

# RECENT DEVELOPMENTS

## DECEPTIVE TRADE PRACTICES AND WARRANTIES

### DTPA CLAIM BASED ON SALE OF RETURNED PRODUCT SUSTAINED

Jackson v. Wal-Mart Assocs., Inc., \_\_\_ F. Supp. 2d \_\_\_ (N.D. Tex. 2008).

**FACTS:** Randy Jackson bought a small angle grinder from Wal-Mart. The grinder was manufactured by Black & Decker, Inc. The grinder's grinding wheel assembly dislodged while Jackson was using it and ripped into his leg, shattering his bone and causing severe injury. Jackson and his wife sued Wal-Mart. Jackson alleged Wal-Mart sold the grinder as new in violation of the Texas Deceptive Trade Practices Act ("DTPA"), when in fact the grinder was a returned item.

According to Jackson, Wal-Mart violated the DTPA because Wal-Mart did not disclose the grinder had been assembled and reassembled, and that it knew or should have known that the grinder was used, deteriorated, and likely to fail. Jackson sought damages for past and future extreme emotional distress, mental anguish, loss of consortium, and medical expenses. Wal-Mart sought summary judgment as to all claims because contending there was no evidence of misrepresentation, defect, or that it was the proximate cause of Jackson's injuries.

**HOLDING:** Granted in part, and denied in part.

**REASONING:** Summary judgment is proper when there is no genuine issue of material fact presented in evidence and pleadings.

The court noted Wal-Mart must show the evidence was sufficient to support the resolution of all factual issues in their favor in order to grant its motion for summary judgment. In order to state a valid DTPA claim, plaintiff must be a consumer, and show that the defendant engaged in false, misleading, or

deceptive acts that were the producing cause of plaintiff's injury. In the present case, the court determined there were no genuine issues of material fact regarding misrepresentation as to price reduction nor bait advertising. A receipt entered into evidence showed the purchase was at full-price without any discounts, and invalidated claims that the defendant was misleading concerning the grinder's price. Hence, Wal-Mart was entitled to summary judgment on these issues.

Jackson sufficiently raised fact issues as to whether the grinder was a used item returned with a defect, whether this was a material fact, and whether the misrepresentation of this fact was the producing cause of his injuries. There was sufficient evidence to establish Wal-Mart sold a defective product previously purchased that the plaintiff would not have purchased had he known of the defect. Wal-Mart's motion for summary judgment was denied based on DTPA claims that raised genuine questions of material fact. The court concluded sufficient evidence was produced to present a fact issue as to whether the grinder was defective, and

thus, unfit for its ordinary purposes at the time Jackson purchased it. Therefore, the court denied Wal-Mart's motion for summary judgment on plaintiff's claim for breach of implied warranty of merchantability.

### DECEDENT'S CHILDREN DEEMED "CONSUMERS" UNDER DTPA

#### MENTAL ANGUISH DAMAGES UPHELD

Serv. Corp. Int'l v. Aragon, 268 S.W.3d 112 (Tex. App.—Eastland 2008).

**FACTS:** Widow Estela Aragon, individually and on behalf of her children brought suit for damages against funeral home owner Service Corporation International ("SCI"). Aragon's alleged the funeral home buried Estela Aragon's husband in the wrong plot and then reinterred his body in the plot purchased without notifying her, requesting her consent or acknowledging their mistake. The jury found SCI violated the Texas Deceptive Trade Practices-Consumer Protection Act ("DTPA") and awarded the plaintiffs mental anguish damages.

On appeal, SCI challenged the standing of Aragon's children as plaintiffs. SCI argued that only a consumer has standing to sue under the DTPA. Estela Aragon was the only plaintiff who sought any services or signed any agreement with SCI. Hence, SCI argued her children were not consumers involved with the transaction that violated the act.

**HOLDING:** Affirmed.

**REASONING:** The DTPA defines consumer as one who seeks or acquires by purchase or lease, any goods or services. A plaintiff need not establish privity of contract to be a consumer. Instead, plaintiff's standing as a consumer is established by her relationship to the transaction. A third-party beneficiary may qualify as a consumer as long as the transaction was specifically required by or intended to benefit the third party, and the good or service was sold or rendered to benefit the third party.

No Texas decision has determined who are the intended beneficiaries when a cemetery plot or funeral services are purchased. The court noted previous cases have allowed immediate family members to bring common law actions for mishandling a corpse. The court assumed a company taking possession of a body has a duty to the decedent's children as well. The court found it reasonable to conclude SCI's interment services were intended for the benefit of the deceased's immediate family. Thus, each child was a consumer with standing to sue under the DTPA. The court affirmed the trial court's decision and denied SCI's challenge.

The court also considered whether the court should have awarded damages for mental anguish. Mental anguish requires a plaintiff to show a high degree of mental pain and distress beyond mere worry, anxiety, vexation, embarrassment or anger. Plaintiff must present evidence detailing the nature, duration and severity of the mental anguish, and show a substantial disruption in the claimant's daily routine. SCI argued that plaintiffs' complaints were not compensable as mental anguish damages as a matter of law. The evidence was legally insufficient to support the jury's awards, and in the alternative, that the evidence was factually insufficient.

**There was sufficient evidence to establish Wal-Mart sold a defective product previously purchased that the plaintiff would not have purchased had he known of the defect.**

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Each witness established that the incident caused some emotional impact and disruption in the plaintiffs' daily lives. The court noted that even SCI's former manager agreed one of the most devastating circumstances that could occur for an already-grieving family was to experience a wrongful burial. In reviewing the jury's award, the court distinguished Estela, Christian, and Rebecca from Stephan and Erica in regards to damages. The court's distinction was based on the degree of pain and impact

suffered by each of the parties. The court found Stephen and Erica's testimony failed to establish injury beyond mere emotions or significant disruption in their routine affairs as to constitute mental anguish. The court noted there must also be evidence to justify the amount awarded. In regards to Estela, Christian, and Rebecca the court upheld the jury's award, and affirmed the finding of mental anguish. However, the court rendered Stephen and Erica take nothing, reversing the jury's decision.

## INSURANCE

### DOCTRINES OF WAIVER AND ESTOPPEL CANNOT BE USED TO RE-WRITE CONTRACT OF INSURANCE AND PROVIDE CONTRACTUAL COVERAGE FOR RISKS NOT INSURED

### IF AN INSURER'S ACTIONS PREJUDICE ITS INSURED, THE INSURER MAY BE ESTOPPED FROM DENYING BENEFITS THAT WOULD BE PAYABLE UNDER ITS POLICY

Ulico Cas. Co. v. Allied Pilots Ass'n, 262 S.W.3d 773 (Tex. 2008).

**FACTS:** Ulico Casualty Company issued a policy to Allied Pilots Association ("APA") for liability coverage. The policy provided coverage for "all losses which such insured shall become legally obligated to pay on account of any claim made against insured during the policy period. Before the policy expired, APA was served with a lawsuit, but did not notify Ulico of the suit until a month after the policy expired. Ulico advised APA that no defense costs could be incurred or settlements made without Ulico's prior written consent and that Ulico expressly reserved its rights to deny coverage.

Ulico then informed APA that pursuant to its reservation of rights, it agreed to reimburse APA for reasonable and necessary defense expenses. APA made no communication to Ulico until one and a half years later when APA's attorney sent a bill to Ulico. Neither APA nor the law firm had sought Ulico's prior approval for the expenses. Ulico filed suit seeking a declaratory judgment that it did not owe APA's defense costs. The trial court entered a judgment in favor of APA and the court of appeals affirmed under the theory of waiver and estoppel. Ulico appealed.

**HOLDING:** Reversed and rendered.

**REASONING:** The court held that APA could not use waiver and estoppel doctrines to extend Ulico's policy coverage to cover the suit. In Texas, insurance policies are contracts and are construed by the rules governing general contract construction. Accordingly, an insurer has the burden to plead any exception or limitation to coverage, but only after the insured has shown the risk of loss is covered by the policy. The equitable doctrines of waiver and estoppel have been applied by the Texas courts when necessary to avoid forfeiture of an insurance policy; however, they have been denied operative force to change, re-write and enlarge the risks covered by an insurance policy.

Here, the court found the issue was not about a forfei-

ture of policy coverage. Instead, it was a question of risk coverage under the contract. The court ruled that applying the doctrine of waiver and estoppel in the instant case would change the insurance policy to cover a risk of loss its terms never originally covered. This would create liability for a risk not created by the contract and never assumed by the insurer. Affirming the general principal to avoid re-writing the contract, the court reversed.

The court noted, however, that under some circumstances, insurers who take control of their insured's defense without a valid right reservation or non-waiver agreement can, and should be prevented from denying benefits that would have been payable had the claim been covered, because the insured is actually prejudiced by the insurer's actions. When an insurer's defense of or controlling the defense of the insured prejudices an insured, the insurer cannot escape liability for the detriment its actions cause its insured. The court held that in such a situation, the insurer would be estopped from refusing to pay the damages of its actions caused, but there was no rewriting of the insurance contract. The determined that ethical rules applicable to attorneys defending insureds, and the doctrine of estoppel, all work to protect an insured without the necessity of remodeling the doctrines of waiver and estoppel to create an anomaly in the law by judicially rewriting agreements between insurers and insureds. It goes without saying that an attorney defending an insured has the obligation to fully disclose to the insured conflicts of interest, whether because of the attorney's relationship with the insurer or otherwise. The court said that obligation is independent of the insurer's issuing a valid reservation of rights or obtaining a non-waiver.

The court held that the question of the insurer's liability should turn whether an insured is prejudiced as a result of the conflict, an inadequate or absent disclosure, or other insurer's actions. If an insurer defends its insured when no coverage for the risk exists, the insurer's policy is not expanded to cover the risk simply because the insurer assumes control of the lawsuit defense. But, if the insurer's actions prejudice the insured, the lack of coverage does not preclude the insured from asserting an estoppel theory to recover for any damages it sustains because of the insurer's actions.

### INSURER HAD DUTY TO DEFEND

Zurich Am. Ins. Co. v. Nokia, Inc., 268 S.W.3d 487 (Tex. 2008).

**FACTS:** Nokia, Inc. became involved in a class action lawsuit, alleging that Nokia products emitted radiation causing biological