DECEPTIVE TRADE PRACTICES AND WARRANTIES

DTPA CONSUMER DOES NOT HAVE TO PAY FOR SERVICES OR HAVE CONTRACTUAL RELATIONSHIP

DTPA CONSUMER MAY ACQUIRE GOODS OR SERVICES PURCHASED BY ANOTHER

Bohls v. Oakes, ___ S.W.3d ___ (Tex. App.—San Antonio 2002).

FACTS: Defendant builder Voges built a new house for Charles and Michelle Oakes ("Oakes"). Defendant Bohls supplied the interim financing. The house was not completed on time and the original certificate of occupancy was revoked because of construction defects. The house was eventually completed and a certificate of occupancy was issued, but the Oakes were still unhappy about the numerous construction defects.

The Oakes sued Voges and Bohls for breach of contract, fraud, DTPA violations, usury, breach of fiduciary duty, and intentional infliction of emotional distress. The claims for breach of contract, fraud, and DTPA violations were submitted to the jury, which found in favor of the Oakes on all three claims. The trial court rendered a judgment on the verdict and denied Bohls' and Voges' motions for JNOV and new trial. Bohls and Voges appealed the jury's verdict. Shortly thereafter, Voges settled with the Oakes.

HOLDING: Judgment reversed on other grounds and remanded.

REASONING: Bohls contends the Oakes' DTPA claim is not viable because neither Charles nor Michelle was a "consumer" and Michelle had no standing to complain because she was a stranger to the transaction. The court notes that to pursue a DTPA cause of action, a plaintiff must be a consumer. *See Mendoza v. American Nat'l Ins. Co.*, 932 S.W.2d 605, 608 (Tex. App. – San Antonio 1996, no writ). The question of consumer status under the DTPA is question of law for the court to decide. *See Lukasik v. San Antonio Blue Haven Pools, Inc.*, 21 S.W.3d 394, 401 (Tex. App. – San Antonio 2000, no pet.). A plaintiff must meet two requirements to qualify as a consumer: (1) the person must seek or acquire goods or services by purchase or lease, and (2) the goods or services purchased or leased must form the basis of the complaint. The court notes that it is not necessary for there to be a written agreement, an actual purchase, or any consideration paid by Charles to be a consumer. Consumer status is established merely by seeking to acquire services, even if the services are not actually acquired no money need change hands to establish consumer status. *See Sears, Roebuck & Co. v. Wilson*, 963 S.W.2d 166, 170 (Tex. App. – Fort Worth 1998, no pet.).

The court also finds that Michelle was a consumer under the DTPA. The court reasons that plaintiffs establish their standing as consumers by their relationship to the transaction, not by a contractual relationship with the defendant. *See Kennedy v. Sale*, 689 S.W.2d 890, 892-93 (Tex. 1985). The court further notes that Michelle was a third party beneficiary of the transaction between Charles and Bohls by virtue of her relationship to Charles and her intent to occupy the house after it was built. A third party beneficiary may qualify as a consumer of goods or services, as long as the transaction was rendered to benefit the third party. *See Lukasik*, 21 S.W.3d at 401.

The issue of Bohls' possible liability under the DTPA must be determined by the jury upon remand.

PROPERTY OWNER'S TESTIMONY ABOUT VALUE MUST REFER TO MARKET VALUE RATHER THAN INTRINSIC VALUE

Cooper v. Lyon Financial Services, Inc., 65 S.W.3d 197 (Tex. App.—Houston [14th Dist.] 2001).

FACTS: Lyon Financial Services, Inc. ("Lyon"), brought an action against Dr. Bruce Cooper ("Cooper"), for breach of contract resulting from the non-payment of money due under a lease agreement.

Cooper was contacted by a Luxor Novapulse Laser ("Luxor") sales representative, who claimed in his sales pitch that with the laser there would be no pain, no discoloration, and no need for re-operation. He also said Cooper could return the laser if Cooper was not satisfied.

Cooper signed a purchase agreement and after Cooper received the laser, Luxor provided a one-day, in-service training, during which Cooper used the laser on two of his patients. Cooper had not previously performed surgery with a laser, did not make any effort to attend any other free training, and did not read the manual before the surgery. According to Cooper, there were no problems with the laser from a functioning standpoint. However, his patients were not satisfied with the surgery, and Cooper did not use the laser again. After a $2,000 non-refundable deposit and a few initial payments, Cooper stopped making payments. Cooper contacted Luxor twice about returning the laser. Lyon repossessed the laser, re-sold it, and then sued Cooper for breach of contract.

At trial, Cooper testified he attempted to return the laser, but did not provide his rejection in writing as required by the contract. Cooper also testified about representations made to him by Luxor regarding the laser and stated the laser had no value to him because it did not deliver as represented. The jury found Lyon and Luxor engaged in knowing violations of the DTPA, but awarded Cooper zero damages, from which Cooper appealed.

HOLDING: Affirmed.

REASONING: Cooper sought out-of-pocket damages on his DTPA claim. The amount of damages under the out-of-pocket rule is measured by the difference between the value of that which the plaintiff has parted with and the value of that which he has received. *George v. Hesse*, 93 S.W. 107, 107 (1906). Cooper's legal and factual sufficiency

challenges rest entirely on his testimony that the laser had no value to him. Under Cooper's analysis, he either suffered $47,000 in damages (the difference between the purchase price and the value of the laser to Cooper as received) or $2,000 (the difference between what he actually expended and the value of the laser to Cooper as received).

For a property owner to testify about the value of his property, the testimony must show that it refers to market value, rather than intrinsic or some other value of property. *Porras v. Craig*, 675 S.W.2d 503, 505 (Tex. 1984). When the owner's testimony affirmatively shows the owner is referring to personal, rather than market value, the testimony constitutes no evidence of market value. Under the rationale of *Porras*, Cooper's testimony is not competent evidence on the value of the laser. Therefore, the jury's finding of zero damages is not so contrary to the overwhelming weight of the evidence so as to be clearly wrong or unjust.

MEDICAL LIABILITY CLAIMS MAY NOT BE "RECAST" AS DTPA VIOLATIONS

Gomez v. Diaz, 57 S.W.3d 573 (Tex. App.—Corpus Christi 2001).

FACTS: Maria Gomez ("Gomez") sued Dr. Pedro Diaz ("Diaz") based on a surgery he performed to repair her bladder and remove her ovaries. A year prior to seeing Diaz, Dr. Douglas Matey ("Matey") performed a hysterectomy on Gomez, in which Diaz did not participate. According to Gomez, Diaz failed to advise her of other treatment alternatives, performed the surgery incorrectly, and falsely assured her that her prognosis was good. Further, Gomez contended that Diaz refused to repeat his diagnosis of the poor quality of her hysterectomy performed by Matey, thus preventing her from recovering damages for the injuries she sustained as a result. Gomez sued Diaz for fraud, misrepresentation, breach of fiduciary duty, violations of the DTPA, breach of express warranty, and battery. She did not, however, assert any claim for professional negligence or medical malpractice in her suit. Diaz moved for no-evidence summary judgment on Gomez's DTPA claims. The district court granted the motion for summary judgment on the DTPA claims, as well as her other claims. Diaz appealed.
HOLDING: Affirmed.
REASONING: Gomez's appeal contends that Diaz violated the DTPA and alleges that he did so knowingly. The DTPA allows claims based on a "laundry list" which provides definitions of "false, misleading or deceptive conduct." TEX. BUS. & COM. CODE ANN. §§ 17.46(b). Despite her claims, Gomez presented no evidence that Diaz acted in a knowingly deceptive manner. The court finds that all Gomez's complaints center on inadequacies in Diaz's medical work and do not evidence that he intentionally misrepresented anything. The court concludes that her complaint was of medical negligence, rather than a violation of the DTPA, and that she may not recast her cause of action as such.

DTPA REQUIRES AWARD OF DAMAGES BEFORE ATTORNEYS FEES MAY BE AWARDED

Guzman v. Ugly Duckling Car Sales of Tex., L.L.P., 63 S.W.3d 522 (Tex. App.—San Antonio 2001).

FACTS: In 1997, Nancy A. Guzman ("Guzman") entered into a purchase agreement for a used car with Ugly Duckling Car Sales of Texas, L.L.P. ("Ugly Duckling"). Pursuant to the terms of the contract, Ugly Duckling reserved the right to repossess the car in the event of default. In addition, the contract contained a non-waiver provision in favor of Ugly Duckling. Over a sixteen month period, Guzman consistently made late and often inadequate monthly payments. After attempting to resolve the situation with Guzman on several occasions, Ugly Duckling ultimately repossessed the car and sold it at auction.

Guzman filed suit against Ugly Duckling for violations of the DTPA and breach of contract, claiming Ugly Duckling made false and misleading statements regarding the acceptance of late payments and the possibility of repossession. Ugly Duckling counter-claimed against Guzman for breach of contract. As her affirmative defense, Guzman asserted Ugly Duckling waived its claim by continually accepting her late payments and not pursuing a remedy.

Because Guzman was not awarded actual damages as a result of Ugly Duckling's DTPA violation, she is not a "prevailing party" under the DTPA.

The trial court granted a directed verdict in favor of Ugly Duckling on Guzman's breach of contract claim but sent Guzman's DTPA claim and Ugly Duckling's breach of contract counterclaim to trial. The jury found Ugly Duckling had committed a DTPA violation, but awarded Guzman no damages. The jury also found that Guzman had breached her contract with Ugly Duckling, but awarded Ugly Duckling no damages on a finding that it had waived its claim. The trial court concluded that neither party was entitled to attorneys' fees. Both parties appealed.
HOLDING: Affirmed.
REASONING: Although both parties prevailed on their respective claims, neither party was awarded damages effectively resulting in a draw. Citing *Milam Dev. Corp. v. 7*7*0*1 Wurzbach Tower Council of Co-Owners, Inc.*, 789 S.W.2d 942, 947 (Tex. App.–San Antonio 1990, writ denied), the court holds that because Guzman was not awarded actual damages as a result of Ugly Duckling's DTPA violation, she is not a "prevailing party" under the DTPA. Therefore, she is not entitled to recover attorneys' fees.

REPRESENTATION THAT PROBLEMS WOULD BE "FIXED" FORMS BASIS OF DTPA COMPLAINT

"AS IS" CLAUSE NOT EFFECTIVE TO ELIMINATE DTPA LIABILITY

Oakwood Mobile Homes, Inc. v. Cabler, ___ S.W.3d ___ (Tex. App.—El Paso 2002).

FACTS: Richard and Jo Cabler ("Appellees"), visited Oakwood Mobile Homes, Inc. ("Oakwood") to search for a mobile home. Their salesperson, Bill Patton ("Patton"), showed them the different models available, and the Appellees decided on a double wide home. Initially the Appellees desired to purchase the model home used for display. Patton, however, discouraged them from purchasing the 1998 model in preference to the 1999 model he had ordered for them, which would be identical to the model home they had seen. Patton guaranteed the Appellees' satisfaction with their home and told them that if there were any problems while the home was still under warranty, Oakwood would fix the home immediately.

Before the arrival of Appellees' ordered home, Patton called to tell them of the arrival of another available home. Although Patton discouraged them from inspecting the home, Appellees did so and found that the home had several problems such as a being in "two halves," a "wavy" ceiling, a broken wall, and crooked kitchen counters that also looked "wavy."

Patton was able to get the Appellees to agree to purchase the substitute home by allowing them to make a list of all defects and the things they wanted "fixed." Patton assured them that those things listed would be fixed. Appellees were shown a video to inform them of their rights and presented with the proper paperwork, but they admitted having not read the documents. Appellees met with Patton, the repair man, and Tyson Murphy ("Murphy"), the General Manager of Oakwood, to go over the list. Murphy stated that there were some items on the list that were not covered under warranty and that he was not going to repair these items.

The disclaimers Oakwood relies on do not act as an "as is" clause and the Appellees are not bound by the disclaimers.

Appellees then sent a DTPA demand letter requesting contract recession and monetary damages. An Oakwood attorney wrote to the Texas Department of Housing and Community Affairs ("TDHCA") asking for the Appellees' home to be inspected. The TDHCA inspector requested numerous repairs. All except one of the repairs he requested were ultimately completed. He stated, however, that many of the problems with the home were due to poor workmanship. Appellees then filed suit against Oakwood in February and the court found breach of contract, fraud, and DTPA violations. Oakwood appealed.
HOLDING: Affirmed and reformed.
REASONING: Oakwood argues that the term "fix" in this case should have been afforded its ordinary meaning in the trial court. The court finds, however, that there was no evidence of an overly literal interpretation of "fix" and that the evidence was sufficient to support the finding that Oakwood breached its contract to fix everything. The representation that everything would be fixed may also serve as the basis for DTPA liability.

Oakwood argues that oral statements should not be enforceable because of a disclaimer of enforceability signed by the Appellees. These disclaimers, found in the delivery instructions and the Homeowners Information form, were admittedly not thoroughly read by the Appellees. Appellees argued in their defense that a buyer is not bound by an agreement to purchase something "as is" if he is induced to do so by fraudulent representation or concealed information on the part of the seller. *See Weitzel v. Barnes*, 691 S.W.2d 598, 601 (Tex. 1985); *Dallas Farm Mach. Co. v. Reaves*, 158 S.W. 2d 233, 240 (Tex.1957); *Cockburn v. Mercantile Petroleum*, Inc., 296 S.W.2d 316, 326 (Tex.Civ.App.—Dallas 1956, writ ref'd n.r.e.). The court recognizes that where an "as is" clause is an important basis for the contract and the parties are of relatively equal bargaining position, a buyer's affirmation and agreement that he is not relying on representations by the seller should be given affect. In the instant case, the court holds that the disclaimers Oakwood relied on do not act as an "as is" clause and the Appellees are not bound by the disclaimers.

INMATE IS NOT CONSUMER AS TO ATTORNEY HIRED BY TEXAS DEPARTMENT OF CRIMINAL JUSTICE TO REPRESENT HIM

Rayford v. Maselli, ___ S.W.3d ___ (Tex. App.—Houston [1st Dist.] 2002).

FACTS: Rayford was receiving legal services provided by the Texas Department of Criminal Justice, State Counsel for Offenders ("TDCJ"). He filed suit against Jani Maselli, Louis A. Gimbert, and TDCJ ("Appellees") for various violations of the DTPA. The trial court dismissed the case against Appellees because the petition was frivolous under section 14.003 of the Texas Civil Practice and Remedies Code ("CPRC").
HOLDING: Affirmed.
REASONING: In two points of error, Rayford argues that (1) he qualified as a consumer within the DTPA and (2) the trial court should not have dismissed his case under section 14.003 of the CPRC. Section 14.003 provides that a trial court may dismiss a claim if the court finds the claim is frivolous or malicious. TEX. CIV. PRAC. & REM. CODE ANN. § 14.003(a)(2) (Vernon Supp.2002).

In determining whether a claim is frivolous or malicious, the court may consider, among other things, (1) if the claim has no arguable basis in law or fact and (2) if it is clear that the party cannot prove facts in support of the claim. To prevail on an action brought under the DTPA,

the party must be a consumer. Whether a party is a consumer under the DTPA is a question of law. *Hand v. Dean Witter Reynolds Inc.*, 889 S.W.2d 483, 496 (Tex.App.—Houston [14th Dist.] 1994, writ denied). Under the DTPA, a consumer is one who seeks or acquires, by purchase or lease, any goods or services. TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon Supp. 2002). A plaintiff establishes standing as a consumer in terms of his or her relationship to a transaction, not by a contractual relationship with the defendant. *Birchfield v. Texarkana Mem'l Hosp.*, 747 S.W.2d 361, 368 (Tex. 1987). Appellant was receiving legal services provided gratuitously by the TDCJ. A gratuitous act is not a purchased good or service under the DTPA. Rayford has proffered no evidence to demonstrate that he sought or acquired services by purchase or lease from Gimbert. Therefore, the court concludes as a matter of law that Rayford was not a consumer within the meaning of the DTPA and that Rayford's claim has no arguable basis in law or fact.

ERISA PREEMPTS DTPA

St. Luke's Episcopal Hosp. Corp. v. Stevens Transp. Inc., 172 F. Supp. 2d 837 (S. D. Tex. 2001).

FACTS: Plaintiff St. Luke's Episcopal Hospital Corporation ("St. Luke's") sued Defendants Stevens Transport, Inc. ("Stevens") and LifeRe Insurance Company ("LifeRe"). The case centered on the health insurance coverage of Thomas Wager ("Wager"), a patient at St. Luke's. Stevens was the patient's employer and provided health insurance for the patient. LifeRe was the third-party administrator of Stevens' employee health insurance plan.

Wager was admitted to and hospitalized in St. Luke's for medical treatment on four separate occasions, after Wager ceased to be an employee of Stevens. At the time, Wager was eligible for health insurance benefits under the Consolidated Omnibus Reconciliation Act of 1985 ("COBRA"). On each hospitalization, St. Luke's contacted Stevens to verify Wager's health insurance coverage. St. Luke's alleged that Stevens misrepresented the nature, scope and existence of Wager's health coverage, and the amount of premiums due for Wager's COBRA coverage. St. Luke's tendered payment for the premiums Stevens stated were due in order to maintain Wager's insurance coverage. Stevens later claimed the payments were insufficient and returned them to St. Luke's. When St. Luke's submitted claims for the cost of Wager's treatment, Stevens refused to pay the charges.

St. Luke's sued Stevens for, among other things, violations of the DTPA and the Texas Insurance Code. Stevens removed the action to United States District Court, asserting the existence of a federal question founded on the Employee Retirement Income Security Act of 1974 ("ERISA") as the basis for removal. St. Luke's sought remand arguing that there was no federal question on jurisdiction because St. Luke's asserted only state law causes of action that were not preempted by ERISA.

HOLDING: Plaintiff's motion for remand denied.

REASONING: The court rules that a federal statute may completely preempt a plaintiff's state law claim and thus render an action removable despite the plaintiff's efforts to keep the action in state court. In addition, the court notes that state law claims relating to employee benefit plans that are governed by ERISA may be preempted by federal law because the Fifth Circuit has held that ERISA preempts state law claims brought by plan participants or beneficiaries that allege improper express terms of an ERISA plan. *Memorial Hosp. Sys. v. Northbrook Life Ins. Co.*, 904 F.2d 236, 245 (5th Cir. 1990). The Fifth Circuit provides a two-step analysis to determine ERISA preemption in the context of suits by third party health care providers for coverage misrepresentations by insurance companies.

If the patient does not have coverage, the suit is not preempted.

First, the court must determine whether the patient had any insurance coverage at all. *Transitional Hosp. Corp. v. Blue Cross and Blue Shield of Tex., Inc.*, 164 F.3d 952, 955 (5th Cir. 1999). If the patient does not have coverage, the suit is not preempted. If, however, the insured is covered in part by an ERISA plan, then the court must take "the next analytical step and determine whether the claim in question is dependent on, and derived from the rights of the plan beneficiaries to recover benefits under the terms of the plan."

In this case, St. Luke's has made allegations seeking benefits under the terms of the policy asserting that Stevens have improperly and unfairly processed St. Luke's claim. The court finds that such claims are exactly what the Fifth Circuit described as invoking preemption because St. Luke's attempts to assert derivative claims arise from Wager's rights under the policy to hold Stevens liable for failing to effectuate those rights. Thus, the court concludes that St. Luke's statutory claims, as pleaded, are preempted by ERISA.