NO. _____

PLAINTIFF	*	IN THE ___ DISTRICT COURT
	*	
V.	*	IN AND FOR
	*	
DEFENDANT(S)	*	_____ COUNTY, TEXAS

COURT'S CHARGE
(Source: T.R.C.P. Rule 226a, III)

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking questions [1] about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.[2]

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

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[1]Rule 278, T.R.C.P. (formerly a portion of Rule 279) states that "failure to submit a question [to the jury] shall not be deemed a ground for reversal . . . unless its submission, in substantially correct wording has been requested in writing and tendered by the complaining party . . . ." unless it is one relied upon by the opposing party. The same applies to a requested correct definition or instruction [even if one relied upon by the opposing party]. "Substantially correct" does not mean absolutely correct. "It means one that in substance and in the main is correct, and that is not affirmatively incorrect." ***Palencio v. Allied Industrial International, Inc.***, 724 S.W.2d 20, 21 (Tex. 1987), (emphasis by the Court). *See also* ***Marling v. Maillard***, 826 S.W.2d 735, 738 (Tex.App.—Houston [14th Dist] 1992, no writ yet).

[2]Rule 277, T.R.C.P. was amended effective January 1, 1988, to provide that "the [trial] court shall, whenever feasible, submit the cause under broad form questions. The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict." The rule is now mandatory; ***Callejos v. Brazos Elec. Power Coop, Inc.***, 755 S.W.2d 73 (Tex 1988). In ***Texas Department of Human Services v. E.B.***, 802 S.W.2d 647, 649 (Tex 1990) the Supreme Court held that once the trial court submits the cause under broad form questions with instructions and definitions, as mandated by Rule 277, "the standard for review is abuse of discretion, and abuse of discretion occurs only when the trial court acts without reference to any guiding principle." See also, ***Downer v Aquamarine Operators, Inc.,*** 70`1 S.W> 2nd 238, 241-42 (Tex 1985). A trial court abuses its discretion if it fails to analyze or apply the law correctly . ***Powell v Stover,*** 165 S.W. 3rde 322, 324 (Tex 2005) Each requested question and instruction is supported by an appropriate authority giving clear principles and should readily meet the standards of Rule 277 and ***TDHS v. E.B.***, supra.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to bide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answer made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

7. These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury, then all of our time will have been wasted.

8. The presiding juror or any other who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the jury not to do so again.

Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence *unless instructed*. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." The term "preponderance of the evidence" means the greater weight and degree of credible testimony or evidence introduced before you and admitted in this case. Whenever a question requires an answer other than "Yes" or "No," your answer must be based on a preponderance of the evidence *unless otherwise instructed.*

After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read alound and then you will deliberate upon your answers to the questions asked.

It is the duty of the presiding juror –

1. to preside during your deliberations,

2. to see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge,

3. to write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the judge,

4. to vote on the questions,

5. to write your answers to the questions in the spaces provided, and

6. to certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of this fact.

When you have answered all the questions you are required to answer under the instructions of the judge and your presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror or obtained the signature, you will inform the bailiff at the door of the jury room that you have reached a verdict, and then you will return into court with your verdict.

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JUDGE PRESIDING

A. SPECIAL INSTRUCTIONS

1. Every answer made by the jury to a question must be by a preponderance of the evidence. By a preponderance of the evidence it is meant the greater weight of credible evidence before you.

2. You will answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence. If you do not find that a preponderance of the evidence supports "Yes" answer, then answer "No." Whenever a question requires other than a "Yes" or "No" answer, your answer must be based on a preponderance of the evidence.

3. A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the word spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved. [3]

4. You will not take into consideration nor discuss any matters not produced in evidence before you, other than matters of common knowledge. [4] [.

5. The lack of intent or of knowledge to engage in a false, misleading or deceptive act or practice is not an element of inquiry in the questions brought under the Deceptive Trade Practices Act unless specifically set forth in either the question or a definition related to the question. [5]

6. The lack of intent to engage in fraudulent, deceptive or misleading representation is not an element of inquiry in the questions brought under the Debt Collection Act.

7. A corporation is bound by the knowledge of its agents if that knowledge came to him/her in the course of the agent's employment. [6]

8. Paul Payne has presented his claim for damages against the Contractor, Don Davis, under two "theories" of the law. A "theory" is a term used in law which means the legal basis for liability or the legal grounds of defense.

> **DTPA THEORY:** Paul Payne claims that Don Davis has violated the Deceptive Trade Practice Act (DTPA, herein). Don Davis, in his response says that he has not violated the DTPA nor has he committed any wrongdoing against Paul Payne and that if he did, he did not do it knowingly or intentionally.
>
> Additionally, Don Davis claims, that once Paul Payne learned that he might suffer damages, he failed to take reasonable action at hand to lessen or mitigate his damages, and further he was the cause in whole or in part of his own damages, if any.

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[3] P.J.C. 100.8 It is not error to give or refuse an instruction on circumstantial evidence. ***Larson v. Ellison***, 217 S.W.2d 420 (Tex. 1949); ***Johnson v. Zuricky General Accident & Liability Ins. Co.***, 205 S.W.2d 353 (Tex. 1947).

[4] See ***Joseph E. Seagrams & Sons v. McGuire***, 814 S.W.2d 385, 388 (Tex1991); ***Gillett Motor Transport v. Tipps***, 125 Tex. 571, 200 S.W.2d 624 (1947); ***Missouri Pacific R.R. Co. v. Kimbrell***, 334 S.W.2d 283, 286 (Tex. 1960); ***Tennessee Gas Transmission Co. v. Hall***, 277 S.W.2d 733 (Tex.. Civ. App. - San Antonio 1955, no writ); Ray, ***Law of Evidence***, Section 156; Texas Practice Series, Vol. 1, p. 202; 36 TEXAS L. REV. 681 (1958).

[5] ***Chastain v. Koonce***, 700 S.W.2d 579 (Tex. 1985); ***Weitzel v. Barnes***, 691 S.W.2d 578 (Tex. 1985).

[6] ***LaSara Grain v. First Nat'l Bank of Mercedes***, 673 S.W.2d 558, 563 (Tex. 1984).

Additionally, Don Davis claims that he timely made a reasonable written offer to Paul Payne to repair or have repaired any construction defect that Paul Payne was complaining about and was unreasonable refused the opportunity to do the repairs or have them done. Don Davis further states that the Plaintiffs claims were not presented within the time limits required by law.

BREACH OF CONTRACT THEORY: Paul Payne further claims that Don Davis materially breached the construction contract between him and Don Davis by failing to complete the building project as required under the contract. Don Davis has responded and claims that he has not breached the contract and even if he has in some small manner, that he has substantially completed the construction project and that if there are items required to finish the project he will either furnish them or pay to have them furnished. [7] Further Don Davis claims that if he has not substantially completed the construction project as required by the contract, he was prevented from doing so by Paul Payne's unjustified conduct and that in such case, he is entitled to recover from Paul Payne the reasonable value of the improvements actually done and under a theory of law called quantum meruit. Don Davis claims that Paul Payne breached the contract by preventing Don Davis from completing the contract without legal justification and has withheld payments due and which would have been due him under the contract and that as a result, Don Davis has lost profits for which he sues. Paul Payne also claims that it was in the contemplation of the parties that the project would be completed by a certain date and that if completed later without legal justification, Paul Payne would lose income profit at a rate to be and that Paul Payne seeks recovery of th lost profit. Both parties seek attorney fees from the other. [8]

The questions that you are to answer will be submitted to you in "Clusters"— one for each "theory" and response thereto. You are to answer each cluster of questions without regard to your answers to the other clusters of questions. Should you be required to answer any damage question in one cluster and are likewise required to answer a like damage question in another cluster, you are not to deduct from either answer any amount that you may have found in the other question.

9. The Court has previously construed portions of the contract between the Plaintiff and the Defendant contractor and you are instructed that the terms and conditions of the agreement between the parties require the Contractor to construct the residential building in a good and workmanlike manner, that the home is " suitable for human habitation." [9]and that the materials used by the contractor are free of defects. [10]

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[7] In ***Sage St. Assocs. v. Northdale Constr****. Co.*, 863 S.W.2d 438 (Tex 1993) we find: "...when a contractor seeks to recover on a theory of substantial performance, the contractor bears the burden of proving the appropriate credit due to the owner for defects and omissions."

[8] **Damages for Loss of Use When Property Destroyed– *J&D Towing, LLC v. Am. Alternative Ins. Corp.***, (Tex 2016). 59 Tex Sup J. 214, Jan 8, 2016: "... we now hold that the owner of personal property that has been totally destroyed may recover loss-of-use damages in addition to the fair market value of the property immediately before the injury. . . And, as many of our sister courts have convincingly held, it is by compensating a plaintiff for loss-of-use damages incurred during the period of deprivation—a period reasonably necessary to obtain replacement property—that the principle of full and fair compensation is satisfied. . . ."

[9] ***Humber v. Morton,*** 426 S.W.2d 554 (Tex. 1968) , the Texas Supreme Court held that the builder/vendor of a new home warrants to the buyer that the home has been constructed in a good and workmanlike manner and that there is an implied warranty that the home is " suitable for human habitation."

[10] ***Moore v. Werner***, 418 S.W.2d 918 (Tex.Civ.App. - Houston [14th Dist.] 1967, no writ).

10. After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.

11. It is the duty of the presiding juror —

(1) to preside during your deliberations,
(2) to see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge,
(3) to write out and hand to the bailiff any communications concerning the case that you desire to have delivered to judge,
(4) to vote on the questions,
(5) to write your answers to the questions in the spaces provided, and
(6) to certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

12. You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of this fact.

13. When you have answered all of the questions you are required to answer under the instructions of the judge and the presiding juror has placed your answers in the places provided and signed the verdict as presiding juror or obtained the signatures, you will inform the bailiff at the door of the jury room that you have reached a verdict, and then you will return into court with your verdict.

B. JUDICIAL NOTICE OF ADJUDICATIVE FACTS

The Court has taken judicial notice of certain adjudicative facts and you must accept such judicially noticed facts as conclusive. They are as follows: The facts are set forth in the attached document called "Building Code of the City of Podunk, Texas" and the terms and conditions of the judicially noticed Building Code constitute terms and conditions of the agreement between the Plaintiff and the Defendant as though they had originally be a part of the agreement. [11] The burden to comply with the Building Code is on the Contractor and not on the Owner. [12]

C. DEFINITIONS

When words are used in this charge in a sense which varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

1. "Goods" means tangible chattels or real property purchased or leased for use. [13] "Use" includes a purchase for the purpose of resale.[14]

2. "Property" includes a residential home. [15]

3. "Services" means work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods. [16]

4. "Unconscionable action or course of action" means an act or practice which, to a person's detriment takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree. [17]

5. By the term "gross" and "grossly" it is meant "glaringly, noticeable flagrant, complete and unmitigated."[18]

6. "Knowingly" means actual awareness, at the time of the act or practice complained of, of the falsity, deception, or unfairness of the act or practice giving rise to the consumer's claim or, in an action brought under Subdivision (2) of Subsection (a) of Section 17.50, actual awareness of the act, practice, condition, defect, or

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[11] ***McCreary v. Bay Area Bank & Trust***, 68 S.W.3d 727 (Tex. App. Houston 14th Dist. 2001). ". . . it is well settled that the laws which are in existence at the time of the making of the contract enter into and become a part of such contract as if expressly referred to or incorporated therein."

[12] See ***Gupta v. Ritter Homes, Inc.***, 646 S.W.2d 168 (Tex.1983)

[13]Section 17.45(1)

[14]***Big H Auto Auction, Inc. v. Saenz Motors***, 665 S.W.2d 756, 759 (Tex. 1984).

[15] The term "property" contained in the implied warranty includes home construction. ***Gonzales v. Southwest Olshan Found. Repair Co.***, *LLC*, 400 S.W.3d 52 (Tex. 2013).

[16]Section 17.45(2), B&CC

[17]Section 17.45(5), B&CC; PJC 102.7

[18]***Chastain v. Koonce***, 700 S.W.2d 579 (Tex. 1985).

failure constituting the breach of warranty, but actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness. [19]

7. "Intentionally" means actual awareness of the falsity, deception or unfairness of the act or practice, or the condition, effect, defect, or failure constituting a breach of warranty giving rise to the consumer's claim, coupled with the specific intent that the consumer act in detrimental reliance on the falsity or deception or in detrimental ignorance of the unfairness. Intention may be inferred from objective manifestations that indicate that the person acted intentionally or from facts showing that a defendant acted with flagrant disregard of prudent and fair business practices to the extent that the defendant should be treated as having acted intentionally. [20]

8. "Good and workmanlike manner" means that quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work. [21]

9. "Producing cause" is an efficient, exciting or contributing cause, which in natural sequence produces the injuries or damages complained of, if any. There can be more than one producing cause. [22]

10. An "agent" is one who undertakes to transact some business, or to manage some affair for another, by the authority and on the account of the latter, and to render an account of it.[23]

11 "Market value," "Fair market value" and "reasonable market value" are defined as the price which the property would bring when it is offered for sale by one who desires, but is not obligated to sell, and is bought by one who is under no necessity of buying it.[24]

12 A "statement" is (1) an oral or written verbal expression, or (2) nonverbal conduct of a perso2, if it is intended by him/her as a substitute for verbal expression.[25]

13 "Negligence" means failure to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances. "Ordinary care" means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.[26]

14 "Proximate cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foresee that the event, or

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[19]Section 17.45(9), B&CC; PJC 102.21

[20]Section 17.45(13), B&CC; PJC 102.21)

[21]***Melody Homes Mfg. Co. v. Barnes***, 741 S.W.2d 349 (Tex. 1987).

[22]***Rourke v. Garza***, 530 S.W.2d 794, 801 (Tex. 1975).

[23] ***Boyd v. Eikenberry***, 122 S.W. 1045 (Tex.Comm.App. 1939, opinion adopted). The same case says "one who acts in my behalf, for my advantage, by my authority, is my agent. p. 1047].

[24]***State v. Carpenter,*** 126 Tex. 604,609, 89 S.W.2d 194, 197 (1936); ***Davenport v. Garcia,*** 837 S.W.2d 73, 77 (Tex 1992)

[25]Rule 801(a), Tex. Rules of Evid.

[26]PJC 65.01.

some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.[27]

15 "Good and workmanlike" means that quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work. [28]

CLUSTER NO. 1: QUESTIONS NOS. 1a - 14, INCLUSIVE ARE SUBMITTED TO YOU UNDER THE PLAINTIFF'S CLAIM BROUGHT UNDER THE DECEPTIVE TRADE PRACTICE ACT AND THE DEFENDANTS' RESPONSES THERETO

(1a) Individual Defendant

Question No. 1a
(Individual Defendant: for Multiple Defendants see Question 1b below.))

Did Don Davis engage in any false, misleading or deceptive act or practice that Paul Payne relied upon to his detriment and that was a producing cause of damages to Paul Payne? [29]

"False, misleading or deceptive act or practice" is meant any of the specific acts or practices inquired about in items (1)-(7) listed below.

(1) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they did not have? [Section 17.46 (5)]

(2) Representing that goods or services were of a particular standard, quality, or grade, or that goods were of a particular style or model, if they were of another? [Section 17.46(7)]

(3) Representing that an agreement conferred or involved rights remedies or obligations which did not have or involve, or which were prohibited by law? [Section 17.46(12)]

(4) Misrepresenting the authority of a salesman, representative, or agent to negotiate the final terms of a consumer transaction? [Section 17.46(14)]

(5) Representing that a guaranty or warranty conferred or involved rights or remedies which it did not have or involve? [Section 17.46(19)]

(6) Failing to disclose information concerning goods or services which was known by the Defendant at the time of the transaction if such failure to disclose such information was intended to induce the Plaintiff into a transaction into which the Plaintiff would not have entered had the information been disclosed? [Section 17.46(23)

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[27] PJC 65.033.

[28] ***Melody Home Mfg. Co. v. Barnes***, 741 S.W.2d 349 (Tex. 1987)

[29] PJC 102.1

"Producing cause" means an efficient, exciting, or contributing cause that, in a natural sequence, produced the damages, if any. There may be more than one producing cause.[30]

The lack of intent or knowledge to engage in a false, misleading or deceptive act or practice is not an inquiry in this question unless specifically set forth in the question itself or in a separate question related to this question.[31]

You are instructed that any "false, misleading or deceptive act or practice which you may find to have been committed by the Defendant that was a producing cause of damages to the Plaintiff need not have taken place at the time of the inception of the plaintiff's seeking or acquiring goods or services by lease or purchase but may occur at any time during the transaction which forms the basis of the plaintiff's claim so long as it was a producing cause of damages to the Plaintiff.[32]

Representations may be either express or implied.[33]

In order for you to answer "YES" to this question, 10 or more of you must agree that one or more of the specific acts or practices inquired about and defined above in items (1)-(7) above was committed by Don Davis and that such act or practice was a producing cause of damages to Paul Payne, and the same 10 or more jurors must be the same 10 or more jurors that agree upon any other answers made to questions submitted to you in this **Court's Charge** and to the entire verdict.[34]

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[30]***Rourke v. Garza***, 530 S.W.2d 794, 801 (Tex. 1975).

[31]A defendant may be held liable for a variety of the laundry list deceptive trade practices without pleadings or proof that the defendant intended to deceive anyone, while others do require such pleading and proof. Misrepresentations which do not necessarily constitute common law fraud may be actionable under the DTPA without a specific intent to deceive. ***Eagle Properties Ltd. v. Scharbauer***, 807 S.W.2d 714, 724 (Tex. 1990); ***Pennington v. Singleton***, 606 S.W.2d 682, 690 (Tex 1980). Only "laundry list" items (9),(10),(13),(17),(22) and (23) incorporate a scienter requirement. ***Chastain v. Koonce***, 700 S.W.2d 579 (Tex. 1985). If any of the "laundry list" items are found by the jury to have been committed, "it is by law an unlawful deceptive trade practice because subsection 17.46(b) makes it unlawful," ***Spradling v. Williams***, 566 S.W.2d 561 (Tex. 1978), and the inquiry of whether the Defendant intended to commit the act is simply not permitted except in the 6 "laundry list" subdivisions listed. The Texas Supreme Court permits instructions to the jury of factors that can and should be considered in arriving at their verdict in cases based upon special statutes. See ***Texas Dept. Human Service v. E.B.***, 802 S.W.2d 649 (Tex. 1990); but they have also permitted instructions to the jury on factors to be considered based upon common law principles and factors. See ***Holley v. Adams***, 544 S.W.2d 367, 371-72 (Tex. 1976). Thus, there should be no different rule in having the jury instructed on what they cannot consider in a proper situation.

[32]Ref. ***Jim Walters Homes, Inc. v. Valencia***, 690 S.W.2d 239 (Tex 1985).

[33]***Royal Globe Ins. Co. v. Bar Consultants, Inc.***, 577 S.W.2d 688, 694 (Tex. 1979); ***Hope v. Allstate Insurance Co.***, 719 S.W.2d 634, 637 (Ft. Worth 1986, n.r.e).

[34]The controlling question in a DTPA "laundry list" claim seems to be whether the Defendant engaged in a "false, misleading or deceptive act or practice," not what specific ground or grounds under Section 17.46(b) the jury may rely on to answer affirmatively the question posed. The question, as drafted has been submitted as closely as possible in the language of the statute, ***Brown v. American Transfer & Stg Co***, 601 S.W.2d 931 (Tex. 1980). However, the effect of the case of ***Eagle Properties Ltd. v. Scharbauer***, 807 S.W.2d 714, 724 (Tex. 1990), is to hold that each subdivision of Section 17.46(b) of the DTPA constitutes an independent ground of recovery as opposed to being merely "operative facts" that the jury might rely on in answering the "controlling question" which tends to militate toward separate submission of each such ground alleged. In ***Lemos v. Montez***, 680 S.W.2d 798 (Tex 1984), the Supreme Court approved the submission of the act and causation in a single question without submitting each "operative fact" separately on the issue of negligence. In ***Texas Dept. Human Services v. E.B.***, 802 S.W.2d 647 (Tex. 1990), the Supreme Court held that in statutory cases the jury is to be asked the "controlling question" and not the "specific ground or grounds"

ANSWER "YES" or "NO."

ANSWER: _____

(1b) Laundry List - Multiple Defendants [Ref. § 17.46(b)]

Question No. 1b

[35] Did any of the Defendants named below engage in any false, misleading or deceptive act or practice that Paul Payne relied upon to his detriment and that was a producing cause of damages to Paul Payne? With respect to the acts or practices inquired about, answer "YES" or "NO" in the space provided for each Defendant.

"False, misleading or deceptive act or practice" means any of the specific acts or practices inquired about in items (1)-(7) listed below. [Duplicate definitions and instructions from the previous question.]

Answer "YES" or "NO."

Answer:_____

(2a) Contributory

Question 2a

Did Paul Payne cause or contribute to cause in any way the harm for which recovery for damages is sought by him in this case? [36]

Answer "YES" or "NO."

Answer:_____

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under the statute which define the "controlling question" even if those grounds are independent grounds, and held that if sufficient jurors find in favor of the "controlling question" then the other argument is not material. However, subdivisions (9),(10),(13),(17),(22) and (23) of Section 17.46 (b), B&CC involve an element of "intent" that the other subdivisions do not involve, ***Chastain v. Koonce***, 700 S.W.2d 579 (Tex. 1985), and indeed, invoke availability of two different elements of damages not available in the other subdivisions of the statute without further action by the jury, namely, mental anguish and exemplary or "additional damages," because of the element of intent, ***Luna v. North Star Dodge Sales, Inc.***, 667 S.W.2d 115 (Tex. 1984). In ***Texas DHS v. E.B.***, 802 S.W.2d 647, 649 (Tex. 1990), the Supreme Court rejected the argument that "a single broad form question incorporating two independent grounds for termination of a parent-child relationship permits the state to obtain an affirmative answer without discharging the burden that the jury conclude that a parent violated one or more of the grounds for termination under the statute," and approved such a question with definitional sub-parts. However, absent the instruction which is included in this proposed jury question, this writer believes that upon a proper objection and requested instruction the question is flawed.

[35]PJC does not have a proposed question for multiple defendants in a DTPA case.

[36] Section 33.003, Tex. Civ. Prac & Rem. Code (1995) states that "[t]he trier of fact, as to each cause of action asserted, shall determine the percentage of responsibility, stated in whole numbers, for the...persons causing or contributing to cause in any way the harm for which recovery of damages is sought...[listing all categories of actions covered by this paper.] This question presents the predicate to determination of percentage of responsibility between all parties involved. This question and the next follow the language of the statute as closely as possible as required by ***Brown v. American Transfer & Storage***, 601 S.W.2d 931(Tex 1980).

If you have answered Question No. 1a (or Question No. 1b) above "YES" and you have answered Question No. 2 "YES," and in that event only answer the following Question.

(2b) Percentage of responsibility

Question No. 2b

State in whole numbers the percentage of responsibility of each person whom you found caused or contributed to cause the harm in any way the harm for which recovery is sought in this case. The percentages of responsibility must total 100%. Answer by placing the percentage found by you as to each person in the place provided below. [37]

ANSWER:

Paul Payne _____
Don Davis _____
I.M. Smart _____
U.R. Dumb _____

TOTAL MUST BE 100%

(3a) Knowingly

If you have answered Question 1a "YES" [as to any of the Defendants] and in that event only, answer the following question.

Question No. 3a

Which Defendants', if any, engaged in such conduct knowingly? Answer **"YES"** or **"NO"** by placing your answer in the appropriate space provided.

You are instructed that if in answering Question No 1a, above, "YES" you found that Don Davis engaged in any of the following false, misleading or deceptive acts or practices, you will answer this question "YES," otherwise, you will answer this question "YES" or "NO" according to the evidence as you may find it:[38]

[Set forth subdivisions your evidence and pleadings will permit].

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[37]Ref. Section 33.003 Tex. Civ. Prac. & Rem. Code

[38]In ***Chastain v. Koonce***, 700 S.W.2d 579 (Tex. 1985) the Supreme Court held that subdivisions (9),(10),(13),(17),(22) and (23) each contain a scienter requirement. In ***Eagle Properties, Ltd v. Scharbauer***, 807 S.W.2d 714, 724 (1990), the Supreme Court held that Section 17.46(b)(23) of the "laundry list" relating to failure to disclose information on hand, "includes an element of intent." In ***Luna v. North Star Dodge Sales, Inc.***, 667 S.W.2d 115, 118 (Tex 1984), the Supreme Court stated that the terms "knowingly," "willful," and "intentional" lie on a continuum of an ascending scale with the effect that a finding at either of the three levels will amount to a finding of "knowing." If the jury has found in its answer to the previous question, one of the 6 "scienter" subdivisions as a basis for its "YES" answer, then the Defendant has "knowingly" violated Section 17.46 (b) as a matter of law and the jury should be so instructed. See ***Murray v. O & A Express, Inc***, 630 S.W.2d 633, 637 (Tex 1982); and ***Eagle Trucking Co. v. Texas Bitulithic Co.***, 612 S.W.2d 503, 507 (Tex. 1981). If there were such an inquiry after such a finding on any of those subdivisions containing a scienter requirement, such inquiry would amount to the submission of an inferential rebuttal issue in violation of Rule 277, T.R.C.P., therefore, the instruction should be given as suggested.

"Knowingly" means actual awareness of the falsity, deception, or unfairness of the act or practice giving rise to the Plaintiffs' claim, if any, but actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness. [39]

ANSWER	"YES"	or "NO"
DON DAVIS	_____	_____
I.R. SMART	_____	_____
U.R. DUMB	_____	_____

(3b) Intentionally

Question No. 3b

Did Don Davis engage in such conduct intentionally?

"Intentionally" means actual awareness of the falsity, deception or unfairness of the act or practice, or the condition, effect, defect, or failure constituting a breach of warranty giving rise to the consumer's claim, coupled with the specific intent that the consumer act in detrimental reliance on the falsity or deception or in detrimental ignorance of the unfairness. Intention may be inferred from objective manifestations that indicate that the person acted intentionally or from facts showing that a defendant acted with flagrant disregard of prudent and fair business practices to the extent that the defendant should be treated as having acted intentionally. [40]

Answer "Yes" or "No."
Answer:_____

(4) Unconscionability [Ref. § 17.50(a)(3)]. [Ref. § 17.50(b)(1)]

Question No. 4

Was an unconscionable action or course of action, if any, committed by Don Davis a producing cause of damages to Paul Payne? [Ref. Section 17.50(a)(3)]. [Ref. Section 17.50(b)(1)]

By the term "unconscionable action or course of action" is meant an act or practice which, to a person's detriment takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; [Ref. Section 17.45 (9)].

By the term "grossly" it is meant "glaringly, noticeably flagrant, complete unmitigated."[41]

You are instructed that any unconscionable action of course of action which you may find to have been a producing cause of damages to the Plaintiff need not have occurred simultaneously with the sale or lease of goods or services that form the basis of the Plaintiff's complaint but may occur at any time during the

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[39]Ref. Section 17.45(9)."Knowingly" is a predicate finding to an award for mental anguish damages, ***Luna v. North Star Dodge Sales, Inc.***, 667 S.W.2d 115 (Tex. 1984); and the opportunity for "additional" or exemplary damages under Section 17.50(b(1).

[40]DTPA Section 17.45(13)

[41]Ref. ***Chastain v. Koonce***, 700 S.W.2d 579 (Tex. 1985).

transaction which forms the basis of the Plaintiff's complaint, so long as it is a producing cause of damages to the Plaintiff.

The lack of intent or knowledge to engage in an unconscionable action or course of action is not an inquiry in this question unless specifically set forth in a separate question related to this question.[42]

Answer: "Yes" or "No"
Answer: _____

(5a) Breach of Express Warranty [Ref. § 17.50]

Question No. 5a

Was the failure, if any, of Don Davis, to comply with an express warranty a producing cause of damages to Paul Payne? [Ref. Section 17.50(a)(2)]. [43]

You are instructed that express warranties are created in any of the following manners:

(1) any affirmation of fact or promise made by the Defendant to the Plaintiff which relates to the goods and services and becomes a part of the basis of the bargain, creates an express warranty that the goods shall conform to the affirmation or promise; or

(2) any description of the goods which is made a part of the basis of the bargain creates an express warranty that the goods shall conform to the description; or

(3) any sample or model which is made a part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

It is not necessary to the creation of an express warranty that the Defendant use formal words such as "warranty" or "guarantee" or that he have a specific intention to make a warranty. An affirmation merely of the value of the goods or a statement purporting to be merely the Defendant's opinion or commendation of the goods does not create an express warranty.[44]

In determining whether there has been a breach of any express warranty by the Defendant, you may consider the limitations, exclusions and exemptions contained in any such express warranty that you may find.[45]

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[42]***Chastain v. Koonce***, 700 S.W.2d 579 (Tex 1985). Ref. ***Flenniken v. Longview Bank & Trust Co.***, 661 S.W.2d 705 (Tex.1983)]; and ***Jim Walters Homes, Inc. v. Valencia***, 690 S.W.2d 239 (Tex. 1985)].

[43]PJC 102.8 provides the basic question relating to breaches of any warranty, adding thereto the definitions and instructions that the particular warranty, the evidence and pleadings permit. However, I have chosen to granulate the questions about breaches into breaches of express warranties, common law implied warranties and statutory implied warranties for clarity to the jurors.

[44]This definition is provided by Section 2.313, B&CC. and applies to sales of tangible goods. In ***Southwestern Bell Tel. Co. v. FDP***, 811 S.W.2d 572 (Tex 1991), the Supreme Court adopted this definition for express warranties for the sale and purchase of services. In light of the analysis of the case, it seems safe to assume that the definition will be applied to express contracts relating to the sale and purchase of any other commodity, including real property.

[45]***Southwestern Bell Tel. Co. v. FDP Corp***, 811 S.W.2d 572 (Tex. 1991).

In order for you to answer "YES" to this question, 10 or more of you must agree that one or more of the specific acts or practices inquired about and defined above in items (1)-(3) above was committed by Don Davis and that such act or practice was a producing cause of damages to Paul Payne, and the same 10 or more jurors must be the same 10 or more jurors that agree upon any other answers made to questions submitted to you in this **Court's Charge** and to the entire verdict.[46]

Answer: "Yes" or "No"
Answer: _____

(5b) Breach of Warranty - Knowingly

If you have answered Question No. 5a "Yes" and in that event only, answer Questions No.'s 3b and 3c below.

Question No. 5b

Did Don Davis engage in such conduct knowingly? [47] [Define "knowingly" and provide a space for answer].

(5c) Breach of warranty – intentionally

Question No. 5c

Did Don Davis engage in such conduct intentionally? [Define "intentionally" and provide a space for the answer].

(6a) Breach of Common Law Implied Warranties relating to Home Construction - Multiple Defendants:

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[46]The controlling question in a DTPA "laundry list" claim seems to be whether the Defendant engaged in a "false, misleading or deceptive act or practice," not what specific ground or grounds under Section 17.46(b) the jury may rely on to answer affirmatively the question posed. The question, as drafted has been submitted as closely as possible in the language of the statute, ***Brown v. American Transfer & Stg Co***, 601 S.W.2d 931 (Tex. 1980). However, the effect of the case of ***Eagle Properties Ltd. v. Scharbauer***, 807 S.W.2d 714, 724 (Tex. 1990), is to hold that each subdivision of Section 17.46(b) of the DTPA constitutes an independent ground of recovery as opposed to being merely "operative facts" that the jury might rely on in answering the "controlling question" which tends to militate toward separate submission of each such ground alleged. In ***Lemos v. Montez***, 680 S.W.2d 798 (Tex 1984), the Supreme Court approved the submission of the act and causation in a single question without submitting each "operative fact" separately on the issue of negligence. In ***Texas Dept. Human Services v. E.B.***, 802 S.W.2d 647 (Tex. 1990), the Supreme Court held that in statutory cases the jury is to be asked the "controlling question" and not the "specific ground or grounds" under the statute which define the "controlling question" even if those grounds are independent grounds, and held that if sufficient jurors find in favor of the "controlling question" then the other argument is not material. However, subdivisions (9),(10),(13),(17),(22) and (23) of Section 17.46 (b), B&CC involve an element of "intent" that the other subdivisions do not involve, ***Chastain v. Koonce***, 700 S.W.2d 579 (Tex. 1985), and indeed, invoke availability of two different elements of damages not available in the other subdivisions of the statute without further action by the jury, namely, mental anguish and exemplary or "additional damages," because of the element of intent, ***Luna v. North Star Dodge Sales, Inc.***, 667 S.W.2d 115 (Tex. 1984). In ***Texas DHS v. E.B.***, 802 S.W.2d 647, 649 (Tex. 1990), the Supreme Court rejected the argument that "a single broad form question incorporating two independent grounds for termination of a parent-child relationship permits the state to obtain an affirmative answer without discharging the burden that the jury conclude that a parent violated one or more of the grounds for termination under the statute," and approved such a question with definitional sub-parts. However, absent the instruction which is included in this proposed jury question, this writer believes that upon a proper objection and requested instruction the question is flawed.

[47]PJC 102.21

Question 6a

Was the failure, if any, of Don Davis, to comply with an implied warranty [48]relating to the construction of Paul Payne's residence a producing cause of damages to Paul Payne? [49]

Answer "YES" or "No" "[50]
Answer:_____

By the term "implied warranty" is meant those obligations set forth below in items (1) through (4), imposed by the law upon persons who undertake to construct a residence for another person for hire. Those obligations are

(1) to construct the building in question in a good and workmanlike manner;[51]

(2) to construct the building in question in a fashion that it will be suitable for human habitation;[52]

(3) if the construction has not been finished, that whatever construction has been done, it has been constructed in a good and workmanlike manner.[53]

(4) to use materials that are not defective.[54]

"Good and workmanlike" is defined as that quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work.[55]

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[48] Section 17.50(a)(2).

[49] PJC 102.8 provides a generic question relating to breaches of warranties. I have chosen break out into 2 questions: relating to breaches of express warranties and breaches of implied warranties [both common law and statutory implied warranties]. I also chose to dove tail the question to the specific construction project rather than a generic question.

[50] **COMMENTARY:** With respect to the claims and evidence directed against an officer or agent of a corporate defendant as a possible co-defendant, the Supreme Court of Texas has held "that there can be individual liability on the part of a corporate agent for misrepresentation made by him. See ***Weitzel v. Barnes***, 691 S.W.2d 598, 601 (Tex. 1985).

[51]***Melody Homes v. Barnes***, 741 S.W.2d 349 (Tex 1987).

[52]***Humber v. Morton***, 426 S.W.2d 554 (Tex 1968).

[53]***March v. Thiery***, 729 S.W.2d 889 (Tex.App.- Corpus Christi, 1987, no writ).

[54]***Moore v. Werner***, 418 S.W.2d 918 (Tex.Civ.App.— Houston [14th Dist] 1967, no writ).

[55]***Melody Homes Mfg. Co. v. Barnes***, 741 S.W.2d 349 (Tex. 1987)

By the term "suitable for human habitation" it is meant that the residence will be safe, sanitary or otherwise fit for humans to inhabit.[56] Nb.[57]

Being "defective" means a condition of the materials that renders them unfit for the ordinary purposes for which they are used because of a lack of something necessary for adequacy.[58]

These warranties may not be waived,[59] and you shall not give credence to any statement, either written or oral, that purports to waive or limit these implied warranties.[60]

In order for you to answer "YES" to this question, 10 or more of you must agree that one or more of the specific acts or practices inquired about and defined above in items (1)-(4) above was committed by Don Davis and that such act or practice was a producing cause of damages to Paul Payne, and the same 10 or more jurors must be the same 10 or more jurors that agree upon any other answers made to questions submitted to you in this **Court's Charge** and to the entire verdict.[61] Nb [62]

(6b-6c) Breach of implied warranty - Knowingly and/or Intentionally:

If you have answered Question No. 6a "YES" and in that event only, answer Question No.'s 6b and 6c below.

Question No. 6b

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[56]***Miller v. Spencer***, 732 S.W.2d 758, 760 (Tex.App. - Dallas 1987, no writ); ***Kamarath v. Bennett***, 568 S.W.2d 658, 660 (Tex. 1978).

[57][COMMENTARY: The implied warranties of construction in a good and workmanlike manner and the implied warranty that the construction will make the residence suitable for human habitation are separate and distinct warranties that do not overlap. See ***Evans v. Stiles, Inc.***, 689 S.W.2d 399 (Tex. 1985)].

[58]***Plas-Tex., Inc. v. U.S. Steel Corp***, 772 S.W.2d 442 (Tex 1989). It is not always necessary to use expert testimony to establish the defect.

[59]Ibid, Fn. 15 and 16.

[60]The jury is to be instructed any time that an element of a ground of liability has been found as a matter of law against a party, leaving only the disputed fact elements to be decided by the jury. ***Murray v. O&A Express Co.***, 630 S.W.2d 633, 637 (Tex 1982); additionally, the jury is to be instructed not to consider any matter in evidence that unlawfully tends to limit a proper award of damages. ***First Title of Waco v. Underwood***, 802 S.W.2d 254, 259 (Tex.App.— Waco, 1990, no writ yet).

[61]The controlling question is whether the Defendant breached a warranty and not what specific warranty. However, the definitions under the question set forth 4 distinct implied warranties that do not overlap. The definitions follow the case law as closely as possible. ***Brown v. American Transfer & Stg Co***, 601 S.W.2d 931 (Tex. 1980). In ***Texas Dept. Human Services v. E.B.***, 802 S.W.2d 647 (Tex. 1990), the Supreme Court held that at least in statutory cases the jury is to be asked the "controlling question" and not the "specific ground or grounds" under the statute which define the "controlling question" even if those grounds are independent grounds, and held that if sufficient jurors find in favor of the "controlling question" then the other argument is not material. However, each defined implied warranty is distinct and involve an element that the others do not involve. The absence of the instruction which is included in this proposed jury question relating to the necessity of 10 or more jurors agreeing on one or more of he four defined implied warranties, makes the question with its definitions is flawed and the instruction should be granted upon request.

[62]**Commentary:** If the Defendant is blaming the homeowner with fault in the causing the damages sought under any theory whatsoever, the Court must the insert the question relating to comparative fault required by Section 33.003 Tex.Civ. Prac. & Rem. Code.

Did Don Davis engage in such conduct knowingly? [63] (Add the definition of "knowingly" and give an instruction and place for the answer).

Question No. 6c
(Conditional Submission Question)

Did Don Davis engage in such conduct intentionally? (Add the definition of "intentionally" and give an instruction and place for the answer).

(9) Defensive Issue Based on Plaintiff's Fraudulent Conduct

Question No. 9

Do you find that the Plaintiff induced the Defendant into the transaction by fraudulent conduct?

You are instructed that fraud in a transaction involving the acquisition of goods or services by lease or purchase consists of a

(1) false representation of a past or existing material fact, when the false representation is
   (a) made to a person for the purpose of inducing that person to enter into a contract; and
   (b) relied on by that person in entering into that contract; or

(2) false promise to do an act, when the false promise is
   (a) material;
   (b) made with the intention of not fulfilling it:
   (c) made to a person for the purpose of inducing that person to enter into a contract; and
   (d) relied on by that person in entering into that contract.[64]

Answer "Yes" or "No."
ANSWER:_____

(11) RCLA Limitation on Damages

Question No. 11

Did Paul Payne's either unreasonably reject a written offer, if any, made by Don Davis to repair or have repaired the construction defect, if any, complained of, or not permit Don Davis a reasonable opportunity to repair the construction defect, if any, complained of after a reasonable written offer, if any, to either repair or have repaired the construction defect was made by Don Davis?

Answer "Yes," or "No."

[63]PJC 102.21

[64]This definition of fraud is taken from Section 27.01 B&CC. In the case of ***Southwestern Bell Tel. Co. v. FDP Corp.***, 811 S.W.2d 572 (Tex. 1991), in a DTPA case, the Supreme Court took its definition of an express warranty relating to the delivery of services, from Chapter 2 of the B&CC. Therefore, the tracking a definition from one chapter of the B&CC into another chapter has precedence and in this circumstance makes good sense.

Answer:_____[65]

(13) Statute of limitations defense - Discovery Rule

If you have answered "Yes" to either questions 1a, 2a, or 3a, and in that event only, answer the following question.[66]

Question 13
(Statute of Limitations Defense - Discovery Rule)

Find the date that the Plaintiff discovered or in the exercise of reasonable diligence should have discovered all of the false, misleading or deceptive acts or practices,[67] if any, of Don Davis.

Answer by setting forth the date in the blank below.
ANSWER: _____

[65]Section 27.004(b) and (f), Tex. Prop. Code (Known as the Residential Contractor's Liability Act, RCLA) This act does not create a cause of action for the consumer; however, it does place limits on the damages recoverable by the consumer if the contractor makes a timely, reasonable, written offer to either repair or have repaired the construction defect complained about. This multiple fact issue submission involves and "either/or" situation and involves submission of multiple facts. The either/or portion of the question is authorized by Rule 277, T.R.C.P. The multiple question submission is permitted when the question requires the jury to answer all subsets affirmatively before they can answer the question "Yes." See ***Coulsen Lake LBJ Municipal Utility District,*** 781 S.W.2d 594, 596 (Tex 1989).

[66]§ 17.565 provides a 2 year statute of limitations for violations of the "laundry list" of the DTPA with a built in "discovery rule." This question presupposes that the statute of limitations has run except for a question of whether the Plaintiff can prove a discovery rule exception. The burden of proof is on the Plaintiff to establish the right to the "discovery rule" in a bench or jury trial. ***Woods v. William M. Mercer, Inc.***, 769 S.W.2d 515, 518 (Tex. 1988); ***Mercer*** holds that the use of the "discovery Rule" by the Plaintiff is a plea of confession and avoidance that the statute of limitations has otherwise run.

[67] Ref. PJC 102.23, slightly modified. Although in § 17.565 of the DTPA clearly states that the 2 year limitation statute applied to "false, misleading or deceptive acts or practices," the cases uniformly hold that it applied to all violations of the DTPA; whether "laundry list, breaches of warranty, unconscionable conduct or violations of Article 21.21 of the Insurance Code. ***Smart v. Texas American Bank/Galleria***, 680 S.W.2d 896 (Tex.App. — Houston [1st Dist] 1984, no writ); ***McAdams v. Capitol Products Corporation***, 810 S.W.2d 290, 292 (Tex.App. — Ft. Worth 1991).

(14) Damages [Ref. Conditional submission of damage issues is now permitted. T.R.C.P. Rule 277]

If you have answered Questions 1a, 2a, or 3a, "We Do" and not otherwise, then answer the following question.

Question No. 14

Find the amount of money, if any, if paid now in cash[68] to Paul Payne that would reasonably and fairly compensate him for his damages, if any, caused by the Don Davis as found in your answers to questions 1a, 2a or 3a. You are to consider each element of damage listed below, separately, so as not to include damages for one element in any other element. You are not to add or deduct from your answers to this question any amounts of money relating to presence or absence of an interest factor. You are not to deduct from your answers to this question any amounts of money that you might have found in answer to similar questions posed to you under any other cluster of questions. You are to answer this damage question without any reduction because of the percentage of negligence or causation, if any, of the person injured. [69]

Do not include any damages resulting from Paul Payne's failure to take reasonable action to maintain the residence; or to take reasonable action to mitigate his damages [70] ; or damages due to normal shrinkage due to drying or settlement of construction components within the tolerance of building standards. [71]You are instructed that Paul Payne need not establish his damages to a mathematical certainty, but he need only establish each element of his damages, if any, inquired about herein to a reasonable certainty.[72] Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the Court when it applies the law to your answers at the time of judgment. [73]

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[68]By the use of the term "if paid now in cash" means that the jury is to find the present value of the claimants' loss. If it finds damages in the past, pre-judgment interest is added. If the damages are for future losses such as mental anguish, pain, future lost wages, and future lost profits, it follows that there must be an evidentiary mechanism for the jury to arrive at a present discounted value of those future losses, which in turn would require evidence of present interest rates and projected interest rates and evidence of the mechanism for discounting to present value. However, in ***Missouri Pacific R.R. Co. v. Kimball***, 334 S.W.2d 283, 286 (Tex. 1960), the Supreme Court rejected the need for such evidence and held that "interest rates and other forms of returns on money safely invested are matters of such common knowledge that intelligent jurors may be presumed to be able to make proper allowance therefore, in estimation, the present value of a sum of money payable in the future, though no evidence upon that subject is introduced."

[69]Rule 277,T.R.C.P.

[70] Section 27.003(1)(B),Tex. Prop. Code authorizes this damage limiting instruction; however, this instruction placing a limitation on damages due to failure of the home owner to mitigate his damages, constitutes a double dipping of the Plaintiff's fault if there has been a submission of the comparative causation question required by Section 33.003 Tex. Civ. Prac. & Rem Code. The Defendant should request the instruction; however, the Plaintiff should object to the instruction if there has been a submission of the comparative causation question.

[71]Chapter 27.003, Tex. Prop. Code [RCLA] mandates an instruction limiting damages resulting from a "laundry list" of matters. See the statute for the list. Most of the list is included in this instruction.

[72]***McKnight v. Hill & Hill Exterminators***, 689 S.W.2d 206, 207 (Tex. 1985); ***White v. Southwestern Bell Tel. Co***, 651 S.W.2d 260, 262 (Tex. 1983); ***Southwest Battery Corp. v. Owen***, 115 S.W.2d 1097, 1099 (Tex. 1983).

[73]PJC 110.2 "Comment" under "Parallel Theories."

Answer separately in dollars and cents, if any, with respect to each of the following elements: [74]

[Mitigation of Damages Instruction][75] **[CAVEAT!]** [76]You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages — that is, to take advantage of any reasonable opportunity he may have had under the circumstances to reduce or minimize the loss or damage.[77] So, if you find that the plaintiff within the limitations of any inability to do so that he may have been under, failed to seek out or take advantage of any opportunity that was reasonably available to him under all the circumstances shown by the evidence, then you should reduce the amount of his damages by the amount he could have reasonably realized if he had taken

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[74]The damage issues must limit the jury's focus to the specific facts that are properly a part of the damages allowable. ***Chrysler Corp. v. McMorris***, 657 S.W.2d 858 (Tex.App. - Amarillo 1983, no writ). A mere listing of specified areas seems to satisfy the "focusing test." ***G.W.L., Inc. v. Robicheaux***, 622 S.W.2d 461 (Tex.App. - Beaumont 1981, writ ref'd n.r.e.).

[75]PJC 110.7 instruction on mitigation of damages is deficient because it omits the element of "reasonable opportunity" to mitigate on the part of the injured party. The best mitigation instruction I have found comes from the federal side of the docket from which this one was crafted. Devitt, Blackmar, and Wolff, ***Section 86.07, Federal Jury Practice and Instructions (Fourth Edition), Volume 3***, West Pub. Co., 1987. The duty to mitigate damages applies to DTPA cases. ***Alexander & Alexander of Texas, Inc. v. Bachus Industries, Inc.***, 754 S.W.2d 252-53 (Tex.App — El Paso 1988, writ denied); ***Town East Ford Sales, Inc. v. Gray***, 730 S.W.2d 796, 806 (Tex.App — Dallas no writ). The party creating the liability problem and who initiates the damages must plead and prove both lack of diligence to mitigate and the amount by which the damages were increased by the failure to mitigate. ***Cocke v. White***, 697 S.W.2d 739, 744 (Tex App — Corpus Christi, 1985, n.r.e.). The matter is handled by instruction only because it is clearly an inferential rebuttal issue. ***Rule 277, T.R.C.P.***

[76] If the Defendant's pleadings and proof raise a question concerning comparative fault in the causation of the claimant's damages, then the instruction on mitigation is not proper. Section 33.003 Tex. Civ. Prac. & Rem. Code subsumes mitigation issues with its language that "each person's causing or contributing to cause in any way the harm for which recovery of damages is sought" shall be determined by percentage of responsibility. If that question is asked in the charge, then to instruct on mitigation is to give the defendant a double dip on damages or if there is a "zero" responsibility found on the part of the plaintiff, an issue on mitigation constitutes a comment on the weight of the evidence.

[77]An "inferential rebuttal issue" is defined in ***Select Ins. Co. v. Boucher***, 561 S.W.2d 474, 477 (Tex. 1978) as follows: "An inferential rebuttal issue is one which seeks to disprove the existence of an essential element submitted in another issue." It is handled by instruction and not as a separate issue." Rule 277.

advantage of such opportunity. [78] The burden of establishing by a preponderance of the evidence the amount of such mitigation reduction, if any, is on the Defendant. [79]

[**Offer of Cure or Replacement**][80] You are instructed that if any tender of delivery or delivery by the Defendant of the tangible goods involved in this lawsuit was rejected by the Plaintiff and the time for performance had not yet expired, the Defendant was entitled to seasonably notify the Plaintiff of his intention to cure and was then entitled, within the contract time, to make a conforming delivery and if you find that the Plaintiff rejected or prevented any such intention to cure, you shall reduce the amount of the Plaintiff's damages, if any, by the amount that such cure would have reduced the Plaintiff's damages, if any.

a. Mental anguish of _____ in the past.
Answer: $_____ [81]

b. Mental anguish of _____ that in reasonable probability he will suffer in the future.
Answer: $_____

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[78]COMMENTARY: The initial draft of the Pattern Jury Charge on DTPA lumps all damages together. There is considerable danger in doing this. For instance, if you lump together your past and future damages for lost wages, pain and suffering, disfigurement, or mental anguish, you cannot recover prejudgment interest on those items, ***Cavnar v. Quality Control Parking, Inc.***, 696 S.W.2d 549 (Tex. 1985). If you lump mental anguish into all other damages for a single jury question and you fail to get an affirmative finding on "knowingly," you have corrupted your award because damages for mental anguish are predicated on a finding of a "knowing" violation of the DTPA. ***Luna v. North Star Ford Sales, Inc.***, 667 S.W.2d 115 (Tex 1984). However, see ***Mitt Ferguson Motor Co. v. Zeretzke***, 827 S.W.2d 349 (San Antonio, 1991) which held that the Supreme Court had abolished annexes of mental anguish to physical manifestation and therefore, to maintain ***Luna*** was to allow two standards for recover. In ***Wingate v. Hajdik***, 795 S.W.2d 717 (Tex 1990), although in a non-DTPA case, the trial court had found a single sum of damages predicated on two separate theories of recovery submitted in a single liability question. The answer did not segregate the damages allowable under one theory of recovery from the damages claimed under the other theory of recovery. One of the theories was not permitted as a ground of recovery. The Supreme Court observed that if there had been a segregation of the damages, the case would have been reversed but only as to one of the sets. (p. 646). Additionally, when the damages are claimed under different theories of damage recover, such as "benefit of the bargain" vs "out of pocket" then there cannot be a single damage issue, because these two theories are mutually exclusive. See ***Leyendecker & Associates, Inc. v. Wechter***, 683 S.W.2d 369 (Tex 1984).

[79]Rule 277, T.R.C.P. provides that the "[placing of the burden of proof may be accomplished by instructions rather than by inclusion in the question." This instruction places the burden on the Defendant where the law places it. PJC 110.7 "Comment" "Defendant's burden of proof," states that "the defendant must offer evidence showing not just the plaintiff's lack of care but also the amount by which the damages were increased by such failure to mitigate." (Citing ***Cocke v. White,*** 697 S.W.2d 739, 744 (Tex App.-Corpus Christi, 1985, n.r.e.) and other cases.

[80]Section 2.508 B&CC. There is a similar right to cure defects in **RESIDENTIAL CONSTRUCTION LIABILITY ACT,** Section 27.001 et seq, Property Code of Texas. These two right to cure sections do not go the issues of liability and are at best inferential rebuttal issues relating only to damages. They are more akind to mitigation of damages issues; hence the management of the matter by instruction rather than by a separate jury question.

[81]The Trial Court should not give a definition of mental anguish. See Appendix B styled "**Mental Anguish and the Court's Charge"**accompanying this article. The article sets forth the evidentiary standards authorizing submission of "mental anguish" as an element of damages. The Supreme Court has established two distinct evidentiary foundations, either of which will support a finding of mental anguish damages. Rather than trying give definitions of mental anguish, the submission of the question as an element of damages is a "gate keeper's function" of the trial court after hearing all the evidence supporting the requested submission. There is also the danger in attempting to provide a definition of mental anguish to impermissibly marshal the evidence of the party seeking damages for mental anguish in violation of ***Gulf Coast State Bank v. Emenhiser,*** 562 S.W.2d 449, 453 (Tex 1978).

g. The difference in the reasonable market value of the premises on the date of foreclosure and the amount of any debt due against such property on that date. [82]
Answer: $_____

h. The difference between the market value of the property as it would have been when completed according to the contract, and the sum of the purchase price of the vacant lot and the contract price to construct the residence on the vacant lot. [83]
Answer: $_____

j. Loss of profits in the past.
Answer: $_____

k. Loss of profits which the plaintiff in all reasonable probability will suffer in the future.
Answer: $_____

You are instructed that by the term "loss of profits" is meant the difference in the gross revenues of the business less the expenses required to generate that revenue;[84] and determining whether there are any future lost profits, you may consider the normal increase in business, if any, which might have been expected in light of past development and existing conditions.[85].[86]

l. The difference, if any, in the value of real estate as it was received and the value it would have had if it had been as represented. The difference in value, if any, should be determined at the time and place where the realty was received.[87] [88]
Answer: $_____

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[82] ***Farrell v. Hunt***, 714 S.W.2d 298 (Tex. 1988)

[83] ***Leyendecker & Assoc., Inc. v. Wechter***, 683 S.W.2d 369 (Tex. 1984)

[84] ***White v. Southwestern Bell Tele. Co.***, 651 S.W.2d 250 (Tex. 1983)

[85] ***Southwest Batter Corp. v. Owen***, 115 S.W.2d 1097, 1099 (Tex. 1938)

[86] In ***Holt Atherton Industries, Inc. v. Heine***, 35 S. Ct. J. 881, 883 (June 17, 1992), the Supreme Court held: "The amount of this loss [profits] must be shown by competent evidence with reasonable certainty . . . as a minimum, opinions or estimate of lost profits must be based on objective facts, figures, or data from which the amount of lost profits can be ascertained. `Lost income' standing alone does not set forth the correct measure to determine `lost profits.'"

[87] "Benefit of the bargain" example provided in ***Odom v. Meraz***, 810 S.W.2d 241,245 (Tex App-El Paso, 1991, writ denied, per curiam, 35 S. CT. J. 856 (June 10, 1992)).

[88] In ***Arthur Andersen & Co. v. Perry Equipment Corp***. 945 S.W.2d 812 (Tex. 1997) the Texas Supreme Court reiterated that " [u]nder Texas common law, direct damages for misrepresentation are measured in two ways. ***W.O. Bankston Nissan, Inc. v. Walters***, 754 S.W.2d 127, 128 (Tex.1988); ***Leyendecker & Assocs., Inc. v. Wechter***, 683 S.W.2d 369, 373 (Tex.1984). Out-of-pocket damages measure the difference between the value the buyer has paid and the value of what he has received; benefit-of-the-bargain damages measure the difference between the value as represented and the value received. ***Leyendecker***, 683 S.W.2d at 373. Under the DTPA, a plaintiff may recover under the damage theory that provides the greater recovery. Id. Both measures of damages are determined at the time of sale."

m. The difference, if any, in the value of the realty, as it was received and the price the plaintiff paid of it [or the value of that which the plaintiff parted with]. The difference in value, if any, shall be determined at the time and place where the realty was received. [89]
Answer: $_____

n. The difference, if any, at the time and place of acceptance of delivery of the tangible goods in question between the value of the goods accepted and the value they would have had if they had been as warranted.[90]
Answer: $_____

o. The reasonable costs of repairs necessary to cure any construction defect, including any reasonable and necessary engineering or consulting fees required to evaluate and cure the construction defect, that Don Davis is responsible for repairing; and the reasonable expense of temporary housing, if any, reasonably necessary during the repair period; and the reduction in market value, if any, to the extent the reduction is due to structural failure. The total damages found in your answer to this subdivision of the damages question may not exceed the greater of Paul Payne's purchase price for the residence or the current fair market value of the residence without the construction defect. [91] Nb[92]

[89]"Out of pocket" example provided in ***Odom v. Meraz,*** 810 S.W.2d 241, 245 (Tex App-El Paso, 1991, writ denied, per curiam: ". . . we neither approve or disapprove of the Court of Appeals' treatment of damages under the [DTPA].") 35 S. CT. J. 856 (June 10, 1992).

[90]If the claim is for breach of warranty in the sale of tangible goods, this damage question tracks the statutory language of Section 2.714(b), B&CC.

[91]Section 27.004(f), Tex. Prop. Code, known as the Residential Contractor's Liability Act (RCLA). This act preempts the DTPA to the extent they conflict. See Section 27.002(b). If the contractor's attorney will carefully instruct the contractor to follow the RCLA, the contractor can avoid the rather stiff impact of the DTPA and confine his damages to the extent of this question, plus attorney fees.

[92]You may desire to add the definition of "Construction Defect provided in Section 27.001(2), Tex. Prop. Code.

CLUSTER NO. 2: QUESTIONS NO.'s 15 THROUGH 19b INCLUSIVE, ARE SUBMITTED UPON PAUL PAYNE'S CLAIM THAT DON DAVIS BREACHED THE CONSTRUCTION CONTRACT AND THE COUNTER-CLAIM OF DON DAVIS THAT PAUL PAYNE BREACHED THE CONTRACT, TOGETHER WITH EACH PARTY'S RESPONSES TO THE CLAIM AND COUNTER-CLAIM

(15) Questions related to Paul Payne's claim that Don Davis breached the construction contract and did not substantially complete the project.

Question 15

Did Don Davis fail to comply with the construction contract?[93]

You are instructed that the terms and conditions of the Building Code of the City of Podunk, Texas, that deal directly with the construction lof the building involved in this case constitute terms and conditions of the agreement between the Plaintiff and the Defendant as though they had originally be a part of the agreement. [94] The burden to comply with the Building Code is on the Contractor and not on the Owner. [95]

Answer "Yes" or "No."
Answer:__

If you have answered Question No. 15 "Yes" and in that event only, answer Question N umber 16.

Question 16

Was Don Davis' failure to comply with the construction contract a material breach of the construction contract?

You are instructed that the circumstances to consider in determining whether a failure to comply is material include:

1. The extent to which the injured party will be deprived of the benefit which he reasonably expected;
2. The extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
3. Then extent to which the party failing to perform or to offer to perform will suffer forfeiture
4. The likelihood that the party failing to perform or to offer to perform will cure his failure, taking into account the circumstances including any reasonable assurances;
5. The extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. [96]

Answer "Yes" or "No."
Answer:__

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[93] PJC 101.2

[94] ***McCreary v. Bay Area Bank & Trust***, 68 S.W.3d 727 (Tex. App. Houston 14th Dist. 2001). ". . . it is well settled that the laws which are in existence at the time of the making of the contract enter into and become a part of such contract as if expressly referred to or incorporated therein."

[95] See ***Gupta v. Ritter Homes, Inc***., 646 S.W.2d 168 (Tex.1983)

[96] See ***Mustang Pipeline Co. Vs Driver Pipeline Co***. 134 S.W. 3rd 195 (Tex 2004) adopting Restatement of Contracts, Section 241 (1981); also PJC 101.2

If you have answered Question Number 15 "YES" and in that event only, answer Question Number 17.

Question 17

Was Don Davis's failure to comply with the construction contract excused?

Failure to comply by Don Davis is excused by Paul Payne's previous failure to comply with a material obligation of the same contract. [97]

Answer "Yes" or "No."
Answer:___

Comparative Fault must be submitted since the advent of Section 33.003, Tex. Civ. Prac. & Proc. Code. See Question 2a et seq above.

Damages–Comment: The damages question may be conditionally submitted. Its contents are conditioned upon the evidence.

(17a) Questions related to Don Davis' claim that Paul Payne breached the construction contract and Don Davis lost profits as a result thereof; also Don Davis' claim for "extras" furnished at the request of Paul Payne

Question 17a

Did Paul Payne fail to comply with the construction contract? [98]

Answer "Yes" or "No."
Answer:_____

If you have answered Question No. 17a "Yes" and in that event only, answer the following question.

Question 17b

Was Paul Payne's failure to comply excused?

Failure to comply by Paul Payne is excused by Don Davis' previous failure to comply with a material obligation of the same contract. [99]

Answer "Yes" or "No."
Answer:_____

Question 18

Did Don Davis provide labor or materials for the construction of extras on the building project that were not a part of the original contract at the special instance and request of Paul Payne? Answer "Yes" or "No" with respect to each item listed in this question, immediately below. With respect to those items to which you answer "Yes" then further answer in dollars and cents, if any, the amount of money that Paul Payne agreed to

[97]PJC 101.21 and 101.22

[98]PJC 101.2

[99]PJC 101.21 and 101.22

pay and place your answer in the space provided. If there was not an agreement as to price, then find the reasonable market value in dollars and cents of each item in the space provided. [100] (Provide a granulated set of subdivisions that describe the disputed "extras" and provide a space for any monetary award to be made for each subset.) [101]

> "Extras" are the result of one or more agreements between the parties for the contractor to furnish labor and materials for additional construction not called for in the original contract.

Damages–Comment: The damages question may be conditionally submitted. Its contents are conditioned upon the evidence. See the damage question in Cluster No. 1 for suggestions relating to claims for lost profit.

If you have answered Question Number 16 "YES" then do not answer the following question otherwise answer question number 19. [102]

Question No. 19a

Do you find that Don Davis substantially completed the construction contract?

Answer "It was not substantially completed" or "It was substantially completed."
Answer:_____

To constitute substantial completion the contractor must have in good faith intended to comply with the contract, and shall have substantially done so in the sense that the defects are not pervasive, do not constitute a deviation from the general plan contemplated for the work, and are not so essential that the object of the parties in making the contract and its purpose cannot, without difficulty, be accomplished by remedying them. Such performance permits only such omissions or deviation from the contract as are inadvertent and unintentional, are not due to bad faith, do not impair the structure as a whole, and are remediable without doing material damage to other parts of the building in tearing down and reconstructing. [103]

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[100]PJC 101.13 as modified.

[101] ***Black Lake Pipe Line Co. v. Union Constr. Co.***, 538 S.W.2d 80 (Tex 1976) "...existence of an express contract does not preclude recovery in quantum meruit for the reasonable value of services rendered and accepted which are not covered by the contract." The suggestion of granulation of the subset issues perhaps is not proper but in ***H.E. Butt Grocery Co. v. Warner,*** 845 S.W.2d 258,260 (Tex 1992), the Supreme Court held that it was error to granulate the issues over an objection of the opposing party but that it was not reversible error if the case was fairly submitted in the granulated form.

[102] ***Hooker v. Nguyen,*** 2005 Tex. App. LEXIS 6580 Court of Appeals of Texas, Fourteenth District, Houston August 18, 2005, "Other courts in Texas have held that if there is a material breach of a contract, that contract has not been substantially performed. See ***Cont'l Dredging v. De-Kaizered***, 120 S.W.3d 380, 394 (Tex. App.--Texarkana 2003, pet. denied); ***Patel v. Ambassador Drycleaning & Laundry Co.***, 86 S.W.3d 304, 309 (Tex. App.--Eastland 2002, no pet.); see also ***Measday v. Kwik-Kopy Corp***., 713 F.2d 118, 124 (5th Cir. 1983). We see no reason why the converse should not apply; that is, that if a party fails to substantially perform, his breach of the contract is material."

[103] This definition is taken from ***Turner, Collie & Braden, Inc. v. Brookhollow, Inc.,*** 642 S.W.2d 160 (Tex 1982) which reaffirmed the holding in ***Atkinson v. Jackson Bros.,*** 270 S.W. 848 (Tex 1925) which also held that determining the costs of completion was an element of the defense of "substantial completion" and held that where it is "made to appear from the pleadings and the proof that there was not a full compliance with the plans and specifications...[the contractor]. . . could not recover at all without invoking the equitable doctrine of substantial performance. We therefore think the burden was on them to furnish the evidence to properly measure the deductions allowable necessary to remedy

If your answer to Question 19a is "It was not substantially completed," and in that event only, answer the following question.

Question 19b

Find the reasonable cost of completion of the construction contact in accordance with its terms and conditions. The burden to prove the costs of completion inquired about in this question is on Don Davis. [104]

Answer in dollars and cents.
Answer: $_____

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the defects and omissions."

[104] Rule 277 states that "[t]he placing of the burden of proof may be accomplished by instructions rather than by inclusion in the question," hence this formulation of the question containing an included instruction. The burden of proof to establish the costs of completion of the "Substantially completed" construction project is on the contractor. See ***Vance v. My Apartment Steak House of San Antonio, Inc.,*** 677 S.W.2d 480 (Tex 1984). In the ***Vance*** case, the Supreme Court revisited ***Atkinson v. Jackson Bros.,*** 270 S.W. 848 (Tex 1925), dealing with the same issue and opined: "It is a well accepted postulate of the common law that a civil litigant who asserts an affirmative claim for relief has the burden to persuade the finder of fact of the existence of each element of his cause of action. ***Grieger v. Vega***, 153 Tex. 498, 271 S.W.2d 85, 89-90 (1954); ***Albright v. Long***, 448 S.W.2d 564, 565 (Tex. Civ. App.--Amarillo 1969, no writ). Therefore, when Vance alleged facts entitling him to recover for his performance and his allegations were denied by Steak House, Vance was placed in the position of having to prove every fact essential to his case. ***Shell Chemical Co. v. Lamb***, 493 S.W.2d 742, 744 (Tex.1973). The primary contention raised by Vance is that this Court should re-examine the holding in ***Atkinson v. Jackson Bros***., 270 S.W. 848, and shift the burden of proof on the cost of remedying building defects to the owner in all instances, even when the contractor is asserting a claim for relief. After consideration of the arguments for and against this change, we decline to overrule ***Atkinson***." Thus, if the contractor wh has not completed his construction project asserts that he/she has in fact "substantially completed" the project, he/she must carry the burden of proof to obtain a finding of the costs of completion. This is counter intuitive since it facially appears that the home owner is the complainant seeking damages for the breach of the contract.

Question No. 23

What is a reasonable fee for the necessary services of Paul Payne's attorney in this case, stated in dollars and cents? [105]

Answer with an amount for each of the following:

(a) For preparation and trial.
Answer:___

(b) For an appeal to the Court of Appeals.
Answer: _____

(c) For an appeal to the Supreme Court of Texas? [106]
Answer: _____[107]

You are instructed that you shall consider the following factors in determining the reasonableness of any attorney fee:

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[105]PJC 110.43. DTPA Section 17.50(a); attorney's fees are mandatory to a prevailing DTPA claimant, therefore the jury question should not inquire as to any amount, "if any." See ***Doerfler v. Espensen Co.***, 659 S.W.2d 929 (Tex. App. - Corpus Christi 1983, no writ) and ***Sattelite Earth Stations East v. Davis***, 756 S.W.2d 385 (Tex. App. - Eastland 1988, no writ).

[106]Attorney's fees to be incurred in the event of an appeal may be recovered at the trial court level if supported by pleadings and proof. This form is predicated upon the system of remittitur to be ministerially invoked by the District Clerk in the event a particular aspect of the appeal process is not utilized. The judgment itself is very convoluted but the method is necessary in order to comply with the one unconditional judgment rule. See ***Intl. Security Life Ins. Co. v. Spray***, 468 S.W.2d 347 (Tex. 1971).

[107]PJC 110.43 acknowledges that the "factors to be considered" is mandatory. In ***Arthur Andersen v. Perry Equipment Corp,*** 945 S.W.2d 812(1997), the Texas Supreme Court held that the listed "factors to be considered" should be submitted and also held that a percentage of the recovery is not the measure of an attorney fee award. However, "A party's contingent fee agreement should be considered by the fact finder... and is therefore admissible in evidence, but that agreement cannot alone support an award of attorney's fees under Texas Business and Commerce Code section 17.50(d) . . . we hold that to recover attorney's fees under the DTPA, the plaintiff must prove that the amount of fees was both reasonably incurred and necessary to the prosecution of the case at bar, and must ask the jury to award the fees in a specific dollar amount, not as a percentage of the judgment. " There is no reason to believe that there will a divergence from this holding in a anon-DTPA case that allows attorneys fees. ***Southland Life Ins. Co. v. Norton***, 5 S.W.2d 767, 768 (Comm. App.—1928, holdings approved) held that an attorney claimed under Article 3.62 of the Insurance Code may not be based on a percentage of the recovery. This holding supports the holding in ***Andersen v. Perry Equipment Corp, supra.*** Keep in mind that old Supreme Court cases do not fade away. In ***Reed v. Buck***, 370 S.W.2d 867, 870-71 (Tex. 1963) the Supreme Court held, in referring to some old Supreme Court cases that had not been cited or followed:

> "As noted by the Court of Appeals, these cases have never been overruled, but likewise they have not been cited in recent years. Because of this latter circumstance, the Court of Appeals was of the opinion that these ancient cases, like old soldiers, had just faded away. Perhaps a reexamination of the holdings of the cases mentioned as called for, but ***Ritter v. Hamilton*** and ***Ennis v. Crump*** are decisions of this court and unless there is some good reason for overruling them, they should not be disregarded."

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly. [108]
(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
(3) The fee customarily charged in the locality for similar legal services.
(4) The amount involved and the results obtained.
(5) The time limitations imposed by the client or by the circumstances.
(6) The nature and length of the professional relationship with the client.
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
(8) Whether the fee is fixed or contingent. [109]

D. CERTIFICATE

CERTIFICATE

We, the jury, have answered the above and foregoing questions as herein indicated and herewith return same into court as our verdict.

(Signature lines for unanimous verdict and for plurality verdict)

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[108] COMMENTARY: In ***Stewart Land Title Guaranty Company v. W. Dawson Sterling, Trustee***, 822 S.W.2d 1 (Tex.1991) the Supreme Court held that when a party seeking attorney fees presents a case having multiple claims or multiple parties, that party must segregate the attorney's services expended on the claim authorizing a recovery of attorney's fees from the part of the claims asserted that do not provide for the recovery of attorney fees and failing to do so will defeat the claim; however, "an award erroneously based upon evidence of unsegregated attorney's fees requires a "remand" as opposed to "reversal and rendition." "A recognized exception to this duty [to segregate] arises when the attorney's fees are in connection with claims arising out of the same transaction and are so interrelated that their prosecution or defense entails proof or denial of essentially the same facts . . . and therefore, when the causes of action involved in the suit are dependent upon the same set of facts or circumstances and thus are `intertwined to the point of being inseparable,' the party suing for attorney's fees may recover the entire amount covering all claims." This being so, the defendant should be careful to object to the submission of the attorney's fees question in the absence of segregation thereof or in the absence of evidence that meets the test of this exception. If the objection is made and the Court sustains the objection, the plaintiff should move to re-open his case and present the evidence correctly.

[109] See "Comment" under PJC 110.43. In ***Andersen v. Perry Equipment Corp.,*** 945 S.W.2d 812, 817-18 (Tex 1997), the Texas Supreme Court held that the "factors to be considered" were mandatory. This raises the prospect that should the evidence of a party seeking attorney fees not include all of the "factors" being considered by the expert proving up those fees, the opposing party is entitled to a directed verdict of no recovery or after verdict is entitled the opposing party, or on timely motion, the opposing party is entitled to judgment not withstanding the verdict.