

## Question MPT-1 – February 2023 – Selected Answer 1

**To:** Zoe Foss  
**From:** Examinee  
**Date:** February 21, 2023  
**Re:** Jasmine Hill Matter

### MEMORANDUM

#### INTRODUCTION

You asked me to draft a memo analyzing whether our client (Mrs. Hill) has one or more claims against Reliant under DPTA. Not only will Mrs. Hill likely prevail on claims of failing to disclose a material fact and misrepresentation of past/current condition, she will also be entitled to special damages and attorneys fees.

#### DISCUSSION

To recover under any of the enumerated DTPA claims, a plaintiff must first prove that (1) plaintiff is a consumer; (2) the defendant is engaged in one or more of the false, misleading, or deceptive in section 204 of the the Business code; (3) the act(s) constituted a producing cause of the plaintiff's damages; and (4) the plaintiff relied on defendant's conduct to his/her detriment. (Diaz, Fr. Bus. Code 205(a)) (Gordon)

(1) Mrs. Hill is a consumer:

A consumer is someone who seeks to acquire any goods or services. (203(d)) Goods include tangible items or real property purchased or lease for use. Here, Mrs. Hill sought to and did acquire a used boat from Reliant boating.

(2) Reliant engaged in one or more of the false, misleading, or deceptive claims under 204:

*(2a) Mrs. Hill will prevail on a claim of Failure to disclose:*

To prevail on a claim of failure to disclose, plaintiff must prove that Defendant failed to disclose information about goods or services (2) known by Defendant at time of transaction and (3) intended to induce consumer to enter into transaction (4) consumer would not have entered had info not been disclosed. (Abrams)

Further, the seller will not be liable for failing to disclose information when the buyer has actual notice. This is because actual notice negates the requirement that Defendant's false/misleading inducement was the producing cause of plaintiff's harm.

In the case of Mrs. Hill, she has a strong argument for failure to disclose on the part of Reliant Boating. On her bill of sale, Reliant expressly represented that the boat had no defects and she was further assured by the owner of the company (Mr. Stevens) that while the boat was used, it was in great condition and worked like new. Although it is not a certainty, it is likely that Reliant Boating knew of the crack in the engine at the time of the sale to Mrs. Hill as the mechanic she paid to examine and replace the engine found remnants of epoxy glue covering the crack which he claimed was likely done recently. Of course, this is a 3rd party opinion who cannot say for sure when the glue was put on, however, as a mechanic in the field of fixing boats, it is likely his knowledge about the glue was truthful. Reliant could argue that the express disclaimer on their bill of sale demonstrates that they in fact did not have knowledge of the defect. However, any analysis of the engine should demonstrate otherwise. Further, as this was a sale by a salesman, it is likely Mr. Stevens could easily be found to intentionally induce Mrs. Hill into buying the boat. The very nature of his job is to induce customers into making purchases. Evidence of his intention can be seen in his pricing of different boats for Mrs. Hill, his personal work with her in deciding on which boat she should buy, and his representations that the boat was a "gem", "perfect for (her) family" and in great condition. He even gave Mrs. Hill his email and cell phone number to ask any further questions. Therefore, it is obvious from both their email exchanges and nature of their in person interactions that Mr. Stevens intended to induce Mrs. Hill into making the transaction. Lastly, it is highly evident that Mrs. Hill would not have entered into the purchase had the information about the condition of the boat been disclosed. Not only does Mrs. Hill tell us expressly that she would not have purchased the boat had she known it was going to break down 15 minutes after being in the water, but she also notes now big of a purchase this was for her and her family. She had never bought anything of the sort and wanted to make sure she was getting something that would fit their needs. Therefore, the representation by Reliant is the producing cause of Mrs. Hill's harm. This means it was a substantial factor in bringing about her injury. And as Mrs. Hill emphasizes, she would not have bought the boat had she known about its defect.

Lastly, Mrs. Hill did not have actual notice of the defect in the boat. Mr. Stevens ran the engine for her when she was at the store and by all appearances, it seemed to run easily. Further, she was assured by Mr. Stevens that the boat was in great condition and her bill of sale contained a disclaimer saying that the store did not know of the defects.

As demonstrated above, Mrs. Hill meets all of the requirements for a failure to disclose claim. As a result, she will be entitled to economic damages at a minimum, and if it is conclusively determined that Reliant acted knowingly, she will be entitled to treble exemplary damages and possibly mental anguish damages (see below).

*(2b) Mrs. Hill prevails on a claim of Misrepresentation of goods/services are of a particular standard, quality, or grade:*

Mrs. Hill likely has a valid argument that Reliant made misrepresentations of the quality of the boat they sold her.

To determine the strength of Mrs. Hill's claim, we must distinguish whether Mr. Stevens' representations were actionable or mere puffing. Mere puffing is not an actionable cause under the DTPA. Puffing is "exaggerated sales-speak" for promotional purpose (Gordon). Actionable statements can be written or spoken.

To determine if puffing, we must examine 3 factors and make an overall determination on the basis of the facts at play:

(1) specificity of alleged misrepresentation. Vague/indefinite, statements that compare one product to another and claim its superiority and mere opinions NOT actionable. As to the specificity of the representations made by Reliant, both sides have a legitimate argument. Mr. Stevens assured Mrs. Hill that the Envoy she bought was "a real gem," "a perfect fit" "perfect for (her) family" "in excellent condition" and "runs just like new."

Statements regarding the gem-like nature of the boat and its perfect fit for her family are clearly general in nature. There is no concrete representation being made behind these vague terms. They are likely "exaggerated-sales speak" (gordon). This is akin to representations that a vehicle is "rugged" or "luxurious" Chapman v. Acme). However, it is arguable that representing the boat to be in excellent condition and running like new are actionable representations as they speak to the working condition of the boat. They are slightly more specific than general adjectives and descriptors used in the previous statements. The strongest evidence in favor of reliant is the express representation they made that they were unaware of any defects in the boat. This was written on the bill of sale and likely trying to avoid any liability. This was clearly not puffing and was an actionable statement. Proof would be needed to rebut it (the epoxy glue). Overall, representations made by reliant in favor of Mrs. Hill were generally vague in nature and may constitute mere puffing under the vagueness test.

(2) the comparative knowledge of the consumer and the seller of service provider: representations made by a service provider with greater knowledge and experience than the consumer are more likely actionable; and

Here, Mrs. Hill is at an advantage given her lack of bargaining power in relation to Mr. Stevens or Reliant. She had only ever ridden on boats (and not very often at that). She had no history of purchasing a boat and had little knowledge of what she wanted. Further, she was on a budget when buying. She relied completely on Mr. Stevens in selecting a boat for her that was in her price range and met her specifications. She had no idea how a boat's engine worked and no reason to think anything would be wrong with it. Mr. Stevens, on the other hand, owns a business that sells boats. He likely has an intricate knowledge of how boats work. Therefore, even though his representations were more vague in nature, it is highly likely they could be considered actionable due to the difference in bargaining power. Reliant could argue however that being in the business of owning and selling boats does not necessarily entail a detailed knowledge of their inner workings (aka the engine and whether it is broken). Nevertheless, Mrs. Hill would likely prevail on this prong.

(3) whether the representation relates to a past or current condition as opposed to a future event/condition. Statements about past or current condition are more likely to be actionable.

The statements made by Mr. Stevens that induced Mrs. Hill to buy were all regarding the current condition of the boat. He maintained that as of the time she bought the boat, it was in great working condition. Therefore, his statements are likely to be actionable under this prong.

Because Mrs. Hill appears to prevail at least on 2/3 of the elements against a finding of puffing, she will also prevail on a misrepresentation claim under Franklin law. This will also entitle her to damages (see below).

### *(3) Mrs. Hill is entitled to Actual and Special Damages*

Under Franklin's DTPA laws, Plaintiff may recover damages after prevailing on either of the claims discussed above. The act must be a producing cause of plaintiff's harm. This means it was a substantial factor in bringing about her injury. And as Mrs. Hill emphasizes, she would not have bought the boat had she known about its defect. Further, the Consumer must've relied to her detriment. Here, Mrs. Hill was depending on Mr. Stevens' representations to ensure she bought a good boat for herself and her family. She spend 7500 to buy the boat and 3000 to replace the engine. That constitutes detrimental reliance.

If Mrs. Hill prevails she may recover economic damages in the discretion of the trial court. In Gordon, this included repair costs and lost net profits. This is akin to the cost for replacement of her engine that Mrs. Hill paid the mechanic (3000). Therefore, Mrs. Hill would, at the very least, recover economic damages.

Further, if Defendant's conduct is found to be committed knowingly, Mrs. Hill may be entitled to special damages (exemplary and mental anguish). As was established above, Mr. Stevens likely had actual awareness to the misleading nature of his conduct given that there was glue on the engine (again, he may argue against this). Therefore, Mrs. Hill is likely entitled to special damages:

1. Exemplary damages: Mrs. Hill would likely recover 9000 in exemplary (treble) damages as they are three times the amount of economic damages.

2. Mrs. Hill will also likely be able to collect mental anguish damages. Mental anguish "implies a relatively high degree of pain and distress beyond mere worry or anxiety...incl. pain resulting from grief, severe disappointment, indignation, and wounded pride (and similar emotions) (oliver v. elite (1997) This is a high standard. In other cases, plaintiffs have recovered mental anguishes from: feeling "severe disappointment" at academic program, having wounded pride at being "had", indignation at academic instruction, and severe despair to the point of dropping out of school.

Here, Mrs. Hill will very likely be entitled to mental anguish damages as the defect in her boat ruined an entire family weekend (to the point where the defect caused them to turn around and go home) and her conversations with Mr. Stevens after finding out about the defect made her feel "taken advantage of." These are akin to the notions of severe disappointment of having wounded pride for "being had." Further, Mrs. Hill emphasizes the heavy economic toll of the boat on her finances and likely feels anguish due to that as well. Therefore, she is entitled to damages at the discretion of the jury.

#### CONCLUSION:

Mrs. Hill will likely prevail on both claims of failure to disclose and misleading misrepresentations. Because Reliant likely acted knowingly, she will be entitled to both actual and special damages

### **Question MPT-1 – February 2023 – Selected Answer 2**

Memorandum

To: Zoe Foss

From: Examinee

Date: February 21, 2023

Re: Jasmine Hill Matter

Thank you for giving me the opportunity to research this information for you. Below, please find the analysis on whether Ms. Hill has a one or more claims against Reliant Boating (Reliant) under the Franklin Deceptive Trade Practices Act (DTPA).

## **I. ANALYSIS**

The DTPA prohibits false, misleading or deceptive acts or practices in the conduct of any trade or commerce. Section 204 contains a list of prohibited acts. Further actionable misrepresentations may be oral or written.

### **(1) DTPA Violations**

In *Gordon*, citing *Diaz*, the elements of a DTPA claim are (1) the plaintiff is a consumer; (2) the defendant engaged in one or more of the false, misleading or deceptive acts enumerated in §204 (3) the acts constituted a producing cause of the plaintiff's damage and (4) the plaintiff relied on the defendants conduct to his or her detriment. In *Diaz*, it finds that a "producing cause" is a substantial fact that brings about the injury without which the injury would not have occurred. The plaintiff consumer would have the burden of proof as to each element. A consumer under §203 is an individual who seeks or acquires any goods or services. A good is a tangible item or real property purchased or lease for use. If a violation is committed "knowingly" the plaintiff is entitled to receive three times his or her actual economic damages as well as mental anguish damages.

Here, Hill is the plaintiff. She is a consumer because she bought the boat and a boat is considered a good because it is a tangible item. The defendant is Boating. They engaged in one or more of the false deceptive acts in §204(d) and (g). Further, Hill relied on the Boating conduct to her detriment of the boat not working and having to have it fixed for a loss of \$3,000. Below we will find that a court is likely to find that Boating committed it knowingly and she is entitled to economic damages but not mental anguish damages.

#### **(a) Representations about standard, quality or grade of services §204(d)(ii)**

Boating wrote to Hill in an email telling her that the Envoy, the boat she was trying to buy was a "real gem" and "would be perfect for you." Under §204(d)(ii), false, misleading or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful including but not limited to the following acts: representing goods or services (ii) are of a particular standard, quality or grade if they are of another. Three factors determine whether sales speak for promotional purposes is

"mere puffing" (1) the specificity of the alleged misrepresentation (2) the comparative knowledge of the consumer and the seller or service providers and (3) whether the representation relates to a past or current condition as opposed to a future event or condition.

Here, the misleading conduct was telling Hill that it was a "real gem." Further, when Hill inquired as to it needing repairs, Greg, the one who showed Hill the boat, wrote to Hill that it was in "excellent condition." It was not mere puffery because Greg was specific as to his representation of the boat, he had greater knowledge of the boat as he only turned on the engine for Hill, Hill could not have taken the boat on her own to inspect it and the representation related to a time during the transaction of the boat. Therefore based on these elements, they show that it was more than mere puffery. This is showing that the boat was of a certain quality, in excellent condition but it was misleading because Hill is showing evidence that the motor stopped working as soon as it was working in the water and when a mechanic inspected it, it showed there was epoxy that was holding the motor together, showing that it was recently fixed. This is evidence showing that his words were more than mere puffery. In contrast to *Gordan*, the words by the defendant were too indefinite to be actionable. He said "We'll get it done, we'll get it fixed we'll get it right back out on the road." There was no specificity as to when it would get fixed and what they would actually do to the truck. Here, a court is more likely to find based on the three elements, Greg's words were more than mere puffery.

### **(b) Representations that services were performed §204(g)**

Under 204(g) it is a violation to fail to disclose information concerning goods or services that was known at the time of the transaction if such failure intended to induce the consumer to enter into a transaction if such failure was intended to induce the consumer to enter into a transaction into which the consumer would not have entered had the information been disclosed.

Here, Greg failed to disclose that the boat needed repairs at the time that the transaction was occurring. Hill has shown evidence that had he known that the motor needed a repair, she would not have boat that boat therefore there is a violation under §204(g) and we can look at damages that Hill may be entitled to.

## **(2) Damages**

### **Economic Damages**

**Under** §203 of the Franklin Business Code, a plaintiff may recover for repair and replacement cost. Economic damages includes total loss sustained by the consumer as a result of the deceptive trade practice which includes related and reasonable necessary expenses.

Here, Hill can show the cost to repair was \$3,000. There is evidence Hill has shown that the epoxy shows that it was freshly applied and thus a court is likely to find it was adhered during the time of the transactions between Hill and Greg and that it was known the motor was not in working order during that time. As seen above Greg would likely be found to have conducted deceptive trade practices, if a court finds that he has then Hill is more than likely going to recover the economic damages which includes the \$3,000 of the total cost to repair the motor in order to use the boat. She would likely not recover any net profits as she was not using the boat for business and no interruption of business occurred and would only get the cost of repair.

### **(3) Knowing Conduct as a Basis for Exemplary Damages**

Under §203 of the FBC, "knowing" 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. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness. In *Diaz*, a court found that a person must think at some point "yes, I know that this is false, deceptive or unfair, but I'm going to do it anyway."

Here Hill is showing evidence from the mechanic that yes there was epoxy on the motor, and that epoxy was freshly adhered on there. This will likely show a court that it was deceptive and Greg knew that when Hill inquired to him if any repairs were needed and he did the deception anyway and told Hill a lie, that the boat was in fact in excellent condition.

In contrast, the court in *Abrams* found that there was no knowing misrepresentation when the evidence showed that a finding that the defendant represented that it had repaired the oil leak when in fact it had not. They showed evidence that the service department believed that the oil leak had been fixed each time it worked on the truck.

Therefore a court will find that Greg knowing acted in the deception of selling a boat that needed repair when the consumer, Hill would not have bought the boat had she known it did need repairs.

### **(4) Attorney's Fees**

A consumer who prevails, may be obtain the amount of economic damages found by the trier of fact or if the trier of fact finds that the conduct of the defendant was committed knowingly then exemplary damages of three times the amount of economic damages and damages for mental anguish. Each consumer who prevail shall be awarded court costs and reasonable and necessary attorneys fees. The award of



reasonable and necessary attorney fees are mandatory for a consumer prevailing as a DTPA plaintiff.

Here if Hill is entitled to prevail on all of the DTPA allegations above against Boating. Further if we are her attorneys and testify to the amount of reasonable and necessary attorneys fees incurred then Hill is entitled to them.

Therefore it is likely that Hill will prevail on an attorney fee award.

### **Mental Anguish Damages**

An award of damages for mental anguish implies a relatively high degree of pain and distress beyond mere worry or anxiety and includes the pain and distress beyond mere worry or anxiety.

Here Hill is unlikely to receive as there is no evidence of pain or distress beyond mere worry or anxiety. Money problems may be a huge factor but she is choosing to keep the boat and could end up selling the boat and get money this way.

Therefore Hill is unlikely to receive mental anguish damages.

### **Potential Claims by Boating**

Here, Reliant boating could argue that the dialogue in the emails could not have been a producing cause of Hill's damages because Hill knew it was a used boat and only found out it was damaged once it went into the water and had it repaired and inspected on why it was damaged. But a court is likely to find as in *Abrams* that there is unrebutted proof that shows the emails contain representations that substantially contributed to Hill's decision to enroll. For example, when Hill commented that she did not want to buy a boat that going to need repairs, Greg responded that even though the Envoy was a few years old, it was in excellent condition and ran like new. Hill can prove through that email when she replied Okay lets do this! she was relying on the representation that the boat was in excellent condition and did not need any repairs. This evidence similar to *Abrams* could be proven sufficient to support a finding that the representations in the email were a producing cause of Hill's loss.

\*

Reliant could argue that it cant be held liable for a failure to disclose information when Hill's had actual notice of the same information. Under 204(g) failing to disclose information concerning goods or services that was known at the time of the transaction if such failure intended to induce the consumer to enter into a transaction if such failure was intended to induce the consumer to enter into a transaction into which the consumer would not have entered had the information been disclosed. This

could be proven when Greg turned the boat on to show that it was in working condition. However, Hill must prove four elements to show that Boating is still liable. First Hill must show that defendant failed to disclose information about goods and services (2) known by the defendant at the time of the transaction and (3) intended to induce the consumer to enter into a transaction (4) into which the consumer would not have entered had the information been disclosed. Further, Boating cannot be held liable for failing to disclose information about which the buyer had actual notice then that information could not be the producing cause of Hill's loss.

Here, there is evidence showing that Greg knew about the motor needing a repair while he was trying to sell the boat to Ms. Hill thus failing to disclose as he did the opposite and said it was in excellent condition, there is evidence showing that this occurred during the transaction, and with his words of sale he was inducing the consumer to enter into the transaction, and Hill is showing and has stated to Greg that she would not have entered into the transaction had the information that the boat needed a repair had been disclosed.

## **II. CONCLUSION**

Thank you for allowing me the opportunity to research these claims for you. If you need anything else or have any other questions for me, please do not hesitate to ask.

Sincerely,  
Examinee

### **Question MPT-1 – February 2023 – Selected Answer 3**

#### **MEMORANDUM**

**To:** Zoe Foss  
**From:** Examinee  
**Date:** February 21, 2023  
**Re:** Jasmine Hill Matter

#### **Question Presented**

You asked me to (1) analyze whether Ms. Hill has one or more potential claims against Reliant under Franklin's Deceptive Trade Practices Act (DTPA), including claims based on breach of express or implied warranty, and (2) discuss the specific relief that Ms. Hill would be entitled to if she were to succeed in a DTPA action.

## Short Answer

Ms. Hill likely has two potential claims under the DTPA against Reliant. The first claim arises under § 204(d) due to Reliant's misrepresentation about the boat's character and particular standard, quality, or grade. The second claim arises under §204(g) due to Reliant's failure to disclose information regarding the boat that was known to Reliant at the time of the transaction and the failure was intended to induce the transaction.

As a result, Ms. Hill is likely entitled to relief from these claims in the form of (1) economic damages, (2) exemplary treble damages, (3) exemplary mental anguish damages, and (4) attorney's fees.

## Legal Analysis

### **I. Ms. Hill would likely succeed in bringing two potential claims under the DTPA against Reliant.**

The DTPA aims to "protect consumers against false, misleading, and deceptive business practices." § 202. To that end, the DTPA prohibits "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade of commerce." *Fr. Bus. Code* § 204. One prohibited act under § 204 is a seller who represents that a good has a character or use it does not have or is of a particular standard, quality, or grade it is not. §204(d). Another prohibited act under § 204 is when a seller fails to disclose information regarding the good that was known at the time of the transaction and the failure was intended to induce the transactions. §204(g). Both oral and written representations that give rise to these prohibited acts are actionable. *Diaz v. Ellis (Fr. Sup. Ct. 1998)*. Importantly, the DTPA makes clear that construction of the statute and its requirements should be "liberally construed . . . to promote its underling purpose." § 202.

To maintain a cause of action under the DTPA, a plaintiff must establish four elements: (1) plaintiff is a consumer, (2) defendant engaged in one or more false, misleading, or deceptive acts in § 204, (3) the act constituted a producing cause of plaintiff's damage, and (4) the plaintiff relied on defendant's conduct to her detriment. *Fr. Bus. Code* § 205(a); *Diaz*. The consumer plaintiff carries the burden of proof as to each element. *Diaz*.

Ms. Hill would likely succeed in bringing an action under the DTPA since she would most likely satisfy this burden of proof all four elements. The first is easily met given that there will likely be no contest that Ms. Hill is a consumer plaintiff since she

purchased a good for her personal recreational use from a seller. Second, the defendant, Reliant, likely engaged in two false, misleading, or deceptive acts as described in § 204(d) and (g). Third, Reliant's acts constituted the producing cause of Ms. Hill's damage. And, fourth, Ms. Hill relied on Reliant's conduct to her detriment. The specifics of each claim under §204(d) and (g) will be separately analyzed below.

## **II. Under § 204(d), Ms. Hill would likely have a claim based on Reliant's representation that the boat was of a certain character and was of a particular standard, quality, or grade.**

Section 204(d) prohibits a seller from representing that a good has a character or use it does not have or is of a particular standard, quality, or grade it is not. § 204(d); *Gordon*. Ms. Hill would likely be able to satisfy the three remaining elements of a DTPA claim (excluding a consumer since would not likely be contested) for this prohibited act.

### **A. A factfinder would likely view Reliant's statements as false, misleading, or deceptive.**

The statements made by Reliant likely satisfy the second element that a false, misleading, or deceptive act occurred. There are two groups of statements by Reliant related to boat purchase that could be actionable. The first group of statements are those made by the seller leading up to the purchase of the boat. The second group includes the written statement in the contract that "Seller has no knowledge of any defects in and to the Boat." Either type of statement--whether oral or written--could satisfy to a false, misleading, or deceptive act. Of these two groups, the written contract statement is the best support for satisfying this element.

#### ***1. The written contract***

The written contract statement is the most likely evidence to satisfy this second element that Reliant engaged in a false or misleading act. The statement uses absolute language that Reliant "has *no* knowledge of *any* defects." (emphasis added). However, evidence to the contrary exists from the boat mechanic's conclusion that the cracked engine block contained epoxy glue showing knowledge of the issue. A factfinder is not likely to reasonably believe that the epoxy glue appeared within the cracks of the engine on its own. The more likely explanation is that someone used the glue to at least temporarily hold the engine together so that it would start up when demonstrating the health of the engine to a prospective buyer. Although this is ultimately an issue for a factfinder to decide, the boat mechanic's conclusion would likely support this element and support a actionable claim by Ms. Hill under the DTPA.

## ***2. Pre-contract statements***

It is also possible that the pre-contract statements that the boat is "a real gem" and in "excellent condition" could satisfy this element. However, this is a closer call than the written contract statement.

In *Gordon*, the Franklin Court of Appeals fleshed out what counts as an actionable false or misleading statement. Mere puffery--"exaggerated 'sale-speak' for promotional purposes"--is an example of what does not count as an actionable misrepresentation. *Gordon* (quoting *Diaz*). Three factors help identify mere puffery. *Id.* Mere puffery occurs when the specificity of the alleged misrepresentation is vague or indefinite, compares one product to another as superior, and the timing that the representation focuses on. *Id.* A representation about a past or current condition is more likely to be actionable than a future representation. *Id.*

Using the factors discussed in *Gordon*, Reliant's representations that the boat is "a real gem" may constitute mere puffery since this statement was preceded with "I think," which could denote this were merely an opinion. This is to the dealership's mere puffery of a vehicle as "luxurious." *Salas v. Carwold* (Fr. Ct. App. 2003). However, Reliant's owner followed up his possible opinion statement by describing the boat as in "excellent condition" and "runs just like new." These representations are less likely opinions since they are reasonably specific, making this statements more analogous to the more definitive statements made by a college to a consumer about its "state of the art" equipment. *Abrams v Chesapeake Business College* (Fr. Ct. App. 2012). Thus,

Second, when a seller possesses comparatively more knowledge than the consumer, the misrepresentation is more likely actionable. Reliant as a seller of boats possessed more comparative knowledge than Ms. Hill as a consumer. Ms. Hill stated that "[t]his is my first time" buying a boat and indicated a desire to lean on the seller's expertise and knowledge, as evidenced by responding favorably to the seller's specific recommendations as to the type of boat she should buy. Ms. Hill stated her concern about the age of the boat recommended by Reliant's owner and explicitly stated that she did not want to buy a boat that would need repair. But the owner replied by reassuring Ms. Hill that the boat is "in excellent condition and runs just like new." Although Reliant didn't explicitly call itself a "subject-matter expert" like the college in *Abrams* described its teachers as, Reliant's comparative knowledge and expertise compared to Ms. Hill make Reliant most analogous to the seller in *Abrams*, resulting in these statements being less likely to be viewed as puffery.

Third, when a seller's statements concern a present or current condition (rather than a future condition), it is more likely to be actionable. Reliant's statements are about a present condition--that the boat is in "excellent condition" and "runs just like new"--rather than a future one.

Accordingly, these factors for determining mere puffery weigh in favor of finding that Reliant's statements were false and misleading, thereby satisfying the second element of a DTPA claim. Although this is ultimately for a factfinder to determine, the evidence Ms. Hill provided likely will be sufficient to bring a DTPA claim under 204(d).

**B. A factfinder would likely view Reliant's acts as constituting the producing cause of Ms. Hill's damage and that Ms. Hill purchased the boat in reliance on Reliant's representations to her detriment.**

A producing cause is a "substantial factor that brings about the injury, without which the injury would not have occurred." *Gordon v. Valley Auto Repair, Inc.* (Fr. Ct. App. 2009) (citing *Diaz*).

If a seller's statements "substantially contributed" to the consumer's decision, then the representation is a producing cause. *Abrams*. In *Abrams*, the court found that the statements in the catalogue constituted "unrebutted proof" that of a substantial contribution to the consumer's decision to enroll in the college. Likewise, Ms. Hill's statement indicate a similar substantial contribution. She stated that she "never would have bought it if I'd known it would need a new motor." Additionally, Ms. Hill relied on the owner's recommendation of what boat to buy and on his reassurances in the email as part of her decision to go through with the purchase. She express trepidation about the purchase, which was eliminated after the seller with comparatively more knowledge about boats reassured her about the purchase.

Ms. Hill also suffered a detriment because of her reliance of Reliant's statements. Because the boat stopped working 15 minutes after Ms. Hill took it out on the lake, Ms. Hill suffered a detriment by not getting to enjoy the weekend getaway with her family and friends. She was forced to end the weekend trip early, much like the college student in *Abrams* needed to drop out of college. In both situations, neither consumer was able to enjoy the purchased good or service and suffered a detriment as a result. Ms. Hill also suffered a detriment by having to cover the costs of repairing the boat engine. She specifically chose to buy a used boat since she could not afford a new boat. Additionally, she told Reliant that she did not want to pay for any repairs. Thus, the unexpected repair costs also caused Ms. Hill to suffer a detriment.

Therefore, this evidence is likely sufficient to support a finding that Reliant's representations were a producing cause of Ms. Hill's loss.

**III. Under § 204(g), Ms. Hill would likely have a claim based on Reliant's failure to disclose information regarding the boat that was known to Reliant at the time of the transaction and that failure was intended to induce Ms. Hill's into the transaction.**

Another prohibited act under § 204 is when a seller fails to disclose information regarding the good that was known at the time of the transaction and the failure was intended to induce the transactions. §204(g). Once again, Ms. Hill would likely be able to satisfy the three remaining elements of a DTPA claim involving this prohibited act.

**A. A factfinder would likely view Reliant's acts as false, misleading, or deceptive and find that the misleading information was known by Reliant at the time of the transaction.**

The false and misleading statement element can also be satisfied by a seller's failure to disclose information (in other words, an omitted statement that is misleading) at the time of the transactions. A seller might avoid liability if the consumer has actual notice of certain important information. *Ling v. Thompson (Fr. Ct. App. 2004)*. Likewise, a seller might avoid liability if the statement was made without knowledge of its falsity at the time or where information was withheld innocently. *Abrams*.

In this case, there is evidence that Reliant likely knew of the boat's cracked engine and still withheld the information from Ms. Hill. The evidence provided by Ms. Hill indicates that this is not a situation in which Reliant was innocent given that a boat in its inventory had a cracked engine that was glued together. Reliant also likely did not accidentally fail to disclose this information since it affirmatively described the boat's condition as "excellent" and that the boat "runs just like new" at the time of the transactions. This is similar to *Abrams*, in which the college knew that its catalogue contained false representations at the time of the transactions and did nothing to disclose otherwise to the consumer. Such sellers will likely not be viewed by a factfinder as innocent or as accidentally withholding information when they make affirmative statements to the contrary.

Therefore, this element of a false or misleading statement would like be met by Reliant's failure to disclose the accurate condition of the boat. As a result, this evidence supports that Ms. Hill could bring a claim under §204(g).

**B. A factfinder would likely view Reliant's acts as constituting the producing cause of Ms. Hill's damage and find that Ms. Hill purchased the boat in reliance on Reliant's conduct to her detriment.**

A producing cause is a "substantial factor that brings about the injury, without which the injury would not have occurred." *Gordon v. Valley Auto Repair, Inc.* (Fr. Ct. App. 2009) (citing *Diaz*). For the same reasons as discussed above, Reliant's failure to disclose is a substantial contribution to Ms. Hill's decision to purchase the boat. Ms. Hill's statements indicate that she would not have purchased the boat had she known about material information about the boat's condition that Reliant failed to disclose.

**II. Ms. Hill could likely obtain relief in the form of economic and exemplary damages.**

Since Ms. Hill would like succeed in bringing DTPA action under § 204(d) and/or § 204(g), the next step is to determine the type of relief she would likely be entitled to. The DTPA authorizes multiple types of relief. The main type of relief is economic damages, which is the "compensation for actual pecuniary loss, including costs of repair and replacement." § 203(f). However, if a plaintiff also shows that the misrepresentation was made knowingly, she may be entitled to exemplary relief. *Id.* Finally, a consumer may also receive a mandatory award of attorney's fees and court costs upon bringing a successful DTPA claim.

**A. Ms. Hill is likely entitled to economic damages.**

Economic damages comprise the "total loss sustained by the consumer as a result of the deceptive trade practice," including "related and reasonably necessary expenses." *Diaz*. Here, this would include the \$3,000 costs to repair the boat.

**B. Ms. Hill is likely entitled to exemplary damages.**

When a violation is committed "knowingly," a plaintiff is entitled to (1) treble damages and (2) damages for mental anguish. *Fr. Bus. Code. § 205(b)(2)*. Here, the evidence likely supports a finding that Reliant knowingly made false or misleading statements and knowingly failed to disclose material information about the condition of the boat. Among the evidence prior discussed in this memo, the mechanic's conclusion that the engine was glued back together and indicates that someone knew of the damage is the most helpful to Ms. Hill in support of exemplary damages. Because actual awareness "does not mean merely that a person knows what he is doing" but that a person "knows that what he is doing is false, deceptive, or unfair," Ms. Hill could use the mechanic's statement in support of requesting treble



damages. *See also Berg v. RMS Roofing* (finding that knowing conduct occurred where contractor admitted work was not done properly but did not fix it despite continuing to bill).

To be sure, Reliant would likely contest that any actionable misrepresentations were made "knowingly," but because objective manifestations of Reliant's knowledge about the cracked motor exist in the boat mechanic's findings, it is permissible to infer actual awareness. Such evidence would likely be sufficient to argue that exemplary damages for Ms. Hill are warranted.

Additionally, Ms. Hill could also seek exemplary damages for mental anguish. When there is evidence of knowing conduct, such damages are proper. *Abrams*. Mental anguish damages "implies a relatively high degree of pain and distress beyond mere worry or anxiety, . . . and includes pain resulting from grief, severe disappointment, indignation, wounded pride and similar emotions." *Oliver v. Elite*. Adequate proof of such mental anguish can be the consumer's own testimony about her severe disappointment, indignation, wounded pride, and severe despair. Here, Ms. Hill said that she feels like was "taken advantage of" by Reliant, was infuriated when Reliant suggested she did something wrong to cause the boat to stop working, was "disappointed" when her weekend getaway was ruined, and upset over having to replace the motor since it was "stressful" and "set [Ms. Hill] back financially." Given her "hassle," Ms. Hill likely could support a request for exemplary damages for mental anguish in addition to exemplary treble damages for the knowing statement.

### **C. Attorney's Fees**

When a plaintiff succeeds on a DTPA claim, attorney's fees are mandatory. Given the aforementioned conclusions that Ms. Hill would likely succeed on her DTPA claim, attorney's fees is a likely form of relief Ms. Hill would be entitled to. This is because the DTPA makes an award of attorney's fees mandatory upon a successful DTPA claim.

### **Conclusion**

Ms. Hill would likely be able to bring two claims under the DTPA. She would also be able to seek relief in the form of economic and exemplary damages, as well as attorney's fees.

