NOT MORE THAN DICTA? WHETHER THE DTPA'S ADDITIONAL DAMAGES CAN QUADRUPLE ECONOMIC AND MENTAL ANGUISH DAMAGES UNDER *TONY GULLO MOTORS I, L.P. V. CHAPA*

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I. INTRODUCTION

For consumers, the most important component of the Texas Deceptive Trade Practices Act (DTPA) has always been its remedy scheme.[1] From its inception, the DTPA has used damage multipliers to encourage private consumer action and to discourage unfair trade practices.[2] Through the DTPA's historical renditions, the Act has allowed prevailing plaintiffs to multiply combinations of actual, economic, or mental anguish damages as additional damages depending on the statute at the time and the violation.[3] But the multiplier itself has been a source of confusion in recent Texas case law.[4]

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[1] RICHARD M. ALDERMAN, THE LAWYER'S GUIDE TO THE TEXAS DECEPTIVE TRADE PRACTICES ACT § 9.01 (2d ed. 2010) (quoting former Attorney General John L. Hill, "The DTPA's most significant contribution . . . was in the area of remedies.").

[2] *See* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (West 2011); *see also* Michael Curry, *The 1979 Amendments to the Deceptive Trade Practices–Consumer Protection Act*, 32 BAYLOR L. REV. 51, 52–53 (1980).

[3] *See* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (allowing "not more than three times" economic damages for a knowing violation and "not more than three times" economic and mental-anguish damages for an intentional violation); Deceptive Trade Practices-Consumer Protection, 66th Leg., R.S., ch. 603, § 4, sec. 17.50(b)(1), 1979 Tex. Gen. Laws 1327, 1330 (current version at TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (West 2011)) (allowing up to three times actual damages for a knowing violation); Deceptive Trade Practices-Consumer Protection Act, 63d Leg., R.S., ch. 143, § 1, sec. 17.50(b)(1), 1973 Tex. Gen. Laws 322, 327 (current version at TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (West 2011)) (allowing automatic trebling of actual damages).

[4] *Compare* Lin v. Metro Allied Ins. Agency, Inc., 305 S.W.3d 1, 10 (Tex. App.—Houston [1st

Despite the legislature's varied approaches to the DTPA's private remedy, the additional damages language remained unchanged from 1979 to 1995, and despite the 1995 amendments, Texas courts used the same additional damages multiplier between 1985 and 2006, which is when the Texas Supreme Court decided *Tony Gullo Motors I, L.P. v. Chapa*.[5] Prior to *Chapa*, the Texas Supreme Court had interpreted the language "not more than three times" to mean prevailing plaintiffs could add up to two times their actual damages.[6] At that time, prevailing plaintiffs were entitled to actual damages for any DTPA violation.[7] The 1995 amendments (which contain today's relevant language) to the additional damages language reintroduced the uncertainty to the calculation that still exists.[8] Today, prevailing plaintiffs can recover economic damages for an unintentional, unknowing violation; economic damages, mental anguish damages, and "not more than three times" economic damages for a knowing violation; and economic damages, mental anguish damages, and "not more than three times" both economic and mental anguish damages for an intentional violation.[9] Until *Chapa*, courts apparently applied the same calculation they had applied to additional damages under the 1979 language—that "not more than three times" meant the plaintiff could add up to two times the damage she was multiplying.[10] But when using the current statute in *Chapa*

Dist.] 2007) (mem. op.) (interpreting Section 17.50(b)(1) to allow economic damages plus additional damages of three times economic damages for a knowing violation), *rev'd on other grounds*, 304 S.W.3d 830 (Tex. 2009), *with* Ramsey v. Spray, No. 2-08-129-CV, 2009 WL 5064539, at *4 (Tex. App.—Fort Worth Dec. 23, 2009, pet. denied) (mem. op.) (interpreting Section 17.50(b)(1) to allow economic damages plus additional damages of two times economic damages for a knowing violation).

[5] 212 S.W.3d 299 (Tex. 2006). The 1979 language, however, was confusing to begin with as courts of appeals and commentators disagreed as to how additional damages functioned under the DTPA. *Compare* Jim Walter Homes, Inc. v. Valencia, 679 S.W.2d 29, 37 (Tex. App.—Corpus Christi 1984), *aff'd as modified* 690 S.W.2d 239 (Tex. 1985), *with* Jasso v. Duron, 681 S.W.2d 279 (Tex. App.—Houston [14th Dist.] 1984, writ denied); *see also* Curry, *supra* note 2, at 61–62 ("Therefore, under amended section 17.50(b)(1), a recovery of more than treble damages is possible.").

[6] *Valencia*, 690 S.W.2d at 241 (interpreting additional damages from Deceptive Trade Practices-Consumer Protection, 66th Leg., R.S., ch. 603, § 4, sec. 17.50(b)(1), 1979 Tex. Gen. Laws 1327, 1330 (current version at TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (West 2011)).

[7] § 4, sec. 17.50(b)(1), 1979 Tex. Gen. Laws at 1330.

[8] *Supra* note 4.

[9] TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (West 2011).

[10] *See, e.g.*, Allstate Indem. Co. v. Hyman, No. 06-05-00064-CV, 2006 Tex. App. LEXIS 2128, at *32 (Tex. App.—Texarkana March 21, 2006, no pet.); Dal-Chrome Co. v. Brenntag Sw.,

to illustrate a point in deciding another issue, the Texas Supreme Court said the plaintiff could add up to *three* times whatever the plaintiff was multiplying for a knowing or intentional violation.[11] This statement has caused confusion among courts trying to interpret Texas law.[12]

To illustrate, imagine Carla Consumer prevailed at trial against Slick Rick's Auto Shop, and the jury found $10,000 economic damages and $5,000 mental anguish damages for a knowing violation of the DTPA. Under pre-1995 additional damages precedent, Carla could receive up to two times the economic damages in addition to economic damages and mental anguish damages.[13] Thus, Carla could get up to $35,000.[14] However, under *Chapa*'s calculation, Carla could add up to three times the economic damages to the economic and mental anguish damages.[15] Thus, under *Chapa*, the plaintiff could receive up to $45,000.[16] If the violation had been intentional, the difference would only be exacerbated.[17] Even for a knowing violation, however, the gap between the two calculations will only increase as the damages do.[18]

This comment evaluates the *Chapa* calculation's validity by examining the development of the DTPA's additional damages multiplier. Part 0 describes the law immediately prior to *Chapa* and then explains how *Chapa* has created confusion. Part 0 explains the history of additional damages under the DTPA to illustrate what a departure *Chapa* is from the prior precedent, and Part 0 describes how lower courts are applying *Chapa*. Finally, Parts 0 and 0 analyze the precedential value of the *Chapa*

Inc., 183 S.W.3d 133, 144 (Tex. App.—Dallas 2006, no pet.); Garza v. Chavarria, 155 S.W.3d 252, 257 n.2 (Tex. App.—El Paso 2004, no pet.).

[11] Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299, 304 (Tex. 2006).

[12] *Supra* note 4.

[13] *See Dal-Chrome Co.*, 183 S.W.3d at 144.

[14] *See id.*

[15] *See Chapa*, 212 S.W.3d at 304.

[16] *See id.*

[17] *See id.* at 307 n.27 (noting that Chapa only requested the jury to find the conduct *knowingly*, but not *intentionally*). In that case, the pre-1995 calculation would produce up to $45,000 total (three times economic and mental anguish) whereas *Chapa*'s calculation would produce up to $60,000 total (four times economic and mental anguish). *See id.*

[18] *See id.* This comment is only concerned with knowing or intentional violations of the DTPA because they are the only types that allow the court to find additional damages. *See* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (West 2011). Unknowing, unintentional violations entitle the prevailing consumer to economic damages, but since such a violation does not allow additional damages, such violations are outside the scope of this comment. *See id.*

calculation and examine whether it is a correct statement of the law. In light of the pertinent Texas Supreme Court statements' role within the *Chapa* opinion and the legislative intent of the relevant statute, the *Chapa* calculation should have no value as precedent and is an incorrect statement of law.

II. THE MODERN REMEDY SCHEME AND THE *CHAPA* PROBLEM

When the Texas Supreme Court decided *Chapa* in 2006, the court used the additional damages language from the 1995 amendment to illustrate damage options for different causes of action the plaintiff had proven.[19] While the 1995 amendment used multiplying language similar to its predecessor, the amendment significantly altered the additional damage components.[20] Where pre-*Chapa* courts apparently treated the 1995 amendment as if it capped additional damages at twice the component multiplied such that the total was no greater than treble the component multiplied,[21] *Chapa* treated the language as if it allowed a quadruple multiplier.[22] To frame the problem, understanding the 1995 amendment and how the Texas Supreme Court used the statute's additional damage language in the *Chapa* opinion is crucial. In later analysis, a critical question will be whether the 1995 amendment warrants the *Chapa* court's calculation.

A. The 1995 Amendment

Before *Chapa*, the Texas Supreme Court had held in *Jim Walter Homes, Inc. v. Valencia* that the 1979 version of the DTPA section on additional damages (Section 17.50(b)(1) of the Texas Business and Commerce Code)[23] allowed no more than a total of three times actual damages.[24] In 1995, though, the legislature amended Section 17.50(b)(1) to change the

[19] 212 S.W.3d at 304.

[20] *See* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1); *see also* Deceptive Trade Practices-Consumer Protection, 66th Leg., R.S., ch. 603, § 4, sec. 17.50(b)(1), 1979 Tex. Gen. Laws 1327, 1330 (current version at TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (West 2011)).

[21] *See* cases cited *supra* note 10.

[22] *See Chapa*, 212 S.W.3d at 304.

[23] *See* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1). Additional damages remain in Section 17.50(b)(1) to this day. *Id.*

[24] Jim Walter Homes, Inc. v. Valencia, 690 S.W.2d 239, 241 (Tex. 1985).

additional damage scheme.[25] The legislature decided to narrow the effectiveness of the DTPA.[26] According to some Congressmen, the legislature wanted to return the DTPA to its original purpose: protecting actual consumers from those who hold a bargaining advantage over them.[27] The worry was that plaintiffs who did not need statutory protection were using the DTPA to obtain large judgments.[28] Already concerned about tort damage judgments generally, the legislature used the 1995 amendments to further limit the opportunity for large judgments under the DTPA.[29] The 1995 amendments furthered these goals and changed DTPA additional damages.[30] Pre-1995, Section 17.50(b)(1) allowed prevailing consumers to recover actual damages plus two times the first $1,000 of actual damages, and if the trier of fact found a knowing violation, the trier of fact could find "not more than three times the amount of actual damages" beyond $1,000.[31] The 1995 amendment changed the scheme in two significant ways.[32] First, it removed automatic trebling of the first $1,000 entirely.[33] Second, it replaced "actual damages" with combinations of economic and mental anguish damages depending on the defendant's mindset.[34] After the 1995 amendment, the plaintiff cannot receive additional damages unless the trier of fact finds a "knowing" or "intentional" violation.[35] Without a knowing or intentional finding, the plaintiff can only recover economic damages.[36] If the defendant committed the violation knowingly, the trier of fact can find

[25] *See* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1); s*ee also* Teel Bivins et al., *The 1995 Revisions to the DTPA: Altering the Landscape*, 27 TEX. TECH L. REV. 1441, 1442–43 (1996).

[26] Bivins et al., *supra* note 25, at 1443.

[27] *Id.* ("The bill sponsors' objective . . . was to reestablish the original intent of the law to protect genuine consumers who encounter unscrupulous parties that are either more sophisticated or in a better bargaining position.").

[28] *See id.*

[29] *Id.*

[30] *See* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (containing the current version of additional damages); *see also* Bivins et al., *supra* note 25, at 1443.

[31] Deceptive Trade Practices-Consumer Protection, 66th Leg., R.S., ch. 603, § 4, sec. 17.50(b)(1), 1979 Tex. Gen. Laws 1327, 1330 (current version at TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (West 2011)); *see infra* Part 0.0.

[32] *Compare* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1), *with* § 4, sec. 17.50(b)(1), 1979 Tex. Gen. Laws at 1330.

[33] TEX. BUS. & COM. CODE ANN. § 17.50(b)(1); Bivins et al., *supra* note 25, at 1455.

[34] *Supra* note 32.

[35] *See* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1).

[36] *See id.*

economic damages, mental anguish damages, and "not more than three times the amount of economic damages."[37] If the defendant committed the violation intentionally, the trier of fact can find economic damages, mental anguish damages, and "not more than three times" the amount of economic damages *and* mental anguish damages.[38]

Notably, the legislature kept the "not more than three times" language.[39] While the legislature changed the additional damages scheme, the discretionary multiplier language at least appears the same.[40] Both the 1995 version and its predecessor use the words "not more than three times" to describe the additional damage multiplier.[41] This is the same phrase the Texas Supreme Court interpreted to mean that total damages were capped at treble damages in *Valencia* just ten years before the 1995 amendment.[42] Not surprisingly, courts continued to apply the *Valencia* interpretation to the 1995 scheme for more than ten years until *Chapa*.[43]

B. Tony Gullo Motors I, L.P. v. Chapa

In *Chapa*, Ms. Chapa sued Tony Gullo Motors (Gullo) and its employee (Garcia) under several causes of action, including DTPA claims.[44] At trial, the jury found knowing DTPA violations and $7,213 in economic damages

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[37] *Id.*

[38] *Id.* Specifically, the 1995 version (which is the current version) stated:

> In a suit filed under this section, each consumer who prevails may obtain . . . the amount of economic damages found by the trier of fact. If the trier of fact finds that the conduct of the defendant was committed knowingly, the consumer may also recover damages for mental anguish, as found by the trier of fact, and the trier of fact may award not more than three times the amount of economic damages; or if the trier of fact finds the conduct was committed intentionally, the consumer may recover damages for mental anguish, as found by the trier of fact, and the trier of fact may award not more than three times the amount of damages for mental anguish and economic damages . . . .

Id.; *see supra* Part 0 for illustration.

[39] *Supra* note 32.

[40] *Id.*

[41] TEX. BUS. & COM. CODE ANN. § 17.50(b)(1); Deceptive Trade Practices-Consumer Protection, 66th Leg., R.S., ch. 603, § 4, sec. 17.50(b)(1), 1979 Tex. Gen. Laws 1327, 1330 (current version at TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (West 2011)).

[42] Jim Walter Homes, Inc. v. Valencia, 690 S.W.2d 239, 241 (Tex. 1985).

[43] *See* cases cites *supra* note 10. Notably, a law review article authored by sponsors of the bill also did not even mention a change in the multiplier. *See generally* Bivins et al., *supra* note 25.

[44] Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299, 303 (Tex. 2006).

against both defendants.[45] Against Gullo, the jury found mental anguish damages of $21,639 and additional damages of $250,000.[46] As to Garcia, the jury found $8,000 in additional damages but no mental anguish.[47] The trial court, however, believed the DTPA violations (as well as fraud) were mere breach of contract and awarded Chapa only the $7,213 economic damages.[48] The trial court thus sidestepped any question of the proper application of the limit on additional damages under the DTPA.[49] Seeking to reinstate the jury verdict, Ms. Chapa appealed.[50]

On appeal, the Ninth Court of Appeals found the trial court erred in rejecting the jury's findings and reinstated all awards accordingly.[51] However, agreeing with the defendants that the punitive damages were too large to satisfy the Constitution, the Ninth Texas Court of Appeals offered a remittitur where Gullo was only liable for $125,000 in DTPA additional damages and $125,000 in exemplary damages for fraud.[52] The Ninth Court of Appeals, however, did not mention the appropriate calculation for a knowing DTPA violation under the 1995 amendments.[53] Regardless, Gullo and Garcia petitioned to the Texas Supreme Court, which took the appeal.[54] In the Texas Supreme Court, the defendants argued that Chapa could not recover under all causes of action because of the one satisfaction rule and

[45] *Id.* at 306–07.

[46] Chapa v. Tony Gullo Motors I, L.P., No. 09-03-568 CV, 2004 Tex. App. LEXIS 7751, at *12–13 (Tex. App.—Beaumont Aug. 26, 2004) (mem. op.), *rev'd*, 212 S.W.3d 299 (Tex. 2006). It is current practice to submit the additional damages question to the jury without telling the jury that their finding may be reduced to fit the DTPA's scheme. *See* COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES: BUSINESS, CONSUMER, INSURANCE, & EMPLOYMENT, PJC 115.11 (2010). Thus, the jury can give its honest assessment of the appropriate additional damages, and the court can later limit their finding according to the statutory scheme. *See* Ramsey v. Spray, No. 2-08-129-CV, 2009 WL 5064539, at *2 n.3 (Tex. App.—Fort Worth Dec. 23, 2009, pet. denied) (mem. op.) (explaining that the trial court reduced the jury's "additional" damages award of $2,000,000 down to $571,337.10 pursuant to the DTPA, which mandated the court to limit the amount at treble economic damages at the time).

[47] *Chapa*, 2004 Tex. App. LEXIS 7751, at *12–13.

[48] *Id.* at *1.

[49] *Id.*

[50] *Id.* at *1–2.

[51] *Id.* at *30–31.

[52] *Id.* at *25–26. The jury had found the same amount ($250,000) for exemplary damages under Chapa's fraud cause of action against Gullo as it had for the DTPA's additional damages. *Id.* at *13.

[53] *See generally id.*

[54] *See* Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299, 303 (Tex. 2006).

that the exemplary damage amount violated the Due Process Clause of the Fourteenth Amendment of the federal Constitution.[55] Further, the defendants argued Chapa could not recover the full attorney's fees under the DTPA because she had failed to segregate her fees.[56] Unfortunately for Chapa, the court agreed with the defendants on each of these points and remanded to determine the attorney's fees and exemplary damages for the fraud claim.[57] Because Chapa only claimed a single injury, the court held she could only recover under one claim.[58] Having prevailed on breach of contract, a knowing DTPA violation, and fraud, Chapa could elect the cause of action with the highest recovery, and she did not have to elect until she knew her recovery options.[59]

To begin analyzing Chapa's options, the court described her choice of remedies by calculating the possibilities for each cause of action.[60] As the court illustrated the damage elements each cause of action could yield, it presented a calculation for the knowing DTPA violation that deviated from the *Valencia* logic and created the problem addressed in this comment.[61] For breach of contract, Ms. Chapa could recover only economic damages and attorney's fees, and for fraud, she could recover only mental anguish damages, economic damages, and exemplary damages.[62] But for the knowing DTPA violation, the court stated she could recover "economic damages, mental anguish, and attorney's fees, but not additional damages beyond $21,639 (three times her economic damages)."[63] The court stated "but not" in reference to the Ninth Texas Court of Appeals' error in remitting the additional damages to $125,000.[64] Surprisingly, however, the court apparently meant Chapa would be entitled to economic damages plus mental anguish plus attorney's fees plus up to three times her economic damages.[65] With that formula, the trial court could quadruple her economic

[55] *See id.*

[56] *Id.*

[57] *Id.* at 314–15.

[58] *Id.* at 303.

[59] *Id.* at 314.

[60] *Id.* at 304.

[61] *Compare id.* (allowing for a quadrupling of damages), *with* Jim Walter Homes, Inc. v. Valencia, 690 S.W.2d 239, 241 (Tex. 1985) (allowing for a trebling of damages).

[62] *Chapa*, 212 S.W.3d at 304.

[63] *Id.*

[64] *See id.* at 304, 306–07.

[65] *See id.* at 314–15.

damages for a knowing violation.[66] Notably, however, the court made this statement while comparing the DTPA damages to the potential recovery of exemplary damages for fraud.[67]

In a footnote to the sentence setting forth the DTPA recovery, the court repeated its interpretation of Section 17.50(b)(1) by stating that if the jury had found an intentional violation, Chapa could have recovered "additional damages up to three times the amount of economic and mental anguish damages combined."[68] That statement's structure again conveys the message that additional damages—not total damages—could be as high as three times the combined total of the economic and mental anguish damages.[69] Once again, the court's formulation would allow quadruple economic and mental anguish damages for an intentional violation.[70] Later in the opinion, the court returned to the calculation of additional damages.[71] After upholding the verdicts for fraud and the DTPA violation, the court held Chapa was entitled to the exemplary damage and additional damage verdicts.[72] The next question was to determine how much, if any, of the $250,000 verdicts each cause of action allowed.[73] Analyzing additional damages under the DTPA, the court stated that additional damages were capped at three times economic damages.[74] Specifically, the court said, "Although the jury assessed exemplary damages for . . . deceptive acts at $250,000, the DTPA caps those damages at $21,639 (three times Chapa's economic loss of $7,213) . . . ."[75] As the court had done previously, the court followed this statement with a footnote stating that Section 17.50(b)(1) "limits additional damages to three times economic and mental anguish damages if conduct is committed *intentionally*."[76] Again, however, the court noted that Chapa had only obtained a knowingly verdict.[77] Regardless, the court had once more suggested that additional damages

[66] *See id.*
[67] *Id.* at 304.
[68] *Id.* at 304 n.6.
[69] *See id.*
[70] *See id.* at 314–15.
[71] *Id.* at 306.
[72] *Id.*
[73] *See id.* at 306–07.
[74] *Id.*
[75] *Id.*
[76] *Id.* at 307 n.27.
[77] *Id.*

could be up to three times economic damages for a knowing violation in addition to economic damages already found.[78]

Section 17.50(b)(1) was almost certain to limit DTPA damages far more than the Texas legislature had limited exemplary damages for fraud.[79] Perhaps recognizing that reality, neither party argued the proper calculation under Section 17.50(b)(1).[80] Instead, in their briefs, the parties addressed only the issue of the exemplary damage recovery in light of the federal constitutional concerns.[81] The court followed suit and did not address the DTPA calculation again until it summarized its remand instructions in its conclusion.[82] In that passage, the court summarized the holdings that would affect Ms. Chapa's election.[83] On remand, the lower courts needed to determine the attorney's fees for the DTPA claims and the exemplary damage amount for the fraud claim in accordance with the court's analysis.[84] Since Chapa would get mental anguish and economic damages under both the DTPA and fraud claims, Chapa's choice concerned only whether the DTPA's additional damages and attorney's fees would exceed fraud's exemplary damages.[85] Describing the DTPA recovery, the court stated that she was "entitled to $7,213 in economic damages and $21,639, in mental anguish."[86] The court then said, "[T]he most Chapa could recover [on remand] under the DTPA would be additional damages of $21,639 (three times her economic damages) plus attorney's fees of something less than $ 20,000 (depending on the new verdict)."[87]

As with previous statements in the *Chapa* opinion, the court apparently meant its conclusion's statements to mean that the trial court should add the

[78] *See id.*

[79] *Id.* at 307.

[80] *See id.* ("Accordingly, the court of appeals' opinion and the parties' briefs address only whether the exemplary damages were properly awarded based on fraud.").

[81] *Id.*

[82] *See id.* at 315.

[83] *Id.* at 314–15.

[84] *Id.* at 314.

[85] *Id.* at 315. Breach of contract was not much of an option at this point because breach of contract only allowed economic damages and attorney's fees, whereas the DTPA offered both of those plus additional damages and mental anguish damages, and fraud offered mental anguish damages, economic damages, and a potentially large exemplary damage award. *See id.* at 304.

[86] *Id.* at 314.

[87] *Id.* The court had previously held that the $20,000 attorney's fee award was too high because Chapa had not segregated her attorney's fees under the DTPA. *Id.* at 310.

additional damages to the economic and mental-anguish damages.[88] As the court stated, Chapa was entitled to both the economic and mental anguish damages, and, in addition, Chapa could recover additional damages, which alone (not the total damages) the court valued at three times her economic damages.[89] Reading this statement to say the most she could recover total would be the additional damages plus the attorney's fees does not make sense because that would not account for the mental anguish damages she was entitled to for the knowing violation.[90] Instead, the court was emphasizing the damages Chapa could get under the DTPA but not under fraud.[91] The passage confirms this conclusion when the court stated that if the exemplary damage finding exceeds the maximum for additional damages plus attorney's fees under the DTPA, then Chapa should obviously elect the fraud remedy.[92]

In short, the court's statements in *Chapa* suggest support for a position the court had rejected under the pre-1995 language—that is, that "not more than three times" in Section 17.50(b)(1) allows additional damages to quadruple either economic damages or both economic and mental anguish damages depending on the violation.[93] Yet, even assuming these statements used this quadrupling calculation, the context of the opinion raises some significant qualifications. Most importantly, the question of calculation of additional damages under Section 17.50(b)(1) was not before the court in *Chapa*.[94] Instead, the court addressed whether Chapa could recover under all three causes of action at once, whether Chapa was entitled to verdicts on her fraud and DTPA claims, whether the exemplary damages award violated Due Process, and whether Chapa could recover attorney's fees under the DTPA without segregating them.[95] In fact, after the court determined Chapa was entitled to both the fraud and DTPA verdicts, the court specifically stated that it did not need to further address additional damages under the DTPA because the parties had decided it was not worth

[88] *See id.* at 304 n.6.

[89] *See id.* at 314–15.

[90] *See* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (West 2011); *infra* Part 0.0.

[91] *See Chapa*, 212 S.W.3d at 314–15 (discussing the overlap and differences between the DTPA and fraud damages for the sake of Chapa's election).

[92] *See id.* at 315.

[93] *See* Jim Walter Homes, Inc. v. Valencia, 690 S.W.2d 239, 241 (Tex. 1985) ("We find no legislative intent [in Section 17.50(b)(1)] to provide for a quadrupling of damages in any case.").

[94] *See generally Chapa*, 212 S.W.3d 299.

[95] *Chapa*, 212 S.W.3d at 303, 308, 310.

arguing since the fraud exemplary damages could be much higher.[96] Another qualification is that the court used this different formula for additional damages without announcing the change.[97] Texas courts had used the *Valencia* interpretation for twenty years, and while the statutory language had changed since *Valencia*, the absence of announcement or explanation for the new approach is at the very least notable, if not suspect.[98]

And yet, to the lower courts' confusion and (undoubtedly) consumers' delight, the court's statements in *Chapa* stand. On remand, the parties settled, and at their request, the court of appeals vacated the trial court's judgment and remanded the case to the trial court with instructions to dismiss the case with prejudice.[99] As such, whether the lower courts would have applied the *Chapa* calculation is unknown.

III. ADDITIONAL DAMAGES BEFORE THE 1995 AMENDMENT

Chapa's quadruple damages scheme is quite a departure from additional damages' history under the DTPA. The DTPA has always incorporated additional damages as a private remedy, but the legislature has twice changed these damages: first in 1979 and again in 1995.[100] Despite these changes, the repeated use of the language "not more than three times" has been a source of confusion since the phrase first appeared in 1979.[101] Originally, however, the DTPA clearly provided for automatic treble damages, and that fact influenced the *Valencia* court when it interpreted "not more than three times" to mean that the total of additional and actual damages could not exceed three times actual damages.[102] Importantly, (except for a period of confusion between the 1979 amendment's enactment and *Valencia*) the DTPA has not previously allowed quadrupling of any of

[96] *Id.* at 306–07.

[97] *See id.* at 304, 304 n.6 (stating the calculation with no mention of its difference from prior practice).

[98] *See* cases cited *supra* note 10.

[99] Chapa v. Tony Gullo Motors I, L.P., No. 09-03-568 CV, 2007 Tex. App. LEXIS 9543, at *1 (Tex. App.—Beaumont Dec. 6, 2007, no pet.) (mem. op.).

[100] ALDERMAN, *supra* note 1, §§ 9.06, 9.061, 9.065[A] (2d ed. 2010).

[101] *See supra* note 5.

[102] *See* 690 S.W.2d 239, 241 (Tex. 1985) ("We find no legislative intent [in Section 17.50(b)(1)] to provide for a quadrupling of damages in any case.").

its damage components.[103] To explain this point, this Part briefly describes the pre-1995 history of additional damages under the DTPA.

A. Additional Damages Before the 1979 Amendment

Before the 1979 amendment, the DTPA provided automatic trebling of actual damages for any violation, regardless of culpability.[104] At that time, Section 17.50(b)(1) stated that a prevailing plaintiff could "obtain . . . three times the amount of actual damages plus court costs and attorney's fees."[105] In *Woods v. Littleton*, the Texas Supreme Court held that a prevailing plaintiff was entitled to treble proven actual damages automatically.[106] Thus, if Carla Consumer had proven $10,000 in actual damages, the pre-1979 Section 17.50(b)(1) gave her $30,000 automatically, regardless of whether the defendant had committed the violation knowingly or not.[107] While today's multiplier is discretionary instead of automatic,[108] the important difference from the *Chapa* calculation is that the Texas Supreme Court originally interpreted the DTPA as using trebled damages as a limit[109] whereas *Chapa* used a limit of quadrupled damages.[110] In the context of such a consumer-friendly statute and interpretation, the legislature modified additional damages for the first time in 1979, and six years later, that

[103] *Id.* Even concerning those pre-*Valencia* cases that had interpreted the 1979 amendment to allow for quadrupling of damages, *Valencia* overruled those interpretations. *Id.* ("We find no legislative intent to provide for a quadrupling of damages in any case.").

[104] Deceptive Trade Practices-Consumer Protection Act, 63d Leg., R.S., ch. 143, § 1, sec. 17.50(b)(1), 1973 Tex. Gen. Laws 322, 327 (current version at TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (West 2011)) (allowing automatic trebling of actual damages); Woods v. Littleton, 554 S.W.2d 662, 669 (Tex. 1977) (holding that the original DTPA allowed for automatic trebling of all actual damages), *superseded by statute*, Deceptive Trade Practices-Consumer Protection, 66th Leg., R.S., ch. 603, § 4, sec. 17.50(b)(1), 1979 Tex. Gen. Laws 1327, 1330 (current version at TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (West 2011)), *as recognized in* McKee Realtors, Inc. v. Martin, 651 S.W.2d 360, 361 (Tex. App.—Fort Worth 1983), *aff'd*, 663 S.W.2d 446 (Tex. 1984).

[105] § 1, sec. 17.50(b)(1), 1973 Tex. Gen. Laws at 327.

[106] 554 S.W.2d at 669.

[107] *See* § 1, sec. 17.50(b)(1), 1973 Tex. Gen. Laws at 327; *see also Woods*, 554 S.W.2d at 669.

[108] *See* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (West 2011).

[109] *Woods*, 554 S.W.2d at 669.

[110] Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299, 314–15 (Tex. 2006).

amendment would finally receive clarification from the Texas Supreme Court.[111]

B. The 1979 Amendment and Jim Walter Homes, Inc. v. Valencia

The 1979 amendment changed additional damages.[112] The language of Section 17.50(b)(1) changed so that a prevailing consumer could obtain:

> [T]he amount of actual damages found by the trier of fact. In addition the court shall award two times that portion of the actual damages that does not exceed $1,000. If the trier of fact finds that the conduct of the defendant was committed knowingly, the trier of fact may award not more than three times the amount of actual damages in excess of $1,000.[113]

This new language differed from the original wording in some significant aspects. For one, the legislature now required courts to award two times the first $1,000 of actual damages proven.[114] While this was new, the bigger change was the two qualifications the legislature added to the multiplier for damages beyond $1,000.[115] First, the plaintiff could not receive this multiplier unless "the trier of fact [found] that the conduct of the defendant was committed knowingly."[116] This introduced the defendant's mindset to additional damages.[117] Second, the language now read that the "trier of fact may award not more than three times the amount of actual damages in excess of $1,000."[118] Whereas the original language stated that the prevailing plaintiff could obtain three times actual damages, the amendment made the "trier of fact" the subject of the word "may."[119]

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[111] *See* Deceptive Trade Practices-Consumer Protection, 66th Leg., R.S., ch. 603, § 4, sec. 17.50(b)(1), 1979 Tex. Gen. Laws 1327, 1330 (current version at TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (West 2011)); Jim Walter Homes, Inc. v. Valencia, 690 S.W.2d 239, 241–42 (Tex. 1985).

[112] *Compare* § 4, sec. 17.50(b)(1), 1979 Tex. Gen. Laws at 1330, *with* § 1, sec. 17.50(b)(1), 1973 Tex. Gen. Laws at 327.

[113] § 4, sec. 17.50(b)(1), 1979 Tex. Gen. Laws at 1330.

[114] *Id.*; Curry, *supra* note 2, at 61.

[115] *Supra* note 114.

[116] *Supra* note 114.

[117] *Supra* note 114.

[118] § 4, sec. 17.50(b)(1), 1979 Tex. Gen. Laws at 1330.

[119] *Supra* note 112.

The statute also stated "not more than three times" instead of just "three times" actual damages.[120] By changing the language to read that "the trier of fact may award not more than three times" the actual damages, the 1979 amendments apparently gave courts discretion to determine whether or not the full multiplier was appropriate.[121]

The amendments left open, however, the question of just how this additional damage calculation worked for knowing violations.[122] Was the trier of fact supposed to award not more than three times the actual damages *in addition to* the actual damages found beyond $1,000? Or, was the total damages recovery beyond $1,000 limited to three times the actual damages finding in excess of $1,000? If Carla Consumer proved $15,000 actual damages for a knowing violation, the question was whether her maximum recovery would be $59,000 or $45,000. The $59,000 figure would come from taking the actual damages ($15,000), adding twice the first $1,000 ($2,000), and then adding three times the actual damages over $1,000 ($42,000). In contrast, the $45,000 figure comes from limiting the entire damage recovery to three times the actual damages—that is, an automatic trebling of the first $1,000 of actual damages ($3,000) and a discretionary amount no greater than the treble of the remaining actual damages (at most, $42,000). The court answered this question in *Valencia*.[123]

In *Valencia*, the Valencias had proven that Jim Walter Homes knowingly violated the DTPA.[124] The jury found $12,682 in actual damages and $38,046 in discretionary additional damages for the knowing violation.[125] The trial court adjusted the damages by taking the actual damages figure ($12,682), adding the double of the first $1,000 ($2,000), and then adding three times the remaining actual damages ($35,046).[126] The result was to triple the first $1,000 and then quadruple the remaining

[120] *Supra* note 112.

[121] *See* § 4, sec. 17.50(b)(1), 1979 Tex. Gen. Laws at 1330; Curry, *supra* note 2, at 61–62.

[122] *See* § 4, sec. 17.50(b)(1), 1979 Tex. Gen. Laws at 1330.

[123] 690 S.W.2d 239, 241 (Tex. 1985).

[124] *Id.* at 240.

[125] *Id.* Again, under the 1979 amendments, the additional damages beyond the automatic trebling of the first $1,000 were discretionary. *See* § 4, sec. 17.50(b)(1), 1979 Tex. Gen. Laws at 1330; Curry, *supra* note 2, at 61–62.

[126] *Valencia*, 690 S.W.2d at 240.

actual damages.[127] Or, put another way, the trial court's calculation was $1,000 less than the quadruple of the actual damages.[128]

On appeal, the Thirteenth Texas Court of Appeals affirmed the trial court's calculation.[129] The court said the purpose of Section 17.50(b)(1) was to shield unknowing violations from multiple damages beyond $1,000.[130] Thus, the court reasoned, that the legislature would intend a larger remedy against knowing violators made sense.[131] The appeals court understood the statute to allow greater than treble damages.[132] As support, the court pointed to the statute's requirement that interpretation favor consumers to further the DTPA's goals of protecting consumers from deceptive and unfair trade practices.[133] The court also cited a law review article by an attorney in the Consumer Protection-Antitrust Division of the Attorney General's Office and an article from the Texas State Bar.[134] Both of those articles came to the same conclusion about 17.50(b)(1): it allowed a recovery greater than treble damages for knowing violations.[135] Thus, the Valencias' $49,728 judgment survived the court of appeals.[136]

The Thirteenth Texas Court of Appeals' decision created a split in the courts of appeals regarding additional damages, and seeing this problem, the Texas Supreme Court reviewed the case.[137] Previously, the Texas Supreme Court had recited the Thirteenth Texas Court of Appeals' interpretation without ruling on that calculation's validity.[138] With the

[127] *See id.*

[128] *Id.*

[129] Jim Walter Homes, Inc. v. Valencia, 679 S.W.2d 29, 39 (Tex. App.—Corpus Christi 1984), *aff'd as modified*, 690 S.W.2d 239 (Tex. 1985).

[130] *Id.* at 37.

[131] *Id.*

[132] *Id.*

[133] *Id.* at 38; *see* TEX. BUS. & COM. CODE ANN. § 17.44 (West 2011).

[134] *Valencia*, 679 S.W.2d at 37; *see* Curry, *supra* note 2, at 61–62 ("Therefore, under amended section 17.50(b)(1), a recovery of more than treble damages is possible."); Philip K. Maxwell, *The 1979 Amendments to the Texas Deceptive Trade Practices—Consumer Protection Act*, *in* TEXAS CONSUMER LAW FOR GENERAL PRACTITIONERS A-1, A-7 (1979).

[135] *See* Curry, *supra* note 2, at 61–62 ("Therefore, under amended section 17.50(b)(1), a recovery of more than treble damages is possible."); Maxwell, *supra* note 134, at A-7.

[136] *Valencia*, 679 S.W.2d at 37, 39.

[137] Jim Walter Homes, Inc. v. Valencia, 690 S.W.2d 239, 241 (Tex. 1985). *Compare Valencia*, 679 S.W.2d at 37, *with* Jasso v. Duron, 681 S.W.2d 279, 281 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

[138] *Valencia*, 690 S.W.2d at 241; *see* Luna v. N. Star Dodge Sales, Inc., 667 S.W.2d 115, 116

calculation issue finally before it in *Valencia*, the Texas Supreme Court noted that before the 1979 amendments, "innocent misrepresentations" were subject to automatic treble damages.[139] With this in mind, the court found the legislature used the 1979 amendments to protect innocent violators of the DTPA from treble damages while still affording a meaningful remedy to consumers.[140] Citing debate in the House over the 1979 amendment, the court concluded that the legislature intended:

> (1) to preserve mandatory treble damages for consumers with small claims causes of action; (2) to eliminate automatic treble damages against sellers who make innocent misrepresentations; and (3) to allow consumers to recover treble damages at the discretion of the trier of fact in cases of knowing violations of the DTPA.[141]

The court stated that Section 17.50(b)(1) met these objectives with the new multiplier system.[142] However, the court found no legislative intent supporting a recovery beyond treble damages.[143] Instead, the court decided that the maximum recovery for a knowing violation was treble actual damages.[144] Applying the calculation to the *Valencia* case, the court reduced the award to $38,046—that is, three times the first $1,000 ($3,000) plus three times the remaining actual damages ($35,046).[145]

The court also addressed the Valencias' (and the Thirteenth Texas Court of Appeals') argument that Section 17.44 of the statute required the court to interpret Section 17.50(b)(1) in favor of the consumer and the DTPA's purpose.[146] The court responded by saying that a treble damage cap on knowing violations favors the purpose of the DTPA and protects

(Tex. 1984), *overruled in part by* Saint Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 651 n.1 (Tex. 1987), *overruled by* Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 17 (Tex. 1994).

[139] *See* 690 S.W.2d at 241.

[140] *Id.*

[141] *Id.* (citing The Texas Deceptive Trade Practice-Consumer Protection Act: Debate on Tex. S.B. 357 on the Floor of the House, 66th Leg., R.S. 3 (May 10, 1979) (tapes available from House Audio & Video Services)).

[142] *Id.* at 241.

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.* at 241–42.

consumers.[147] Seeing the purpose of multiple damages as an incentive for consumers to initiate DTPA lawsuits and a deterrent against violations, the court reasoned that a treble damage cap for knowing violations met both of those goals.[148] As further support, the court noted that a knowing violation under the 1979 amendments potentially yielded the same recovery as the predecessor language did.[149]

In the context of *Chapa*, *Valencia* raises the question of how much consideration the pre-amendment scheme should receive. Prior to 1979, the legislature had limited damages to three times actual damages,[150] and that limitation influenced the court's interpretation of the 1979 language.[151] The court found it unlikely that the legislature would have intended to limit the number of plaintiffs who could access discretionary additional damages to those who proved a knowing violation while raising the maximum additional damages available to an amount greater than it ever was before the amendment.[152] The 1979 language was neither strong nor clear enough to convince the court the legislature was raising the DTPA's total possible recovery.[153] In contrast, the *Chapa* calculation interprets the legislature as now allowing recovery greater than treble the base damages without any explanation or regard to the prior scheme.[154] Considering the current statute has the same "not more than three times" language as the 1979 statute,[155] this change without further court explanation is a sizable shift from *Valencia*'s consideration of the pre-1979 scheme in deciding how much change the legislature intended.

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[147] *Id.* at 242.

[148] *Id.*

[149] *Id.*

[150] Deceptive Trade Practices-Consumer Protection Act, 63d Leg., R.S., ch. 143, § 1, sec. 17.50(b)(1), 1973 Tex. Gen. Laws 322, 327 (current version at TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (West 2011)) (allowing automatic trebling of actual damages).

[151] *Valencia*, 690 S.W.2d at 242.

[152] *Id.*

[153] *See id.*

[154] *See* Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299, 304 (Tex. 2006).

[155] *Compare* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (West 2011), *with* Deceptive Trade Practices-Consumer Protection, 66th Leg., R.S., ch. 603, § 4, sec. 17.50(b)(1), 1979 Tex. Gen. Laws 1327, 1330 (current version at TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (West 2011)).

IV. JUDICIAL REACTION TO *CHAPA*

Given *Chapa*'s complete lack of discussion of how the 1995 amendment changed the additional damages multiplier, the question facing courts and practitioners is how to interpret *Chapa*'s unexplained calculation. Courts of appeals have faced additional damages since *Chapa*, and their mixed responses are helpful in evaluating *Chapa*. Courts have varied from following *Chapa*'s calculation without comment to ignoring it altogether. At least one, however, has attempted to address *Chapa*'s bearing on the law, and that court's response is especially important to evaluating *Chapa*'s validity. This Part discusses the cases that have cited *Chapa*'s calculation in some way, and for clarity, the cases are divided between those that favored and those that opposed the *Chapa* calculation.[156]

A. The Lower Courts Favoring the Chapa *Calculation*

Two cases have favorably cited the *Chapa* calculation, but neither openly addressed whether *Chapa* changed additional damages. Importantly, however, in both cases the court used the *Chapa* calculation to explain additional damages to the litigants. While the courts faced other issues at the time, the courts were clearly willing to follow the *Chapa* calculation when neither party objected. In the first case, *Bossier Chrysler-Dodge II, Inc. v. Riley*, the trial court had found Bossier liable for a knowing violation.[157] The jury had found $7,000 in economic damages, $28,000 in past mental anguish damages, and $5,000 in future mental anguish damages.[158] Apparently, the trial court read Section 17.50(b)(1) to

[156] This section excludes *Iniekpo v. Avstar Int'l Corp.* because the opinion appears to differ from the later findings in the costs and fees proceeding. *Compare* Iniekpo v. Avstar Int'l Corp., No. SA-07-CV-879-XR, 2010 U.S. Dist. LEXIS 75184, at *28 (W.D. Tex. July 26, 2010) ("Defendant shall recover $7,345 in actual damages for violation of the DTPA and trebled damages for Iniekpo's knowing or intentional violation of the DTPA."), *with* Iniekpo v. Avstar Int'l Corp., No. SA-07-CA-879-XR, 2010 U.S. Dist. LEXIS 104619, at *2 (W.D. Tex. Sept. 30, 2010) ("The Court rendered judgment on July 26, 2010 after a bench trial, in which the judge found Plaintiff had violated the DTPA and awarded Defendant $7,345.00 in damages, tripled by the statute for an intentional violation."). Since one document seems to follow the *Chapa* calculation while the other does not, its value for the analysis is negligible.

[157] Bossier Chrysler-Dodge II, Inc. v. Riley, 221 S.W.3d 749, 752 (Tex. App.—Waco 2007, pet. denied).

[158] Brief of Appellant at 23, Bossier Chrysler-Dodge II, Inc. v. Riley, 221 S.W.3d 749 (Tex. App.—Waco 2007, pet. denied) (No. 10-05-00049-CV), 2005 TX App. Ct. Briefs LEXIS 705 at *23.

cap past mental anguish damages at three times economic damages.[159] Thus, instead of awarding additional damages, the trial court reduced past mental anguish damages to $21,000 while leaving future mental anguish at $5,000.[160] In total then, the trial court awarded $26,000 in mental anguish.[161] On appeal, Bossier argued that Section 17.50(b)(1) actually limited *all* (past and future) mental anguish damages to three times economic damages.[162] In short, the trial court and Bossier had misread Section 17.50(b)(1) to limit mental anguish damages for knowing violations instead of allowing additional damages.[163] Seeing the error, the Tenth Texas Court of Appeals rejected Bossier's argument and explained Section 17.50(b)(1).[164] Citing *Chapa*, the court stated that a knowing violation allowed "'economic damages,' mental anguish damages, *and* additional damages of up to three times the amount of economic damages awarded."[165] Under that explanation, the maximum possible damages for Bossier's knowing violation could have been $56,000—that is, economic damages ($7,000) plus mental anguish damages ($28,000) plus three times economic damages ($21,000).[166] For Carla Consumer, this formula would allow a maximum of $45,000—that is, $10,000 economic damages, $5,000 mental anguish damages, and $30,000 additional damages.

The *Bossier* court's explanation relied on *Chapa* and apparently would allow quadruple economic damages plus mental anguish damages for a knowing violation.[167] Like *Chapa*, though, *Bossier* did not mention this as a departure from the pre-*Chapa* course.[168] Instead, the court just stated the *Chapa* calculation as its explanation and continued without pause.[169] Ultimately, the Tenth Texas Court of Appeals affirmed the trial court for all relevant purposes, and since the trial court had not found quadruple economic damages, the Tenth Texas Court of Appeals did not have to

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.* at *23–24.

[163] *Id.*

[164] Bossier Chrysler-Dodge II, Inc. v. Riley, 221 S.W.3d 749, 758–59 (Tex. App.—Waco 2007, pet. denied).

[165] *Id.* at 759 (emphasis added).

[166] *See id.*

[167] *See id.*

[168] *See id.*

[169] *Id.*

approve damages greater than treble economic damages for a knowing violation.[170]

In the second case, *Lin v. Metro Allied Insurance Agency, Inc.*, the jury found Metro liable for a knowing violation, but the trial court granted judgment notwithstanding the verdict.[171] On appeal, however, the First Texas Court of Appeals reinstated the jury's findings in a memorandum opinion.[172] The jury had found $175,000 in economic damages and $300,000 in additional damages.[173] On appeal, Metro argued the $300,000 were actually mental anguish damages, which were not supported by the evidence.[174] The court rejected that argument, concluding the jury instruction did not confine the finding to mental anguish.[175] Instead, the jury instruction asked the jury to determine an amount "in addition to actual damages" without defining that term, and Metro had not objected.[176] As such, the court decided to treat these damages as additional damages.[177] The court cited *Chapa* to explain that a knowing violation allows an additional award of up to three times economic damages.[178] Thus, the court stated that Lin's additional damages could have been three times the economic damages—that is, $525,000.[179] Thus, an additional award of $300,000 was permissible.[180] Importantly, however, Lin received this amount in addition to the $175,000 economic damages already found.[181] According to the First Texas Court of Appeals then, Lin could have gotten a maximum of $700,000—that is, quadrupled economic damages.[182] Unfortunately, like *Bossier*, the *Lin* court did not have to address whether Section 17.50(b)(1) allows recovery greater than treble economic damages plus mental anguish damages for a knowing violation because the jury's

[170] *Id.*

[171] 305 S.W.3d 1, 3–4 (Tex. App.—Houston [1st Dist.] 2007) (mem. op.), *rev'd on other grounds*, 304 S.W.3d 830 (Tex. 2009) (per curiam).

[172] *Id.* at 10.

[173] *Id.* at 3–4.

[174] *Id.* at 10.

[175] *Id.*

[176] *Id.* at 9–10.

[177] *See id.* at 10.

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *See id.*

[182] *See id.*

$300,000 additional damage finding would also have survived *Valencia*'s approach to the additional damage multiplier.[183] Under *Valencia*, Lin would be entitled to economic damages plus additional damages: except this time, additional damages could only be up to two times economic damages (rather than three).[184] In other words, Lin's maximum additional damages would be $350,000 (twice economic damages), and Lin's $300,000 additional damage finding would still survive.[185] Thus, like *Bossier*, *Lin* did not accept an additional damage award for a knowing violation greater than double economic damages.[186] To date, there is no such example. Also like *Bossier*, *Lin* did not comment about the *Chapa* formula being new or a departure from *Valencia*.[187]

Unlike *Bossier*, the Texas Supreme Court granted review in *Lin*.[188] Ultimately, in a per curiam opinion, the court reversed the court of appeals and reinstated the trial court's judgment notwithstanding the verdict ordering that Lin take nothing.[189] The court did not mention the court of appeals' additional damages formula, and the court of appeals' application of *Chapa* was neither affirmed nor denied.[190]

B. The Lower Courts Opposing the Chapa *Calculation*

While the courts favoring *Chapa* did so with no explanation or remark on the change, one case, *Texas Mutual Insurance Co. v. Morris*, refused to follow the new calculation and even criticized *Chapa*'s statements as obiter dicta.[191] Yet, *Morris* technically was not a DTPA case, though the provision of the Texas Insurance Code that Morris sued Texas Mutual under included similar additional damages language.[192] At trial, the jury had found $125,000 in actual damages and $500,000 in additional damages.[193] Believing additional damages could be no more than three

[183] *See supra* Part 0.0.

[184] *Id.*

[185] *See Lin*, 305 S.W.3d at 10; *supra* Part 0.0.

[186] *See supra* Part 0.0.

[187] *See generally Lin*, 305 S.W.3d 1.

[188] *See* Metro Allied Ins. Agency, Inc. v. Lin, 304 S.W.3d 830, 832–33 (Tex. 2009) (per curiam).

[189] *Id.* at 838.

[190] *See generally id.*

[191] 287 S.W.3d 401, 434 (Tex. App.—Houston [14th Dist.] 2009, pet. filed).

[192] *Id.* at 431–32.

[193] *Id.* at 431.

times actual damages, Morris requested his additional damages be reduced to $375,000.[194] The trial court, however, interpreted the statute to cap additional damages at twice actual damages.[195] Thus, the trial court reduced the additional damages to $250,000.[196]

On appeal, Morris attempted to convince the Fourteenth Texas Court of Appeals that the Texas Insurance Code allowed additional damages up to three times actual damages.[197] The court rejected Morris's statutory construction argument and turned to his alternative argument.[198] Morris asked the court to interpret the insurance statute similarly to how the Texas Supreme Court had interpreted Section 17.50(b)(1) in *Chapa* because the two statutes were analogous.[199] Citing *Chapa*, Morris argued the legislature must have intended a similar construction for the insurance statute since it enacted the insurance statute after the 1995 amendment to Section 17.50(b)(1).[200] Reviewing *Chapa*'s statements on DTPA additional damages, the Fourteenth Texas Court of Appeals found the validity of *Chapa*'s statements suspect.[201] To begin, the court noted those statements in *Chapa* were not necessary to the case.[202] Further, the court noted the Supreme Court neither appeared to have made the statements deliberately, nor did the Supreme Court appear to be instructing practitioners or courts on the conduct of future litigation.[203] Hence, the Fourteenth Texas Court of Appeals concluded the statements in *Chapa* were obiter dicta and should not be followed.[204] Unlike judicial dictum, obiter dictum has no persuasive value because it consists of statements that the court did not state deliberately after mature consideration for guidance of the conduct of future litigation.[205]

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[194] *Id.*

[195] *Id.*

[196] *Id.*

[197] *Id.*

[198] *Id.* at 433.

[199] *Id.*

[200] *Id.* at 433–34.

[201] *Id.* at 434.

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] *See* Edwards v. Kaye, 9 S.W.3d 310, 314 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

Morris is the only case so far to expressly address whether *Chapa* should be followed as a new formulation. The Fourteenth Texas Court of Appeals eventually rejected Morris's *Chapa*-based argument because *Chapa* was irrelevant to the insurance statute in question.[206] But *Morris* presents a significant obstacle to relying on the *Chapa* calculation. In *Chapa*, the Texas Supreme Court did not mention any shift in calculation or break from *Valencia*.[207] Further, because of the potentially large amount of exemplary damages available for fraud, the additional damages calculation was not an issue before the court in that case.[208] The court's silence on the shift and the fact that the *Chapa* calculation was unnecessary to the case both support the Fourteenth Texas Court of Appeals' conclusion that the calculation is merely obiter dicta.[209] Of course, *Morris* was not technically a DTPA case,[210] but the argument is a strong one.

In another post-*Chapa* case, *Ramsey v. Spray*, the Second Texas Court of Appeals adhered to the traditional formula without mentioning *Chapa*. In *Ramsey*, the jury found the Ramseys had knowingly violated the DTPA.[211] For damages, the jury found $200,000 economic damages, $100,000 mental anguish for each of the Sprays, and $2,000,000 in additional damages.[212] The trial court adjusted the economic damages to $190,445.70.[213] Believing Section 17.50(b)(1) allowed additional damages up to three times economic damages, the trial court awarded $571,337.10 in additional damages plus $190,445.70 economic damages.[214] Oddly, the trial court's decision to reduce the additional damages came at the Ramseys' request.[215] The Ramseys had argued $600,000 as the additional

[206] *Id.*

[207] *See generally* Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299 (Tex. 2006); *see also* Part 0.0.

[208] *Chapa*, 212 S.W.3d at 306–07 ("[T]he court of appeals' opinion and the parties' briefs address only whether the exemplary damages were properly awarded based on fraud.").

[209] *Morris*, 287 S.W.3d at 434.

[210] *See id.*

[211] Ramsey v. Spray, No. 2-08-129-CV, 2009 WL 5064539, at *1 (Tex. App.—Fort Worth Dec. 23, 2009, pet. denied) (memo. op.).

[212] *Id.* The *Ramsey* court uses the term "actual damages," but that term is the same as "economic damages" for DTPA purposes in this context because it is for the cost of repairing the house. *See id.*

[213] *Id.*

[214] *See id.*

[215] Petition for Review at 5, Spray v. Ramsey, No. 10-0249, 2010 Tex. LEXIS 722 (Tex. Oct. 1, 2010) (No. 10-0249), 2010 TX S. Ct. Briefs LEXIS 956 at *5.

damages limit under Section 17.50(b)(1), and the trial court apparently reduced accordingly.[216] Post-trial, however, claiming a mistaken calculation, the Ramseys asked the court to reduce the additional damages to twice economic damages.[217] The trial court denied this request and kept $571,337.10 additional damages.[218]

On appeal, the Ramseys argued to the Second Texas Court of Appeals that the trial court erred in allowing a total of quadruple economic damages for a knowing violation of the DTPA.[219] The Second Court of Appeals agreed with the Ramseys because it believed Section 17.50(b)(1) limited additional damages for a knowing violation to twice economic damages.[220] As support, the court of appeals cited its own decision released nearly a year before *Chapa*.[221] Finding that the trial court had abused its discretion in awarding quadruple economic damages, the Second Texas Court of Appeals remanded the case to the trial court to award additional damages twice the amount of economic damages.[222]

Thus, like *Morris*, *Ramsey* treats additional damages as if *Chapa* never happened, but unlike *Morris*, it also fails to mention *Chapa* altogether.[223] Since the Second Texas Court of Appeals did not address *Chapa*'s calculation, that neither party raised it seems likely. [224] The court of appeals would probably have said something if it intended to ignore *Chapa*.[225] If nothing else, the court of appeals would need to explain the weight of the Texas Supreme Court's statements in *Chapa*.[226] Nonetheless, unlike *Morris*, *Ramsey* is a DTPA case, and taken with the DTPA cases following

[216] *Id.*

[217] Response to Petition for Review at 10–11, 11 n.8, Spray v. Ramsey, No. 10-0249, 2010 Tex. LEXIS 722 (Tex. Oct. 1, 2010) (No. 10-0249), 2010 TX S. Ct. Briefs LEXIS 1230 at *10–11, *11 n.8.

[218] *Ramsey*, 2009 WL 5064539, at *1.

[219] *Id.* at *3–4.

[220] *Id.*

[221] *Id.* at *4 n.27 (citing Dal-Chrome Co. v. Brenntag Sw., Inc., 183 S.W.3d 133, 143–44 (Tex. App.—Dallas 2006, no pet.)).

[222] *Id.* at *4, *7.

[223] *See id.* at *4.

[224] *See id.*; *see* Petition for Review, *supra* note 215, at 9–11; Response to Petition for Review, *supra* note 217, at 10–11.

[225] *See Ramsey*, 2009 WL 5064539, at *3 n.21 (merely stating "the trial court erroneously exceeded this cap by awarding the Sprays four times the amount of economic damages" without specifically addressing *Chapa's* calculation).

[226] *See id.*

Chapa, *Ramsey* shows that courts are disagreeing as to the proper calculation for additional damages under Section 17.50(b)(1).[227] Given the disagreement, the question is whether the *Chapa* calculation should serve as precedent at all.

V. THE CORRECT APPROACH TO ADDITIONAL DAMAGES

The lower courts show that the law on additional damages after *Chapa* is unclear.[228] The question is what the law should be after *Chapa*—that is, how courts should treat *Chapa*.[229] Because the statements in *Chapa* amount to unpersuasive dicta, and the Texas Supreme Court's statement of additional damages incorrectly interprets the legislative intent for the 1995 amendments, lower courts should ignore the *Chapa* calculation and follow the *Valencia* holding.

A statement is dictum when it regards some rule, principle, or application of law in a particular case and that statement is not necessary to determine the case.[230] By its nature, dictum is not binding precedent, but it can be persuasive.[231] Dictum's persuasiveness depends on whether the court made the statement deliberately after mature consideration and intended the statement to guide the conduct of future litigation.[232] As mentioned earlier, persuasive dictum is judicial dictum whereas non-persuasive dictum is obiter dictum.[233] Each time the Texas Supreme Court made statements in *Chapa* concerning additional damages, it was comparing DTPA damages with Chapa's other options.[234] In other words, the court was describing Chapa's choice under the one-satisfaction rule.

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[227] *Id.* ("[T]he trial court *erroneously* . . . award[ed] the Sprays four times the amount of economic damages.") (emphasis added).

[228] *Supra* Part 0.

[229] *Compare* Lin v. Metro Allied Ins. Agency, Inc., 305 S.W.3d 1, 10 (Tex. App.—Houston [1st Dist.] 2007) (mem. op.) (interpreting Section 17.50(b)(1) to allow economic damages plus additional damages of three times economic damages for a knowing violation), *rev'd on other grounds*, 304 S.W.3d 830 (Tex. 2009), *with Ramsey*, 2009 WL 5064539, at *4 (interpreting Section 17.50(b)(1) to allow economic damages plus additional damages of two times economic damages for a knowing violation).

[230] Edwards v. Kaye, 9 S.W.3d 310, 314 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] *See* Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299, 304 & n.6, 307 & n.27, 315 (Tex. 2006); *see supra* Part 0.0.

However, the court resolved the case by holding that Chapa could only recover under one theory for a single injury, that the exemplary damages for fraud were unconstitutionally excessive, and that attorney fees had to be segregated.[235] The court specifically noted the parties had only briefed and argued the exemplary damages issue since the potential size of that award made fraud the likely choice on remand.[236] In short, the issue of additional damages was not even before the court.[237] It was merely background to Chapa's election and to why exemplary damages for fraud were important.[238] Since additional damages were not an issue before the court, they also were not determinative of the case.[239] As such, the statements regarding the calculation of additional damages were dicta.

The key inquiry, however, is whether the court's statements are persuasive dicta. The *Morris* court concluded the *Chapa* calculation is obiter dicta by restating the rule that it was neither deliberately stated after mature consideration nor made for guidance of future litigation conduct.[240] As discussed previously, the argument supporting this conclusion is strong.[241] The *Chapa* calculation broke from *Valencia*, and yet, *Chapa* did not mention a shift in interpretation.[242] Considering that the two formulas produce significantly different results, the court's nonchalant recitals of the *Chapa* calculation make doubtful that the court was hinting at how it would rule on this issue in the future. The casual nature of these statements plus the lack of explanation for the new interpretation appear far from deliberate statements resulting from mature consideration. The statements do not show an intent to change the law, and there is no evidence whatsoever of considerations for the change.

The statements also do not appear to be for the guidance of future litigation conduct. While the statements are certainly capable of citation for future litigation, the court's guidance on the subject is nonexistent. The court gives no justifying argument for this alleged new rule. There is no

[235] *See id.* at 314–15.

[236] *Id.* at 306–307.

[237] *See id.*

[238] *See id.*

[239] *Id.* at 307 (stating that the court will address "only whether the exemplary damages were properly awarded *based on fraud*") (emphasis added).

[240] Tex. Mut. Ins. Co. v. Morris, 287 S.W.3d 401, 434 (Tex. App.—Houston [14th Dist.] 2009, pet. filed).

[241] *See supra* Part 0.B.

[242] *See Chapa*, 212 S.W.3d at 315.

statutory construction of the 1995 amendments and no mention of the holding in *Valencia*. The language did not even identify the calculation as new, and there is nothing but the statement of the calculation itself to suggest guidance for the future. Considering the lack of a considered, deliberate statement and the silence on guidance for the future, the *Chapa* calculation is obiter dicta, and the lower courts should not follow it.

Chapa's additional damages dictum is also unpersuasive because the court's statement is legally incorrect. To apply Section 17.50(b)(1), the court must discern that section's legislative intent.[243] Even assuming arguendo that the statute's additional damages language is ambiguous, Section 17.50(b)(1)'s history reveals the statute's purpose.[244] The legislature is presumptively aware of judicial interpretations of prior versions of statutes.[245] Thus, when the legislature keeps similar language and structure from the predecessor version, courts should presume the legislature intended to keep the prior interpretation.[246] The 1995 amendment added different damage components and culpability to Section 17.50(b)(1), but it retained the multiplying language "not more than three times the amount" from the 1979 amendment.[247] Additionally, both statutes followed the same structure.[248] They both declared the base reward for a mere violation and then stated that if the trier of fact found that the defendant committed the violation with a specific mindset, the trier of fact could award "not more than three times the amount" of some damage.[249] The 1995 amendments' only changes regarded the automatic trebling of the first $1,000, the type of damages available, and an intentional violation remedy.[250] The structure of the statute and the multiplying language, however, remained the same as the 1979 version.[251]

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[243] *See* Jim Walter Homes, Inc. v. Valencia, 690 S.W.2d 239, 241 (Tex. 1985).

[244] *See id.* (describing three objectives the legislature sought to achieve by amending section 17.50(b)(1)).

[245] First Emps. Ins. Co. v. Skinner, 646 S.W.2d 170, 172 (Tex. 1983).

[246] *Id.*

[247] *Compare* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (West 2011), *with* Deceptive Trade Practices-Consumer Protection, 66th Leg., R.S., ch. 603, § 4, sec. 17.50(b)(1), 1979 Tex. Gen. Laws 1327, 1330 (current version at TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (West 2011)).

[248] *Supra* note 247.

[249] *Supra* note 247; *supra* Part 0.0.

[250] *See* Bivins et al., *supra* note 25, at 1455–56; *supra* note 247.

[251] *Supra* note 247.

Valencia's interpretation of the 1979 amendments' additional damage scheme is vital to the legislative intent for keeping the same language and structure in the 1995 amendments. In 1995, the legislature presumptively knew the Texas Supreme Court had interpreted "not more than three times" to limit additional damages to twice whatever was multiplied. Thus, when the legislature kept the same language and structure in the 1995 version, it must have intended that *Valencia*'s interpretation would continue to apply to the additional damages multiplier. If the legislature had intended a different reading, it could easily have used different language to more clearly convey a formula such as the one in *Chapa*. Since it did not, the correct way to apply Section 17.50(b)(1) is to follow the holding in *Valencia*. While *Chapa* gave no rationale for its calculation, its result is incorrect as it conflicts with legislative intent for Section 17.50(b)(1). Notably, arguing that *Chapa* overruled the analysis in *Valencia* is also incorrect. Again, in applying Section 17.50(b)(1), the Texas Supreme Court was interpreting the statute according to legislative intent.[252] By the statutory analysis above, the legislature essentially incorporated the *Valencia* holding into Section 17.50(b)(1). Thus, the Texas Supreme Court was unable to change its stance on Section 17.50(b)(1) by overruling *Valencia*.

VI. CONCLUSION

The *Chapa* calculation is thus an incorrect statement of law, and as obiter dicta, it is unpersuasive and should not be precedent for lower courts. Considering the confusion that this incorrect statement is creating, the Texas Supreme Court should correct the calculation for additional damages as soon as a case is available, or better yet, the legislature should amend the statute to remove any doubt of the intent for Section 17.50(b)(1). For now though, the *Chapa* statements stand uncorrected. Because of that, consumers would be remiss to ignore what could be a significant tool for increased damages, and conversely, defendants would be equally unwise to ignore this hazard.

[252] *See Valencia*, 690 S.W.2d at 241.