

RECENT DEVELOPMENTS

DECEPTIVE TRADE PRACTICES AND WARRANTIES

“AS IS” CLAUSE DOES NOT NEGATE DTPA CAUSE OF ACTION

Kupchynsky v. Nardiello, 230 S.W.3d 685 (Tex. App.—Dallas 2007).

FACTS: William Nardiello (“buyer”) brought suit against Ihor Kupchynsky (“seller”) for claims related to a home purchase. Buyer purchased a new home from seller. While inspecting the home, buyer noticed that water was not draining properly from the balconies. Seller assured buyer that the house had been built according to plan and the drainage issue was normal. Buyer later discovered that the balconies had not been built according to any plan, that they were defective and had to be replaced.

Buyer sued seller for negligent misrepresentation and under the Deceptive Trade Practices Act (“DTPA”). A jury found for buyer and awarded damages. Seller appealed.

HOLDING: Affirmed.

REASONING: The court analyzed Seller’s argument that buyer’s DTPA claim was negated because of the “as is” provision in the sales contract. Seller’s argument relied on *Prudential Insurance Co. of America v. Jefferson Associates, Ltd.* which concerned a commercial lease that contained an “as is” provision. 896 S.W.2d 156, 161 (Tex. 1995). The lessee later found asbestos that had to be removed and sued. The *Prudential* court found that the “as is” provision voided lessee’s claim.

Here, the court found that there was a difference between the two cases. In *Prudential*, the negotiations were carried out at arms length between sophisticated parties. The court in *Prudential* also thought that it was “too obvious for argument that an ‘as is’ agreement freely negotiated by similarly sophisticated parties as part of the bargain in an arm’s-length transaction has a different effect than a provision in a standard form contract which cannot be negotiated and cannot serve as the basis of the parties’ bargain.” *Id.* at 162. In this case, the court found that neither party had ever discussed the “as is” clause in the course of negotiations and that it

In this case, the court found that neither party had ever discussed the “as is” clause in the course of negotiations and that it was contained in a boilerplate agreement.

was contained in a boilerplate agreement. For these reasons, the court found that the “as is” provision could not have “served as the basis of the parties’ bargain” and thus could not negate the DTPA claim. There was also a “totality of circumstances” exception in *Prudential*. Here, the court found that seller’s representations regarding the balconies called for that exception as well. For these reasons, the majority of the court affirmed the jury’s decision.

There was a strong dissent in the case by Justice Moseley. He argued that the *Prudential* exceptions quoted by the court were not supported by the facts. He also argued that buyers should have pled an affirmative defense to the “as is” clause at trial, and because they did not do so, they waived that defense on appeal. Thus, the “as is” clause should have precluded their claim, and Moseley would have had buyers take nothing.

The majority’s opinion accused Justice Moseley of “crafting an argument for [the Sellers] that they never briefed, argued, or otherwise urged in this appeal or in the trial court.” Justice Moseley stated that the seller did argue the “as is” claim on appeal and at the trial court level when it made its motions for summary judgment, directed verdict and judgment notwithstanding the verdict. Justice Moseley also noted that the “as is” clause is not itself an affirmative defense, but something that negates an element of the opposing parties’ claim. As such, it was not necessary for seller to affirmatively plead it.

ONLINE “CLICKWRAP” AGREEMENT’S FORUM CLAUSE IS ENFORCEABLE

Adsit Co., Inc. v. Gustin, 874 N.E.2d 1018 (Ind. Ct. App. 2007).

FACTS: Adsit is a retailer of new, used, and rebuilt parts and accessories for Mercedes-Benz automobiles. Adsit does business over the phone and the Internet. Before placing an online order, a customer must click a button reading “I Accept,” which is located at the bottom of a web page describing the company policy. The policy, under the heading of “Warranty” states that there are no refunds or returns, the warranty exists for 30-days for exchanges only, and that all sales are final. The webpage also states that customers agree to file any lawsuits in Delaware County, Indiana and that Indiana state laws will govern the claims.

Mary Gustin lived in Texas and her daughter-in-law Julie lived in Alabama. Julie’s husband, Kevin, owned a classic 1967 Mercedes-Benz roadster. On December 15, 2004, Mary placed an order on Adsit’s website for two camel-colored leather seat covers and two camel-colored leather armrest covers. Mary originally placed the order on her credit card with instructions to ship the goods to Kevin and Julie. Two days later, an Adsit employee called Mary to inform her that the credit card to which the order was billed needed to match the address to which it was shipped. Mary provided Adsit with Julie’s credit card number and information. After verifying the order, Adsit placed an order for camel-colored leather seat and armrest covers from its supplier, German Auto Tops in North Hollywood, California.

Julie and Kevin did not receive the goods until January 22, 2005. They discovered that the color of the seat covers did not match their vehicle’s interior. Julie and Kevin also discovered that there were no armrest covers included in the package. Within six days of receiving the seat covers, Julie and Kevin returned them to the California address from which they were sent. They sent the seat covers via certified United States Mail and received confirmation of delivery. They also reversed the charge on their credit card. Kevin received a credit on his credit card for the amount of the armrest covers.

On July 12, 2005, Adsit filed a breach of contract complaint against Julie, later adding Mary as a defendant, seeking \$1,100 for the price of the seat covers, \$750 in attorney fees, and \$600 in collection costs. Following a November 3, 2006, bench trial, the trial court entered its order on December 11, 2006, entering judgment for Adsit but also finding Adsit was only entitled to recover attorney fees of \$500.00. Adsit appealed and

RECENT DEVELOPMENTS

the Gustins cross-appealed.

HOLDING: Affirmed in part, reversed in part.

REASONING: This type of web-based contract is commonly referred to as a “clickwrap” agreement. A clickwrap agreement “appears on an internet webpage and requires that a user consent to any terms and conditions by clicking on a dialog box on the screen in order to proceed with the internet transaction.” Clickwrap agreements are considered to be writings because they are printable and storable. To determine whether a clickwrap agreement is enforceable, courts apply traditional principles of contract law and focus on whether the plaintiffs had reasonable notice of and manifested assent to the clickwrap agreement.

Here, the Adsit policy gave reasonable notice of its terms. To complete a transaction, a user must accept the policy and the user is required to take affirmative action by clicking on the “I Accept” button. Without clicking the button, the user cannot complete the transaction. The entire Adsit policy is three brief paragraphs in length. The paragraph also begins with the heading, “AGREEMENT ON JURISDICTION TO DAMAGES.”

Under these circumstances, the court found that Mary had reasonable notice of and manifested assent to the clickwrap agreement containing the forum selection clause. Mary was capable of understanding the terms of the agreement, she consented to them, and she could have rejected the agreement. Further, Mary had her day in court as she and Julie retained counsel, requested and obtained permission to participate telephonically in hearings, and actually participated telephonically. Based on these events, the forum selection clause contained in Adsit’s clickwrap agreement was valid, enforceable, and binding on Mary.

Whether the forum selection clause also binds Julie was a closer call. Julie’s only role in the transaction was to provide Mary with her credit card number. Julie did not personally accept Adsit’s policy, including the forum selection clause. If Mary was acting as Julie’s agent, then Julie is bound to the terms of the contract, including the forum selection clause. The fact that Julie provided Mary with her credit card number so Mary could complete the purchase was clear. Under these circumstances, Julie’s conduct was sufficient to give Mary actual authority to engage in the transaction on her behalf. Consequently, Julie was likewise bound by Adsit’s forum selection clause. In sum, the trial court properly exercised personal jurisdiction over Mary and Julie.

REFUSING TO SELL 100 HARD DRIVES AT THE ADVERTISED PRICE OF \$1 EACH DOES NOT VIOLATE DTPA

Perez v. Luu, ___ S.W.3d ___ (Tex. App.—Eastland 2007).

FACTS: Mario Perez was looking for hard drives on the internet and went to MicroCache’s website where he found hard drives listed for \$1 each. Perez ordered and paid for 100 hard drives. The next day Hung Kien Luu, an officer for MicroCache, e-mailed Perez advising him of a system error and refunded his payment. The actual price of the hard drives was \$1,195 each. Perez declared to Luu that he did not want a refund and expected delivery within 10 days. Luu refused to deliver the hard drives.

Perez filed suit against MicroCache and Luu. Perez alleged three violations of the Deceptive Trade Practices Act (“DTPA”): (1) representing that goods or services have sponsorship, approval,

characteristics, ingredients, uses, benefits, or qualities which they do not have; (2) advertising goods or services with intent not to sell them as advertised; and (3) representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve or which are prohibited by law. The trial court held that MicroCache’s website contained a pricing error; the website advised customers that MicroCache had the right to correct any pricing error; Perez was aware of this right; MicroCache refunded the purchase price; Perez accepted the credit; and, MicroCache did not violate the DTPA. Perez appealed the decision of the trial court.

HOLDING: Affirmed.

REASONING: The court reasoned that the legislature expressly required Perez to prove that MicroCache intentionally misrepresented the price of the hard drives because “[s]ubsection (9) prohibits advertising with intent not to sell them as advertised and subsection (10) prohibits advertising goods or services with intent not to supply a reasonable expectable public demand unless the advertisement discloses a limitation of quantity.” In the case of general advertising, as is the case here, the court held that Perez must prove MicroCache intended to misrepresent the price of the hard drive, and Perez failed to prove the required intent.

Additionally, “[t]he website advised customers that ‘[p]rices are for reference purposes only and are subject to change without notice. MicroCache is not held responsible for any errors or discrepancies...’” Consequently, Perez was on notice when he ordered... [the] hard drives that MicroCache could refuse to consummate the transaction if there was a pricing error.” MicroCache proved that the price was not an intentional misrepresentation because they were testing the website and put a \$1 price on the website during the test run; and subsequently, MicroCache mistakenly failed to put the proper price on the website when it went live.

The court held that Perez had to prove that MicroCache intentionally misrepresented the price of the hard drives, which he failed to do and that Perez was aware of MicroCache’s policy that prices were subject to change if there was a pricing discrepancy.

RESTITUTION DOES NOT HAVE TO BE ORDERED TO AN IDENTIFIABLE PERSON

Thomas v. State, 226 S.W.3d 697 (Tex. App.—Corpus Christi 2007).

FACTS: The State of Texas (“appellee”), acting through the Consumer Protection Division of the Attorney General’s Office, sued John and Ruth Thomas (“appellants”) for violations of the Notary Public Act (“NPA”) and the Deceptive Trade Practices Act (“DTPA”). Specifically, the State alleged that by offering immigration services through their business, appellants engaged in the unauthorized practice of law.

Following a trial, the jury (1) found each appellant had acquired \$469,416.50 by means of engaging in an unlawful act or practice; (2) assessed penalties in the amount of \$20,000.00 as to

Perez was aware of MicroCache’s policy that prices were subject to change if there was a pricing discrepancy.

RECENT DEVELOPMENTS

each appellant, and (3) awarded attorneys' fees to the State in the amount of \$22,000.00 as to each appellant. The trial court rendered judgment in the State's favor, ordered permanent injunctive relief as to each appellant, and ordered restitution, penalties, and attorneys' fees as awarded by the jury. The defendants appealed.

HOLDING: Affirmed.

REASONING: The appellants contended the trial court erred in rendering a judgment that violates section 17.47(d) of the DTPA because it ordered restitution to "consumers" without specifying the identifiable persons entitled to the restitution and the amount of money to be paid to each identified person. Additionally, appellants contended that the judgment violates section 17.47(d) because it ordered restitution in an amount that includes monies paid to appellants beyond a point two years prior to the filing of the lawsuit. The court concluded that the plain language of section 17.47(d) authorized the trial court to order the restoration of money or property acquired by unlawful means, without any requirement that the trial court specify "identifiable persons" or the amount of money to be paid to each consumer.

The court reasoned whether a particular remedy is available under a statute is a question of law for the court. In construing a statute, the objective of the court was to determine and give effect to the legislature's intent. If the statutory text was unambiguous, the court "must adopt the interpretation supported by the statute's plain language unless that interpretation would lead to absurd results." The court further reasoned that "[l]egislative intent is derived from the entire act, not just its isolated portions." The court gave the cardinal rule of statutory construction, that is, "every word used must be presumed to have been used for a purpose. It is also presumed that words excluded were left out for a purpose."

In concluding that the 2-year limitation period applied only to damages and not restitution, the court stated that the primary purpose of a statute of limitations was to ensure that a defendant is placed on notice of claims within a reasonable time. Here, the filing of the suit placed appellants on notice, not only of the specific claims being asserted, but also of the number of potential consumers who may ultimately participate in the final judgment.

ONLY FDA CAN REGULATE DRUG ADVERTISING

Pennsylvania Employees Benefit Trust Fund v. Zeneca Inc., 499 F.3d 239 (3d Cir. 2007).

FACTS: AstraZeneca Pharmaceuticals, L.P. ("Zeneca") conducted a clinical study to compare the effects of two drugs, Nexium and Prilosec. The study showed 40 milligrams of Nexium outperformed

20 milligrams of Prilosec when healing damage caused by erosive esophagitis. After receiving approval from the Food and Drug Administration ("FDA") in February 2001, Zeneca started a large promotional campaign claiming Nexium was superior to Prilosec. The FDA's endorsement pertained to Zeneca's final labeling for Nexium. Plaintiffs filed suit in February 2005 against Zeneca claiming that Nexium's superiority characteristic described on the advertisement was misleading.

The United States District Court for the District of Delaware heard the claims brought under the Delaware Consumer Fraud Act ("DCFA") and other consumer protection statutes. However, the claim was dismissed when the court granted Zeneca's motion for failure to state a claim. Plaintiffs appealed and the Third Circuit Court of Appeals ultimately affirmed the decision.

HOLDING: Affirmed.

REASONING: The court segmented the case into two main issues. First, the court addressed "whether the DCFA exemption for advertising regulated by the Federal Trade Commission ("FTC") applies to the facts of this case." The DCFA exemption clause excused advertisements from complying with Delaware standards so long as they were subject to and in compliance with the FTC statutes. Plaintiffs argued the exemption should have been read so narrowly as to restrict its application to advertisements. The plaintiffs asserted that Zeneca's Nexium advertisements were not expressly endorsed by the FTC. The court stated that advertising simply based on approved labeling by the FDA was too far of an extension of the exemption. The court went on to distinguish labeling and marketing as they relate to regulation, and ultimately held that the present case was outside of the DCFA exemption.

Second, the court asked "whether federal law preempts the plaintiffs' state consumer protection claims." Again, federal regulation trumped state law. The court suggested that Delaware's law was interfering with the objectives of Congress. The FDA maintained its supervisory role in protecting prescription drug users. The court refused to allow states to interpose consumer fraud laws which would frustrate the purpose of the FDA. The court was hesitant to open doors which would allow "plaintiffs to question the veracity of statements approved by the FDA." Even though Zeneca's action did not fall within the state exemption clause, federal law protected their interests and the lower court's decision was affirmed.

The court refused to allow states to interpose consumer fraud laws which would frustrate the purpose of the FDA.