

IN THE SUPREME COURT OF TEXAS

No. 01-0346

PPG INDUSTRIES, INC., PETITIONER

v.

JMB/HOUSTON CENTERS PARTNERS LIMITED PARTNERSHIP, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

Argued on November 20, 2002

JUSTICE O'NEILL, joined by JUSTICE SCHNEIDER and JUSTICE SMITH, concurring in part and dissenting in part.

S, a car dealer, turns the odometer back on a vehicle that it sells to B, clearly a false and deceptive trade practice that the DTPA was designed to remedy. Unaware that the odometer has been tampered with, B sells the car to C a week later and assigns all warranties associated with it. The car immediately breaks down, and C discovers that the vehicle has 100,000 more miles on it than the odometer represents. After today, C has no remedy against S for deceptive trade practices because the Court indiscriminately outlaws the assignment of all DTPA claims, even those that do not raise the policy concerns the Court fears.

I agree with the Court that DTPA assignments have the potential to raise public policy concerns, and when they do we should address them. But before proceeding to abolish, wholesale,

the assignment of all DTPA claims – even those that would further the DTPA’s purposes – I would first decide whether HCC had a DTPA claim to assign. The Court skips over this threshold legal question to make a broader policy choice. Addressing the first question, I conclude that HCC was not a consumer under the DTPA and was therefore not entitled to invoke its protections. Having no DTPA claim itself, HCC certainly could not assign one. For this reason, I would reverse and render judgment against JMB on its DTPA claim without reaching the broader assignability question. But if I did reach that question, I would uphold the assignment in this case; it is consistent with the DTPA’s purpose and does not violate public policy. The Court’s decision today is inconsistent with our own jurisprudence and the legislative intent underlying the DTPA. Accordingly, I concur in the Court’s judgment insofar as it relates to JMB’s right to recover under the DTPA, although for different reasons. Further, I agree with the Court that limitations does not bar JMB’s claim regarding breach of the twenty-year seal warranty, but I disagree that the trial court erred in finding that the warranty applied as a matter of law. For reasons that the court of appeals expressed, 41 S.W.3d 270, 284, I would render judgment in JMB’s favor on the breach-of-warranty claim and respectfully dissent from the Court’s judgment remanding that claim for a new trial.

I. Deceptive Trade Practices Act

A. Consumer Status

In 1976, PPG contracted with HCC to provide glass and glazing for One Houston Center. As a buyer of PPG’s goods and services, HCC qualified as a consumer under the DTPA in effect at the time. In 1983, the Legislature excluded from the DTPA’s consumer protections entities like HCC whose assets exceeded \$25 million. In 1989, JMB, whose assets also exceeded \$25 million,

purchased the building and was assigned all warranties and claims associated with it. In 1994, after many windows had fogged or discolored, JMB sued PPG for breach of warranty and DTPA violations.

Assuming that PPG committed deceptive acts or practices in connection with selling and servicing its windows, as the jury found, only a “consumer” has standing to seek recovery against it under the DTPA. *See Knight v. Int’l Harvester Credit Corp.*, 627 S.W.2d 382, 388 (Tex. 1982). The 1973 version of the Act that applied when HCC purchased the windows defined “consumer” broadly to include a “corporation who seeks or acquires by purchase or lease, any goods or services.” Act of Apr. 10, 1975, 64th Leg., R.S., ch. 62, § 1, 1975 Tex. Gen. Laws 149, 149 (amended 1983) (current version at TEX. BUS. & COM. CODE § 17.45(4)). HCC clearly qualified as a “consumer” under this definition. HCC still owned the building in 1983 when the Legislature amended the statutory definition to exclude business consumers with assets exceeding \$25 million. Act of Aug. 29, 1983, 68th Leg., R.S., ch. 883, § 2, 1983 Tex. Gen. Laws 4943, 4943-44 (current version at TEX. BUS. & COM. CODE § 17.45(4)). HCC did not qualify as a consumer under the amended definition. For reasons that follow, I believe that the amended definition became effective immediately and operated to extinguish any DTPA claims that HCC might have had.

The DTPA is a statutory cause of action that the Legislature created to protect consumers damaged by deceptive trade practices. Having created the cause of action, the Legislature is free to repeal or amend it at any time. *See Knight*, 627 S.W.2d at 384. When a party’s right or remedy is dependent upon a statute, the repeal of that statute without a savings clause limiting the repeal’s effect operates to immediately deprive the party of all rights that have not become vested or been

reduced to final judgment. *Quick v. City of Austin*, 7 S.W.3d 109, 128 (Tex. 1999); *see also Knight*, 627 S.W.2d at 384; *Nat'l Carloading Corp. v. Phoenix-El Paso Express, Inc.*, 176 S.W.2d 564, 568 (Tex. 1943); *Dickson v. Navarro County Levee Improvement Dist. No. 3*, 139 S.W.2d 257, 259 (Tex. 1940). Thus, “suits filed in reliance on the statute must cease when the repeal becomes effective; if final relief has not been granted before the repeal goes into effect, final relief cannot be granted thereafter, even if the cause is pending on appeal.” *Quick*, 7 S.W.3d at 128; *see Knight*, 627 S.W.2d at 384 (citing *Dickson*, 139 S.W.2d at 259).

A savings clause may modify this general rule of abatement. *Quick*, 7 S.W.3d at 128-29. Texas’s general savings clause is found in section 311.031 of the Government Code, which provides that the repeal or amendment of a statute does not affect the statute’s prior operation or any rights previously acquired under it. TEX. GOV’T CODE § 311.031(a). In this case, the court of appeals applied the general savings clause and held that the 1983 amendments did not immediately apply to alter the consumer status of corporations whose assets exceed the \$25 million cap. 41 S.W.3d at 278-79. In doing so, though, the court ignored the 1983 Act’s more specific amendatory language. While it may be true that a specific savings clause does not necessarily negate section 311.031’s general application, that does not mean the more specific language may be disregarded. If contrary legislative intent can be found in the amendatory language, the general savings clause does not apply. *Quick*, 7 S.W.3d at 130. Accordingly, I begin by analyzing the 1983 Act’s amendatory terms.

The 1983 amendments to the DTPA effected three separate changes. First, as already said, the amendments excluded from the Act’s consumer protections businesses with assets exceeding \$25

million. Second, the legislation allowed smaller businesses with assets of \$5 million or more to waive the Act's protections by written contract. Finally, the Act added a definition of "business consumer." Act of Aug. 29, 1983, 68th Leg., R.S., ch. 883, §§ 1, 2, 1983 Tex. Gen. Laws 4943, 4943-44 (current version at TEX. BUS. & COM. CODE §§ 17.42, 17.45(4)). Section 4 then contains the following provision:

This Act applies only to *a contract executed* on or after the effective date of this Act. *A contract executed* before the effective date of this Act is governed by the law in effect when *the contract was executed*.

Act of Aug. 29, 1983, 68th Leg., R.S., ch. 883, § 4, 1983 Tex. Gen. Laws 4943, 4944 (emphasis added). The question, then, is whether this savings provision applies only to the portion of the amending act governing contractual waivers, or if it also preserves the consumer status of corporations with assets exceeding \$25 million as to transactions occurring before the amendment's effective date. I conclude that the specific amendatory language indicates the Legislature did not intend to leave the consumer status of corporations exceeding the asset cap intact as to pre-amendment transactions.

Section 4 of the 1983 Act specifically provides that the Act applies only to "contract[s] executed" on or after the amendments' effective date, indicating that it must have intended to preserve from the amendments' immediate effects contracts that were executed before. *Id.* The DTPA's protections, though, extend beyond transactions based upon written contracts. From its inception, the DTPA has defined a "consumer" as anyone "who seeks or acquires" goods or services. Act of May 21, 1973, 63rd Leg., R.S., ch. 143, § 1, 1973 Tex. Gen. Laws 322, 323 (current version at TEX. BUS. & COM. CODE § 17.45(4)). Thus, "consumers" do not need a written contract; the Act

encompasses those with oral contracts or no contract at all (*i.e.*, mere shoppers). If the Legislature truly meant the asset cap to apply only to “contracts executed” after 1989, then it has never become operative for oral contracts or shoppers. Such a reading would contravene the Legislature’s directive that, in construing statutes, we should presume that “the entire statute is intended to be effective.” TEX. GOV’T CODE § 311.021(2).

Moreover, the Legislature knows how to more broadly preserve claims if that is its intent. The Legislature clearly expressed its intent to “save” all claims arising in whole or in part before its 1979 and 1981 DTPA amendments became effective. As to the 1979 amendments, the Legislature stated that “[t]his Act shall be applied prospectively only. Nothing in this Act affects either procedurally or substantively a cause of action that arose either in whole or in part prior to the effective date of this Act.” Act of Apr. 10, 1979, 66th Leg., R.S., ch. 603, § 9, 1979 Tex. Gen. Laws 1327, 1332. The 1981 amendatory language is similarly broad: “Nothing in this Act shall affect procedurally or substantively a cause of action arising in whole or in part prior to the effective date of this Act.” Act of March 30, 1981, 67th Leg., R.S., ch. 307, § 2, 1981 Tex. Gen. Laws 863, 864. By contrast, the Legislature’s 1983 effective-date provision is carefully limited to executed contracts, which can only refer to the contractual waiver provision. As some commentators have noted:

There is no savings clause in the 1983 amendments to the DTPA which would save a business consumer’s pending cause of action. The savings clause of the 1983 amendments is applicable only to contracts executed before the effective date of the amendment (*i.e.*, waivers of DTPA claims in contracts executed before effective date are not valid.)

The Texas legislature clearly distinguishes its express intent regarding the immediate application of the 1979 and 1981 amendments to a pending cause of action from the 1983 amendments. In 1983, the legislature expressly chose to “save” only existing contracts (i.e., no valid disclaimer of DTPA rights in contracts executed before effective date) from immediate or retroactive application, and did not intend to “save” the cause of action of a business consumer (with more than \$25 million in assets) arising in whole or in part prior to the effective date of such amendment.

Andy A. Tschoepe II, et al., *Aspects of Defending a Texas Deceptive Trade Practices – Consumer Protection Act Claim*, 20 ST. MARY’S L.J. 527, 555-56 (1989).

Because the specific 1983 amendatory language indicates the Legislature did not intend to preserve a business consumer’s claim that arose before the effective date, the general savings clause found in section 311.031(a) has no application. Thus, the 1983 amendment establishing the \$25 million asset cap became effective immediately and extinguished HCC’s consumer status. As a nonconsumer, then, HCC had no cause of action under the DTPA when it sold the building to JMB in 1989; the only claims JMB acquired in that purchase were potential breach-of-warranty claims. For this reason, I agree that JMB may not recover under the DTPA. But if HCC did qualify as a consumer, I would uphold the assignment of its DTPA claim to JMB when it sold the building.

B. Assignability

The Court concludes that DTPA assignments in general, and the one in this case particularly, violate public policy and thwart the Legislature’s purpose. While this may be true in some other case, I fail to see it here. JMB owns the defective and allegedly misrepresented “Twindows” and has suffered real economic harm. JMB’s DTPA breach-of-warranty claim is, in essence, a property-damage claim, and such claims have long been freely assignable. *See, e.g., G.H. & S.A.R.R. v.*

Freeman, 57 Tex. 156, 157 (Tex. 1882); *Allstate Ins. Co. v. Kelly*, 680 S.W.2d 595, 610 (Tex. App.–Tyler 1984, writ ref’d n.r.e.); *Rosell v. Farmers Tex. County Mut. Ins. Co.*, 642 S.W.2d 278, 279 (Tex. App.–Texarkana 1982, no writ); *see also Thomes v. Porter*, 761 S.W.2d 592, 594 (Tex. App.–Fort Worth 1988, no writ) (holding DTPA claim survived owner’s death and could be pursued by estate). Moreover, common-law principles support the assignment in this case. *See Thomes*, 761 S.W.2d at 594 (applying common-law rules because the DTPA does not expressly provide for survival of a cause of action).

In *State Farm Fire & Casualty Co. v. Gandy*, we examined the history of assignments and the policy considerations underlying them. 925 S.W.2d 696, 705-11 (Tex. 1996). At early common law, a chose in action generally could not be assigned. *Id.* at 705. This aversion to assignments was based in part upon courts’ reluctance to increase or distort litigation. *See id.* at 706. Assignments were also disfavored because, under the common law, a chose in action presupposed a personal relationship between the parties which could not be transferred. *See id.*; *see also* JAMES B. AMES, *The Inalienability of Choses in Action*, in LECTURES IN LEGAL HISTORY 210, 211-212 (1913).

Over time, the demands of commerce eroded the disfavored status of assignments, although certain uniquely personal tort actions which affected their owner’s person, personal feelings, or character – such as slander, libel, battery, and false imprisonment – remained unassignable under the common law. *See Gandy*, 925 S.W.2d at 706-07; Walter W. Cook, *The Alienability of Choses in Action*, 29 HARV. L. REV. 816, 826-29 (1916). The continued nonassignability of such claims was justified by the concern that the factors determining liability and damages were so closely associated with the particular actors involved in the alleged wrongdoing that they could not be fairly assessed

when one of the actors was replaced. *See Gandy*, 925 S.W.2d at 706-07; *Freeman*, 57 Tex. at 157; *see also Mallios v. Baker*, 11 S.W.3d 157, 169 (Tex. 2000) (HECHT, J., concurring). But “when the injury affect[ed] the estate rather than the person . . . the right of action could be bought and sold.” *Freeman*, 57 Tex. at 157. Thus, assignability of property-damage claims long ago became the general rule. *See, e.g., Graham v. Franco*, 288 S.W.2d 390, 393 (Tex. 1972); *Stewart v. H. & T.C. R’y Co.*, 62 Tex. 246, 247 (1884); *Wolff v. Commercial Standard Ins. Co.*, 345 S.W.2d 565, 568 (Tex. Civ. App.–Houston 1961, writ ref’d n.r.e.); *Wichita City Lines, Inc. v. Pucket*, 288 S.W.2d 122, 124 (Tex. Civ. App.–Fort Worth 1956), *aff’d*, 295 S.W.2d 894 (1956); *see also Johnson v. Rolls*, 79 S.W. 513, 514 (Tex. 1904) (noting that at “common law all causes of action for damages die with the person of the party injured, or the person inflicting the injury, except such damages as grow out of acts affecting the property rights of the injured party”).

Gradually, assignability of choses in action expanded beyond contract and property-damage claims to include torts and other wrongful acts. *See Gandy*, 925 S.W.2d at 707. On the premise that assignability depended on survivability, the passage of the Texas Survivor Statute meant that personal injury claims became assignable. *See Act of May 4, 1895, 24th Leg., R.S., ch. 89, § 1, 1895 Tex. Gen. Laws 143 (amended 1985) (current version at TEX. CIV. PRAC. & REM. CODE § 71.021); Gandy*, 925 S.W.2d at 707 (“On the theory that assignability of a chose in action depended on whether it survived the owner’s death, personal injury claims thus became assignable in Texas.”); *Beech Aircraft Corp. v. Jinkins III*, 739 S.W.2d 19, 22 (Tex. 1987) (“We are mindful of the general rule that a cause of action for damages for personal injuries may be sold or assigned.”) (citations omitted). Thus, while some of the common law’s reservations still remain, choses in action are now

generally considered freely alienable. *See Gandy*, 925 S.W.2d at 707; *Doty v. Caldwell*, 38 S.W. 1025 (Tex. App. 1897, no writ); *see also Int'l Proteins Corp. v. Ralston-Purina Co.*, 744 S.W.2d 932, 934 (Tex. 1988) (“As a general rule a cause of action may be assigned . . .”).

In *Gandy*, which involved an attempted assignment of an insured’s DTPA and other claims against his insurer, we decided the claims’ assignability based on considerations of equity and public policy. 925 S.W.2d at 696; *see also Int'l Proteins*, 744 S.W.2d at 934 (invalidating assignment of plaintiff’s products liability and negligence claims to joint tortfeasor as contrary to public policy). The facts presented in *Gandy* are instructive. There, the plaintiff sued her stepfather, Pearce, for sexual abuse. *Gandy*, 925 S.W.2d at 698. State Farm, which insured the Pearce home, agreed to pay for Pearce’s defense and reserved its right to contest coverage. *Id.* at 699-700. Pearce and Gandy settled the case, and, as part of the settlement, Pearce assigned any claims against State Farm to Gandy. *Id.* at 700. Although Pearce had originally denied ever abusing Gandy, after the settlement was negotiated he agreed to a \$6 million adverse judgment reciting that he had abused her on 325 occasions. *Id.* at 712. And contrary to the position that Gandy took in her suit against Pearce, she argued in her suit against State Farm as Pearce’s assignee that Pearce would not have been liable had State Farm properly handled his defense, while Pearce returned to his original contention that he had never abused Gandy and would have proved his innocence had State Farm provided him with competent counsel. *Id.*

In holding that the assignment in *Gandy* was invalid, our concerns were twofold. First, rather than resolving the suit, the assignment prolonged the litigation. Even after the district court held as a matter of law that Gandy’s claims were not covered and that State Farm had no duty to

defend Pearce, the settlement practically guaranteed that litigation would continue because, “as Gandy’s counsel freely testified, the entire purpose of the arrangement was to find a way to recover against State Farm.” *Id.* Second, and more importantly, the assignment distorted the litigation, causing the parties to take “positions that appeared contrary to their natural interests for no other reason than to obtain a judgment against State Farm.” *Id.* Thus, we held the claims nonassignable based on public policy concerns. *Id.* at 713.

We have also held that Mary Carter agreements, which assign a plaintiff’s claims against a nonsettling defendant to a settling defendant, are void as against public policy. *Elbaor v. Smith*, 845 S.W.2d 240 (Tex. 1992). These arrangements “nearly always ensure a trial against the non-settling defendant” and “grant the settling defendant veto power over any proposed settlement between the plaintiff and any remaining defendant.” *Id.* at 248. They also confuse the jury by presenting “a sham of adversity” between the plaintiff and settling defendant. *Id.* at 249. We concluded that public policy did not support arrangements “that skew the trial process, mislead the jury, promote unethical collusion among nominal adversaries, and create the likelihood that a less culpable defendant will be hit with the full judgment.” *Id.* at 250. Similar concerns that arise when parties purport to assign legal malpractice actions. *See Zuniga, Jr. v. Groce, Locke & Hebdon*, 878 S.W.2d 313, 318 (Tex. App.–San Antonio 1994, writ ref’d) (noting that such assignments would cause “a demeaning reversal of roles” and a “shameless shift of positions”).

The assignment of HCC’s warranty-based DTPA claims to JMB when it purchased the building does not present the same concerns. The assignment did not spawn litigation that would not likely have occurred otherwise. Instead, the DTPA claims are in the hands of the defective

windows' owner, who seeks the same remedy the assignor could have pursued had it not sold the building. Furthermore, the assignment does not require the assignor and assignee to assume positions contrary to their natural interests, nor is the assignment likely to cause jury confusion. Consequently, the distortion of the litigation process that we deplored in *Gandy* and *Elbaor* is simply nonexistent.

The Court additionally premises its holding on the notion that, because the DTPA permits the recovery of enhanced damages, DTPA claims are punitive in nature and thus should not be assignable. Without question enhanced damages, by definition, produce an award that exceeds the amount of underlying damage and therefore have a punitive effect. But the DTPA's enhanced-damages provision also has a remedial purpose that the Court entirely ignores. The remedial aspect is expressed in the statutory language, which states that the Act's underlying purpose is "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." Act of May 21, 1973, 63rd Leg., R.S., ch. 143, § 1, 1973 Tex. Gen. Laws 322, 322-23 (amended 1995) (current version at TEX. BUS. & COMM. CODE § 17.44(a)); *see generally* John L. Hill, *Introduction to Consumer Law Symposium*, 8 ST. MARY'S L. J. 609, 609-12 (1977) (discussing the lack of consumer protections and the inadequacy of remedies for consumer complaints prior to the DTPA). The Legislature has expressed its intent that the DTPA be "liberally construed and applied to promote its underlying purposes" Act of May 21, 1973, 63rd Leg., R.S., ch. 143, § 1, 1973 Tex. Gen. Laws 322 (amended 1995) (current version at TEX. BUS. & COMM. CODE § 17.44(a)). We have observed that "one purpose of the DTPA's treble damages provision is to encourage privately

initiated consumer litigation, reducing the need for public enforcement.” *Pennington v. Singleton, III*, 606 S.W.2d 682, 690 (Tex. 1980). The DTPA’s enhanced-damages provision also acts as a deterrent in discouraging violations by others. That the damages in this case were mandatorily trebled indicates an intent that they be proportional to the magnitude of the harm caused and not dependent on the degree of the defendant’s culpability, making them less personal than ordinary punitive damages and underscoring the trebling provision’s remedial purpose. *See* Act of May 21, 1973, 63rd Leg., R.S., ch. 143, § 1, 1973 Tex. Gen. Laws 322, 327; *Woods v. Littleton*, 554 S.W.2d 662, 671 (Tex. 1977); *Pennington*, 606 S.W.2d at 691 (noting that culpability is an important consideration of section 17.50 as amended in 1979). Our decision in *Pace v. State*, 650 S.W.2d 64 (Tex. 1983), does not negate the DTPA’s remedial effect. There, plaintiffs sought to recover from the Real Estate Recovery Fund, a public fund the Legislature created to reimburse those who suffered monetary loss caused by unscrupulous real estate agents. *Id.* at 65. Relying on the statutory mandate that the fund be used “for reimbursing aggrieved persons who suffer *monetary damages*,” we noted that treble damages are punitive rather than restitutionary and “[t]herefore the Legislature could not have intended that treble damages be paid from the fund.” *Id.* at 65 (emphasis in original). Designed to remedy a public harm with limited funds, the Real Estate Recovery Fund specifically provided a limited remedy. That does not mean, however, that mandatory DTPA trebling is devoid of remedial purpose. The punitive aspect that the Court emphasizes is only one of several purposes that the DTPA serves.¹

¹ Many other courts, in assessing the assignability of enhanced damages under state law, have abandoned the remedial/punitive distinction, focusing instead on the underlying claim’s assignability. *See, e.g., Cuson v. Md. Cas. Co.*, 735 F. Supp. 966, 971 (D. Haw. 1990) (applying Hawaii law and holding that “punitive damages claims which have their

The closely analogous Sherman Anti-Trust Act provides a useful comparison. Similar to the version of the DTPA in question here, a violation of the antitrust act gives rise to a claim for mandatory treble damages. 15 U.S.C. § 15(a). As under the DTPA, these damages have a punitive effect, but they were also “designed to deter future antitrust violations” and were “created primarily as a remedy.” *Am. Soc’y of Mech. Eng’rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 575 (1982); *see, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977) (noting treble damages function to penalize and deter wrongdoers). And federal law is uniform in holding that an action to recover treble damages under the Sherman Anti-Trust Act “is not an action to recover a penalty” and is assignable. *See Hicks v. Bekins Moving & Storage Co.*, 87 F.2d 583, 585 (9th Cir. 1937) (citing *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390, 397 (1906)); *see also, e.g., Sampliner v. Motion Picture Patents Co.*, 254 U.S. 233, 234 (1920); *Gulfstream III Assocs., Inc. v.*

genesis in [assignable claims] are assignable as well”); *Fed. Deposit Ins. Corp. v. W.R. Grace & Co.*, 691 F. Supp. 87, 92 (N.D. Ill. 1988) (applying Illinois law and holding that punitive damages are assignable if the underlying claim is assignable because “punitive damages are a type of relief which is part and parcel of the underlying cause of action”), *rev’d in part on other grounds*, 877 F.2d 614 (7th Cir. 1989); *First Fed. Sav. & Loan Assoc. of Pittsburgh v. Oppenheim, Appel, Dixon & Co.*, 629 F. Supp. 427, 446-47 (S.D.N.Y. 1986) (applying federal and state law and concluding that “once a cause of action is determined to be assignable, a punitive damage claim based upon the cause of action may also be brought by the assignee”); *Oppel v. Empire Mut. Ins. Co.*, 517 F. Supp. 1305, 1307 (S.D.N.Y. 1981) (concluding that because “New York courts permit punitive damages in a bad faith case . . . there is no reason why this cause of action also cannot be assigned”); *Kleinwort Benson N. Am., Inc. v. Quantum Fin. Servs., Inc.*, 692 N.E.2d 269, 273-75 (Ill. 1998) (holding that punitive damages are a component of relief and are therefore “deemed a part of the underlying action,” and assignability favors the public policy goal of deterrence); *Clearwater v. State Farm Mut. Auto. Ins.*, 780 P.2d 423, 427 (Ariz. Ct. App. 1989), *vacated in part on other grounds*, 792 P.2d 719 (Ariz. 1990) (holding that under Arizona law a claim for bad faith was not a personal tort and neither law nor public policy prevented the punitive damages aspect of the claim from being assigned); *see also INS Investigations Bureau, Inc. v. Lee*, 709 N.E.2d 736, 742 (Ind. Ct. App. 1999) (applying Indiana law); *Allstate Ins. Co. v. Axsom*, 696 N.E.2d 482, 285-86 (Ind. Ct. App. 1998) (applying Indiana law and holding bad faith insurance claims assignable); *Kaplan v. Harco, Nat. Ins. Co.*, 716 So. 2d 673, 680 (applying Mississippi law and concluding that public policy goal of deterrence is fostered by allowing assignment of punitive damages). Under this line of authority, the assignability of DTPA treble damages would depend upon the assignability of JMB's underlying warranty claim, which has long been recognized as assignable. This result is consistent with our opinion in *Hofer v. Lavendar*, 679 S.W.2d 470, 472-75 (Tex. 1984), in which we held that punitive damages survive along with an underlying claim for personal injury.

Gulfstream Aerospace Corp., 995 F.2d 425, 431 (3rd Cir. 1993); *Chiropractic Coop. Ass'n of Mich. v. Am. Med. Ass'n*, 867 F.2d 270, 272 (6th Cir. 1989); *Health Care Equalization Comm. of the Iowa Chiropractic Soc'y v. Iowa Med. Soc'y*, 851 F.2d 1020, 1022 (8th Cir. 1988); *Klamath-Lake Pharm. Ass'n v. Klamath Med. Servs. Bureau*, 701 F.2d 1276, 1283 (9th Cir. 1983); *Fazakerly v. E. Kahn's Sons Co.*, 75 F.2d 110, 114 (5th Cir. 1935). That anti-trust violations result in injury to the property or business, not the person, of the individuals bringing claims further operates in favor of assignability. See *Moore v. Backus*, 78 F.2d 571, 576 (7th Cir. 1935); *United Copper Sec. Co. v. Amalgamated Copper Co.*, 232 F. 574, 577-78 (2d Cir. 1916).²

Finally, the Court vastly overstates our holding in *Amstadt v. United States Brass Corp.*, 919 S.W.2d 644, 647 (Tex. 1996). There, we addressed “whether the Legislature intended that upstream suppliers of raw materials and component parts be liable under the DTPA when none of their misrepresentations reached the consumers.” *Id.* at 652 (emphasis added). Our concern was that the deceptive act or practice touch the consumer transaction: “[the defendants’] actions were not

² Enhanced-damage awards under other federal statutory schemes have similarly been held to be nonpenal in nature and therefore assignable. These claims include treble-damage patent actions, see, e.g., *Cheremie v. Orgeron*, 434 F.2d 721, 723 (5th Cir. 1970); *Pierce v. Allen B. Du Mont Labs., Inc.*, 297 F.2d 323, 324-25 (3rd Cir. 1961); *Armstrong v. Emerson Radio & Phonograph Corp.*, 132 F. Supp. 176, 179 (S.D. N.Y. 1955); *Activated Sludge, Inc. v. Sanitary Dist. of Chicago*, 64 F. Supp. 25, 35-36 (N.D. Ill. 1946), fifty-percent penalties for civil tax fraud, see, e.g., *Reimer's Estate v. Comm'r of Internal Revenue*, 180 F.2d 159, 160 (6th Cir. 1950); *Kahr v. Comm'r of Internal Revenue*, 414 F.2d 621, 626 (2d Cir. 1969); *Rau's Estate v. Comm'r of Internal Revenue*, 301 F.2d 51, 55-56 (9th Cir. 1962); *Kirk v. Comm'r of Internal Revenue*, 179 F.2d 619, 621-22 (1st Cir. 1950), and treble-damage Truth-in-Lending Act claims, see e.g., *Porter v. Household Fin. Corp.*, 385 F. Supp. 336, 342 (S.D. Ohio 1974); *Murphy v. Household Fin. Corp.*, 560 F.2d 206, 211 (6th Cir. 1977); but see *Johnson v. Household Fin. Corp.*, 453 F. Supp. 1327, 1331 (S.D. Ill. 1978) (holding that because “actual damages are not a necessary allegation” of a complaint under the Truth-in-Lending Act, the statutory award is a civil penalty and does not survive). See also *W. Auto Supply Co. v. Gamble-Skogmo, Inc.*, 348 F.2d 736, 740-41 (8th Cir. 1965), *Derdiarian v. Futterman Corp.*, 223 F. Supp. 265, 270-71 (S.D.N.Y. 1963); *Int'l Ladies' Garment Workers' Union v. Shields & Co.*, 209 F. Supp. 145, 149-50 (S.D.N.Y. 1962); *Mills v. Sarjem Corp.*, 133 F. Supp. 753, 761-62 (D. N.J. 1955) (all holding that securities fraud claims, which limit recovery to actual damages, are assignable since they are neither penal nor personal).

connected with the plaintiffs' transactions, that is, *the sale of the homes*, in a way that justifies liability under the DTPA." *Id.* (emphasis added). There is nothing in our *Amstadt* opinion to suggest that, had the defendants' misrepresentations been directly connected with the homes' sale, subsequent buyers of the homes could not assert DTPA claims by assignment. This is entirely consistent with our decision in *Gupta v. Ritter Homes, Inc.*, 646 S.W.2d 168, 169 (Tex. 1983), which involved a homeowner's warranty-based DTPA claim against the builder, where we said:

As between the builder and owner, it matters not whether there has been an intervening owner. The effect of the latent defect on the subsequent owner is just as great as on the original buyer and the builder is no more able to justify his improper work as to a subsequent owner than to the original buyer.

Id. *Amstadt* simply did not concern warranty-based DTPA claims against a product supplier whose representations were made directly to the consumer – in this case HCC.

In sum, none of the theories that have been applied to determine a claim's assignability supports striking down the assignment in this case. Liability is predicated upon a breach-of-warranty property-damage claim, which has long been held assignable at common law. Recognizing the validity of such an assignment is consistent with the DTPA's underlying purposes and does not give rise to the policy concerns that led us to invalidate the assignment in *Gandy*. Just as C should be able to assert a DTPA claim against S for turning back his vehicle's odometer before sale, JMB should be able to step into HCC's shoes and, were HCC a consumer, assert a DTPA claim against PPG.

II. Breach of Warranty

JMB additionally asserts claims based upon PPG's alleged breach of five- and twenty-year warranties. I agree with the Court that limitations does not bar JMB's claims that are based on the twenty-year seal warranty. PPG contends, though, that JMB cannot recover under that warranty because it failed to obtain jury findings that the warranty formed the "basis of the bargain" and that JMB notified PPG of the defect within a reasonable time. *See* TEX. BUS. & COM. CODE §§ 2.313(a)(1), 2.607(c)(1). The Court agrees, holding that the trial court erred in finding these elements as a matter of law rather than submitting them to the jury. I disagree.

An issue that is conclusively established as a matter of law should not be submitted to the jury. *See T.O. Stanley Boot Co., Inc. v. Bank of El Paso*, 847 S.W.2d 218, 222-23 (Tex. 1992); TEX. R. CIV. P. 278 (requiring the court to submit to the jury only those questions raised by the pleadings and the evidence). Thus, if the trial court correctly found that these elements were conclusively established, it did not err in failing to submit them. *See Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 391-92 (Tex. 1997) (holding that trial court properly refused to submit a question unsupported by evidence to jury).

To be actionable, a representation relating to an express warranty must form a "basis of the bargain." *See* TEX. BUS. & COM. CODE § 2.313 cmt. 3; *Sweco, Inc. v. Cont'l Sulfur & Chem.*, 808 S.W.2d 112, 115 (Tex. App.—El Paso 1991, writ denied). PPG argues that the warranty could not have formed a basis of the bargain because there was no evidence PPG relied on it. JMB, on the other hand, relying on a comment to section 2.313, claims no particular reliance need be shown for a representation to become an actionable part of the agreement. Whether or not reliance is an

essential element of a breach-of-warranty claim is a question we recently noted in *Compaq v. Lapray* is undecided in Texas. ___ S.W.3d ___, ___ (Tex. 2004). But we do not need to answer that question here because, whether or not specific reliance is a necessary element, it was shown here.

It is undisputed that PPG published the twenty-year warranty in Sweet's Architectural Guide before HCC accepted its bid for the "Twindows" in order to induce customers to purchase its product. Jim Gatton, HCC's lead architect, testified that he depended upon the information that PPG provided in Sweet's Guide:

It was very important to us. It presented the Pittsburgh Plate Glass [PPG], as well as other glass products within the Sweet's Architectural file. We read it very closely. We were dependent upon the information that was printed about the glass in the Sweet's index.

Gatton specifically testified that he relied on the warranty, along with the product specifications provided in Sweet's, in selecting the "Twindows" for One Houston Center. The only evidence that PPG offered to controvert HCC's contention that it selected the "Twindows" based on the twenty-year warranty was Gatton's testimony that the warranty was not the *only* reason "Twindows" were chosen. But it is not necessary to a breach of warranty action to prove that the warranty was the only basis upon which a particular product was chosen. To become a "basis of the bargain," it need only be shown that the affirmation of fact or promise made to the buyer was *part* of the basis of the bargain, not the sole basis. *See* TEX. BUS. & COM. CODE § 2.313(a)(1).

The Court concludes that the trial court erred in determining as a matter of law that the twenty-year warranty was a basis of the bargain, in part, because Gatton "did not explain why he omitted it when he drew up the bid specification that included numerous other shorter warranties."

___ S.W.3d at ___. But Gatton testified repeatedly that the warranty was considered the equivalent of other specifications of the “Twindows,” such as U-value and shading coefficient, that also were not expressly stated in the contract. He explained that the twenty-year warranty was “part of the statement by PPG that they would provide along with the glass, along with the shading coefficient, stated with the U-value with everything else they said about the glass.” Gatton had previously testified that HCC chose “Twindows” based upon their shading coefficient, their U-value, and the warranty because these specifications best fit the building’s needs.

PPG also argues that it had revised the warranty to a ten-year limited warranty before it signed the contract to supply HCC windows, and offered in support a July 1, 1976, a letter from PPG’s senior vice president informing the trade that PPG was offering a ten-year warranty, effective September 1, 1976. But PPG presented no evidence that this letter was ever disseminated or published. Moreover, HCC accepted PPG’s bid on May 27, 1976, over three months before the purported revised warranty’s effective date. The testimony of PPG’s lay witnesses that the ten-year warranty was the operative one are conclusory legal opinions not binding on the court. *See Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex. 1991). PPG presented no evidence of rescission or modification of the twenty-year warranty. Thus, the trial court did not err in failing to submit the “basis of the bargain” issue to the jury.

PPG also contends that the trial court erred in failing to submit the issue of reasonable notice of breach of warranty to the jury. Again, I disagree. The question of reasonable notice may be decided as a matter of law. *See O’Ferral v. Coolidge*, 228 S.W.2d 146, 148 (Tex. 1950). Here, the uncontroverted evidence shows that HCC first notified PPG of a “halo effect” in some units in 1982.

PPG inspected the units and saw the problems first-hand. *See Carroll Instrument Co. v. B.W.B. Controls, Inc.*, 677 S.W.2d 654, 657-58 (Tex. App.—Houston [1st Dist.] 1984, no writ) (buyer gave adequate notice by showing defective part to seller). PPG received notification of problems with additional units in July 1989. PPG’s notice to JMB in October 1989 that it would no longer replace failed units also suggests that it had notice of the continuing problems.

In sum, the trial court did not abuse its discretion in refusing to submit the “basis of the bargain” or reasonable notice issues to the jury. Because legally sufficient evidence supports the jury’s finding that JMB neither discovered nor should have discovered PPG’s breach of the twenty-year warranty, I would affirm the court of appeals judgment in JMB’s favor on this claim.

As to the five-year warranty, PPG contends that JMB’s claims are barred by limitations. But JMB alleged the same injuries under the twenty-year warranty, and the jury awarded the same amount of damages for each breach that it found. Because the judgment can be sustained on the jury’s findings regarding JMB’s twenty-year warranty claim, I would not reach PPG’s arguments challenging recovery under the five-year warranty.

III. Conclusion

I would hold that JMB may not invoke the DTPA’s consumer protections, and therefore concur in the Court’s judgment to the extent it renders judgment against JMB on that claim. I also agree with the Court that limitations does not bar JMB’s claims based on breach of the twenty-year seal warranty. I disagree, though, with the Court’s sweeping conclusion that no DTPA claims are assignable and its conclusion that the trial court abused its discretion in the manner in which it submitted the breach-of-warranty claim to the jury. I would affirm the court of appeals’ judgment

on the breach-of-warranty claim. Because the Court remands that claim for a new trial, I respectfully dissent.

Harriet O'Neill
Justice

OPINION DELIVERED: July 9, 2004