DECEPTIVE TRADE PRACTICES AND WARRANTY

BECAUSE THE LENDING OF MONEY IS NOT A GOOD OR SERVICE, A BORROWER WHOSE SOLE OBJECTIVE IS TO GET A LOAN DOES NOT BECOME A CONSUMER UNDER THE DTPA

Skipworth v. Reverse Mortg. Funding LLC, ___ F. Supp. 3d ___ (N.D. Tex. 2022). https://scholar.google.com/scholar_case?case=25909814101637 7820&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Plaintiffs Patricia Skipworth and her husband (collectively, "the Skipworths") took out a reverse mortgage with Reverse Mortgage Solutions ("RMS"), a predecessor of Defendant Reverse Mortgage Funding LLC ("RMF"). The Skipworths secured the reverse mortgage by executing a Deed of Trust encumbering another property of theirs ("Property"). The Skipworths defaulted on the reverse mortgage by failing to pay the Property's taxes and insure the Property against casualty loss. RMS filed suit seeking judgment to authorize the foreclosure of the Property's lien. The court entered a final judgment in favor of RMS to authorize the foreclosure. RMF noticed the Property for foreclosure and scheduled the Property for sale.

The Skipworths sued RMF, alleging violations of the DTPA. RMF moved for summary judgment to dismiss the claim.
HOLDING: Granted.
REASONING: The Skipworths alleged that they were consumers under the DTPA because their objective in acquiring the reverse mortgage from RMS was to buy a home.

The court disagreed. The Skipworths' claim pertained to the reverse mortgage, which was not a good or service. The Skipworths entered into the reverse mortgage loan agreement with RMS, and the Deed of Trust prominently stated that it was a reverse mortgage. Moreover, no evidence showed that the Skipworths' objective to get the reverse mortgage was for the purchase of goods or services. Although one who borrows money to buy a house can be a consumer under the DTPA because that person's objective is to buy a home, subsequent actions related to mortgage accounts — for example, extensions of further credit or modifications of the original loan — do not satisfy the "goods and services" element of the DTPA. Because the lending of money was not a good or service, the Skipworths' sole objective of getting a loan excluded them as consumers under the DTPA.

DTPA PREEMPTED BY CARMACK AMENDMENT

Track Trading Co. v. YRC, Inc., ___ F. Supp. 3d. ___ (W.D. Tex. 2022). https://scholar.google.com/scholar_case?case=109825391 463242099 71&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Plaintiff Track Trading Co. d/b/a Exaco Trading Co. ("Exaco") contracted with Defendant YRC Freight ("YRC") to transport products and equipment for a trade show. YRC delivered the shipment late, causing Exaco to forgo participation in the out-of-state trade show. YRC refused to compensate Exaco because the shipment was neither damaged nor lost. Exaco filed suit in state court alleging violation of the DTPA. The district court referred the case to a magistrate judge for report and recommendation.

YRC moved to dismiss Exaco's claims as being preempted by the Carmack Amendment.
HOLDING: Recommended granting YRC's motion to dismiss.
REASONING: The Carmack Amendment establishes the standard for imposing liability on a motor carrier for the actual loss or injury to property transported through interstate commerce. Exaco argued that the Carmack Amendment did not preempt its claims because the amendment only applies to claims arising out of loss or damage to the shipped goods, and not to the failure of the delivery of goods. Exaco argued that the Carmack Amendment did not preempt its DTPA claim because the claim was not within the scope of the Amendment since it was based on misrepresentations YRC made before completing the bill of lading.

The magistrate judge disagreed. The magistrate judge looked to precedent to determine the meaning of "loss" under the Amendment and adopted the Fifth Circuit's broad interpretation of a "loss" encompassing all damages resulting from any failure of a carrier to transport or deliver goods. Thus, "loss" within the Carmack Amendment was interpreted to include claims for damages that were the result of delayed shipment including Exaco's claims.

Thus, "loss" within the Carmack Amendment was interpreted to include claims for damages that were the result of delayed shipment including Exaco's claims.

The magistrate judge also found Exaco's DTPA claim to be preempted by the Carmack Amendment despite the timing of the alleged misrepresentations. Although the Texas Supreme Court had previously held in *Brown v. Am. Transfer & Storage,* 601 S.W.2d 931, 938 (Tex. 1980) that a DTPA suit for misrepresentation made before the contract was not preempted by the Carmack Amendment, the magistrate judge pointed out that *Brown* has been called into doubt many times. District courts have repeatedly rejected arguments relying on *Brown.* See, e.g., *St. Pierre v. Ward*, 542 F. Supp. 3d 549, 554 (W.D. Tex. 2021) (rejecting plaintiff's argument that Brown controlled the preemption question because "the Court is bound by Fifth Circuit law—not Texas state law"); *Hayes v. Stevens Van Lines, Inc.*, 2015 WL 11023794, at *2 (N.D. Tex. 2015) (rejecting plaintiff's argument under Brown that Carmack Amendment does not apply to Texas DTPA claims premised on precontractual representations); *Franyutti*, 325 F. Supp. 2d at 777 n.1 (stating that because Brown "occurred prior to many of the Supreme Court and Fifth Circuit opinions relied upon, [its] holding has limited value").

The magistrate judge also relied on *Von Der Ahe v. 1-800-Pack-Rat, LLC,* 2022 WL 3579895, at *3 (N.D. Tex. 2022), which held that a misrepresentation that occurred before

a contract that did not result in a separate harm is not separate pre-contractual conduct. Thus, the Carmack Amendment applies regardless of when the misrepresentations were made.

A SELLER HAS NO DUTY TO DISCLOSE FACTS THAT HE DOES NOT KNOW AND IS NOT LIABLE FOR FAILING TO DISCLOSE "WHAT HE ONLY SHOULD HAVE KNOWN"

UNDER AN AGREEMENT TO PURCHASE SOMETHING "AS IS," THE BUYER AGREES TO MAKE HIS OWN APPRAISAL OF THE BARGAIN AND ACCEPTS THE RISK THAT HE MAY HAVE BEEN WRONG

MacPherson v. Aglony, ___ S.W.3d ___ (Tex. App. 2022).
https://casetext.com/case/macpherson-v-aglony

FACTS: Plaintiff-Appellant Colton MacPherson bought a home from Defendant-Appellee Leila Shahin Aglony that contained an "As Is" clause. After moving into the house, MacPherson found substantial structural problems with the ceiling, floors, and doors, even though Aglony had indicated on the Seller's Disclosure that she was unaware of any significant structural issues,
Aglony the , but MacPherson after moving into the house.

MacPherson then sued Aglony for violations of the DTPA, fraud, fraudulent inducement, fraud in a real estate transaction, negligence, breach of contract, and conspiracy. MacPherson also claimed that Aglony should be liable because of his reliance on the Seller's Disclosure and that he would not have bought the house had he known of the defects. The trial court found no evidence or insufficient evidence as to MacPherson's reliance on the Seller's Disclosure and entered a take-nothing judgment in favor of Aglony. MacPherson appealed.
HOLDING: Affirmed.
REASONING: MacPherson argued that the trial court erred in its findings because he did present enough evidence to show liability on Aglony. The court of appeals disagreed.
A Seller's Disclosure "shall be completed to the best of the seller's belief and knowledge as of the date the notice is completed and signed by the seller." Tex. Prop. Code Ann. § 5.008(a). Furthermore, "a buyer who purchases property 'As Is' chooses to rely entirely upon his own determination of the property's value and condition without any assurance from the seller." *Id.* Here, the court found strong evidence in the record that Aglony was unaware of any defects or malfunctions in the property except those disclosed in the Seller's disclosure. As such, the court held that nothing in the text of section 5.008(d) imposed liability on Aglony for failing to exceed the disclosure requirements. A seller has no duty to disclose facts that he does not know.

Additionally, the court held that the "As Is" clause negated the causation elements in MacPherson's DTPA, negligence, breach of contract, and fraud claims—all of which require the defendant's acts and/or omissions to cause a plaintiff's injury—because the buyer chooses "to rely entirely upon his own determination' of the property's value and condition without any assurances from the seller" and it removes "the possibility that the seller's conduct will cause him damage." When purchasing something "As Is," the buyer accepts the risk that his appraisal of the bargain may have been wrong. Thus, Aglony is not liable.

HEALTH CARE CLAIM IS NOT AUTOMATICALLY UNDER SECTION 74.051, CIVIL PRACTICE AND REMEDIES CODE
THE DTPA PROVIDES FOR AUTOMATIC ABATEMENT, BUT REQUIRES THE FILING OF A VERIFIED PLEA IN ABATEMENT

Marsh v. Haldankar, ___ S.W.3d ___ (Tex. App. — Houston [14th Dist.] 2022).
https://law.justia.com/cases/texas/fourteenth-court-of-appeals/2022/14-21-00049-cv.html

FACTS: Appellee-Defendant Pradanya Haldankar, M.D. ("Dr. Haldankar") provided general anesthesia to Appellant-Plaintiff Kenneth Marsh for cataract surgery. Marsh and his wife brought health care liability claims against Dr. Haldankar based on the administration of the anesthesia, which lead to post-operative complications for Marsh.

Dr. Haldankar filed his answer alleging the case was abated because the Marshes failed to provide a medical authorization in their pre-suit notice as required by Chapter 74 of the Texas Civil Practice and Remedies Codes. Dr. Haldankar's abatement notice was never verified, and the trial court never entered an order abating the case. The parties proceeded as if the case had not been abated and Dr. Haldankar filed three motions to dismiss the Marshes' claims. After three denied motions for summary judgment, Dr. Haldankar filed a hybrid motion that included a traditional summary judgment and a no-evidence summary judgment motion. The trial court granted Dr. Haldankar's hybrid summary judgment. The Marshes appealed.
HOLDING: Affirmed.
REASONING: Section 74.052 of the Texas Civil Practice and Remedies Codes states that notice of a health care claim under Section 74.051 "must be accompanied by a medical authorization" that meets the section's statutory requirements. Failure to do so results in a 60-day abatement period. The Marshes argued that the case was automatically abated when Dr. Haldankar invoked Section 74.052, making Dr. Haldankar's summary judgment order void. The court disagreed.

The Marshes provided no authority that supported an abatement under section 74.052 without proof, verification, a hearing, or a ruling.

The court explained that Section 74.052 does not operate in a vacuum and cannot occur automatically. Before a case is abated, a motion to abate or plea in abatement that relies upon facts outside the record must be verified and a trial court must order abatement. The court found that regardless of statutory silence on the failure to give notice, abatement is not automatic and a defendant must file a motion for abatement. The DTPA provides for automatic abatement, but still requires the filing of a verified plea in abatement. Dr. Haldankar's original abatement notice was never verified and no trial court order was entered on abatement. Both parties ignored the initial abatement. The Marshes provided no authority that supported an abatement

under section 74.052 without proof, verification, a hearing, or a ruling. Thus, no abatement occurred that would render the trial court's summary judgment void.

UNCONSCIONABILITY CLAIMS UNDER DTPA § 17.45(5) AND § 17.50(A)(3) AND DTPA § 17.46(B)(24) CLAIMS ARE "NOT AMENABLE TO A DETERMINATION ON A CLASS BASIS DUE TO THE INDIVIDUAL ISSUES INVOLVED"

Frisco Med. Ctr., L.L.P. v. Chestnut, ___ S.W.3d ___ (Tex. App. 2022).
https://law.justia.com/cases/texas/fifth-court-of-appeals/2022/05-22-00058-cv.html

FACTS: Paula Chestnut and Wendy Bolen ("Appellees") sought class certification in claims against Frisco Medical Center, L.L.P. and Texas Regional Medical Center, L.L.C. (collectively, "the Hospitals") for the addition of an evaluation and management fee ("E&M Fee") to patient's emergency room bill that was unique to services performed for the patient. The Hospitals did not discuss this fee with the patient prior to adding it to the total bill.

The Appellees argued that it was unconscionable for past, current, and future patients to pay the E&M Fee, and all patients that had previously paid the E&M Fee deserved restitution. The Hospitals argued that it would be overly cumbersome to determine restitution as a class because of the intricacies of each patient's bill. The trial court granted the class certification, and the Hospitals appealed.
HOLDING: Reversed and remanded.
REASONING: The court held that class certification was not appropriate for the unconscionability claims under DTPA § 17.45(5), § 17.50(A)(3), or DPTA §17.46(B)(24) because of the unique aspects of each patients' bill. The Hospitals showed that the E&M Fee calculation for each patient would be difficult because of the required insurance company data collection, the required subjective analysis of that collected data, and the calculation differences due to patients' varying insurance coverage plans.

The court held that nothing in the record demonstrated that the E&M Fee calculations could be done manageably. Because of the individual nature of the fee calculation, the demand for excessively cumbersome data analysis, and the lack of guidance from the trial court, the court held that class certification would not be appropriate for the unconscionability claims.

WHETHER DTPA ATTORNEY FEES ARE REASONABLE AND NECESSARY IS A QUESTION OF FACT TO BE DETERMINED BY THE FACT FINDER

Hernandez v. Duran, ___ S.W.3d ___ (Tex. App. 2022).
https://law.justia.com/cases/texas/eighth-court-of-appeals/2022/08-20-00131-cv.html

FACTS: Appellant-Plaintiff Horacio Hernandez took a semi-truck and two other vehicles to Defendant-Appellee Edgar Duran for repairs and improvements. Hernandez's insurance company issued payment for the work on the semi-truck. Duran demanded payment for the repairs on the other two vehicles before releasing all three vehicles. Despite Duran not having completed repairs on the semi-truck, Hernandez paid.

Hernandez filed suit, alleging, among other claims, deceptive trade practices. The trial court granted judgment for Hernandez for the amount of the amount paid for repairs, attorney's fees, and costs. However, of the $7,494.99 in attorney's fees requested by Hernandez, the trial court only awarded $1,000. Hernandez appealed, challenging the trial court's failure to award the full requested amount of attorney's fees.
HOLDING: Affirmed.
REASONING: Hernandez asserted that the trial court abused its discretion in awarding less in attorney's fees than what Hernandez requested at trial in the absence of rebuttal evidence. The court of appeals disagreed.

A trial court's award for attorney's fees is reviewed under an abuse-of-discretion standard. A court abuses its discretion when it acts in an arbitrary and unreasonable manner. The DTPA provides that the party seeking fees has the burden to show that the requested fees are both reasonable and necessary. Whether attorney's fees are reasonable and necessary is a question of fact to be determined by the fact finder. Here, no evidence was presented to rebut Hernandez's claim for attorney's fees. Only Hernandez's uncontroverted affidavit by his attorney regarding the amount of attorney's fees, which included contemporaneous billing records, information on his experience and background, and his opinion on customary fees for similar litigation was introduced. The court held that because the trier of fact will ultimately make determinations as to whether the uncontradicted attorney's fees evidence shows unreasonableness or credibility issues, any evidence to the contrary will similarly only raise a fact issue to be determined by the trier of fact. Therefore, the failure to offer contradicting evidence at trial is not dispositive, is only a factor to be considered by the trial court, and does not mandate an award of the requested damages.

A trial court's award for attorney's fees is reviewed under an abuse-of-discretion standard.

CONSUMER CANNOT RECOVER DAMAGES FROM INSURER ON ALLEGED EXTRACONTRACTUAL STATUTORY VIOLATION, SUCH AS DTPA OR TEXAS INSURANCE CODE, BECAUSE HE FAILED TO ESTABLISH RIGHT TO RECEIVE BENEFITS UNDER THE POLICY OR AN INDEPENDENT INJURY

Sentry Equities, Ltd. v. Allstate Life Ins. Co., ___ F.4d ___ (5th Cir. 2022).
https://casetext.com/case/sentry-equities-ltd-v-allstate-life-ins-co

FACTS: Plaintiffs-Appellants, Sentry Equities, Ltd., Sentry Holdings, LLC, and Robert Haas (collectively, "Haas"), purchased a life insurance policy from Defendants-Appellees, Allstate Life Insurance Co., et al (collectively "Allstate"), that promised a guaranteed cash value based on a guaranteed minimum interest rate declared by Allstate.

After Allstate unilaterally lowered the interest rate on the policy, Haas sued for breach of contract. Allstate removed the case to federal court. Haas moved for summary judgment. Allstate also

moved for summary judgment. The court denied Haas' motion and dismissed the suit, citing the policy's unambiguous terms. Haas appealed, arguing the court erred in failing to consider his arguments under the Texas Insurance Code and the DTPA.

HOLDING: Affirmed.

REASONING: Haas argued he was prevented from offering additional evidence related to the policy's cash value and extracontractual statutory violations because the district court dismissed the suit without sufficient notice.

Haas could not have prevailed in his suit against Allstate because Haas's breach of contract claims failed as a matter of law.

The court found that, even with more evidence, Haas could not have prevailed in his suit against Allstate because Haas's breach of contract claims failed as a matter of law. Allstate was not in breach of their performance because the policy unambiguously permitted them some discretion with the interest rate. The court held that Haas could not recover damages from Allstate based on an alleged extracontractual statutory violation, such as a DTPA or Texas Insurance Code violation, because he failed to establish a right to receive benefits under the policy or an injury independent of a right to benefits.