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YATES: May it please the court. Your honors, Mr. Powers will do the rebuttal for the petitioners.

GONZALEZ: Before we start on your time, can you speak to the motion to dismiss the appeal based on settlement and clarify that for me? Or at least give me your perspective as to why we are here if the case has been settled?

YATES: The motion of course has been withdrawn by the plaintiffs last week. It was withdrawn after it was filed.

GONZALEZ: Are the parties about $25,000 apart?

LAWYER; There is a provision in the settlement agreement pursuant to which depending on how this appeal comes out there is another amount of money; and I believe your honor it may be $50,000 that would change hands depending on the outcome of the appeal. The settlement agreement was postured intentionally to permit this case to be argued because it is in the interest of both parties to get it decided.

And under your Ruiz v. __________ decision, a very similar settlement agreement was at issue, and the court said the appellate issue was not moot.

Your honors, the issue in these consolidated DTPA cases is not whether the plaintiffs in this case who bought these homes, the purchasers of the homes on our chart, are consumers. These plaintiffs are of course consumers with respect to their consumer transaction in which they purchased their homes from the homebuilder; and on the chart it is General Homes. The consumer transaction for purposes of the DTPA is therefore the red circled transaction where the consumer purchases his or her home from General Homes on the poster.

The issue before this court is whether or not these petitioners: Shell, US Brass & Celanese who are upstream from the consumer transaction, who are suppliers of raw materials and component parts that go into the house, who are alleged to have made misrepresentations upstream of the consumer transaction - upstream - that the consumer never heard, that the consumer was not aware of, whether these type of upstream defendants can be defendants who are liable under the DTPA.

Now your honors we are not asking the court to rewrite the statute. This court stated in the Flenniken opinion, which is one of your decisions which is listed on our chart here, this court stated in Flenniken that the statute does not define who can be a defendant. The statute does not define; and, therefore, in these series of cases your honors have held 1) the defendant does not have to be in contractual privity. And we are not here today arguing that the defendant has to be in contractual privity. But what your honors have held, what this court has held in these series of cases is that the defendant, while privity is not required, the defendant's deceptive act, the defendant's violation of the DTPA must have been done in connection with, or connected with, or in the context of, or during occurring in connection with the consumer transaction. And our position here is that you have never held, this court has never held, that an upstream supplier of component parts or raw materials whose representations never were heard by the consumer is somebody who is in connection with the consumer transaction. And this is your rule, not our rule. We are not asking the court to engraft some new rule on the DTPA. This is the rule that this court has already recognized. What we are asking this court to do is stick with the law that you have already written. And what you've said in every one of these cases the defendant has injected itself into the red circle, into the consumer transaction. In Cameron, the first case on the chart, the real estate agent goes into the consumer transaction and makes a representation to the consumer. In Flenniken, the creditor bank is the trustee on the deed of trust that the consumer signs. And as your honors wrote, or as the court wrote in that opinion, the creditor in Flenniken was exercising the seller's rights when the bank creditor foreclosed on the consumer's house. These upstream suppliers in this case of raw materials, and component parts are not exercising any rights of the seller. They did not inject themselves into the consumer transaction. They did not make any misrepresentation that was heard or aware that the consumers were even aware of.

Now the rule that the plaintiffs want your honors to adopt is a rule where you step away from what you have already written, and you say okay we are going to eliminate, we are going to abandon our in connection with requirement, and say it doesn't matter whether your representation was made in connection with the consumer transaction. It's not been a matter anymore. And that's a slippery slope your honors. Because if that's the case, then the example that I would give you is that the polybutalene business in this case, the making of these chemicals, was sold to Shell by Witco, and was bought from Witco from Mobil. And if the plaintiffs were right and had Mobil made some representation when it sold the polybutalene business to Witco that heah this stuff is good to make plumbing systems, the plaintiffs could sue on that misrepresentation. So the purchaser could come all the way up the chain and get Witco, and that's never been what your honors have held. You have always said no privity, but the defendant's conduct must be in connection with. And actually, the very fact situation that we have here today interestingly enough has already been decided by the Austin CA in a case that came up to this court: Southwestern Bell Telephone v. Boyce Iron Works. Because in that case the telephone company, an upstream supplier of telephone services for the alarm system, had made representations to the PUC. And had the telephone company not made those representations to the PUC, the phone lines never would have been used. Just like the plaintiffs say if Shell had not made representations to the code bodies in this case, the plumbing systems never would have been in the houses. But the Austin CA said: What is the consumer transaction? The first sentence in the significant paragraph in Judge Shannon's opinion: What is the consumer transaction? And he identifies the consumer transaction as the purchase of the alarm system.

Now he could have decided that case on in connection with. But instead, instead he decided it on producing cause. And I am here today your honors to tell you that you can decide our case on your in connection with rule, or on producing cause.

GONZALEZ: How about Weitzel v. Barnes?

YATES: That's a very good question your honor. Weitzel did not involve a situation where the plaintiff, consumer, did not hear the representation. In Weitzel you will recall your honor the plaintiff heard the consumer transaction. And I would say your honor that this case straight-up presents the issue that Justice Gonzalez you wrote on in your dissenting opinion in Weitzel, and that Justice Enoch picked up on on his concurring opinion last year in Celtic Life, which is not whether reliance is an element of the cause of action on which you charge the jury. And that was the issue in Celtic Life: Do you charge the jury on reliance? No. The statute says producing cause is the element of the cause of action. But what your honor, Justice Gonzalez, said in Weitzel is: We still have to know what does producing cause mean?

CORNYN: Is there a difference between reliance and producing cause?

YATES: Your honor I believe there can be. This is after all the DTPA. And, you, your honors, have never written that a representation, that the plaintiff/consumer never hears can be a producing cause. You have never said that. In Weitzel the plaintiff heard the representation. In Celtic Life, the plaintiff most certainly heard the representation. You have never said that somebody that didn't hear it, and wasn't deceived could still prove producing cause. And that's what Justice Gonzalez was writing about in Weitzel. What is legally sufficient proof of producing cause in a misrepresentation case?

PHILLIPS: Why is it necessary here in order for it to be in connection with the transaction? I mean what's the magic about the consumer hearing it as long as the representation led to the product being in the __________, which the consumer __________________?

YATES: It may not be necessary. For example, some of our findings here are unconscionability findings. Flenniken was an unconscionability case. And the court still said the DTPA violation has to be in connection with the consumer transaction. Now it is difficult for me to imagine how in a misrepresentation context, the plaintiff could prove in connection with without the misrepresentation reaching the consumer. But my point is that this court could go off if you wanted to in either way in this opinion. You could write an opinion that says it is not in connection with...

PHILLIPS: You see a factual pattern in similarity in these cases that have set up this test. But is there any language in these cases that says that the consumer hearing a representation or being directly in the very transaction itself, which is unconscionable on the part of one of the defendants is necessary in order to meet these tests as we have articulated, or is this just something you are gathering out of the fact pattern?

YATES: The language of your cases does not go off on whether the consumer heard it. But what it does say is that the DTPA violation must be in connection with. And the test that I am drawing from your cases is, because that's the fact pattern in every one of them, the defendant has injected itself into the consumer transaction, has been involved in that transaction in some fashion, has dealt with the plaintiff, has interfaced with the plaintiff, or has stood in the shoes of the seller in some fashion as in Flenniken.

PHILLIPS: But that's no invariably a logical cutoff in terms of the badness of the conduct?

YATES: It may not be with respect to all types of recovery, all types of liability. But I am just talking about the DTPA. And the statute is a consumer protection act, and you have said that who is a consumer is defined not in terms of the relationship of the parties, but in relationship to the transaction. And all we are saying here is that you have also said that who is a defendant is defined in terms of the relationship to the transaction.

Now I don't believe that this is inconsistent with Weitzel and back to Justice Cornyn's question, with Weitzel or Celtic, because all you said in Weitzel and Celtic is it's not an element of the cause of action. And in Celtic what you said specifically last year is you don't charge the jury on it. But that doesn't reach the issue here. The issue here is what is legally sufficient proof of producing cause in a misrepresentation case? And can you prove producing cause in a misrepresentation case where the consumer never heard the representation? And so that is a second an alternative way for this court to deal with this case. You could decide it my point is on either one of two grounds: it could be because the representations up the chain are not in connection with the consumer transaction; or it could be because the representations that the consumer never hears can't possibly be legally sufficient proof of producing cause.

CORNYN: Why isn't it just more efficient to allow the consumer to assert a cause of action against the one who actually made the misrepresentation even though they may be up stream rather than require a lawsuit to the ________ seller, and then allow a succession of indemnity actions and things like that to bring in about 5 different parties? Why shouldn't we allow just an action against the culprit and allow it to be hashed out in that way?

YATES: The consumer of course has an action against the culprit if the culprit makes a misrepresentation that the consumer hears that is a producing cause of the consumer's transaction.

CORNYN: But here if the sellers are merely conduits of I guess the product, they are not actually consumers of the product, but consumers are the first one who suffers a loss as a result of the misrepresentation; why not the direct action?

YATES: Well I would say one that that is inconsistent with what the court has already said. But two, to answer the policy question that your honor is asking it provides no limitation on liability at all. In other words if you don't limit it to the consumer transaction, then I get back to my Witco example, it can

be any misrepresentation up the chain. Because you see the plaintiff's position here is that any representation even in the Amstadt case which is one of these three cases, it is undisputed that there were no representations to the homebuilder. That's what they are complaining about to this court in Amstadt is even in the case where the homebuilder didn't even get any representations that caused it to put the plumbing systems in the houses, they think they should still be able to recover. Because in their view there is no limitation. And in our view there is a limitation on the DTP statute and it is the limitation you have repeatedly recognized: who can be a defendant is defined in terms of relationship to the transaction.

CORNYN: What remedy is the consumer left with under your...

YATES: The consumer can sell the seller, or anybody else who is inextricably intertwined in the consumer transaction.

CORNYN: Even though the immediate seller did not make a misrepresentation?

YATES: If he does, he can of course. And then if the seller has received a misrepresentation from somebody up the stream, then in his consumer transaction if he doesn't exceed the $25 million limitation under the DTPA to be a consumer, the seller has a claim over also. And I would like to point out your honor that we are not here reaching common law theories of liability. If these plaintiffs could prove common law fraud or something against somebody up the stream they are free to do that. But they can't. That's why they are trying to get there under the DTPA. Because no misrepresentation that anybody on our side made was ever heard by the plaintiffs. And that's why they can't prove fraud. And we believe they shouldn't be able to prove a deceptive act when they weren't deceived. That nothing that we said deceived these home buyers, and therefore they should not be able to either prove in connection with, because there is nothing that we did that's injected ourselves - intentionally injected ourselves into a transaction. Nor should they be able to prove producing cause.

GONZALEZ: Was there also a negligence cause of action that's viable?

YATES: There is your honor and we have points of error, Shell does, on the negligence theory.

GONZALEZ: You are not conceding negligence?

YATES: No we are not conceding that. I know you didn't grant writ on that. We would say that an upstream supplier whose misrepresentations if any were never heard by the consumer can't possibly be a proximate cause of any damages to the consumer either.

GONZALEZ: How about limitations of some plaintiffs?

YATES: Now there is a statute of limitations issue with respect to some of the plaintiffs.

Again points of error that we didn't bring up, and I am not really sure any of the petitioners brought up, but plaintiffs may have. With respect to some of the plaintiffs they were properly denied a recovery because they had experienced leaks more than 2 years before they brought suit. And the courts have said they should have brought suit earlier. We think that is a proper result.

GONZALEZ: So you are saying the people you represent are not liable under any theory?

YATES: Not under either negligence or the DTPA. Those are the theories that are here before you and we feel strongly on the issue that your honors granted writ on, that regardless of what you say about negligence, and we think we are right on negligence, that we do not believe that we could possibly be liable under the DTPA. And that it would greatly expand the DTPA liability. If this court allows DTPA to now be extended to component parts and raw material suppliers who make representations in the marketplace in order to generate an interest in their product, if we are going to do that and allow those kind of misrepresentations to be the basis of a DTPA cause of action you have gone light years beyond where this court has been under the DTPA. And that's the one thought I would like to leave you with is that we are the ones that are asking you to follow what you have already written, and we believe the plaintiffs are asking you to change what you have already written.

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TORRES: May it please the court. My name is Hector Torres. I am here on behalf of Celanese Corporation. I would like to pick up on a point that Shell's counsel just raised at the end. And that is that contrary to the position of the respondents here, Celanese at least is in no way requesting that the court extend __________ liability with respect to its existing law. And essentially what I would like to state is that there has been no case from this court or any Texas state court where liability under the DTPA has been exposed on a raw material supplier who is far removed from the transaction, the consumer transaction, that is the basis for the lawsuit, and who never made any representations whatsoever to the consumer. The CA imposed DTPA liability on Celanese, which is a raw material supplier, based on a theory of inextricably intertwining.

Now just to clarify Celanese's role in this case, Celanese is a raw material supplier, which was sold to US Brass as one part of a component of the plumbing system that was ultimately incorporated into a home that was then sold to the consumer here. Under the court's theory the basis for finding DTPA liability against Celanese was the notion that Celanese was inextricably intertwined with General Homes and the other defendants in the same way that the lender and the consumers were inextricably intertwined in the Knight case, and the Holland Mortgage v. Bone decision.

I would like to focus on those decisions and flush out what exactly the courts found in those cases as far as inextricably intertwining. In the Knight decision, the court found that a lender was liable under the DTPA, although it was a nonprivity defendant because it was inextricably intertwined with the seller of a truck. And it was a case based on a violation of...the contract had a provision which is

unlawful, and that became a basis for the DTPA action. But the lender never had any relationship with the consumer. But the court found that the contract that was at issue had actually been drafted and supplied by the lender. There was a pre-printed clause in the contract, which provided that it was to be assigned to the lender after it was executed. And all the contracts that the seller provided in connection with selling trucks in that business were provided essentially by the lender.

CORNYN: In contrast to Ms. Yates argument you're arguing the home buyers were not consumers?

YATES: Well we are not arguing that home buyers were not consumers. But we are arguing that with respect to Celanese, the issue is the statute provides a definition of what the consumer is, and that's determined in relationship to the consumers or the plaintiff's relationship to the transaction. But against which defendants can you impose this liability.

CORNYN: Well are you arguing that there is no liability under the DTPA, or are you arguing that they are not consumers relative to your client, or are you arguing both?

YATES: What we are arguing is that with respect to Celanese there can be no DTPA liability because this standard which was applied by the court which was that the parties were inextricably intertwined is just not met here.

CORNYN: So they are not consumers?

YATES: As to Celanese.

GONZALEZ: They may be as to Shell but not Celanese?

YATES: Under the inextricably intertwined standard it depends on how you define it. But one thing that is clear is that if you look at the relationship of Celanese to General Homes, you will not find that there is any connection there. Unlike the Knight case, and unlike the Bone case, there is no connection whatsoever between Celanese and General Homes. Or if you look at the connection between Celanese and Shell or US Brass there is no connection that in any way even remotely resembles the connection that you have in the Knight case, which is really the only case out of this court where liability has been predicated on the inextricably intertwined theory. As to Brass there is a relationship obviously but that relationship is an ordinary business relationship of a raw material supplier with a manufacturer.

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RESPONDENT

O'BRIEN: May it please the court. I think the Justices have already isolated the primary issue before you. Consumer law in this state has been well established since 1977 in the Woods v. Littleton

decision; in the Cameron decision; in the Knight decision, and each one of the decisions that they have placed on the board before you. The only clear reading of those cases is that there are only two requirements to be a consumer under the DTPA. One must acquire by purchase as in this case goods and those goods must be the subject of the complaint. No supreme court decision has ever embraced an in connection with requirement. You might wonder where counsel gets that language.

ENOCH: Is there any case in Texas where a seller...where some supplier of materials to someone who manufactures a product and then sells it has ever been found liable under the DTPA for any of the acts enumerated in there, or that they would be liable for?

O'BRIEN: Yes, I think you will find that Celetex opinion out of the Austin Court in 1993, where Celetex, the remote supplier of shingles who then distributed it through installers, distributors and suppliers was held liable under the DTPA to a condominium project. See the factual underpinnings of this case are unique, and that may be why this case has gotten this court's attention. But the principles underlying this case are well founded. To suggest that our argument is the one that deviates from your long standing precedent and from legislative intent is to turn the argument on its head. Two requirements have been set forth in your opinions: Did we acquire the polybutalene system with the celcon fittings? Did we acquire the polybutalene system marketed by Shell, sold and manufactured by US Brass? Undisputed in this record. Is the defective plumbing system the subject of the complaint? Undisputed in this record. You heard Ms. Yates say: We are really not disputing that they are consumers. They have to make that argument because these two elements...

GONZALEZ: They are consumers as to General Homes, the builder or wherever they purchased it from. They are consumers but not as to this transaction that they are talking about, not as to Shell.

O'BRIEN: I see their argument as being a play on words. They are consumers with respect to this polybutalene plumbing system. But the SC they say has engrafted a requirement of in connection with. And nowhere in those opinions or in the legislative intent can you find words in connection with. Where they got it out of Cameron is most interesting. On page 541 it merely said that the act was designed to protect consumers from deceptive acts made in connection with the purchase of goods. That is base English language that meets the second component of a consumer test. That is the representations must be about the goods, which the consumer acquired. That is all that means. And then right after the court said that, the court said: To this end we must give the act under the rule of liberal construction its most comprehensive application without doing any violence to its _________.

ENOCH: Isn't the act really designed to protect the consumer in transactions where the harm to an individual consumer may be something significant, but it doesn't want the seller who is in a much better position to know the knowledge about their products from misleading a consumer into buying a product that is obviously defective? I mean isn't that the nature of all this, and isn't it kind of far afield to simply say consumer if you can find some advertisement somewhere down in the chain of back to the person who gets the raw materials somewhere along the line and that product ever fails that you then have this protection

because of the overreaching...I mean if the policy behind it is to protect consumers in an overreaching transaction how is this some sort of protection to the consumer that they are not influenced by any sort of representation?

O'BRIEN: You bring up a point that goes to the very heart of the DTPA and the public policy that mandates in this case you find consumer status. Look at what happens if you adopt petitioner's argument: Celanese; Shell; and US Brass; Celanese produced the celcon fitting that corroded, failed and degraded when used in residential potable water. They tested this product, they worked with US Brass in designing the system and insuring that Celcon was the fitting that was used in the system. What you will see happen is is suppliers of raw material, manufacturers of products shift their responsibility for their wrongful acts and place those on retailers.

In this case if you accept their argument, the only party who is responsible under the DTPA is General Homes. General Homes received the same representations that they have made all the way down the chain.

CORNYN: So can't they collect from their seller?

O'BRIEN: Sure they can. And in this case the jury found 30% responsibility to General Homes. But understand that within the confines of the DTPA when you interpret it this way it means that these parties who are the wrongdoers who knew their product was defective, who tested their products, who knew what it could do when it operated within a residential environment, they escape liability. And why do they escape liability? Under an argument this court has never adopted, under an argument that flies in the face of the legislative intent of the act, which is to give it its broadest and liberal application to protect consumers.

HECHT: And you think that means...to be clear that any homeowner in these circumstances could sue any person who supplied something for the construction of the house that failed, either a good or service that you claim was defective?

O'BRIEN: Absolutely.

HECHT: Could subsequent homeowners do that? For example: if A owns the home for awhile, sells it to B, B sells it to C, C sells it to D, all four of them actually can have lawsuits against all of these suppliers?

O'BRIEN: Well I think you are raising part of that issue brought by this court under the res judicata argument, that if a claim is brought by one consumer, and he makes a recovery, does that cutoff claims of subsequent consumers?

HECHT: And I understand your argument to mean no, it does not cut them off?

O'BRIEN: Yes. But that's under a privity argument which is a little bit separate issue obviously than the consumer status issue. So we are clear, the law is that there are two requirements. The act merely talks in terms of the class of persons who can bring suit. Once those two requirements are met a party is a consumer. The issue then focuses: Was there a misrepresentation, and was that representation a producing cause of damage?

CORNYN: Where is the producing cause under your scenario if the ultimate consumer didn't hear the misrepresentation how do they prove but for misrepresentation they would not have suffered damages?

O'BRIEN: This is my belief on what producing cause means. It does not mean that a party must hear the representation and rely on the representation. Albeit in this case, there is evidence of reliance by General Homes in purchasing this system from US Brass based on representations of US Brass and Shell representatives.

GONZALEZ: That helps US Homes as to their cause of action against Shell and Celanese, but how does that help your clients?

O'BRIEN: Well because it is not necessary that my consumers be in contractual privity or that they purchase the goods directly from the wrongdoer. This court has held in Flenniken, in Cameron and in all subsequent decision including Birchfield in 1987 that we look in terms of the relationship to the overall transaction, not from one to another.

CORNYN: But it's got to be the producing cause of their damages doesn't it?

O'BRIEN: No question. And the fact of the matter is, this plumbing system would not be in these people's homes, would not have caused the damage to these consumers, but for the representations made to General Homes to put it in there.

ENOCH: Let me ask you a hypothetical question. Say I am in the business of selling vacuum cleaners. And I am looking to be a dealership for some manufacturer out there; and I go to various manufacturers and they make various representations. One of them says this vacuum cleaner really has an expected life of 15 years. Now we will warranty it for 10, but we expect it to last about 15 years. And so the business owner says well this is the kind of vacuum cleaner that I want to sell the public. And so they stock up and they sell it to the public, and the vacuum cleaner fails in 11 years. Now they had a 10 year warranty on the vacuum cleaner, but it failed in 11 years. And so the consumer comes back to the seller of this and said now I want to know any representations you had. Well I bought it because they told me it would last 15 years. Now would the vacuum cleaner buyer, the consumer have a DTPA against the original manufacturer of the vacuum cleaner because of that representation?

O'BRIEN: Sure, because the manufacturer in your scenario has made a representation to his

retailer about the integrity of his product. He has said that my vacuum cleaner will last 15 years.

ENOCH: So let's go back to your home. Anytime that you have a manufacturer who uses parts supplied virtually any one of them will have some sort of representation about the quality of that product. As between General Motors and say a supplier of radios there will always be some discussion about the quality of the product. So if that product ever fails, then the ultimate consumer could always sue any supplier of any matter simply because the retailer of that product sold it on the market?

O'BRIEN: Well if the product was defective and factually caused the damage to the consumer, yes, and that only makes sense. The standard under common law under negligence and strictly liability where privity has been abolished would provide such liability.

ENOCH: But the consumer already has a cause of action for defective products on the market. That's not this issue. The issue here is deceptive trade practices, which is designed to meet a particular conduct in the marketplace, which is the overreaching of the seller to the buyer. The relative lack of bargaining power of the consumer who walks off the street to buy this vacuum cleaner as opposed to the retailer who is buying lots of these vacuum cleaners and making the decision on which one to buy and which one not to buy. Why should DTPA extend to simple product defects that caused damage as opposed to being taken out of the transaction that was designed to reach which was the overreaching of a seller to a buyer and influencing them to buy a particular product?

O'BRIEN: I would say the public policy of the DTPA is evidenced by the legislative intent, that's contained in 17.44. To suggest that the legislature intended only to protect the consumer against the retailer and overreaching by the retailer does not pay homage to the liberal construction in 17.44, nor this court's decisions, which have rejected privity, or any other similar requirement. This court has refused to inject requirements into the act unless the legislature has specifically placed them in the statute itself. And the only requirement to be a consumer under the DTPA are the two-fold requirements this court has already indicated. The only requirement for producing cause has been that the representations were false and factually caused damage. Weitzel v. Barnes, which has already been mentioned by the court is a classic illustration. Admittedly there is a difference of opinion about whether reliance is an element of producing cause logically should be an element of producing cause.

I would say to the court that many times the evidence of reliance is used to establish producing cause. We see that often in the cases. But it is not an element of the DTPA. So says Weitzel; so says this court in Celtec. And to inject reliance as an element of the statute when it is clear that the legislature has not intended to do so as interpreted by this court, is what they are asking you to do.

CORNYN: You said reliance will prove producing cause many times? Can you explain the difference between producing cause and reliance if there is any?

O'BRIEN: I see it as this fact. What the court recognized in Weitzel, that is but for the falsity

of the representations, the damage would not have occurred. Apply it to this case. The representations of the suitability of Celcon as being feasible, and usable in this plumbing system were false. That is what the evidence was, is supported by the opinion of the jury, the trial court's judgment and the CA's opinion. The conduct of Shell in marketing the product; the conduct of US Brass in representing that it would last over 25 years, that it was easy to install, that it wouldn't corrode, all these representations were found by the jury to be false. They were also found by the jury to be the cause of the damage, that the Celcon did corrode, that the system was not easy to install, that it would not last a lifetime of the home, that it would not last 26 years - it wouldn't last 5 years - in many cases it didn't last a couple of years.

CORNYN: Are you are arguing that that's different from reliance?

O'BRIEN: Yes, because it doesn't depend on whether someone heard or acted on it. It only depends on the fact that the representation was false, and that it is what caused the damage. And that is that but for test that doesn't depend on reliance that this court has discussed in Weitzel. Now the fact of the matter is many cases go further in establishing that someone relied on these representations. It is clear and not subject to attack in this record, that General Homes relied on the representations of Shell and US Brass in purchasing this system and putting it into consumers' homes in Fairmont Park.

GONZALEZ: But how does that help your clients if they did not rely upon any misrepresentations to buy their home?

O'BRIEN: Because reliance Justice Gonzalez is not a necessary element...

GONZALEZ: We are talking about producing cause. How was that representation a producing cause of their damages?

O'BRIEN: If reliance is not necessary, if General Homes would not have put the plumbing system in their home, then they never would have suffered any damage. It doesn't matter that the consumer heard or had to act upon. General Homes purchased the system for their benefit. Just like in Kennedy v. ________, when the company purchased the insurance policy for the benefit of the employee. That's why in Cameron and always followed by this court, this court has said you don't have to buy the goods directly from the defendant, you don't have to have privity. In this case it is clear that if General Homes did not rely on the representations of Shell, US Brass, and if US Brass had not relied on the representations of Celanese about celcon, this system would not be in the homes of these consumers, they would not have suffered the damage that was found by the jury.

HECHT: Is it important to your argument that representations were made to General Homes?

O'BRIEN: I think it is.

HECHT: So if none had been made to General Homes, then you would not have the same

position?

O'BRIEN: I would have the same position, but I think as an evidentiary posture again reliance may help support producing cause. My position on producing cause is simple: But for the falsity of the representations, the damage factually would not have occurred.

HECHT: Even if they had not been made to General Homes?

O'BRIEN: Just that they were made. They would not have to have been heard by the consumer.

HECHT: The manufacturer - the president turns to the vice president and says I think this is good stuff, then that will do it?

O'BRIEN: I believe so. Because we are talking about the falsity of the representations that factually caused the damage. Is it a stronger case? Is it more palatable to have reliance that someone heard it and acted upon it and put it in? Of course. It is logical as the justices have already indicated. But it is not an element of the DTPA case, because the object of the act is to provide an efficient and economical procedure to protect consumers from false, misleading and deceptive acts.

CORNYN: Counsel how would the misrepresentation be the producing cause of the damages if the damages would occur even if there had been no misrepresentation?

O'BRIEN: Well if there is no representation one wouldn't have a DTPA case because it would require at least a representation, or unconscionability, or some other element of the DTPA. You need obviously the several prongs: you need consumer status, and actionable violation of the act, and producing cause of damage. So again you would need that representation. What we are discussing here it seems to me is must the consumer hear it, rely upon it? If you impose that requirement is it logical to assume that people such as a manufacturer, a supplier or a distributor of the product will be in the sales home of General Homes, or any other builder at the time the purchaser comes in? Aren't you really injecting a requirement of privity? Aren't you really saying that if a purchaser walks into that sales home to buy his home, if the manufacturer is not sitting across the table, and the supplier and the distributor so he can ask them about the component parts, they have no cause of action against those parties for their false, misleading acts?

CORNYN: If we agreed with the petitioners in this case, would your clients be deprived of a DTPA cause of action against their immediate seller?

O'BRIEN: Not against General Homes, but against US Brass, who sold, manufactured, designed, tested the system. When this system was failing, when Shell was having its own internal correspondence refer to these fittings as the acetyl albatross.

CORNYN: So we are talking about a DTPA cause of action in addition to the one that you say already exists against the immediate seller?

O'BRIEN: I am saying the cause of action exist today under this court's authority, and under statute to Shell, to US Brass, to Celanese.

CORNYN: And against the immediate seller?

O'BRIEN: And the immediate seller. To suggest that this is an unprecedented expansion of the law is totally incorrect. It is just the opposite. You are applying well established firmly embedded authority that the two requirements for consumer status must be met - they are met, that producing cause does not include reliance. Producing cause was proved in this record by the fact that the representations about the suitability of this system was what caused the damage in this case. And the damages obviously have been established through this evidence.

PHILLIPS: In the Andraus case, why aren't many of the plaintiff's cases barred by the statute of limitation for the failure of the plaintiffs to secure a finding with the discovery rule ____________?

O'BRIEN: As the CAs found Shell took as well as the other defendants secured the burden on that particular issue. And the findings of the jury with respect to that support the finding that they did not discover, nor should have discovered the defect that was in their plumbing system before 2 years filing suit.

GONZALEZ: Was it not your burden to secure a jury finding?

O'BRIEN: It would have been our burden under Woods v. Mercer, but that was a burden that was assumed by the defendants due to the state of the law at the time and some confusion concerning the submission of that issue. But it was a burden that was assumed by the defendants under this record, and found to support a finding that there was in fact no discovery and that they should not have reasonably discovered those defects.

I would merely say that I understand that under the current law as it exists, there has been some desire to look at the entirety of the transaction. If the court does that, looks at the entirety of this transaction, the evidence is overwhelming that each of these defendants sought to enjoy the benefits of this transaction. Each of these defendants played an integral part in insuring that this product reached the stream of commerce. Any attempt to engraft a requirement that this supreme court has never recognized, and that is cited nowhere in the statute, maybe the question that should be posed on rebuttal is simple: Where in the statute can you find and point to me the famous words in connection with? They're not.

GONZALEZ: You've talked about Cameron v. Garrett, you have not talked about Knight and

Chastain v. Koonce and _________________, which do have some language in connection with the transaction?

O'BRIEN: You will find as you read those decisions, and I will ask the court to read them and see the context in which those words were used. They were used in a generic description of what the intent of the act was. When they got to the holding, the holding of the case, the holding of the case does not support this interpretation. The holding of the case was privy or similar requirement is not necessary. The holding of the case was only 2 requirements are necessary. The holding of the case is public policy demands a liberal construction of the Act. And there is no case with the exception of this Taylor v. Burke case, out of the Amarillo CA, has anyone ever latched on to the in connection with language of these opinions.

PHILLIPS: If the statute were written to include in connection with would you lose?

O'BRIEN: I don't think we would lose. I think there would be a question of what in connection with means? And I would say that in connection with means that the complaint must relate to the goods. In connection with is simply a discussion of the fact that the second prong must be satisfied, that it makes no sense to impose liability against the defendant who is innocent, who has no involvement with the entirety of the transaction. But we don't have that factual pattern here. We have the defendants who were found culpable, who knew their product was defective and was sold in the marketplace in a defective condition, and the question is do we fashion a rule of law heretofore never adopted by a court in order to allow them to escape liability?

CORNYN: The question is not I take it from your earlier answer whether your clients recover under the DTPA, the question is against whom they recover?

O'BRIEN: Correct. And I would say that the consumer defines the class of persons who can be sued. We satisfy that test and we are consumers. You have been asked to interject this in connection with requirement and that of course is nowhere found in the statute.

HECHT: It looks to me is if you lose that argument, if the consumer defines who can be sued, their argument is well you may be a consumer as to somebody, but you are not a consumer as to me; what's the response to that?

O'BRIEN: Consumer defines a class of persons who can sue. This court has interpreted case law the situation of which defendants can be held liable; and those holdings turn on the involvement of the defendant between themselves. Not with the consumer. Inextricably intertwined, tie-in Knight, Flenniken, Quantel in 1988, all turned on the fact that the relationship between the defendants with respect to the goods were such that liability should be imposed. And in here in our case the relationship between the defendants is inextricably intertwined. They are each an integral part of why this product got into this home, an integral part of why there was damage caused to these homeowners.

SPECTOR: In your view Shell and Celanese did not just sell raw materials, they were involved in the development of the product?

O'BRIEN: I would say it was just not my view your honor. I would say this record is abundantly clear. I have a copy of this exhibit before you. You will see with respect to each element in this case: design, manufacturing, testing, sales & marketing, failure analysis, concealment knowledge of the defect, each one of the defendants has been found in those categories by evidence in this record to have been involved. So this is not as they suggest to you the case of an innocent supplier who put a product out into the marketplace. They helped design the system. They tested the system. I am speaking of Celanese. They helped with the design.

ENOCH: According to your view of how this applies it doesn't matter whether they are innocent or not. If they are a supplier of a product, raw material that goes into a product, parts that go into a product, and that part or raw material fails, they are not innocent?

O'BRIEN: By definition they are not innocent if they produce a defective product.

ENOCH: So it's really not relevant that they designed or manufactured. The only relevance is that they put this product into the stream of commerce, and that product ultimately ended up being purchased by the homeowners and that product failed; and that satisfies every element of the DTPA?

O'BRIEN: Well I think you need to satisfy all three elements: consumer status; a representation; and producing cause.

ENOCH: As a person who is building a product I wouldn't put a part in there that was not represented to me that would do the work that it was designed to do.

O'BRIEN: Right. And this act was designed to protect consumers so that people who do produce defective products, make false misleading deceptive acts, act unconscionably are held responsible under the full breath of the Act.

PHILLIPS: In any of these suits was there ever a pleading of strict liability in the tort?

O'BRIEN: Yes. At one point in time the strict liability was not submitted to the jury. Obviously there are other concerns in submission with regard to strict liability. Given the nature of the case and it was not submitted. The only issues submitted were negligence and DTPA.

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REBUTTAL

POWERS: May it please the court. Mr. O'Brien asked me a question for rebuttal and I will

take him up on that question. He says where in the statute is the in connection with language that this court _________ demonstrated, this court has recognized on several occasions in several opinions; where is that in the statute, as though we are asking the court to rewrite the statute? Well I represent clients who don't think the court ought to rewrite statutes, and I would like to answer that question. In Flenniken, this court pointed something out about the statute. And that is it defines who the plaintiffs are who can sue, but it is silent on the question of what kinds of defendants on what kinds of theories can be sued. It is silent how far up the chain of distribution the DTPA goes. When the statute is silent on something, this court has no option but to fill in that gap. It simply can't leave the gap unwritten on. In fact the plaintiffs and the court of appeals in this case relied on the inextricably intertwined language. And inextricably intertwined tells us when a defendant can be sued.

I would ask the plaintiffs where the inextricably intertwined language is in the statute. It's not anywhere in the statute. The reason is the statute is silent on this point, and the court has to come up with a workable rule and it has come up with a workable rule in connection with the transaction that makes the point different - a consumer. So that's not asking the court to rewrite the statute.

And the second thing in response to Mr. O'Brien's argument is he's made his position perfectly clear. All they have to show according to their theory is that there is a misrepresentation and cause and fact. That's all they have to show. That's an unworkable rule that is not going to give any guidance to trial court, it's not going to give any guidance to courts of appeals in dealing with these cases. Let's go through some of the examples, some of them have come out in the discussion and in the questions up till now. We could go under their theory all the way back to Mobil, if when Mobil was selling its polybutalene business it made any representation about polybutalene in plumbing. Their clients would have a cause of action under the DTPA, not just a products liability cause of action, but under the DTPA under their theory against Mobil. The vacuum clean distributor: under their theory there would be a cause of action against the manufacturer dealing with the distributor simply as to whether the distributor was going to carry their product. If we hadn't had these misrepresentations we wouldn't have carried this product, this plaintiff would not have purchased it. Misrepresentation and cause and fact. In fact it's going to be even broader than that. If I sell batteries, and I am selling 100,000 batteries to Ford to put in their automobiles, I am going to say they are good batteries. These are good for automobiles. One of them doesn't work, and this misrepresentation isn't passed along to the consumer, but one of these batteries doesn't work. Because of that the consumer doesn't go out of town on an out of town trip; stays in town and gets mugged, gets shot, there is a misrepresentation, there is cause and fact. The test they are asking the trial courts to apply is that there be liability in that case.

Now I am not suggesting they think there would be liability in that case. That is an extreme example. But the test they are proposing, if they say just look at the language of the statute the test they are proposing would permit liability in that situation. And the court has to develop a workable test. In fact the court has developed a workable test, that the misrepresentation has to be in connection, connected to the transaction _________ the plaintiff or consumer. That is a workable test, the test they are suggesting.

GONZALEZ: They meet that test. The plumbing failed. So they are suing, the homeowners were damaged?

POWERS: Correct.

GONZALEZ: So it is in connection with the transaction?

POWERS: The only thing that makes it in connection with under their test is cause and fact. And if their definition of in connection with is cause and fact, then everyone of these examples there is going to be cause and fact. And so under that test in everyone of these examples they would be in connection with.

GAMMAGE: Counsel did he use the term cause in fact or producing cause?

POWERS: Well they have used both the terms producing cause, and cause in fact. And they are not adding anything in their argument...I don't think producing cause means cause in fact. But under their theory, their argument is that producing cause means cause in fact. But for, that's all they've argued - but for some representation up the chain this would have never ended up in the plaintiffs' home. That is the test of causation they are using. And that test is going to go all the way back up the chain, and it is going to create liability in all of these other examples that we've been through, which I think we can all agree there ought not be liability, but their test is not going to give any guidance to the trial courts and the courts of appeals. Whereas the in connection with test, that this court has recognized does give the trial courts and courts of appeals. In other words they can look at the transaction here and say whatever representations we made, to whomever we made them it wasn't in connection with the purchase of the home from General Homes. I think that is a workable relatively bright line test that the courts of appeals and the trial courts can deal with.

In fact in Andraus, where we are the only party, they actually make a more extreme argument. In the Andraus case, the representations were made not to anybody who had anything to do with the plaintiffs' homes: not to the homebuilders, not to anybody else, had nothing to do with the fact that the plumbing was in the plaintiff's homes, and yet they still argue there is producing cause. Why? Because if the plumbing had lived up to the representations, the plumbing would have still been there, it still would have been defective, but if it had lived up to the representations, then the damage would not have occurred. Well that's just writing even cause in fact, well producing cause out of the cause of action. That argument was directly considered in McKnight v. Hill & Hill Exterminator, and was rejected by this court. So the argument they are making in Andraus, this court has already dealt with. There was a representation by the exterminator, this is termite free house. The house was not termite free, so it didn't live up to the representations. And the court said, no that's not the causal link, that the plaintiff has to show against the exterminators. The plaintiff has to show that but for the statement, but for the representation the damage would have occurred. And the court said there was no proof of that and, therefore, just the fact that the product doesn't live up to the representation is not enough, even under the but for test of causation.

But to come back to the Andraus case and the Kochie case, even the but for ___________ foundation is not going to give the trial courts and the courts of appeals guidance as to why there would not be liability against Mobil, why there would not be liability in the battery case where somebody gets mugged, why there would not be liability in the situation with the vacuum cleaner distributors.

I would like to make just one point on the res judicata issue, which Mr. O'Brien raised on the privity issue. In many of these cases, the plaintiffs are suing after somebody else has already recovered repair and replacement damages for that _______. And a new plaintiff buys the house, and wants to recover again. The standard rule of res judicata is that successors entitled to property are bound by the previous litigation. And the only argument the court of appeals and the plaintiffs make against that is these are new damages, new leaks. Well in fact every bit of damage in these successor lawsuits was recoverable in the previous lawsuits. Repair and replacement which would have taken care of the entire problem was recoverable in the previous lawsuit. So the plaintiffs are not asking in the second lawsuit for any new damages. And in fact if repair and replacement had not taken care of the damages, the plaintiffs in the original lawsuit still could have recovered for lost or diminished market value. That is just a present cash value reduction of future problems with the property. That is just like recovering future medical bills reduced to present cash value in a personal injury case. So all of these damages, either under repair and replacement, or diminished market value were recoverable in the original lawsuit, the successors are entitled to that property are privy and res judicata ought to apply.

By the way in response to the Chief Justice's question that same point ought to be dispositive of the statute of limitations issues as well, but the court did not grant the writ on it.

The plaintiff's position on the statute of limitations point in the court of appeals is that since the original purchaser might have known or been on notice of the defect in the plumbing and the damage, they would have been barred by the statute of limitations. But the successor purchasers so the argument went had not yet discovered the plumbing, they weren't told about it during the sale or they sued within two years after they purchased the property. So the argument was that they were not barred by the statute of limitation. Now again the general rule in the statute of limitations is that successor is entitled to property are privies and therefore step into the shoes of the predecessor for res judicata purposes as I have argued but also for statute of limitations purposes.

PHILLIPS: If we agree with that legal theory this is established as a matter of law on the record, so that we don't have to get into question 36 and whether it was proper or not?

POWERS: That is correct. Now I want to be clear. I have not gone back to the factual record on each statute of limitation problems as to whether the predecessor, whether there is a fact question on whether the predecessor had discovered or should have discovered the injury. But if the predecessor had discovered or should have discovered the injury, then as a matter of law then the successor should be barred as a privy. And if that were not the rule, if somebody had problems with their plumbing and they

find out they are barred by the statute of limitations, under their theory that the successor in title is not a privy all they would have to do is sell the property. Even so the property with notice of the problem in the plumbing because the new purchase owner under their theory would still have two years to sue. In any homeowner case a plaintiff could always avoid the statute of limitations just by going through a sale and a new statute of limitations would start. We could have litigation going all the back to Mobil, and going all the way down to repurchases of these houses forever never barred by statute of limitations, never barred by res judicata. That is the theory they are trying to sell to this court.