DECEPTIVE TRADE PRACTICES AND WARRANTIES

BORROWER OF LOAN TO PAY TAXES IS A DTPA CONSUMER

ATTORNEYS' FEES MUST BE SEGREGATED

Allen v. Am. Gen. Fin., ____ S.W.3d ____ (Tex. App.—San Antonio 2007).

FACTS: Kyle Allen was served a citation for delinquent taxes on a San Antonio property deeded to him by his father. Upon learning of the citation, Allen came to Texas from his home in Oregon and sought a home equity loan from American General Finance ("AGF") for the purpose of paying the property taxes. AGF assured Allen that it routinely paid customers' delinquent taxes, and that it would "pay the taxes and handle the suit." AGF loaned Allen the minimum loan amount of $15,000 and agreed to pay Bexar County for the delinquent taxes and the remainder to Allen. However, AGF underpaid Bexar County. As a result, Bexar County continued its tax suit and eventually foreclosed on the San Antonio property in late July. After the foreclosure sale, Allen filed a redemption action and recovered approximately $30,000, the excess proceeds of the foreclosure sale.

To qualify as a consumer under the DTPA, a plaintiff must "seek or acquire goods or services by purchase or lease" and those goods or services must form the basis of the complaint.

AGF filed suit against Allen seeking a constructive trust against Allen's redeemed proceeds for his failure to pay the home equity loan. Allen counterclaimed on several theories including a DTPA action. Although Allen prevailed at trial on a breach of contract claim, the trial court dismissed Allen's Deceptive Trade Practices Act ("DTPA") claim. He was awarded damages for his breach of contract and negligence claims. He received $150,000 for attorney's fees, but remitted $100,000 at the trial court's suggestion. Both AGF and Allen appealed.
AGF and Allen appealed.

HOLDINGS: Reversed and remanded.

REASONING: Recovery under the DTPA requires that the plaintiff qualify as a consumer. To qualify as a consumer under the DTPA, a plaintiff must "seek or acquire goods or services by purchase or lease" and those goods or services must form the basis of the complaint. When a person seeks only credit, he is not a consumer under the DTPA since money lending is not a good or service. However, when a borrower seeks services, such as financial counseling, from the lender as an independent objective, then the borrower is considered a consumer with respect to those services. The test is whether the borrower's objective is solely to obtain a loan or to obtain a good or service. *La Sara Grain v. First Nat'l Bank of Mercedes*, 673 S.W.2d 558, 567 (Tex. 1984).

The court held that Allen presented more than a scintilla of evidence that his objective in going to AGF was service-based because Allen sought to have AGF "take care of" the tax suit. AGF failed to establish that Allen was not a consumer as a matter of law, thus the trial court erred in dismissing Allen's DTPA cause of action on that ground.

Allen also argued the trial court erred in suggesting a remittitur and requested the court reinstate the jury's award of $150,000 in attorneys' fees. AGF challenged the charges because Allen's attorneys failed to distinguish between claims for which attorneys' fees were available. Allen's attorneys testified that it was impossible to segregate time allotted to the various claims due to the significant overlap and common facts.

The court first determined that Allen may complain about the remittitur he agreed to because he did not waive the right to appeal simply by following the recommendation of the court. The court then examined the question regarding segregation of attorneys' fees incurred for claims which were recoverable. A party may only claim attorneys' fees when statutorily or contractually authorized. Allen was only able to recover attorneys' fees for the usury and breach of contract claims. The court noted that in *Tony Gullo Motors I, L.P. v. Chapa,* the Texas Supreme Court stated that "the mere fact that claims are based on common facts or are 'intertwined' does not make all fees incurred recoverable." 212 S.W.3d 299, 313 (Tex. 2006). The court did not accept Allen's argument of "double service" and denied his appeal. Because Allen's attorneys failed to segregate attorneys' fees, the jury's award was not reinstated.

CONTRACT REPRESENTATIONS ACTIONABLE UNDER DTPA

State v. Life Partners, Inc., 243 S.W.3d 236 (Tex. App.—Waco 2007).

FACTS: Life Partners, Inc. facilitated the sale of life insurance policies to investors. The company had investors sign a contract entitled "policy funding agreement," which stated the purchaser would not incur further costs of any type after paying a deposit for purchase of the policy.

When Life Partners mailed "demand letters" notifying Travis County investors that their escrow accounts were depleted and an additional fee must be paid to prevent the policy from lapsing, the State of Texas filed suit on behalf of the public interest. The suit against Life Partners involved a Deceptive Trade Practices Act ("DTPA") claim. The State of Texas argued that the contract's language stating no further costs would be incurred after paying the deposit led purchasers to believe they would not be required to pay any further costs for the life of the transaction, after submitting payment as a purchase deposit. The company argued that the word "costs" referred to fees for services and the contract provision meant the purchaser would not have to pay any other fees for Life Partners' services.

Life Partners moved for summary judgment claiming this was a contract claim, which was not actionable under the DTPA. The trial court agreed and granted its motion for summary judgment.

HOLDING: Reversed and remanded.
REASONING: According to the court, a mere breach of contract claim is not actionable under the DTPA. The distinction "between a DTPA violation and a breach of contract claim, properly lies when an alternative interpretation of the contract is asserted, and the dispute arises out of the performance of the contract." The court stated that "in such a case the DTPA is not violated, and the legal rights of the parties are governed by traditional contract principles."

The court held that Life Partners' interpretation of the contract was not reasonable and the language in the contract was not ambiguous. Life Partners used two different terms, "fees" and "costs," in the course of describing the purchaser's financial obligations. The contract's plain language expressly stated that the "PURCHASER will not incur costs of any type" and does not limit "costs" to fees for Life Partners' services. The court stated that when called upon to interpret a contract, it will give plain meaning to the words used in the writing, and that language may be given a certain and definite meaning that is not ambiguous. Because the language had a plain meaning, the State's DTPA claim was actionable.

INSURANCE

HOMEOWNER'S INSURANCE DOES NOT COVER MOLD

MITIGATION IS NOT AN AFFIRMATIVE DEFENSE

Carrizales v. State Farm Lloyds, 518 F.3d 343 (5th Cir. 2008).

Facts: Javier and Eva Carrizales held a standardized homeowners insurance policy ("Form B") issued by State Farm. They filed a claim for damages resulting from a plumbing leak in their garage. State Farm paid for the claim plus additional living expenses. The Carrizaleses later submitted three mold remediation claims which State Farm denied.

The Carrizaleses sued State Farm for alleged violations of the insurance code, breach of the insurance contract, and breach of the duty of good faith and fair dealing. The court granted State Farm summary judgment, concluding that Form B did not extend coverage to a dwelling for damage caused by mold. Because of the summary judgment ruling, when the case proceeded to trial, evidence of the mold damage was excluded. The jury found for State Farm.

On appeal the Carrizaleses argued that the interaction of two provisions in Form B, the mold exclusion and the exclusion repeal provision, was such that it was ambiguous as to whether Form B covered mold damage to a dwelling caused by a plumbing leak. Carrizaleses also challenged the jury instruction arguing that their duty to mitigate damages was not a condition precedent to recovery, but an issue for the jury to consider in determining the amount of damage to award.
Holding: Affirmed.
Reasoning: The court agreed that Form B did not cover mold damage to a dwelling resulting from a plumbing leak. Form B specifically divided coverage into two distinct subdivisions: A and B. Coverage A insured all risks to the dwelling except those which were excluded within Section I. Damage resulting from mold was excluded from coverage in 1.f of Section I. Coverage B insured personal property against certain, enumerated perils, not excluded by Section I. Damage from plumbing leaks was listed as a covered peril in the ninth subsection of Coverage B ("Section 9").

Section 9 also includes the exclusion repeal provision which provided that "exclusions 1.a through 1.h under [Section I] do not apply to loss caused by this peril." According to the court, the location of the exclusion repeal provision within the text of Form B implied that the mold exclusion was only repealed in regard to a loss insured by Section 9 of Coverage B. Stated another way, the mold exclusion was repealed for plumbing leaks resulting in loss of personal property, not damage to a dwelling.

Additionally, the court stated that in Texas, Form B did not cover mold damage to a dwelling resulting from a plumbing leak because ruling otherwise would eviscerate the mold exclusion entirely. The court based its conclusion on an answer to a certified question that was received in a previous case, *Fiess v. State Farm Lloyds*, 202 S.W.3d 744 (Tex. 2006). The Texas Supreme Court had been asked in *Fiess* whether mold damage was covered under Form B when it occurred as a result of water damage that was otherwise covered. The Court answered that mold damage was not covered under Form B.

In general, the duty to mitigate damages is an equitable doctrine, allowing for a reduction in the amount of damages, not an affirmative defense.

The Fifth Circuit looked to various sources to inform itself on the duty to mitigate damages. The court found that in general, the duty to mitigate damages is an equitable doctrine, allowing for a reduction in the amount of damages, not an affirmative defense. The Texas Rules of Civil Procedure does not list mitigation of damages as an affirmative defense that must be pled.

The court found that while the policy language firmly required insureds to take certain steps as "Duties After Loss" the policy did not expressly render these "conditions" as prerequisites to recovery. Consequently, Texas courts have concluded some "Duties After Loss" are conditions precedent while others are not. The duty to provide notice has been held to be a condition precedent to recovery so long as the insurer is prejudiced by the insured's breach of the duty.

According to the court, holding that the breach of the duty to mitigate constitutes an affirmative defense would be contrary to the Texas court decisions finding conditions precedent only when the insurer is prejudiced. The court stated that an offset to any award of damages based on failure to mitigate is more analogous to the "prejudice" bar. The court found barring all recovery for failure to mitigate would be an onerous consequence upon the insured that did not conform with the rule that ambiguous policy provisions are construed in favor of the insured.