubow v. Dragon, 746 S.W.2d 857, 859–60 (Tex. App.—Dallas 1988, no writ).

[33] *Id.* at 858.

right by hiring a professional inspector.[34] The inspection raised concerns about the house, so the Dubows hired a foundation specialist to "explore the situation further."[35] A written report from this specialist provided little comfort regarding the condition of the house.[36] In spite of their ongoing concerns, the Dubows completed the purchase, but soon "[a]fter closing and taking possession of the house, [they] allegedly encountered" the very problems they had feared and brought suit against the sellers under the DTPA.[37]

Although the court recognized that the Dubows' suit fell under a version of the DTPA that did not include reliance as an essential element of a laundry-list cause of action, the court still read reliance into its producing-cause analysis.[38] The Dallas court explained that the "producing cause inquiry . . . pose[d] the question of whether . . . the Dubows' actions in relying on their own inspection of the house's condition . . . became the sole and efficient cause of the Dubows' actual damages."[39] The court concluded that they had.[40]

2. The Corpus Christi Court of Appeals

The Corpus Christi Court of Appeals has also conceded that reliance may be relevant to the producing-cause inquiry.[41] The case before the Corpus Christi court involved a German immigrant named Gunter Schmidt who sought to purchase property "with the intention of using it as a shipyard to construct ocean-going vessels."[42] Schmidt's realtor orally advised him that "there were no restrictions on the property and he could

[34] *Id.*

[35] *Id.* at 858–59 (The court noted that the Dubows hired two separate companies to inspect the house and also "had an architect and contractor look at certain aspects of the house prior to closing.").

[36] *See id.* at 858. (The specialist's report "noted additional problems attributable to differential foundation movement including 'cracks in brick mortar and perimeter beam, separation of brick veneer from door and window frames, floors not level, door frames not plumb, sheet rock cracks, etc.'").

[37] *Id.* at 859.

[38] *See id.* at 859–60.

[39] *Id.* at 860.

[40] *Id.*

[41] *See* Bartlett v. Schmidt, 33 S.W.3d 35, 39 (Tex. App.—Corpus Christi 2000, pet. denied).

[42] *Id.* at 37.

use it for anything he wanted."[43] A title company issued a title commitment indicating that there were "no restrictions on the land being purchased."[44] Schmidt also personally examined the documents and contacted his attorney in Germany, who advised Schmidt that the property was not burdened by restrictions or covenants.[45] Presuming that the property was free from restrictions, Schmidt bought the property to fulfill his dream.[46] However, "When Schmidt began to lay the foundation for his shipbuilding enterprise, he was advised that the property had been . . . limited to residential use only."[47] Schmidt then brought suit against the realtor for fraud, negligent misrepresentation, and DTPA claims.[48]

Following the language of the DTPA, as well as that of *Dubow*, the Corpus Christi court explained that to recover damages for any deceptive act or practice under the controlling version of the DTPA, "[I]t [was] necessary to prove the [realtor's] conduct was a 'producing cause' of the injuries sustained."[49] While recognizing that the pre-1995 version of the DTPA did not require a plaintiff to show either reliance or foreseeability, the court found that reliance may be a factor in "deciding whether the defendant's conduct was a producing cause of damages to the plaintiff."[50] In the end, Schmidt's "expressed reliance upon the title commitment . . . [was] sufficient as a matter of law to negate the producing cause element of his DTPA claim against [the realtor]."[51]

3. The Texas Supreme Court

In the very year that the Texas Legislature amended section 17.50(a)(1) to require detrimental reliance, the Texas Supreme Court confirmed what these other courts had suspected: reliance is inherent in producing cause.[52] The Supreme Court explained that the "as is" clause in the purchase

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *See id.*

[47] *Id.*

[48] *See id.*

[49] *Id.* at 38–39 (citing Weitzel v. Barnes, 691 S.W.2d 598, 600 (Tex. 1985)).

[50] *Id.* at 39.

[51] *Id.* at 41.

[52] *See* Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd., 896 S.W.2d 156, 160–61 (Tex. 1995).

agreement at issue precluded the consumer from proving that the defendant's conduct caused any harm.[53] In other words, the consumer's contractual disavowal of reliance negated the element of producing cause.[54] Long before the Texas Legislature amended section 17.50(a)(1) to include detrimental reliance as an independent element of a laundry-list claim, producing cause and reliance had become inseparably connected in DTPA jurisprudence.[55]

IV. THE ADDITION OF RELIANCE

A. A Word Without Meaning

The Texas Legislature ended the need for this reliance-is-implicit-in-producing-cause approach when it added detrimental reliance as a separate element for a cause of action under section 17.50(a)(1).[56] Attorneys and courts alike should take notice when the legislature explicitly adds an element to a cause of action.[57] Yet, some courts did not alter their analyses

[53] *Id.* (The agreement specifically provided: "Purchaser acknowledges that it is not relying upon any representation, statement, or other assertion with respect to the Property condition, but is relying upon its examination of the Property.").

[54] *Id.* Notably, the court did not suggest that an "as is" agreement could have such a "determinative effect in every circumstance . . . A seller cannot have it both ways: he cannot assure the buyer of the condition of a thing to obtain the buyer's agreement to purchase 'as is', and then disavow the assurance which procured the 'as is' agreement." *Id.* at 162.

[55] *See, e.g.*, *id.*; Weitzel v. Barnes, 691 S.W.2d 598, 602–03 (Tex. 1985) (Gonzalez, J., dissenting) ("I agree with the court that reliance is not an *express element* of a cause of action under the Deceptive Trade Practices Act. The Legislature did, however, require that some causal connection be established by the plaintiff prior to recovery under the Act."); Dubow v. Dragon, 746 S.W.2d 857, 859–60 (Tex. App.—Dallas 1988, no writ); *Bartlett*, 33 S.W.3d at 40 (noting that reliance on "external assessments of the feasibility of purchasing land has been held to introduce a 'new and independent' cause of the buyer's damages in several pertinent DTPA cases, thus negating the producing cause element of a DTPA claim").

[56] *See* Act of May 19, 1995, 74th Leg., R.S., ch. 414, § 5, sec. 17.50, 1995 Tex. Gen. Laws 2988, 2992; *see also* Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675, 686 (Tex. 2002) (recognizing that "reliance is not only relevant to, but an element of proof of . . . DTPA laundry-list violations").

[57] *See* City of Marshall v. City of Uncertain, 206 S.W.3d 97, 105 (Tex. 2006) (noting that courts should presume that "every word of a statute has been included or excluded for a reason"); Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535, 540 (Tex. 1981) (recognizing that "[t]he legislature is never presumed to have done a useless act," and that "[i]t is a rule of statutory construction that every word of a statute must be presumed to have been used for a purpose"); *see also* Donwerth v. Preston II Chrysler-Dodge, Inc., 775 S.W.2d 634, 639 (Tex. 1989) (Phillips, J.,

following this change.[58] At least two courts have seemingly ignored the presence of the word reliance altogether,[59] while the Dallas Court of Appeals has stayed true to *Dubow*'s causation analysis in at least two cases that, like *Dubow*, involved the purchase of a house.[60] In both cases out of the Dallas court, the sellers claimed on appeal that the juries erred in finding that the buyers had the requisite reliance because any misrepresentation the sellers made was not relied upon by the buyers.[61] Though reliance presented an independent issue in each case, the court cited *Dubow*'s discussion of producing cause in its analysis.[62]

Whatever else the Dallas court had done when it originally read producing cause to require a certain degree of reliance, it foreshadowed its own deference to a causation-dominant reading of reliance.[63] Instead of materially changing its analysis under section 17.50(a)(1) in response to the legislature's addition of the reliance element, the Dallas court has merely recognized that a consumer's reliance now presents an issue distinct from producing cause.[64] However, the impact of the addition does not end

concurring) ("When the legislature amends a law, it is presumed that it intends to change the law.").

[58] *See, e.g.*, Bernstein v. Thomas, 298 S.W.3d 817, 822–23 (Tex. App.—Dallas 2009, no pet.) (The court distinguished the facts before it from *Dubow*, but followed *Dubow*'s analysis); Kupchynsky v. Nardiello, 230 S.W.3d 685, 689 (Tex. App.—Dallas 2007, pet. denied); Larsen v. Carlene Langford & Assocs., Inc., 41 S.W.3d 245, 250, 253 (Tex. App.—Waco 2001, pet. denied) (explaining that the element of reliance was negated which "affirmatively negate[d] the element of each claim that [the defendant's] conduct caused [the plaintiff] any harm").

[59] *See* Monsanto Co. v. Altman, 153 S.W.3d 491, 495 (Tex. App.—Amarillo 2004, pet. denied) (noting that a "consumer is not required to prove reliance as an element to recover under the [post-1995] DTPA"); *Larsen*, 41 S.W.3d 245, 250 (Tex. App.—Waco 2001, pet. denied) (failing to include reliance in its listing of the elements of a DTPA laundry-list action even though the alleged violations occurred in 1996). Following its error, the Waco court used reliance to explain a lack of causation, holding that the "as is" clauses in the parties' agreement "conclusively negate[d] the reliance element," and thus, affirmatively negated the element of each claim that the defendant's conduct caused the plaintiff's injury. *See id.* at 253.

[60] *See Bernstein*, 298 S.W.3d at 822–23; *Kupchynsky*, 230 S.W.3d at 689.

[61] *See Bernstein*, 298 S.W.3d at 822; *Kupchynsky*, 230 S.W.3d at 689 ("This Court [in *Dubow*] focused on the buyers' reliance upon the experts' opinions . . . . As a matter of law, the buyers' careful inspection of the house's condition 'constituted a new and independent basis for the purchase.'").

[62] *See Bernstein*, 298 S.W.3d at 822; *Kupchynsky*, 230 S.W.3d at 689.

[63] *See* Dubow v. Dragon, 746 S.W.2d 857, 859–60 (Tex. App.—Dallas 1988, no writ).

[64] *See Bernstein*, 298 S.W.3d at 821, 823 (addressing the element of reliance and producing cause as two separate issues on appeal); *Kupchynsky*, 230 S.W.3d at 688–89 (addressing the element of reliance and causation as two separate issues on appeal).

there.[65] Rather, because section 17.50(a)(1) now requires proof of reliance independent of producing cause, consumers may legitimately wonder whether their choice to verify a seller's claims has left them without a remedy under the DTPA in some jurisdictions.[66]

B. Independent Investigation and the Element of Reliance Under the DTPA

1. The Dallas Court of Appeals

Recent cases from the Dallas Court of Appeals reveal its adherence to a few main points regarding when a consumer's independent investigation will not negate the element of reliance.[67] If a consumer provides reliable evidence that he specifically relied on a seller's representations and that the consumer did not rely solely on his own investigation when making the decision to consummate a purchase, he can establish the element of reliance despite his own investigation.[68] As a part of this analysis, the Dallas court also considers whether the seller's assurances played a part in dissuading the consumer from further inspection.[69] The Dallas court has made it clear that the crucial fact is not whether the buyer procured an independent investigation, but whether the buyer expressly and exclusively relied on the professional opinions he received.[70]

[65] *See infra* Part V.

[66] *See id.*; Bartlett v. Schmidt, 33 S.W.3d 35, 39 (Tex. App.—Corpus Christi 2000, pet. denied).

[67] *See Bernstein*, 298 S.W.3d at 822–23; *Kupchynsky*, 230 S.W.3d at 689.

[68] *See Bernstein*, 298 S.W.3d at 822–23 (The buyers testified that they relied on the sellers' disclosure and assurance that there was nothing wrong with the house "to allay any concerns about the condition of the house, including the foundation, before they purchased it.").

[69] *See id.* at 823 (The sellers' "assurances about the condition of the house, and their specific representation that there was no defect or malfunction in the foundation, played a part in dissuading the [buyers] from further investigation."); *see also* Fernandez v. Schultz, 15 S.W.3d 648, 653 (Tex. App.—Dallas 2000, no pet.) ("Had Fernandez informed the Schultzes about the termites, they could have required their inspector to look more deeply for signs of termite damage.").

[70] *Fernandez*, 15 S.W.3d at 652; *see Bernstein*, 298 S.W.3d at 822; *Kupchynsky*, 230 S.W.3d at 689.

2. The San Antonio Court of Appeals

The San Antonio Court of Appeals has adopted a different approach.[71] Just this year it voiced its disagreement with the Dallas court in a case that involved defects in the foundation of a newly-purchased house.[72] The court explained that the seller could defeat the elements of causation and reliance under the DTPA by merely showing that the consumer's independent inspection afforded the same level of warning that the seller had "with regard to the structural condition of the house."[73] Once the seller established that he did not know "anything more or different than" the consumer did about the condition of the house, the consumer could not establish the elements of reliance or producing cause as a matter of law.[74] Instead of focusing on whether the consumer in fact relied upon the seller's representations and thereby suffered injury, the San Antonio court chose to focus on whether the seller had knowledge that the consumer did not possess.[75]

3. Outside the Dallas and San Antonio Courts of Appeals

Courts outside of Dallas and San Antonio have not directly stated the consequences of a consumer's independent investigation in a laundry-list suit.[76] The Austin Court of Appeals recently declined to answer what

[71] *See* Lesieur v. Fryar, No. 04-09-0397-CV, 2010 WL 2788277, at *7 (Tex. App.—San Antonio July 14, 2010, pet. filed); Lim v. Lomelli, No. 04-06-00389-CV, 2007 WL 2428078, at *4 (Tex. App.—San Antonio Aug. 29, 2007, no pet.) (mem. op., not designated for publication).

[72] *Lesieur*, 2010 WL 2788277, at *7 (disagreeing with the consumer's claim that it had previously adopted the Dallas court's approach and explaining, "Unlike our sister court, we did not hold that a pre-purchase inspection negates causation and reliance only when there is evidence the buyer relies solely on his inspector's report").

[73] *Id.* at *6.

[74] *Id.* at *6–7. *See also Lim*, 2007 WL 2428078, at *4 (holding that because the information on which the consumers claimed to have relied was equally available to them as a result of their inspection, they could not "establish that they detrimentally relied on the [seller's] alleged misrepresentations" as a matter of law).

[75] *See Lesieur*, 2010 WL 2788277, at *7. The San Antonio Court of Appeals did not ask whether the consumer plaintiff had presented any evidence that he had relied on the seller's representations, but instead placed the burden on the consumer plaintiff to present evidence that the seller had some knowledge that the consumer did not. *See id.* at *6.

[76] *See, e.g.*, Pleasant v. Bradford, 260 S.W.3d 546, 554 n.4 (Tex. App.—Austin 2008, pet. denied) (declining to actually answer what effect a consumer's independent investigation would have on the element of reliance). Upon turning to the shipbuilder's DTPA claims, the Corpus Christi court acknowledged that a "careful subsequent investigation" constitutes an intervening

effect, if any, a consumer's own inspection has on the element of reliance under the DTPA.[77] In fact, it sidestepped the question of whether an independent investigation barred a consumer's laundry-list claim by concluding that no independent investigation had even occurred.[78]

In that case, Jason and Ashley Bradford were preparing to purchase their first home, and they had found one particularly attractive to them because of its listed price per square foot on the Multiple Listing Service (MLS).[79] After viewing the home, the Bradfords went to the Bell County Appraisal District (Bell CAD) website and observed that the square footage listed matched what their realtor had represented.[80] They purchased the home and subsequently received a lender's appraisal that revealed that the house's square footage was less than what the realtor had originally told them.[81] Upon making this discovery, the Bradfords filed suit claiming fraud, negligent misrepresentation, and DTPA violations.[82]

In response to each of these claims, the realtor maintained that the Bradfords could not have relied on the MLS listing for square footage because they had viewed the Bell CAD website themselves.[83] Conversely, the Bradfords testified that they viewed the Bell CAD website solely to

and superseding, and thus producing, cause of a buyer's damages, but because the pre-1995 statute controlled, the Corpus Christi court did not attempt to answer whether a buyer's decision to undertake an investigation would correspondingly negate the post-1995 statutory element of reliance. *See* Bartlett v. Schmidt, 33 S.W.3d 35, 40 (Tex. App.—Corpus Christi 2000, pet. denied).

[77] The Austin Court of Appeals avoided clarifying the effect a consumer's independent investigation has on the element of reliance altogether. *See Pleasant*, 260 S.W.3d at 554 n.4.

[78] *See id.* at 555 (The court noted that regardless of the Corpus Christi court's holding, the actions of the plaintiff were "not an 'independent investigation' as contemplated" by the Corpus Christi court. Taking the plaintiff's testimony as true, "neither his viewing of the Bell CAD website nor [his wife's] professed partial reliance on that source would negate their continued reliance on the MLS listing.").

[79] *See id.* at 550–51 (The defendant realtor had listed the house on the Multiple Listing Service (MLS) and included the approximate heating area and listing price. "The MLS automatically calculated and listed the price per square foot at $65.52." The plaintiffs "testified that they were drawn to the listing's price per square foot because all the other houses they had viewed were priced between $75 and $80 per square foot.").

[80] *See id.* at 551.

[81] *See id.* at 552 (The measurement in the lender's appraisal was 253 feet less than that represented by the MLS listing, "resulting in a price per square foot of $76.07 rather than $65.52.").

[82] *See id.*

[83] *See id.* at 553.

establish the amount of property taxes and not to verify the square footage represented.[84] They also testified that they relied on the MLS listing of the price per square foot.[85] The Austin court accepted the Bradfords' testimony and found that that they had not performed an investigation to verify the price per square foot.[86] In a footnote, the court clarified its position: "We express no opinion whether the Bradfords' accessing the Bell CAD website in order to check the house's square footage would have been an investigation sufficient in scope to negate the element of reliance because we find sufficient evidence that the Bradfords did not conduct such an investigation."[87]

V. INDEPENDENT INVESTIGATION AS A BAR TO ACTION

A. Parallel Reliance Standards

While choosing not to articulate the effect an independent investigation has on a consumer's ability to prove the element of reliance, the Austin court made it clear that it recognized no distinction between the element of reliance under the DTPA and the element of reliance in common law fraud.[88] The Texarkana Court of Appeals has also recently indicated that common law fraud and the DTPA maintain parallel reliance standards.[89] In particular, it cited the Dallas court's DTPA producing-cause analysis in a case of common law fraud to support its statement that "independent inspections by the purchaser establish as a matter of law that the purchaser did not rely on another party's misrepresentation or failure to disclose."[90] In making this statement, the Texarkana court merged its analysis of

[84] *See id.* at 555 (Jason Bradford "claimed that he accessed the website to learn the property tax amount on the house, and his viewing of the square footage on the website was merely incidental to such purpose.").

[85] *See id.* at 553.

[86] *See id.* at 555 (The defendant-appellants did not argue that the Bradfords "measured the house or conducted any other investigation of the square footage. Instead, appellants' position appears to be that there was opportunity for an independent investigation." The court noted that "it is actually conducting an independent investigation that can indicate the absence of reliance.").

[87] *See id.* at 554 n.4.

[88] *See id.* at 553–54 (discussing the element of reliance in the DTPA simultaneously with the element of reliance in fraud).

[89] *See* Shoalmire v. U.S. Title of Harrison Cnty, No. 06-09-00034-CV, 2010 Tex. App. LEXIS 421, at *12–13 (Tex. App.—Texarkana Jan. 26, 2010, no pet.) (mem. op.).

[90] *See id.* at *12.

reliance in a case of common law fraud with the Dallas court's analysis of producing cause under the DTPA.[91] If courts do not distinguish the element of reliance in fraud from the element of reliance under the DTPA, then the way that courts have interpreted the element of reliance in fraud becomes central to determining the impact a consumer's independent investigation may have on the element of reliance under the DTPA in some jurisdictions.[92]

B. Independent Investigation and the Element of Reliance in Common Law Fraud

Several courts have strictly construed the element of reliance in fraud, holding that evidence of an independent investigation of the facts presented prevents a fraud claimant from claiming reliance on a seller's misrepresentations as a matter of law.[93] The Corpus Christi Court of

[91] *See id.*

[92] *See id.*; *Pleasant*, 260 S.W.3d at 553–54.

[93] *See* Bartlett v. Schmidt, 33 S.W.3d 35, 38 (Tex. App.—Corpus Christi 2000, pet. denied); Marcus v. Kinabrew, 438 S.W.2d 431, 432 (Tex. Civ. App.—Tyler 1969, no writ) ("[W]e think the rule in such cases is to the effect that where one hires experts to value the property and relies on their judgment in making the purchase, he cannot thereafter seek to recover when the information is incorrect."); *see also* Kolb v. Tex. Emp. Ins. Ass'n, 585 S.W.2d 870, 872 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.) (agreeing with the rule that "[w]here a person makes his own investigation of the facts, or relies upon expert opinions he has himself obtained, he cannot sustain a cause of action based upon misrepresentations made by others"); Lone Star Mach. Corp. v. Frankel, 564 S.W.2d 135, 138 (Tex. Civ. App.—Beaumont 1978, no writ) (finding that the plaintiff fell within the rule that "no purchaser who relies on his own investigation may successfully assert that he relied upon representations made to him by his vendor"); Mayfield Petroleum Corp. v. Kelly, 450 S.W.2d 104, 110 (Tex. Civ. App.—Tyler 1970, writ ref'd n.r.e.) ("If a purchaser makes a personal investigation which is free and unhampered and the conditions are such that he must obtain the information he desires, he is presumed to rely upon his own investigation rather than on representations made to him by his vendor."); Mann v. Rugel, 228 S.W.2d 585, 587 (Tex. Civ. App.—Dallas 1950, no writ); *but see* Maniatis v. Tex. Mut. Life Ins. Co., 90 S.W.2d 936, 937 (Tex. Civ. App.—Waco 1936, no writ) ("Neither does the fact that appellee undertook to make an independent investigation defeat its right as a matter of law to rely on the alleged false representations, and this is especially true where the investigation failed to disclose the falsity of the representations or any suspicious circumstances concerning the same."); Durham v. Wichita Mill & Elevator Co., 202 S.W. 138, 142 (Tex. Civ. App.—Fort Worth 1918, writ ref'd) ("The mere fact that one makes a personal investigation, or consults with others, or has other sources of information open to him, does not necessarily show that he relied on such personal investigation, or the information gained therefrom, or through the other sources. The material question is, Did the party claiming fraud rely on false statements or misrepresentations made by the other?").

Appeals cited a number of cases to support the conclusion that "regardless of the result of [the] investigation, [a] buyer's decision to undertake . . . an investigation indicates that he or she is not relying on the seller's representations about the property."[94] However, the court's own language may not fully support this conclusion.[95] In particular, the court noted:

> Many courts have held that where false and fraudulent representations are made concerning the subject-matter of a contract, but the person to whom they are made, before closing the contract inspects and examines the subject of the contract, or conducts an independent investigation into the matters covered by the representations, which is sufficient to inform him of the truth . . . it is presumed that he places his reliance on the information acquired by such investigation.[96]

By its own terms, the presumption to which the Corpus Christi court pointed does not arise in every case where a person conducts an independent investigation,[97] nor does such investigation disqualify a person from claiming reliance on someone or something in addition to that investigation.[98] In spite of this, the Corpus Christi court concluded that common law fraud maintains a strict reliance standard that bars action when a plaintiff has undertaken his own investigation into the truthfulness of represented facts.[99]

Paradoxically, the Corpus Christi court held in another common law fraud case that a "person must exercise reasonable ordinary care for the protection of his own interests and discover the existence of fraud if he has knowledge of facts that would put a reasonably prudent person on

[94] *Bartlett*, 33 S.W.3d at 38.

[95] *See id.* (citing cases to support the proposition that independent investigation negates reliance when such investigation "is sufficient to inform him of the truth").

[96] *Id.* (quoting Marcus v. Kinabrew, 438 S.W.2d 431, 432 (Tex. Civ. App.—Tyler 1969, no writ).

[97] *See id.* (It only arises in cases where the investigation is "sufficient to inform [a plaintiff] of the truth.").

[98] At least not in the context of the DTPA. *See* Fernandez v. Schultz, 15 S.W.3d 648, 653 (Tex. App.—Dallas 2000, no pet.).

[99] *See Bartlett*, 33 S.W.3d at 40; *see also* TCA Bldg. Co. v. Entech, Inc., 86 S.W.3d 667, 674 (Tex. App.—Austin 2002, no pet.) ("The non-existence of any of the requisite elements of a fraud action, whether as a matter of law or fact, is fatal to the claim.").

inquiry."[100] Thus, the nature and circumstances of a given transaction may put a person on notice of the need to make further investigation, but the person who so investigates, regardless of what the investigation fails to reveal, cannot thereafter "be said to have relied upon the misrepresentations of others."[101] Under such a rule, fraud claimants face the trap of potentially having a duty to investigate but conclusively establishing a lack of reliance once they fulfill that duty.[102]

Inasmuch as the Austin and Texarkana courts' opinions suggest that the element of reliance under the DTPA parallels the element of reliance in common law fraud, they imply that any level of independent inspection effectively bars a cause of action under the DTPA because, like fraud, it has included reliance as an essential element since 1995.[103] Other courts may likewise choose not to distinguish the element of reliance in the context of common law fraud from the element of reliance within the framework of the DTPA.[104] Thus, the all-or-nothing approach many courts have applied to the element of reliance in common law fraud cases may find its way into laundry-list suits in some jurisdictions.[105]

[100] Arroyo Shrimp Farm, Inc. v. Hung Shrimp Farm, Inc., 927 S.W.2d 146, 153–54 (Tex. App.—Corpus Christi 1996, no writ). Other Texas courts have similarly held that "a party to an arm's length transaction must exercise ordinary care and reasonable diligence for the protection of his own interests, and a failure to do so is not excused by mere confidence in the honesty and integrity of the other party." DeClaire v. G&B McIntosh Family L.P., 260 S.W.3d 34, 46 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *see* Taft v. Sherman, 301 S.W.3d 452, 457 (Tex. App.—Amarillo 2009, no pet.); TMI, Inc. v. Brooks, 225 S.W.3d 783, 795 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

[101] *Arroyo Shrimp Farm, Inc.*, 927 S.W.2d at 153.

[102] *See id.*

[103] *See* Shoalmire v. U.S. Title of Harrison Cnty., No. 06-09-00034-CV, 2010 Tex. App. LEXIS 421, at *12–13 (Tex. App.—Texarkana Jan. 26, 2010, no pet.) (mem. op.); Pleasant v. Bradford, 260 S.W.3d 546, 552–556 (Tex. App.—Austin 2008, pet. denied).

[104] *See Shoalmire*, 2010 Tex. App. LEXIS 421, at *12–13 (citing the Dallas Court of Appeals' discussion of producing cause as a part of its analysis of the element of reliance in fraud).

[105] *See Pleasant*, 260 S.W.3d at 554 (discussing the argument that "the very decision to undertake an investigation can indicate that the person is not relying on the information"); *see also* Bartlett v. Schmidt, 33 S.W.3d 35, 40 (Tex. App.—Corpus Christi 2000, pet. denied) (explaining that reliance on external assessments of the "feasibility of purchasing land has been held to introduce a 'new and independent' cause of the buyer's damages in several pertinent DTPA cases, thus negating the producing cause element of a DTPA claim").

VI. INDEPENDENT INVESTIGATION DOES NOT INEVITABLY BAR A LAUNDRY-LIST CLAIM

A. The DTPA Demands a Liberal Standard of Reliance

However, such a strict approach conflicts with the DTPA's explicit requirement that courts liberally construe and apply its provisions to protect deceived consumers.[106] The Texas Supreme Court has also explained that when courts construe the language of the DTPA, "the legislative intent rather than the strict letter of the Act will control."[107] Accordingly, courts must give reliance a meaning consistent with the DTPA's purpose "to provide consumers a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in a common law fraud or breach of warranty suit."[108] Courts fail to do so if they graft an all-or-nothing approach, which was born in the context of common law fraud, onto the DTPA's element of reliance whenever there is evidence of an independent investigation.[109] They also do not give reliance a meaning consistent with the DTPA's purpose if they place the burden on the consumer to provide evidence that the seller "knew anything more or different than" the consumer.[110]

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[106] *See* TEX. BUS. & COM. CODE ANN. § 17.44 (West 2002 & Supp. 2009) ("This subchapter shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection.").

[107] Pennington v. Singleton, 606 S.W.2d 682, 686 (Tex. 1980).

[108] Smith v. Baldwin, 611 S.W.2d 611, 616 (Tex. 1980). Consumers, who cannot recover under the DTPA, will likely find that they cannot recover under any other theory of liability. *See* Eagle Props., Ltd. v. Scharbauer, 807 S.W.2d 714, 724 (Tex. 1990). Or a consumer may plead DTPA violations not because the DTPA provides "the only remedy, but because it [provides] the most favorable remedy." PPG Indus., Inc. v. JMB/Houston Ctrs. L.P., 146 S.W.3d 79, 89 (Tex. 2004). Fraud requires proving that the representation was false and made with the intent that it be acted upon. Ernst & Young, L.L.P. v. Pac. Life Ins. Co., 51 S.W.3d 573, 577 (Tex. 2001). Negligent misrepresentation requires establishing a breach of a duty of care in obtaining or communicating false information. *Id.* On the other hand, the DTPA provides a private cause of action for consumers who have suffered injury from a seller's deceptive act or practice without having to prove the seller's state of mind or negligence. *See Eagle Props., Ltd.*, 807 S.W.2d at 724.

[109] *See Eagle Props., Ltd.*, 807 S.W.2d at 724 (recognizing that "misrepresentations which do not necessarily constitute common law fraud may be actionable under the DTPA").

[110] *See* Lesieur v. Fryar, No. 04-09-0397-CV, 2010 WL 2788277, at *5 (Tex. App.—San Antonio July 14, 2010, pet. filed); Lim v. Lomelli, No. 04-06-00389-CV, 2007 WL 2428078, at

B. Protecting Consumers Without Punishing Innocent Sellers

That being said, the liberal standard the DTPA demands does not require courts to rule in favor of consumers notwithstanding their own investigations.[111] Rather, courts need to balance between providing a remedy for deceived consumers and not punishing sellers whose conduct did not cause any harm.[112] Those who supported the 1995 addition of the reliance element did so because it limited "relief to consumers who had actually relied on a deceptive act of the seller."[113] In some cases a seller may be unaware of a defect in the goods sold or services provided while a consumer has already discovered the problem through his own investigation.[114] In such circumstances the seller would be liable only if the consumer actually relied on the seller's representations.[115]

C. Adopting a Joint Causation Framework

Correspondingly, inasmuch as reliance is inherent in producing cause, Texas law dictates that a consumer's independent investigation negates the element of reliance only if the consumer solely relied on that investigation.[116] The Texas Supreme Court and the legislature have long

*4 (Tex. App.—San Antonio Aug. 29, 2007, no pet.) (mem. op., not designated for publication); *see also Eagle Props., Ltd.*, 807 S.W.2d at 724 ("A defendant may be held liable for the deceptive trade practices described in § 17.46(b) . . . even if the defendant did not know that the representations made were false or did not intend to deceive anyone . . . . Thus, misrepresentations which do not necessarily constitute common law fraud may be actionable under the DTPA."). A consumer must prove a seller's knowledge or intent only if the language of the implicated laundry list item requires it. *See Pennington*, 606 S.W.2d at 686; TEX. BUS. & COM. CODE ANN. § 17.50(a)(1) (West 2002).

[111] Consumers must still prove that they relied on the seller's deceptive act or practice and that the deceptive act or practice caused an injury. TEX. BUS. & COM. CODE ANN. § 17.50(a)(1).

[112] *See* H. Research Organization, Bill Analysis, Tex. H.B. 668, 74th Leg., R.S. (1995) ("Supporters [of the addition of reliance to section 17.50(a)(1)] say the changes . . . are designed to return the [DTPA] to [its] role of actually protecting the consumer. These changes would stop sophisticated consumers from using [the DTPA] as a hammer against sellers of goods and services.").

[113] H. Research Organization, Bill Analysis, Tex. H.B. 668, 74th Leg., R.S. (1995).

[114] *See* Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd., 896 S.W.2d 156, 162 (Tex. 1995) (noting that while there may have been evidence that the seller "should have suspected the presence of asbestos in the . . . [b]uilding, there [was] no evidence that [the seller] actually knew of the asbestos" which the buyer discovered three years after purchasing the building).

[115] TEX. BUS. & COM. CODE ANN. § 17.50(a)(1)(B).

[116] *See id.* § 17.50(a); Haynes & Boone v. Bowser Bouldin, Ltd., 896 S.W.2d 179, 182 (Tex.

recognized that there may be more than one producing cause of damages under the DTPA.[117] Therefore, courts must determine whether reliance on the seller's representations and on the consumer's own investigation jointly caused the consumer's injury or whether a consumer's reliance on his own inspection alone caused the injury.[118] The consumer-claimant still bears the burden to prove the element of reliance,[119] while a defendant may attempt to overcome the consumer's evidence with his own evidence of facts that are inconsistent with a consumer's claim of reliance and producing cause.[120]

In other words, a seller may prove that a consumer's independent investigation negates the elements of reliance and producing cause because that investigation constitutes a superseding and intervening cause that destroys the causal connection between the seller's act and the consumer's injury as a matter of fact.[121] Unfortunately, some courts have misconstrued the legal concepts of intervening and superseding cause.[122] As a result,

1995).

[117] *See Haynes & Boone*, 896 S.W.2d at 182; Checker Bag Co. v. Washington, 27 S.W.3d 625, 635 (Tex. App.—Waco 2000, pet. ref'd); *see also* TEX. BUS. & COM. CODE ANN. § 17.50(a)(1) (requiring that the seller's act be a producing cause of damages, not the producing cause of damages).

[118] Thus, courts should focus, as the Dallas court has, on the question of whether a consumer has placed exclusive reliance on his own investigation. *See* Bernstein v. Thomas, 298 S.W.3d 817, 822 (Tex. App.—Dallas 2009, no pet.); Kupchynsky v. Nardiello, 230 S.W.3d 685, 689 (Tex. App.—Dallas 2007, pet. denied).

[119] Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675, 693 (Tex. 2002).

[120] This approach mirrors the concept of inferential rebuttal defenses. *See* Select Ins. Co. v. Boucher, 561 S.W.2d 474, 477 (Tex. 1978) ("The basic characteristic of an inferential rebuttal is that it presents a contrary or inconsistent theory from the claim relied upon for recovery."); Dillard v. Tex. Elec. Coop., 157 S.W.3d 429, 430 (Tex. 2005); Dew v. Crown Derrick Erectors, Inc., 208 S.W.3d 448, 450 (Tex. 2006) (plurality opinion); *In re* Nance, 143 S.W.3d 506, 513 n.7 (Tex. App.—Austin 2004, no pet.). A defendant may not submit questions to a jury regarding a factual theory that is inconsistent with the plaintiff's ground for recovery. Tex. R. Civ. P. 277. Instead, "The placing of the burden of proof may be accomplished by instructions rather than by inclusion in the question." *Id.*

[121] *See Dew*, 208 S.W.3d at 450; *In re Nance*, 143 S.W.3d at 513 n.7 ("Inferential rebuttal issues attempt to disprove a claim by establishing the truth of a positive factual theory that is inconsistent with some factual element of the ground of recovery.").

[122] *Compare* Shoalmire v. U.S. Title of Harrison Cnty., No. 06-09-00034-CV, 2010 Tex. App. LEXIS 421, at *12 (Tex. App.—Texarkana Jan. 26, 2010, no pet.) (mem. op.) (citing the Dallas Court of Appeals' discussion of intervening and superseding cause to conclude that "independent inspections by the purchaser establish as a matter of law that the purchaser did not rely on another party's misrepresentations"), *and* Bartlett v. Schmidt, 33 S.W.3d 35, 41 (Tex. App.—Corpus Christi 2000, pet. denied) (holding that the buyer's reliance on his own investigation negated the

these courts have carried a self-imposed burden of determining whether a consumer's choice to verify a seller's claims has negated the element of reliance as a matter of law instead of allowing the trier-of-fact to decide whether the consumer's reliance on the seller's representations caused any of the alleged injury.[123] If the trier-of-fact determines that the consumer's reliance on his own investigation constitutes the sole cause of the injury, then the consumer has failed to prove the element of reliance.[124] On the other hand, if the trier-of-fact finds that the consumer relied on the seller's representation despite his own investigation, the consumer has proved the element of reliance.[125]

Under this joint-causation standard, consumers may attempt to verify sellers' claims without inevitably forfeiting the ability to bring a suit based on the seller's false, misleading, or deceptive acts or practices. This standard incorporates a concept the Dallas Court of Appeals has advocated: while the failure of a consumer's own investigation may be a producing cause of his injury, it may not constitute the only producing cause of the injury suffered.[126] Not every investigation, nor the mere choice to investigate, negates reliance under section 17.50(a)(1) of the DTPA, even if it might do so in a case of common law fraud.[127]

element of producing cause despite accepting testimony that the seller's statements caused the buyer's damages), *with* Dallas Ry. & Terminal Co. v. Bailey, 151 Tex. 359, 367, 250 S.W.2d 379, 383–84 (1952) ("The theory of new and independent cause . . . is but an element to be considered by the jury in determining the existence or non-existence of proximate cause."), *and Dew*, 208 S.W.3d at 450 (stating that intervening and superseding cause "is one of a number of inferential rebuttal defenses that 'operates to rebut an essential element of the plaintiff's case by proof of other facts'").

[123] *See, e.g.*, Pleasant v. Bradford, 260 S.W.3d 546, 554 (Tex. App.—Austin 2008, pet. denied); Lesieur v. Fryar, No. 04-09-0397-CV, 2010 WL 2788277, at *7 (Tex. App.—San Antonio July 14, 2010, pet. filed).

[124] *See* Dubow v. Dragon, 746 S.W.2d 857, 860 (Tex. App.—Dallas 1988, no writ).

[125] *See* Nast v. State Farm Fire & Cas. Co., 82 S.W.3d 114, 121 (Tex. App.—San Antonio 2002, no pet.).

[126] Fernandez v. Schultz, 15 S.W.3d 648, 653 (Tex. App.—Dallas 2000, no pet.) ("Although it may be true that their inspector's failure to discover the termites inside the house was a producing cause of the [buyers'] damages, there nevertheless may be more than one producing cause of damages in a case."). Independent investigation of one representation also does not preclude the possibility of claiming reliance on another representation. *See* United Postage Corp. v. Kammeyer, 581 S.W.2d 716, 720 (Tex. App.—Dallas 1979, no writ) ("To admit to understanding one set of representations does not preclude one from claiming he relied upon another and conflicting set.").

[127] *See* Eagle Props., Ltd. v. Scharbauer, 807 S.W.2d 714, 724 (Tex. 1990); *see also* Smith v.

VII. CONCLUSION

Texas law does not require absolute reliance from consumers before they can maintain a cause of action from the DTPA's laundry list.[128] Yet, despite their application of a reliance standard intimately tied to producing cause, some Texas courts continue to ask whether evidence of independent investigation prevents consumers from asserting a laundry-list cause of action instead of asking whether reliance on a seller's representations caused any injury.[129] Courts that ask only whether a consumer's independent investigation bars a laundry-list claim demonstrate their failure to fully appreciate the DTPA's purpose and the relationship between reliance and producing cause. Although reliance necessarily implicates trust, consumers' efforts to verify sellers' representations do not invariably bar action under the DTPA.[130] Consumers can trust, but verify.

Baldwin, 611 S.W.2d 611, 616 (Tex. 1980). The Dallas Court of Appeals has recognized that "an independent inspection does not always supersede a seller's misrepresentations as a producing cause of damages to the buyer." Fernandez v. Schultz, 15 S.W.3d 648, 649 (Tex. App.—Dallas 2000, no pet.).

[128] *See* TEX. BUS. & COM. CODE ANN. § 17.50(a)(1) (West 2002) (requiring that the seller's act be a producing cause of damages, not the producing cause of damages); *see also Fernandez*, 15 S.W.3d at 653 ("[T]here nevertheless may be more than one producing cause of damages in a case.").

[129] *See* Bartlett v. Schmidt, 33 S.W.3d 35, 38 (Tex. App.—Corpus Christi 2000, pet. denied); Marcus v. Kinabrew, 438 S.W.2d 431, 432 (Tex. Civ. App.—Tyler 1969, no writ); *see also* Kolb v. Tex. Emp. Ins. Ass'n, 585 S.W.2d 870, 872 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); Lone Star Mach. Corp. v. Frankel, 564 S.W.2d 135, 138 (Tex. Civ. App.—Beaumont 1978, no writ).

[130] *See* Maniatis v. Tex. Mut. Life Ins. Co., 90 S.W.2d 936, 937 (Tex. Civ. App.—Waco 1936, no writ) ("Neither does the fact that appellee undertook to make an independent investigation defeat its right as a matter of law to rely on the alleged false representations, and this is especially true where the investigation failed to disclose the falsity of the representations or any suspicious circumstances concerning the same."); *see also* Durham v. Wichita Mill & Elevator Co., 202 S.W. 138, 142 (Tex. Civ. App.—Fort Worth 1918, writ ref'd) ("The mere fact that one makes a personal investigation, or consults with others, or has other sources of information open to him, does not necessarily show that he relied on such personal investigation, or the information gained therefrom, or through the other sources."); *United Postage Corp.*, 581 S.W.2d at 720 ("To admit to understanding one set of representations does not preclude one from claiming he relied upon another and conflicting set."); *Fernandez*, 15 S.W.3d at 649 ("[A]n independent inspection does not always supersede a seller's misrepresentations as a producing cause of damages to the buyer.").