DECEPTIVE TRADE PRACTICES AND WARRANTIES

ATTORNEY'S FEES ARE NOT AVAILABLE UNDER TEXAS CIVIL PRACTICE & REMEDIES CODE §38.001(8) FOR BREACH OF EXPRESS WARRANTY

Carlisle Corp. v. Medical City Dallas, LTD., 196 S.W.3d 855 (Tex.App.—Dallas 2006).

FACTS: Medical City Dallas, a hospital, brought a breach of warranties and negligence action against Carlisle Corporation, a manufacturer of rubber roofing material. Upon completion of the installation of a new roof on the hospital in March, 1991, Carlisle issued two warranties to Medical City, a fifteen-year Total Roofing System warranty, and a twenty-year material warranty that warranted against premature deterioration. The roof began to leak in July, 1991 and despite repairs and patches, continued until the hospital filed suit in July, 2001 and ultimately had the roof replaced in 2002. The 192nd Judicial District Court entered judgment on a jury verdict for the hospital, and Carlisle Corporation appealed all rulings, including the award of attorney's fees in the amount of $121,277.04.
HOLDNG: Affirmed in part and reversed in part.
REASONING: The court upheld the jury's findings in favor of Medical City on all claims except attorney's fees. The court held that while a party may recover attorney's fees pursuant to the express terms of the contract or a statute authorizing such an award, a party cannot recover attorney's fees under a breach of express warranty claim pursuant to statute allowing attorney fees in breach of contract actions. This is because a breach of express warranty claim is distinct from a breach of contract claim.

Breach of contract and breach of warranty are different causes of action with distinct remedies.

In reaching this decision, the court relied upon both relevant case law and the Texas Business & Commercial Code, which recognize that breach of contract and breach of warranty are different causes of action with distinct remedies. The court stated that because Medical City did not plead or try a breach of contract cause of action, nor recover on that theory, the award of attorney's fees was in error. The hospital argued that their claims sounded in both warranty and contract, but the court disagreed, stating that Carlisle's promises to replace or repair defective material were promises to perform acts in the future related to a defect in the performance of goods; in other words, a warranty, not a contract. Medical City also argued that the hospital was entitled to attorney's fees because express warranties are a function of contract, but again the court disagreed, rejecting the hospital's argument.

THE LESSEE OF A VEHICLE DOES NOT QUALIFY AS A "CONSUMER" WITH STANDING TO SUE UNDER THE MAGNUSON-MOSS WARRANTY ACT

Parrott v. DaimlerChrysler Corp., 130 P.3d 530 (Ariz. 2006).

FACTS: Plaintiff Bill Parrot executed a written lease agreement with Pitre Chrysler Plymouth Jeep Eagle ("Pitre") for a Jeep Cherokee. Pitre retained title to the vehicle but assigned the lease to lender, Chrysler Financial Company. Plaintiff alleged that after at least thirteen trips for vehicle repairs, he filed suit against manufacturer DaimlerChrysler for alleged breach of written warranty under the Magnuson-Moss Warranty Act ("Warranty Act") and the Lemon Law.

The trial court granted summary judgment in favor of DaimlerChrysler. The court of appeals reversed and ruled that Parrot qualified as a protected consumer under the Warranty Act and the Lemon Law. The Supreme Court of Arizona granted DaimlerChrysler's petition for review because the issue of whether a lessee is protected by the Warranty Act and the Lemon Law is of first impression in this Court.
HOLDING: Vacated.
REASONING: Congress enacted the Magnuson-Moss Warranty Act in 1975 "to prevent warranty deception." Under the Act, there are three categories of consumers who may bring a cause of action. The first is one who buys any consumer product for purposes other than resale. The second is one "to whom [a consumer product] is transferred during the duration of … [a] written warranty." The third is one who is entitled via the terms of the warranty or state law.

All three categories require that the consumer purchase a consumer product for purposes other than resale. For the first category of consumers, this requirement is evident in the definition itself. For the latter two categories, this requirement is embedded in the definition of "written warranty." A "written warranty" under the Act requires a purchase for purposes other than resale and a written warranty which is "part of the basis of the bargain between a supplier and a buyer."

Parrot argued that he qualified as a consumer under category two or three. The Arizona Supreme Court held that he did not meet the requirements because there was no purchase for purposes other than resale. Here, the only sale was between the manufacturer and the dealer-lessor Pitre, and Pitre purchased the Jeep for resale.

Other cases have held that a dealer who purchased a vehicle with the intent of leasing the vehicle satisfied the Act. *See* Cohen v. AM General Corp., 264 F.Supp.2d 616, 619 (N.D. Ill. 2003) and Peterson v. Volkswagen of America, Inc., 697 N.W.2d 61 (Wisc. 2005). Parrot, however, did not dispute that Pitre purchased the Jeep with the intent to resell it. The Court also rejected the argument that excluding leases was inconsistent with the purpose of the Act. The plain language of the Act requires a qualifying sale. Finally, the Court rejected the argument that the Act extends to warranties enforceable under state law. Prior cases that supported this argument had misinterpreted 15 U.S.C. §2301(6). Thus, Parrot, as lessee of the vehicle, did not qualify as a "consumer" with standing to sue under the Magnuson-Moss Warranty Act.

PHARMACY LIABLE FOR ADVICE CONTAINED IN PRESCRIPTION INSERT

Rite Aid Corp. v. Levy-Gray, 391 Md. 608 (2006).

FACTS: A consumer was diagnosed with Lyme disease and given a prescription for doxycycline to treat the condition. She had the prescription filled at a local Rite Aid Pharmacy. Included with the

medication was a pamphlet entitled "Rite Advice," listing specific information related to the prescription including how to take the medicine and possible side effects. The pamphlet directed her to take each dose with a glass of water and also stated if she experienced an upset stomach, the mediation should be taken with food or milk. Because she experienced an upset stomach after the first dose, she consumed a large quantity of dairy products with the medication to alleviate the side effects. Several days later, her symptoms had not improved. After a second course of medication, she was diagnosed with post-Lyme syndrome, a chronic autoimmune response in which the symptoms of Lyme disease are present without an actual bacterial infection. She claimed the consumption of dairy products, per the pharmacy instructions, reduced the absorption of the drug and proximately caused her post-Lyme syndrome.

In November 2001, she filed suit against Rite Aid based on theories of negligence, product liability, failure to warn, negligent misrepresentation and breach of express warranty. At trial, all causes of action were dismissed except negligence and breach of express warranty. The jury found in favor of Rite Aid on the negligence claim but awarded the consumer $250,000 for the breach of express warranty claim. The Maryland Court of Special Appeals upheld the trial court decision and determined the consumer had relied on the pamphlet provided by Rite Aid. The instruction related to consumption of dairy products with the medication constituted an express warranty that the medicine could be taken with milk without altering the drug's effectiveness. On appeal, Rite Aid presented two questions for review: (1) can a pharmacy be held liable on a theory of express warranty for information provided with a prescription drug and (2) does that information constitute an express warranty as defined by Maryland statute?

HOLDING: Judgment of Court of Special Appeals affirmed.

REASONING: The Appellate Court determined Rite Aid did not present any absolute authority that prevented the court from including prescription drugs as a "good" covered by the Uniform Commercial Code and subject to express warranties. Rite Aid argued the "Rite Advice" pamphlet did not constitute an express warranty because the pamphlet was not a basis of the bargain because the consumer was not aware of the pamphlet prior to the sale nor did the pamphlet specifically include language indicating the intent to provide a specific warranty.

The Court noted that comments to the Maryland commercial code indicated express warranties may be made prior to or even after the completion of the sale and specific language indicating an warranty is not necessary to determine an express warranty did exist. Md. Code (1975, 2002 Repl. Vol.), §2-313 official cmt. 7. Rite Aid also relied on the "learned intermediary" doctrine, which governs the patient-pharmacist relationship when a pharmacist fills a prescription ordered by a physician, to preclude liability imposed by an express warranty. The Court declined to extend the doctrine to this case because the pharmacy independently provided instructions and information related to the drug prescribed. Ultimately, the Court concluded pharmacies may be held liable for breach of express warranty under the Uniform Commercial Code and the statements contained in the "Rite Advice" pamphlet provided to the consumer in this case constituted an express warranty under Maryland Code.

COURT FINDS "CHECK" TO BE DECEPTIVE

FTC v. Cyberspace.com, LLC, 453 F.3d 1196 (9th Cir. 2006).

FACTS: The owners of Electronic Publishing Ventures LLC, and its four subsidiaries, mailed approximately 4.4 million solicitations between early 1999 and the middle of 2000, offering internet access to individuals and small businesses. The solicitations included a check for a nominal amount attached to a form resembling an invoice designed to be detached by tearing at the perforated line. Depositing the check served to sign the customer up for internet service, and this was stated in small print disclosures appearing on the backs of the checks, invoices, and marketing inserts.

Defendants acknowledged knowing that some customers had unknowingly signed up when they deposited the check. Materials prepared by the company in 1999 stated that some customers had unwittingly signed up. The companies had received direct complaints from others. In June of 2000, after the direct mail program had been terminated, Cyberspace.com, the largest of the four subsidiaries, commissioned a study that found that 87.9% of 256 participants who actually read the language on the back of the solicitation understood that the act of cashing or depositing the check constituted an agreement to purchase internet service.

Believing the solicitations were deceptive in violation of § 5 of the Federal Trade Commission Act ("FTCA"), the Federal Trade Commission ("FTC") sought an injunction and consumer redress pursuant to FTCA § 13(b). The district court entered two stipulated permanent injunctions in which the defendants agreed to cease the practices at issue without admitting to a FTCA § 5 violation. The parties then filed cross-motions for summary judgment on the issues of liability and consumer redress. After denying the defendants' motions for summary judgment, the district court granted the FTC's motion in part. The court concluded, inter alia, that the solicitation violated FTCA § 5 as a matter of law and that the proper amount of consumer redress was $17,676,897. Defendants appealed.

HOLDING: Affirmed.

REASONING: A practice is prohibited under § 5(a)(1) of the FTCA if it is likely to mislead consumers acting reasonably under the circumstances in a way that is material. The court disagreed with defendants' contention that the fine print notices on the reverse side of the check, invoice, and marketing insert precluded liability. A solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures. Here, defendants' mailing created the deceptive impression the check was simply a refund or rebate rather than an offer for services. The check was made out to the individual or small business to whom it was sent, with the consumer's phone number in the "re" line. The invoice portion of the document included contents implying a pre-existing business relationship for which a refund was offered. The circuit court, therefore, agreed with the district court's assessment that no reasonable fact-finder could conclude that the solicitation was not likely to deceive consumers acting reasonably under the circumstances. This conclusion was bolstered by undisputed evidence indicating that the solicitation deceived nearly 225,000 individuals and small businesses, 99% of whom never attempted to use the service for which they had supposedly signed up.