DECEPTIVE TRADE PRACTICES AND WARRANTIES

CAR DEALER DID NOT MISREPRESENT THE NATURE OF THE DEALER'S INVENTORY TAX

Gifford v. Don Davis Auto, Inc., 274 S.W.3d 890 (Tex. App.—Fort Worth 2008).

FACTS: Billy Don Gifford purchased a vehicle from Don Davis Auto, Inc., which used a form retail installment sales contract for the transaction. The contract between Gifford and Don Davis included a small charge for a dealer's inventory tax paid to seller. Gifford took possession of the car, became unable to pay and the vehicle was repossessed. Gifford sued Don Davis for fraud, violations of the Texas Finance Code and under the Deceptive Trade Practices Act ("DTPA"). Gifford asserted Don Davis misrepresented the nature of the dealer's inventory tax because it misled him into thinking he owed the taxing authority instead of Don Davis. Don Davis moved for summary judgment. Without specifying the basis for its ruling, the trial court granted summary judgment for Don Davis and Gifford appealed.
HOLDING: Affirmed.
REASONING: Gifford contended the vehicle inventory tax was not a tax that could be included as an itemized charge in an installment contract. The court stated that if the dealer's inventory tax is a tax within the meaning of any taxes as used in the Texas Finance Code, then the seller is authorized to include it as an itemized charge in an installment contract. The court agreed with Don Davis that the itemized charge was not a misrepresentation. The unit property tax value is a tax pursuant to the Texas Tax Code, and Texas Finance Code authorizes dealers to include the amount of the unit property tax value for a particular vehicle at the time of sale as an itemized charge. The court explained that Gifford's subjective belief about what the words "dealer's inventory tax paid to seller" meant was not dispositive of whether those words amounted to a misrepresentation. The language used in Don Davis's installment contract was taken almost verbatim from the model contract published by the Office of the Consumer Credit Commissioner, which requires motor vehicle sales contracts include dealer's inventory tax as an itemized charge. Accordingly, the court found Don Davis did not misrepresent the nature of the dealer's inventory tax, and the trial court did not err by granting summary judgment for Don Davis.

INSURANCE

INSURANCE CODE PENALTY DOES NOT APPLY TO AMOUNTS UNCONDITIONALLY OFFERED IN SETTLEMENT

GuideOne Lloyds Ins., Co. v. First Baptist Church of Bedford, 268 S.W.3d 822 (Tex. App. 2008).

FACTS: GuideOne Lloyds Insurance Co. issued an insurance policy to First Baptist Church of Bedford ("FBCB"), insuring FBCB's commercial property for hail damage. After a hail storm damaged its roof, FBCB notified GuideOne. A GuideOne adjuster inspected the roof, acknowledged the damages, and stated the roof needed repair. The adjuster recommended paying a certain amount, less the depreciation value to FBCB. GuideOne sent a letter to FBCB with a check in the amount the adjuster recommended in order to settle the claim. FBCB refused the offered settlement, and sent a letter to GuideOne requesting over twice the amount GuideOne offered as settlement, which included the roof replacement cost and attorneys' fees.

GuideOne declined the request and instead offered $164,000 and a check for $7,000 to cover emergency repairs. FBCB refused the $164,000 but accepted the $7,000 for emergency repairs. GuideOne then offered $155,000 as "unconditional" tender to replace the roof. FBCB rejected the settlement offer. A jury found in favor of FBCB and the trial court signed a judgment in favor of FBCB in the amount of $765,105.44 which included an 18% penalty interest. GuideOne filed a motion for new trial but the trial court did not rule on the motion. GuideOne appealed.
HOLDING: Affirmed as modified.
REASONING: GuideOne argued the court failed to subtract the unconditional tender of $155,000 and the 18% penalty should not have been applied to that amount. The court found Article 21.55 of the Texas Insurance Code provides for 18% interest on claims unpaid by the insurer. Additionally, the court found the amount of the claim on which a penalty is calculated should be the amount ultimately determined owed by the claimant, less any partial payments made. The court stated the interest penalty may be assessed against the insurer on the full amount of the claim if the insurer's payment was not unconditional. GuideOne stated twice the payment was unconditional in the letter sent along with the $155,000 check. The court also found the letter implicitly recognized there remained a disputed amount of money on the claim. FBCB argued the payment was not unconditional, because GuideOne continued to contest its liability. The court held the trial court erred by disregarding the consequences of the jury's finding that tender of the $155,000 was unconditional. The court modified the judgment by applying the $155,000 first to the amount of the prejudgment interest then to the remaining $286,596.63 principal balance. The court then affirmed the judgment.

The court stated the interest penalty may be assessed against the insurer on the full amount of the claim if the insurer's payment was not unconditional.

HOMEOWNER CAN SUE OVER MISTAKE IN FLOOD DESIGNATION

Paul v. Landsafe Flood Determination, Inc., 550 F.3d 511 (5th Cir. 2008).

FACTS: Mary Dobsa owned a home in which she and Neil Paul resided. Countrywide Home Loans, Inc. was the mortgage lender and prior to financing in accordance with the National Flood Insurance Act ("NFIA"), Countrywide selected Landsafe Flood Determination, Inc. to determine whether Dobsa's home was located in a federal flood zone. Landsafe indicated that the home was not situated in a flood-hazard area, and Countrywide provided financing without requiring Dobsa to obtain flood insurance. Dobsa paid for Landsafe's services. Hurricane Katrina caused substantial damage to the home, without flood insurance coverage. The home was discovered to be located in a flood-hazard area, and Dobsa filed a diversity action against Landsafe, claiming negligence and negligent misrepresentation. The district court granted Landsafe's motion for summary judgment. Dobsa appealed.
HOLDING: Reversed and remanded.
REASONING: The NFIA obligates federally regulated lenders making a loan secured by improved real estate located in a designated flood-risk zone to require the purchase of insurance through the National Flood Insurance Program as a condition of making the loan. Banks and lending institutions are responsible for determining if a piece of property falls within a designated flood-risk zone. The institutions may delegate the determination to third parties provided the accuracy of the information is guaranteed. Landsafe claimed its only duty was to provide Countrywide with a determination for purposes of complying with NFIA. As a result, there was an absence of privity between itself and Dobsa. The court rejected Landsafe's argument. Under Mississippi law, in all causes of action for personal injury, property damage, or economic loss brought on account of negligence, strict liability, or breach of warranty, privity is not a requirement to maintain an action. Liability extends to reasonably foreseeable users and not just to those who requested the work. The court determined buyers such as Dobsa are foreseeable recipients of notice that a flood hazard was present. The erroneous flood-zone determination by Landsafe was the kind of professional opinion on which a reasonably foreseeable person justifiably relied to her detriment. The court held that Landsafe was not entitled to summary judgment, reversed the district court's judgment, and remanded for further proceedings.

COURT UPHOLDS FINDING OF BAD FAITH

State Farm Lloyds v. Hamilton, 265 S.W.3d 725 (Tex. App.—Dallas 2008)

FACTS: The Hamiltons purchased a home that had experienced foundation problems since it was built. Later the Hamiltons experienced some flooding and drainage issues, and called a plumber after noticing structural distress in the house. The Hamiltons notified their insurance company State Farm Lloyds ("State Farm") of their foundation concerns and were assigned a claims adjuster. An independent plumbing company found three sewer-line leaks, two above the foundation slab and one below. Even after corrective measures had been attempted, the Hamiltons were left with a hole in their living room floor filled with new piping and 16 to 20 inches of standing water.

State Farm performed an engineering analysis of the home and soil, and an elevation survey that showed the floor slab to be out of level by some four inches. State Farm concluded the plumbing leaks did not "influence the slab" and the Hamiltons' claim was denied. The Hamiltons then retained an independent structural and geotechnical engineer to provide a second opinion. The expert inspected the home, performed his own elevation survey and concluded the plumbing leak under the living room caused the foundation damage. The Hamiltons sued State Farm for breach of contract, and liability for extra-contractual violations and damages. At trial, a jury found in favor of the Hamiltons and determined that State Farm had denied the Hamiltons' claim in bad faith. State Farm appealed.
HOLDING: Affirmed.
REASONING: The court concluded there was some evidence to support the jury's finding State Farm had denied the Hamiltons' claim in bad faith. An insurer does not breach its duty of good faith merely by erroneously denying a claim. Instead, an insurer breaches its duty of good faith and fair dealing when the insurer fails to settle a claim if the insurer knew or should have known that it was reasonably clear the claim was covered. Further, the insurer's reliance on an expert's report must have been reasonable.

In the instant case, there was evidence to show the expert State Farm retained had been paid over $3 million by State Farm to investigate claims and over 50% of the expert's income was made from work for State Farm. The court found if jurors believed State Farm's expert was not independent, they could have reasonably concluded his report was not objectively prepared and unreasonable for State Farm to rely on it. Also, the court noted inconsistencies between State Farm's expert report and his conclusion. The unexplained standing water in the Hamiltons' living room, four inch differential in the slab level, and high moisture levels in soil samples in contrast to a conclusion the leak did not damage the foundation could have led a reasonable jury to a bad faith finding. Because a determination of bad faith is a factual determination left up to a jury, and because there was some evidence to support the jury's finding of bad faith the court affirmed trial court's judgment.

DRIVER WHO GOT OUT OF CAR TO ASSIST ANOTHER WAS NOT "OCCUPYING" THE CAR AT THE TIME OF THE ACCIDENT

U.S. Fid. & Guar. Co. v. Goudeau, 272 S.W.3d 603 (Tex. 2008).

FACTS: Louis Goudeau worked for Advantage BMW and was driving one of its cars in the course of his employment. He stopped on a Houston freeway to help a stranded motorist. After he exited the car, closed the door, and walked around the front toward the retaining wall to approach the disabled vehicle, Goudeau was severely injured when a third driver smashed into both cars and pinned Goudeau between the cars and a retaining wall. There was no question Goudeau could recover from the third driver who caused the accident, and recovered the maximum amount allowed

from the third driver's insurance policy.

Goudeau's employer had an auto insurance policy with United States Fidelity & Guaranty Company, which included underinsured motorist. The underinsured motorist policy only applied to persons seeking recovery who actually occupied the car at the time of the incident. The insurance company denied Goudeau benefits because Goudeau was not occupying the car at the time of the accident. The trial court granted summary judgment against Goudeau on his underinsured claim. The appellate court reversed and remanded for trial, finding a fact issue as to whether Goudeau was occupying the vehicle.

HOLDING: Reversed and rendered.

REASONING: The policy defined occupying as in, upon, getting in, on, out or off. Goudeau conceded he was not in the car when the accident occurred. He asserted coverage only based on the argument that he was occupying the car by being upon it when he was injured. The court held that a driver who had exited the car, closed the door, walked around the front, and then ended up partially upon the car due to a collision could not be said to be occupying the car at the time of the accident. Texas courts are required to construe insurance policies according to their plain language using the ordinary, everyday meaning of the words to the general public. The court determined that the plain meaning of the term occupying as defined in the insurance policy could not be stretched to include Goudeau. The court reversed and rendered that Goudeau take nothing.

DEBT COLLECTION

LETTERS SIGNED BY CORPORATE OFFICERS DID NOT VIOLATE FAIR DEBT COLLECTION PRACTICES ACT

Campuzano-Burgos v. Midland Credit Mgmt., Inc., 550 F.3d 294 (3d Cir. 2008).

FACTS: Plaintiffs filed a complaint against Midland Credit Management, Inc. ("Midland Credit") and alleged Midland Credit violated the Fair Debt Collection Practices Act ("FDCPA") by sending false, misleading or deceptive collection notices. Plaintiffs claimed Midland Credit sent three dunning letters, repeated demands for repayment of debt, which contained the typed names of top company executives. Although the listed executives were real employees, they were not aware of the letters, nor were they aware that Midland Credit was attempting to collect these debts.

The court applied the least-sophisticated-debtor standard in interpreting a communication, but noted that even the least sophisticated debtor is bound to read the entire collection notice.

Both Plaintiffs and Midland Credit filed motions for summary judgment directed at the issue of liability. The district court concluded the use of top executives as signatories was likely used to impress upon the debtors the seriousness of the communication. Further, the district court found the dunning letters violated FDCPA Section 1692e as being deceptive and misleading, because the executive had no actual involvement to send the letters. Although the district court granted partial summary judgment to Plaintiffs, it submitted a certified question of law to the appellate court to determine whether a senior officer of a collection company violates the FDCPA by signing dunning letters to debtors. The Third Circuit Court of Appeals accepted the certification.

HOLDING: Reversed and remanded.

REASONING: FDCPA prohibits debt collectors from using any false, deceptive or misleading representation or means in connection with the collection of any debt. Although FDCPA lists several specific violations, the court applied the general rule that a communication is deceptive for purposes of FDCPA if it can be read to have two or more meanings, one of which is inaccurate. The court applied the least-sophisticated-debtor standard in interpreting a communication, but noted that even the least sophisticated debtor is bound to read the entire collection notice. The court held the letters were not deceptive attempts to collect debt because when read as a whole, they resemble advertisements, rather than routine business letters. The letters were technically not dunning letters because they did not demand anything. They offered an opportunity to settle at a discounted rate, and used generic form language, exclamations points, bold-faced type, a toll-free telephone number and other indicia consistent with an advertisement.

Attorney-debt collectors are held to a higher standard of care than other collectors because abusive debt collection practices have the potential to be far more egregious. A lawyer who sends a dunning letter must be directly and personally involved in supervising and mailing to meet FDCPA requirements. Midland Credits letters did not contain any reference to an attorney or legal department, and did not invoke a similar sense the high executives were involved. The letters were honest attempts to extend settlement, and could not be interpreted by even the least sophisticated debtor as coming from anyone other than a corporation. The court reversed, and ordered the lower court to enter summary judgment for Midland Credit.

COLLECTION LETTER DOESN'T VIOLATE FDCPA.

Hahn v. Triumph P'ships L.L.C., ____ F.3d ____ (7th Cir. 2009).

FACTS: Triumph Partnerships LLC bought overdue credit card debts from HSBC Bank. One of Triumph's affiliates sent Marylou Hahn a letter stating that she owed $1,134.55; $1,051.91 of this was labeled as "amount due" and $82.64 was "interest due". Hahn did not deny owing $1,134.55. Hahn filed suit under the Fair Debt Collections Practices Act ("FDCPA") relying on § 1692e that provides "[a] debt collector may not use any false, deceptive or misleading representation or means in connection