

Chapter 4

Responding to the Notice

- § 4.01 Evaluating the Notice Letter
 - [a] FORM: Letter requesting inspection of goods
- § 4.02 —Initial Evaluation of DTPA Notice Letter
 - [a] FORM: Letter to client analyzing claim
 - [b] FORM: Letter requesting additional time
- § 4.03 —Initial Evaluation of Residential Construction Notice Letter
 - [a] FORM: Letter requesting opportunity to inspect and photograph defects
 - [b] FORM: Letter to builder analyzing the notice letter
- § 4.04 —Notice to Subcontractors
 - [a] FORM: Letter to subcontractor giving notice of claim
- § 4.05 Requesting Additional Information
 - [a] FORM: Letter requesting additional information (general)
 - [b] FORM: —Alternative questions: residential construction defects
- § 4.06 Responding to the Notice Letter
 - [a] FORM: General statement denying liability
- § 4.07 —Offering the *full* amount sought
 - [a] FORM: Offer of settlement: *full* amount of claim
- § 4.08 —Offering Less Than the Amount Sought
 - [a] FORM: Offer of settlement: less than amount sought
- § 4.09 —Offer to Repair Construction Defects
 - [a] FORM: Offer of settlement: repair of construction defects
 - [b] FORM: Offer of settlement: pay for repairs
- § 4.10 Rejecting the Claim
 - [a] FORM: Letter rejecting claim
- § 4.11 Effect of Consumer's Rejection of Settlement Offer
 - [a] FORM: Affidavit of rejection of settlement offer

§ 4.01 Evaluating the Notice Letter

The purpose of a notice letter under either the DTPA or Article 21.21 of the Insurance Code is to afford the parties an opportunity to resolve a claim before lawsuit is filed.

In most cases, the notice letter will be delivered directly to the client. The DTPA provides a sixty day window within which a response can be made. DTPA § 17.505(c). Since the time period begins to run from the date the client first receives the letter, it is important to advise clients in advance that if such a letter is received, it should be forwarded to the attorney immediately.

The 1995 amendments made significant changes in the procedure and effect of responding to a DTPA notice letter. The Legislature recognized that the notice provisions of the DTPA and Insurance Code were not working as well as expected. Consequently, the notice provisions that were in the statutes were in large part, repealed, and replaced with a new, comprehensive scheme which is intended to promote settlements and save expense. Since this also was the purpose of the existing notice and response provisions, it is unknown whether the new procedures will be effective.

In order to reconcile the presuit notice periods under the DTPA and Article 21.21, a recipient of an Article 21.21 notice letter now has 60 days in which to respond, TEX. INS. CODE art. 21.21 § 16A, as amended 1995. Additionally, the 1995 amendments provide a defendant with a second opportunity to respond to the notice after suit is filed, if the response is made within 90 days after the filing of the original answer. DTPA § 17.5052(b), as amended 1995. If mediation is held pursuant to DTPA § 17.5051, an offer

may be made within 20 days of the conclusion of mediation. DTPA § 17.5052(c), as amended 1995.

If the recipient of a notice letter elects to make an offer of settlement, it must include an offer to pay the following amounts of money, *separately stated*:

- (1) an amount of money or other consideration, reduced to its cash value, as settlement of the consumer's claim for damages; and
- (2) an amount of money to compensate the consumer for the consumer's reasonable and necessary attorney's fees incurred as of the date of the offer.

DTPA § 17.5052, as amended 1995; TEX. INS. CODE art. 21.21 § 16(d), as amended 1995.

If a settlement offer is made, both parts of the offer must be accepted by the consumer "not later than the 30th day after the date the offer is made." If the offer is not accepted, then it is deemed rejected. DTPA § 17.5052(e), as amended 1995; TEX. INS. CODE art. 21.21 § 16(e), as amended 1995.

The penalty for rejecting a settlement offer may be severe. First, the 1995 amendments to both the DTPA and Article 21.21 provide as follows:

If the court finds that the amount tendered in the settlement offer for damages under [the DTPA or Article 21.21] is the same as, substantially the same as, or more than the damages found by the trier of fact, the claimant may not recover as damages any amount in excess of the lesser of:

- (1) the amount of damages tendered in the settlement offer; or
- (2) the amount of damages found by the trier of fact.

DTPA § 17.5052(g), as amended 1995; TEX. INS. CODE art. 21.21 § 16(g), as amended 1995.

Second, if the court finds that the settlement offer was the same as or more than the amount of damages, it must then make a finding with respect to attorney's fees. That is, the court must determine the reasonable and necessary attorney's fees incurred before the date and time of the rejected settlement offer. The court must then compare its own finding with the amount tendered for attorney's fees in the settlement offer. If the amount tendered is the same as or more than the amount found by the court to be reasonable and necessary, then the consumer may recover only the amount of attorney's fees tendered in the settlement offer. DTPA § 17.5052(h), as amended 1995; TEX. INS. CODE art. 21.21 § 16(h), as amended 1995. Presumably, if the amount tendered is not substantially the same as the amount incurred by the consumer as of the date of the settlement offer, the consumer would be entitled to recover the amount found by the court to be reasonable.

The 1995 amendments fail to address the question of contingent attorney's fees. Many DTPA and Insurance Code cases are handled on a contingent fee. And, recovery of contingent fees in DTPA cases has long been recognized. *See e.g. March v. Thiery*, 729 S.W.2d 889 (Tex. App. —Corpus Christi 1987, no writ); *Fairmont Homes, Inc. v. Upchurch*, 704 S.W.2d 521 (Tex. App.—Houston [14th Dist.] modified on other grounds, 711 S.W.2d 618 (Tex. 1986); *Hochheim Prairie Farm Mut. Ins. Co. v. Burnett*, 698 S.W.2d 271 (Tex. App. —Fort Worth 1985, no writ); 4 TEX. PATTERN JURY CHARGES § 110. 15, 110.16 (1990). The

percentage fee frequently is the same when the attorney-client contract is signed as it is when the jury returns its verdict. Obviously, in making its findings, the court must consider the fee arrangement between the consumer and the attorney so that it can determine the amount of reasonable and necessary attorney's fees "incurred by the consumer." If the attorney-client agreement is based on a contingent fee, then the attorney's fees "incurred by the consumer" would be a percentage of the amount of the claim.

The person making the offer of settlement must be able to perform as offered; and, the cash value of the offer must be substantially correct. If the offer cannot be performed, or, if the cash value is misstated, then the limitations on recovery described above do not apply. DTPA § 17.5052(i), as amended 1995.

Both before and after the 1995 amendments, a person receiving a DTPA or Article 21.21 notice letter may receive a significant legal benefit from making a response, even though no response is required. The extent of the benefit depends on (1) the strength of the consumer's claim and (2) the legal adequacy of the response. In the extreme case, if a recipient of a notice letter tenders to the consumer the full amount of the damages claimed and the expenses, including attorneys' fees reasonably incurred, the response constitutes a complete defense to an action subsequently filed under the DTPA. DTPA § 17.506(d). *See In Re Alford Chevrolet-Geo, et al., Relators*, 997 S.W.2d 173, 176 (Tex. 1999).

A settlement offer that is "the same as, substantially the same as, or more than the damages" found at trial can limit a consumer's recovery to the amount of the offer, including attorney's fees. DTPA § 17.5052(g), (h), as amended 1995. Although it may sound unlikely that a consumer's demand would ever be so low that such a response would be appropriate, many consumers contact busi-

nesses directly before consulting with an attorney and before they are aware of the full amount of damages they potentially can recover.

There are several practical benefits to responding to a DTPA or Article 21.21 notice letter. First, a carefully written response provides an opportunity to educate the consumer's attorney on facts about the transaction that may be unknown to the attorney. Second, in the appropriate case, a "low" offer of settlement to a consumer may force the consumer to make a hard choice: if the amount of damages is difficult to

prove, a small cash offer may be sufficient to convince the consumer to avoid further legal action. Third, in extreme cases, the response to a notice letter can set up a counterclaim for bad faith and harassment by putting the plaintiff on clear, provable notice that there is no case to be pursued. *See* DTPA § 17.50(c).

Regardless of the type of response which ultimately is made to the consumer, immediately upon receipt of a notice letter involving goods, a written request to inspect the goods should be made.

[a] FORM: Letter requesting inspection of goods

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

(Date)

(Inside address)

Re: [Consumer's name]

Dear _____:

This is in response to your letter dated _____, 20__, to _____, our client. We are evaluating your client's claim at this time.

In order to assist us in evaluating your client's claim, we request that you permit our client to inspect the _____ at a time and place that is mutually convenient. We are prepared to conduct the inspection on _____, 20__ at _____.m. If this date and time are not convenient to either you or your client, please let us know and we will make every effort to accommodate your schedules. Please understand, however, that the inspection needs to occur as soon as possible so we may have sufficient time to complete our evaluation of your client's claim before we are required to make a response to your client's notice letter.

This request is made under the authority of TEX. BUS. & COM. CODE § 17.505(a). We look forward to your prompt response.

Sincerely,

[Signature of attorney]