The Role of the Texas Attorney General in Consumer Protection

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I. Introduction

This paper describes the Texas Attorney General's role in consumer law and highlight key differences from traditional private consumer claims. Undoubtedly, the Attorney General is charged with significant responsibilities regarding consumer law. At the broadest level, the Attorney General represents the State of Texas in claims against individuals and businesses that violate statutory consumer laws.

The Attorney General's role in consumer law has a long history. Many view 1973 as a watershed moment for the Attorney General in consumer law, particularly due to the enactment of the Deceptive Trade Practices-Consumer Protection Act ("DTPA"). The 1973 DTPA bill established the Attorney General's Consumer Protection Division, a group of lawyers, investigators and other professionals who focus on consumer issues and consumer law violations. That same legislative session included other significant consumer law changes, many of which empowered the Attorney General to enforce violations of the new laws.

The Attorney General's role in consumer law, however, vastly predates the adoption of the DTPA. Going back as far as 1876, the Texas Constitution empowers the Texas Attorney General to protect Texans from abuses by corporations:

> [The Attorney General] shall especially inquire into the charter rights of all private corporations, and from time to time, in the name of the State, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage not authorized by law. He shall, whenever sufficient cause exists, seek a judicial forfeiture of such charters, unless otherwise expressly directed by law ….[1]

Similarly, the Attorney General was charged with enforcing antitrust laws in 1889, two years prior to the first federal antitrust laws. Likewise, the Attorney General was granted powers to enforce a variety of consumer and public health statutes adopted in the early part of the 20th century, including early insurance laws, securities laws, food and drug laws, and others.

[1] Tex. Const., Art. 4 § 22.

The role of the Attorney General in the 140-year history of enforcing consumer laws has certainly grown and changed over time. Currently, the Attorney General is empowered by approximately 80 statutes to take action on consumer-related issues. Nevertheless, the core concepts of an Attorney General consumer claim—and the differences with private consumer claims—have remained fairly constant, whether the claims originate with the Attorney General or are referred to the Attorney General from other governmental bodies.

The key difference between an Attorney General and private consumer claim arises from the differing purposes of the claims. Generally, the purpose of a private claim is to resolve a dispute between a consumer and business regarding a specific transaction, with the end goal of making a damaged consumer whole. The Attorney General claim, on the other hand, is a government regulatory action, seeking to remove deceptive and unlawful business practices from the marketplace to protect consumers and to protect a free market for honest businesses. It is the governmental purpose of an Attorney General claim that explains the unique capacity of the Attorney General as lawyer, differing procedural tools that are not available in private matters and differing claims, remedies and defenses.

II. Capacity to Act

The Attorney General's capacity to take action in a consumer matter is fundamentally different from the role of a lawyer in a private matter. In a private dispute, a lawyer has no inherent power. Instead, the lawyer is empowered by a consumer client who has been injured by a business or individual's violation of law, or by a business client who is accused by a consumer of violating the law. The lawyer, once engaged, works in the client's interest and under the client's direction to resolve the dispute. To the extent the dispute is resolved by agreement, the lawyer serves in an advisory role and only the client has the capacity to settle the claims.

In a government action, the Attorney General is pre-authorized to take action on behalf of the State when the Attorney General determines that action is in the State or the public's interest. The Attorney General (through Assistant Attorneys General) appears in court as lawyer for the State and, simultaneously, is the sole decision-maker for the State regarding the filing of claims, litigation strategy and settlement of claims. For example, the Texas Free Enterprise and Antitrust Act of 1983 provides:

> The attorney general may file suit in district court … on behalf of the State of Texas to collect a civil fine from any person, other than a municipal corporation, whom the attorney general believes has violated any of the prohibitions in Subsection (a), (b), or (c) of Section 15.05 of this Act.[2]

This pattern, where the Attorney General serves in all capacities, the complainant, advisor, litigator and client, is typical of the Attorney General's role in consumer law matters.

In some cases, typically where a state agency has specific regulatory authority over a licensed business or individual, the Attorney General's power begins when the agency refers a matter to the Attorney General for action. For example, under the Assisted Living Facility Licensing Act, the Department of Aging and Disability Services determines whether there is a

[2] Tex. Bus. & Com. Code § 15.20.

continuing violation that warrants state action, then refers the matter to the Attorney General to pursue an injunction in district court.[3] However, even in highly regulated industries such as insurance, the Attorney General often has independent authority to initiate and resolve lawsuits related to deceptive conduct impacting consumers.[4] Moreover, once an agency has referred a matter to the Attorney General for litigation, the Attorney General then represents the State of Texas and fully controls the litigation. As the Austin Court of Appeals concluded:

> In matters of litigation, the Attorney General is the officer authorized by law to protect the interests of the State, and even in matters of bringing suit, the Attorney General "must exercise judgment and discretion, which will not be controlled by other authorities".[5]

III. Pre-suit Investigative Procedures

While private litigants can engage in limited, non-routine pre-suit investigation through a court-ordered Rule 202 deposition,[6] the pre-suit investigatory power exists broadly for government claims. In Texas, this broad governmental investigation power dates back to at least 1907, when the Attorney General was granted the power to examine the books and records of any Texas-charted corporation, non-profit corporation, limited liability company and other charted business associations. This power was intended to allow oversight of state-created business associations' compliance with their governing documents and state law. The Attorney General, as well as many other statewide governmental regulatory bodies, possess powerful tools to compel the production of information outside of litigation. These pre-suit investigatory tools often lack the discovery controls provided by the Texas Rules of Civil Procedure or other rules pertaining to administrative proceedings. This can be especially true in the context of a state agency investigating the conduct of its licensees, presumably based on the theory that a party's right to engage in licensed activity is premised on a requirement that the regulating agency be able investigate such activity.

For example, under Texas Insurance Code section 38.001, the Texas Department of Insurance (TDI) may send a reasonable request for information to any insurance company relating to (1) the person's business condition; or (2) any matter connected with the person's transactions that the department considers necessary for the public good or for the proper discharge of the department's duties.[7] Although such inquiries are subject to a reasonableness requirement, the provision ultimately defers to the TDI with respect to inquiries that the TDI considers "necessary".[8] In doing so, the statute empowers the TDI with a broad, pre-suit

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[3] Tex. Health & Safety Code § 247.044.
[4] Tex. Ins. Code § 541.201.
[5] *Bullock v. Escobedo*, 583 S.W.2d 888, 894 (Tex.App.—Austin 1979, writ ref'd) (quoting *Charles Scribner's Sons v. Marrs*, 262 S.W. 722, 727 (Tex. 1924)).
[6] *See* Tex. R. Civ. P. 202.4(a) (providing that the court must order a deposition only if the court finds that the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure); *see also In re Wolfe*, 341 S.W.3d 932, 933 (Tex. 2011) (orig. proceeding) (per curiam) ("Rule 202 is not a license for forced interrogations. Courts must strictly limit and carefully supervise pre-suit discovery to prevent abuse of the rule."); *In re Jorden*, 249 S.W.3d 416, 423 (Tex. 2008) (orig. proceeding) ("Rule 202 depositions are not now and never have been intended for routine use. There are practical as well as due process problems with demanding discovery from someone before telling them what the issues are.").
[7] Tex. Ins. Code § 38.001(b).
[8] *Id*.

investigatory tool. Further, the recipient of a section 38.001 request is not afforded the same protections provided to a litigant under the Texas Rules of Civil Procedure. While a traditional litigant typically has thirty days to respond to discovery requests, section 38.001 provides a recipient with only ten days to respond.[9] Moreover, section 38.001 does not contain any specific provision for challenging the TDI's request for information. These features, among others, demonstrate the breadth of at least one of the TDI's pre-suit investigatory tools.

Such broad governmental investigatory power also exists with respect to consumer claims. The Attorney General is empowered to investigate various potential violations of law governing business conduct and consumer rights. The Attorney General's pre-suit investigative powers are extensive and exist separate from court-sanctioned discovery because the Attorney General's claim is different from a private claim. Relevant statutes empower the Attorney General to seek information through procedures that in some ways resemble discovery tools provided to private parties in civil litigation, such as requests for production, interrogatories and depositions. Upon closer review, however, the Attorney General powers are more broad and do not include many of the corresponding protections for respondents provided in traditional discovery.

Nevertheless, the Attorney General's pre-suit investigatory powers are tailored to the consumer law context, and for this reason, there are certain protections for respondents in connection with the Attorney General's investigation. For example, respondents have the the right to contest certain demands in court before those demands are binding on the respondent, and in some cases, the right to object. While these protections are certainly more limited than those provided in traditional discovery, they do provide respondents with the opportunity to challenge the scope of particular requests for information. The section below provides a brief survey of the Attorney General's pre-suit investigation powers provided in the Texas Free Enterprise and Antitrust Act, Texas Deceptive Trade Practices Act and the Texas Business Organizations Code.

1. Attorney General Antitrust Civil Investigative Demand

The Texas Free Enterprise and Antitrust Act authorizes the Attorney General of Texas to issue a civil investigative demand (the "Antitrust CID") as part of a civil antitrust investigation.[10] The Antitrust CID may be used to compel a person to produce documents, answer written interrogatories, give oral testimony, or any combination thereof prior to the commencement of a civil proceeding.[11] The Attorney General may use this tool for the purpose of ascertaining whether a person is or has engaged in or is actively preparing to engage in activities that may constitute a violation of Texas or federal antitrust laws.[12] A party obligated to respond to an Antitrust CID may be the target of an investigation or merely a person that the Attorney General

[9] As a practical matter, the deadline to respond may be extended by agreement between the recipient and the TDI.
[10] Tex. Bus. & Com. Code § 15.10(b).
[11] *Id.*
[12] *Id.*

believes has relevant information.[13] Accordingly, the Attorney General is given broad discretion to determine who is a reasonable subject for an Antitrust CID.

The scope of an Antitrust CID is limited to materials or information that would be discoverable under the Texas Rules of Civil Procedure or other state law relating to discovery.[14] As such, the demand must describe the nature of the activities that are subject to the investigation and set forth each statute and section of that statute that may have been violated.[15] For document demands, the Attorney General must describe the class of material to be produced with reasonable specificity so that the material demanded is fairly identified.[16] Demands for answers to interrogatories must "propound the interrogatories with definiteness and certainty".[17] Demands for giving oral testimony, however, need only state a reasonable date, time, and place at which the testimony shall begin.[18]

The Attorney General is given wide discretion in determining the deadline for a response to an Antitrust CID. Unlike traditional civil discovery, there is no statutory deadline provided for respondents to a CID. Instead, for documents the Attorney General must provide a reasonable period of time within which the material is to be produced.[19] Similarly, a demand for oral testimony must provide a reasonable date and time for taking the testimony.[20] For interrogatories, however, the Attorney General needs only to "prescribe a date or dates by which answers to interrogatories shall be submitted".[21] There is no express statutory obligation that the response date be reasonable.[22]

A party seeking to resist or limit an Antitrust CID may file a petition for an order modifying or setting aside the demand in Travis County District Court or the district court in the

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[13] *Id.* § 15.10(b). "Person" is defined broadly to include a natural person, proprietorship, partnership, corporation, municipal corporation, association, or any other public or private group. *Id.* § 15.10(a)(5). However, the Attorney General may not issue a demand for documentary material on a proprietorship or partnership whose annual gross income does not exceed $5 million. *Id.* § 15.10(b). The statute does not similarly protect such a proprietorship or partnership from responding to written interrogatories or providing oral testimony. *Id.* Additionally, the statute provides no restrictions regarding the type of business or location of the respondent, though a recipient may have protections based on other grounds such as personal jurisdiction.

[14] *Id.* § 15.10(d)(1).

[15] *Id.* § 15.10(c)(1). *See also Attorney Gen. of Tex. v. Allstate Ins. Co.*, 687 S.W.2d 803 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (finding the antitrust CID statement that the Attorney General "is investigating the possibility of a group boycott of certain providers of health care services to workers' compensation claimants in the State of Texas" sufficient to allow the party being investigated to determine the relevancy of the documents demanded for inspection).

[16] *Id.* § 15.10(c)(2).

[17] *Id.* § 15.10(c)(3).

[18] *Id.* § 15.10(c)(4)

[19] *Id.* § 15.10(c)(2).

[20] *Id.* § 15.10(c)(4).

[21] *Id.* § 15.10(c)(3).

[22] However, the Attorney General's deadline discretion is somewhat limited regarding Antitrust CID document requests seeking a "product of discovery". A product of discovery includes items produced, obtained or created in any judicial or administrative proceeding of an adversarial nature. *Id.* § 15.10(a)(6). That may include deposition transcripts, responses to interrogatories, documents produced in response to a request for production, results of an inspection of land or admissions obtained in any method of discovery. *Id.* Thus, this category of documents may include information discovered in a private lawsuit from a third party who is not the recipient of an Antitrust CID.

county of the person's residence or principal office.[23] However, the Assistant Attorneys General managing a civil investigative demand commonly work with respondents to address concerns regarding the scope and content of a demand. The maximum deadline to file a petition is 20 days from the date of service.[24] However, if the return date of the CID is less than 20 days, the petition must be filed prior to the return date.[25] The basis for the petition may be the Attorney General's noncompliance with the Antitrust CID statute or any constitutional or legal right of the petitioner.[26] In ruling on the petition, the court is to presume, absent evidence to the contrary, that the Attorney General issued the demand in good faith and within the scope of his or her authority.[27] Importantly, the deadline to comply with the contested portions of an Antitrust CID does not run while the petition is pending.[28] However, the respondent must comply with any portions of the Antitrust CID that are not subject of the petition to modify or set aside the Antitrust CID.

If a party fails to fully respond to an Antitrust CID, the Attorney General may seek to enforce the Antitrust CID by filing a petition in district court.[29] Whenever a petition is filed, the court is granted jurisdiction to hear and determine the matter presented and to enter any order required to implement the provisions of the statute.[30] If the court orders compliance with a CID, failure to comply with the order is punishable as contempt. However, any person who acts with the intent to evade a CID and removes, conceals, destroys, withholds, alters or falsifies documentary material or otherwise provides inaccurate information may be guilty of a misdemeanor and subject to a fine of not more than $5,000 or confinement in county jail for not more than one year.[31]

Regarding the right to object, the statute provides differing treatment based on the type of investigatory tool. First, the statute does not expressly allow a respondent to object to a request in an Antitrust CID and withhold documents based on the objection, although that right may exist based on other provisions of the statute. Second, the statute provides that the respondent may object to an interrogatory, in which case the basis for the objection must be set forth in lieu of an answer.[32] Third, during the oral testimony the respondent may object to any question on the grounds that the respondent is entitled to refuse to answer the question based on a constitutional or other legal right or privilege.[33]

Notably, the statute does not allow a responding party to withhold information that it considers confidential or constitutes a trade secret. Rather, a responding party must identify in writing documents produced that contain confidential or trade secret information.[34] To the extent

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[23] *Id.* § 15.10(f).
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.* § 15.10(g)(2).
[29] *Id.* § 15.10(h)(1).
[30] *Id.* § 15.10(j).
[31] *Id.* § 15.10(h)(2).
[32] *Id.* § 15.10(g)(4)(A).
[33] *Id.* § 15.10(g)(5)(E). However, neither the respondent nor his or her counsel may otherwise object, refuse to answer any question or interrupt the examination. *Id.*
[34] *Id.* § 15.10(g)(3)(A).

the responding party identified information as confidential or containing trade secret information, the Attorney General must give the party notice of the intent to disclose the information at least 15 days prior to the disclosure. In turn, the responding party may petition a district court for a protective order limiting the terms under which the Attorney General may disclose the confidential information.

2. Attorney General Deceptive Trade Practices Civil Investigative Demand

The Texas Deceptive Trade Practices Act ("DTPA") authorizes the consumer protection division of the Office of the Attorney General to seek the production of information through a civil investigative demand (the "DTPA CID").[35] Unlike the Antitrust CID, the DTPA CID may only require the production of documentary information.[36] The DTPA CID does not empower the Attorney General to propound interrogatories or take oral testimony. A separate provision of the DTPA, described in the next section, provides measures to obtain testimony prior to litigation. While the DTPA CID has similar features to the document request features of the Antitrust CID, a DTPA CID respondent has fewer protections. However, there is a long custom of Assistant Attorneys General working with respondents to address concerns regarding civil investigative demands.

The Attorney General is empowered to issue a DTPA CID to any person the consumer protection division believes may have possession, custody or control over any documentary material relevant to an investigation of a possible DTPA violation.[37] As with the Antitrust CID, the Attorney General is given wide discretion to determine who will be the subject of a DTPA CID. The DTPA CID may demand any documentary material the Attorney General deems relevant to the investigation of possible DTPA violations.[38] The CID must state the general subject matter of the investigation, the statute and section under which the alleged violation is being investigated, and the class of material to be produced with reasonable specificity so as to fairly indicate the material demanded.[39]

The DTPA CID is arguably limited to items that would be discoverable under the Texas Rules of Civil Procedure, but that protection in not clear under the statute. The DTPA provides:

> A civil investigative demand may contain a requirement or disclosure of documentary material which would be discoverable under the Texas Rules of Civil Procedure.[40]

By contrast, the Antitrust CID clearly limits the scope of a CID to discoverable information:

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[35] Tex. Bus. & Com. § 17.61.
[36] *Id.* § 17.61(a).
[37] *Id.* § 17.61(a). "Person" includes an individual, partnership, corporation, association, or other group, however organized. *Id.* § 17.45(3). The DTPA provides no restrictions regarding the location of the respondent or the type of business activities at issue, though a recipient may have protections based on other grounds such as personal jurisdiction.
[38] *Id.* § 17.61(a). "Documentary materials" include any tangible document or recording, wherever situated, whether an original or a copy. *Id.* § 17.45(7).
[39] *Id.* § 17.61(b).
[40] *Id.* § 17.61(c).

> A demand may require the production of documentary material . . . only if the material or information sought would be discoverable under the Texas Rules of Civil Procedure or other state law relating to discovery.[41]

Compared to the language of the Antitrust CID, the DTPA CID reference to the Rules of Civil Procedure could be construed as an additional grant of power, not a restriction as in the Antitrust CID. However, the DTPA reference to the Rules of Civil Procedure is generally understood as a limit on the scope of DTPA CIDs.

The Attorney General has discretion to set the deadline for a response to a DTPA CID. Nothing in the statute expressly restricts the Attorney General from setting any particular deadline. The DTPA CID recipient may file a petition in district court to extend the return date or modify or set aside the DTPA CID.[42] Such a petition must be filed in district court where the respondent resides or in Travis County. As with the Antitrust CID, the deadline to file a petition challenging a DTPA CID is the earlier of the return date or 20 days from the date of service.[43] As a result, a respondent may have very little time to evaluate his or her options for how to proceed after receiving a DTPA CID.

One difference in the DTPA, however, is that filing a petition does not toll the deadline to respond to the DTPA CID. Instead, the respondent must comply with the DTPA CID regardless of filing a petition unless the court issues an order to the contrary.[44] Thus, to effectively resist a DTPA CID, a respondent may wish to file a petition and get a favorable order before the return date, which may be only a few days from the date of service.

If a person fails to comply with a DTPA CID, the Attorney General may file a petition for an order to enforce the DTPA CID.[45] Additionally, the Attorney General may seek an order to compel the surrender of the requested material if the Attorney General is unable to satisfactorily copy or reproduce it.[46] After the court orders compliance with a DTPA CID, failure to comply with the order is punishable as contempt.[47] On the other hand, as with the Antitrust CID, if a person "with the intent to avoid, evade, or prevent compliance, in whole or in part" conceals, withholds, destroys, alters or by any means falsifies documentary material, the person may be guilty of a misdemeanor and subject to a fine of not more than $5,000 or confinement in county jail for not more than one year.[48]

The DTPA also addresses the treatment of trade secret information. To the extent the respondent produces trade secret information in response to a DTPA CID, the Attorney General may not present the trade secret material to a court without court approval after adequate notice to the respondent.[49] The DTPA statute does not require any particular method of designating information as containing trading secrets, and there is no provision that expressly requires the

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[41] *Id.* § 15.10(d)(1).
[42] *Id.* § 17.61(g).
[43] *Id.*
[44] *Id.* § 17.61(g).
[45] *Id.* § 17.62(b).
[46] *Id.*
[47] *Id.* § 17.62(c).
[48] *Id.* § 17.62(a).
[49] *Id.* § 17.62(f).

responding party to designate documents as trade secrets at the time of production. Note also that, as discussed above, the DTPA does not provide an express right to withhold information based on an objection to a request in a DTPA CID.

Importantly, the protection appears to be limited only to trade secret information and not other information considered privileged or confidential. However, given that this provision governs the presentation of documents to a court, the responding party should be able to use other procedures to protect its confidential and privileged information. Notably, the DTPA CID statute, unlike the Antitrust laws, does not require the Attorney General to give notice of the disclosure of trade secret information when that disclosure is made outside of a judicial proceeding, to the extent such a disclosure is ever authorized.

3. Attorney General DTPA Demand for Reports and Examinations

As described above, the Attorney General's powers under the DTPA to demand documents and testimony prior to litigation are separated into two statutes, unlike the Antitrust CID statute, which authorizes both. The power to demand sworn testimony is found in section 17.60 of the DTPA (the "17.60 Demand"). As described below, the protections associated with a 17.60 Demand arguably make this investigation tool meaningfully different from the related Antitrust CID demand for interrogatories or oral testimony.

The Attorney General's consumer protection division is authorized to send a 17.60 Demand to any person in connection with an investigation of a possible violation of the DTPA.[50] The DTPA provides no express restrictions regarding the location of the respondent or the type of business activities at issue, though a recipient may have protections based on other grounds such as personal jurisdiction. Unlike the DTPA CID statute, there is no express requirement that the consumer protection division has a reasonable belief that the person has relevant information, although it would be a fair expectation based on the statute as a whole.

The subject matter of a 17.60 Demand is based on the Attorney General's investigation of a potential violation of the DTPA. The Attorney General's consumer protection division may issue a 17.60 Demand when it has reason to believe a person is engaging in, has engaged in, or is about to engage in any act or practice declared to be unlawful under the DTPA.[51] The division may also issue a 17.60 Demand when it believes it is in the public interest to investigate whether any person is engaging in, has engaged in, or is about to engage in any such act or practice.[52]

The Attorney General has access to various investigation methods as part of a 17.60 Demand that shape the subject matter of the Demand. First, a 17.60 Demand may require a person to return answers to written questions, under oath or otherwise, as to all the facts and circumstances concerning the alleged violation and "such other data and information the consumer protection division deems necessary".[53] Second, the Attorney General may examine

[50] *Id.* § 17.60. "Person" includes an individual, partnership, corporation, association or other group, however organized. *Id.* § 17.45(3).
[51] *Id.* § 17.60.
[52] *Id.*
[53] *Id.* § 17.60(1).

under oath any person in connection with the alleged violation.[54] Third, the Attorney General may examine any merchandise or sample of merchandise deemed necessary and proper.[55] Last, the Attorney General, when authorized by court order, may impound any sample merchandise produced by the respondent and retain it until the completion of all proceedings related to the investigation.[56] The DTPA is silent as to the timing of a response to a 17.60 Demand or any standards conditioning the Attorney General's exercise of discretion regarding deadlines.

The DTPA provides no express process for a recipient of a 17.60 Demand to object to the Demand or seek a court order to modify, limit, or postpone a 17.60 Demand. The right, if any, to affirmatively challenge a 17.60 Demand arguably must come from other sources of law. The Attorney General, on the other hand, has the same remedies to address a failure to respond to a 17.60 Demand as is available for a DTPA CID. The Attorney General may file a petition for an order to enforce the 17.60 Demand.[57] If the court orders compliance with a 17.60 Demand, failure to comply with the order is punishable as contempt. As with the Antitrust CID and the DTPA CID, if a person "with the intent to avoid, evade, or prevent compliance, in whole or in part" conceals, withholds, destroys, alters or by any means falsifies documentary material, the person may be guilty of a misdemeanor and subject to a fine of not more than $5,000 or confinement in county jail for not more than one year.[58]

4. Attorney General Requests to Examine Corporate Records

The Texas Business Organizations Code authorizes the Attorney General to examine the books and records of any Texas-charted corporation, non-profit corporation, limited liability company and other charted business associations (a "Request to Examine"). To promote compliance, a business entity that fails to comply with a Request to Examine may forfeit its right to conduct business in Texas. The Request to Examine applies to all filing entities and foreign filing entities in the state.[59] A Request to Examine is triggered by a "Visitorial Letter" in which the Attorney General communicates the intent to examine records to the respondent's managerial official.[60] The respondent must "immediately permit" the Attorney General to examine the requested records.[61] The Request to Examine statute does not provide any express mechanism to seek judicial relief to modify the scope or timing of the examination.

Through a Request to Examine, the Attorney General may inspect, examine, and make copies of any of the entity's records the Attorney General considers necessary.[62] The Attorney

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[54] *Id.* § 17.60(2).
[55] *Id.* § 17.60(3).
[56] *Id.* § 17.60(4).
[57] *Id.* § 17.62(b).
[58] *Id.* § 17.62(a).
[59] Tex. Bus. Orgs. Code § 12.151. A filing entity is any entity formed under the Texas Business Organizations Code that is a corporation, limited partnership, limited liability company, professional association, cooperative, or real estate investment trust. *Id.* §§ 1.002(18), (22). A foreign filing entity is an out-of-state entity that registers or is required to register as a foreign entity under the Code. *Id.* § 1.002(29).
[60] *Id.* § 12.152.
[61] *Id.*
[62] *Id.* § 12.151. Records include minutes, books, accounts, letters, memoranda, documents, checks, vouchers, telegrams, constitutions, and bylaws. *Id.*; *see also Humble Oil & Refining Co. v. Daniel*, 259 S.W.2d 580 (Tex. Civ. App.—Beaumont 1953, writ ref'd n.r.e.) (noting the Attorney General's unlimited and unrestricted right to examine

General may examine records maintained in Texas or any other state.[63] The Attorney General may use the information obtained in a Request to Examine to investigate whether the entity is or has been engaged in acts that violate its governing documents or any state law.[64] The Request to Examine statute provides no express mechanisms to challenge the Attorney General's authority to examine records. The right, if any, to affirmatively challenge a Request to Examine must come from another source of law, such as a declaratory judgment action.[65] An entity that fails to permit the Attorney General to examine or make copies of records is subject to forfeiture of its right to do business in Texas and revocation of the entity's registration or certificate of formation.[66] Moreover, an officer or a governing person of the entity who refuses to permit an Attorney General examination personally commits a Class B misdemeanor.[67] Further, there are no express provisions for the protection of trade secret, privileged or confidential information.

IV. Elements of a Government Claim

The elements of a governmental claim are defined by the controlling statute, which naturally varies based on the subject matter at issue. However, broadly speaking, a defendant is liable for statutory remedies when the State proves the defendant violated the statute. For example, the Attorney General may bring an action to recover a civil penalty for violating state antitrust laws[68], noncompliance with medical records privacy laws[69], and the capture of a retina scan, fingerprint or other biometric identifier for commercial purposes.[70] The specific elements of proof for these violations would vary widely, and may be complex, depending on the nature of the statutory scheme. However, the Attorney General need not prove more than a violation. Put in the vernacular of a common law tort claim, the government generally wins on proof of duty and breach, while a private plaintiff (when the statute provides for a private cause of action) must also prove causation and damages. That is because the purpose of the governmental regulatory action is different from the private action.

The DTPA is an illustrative example. Along with a private cause of action, the DTPA empowers the Consumer Protection Division of the Office of the Attorney General to seek a variety of remedies outlined below. However, the elements of an Attorney General claim are substantially different. The DTPA provides:

> Whenever the consumer protection division has reason to believe that any person is engaging in, has engaged in, or is about to engage in any act or practice declared to be unlawful by this subchapter, and that proceedings would be in the

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the books and records of a corporation but stating that the Attorney General could not copy and use the records in pending tax lawsuit). After the *Humble Oil* decision, the statute was subsequently amended to add the right to copy records. No reported opinion has construed the amended statutory language.

[63] *Id.* § 12.155.

[64] *Id.* § 12.153; *see also Chesterfield Fin. Co. v. Wilson*, 328 S.W.2d 479, 482-483 (Tex. Civ. App.—Eastland 1959, no writ) (concluding the Attorney General has unrestricted power to examine and copy records pursuant to a Request to Examine for the purpose of investigating potential usury by a finance company).

[65] *See Humble Oil*, 259 S.W.2d at 588 (granting partial relief under a declaratory judgment action challenging a Request to Examine).

[66] *Id.* § 12.155.

[67] *Id.* § 12.156.

[68] Tex. Bus. & Com. Code § 15.20.

[69] Tex. Health & Safety Code § 181.201.

[70] Tex. Bus. & Com. Code § 503.001.

> public interest, the division may bring an action in the name of the state against the person to restrain by temporary restraining order, temporary injunction, or permanent injunction the use of such method, act, or practice.[71]

In other words, a governmental claim accrues and liability attaches when a person has violated or is about to violate the laundry list of unlawful acts itemized in the statute. The governmental claim does not require a showing that the deceptive conduct was a relied on by a consumer or that the conduct was the producing cause of economic or mental anguish damages. That is because the governmental claim has a regulatory purpose that is different from the restorative purpose of the private cause of action.

V. Remedies

The legislature has empowered the Attorney General not only to enforce numerous consumer laws but also to obtain remedies on behalf of the State of Texas and consumers generally. Such remedies may include temporary restraining orders, temporary and permanent injunctions, civil penalties, restitution, and attorneys' fees, among others.[72] The Attorney General's remedies differ from individual consumer remedies due to the nature of the claims at issue. While the individual consumer seeks to be made whole in connection with a particular transaction, the Attorney General seeks to protect all consumers by eliminating deceptive and unlawful business practices and deterring such conduct in the future.

On the whole, the remedies available to the Attorney General under the DTPA are more substantial and extensive than the remedies available to private litigants,[73] because the Attorney General seeks relief on behalf of the State of Texas and the public rather than on behalf of individual consumers, although some legal actions brought by the Attorney General do result in restitution for individual consumers. The following is a brief summary of the DTPA remedies available to consumers as compared to the Attorney General:

DTPA REMEDIES	CONSUMER	ATTORNEY GENERAL
Damages	• economic damages[74] • mental anguish damages[75] • reasonable attorneys' fees and costs[76]	• reasonable attorneys' fees and costs[78] • (see reference to actual damages under "Restitution" below)

[71] Tex. Bus. & Com. Code § 17.47.
[72] *See, e.g.*, Tex. Bus. & Com. Code § 17.47 (empowering the attorney general to seek injunctive relief, restitution, and civil penalties); Tex. Ins. Code §§ 541.201, 541.204, 541.205 (providing that the attorney general may obtain injunctive relief, restitution, and civil penalties in an enforcement action under Chapter 541 of the Texas Insurance Code pertaining to unfair or deceptive acts or practices in the business of insurance); Tex. Bus. & Com. Code § 521.151 (permitting the attorney general to obtain injunctive relief, civil penalties, and attorneys' fees and costs in suits to enforce the Identity Theft Enforcement and Protection Act).
[73] *See Texas v. Veterans Support Org.*, No. 1-14-CV-365-RP , 2015 WL 10634955, at *4 (W.D. Tex. Apr. 20, 2015) (noting that "the DTPA gives the Consumer Protection Division explicit authority to seek remedies unavailable to an individual consumer such as civil penalties") (citing Tex. Bus. & Com. Code §§ 17.47(a), (c) and (d)).
[74] *See* Tex. Bus. & Com. Code § 17.50(b)(1).
[75] *Id*.

	• actual damages (tie-in statute)[77]	
Injunctive Relief	• an order enjoining an act or failure to act[79]	• temporary restraining orders • temporary or permanent injunctions[80]
Restitution	• an order to restore money or property acquired in violation of the DTPA[81]	• court orders or judgments that are "necessary to compensate identifiable persons for actual damages or to restore money or property, real or personal, which may have been acquired by means of any unlawful act or practice"[82]
Penalties or Additional Damages	• additional damages[83] up to three times the amount of the consumer's economic and mental-anguish damages for a DTPA claim if the defendant acted knowingly and/or intentionally	• civil penalties up to $20,000 per violation[84]
Other Relief	• any other relief the court deems proper (including appointment of a receiver or the revocation of a defendant's license or certificate to do business)[85]	• other orders of the court including the appointment of a receiver or a sequestration of assets, if a person ordered by the court to make restitution fails to do so within the

[76] *Id*. § 17.50(d).
[78] The State can recover reasonable attorney's fees and court costs in cases in which the State is entitled to recover civil penalties or damages. *See* Tex. Gov't Code § 402.006(c).
[77] *Id* § 17.50(h) ("[I]f a claimant is granted the right to bring a cause of action under this subchapter by another law, the claimant is not limited to recovery of economic damages only, but may recover any actual damages incurred by the claimant, without regard to whether the conduct of the defendant was committed intentionally.").
[79] Tex. Bus. & Com. Code § 17.50(b)(2).
[80] *Compare* Tex. Bus. & Com. Code § 17.47(a) ("[S]uch injunctive relief shall lie even if such person has ceased such unlawful conduct . . . .") *with* § 17.47(b) ("The Court *may* issue . . . temporary or permanent injunctions to restrain and prevent violations of this subchapter . . . .") (emphasis added).
[81] *Id*. § 17.50(b)(3).
[82] *Id*. §§ 17.47(c)-(d).
[83] Economic damages can be trebled if the defendant knowingly or intentionally violated the DTPA. *Id*. § 17.50(b)(1). Mental-anguish damages can be trebled if the defendant acted intentionally. *See id*.
[84] *Id*. § 17.47(c)(1).
[85] *Id*. § 17.50(b)(4).

		specified time • assurance of voluntary compliance

While a private party can recover damages[86] and obtain equitable relief,[87] these remedies are limited in nature as they generally only apply to the parties to the suit. For example, a prevailing consumer may obtain "orders necessary to restore to *any party to the suit* any money or property, real or personal, which may have been acquired in violation of [the DTPA]."[88] Similarly, a consumer can recover additional damages of up to three times the amount of that consumer's economic damages if the defendant acted knowingly or intentionally and three times the consumer's mental anguish damages if the defendant acted intentionally. To obtain injunctive relief under the DTPA, a private litigant must specifically show that the acts sought to be enjoined were a producing cause of damage to other consumers.[89]

In contrast, the Attorney General has the broad authority to obtain restitution,[90] assess civil penalties up to $20,000 per violation,[91] and seek injunctive relief when such proceedings are in the public interest.[92] The DTPA provides that the Attorney General may seek court orders or judgments that are "necessary to compensate identifiable persons for actual damages or to restore money or property, real or personal, which may have been acquired by means of any unlawful act or practice."[93] Notably, the DTPA does not define the term "identifiable persons." Nevertheless, courts have concluded that "section 17.47(d) authorizes the trial court to order the restoration of money or property acquired by unlawful means, without any requirement that the trial court specify 'identifiable persons' or the amount of money to be paid to each consumer."[94]

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[86] *Compare* Tex. Bus. & Com. Code § 17.50(b)(1) (economic and mental anguish damages), § 17.50(h) (actual damages), § 17.50(d) (attorneys' fees); *with* Tex. Bus. & Com. Code § 17.43 ("no recovery . . . permitted under both [the DTPA] and another law of both damages and penalties for the same act or practice").

[87] *Id*. §§ 17.50(b)(2)-(4).

[88] *Id*. § 17.50(b)(3) (emphasis added). Further, a consumer who fails to recover actual damages is not entitled to restoration as a remedy. *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 823 (Tex. 2012). Generally, the remedy of restoration incorporates the doctrine of recisssion. *See id*. at 826-827.

[89] *Rivers v. Charlie Thomas Ford, Ltd.*, 289 S.W.3d 353, 362 (Tex. App.—Houston [14th Dist.] 2009, no pet.) ("To obtain injunctive relief under the DTPA, a plaintiff must show that the acts sought to be enjoined were a producing cause of damage to other consumers."); *see also David McDavid Pontiac, Inc. v. Nix*, 681 S.W.2d 831, 839 (Tex. App.—Dallas 1984, writ ref'd n.r.e.) (noting that injunctive relief is discretionary and concluding that "absent a showing that the acts sought to be enjoined were occurring as to other consumers or that [the defendant] intended to do those acts in the future, a permanent injunction forbidding future acts would be improper.").

[90] Tex. Bus. & Com. Code § 17.47(d).

[91] *Id*. § 17.47(c). The Attorney General may also recover an additional amount of not more than $250,000 when the act or practice at issue was calculated to acquire or deprive money or other property from a consumer who was 65 years of age or older when the act or practice occurred. *Id*. § 17.47(c)(2).

[92] *Id*. § 17.47(a).

[93] *Id*. § 17.47(d). With respect to "actual damages," the Attorney General may not recover damages incurred "beyond a point two years prior to the institution of the action by the consumer protection division." *See id*. However, when seeking restitution, the Attorney General is not barred by any limitations period. *See Thomas v. State*, 226 S.W.3d 697, 710 (Tex. App.—Corpus Christi 2007, pet. dism'd) (holding that Section 17.47(d) did not limit the State's ability to seek restitution of monies acquired by the defendants through alleged unlawful means more than two years prior to the Attorney General's filing of suit).

[94] *Thomas*, 226 S.W.3d at 707 (concluding that the "identifiable persons" language applies only to orders to compensate for actual damages and that consumers whose money was acquired by the unlawful act or practice may be identified by examining the receipt books and computer printout from the defendant's business); *Avila v. State*,

Accordingly, the Attorney General's restitution remedy is more far-reaching than the consumer-specific restitution available to a private litigant.

With respect to civil penalties, the term "violation" is not defined by the statute, and the Attorney General may treat each event or transaction as a separate violation. Under such a scenario, the amount of penalties could be significant in certain types of cases with numerous alleged violations. Further, there is no express statutory limitation on the amount of restitution or civil penalties that can be assessed by the Attorney General under the DTPA.[95] Additionally, there are no Texas cases applying Texas Civil Practice and Remedies Code Chapter 41's limitations on damages to restrict the Attorney General's assessment of civil penalties.[96] Courts have consistently upheld a wide array of governmental penalty statutes, recognizing that "statutory civil penalties are tailored to aid the State in its law enforcement role."[97] Similarly, the Supreme Court has recognized that "[i]n a civil penalty action, the Government is not only a different kind of plaintiff, it seeks a different kind of relief," specifically "penalties, which go beyond compensation, are intended to punish, and label defendants wrongdoers."[98] In contrast, due to the fact that individual consumers are not generally charged with representing the public interest or punishing wrongdoers, there are few statutes that expressly allow private parties to seek "penalties."[99]

Nevertheless, using the DTPA as an example, there are certain factors that may limit an award of civil penalties. The DTPA lists various factors that the trier of fact must consider in determining the amount of civil penalties under Section 17.47(c), including:

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252 S.W.3d 632, 645-646 (Tex. App.—Tyler 2008, no pet.) (upholding civil penalties based on evidence that defendant was paid at least $150 by at least 2,181 individuals).

[95] Please note, however, that there are statutes enforced by the Attorney General which do include additional parameters for calculating penalties, such as a set amount of penalties per day.

[96] *Wal-Mart Stores, Inc. v. Forte*, No. 15-0146, 2016 WL 2985018, at *3 (Tex. May 20, 2016) (noting that Chapter 41 should not apply to limit the Attorney General or Optometry Board's imposition of sanctions because (1) Chapter 41 would destroy their enforcement powers under the [Texas Optometry Act]; and (2) the imposition of sanctions by the government is limited by institutional constraints not present when the claimant is a private person); *cf. State v. Emeritus Corp*., 466 S.W.3d 233 (Tex. App.—Corpus Christi Mar. 26, 2015, pet. denied) (concluding that "the term 'damages' in the [Texas Medical Liability Act] does not include civil penalties sought by the State rather than a private litigant"); *see also Norra v. Harris County*, No. 14-05-01211-CV, 2008 WL 564061, at *2, n. 3 (Tex. App.—Houston [14th Dist.] March 4, 2008, no pet.) (mem. op.) (summarizing and noting the "persuasiveness" of the government's arguments as to why Chapter 41 is inapplicable to State penalty actions, but holding that the court did not have to reach the issue).

[97] *Forte v. Wal-Mart Stores, Inc.*, 780 F.3d 272, 283 (5th Cir. 2015), certified question accepted (Mar. 6, 2015), certified question answered sub nom. *Wal-Mart Stores, Inc. v. Forte*, No. 15-0146, 2016 WL 2985018 (Tex. May 20, 2016) (citing *State v. Harrington*, 407 S.W.2d 467, 474 (Tex. 1966)).

[98] *Gabelli v. S.E.C.*, 133 S.Ct. 1216, 1223 (2013); *see also Emeritus Corp*., 466 S.W.3d. at 248 ("Penalties are 'intended to punish culpable individuals,' not 'to extract compensation or restore the status quo.' . . . . Civil monetary penalties payable to the government do not constitute compensation for actual pecuniary loss.") (internal citations omitted).

[99] *See, e.g.*, Tex. Prop. Code § 92.0081(h)(2) (providing that, if a landlord violates the statute, "The tenant may . . . recover from the landlord a civil penalty of one month's rent plus $1,000"); Tex. Gov't Code § 82.0651(b)(4) (providing that an attorney's "client who prevails in [a barratry] action . . . shall recover from [the attorney] . . . a penalty in the amount of $10,000"); Tex. Gov't Code § 423.006 (permitting the recovery of a civil penalty by property owners or tenants for illegal use of an unmanned aircraft to capture images of the property or the owner or tenant while on the property, in an amount of $5,000 for all images captured in a single episode or $10,000 for disclosure of the images captured).

(1) the seriousness of the violation, including the nature, circumstances, extent, and gravity of any prohibited act or practice;
(2) the history of previous violations;
(3) the amount necessary to deter future violations;
(4) the economic effect on the person against whom the penalty is to be assessed;
(5) knowledge of the illegality of the act or practice; and
(6) any other matter that justice may require.[100]

Similarly, the Attorney General's evaluation of these and similar factors should tailor the amount of civil penalties assessed, if any, in a manner that is just and commensurate with the proven violations at issue.

Further, to be entitled to injunctive relief under the DTPA, the Attorney General need only demonstrate to the court that the defendant is engaging in, has engaged in or is about to engage in an act or practice that is unlawful under the DTPA and that the proceedings are in the public interest.[101] The Attorney General is not required to provide evidence of irreparable injury or the absence of adequate legal remedy to obtain an injunctive relief against DTPA violations.[102] In addition, the Attorney General may accept an assurance of voluntary compliance ("AVC"), which is a voluntary agreement between the Attorney General and the individual or business that "is engaging in, has engaged in, or is about to engage in" a DTPA violation.[103] An AVC is a court-approved settlement outside of litigation in which the defendant promises future compliance with the terms of the AVC. Although an AVC is not an admission of any prior DTPA violation, a party's subsequent failure to comply with the terms of an AVC is prima facie evidence of a DTPA violation.[104] Further, the terms of the AVC may require restitution and payments of civil penalties and attorneys' fees.

VI. Defenses

In Texas, governmental entities acting in a sovereign capacity, unlike ordinary litigants, are generally immune from equitable affirmative defenses. Texas courts consistently hold that affirmative defenses such as limitations, laches, estoppel, and waiver do not apply when the activity complained of is a governmental function.[105] Furthermore, the Texas Civil Practice &

[100] Tex. Bus. & Com. Code § 17.47(g).
[101] *Id*. § 17.47(a); *David Jason West & Pydia, Inc. v. State*, 212 S.W.3d 513, 519 (Tex. App.—Austin 2006, no pet.).
[102] *See Avila*, 252 S.W.3d at 647-648.
[103] Tex. Bus. & Com. Code § 17.58.
[104] *Id.* §§ 17.58(b)-(c).
[105] *See, e.g*., *State v. Durham*, 860 S.W.2d 63, 67 (Tex. 1993) (noting that "the State in its sovereign capacity, unlike ordinary litigants, is not subject to the defenses of limitations, laches, or estoppel"); *City of Hutchins v. Prasifka*, 450 S.W.2d 829, 835 (Tex. 1970) ("The general rule has been in this state that when a unit of government is exercising its governmental powers, it is not subject to estoppel."); *Brooks v. State*, 91 S.W.3d 36, 39 (Tex. App.—Amarillo 2002, no pet.); *Capitol Rod & Gun Club v. Lower Co. River Auth.*, 622 S.W.2d 887, 896 (Tex. App. – Austin 1981, writ ref'd n.r.e.) ("[T]he general rule is that where a unit of government is exercising its governmental powers, it is not subject to estoppel or laches."). *But see City of White Settlement v. SuperWash, Inc.*, 198 S.W.3d 770, 774-775 (Tex. 2006) (articulating a limited exception to the general rule barring estoppel against the government in circumstances where "justice requires it" and there is no interference with the exercise of governmental functions).

Remedies Code expressly exempts certain governmental bodies from limitations periods.[106] Accordingly, as a general matter, the Texas Attorney General is not subject to the traditional litigation defense of limitations or other equitable affirmative defenses.

Texas courts acknowledge that protecting Texas citizens through the enforcement of legislation constitutes the government acting in a sovereign capacity, and therefore, implicates immunity from equitable defenses. For example, in *State v. Emeritus Corp.*, the Attorney General brought action against the operator of an assisted living facility, seeking civil penalties and injunctive relief under the DTPA and the Assisted Living Facility Licensing Act (ALFLA).[107] The trial court granted the defendant's motion to dismiss due to the State's failure to satisfy the Texas Medical Liability Act (TMLA) expert report requirements. However, the appellate court reversed, holding that the Attorney General was not subject to the TMLA expert report requirements. Notably, the appellate court also concluded that the Attorney General was not subject to the defenses of limitations, laches, or estoppel in pursuing this action notwithstanding the various substantive and procedural requirements of the statutes implicated in the case such as the limitations measurement period in the TMLA. According to the court, the State was acting in its sovereign capacity by seeking statutory civil penalties and injunctive relief and therefore the State was immune from equitable defenses.[108] The court further stated that if the TMLA were held to apply to the State in its sovereign capacity seeking civil penalties, "it would eviscerate the Legislature's numerous statutory directives that give the State the responsibility and duty to enforce health care statutes to protect its citizens."[109]

Similarly, in *Shields v. State*, the State of Texas brought an action against a securities broker to enjoin the broker from certain conduct relating to securities and to obtain restitution for violations of the Texas Securities Act.[110] The defendant argued the State's claims for restitution were barred by limitations, and that the State was required to sue him within the time prescribed by the Texas Securities Act article providing investors with a private cause of action. The Court of Appeals rejected this contention, stressing that the State was exercising the legislature's police power to constrain the conduct of securities dealers for the public's protection. As such, the State was acting in its sovereign capacity, and "it is well settled that the State in its sovereign capacity is not subject to the defense of limitations."[111]

Texas courts have also upheld the Attorney General's immunity from equitable defenses in cases involving family law matters. For example, in *In re T.L.K.*, a child support obligor

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[106] Tex. Civ. Prac. & Rem. Code §16.061(a). Accordingly, the State is not bound by any statute of limitations unless a statute expressly provides for such limitations. *See Brown v. Sneed*, 14 S.W. 248, 251 (Tex. 1890) ("[T]he statute of a state prescribing periods of time within which rights must be asserted are held not to embrace the state itself unless expressly designated."). *Cf. Thomas*, 226 S.W.3d at 710 (noting that "the first sentence of section 17.47(d) provides that a court may make orders for actual damages or for restoration of money or property . . . [and the] second sentence of the section establishes a two-year limitation applicable to "damages," but is silent as to restoration of money or property" and concluding that "the two-year limitation in section 17.47(d) applies only to damages, not restitution"). Notably, there is no statutory language that restricts the State to a two-year limitation for a DTPA action under section 17.47.

[107] 466 S.W.3d 233.

[108] *Id.* at 249-251.

[109] *Id.* at 251.

[110] 27 S.W.3d 267, 272 (Tex. App.–Austin 2000, no pet.).

[111] *Id.* at 275 (citations omitted).

appealed an order requiring him to pay child support arrearages plus interest under a 1985 arrearage judgment, arguing that limitations prevented the Attorney General from reviving the dormant judgment.[112] However, the appellate court held that the two-year limitation on the revival of judgments did not apply to the Attorney General.[113] The court further explained, "[j]ust as laches is not a defense against the OAG, . . . the limitations defense . . . is not applicable to an action brought by the OAG to enforce child support because the OAG is asserting a right of action of the state."[114]

There are varying rationales for the inapplicability of equitable doctrines to actions initiated by the Attorney General in its sovereign capacity. One rationale is that the government should not be barred from enforcing its laws to protect the general public.[115] Considering that certain violations of statutes may not come to light until after the act has occurred, permitting the government to prosecute violators of statutes at any time helps to ensure the welfare of the citizenry.[116] Additionally, Texas courts recognize that the legislative prerogative would be frustrated and undermined if "a government agent could—through mistake, neglect, or an intentional act—effectively repeal a law by ignoring, misrepresenting, or misinterpreting a duly enacted statute or regulation."[117] These concerns related to the government's ability to enforce laws that are in the public interest simply do not apply in the context of private litigation, which explains the difference in the applicability of equitable affirmative defenses between Attorney General and private consumer claims.

VII. Conclusion

The Attorney General's role in consumer law is unique by design. Private lawyers utilize consumer laws to represent parties in disputes over specific transactions, with the ultimate goal of making a damaged consumer whole. The Attorney General, acting for the State of Texas, has both a restorative and a regulatory purpose. The Attorney General seeks to remove deceptive and unlawful business practices from the marketplace, protect consumers from harm, protect a free market for honest businesses, and remedy the harms to consumers from deceptive practices. The Attorney General's unique capacity to act and the distinct governmental purposes of Attorney General claims explain the differing procedural tools that are not available in private matters and differing claims, remedies and defenses.

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[112] 90 S.W.3d 833, 839–40 (Tex. App.–San Antonio 2002, no pet.).
[113] *Id.* at 839–40.
[114] *Id.* at 840; *see also Reyna v. Attorney Gen. of Texas*, 863 S.W.2d 558, 559 (Tex. App.–Fort Worth 1993, no pet.) (barring a putative father from asserting a laches defense because the OAG was exercising a governmental function by bringing an action to determine paternity).
[115] *See Shields*, 27 S.W.3d at 275 (citing *Waller v. Sanchez*, 618 S.W.2d 407, 409 (Tex. Civ. App.–Corpus Christi 1981, no writ.)).
[116] *Waller*, 618 S.W.2d at 409.
[117] *City of White Settlement v. Super Wash, Inc.*, 198 S.W.3d 770, 773 (Tex. 2006) (barring estoppel when the government is exercising its governmental functions).