DECEPTIVE TRADE PRACTICES AND WARRANTIES

CAR LESSEE CAN SUE UNDER THE MAGNUSON-MOSS WARRANTY ACT

Am. Honda Motor Co., Inc., v. Cerasani, 955 So.2d 543 (Fla. 2007).

FACTS: Jennifer Cerasani acquired a new Honda Civic through a long term lease and began to have problems with the car. She took the car to the dealership for repairs many times but remained dissatisfied with the results. She filed suit against American Honda Motor Company under the Magnuson-Moss Warranty Act ("MMWA"). She alleged one count of breach of written warranty and one count of breach of implied warranty.

The trial court dismissed the complaint with prejudice on the grounds that the provisions of the MMWA covering a "written warranty" as defined in the MMWA do not apply to persons who lease rather than purchase vehicles, and that Cerasani was not in privity with Honda as required under Florida law for an implied warranty claim. The court of appeals affirmed the dismissal of the implied warranty claim but reversed the dismissal of the breach of written warranty claim. The court reasoned that because the warranty was part of the basis of the bargain in the sale of the car to the lessor, Honda, and because the sale was for purposes other than resale, there were sufficient facts to allege a written warranty as defined by the MMWA. It determined that Cerasani was a consumer under the MMWA because she was a person the car was "transferred during the duration" of a written warranty and because she was entitled under the terms of the warranty to enforce the warranty, as reflected by Honda's willingness to provide repair service.

HOLDING: Affirmed.

REASONING: The MMWA authorizes a lawsuit for damages and other equitable relief by a "consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or written warranty, implied warranty, or service contract." 15 U.S.C. §2310(d)(1) (2000). Only a person defined as a consumer may bring suit under the MMWA. A consumer means a buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty applicable to the product, and any other person who is entitled by the terms of such warranty or under applicable state law to enforce against the warrantor the obligations of the warranty. 15 U.S.C. §2301(3) (2000). An individual qualifies as a consumer if she meets any of the three aforementioned definitions found in the MMWA.

The court determined that Cerasani qualified as a consumer "under applicable state law" because Florida's Lemon Law entitles lessees to enforce the obligations of automobile warranties. The court ruled that state law should be used to determine the definition of warranty when it is found under the MMWA that "consumer" should be defined "under applicable state law." As a result, warranty means any written warranty issued by the manufacturer, excluding statements made by the dealer, in connection with the sale of a motor vehicle to a consumer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is free of defects or will meet a specified level of performance. Fla. Stat. § 691.102(23) (2006). The court held the warranty fell within the Lemon Law criteria and thus Cerasani had a cause of action under the MMWA. The court also stated that its interpretation of the MMWA through Florida's Lemon Law was consistent with MMWA's purpose of preventing warranty deception and protecting consumers.

COURT AFFIRMS FINDING THAT SELLER VIOLATED DTPA

Bossier Chrysler-Dodge II, Inc. v. Riley, 221 S.W.3d 749 (Tex. App.—Waco 2007).

FACTS: James Riley tentatively agreed to buy a vehicle from Bossier Chrysler-Dodge II, Inc. ("Bossier Country"). Riley signed a Motor Vehicle Purchase Order ("MVPO") and a Conditional Sale and Delivery Agreement ("CSDA"). The MVPO contained language stating that it was not a binding contract and that the seller was not obligated to sell until the financing was arranged. The CSDA contained language stating that the buyer was obligated to complete the purchase after financing was arranged, and that the buyer could cancel the agreement anytime before the buyer received notice of the financing approval.

Shortly thereafter, Riley signed another MVPO which included a service contract for the vehicle. This MVPO differed from the first in that it showed Daimler Chrysler, LLC as a lien holder. At this time, Riley also signed an installment contract that he did not read. Riley was not told that he could not back out of the agreement once he signed the installment contract, and there was evidence that he had been specifically told that he could terminate the agreement. Some time later, Riley contacted Bossier Country to inform them that he had changed his mind about buying the vehicle.

Bossier Country filed suit against Riley for breach of contract after Riley failed to follow through with his purchase. Riley countersued Bossier Country for fraud and Deceptive Trade Practices Act ("DTPA") violations. Riley testified at trial that he was told financing had been approved when he signed the installment contract. Evidence at trial showed that Bossier Country received notification about financing approval at 6:02 p.m. At trial, conflicting evidence was presented regarding the timing of the contract signings and the time of Riley's attempted termination of the agreement.

At trial, the jury found that Riley and Bossier Country did not have a contract, and that Bossier Country had violated the DTPA. The jury awarded Riley damages including DTPA treble damages. Bossier Country appealed, in part, on the basis that there was "no evidence or factually insufficient evidence that Bossier Country made a misrepresentation to Riley or failed to disclose information to him" in violation of the DTPA.

HOLDING: Affirmed.

REASONING: The court deferred to the jury's factual findings where conflicting evidence existed. The court found that "a reasonable juror could infer from the evidence that this representation [about the timing of the financing approval] was false because financing was not approved until that evening." It also found that a reasonable juror could find that Bossier Country

withheld information about the financing in an attempt to induce Riley to sign the installment contract, because Riley would not have signed the contract had he known that the financing had not been approved. The court held that "the record contain[ed] factually sufficient evidence to uphold the jury's findings that Bossier Country made an actionable misrepresentation to Riley and failed to disclose information to him" in violation of the DTPA.

CLAIM ARISING FROM A TRANSACTION IN EXCESS OF $500,000 IS NOT SUBJECT TO DTPA

E. Hill Marine, Inc. v. Rinker Boat Co., ____ S.W.3d ____ (Tex. App.—Fort Worth 2007).

FACTS: East Hill Marine, Inc. entered an oral dealer agreement with Rinker Boat Co., Inc. to be the exclusive dealer of Rinker's boats and boating products in the North Dallas area. East Hill paid no money for the agreement nor did it have a minimum purchase requirement. East Hill requested a written agreement, but Rinker refused. Seven months into the dealer agreement, Rinker called East Hill to say it wished to terminate the arrangement. East Hill brought multiple suits against Rinker for terminating the agreement without good cause and without written notice, including a claim under the Deceptive Trade Practices Act ("DTPA") for ten years lost profits on orders for $859,513. Rinker filed a motion for summary judgment. The trial court granted the motion for summary judgment. East Hill's appeal was granted.

The consideration for East Hill's claim exceeded $500,000, therefore the claim was exempt from a DPTA cause of action.

HOLDING: Affirmed.

REASONING: The court cited the Tex. Bus. & Com. Code § 17.49(g), which exempts DTPA causes of action arising from a transaction or a set of transactions relating to the same project if the total consideration amounts to more than $500,000. East Hill argued that because it was not required to make a minimum purchase under the agreement, the § 17.49(g) exemption did not apply to its claim. The court held that this argument failed because East Hill had promised to pay $859,513 for an order. Further, the court stated that East Hill had not applied to sell Rinker boats simply for the option to sell, but rather to make profitable sales. The court held that the consideration for East Hill's claim exceeded $500,000, therefore the claim was exempt from a DPTA cause of action.

EXPRESS WARRANTY REQUIRES RELIANCE

Evans v. Ford Motor Co., 484 F.3d 329 (5th Cir. 2007).

FACTS: Extreme Nissan, a car dealership in New Orleans, purchased a used 1999 Ford Explorer from Ford Motor Credit Company at a Florida auction. The Explorer was still within the original 36-month/36,000 warranty when it was purchased and it had also been classified as a "green light" vehicle, meaning it did not have any mechanical defects. The Explorer was shipped to New Orleans along with other vehicles that had been purchased. All of the vehicles were unloaded onto Extreme Nissan's car lot. Mark Evans, then an assistant manager at Extreme Nissan, drove the Explorer into a parking lane, believed he put the vehicle in "Park," and exited the car leaving the motor running and the door open. As Evans was speaking with a co-worker, the Explorer moved backward, hitting him, knocking him to the ground, and running over his right leg.

Evans filed suit against Ford Motor Company and Ford Motor Credit Company in Louisiana state court asserting various causes of action based on the Louisiana Products Liability Act. Evans also asserted various negligence claims against Ford Motor Credit Company. The defendants removed suit to federal district court based on diversity jurisdiction. Evans asserted that the Explorer had a "perceived park" defect arising from the 3/16ths-inch insert plate in the steering column between the park and reverse gears. Specifically, this plate deceived Evans into believing that the Explorer was in "Park" when it was not. Evans also alleged that the Explorer was unreasonably dangerous in its construction or composition, in its design, and due to inadequate warnings. Although Evans did not allege that the Explorer failed to conform with an express warranty, this allegation was listed as an issue in the pre-trial order.

At the close of Evans' case-in-chief, Ford moved for judgment as a matter of law. The district court granted that motion in part, dismissing Evans's design and warning claim, but allowing Evans's construction claim to proceed. At the conclusion of the evidence, the jury failed to find the Explorer was defective in construction or composition and failed to find Ford Motor Credit Company at fault, but they did find the vehicle to be unreasonably dangerous because of nonconformity with an express warranty. The jury assessed damages of $900,000 for physical and mental pain and suffering and $80,000 in lost wages and apportioned 80% of the cause of those damages to Ford and 20% to Evans. Ford moved for judgment notwithstanding the verdict asserting that Evans failed to meet the Louisiana Product Liability Act's requirements for establishing an express-warranty claim. Alternatively, Ford moved for a new trial contending that the jury charge did not conform to statutory language of the Louisiana Product Liability Act. Evans moved for entry of judgment on the verdict. The district court denied both motions and concluded that the jury award was excessive. The district court informed Evans that it would order a new trial unless Evans accepted a remittitur which would reduce the award to $150,000. Evans refused the remittitur, a new trial was held, and the second jury awarded a total of $119,871. The district court then reduced that award by 20%. Ford Motor Company challenged the district court's judgment.

HOLDING: Reversed.

REASONING: Ford Motor Company was responsible for any representations or warranties that the owner's manual contained. The owner's manual for the Explorer stated that the driver must "[a]lways come to a complete stop before shifting into P (Park). Make sure the gearshift is securely latched in P (Park). This position locks the transmission and prevents the rear wheels from turning." Because Evans did not make sure the gearshift was securely latched in Park, Ford did not breach its express warranty. Furthermore, there was no evidence that Evans had "seen or relied

on the owner's manual before he was injured." In order to prevail on an express warranty claim under Louisiana law, "someone injured by using a product must adduce evidence that he or she had read or was aware of the express warranty and was induced to use the product because of it."

DECEPTIVE TRADE PRACTICES ACT SUIT BASED ON MISREPRESENTATIONS DURING FORECLOSURE PROCEEDING NOT TIME-BARRED

Lozano v. Ocwen Fed. Bank, 489 F.3d 636 (5th Cir. 2007).

FACTS: On April 15, 1980, the Lozanos executed a promissory note for $76,500 payable to University Savings over a thirty year term at 12% interest for the purchase of a home. The Lozanos also executed a deed of trust granting University Savings a lien on their homestead. The Lozanos submitted two cancelled checks totaling $23,000 in payments to University Savings that were never credited to the balance owed on the note.

From 1989 to 1997, the note and deed of trust changed hands several times. Ocwen Federal Bank purchased the note and deed of trust in 1997. The Lozanos filed for bankruptcy in 1996, 1998, and 2000. During these bankruptcies, the Lozanos entered into two forbearance agreements with Ocwen where they acknowledged default on the note and agreed to modify the note's terms if Ocwen would promise not to foreclose at that time. In 2002, the Lozanos defaulted on the note and Ocwen foreclosed on the property.

The Lozanos brought suit seeking declaratory relief and damages based on the payments that were never credited and on Ocwen's alleged violations of notice and verification requirements. The Lozanos also sought damages based on alleged violation of the Deceptive Trade Practices Act ("DTPA"). Specifically the Lozanos argued that Ocwen violated section 17.46(b)(12) which prohibits false, misleading or deceptive acts or practices including "representations that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law." Tex. Bus. & Com. Code § 17.46(b)(12). Both parties filed cross motions for summary judgment. The district court granted Ocwen's motion. The Lozanos appealed.

HOLDING: Affirmed in part, reversed in part.

REASONING: The court dismissed the DTPA claim on the basis that it was barred by the statute of limitations. The statute of limitations was the only ground the district court relied upon to dismiss. However, when the Lozanos filed the lawsuit, including the DTPA claim, it was three months after the foreclosure. The Lozanos DTPA claim is based on Ocwen's alleged misrepresentations during the foreclosure proceedings in March 2003. As the Lozanos filed suit in May 2003, the suit was filed within the two-year statute of limitations applicable to a DTPA claim. Thus, the district court erred in dismissing the DTPA claim on statute of limitations grounds and the suit was remanded.

INSURANCE

WHEN A POLICY'S NAMED BENEFICIARY MERGES WITH ANOTHER ENTITY AND THE OTHER ENTITY IS THE SURVIVING COMPANY, THE POLICY PROCEEDS ARE PAYABLE TO THE SURVIVING COMPANY

Allen v. United of Omaha Life Ins. Co., ____S.W.3d____ (Tex. App.—Ft. Worth 2007).

FACTS: Judy Allen was married to Marvin Fred Allen, C.E.O. of CreditWatch Services, L.P. and the president of Stoneleigh Financial Services L.L.C., CreditWatch's general partner. A "key man" life insurance policy was taken out on Mr. Allen with CreditWatch Services, L.P. as the policy's sole beneficiary; the policy was issued by United of Omaha Life Insurance Company. Mr. Allen signed the policy in his capacity as president of Stoneleigh and the policy's applicant and owner, as well as in his individual capacity as the proposed insured.

In June 2002, CreditWatch Services, L.P. merged with CreditWatch Services, Ltd. According to the merger agreement, the surviving entity would be CreditWatch Services, Ltd. After the merger, CreditWatch Services, Ltd. changed its name to CreditWatch Services LLC. The life insurance policy on Mr. Allen was never changed to list CreditWatch Services LLC as the beneficiary.

In December of 2002, Mr. Allen died of natural causes and United issued a check in the amount of $1 million to CreditWatch Services, which was deposited into the company's account. Mrs. Allen sued United and some of its employees and the attorney for CreditWatch Services LLC and some of its employees. Mr. Allen's two sons later joined the suit. The issue was: if a policy's named beneficiary merged with another entity, and the other entity was the surviving company, are the proceeds payable to the surviving company. The trial court granted summary judgment in favor of United. Allen and sons appealed. The appellants alleged among other things the trial court erred in granting summary judgment in favor of United because the insurance proceeds should have been paid to Mr. Allen's estate after CreditWatch Services, L.P. merged with CreditWatch Services, Ltd.

HOLDING: Affirmed.

REASONING: The court held that under the express terms of the agreement, as well as under relevant Texas and Ohio statutes, all of CreditWatch Services, L.P.'s rights and interests automatically vested in CreditWatch Services, Ltd. without the need for further act or deed. Citing Texas and Ohio merger statutes, all rights and obligations of the merging entity continue to exist in the surviving entity. Based on section 1701.82(A)(3) of the Ohio Revised Code Annotated and Article 6132a-1, section 2.11(g)(2) of the Texas Revised Civil Statutes Annotated, the court held while CreditWatch Services, L.P.'s separate existence ceased at the time of the merger with CreditWatch Services, Ltd., all of its rights and obligations lived on in CreditWatch Services, Ltd. Accordingly, the court affirmed the trial court's ruling and permitted Omaha to

All rights and obligations of the merging entity continue to exist in the surviving entity.