DECEPTIVE TRADE PRACTICES AND WARRANTIES

PLAINTIFF SUING UNDER DTPA PURSUANT TO A TIE-IN STATUTE MUST BE A CONSUMER

Burnette v. Wells Fargo Bank, N.A., ____ F. Supp. 2d____ (E.D. Tex. 2010).

FACTS: Plaintiff Dustin Curtis Burnette filed a lawsuit against Wells Fargo Bank, N.A. and HSBC Bank USA, N.A. (collectively known as "Defendants") in response to the foreclosure sale of his real property. Plaintiff had received a loan from Wells Fargo in February of 2006 in order to finance the purchase of a real property located on 1917 Castille Drive in Carrollton, Texas (the "Property"). After Plaintiff's monthly payment increased to $1,576.00 in May of 2008, he contacted Wells Fargo about a loan modification in October of 2008. Wells Fargo instructed Plaintiff to submit payments of $1,644.48 in November 2008, December 2008, and January 2009. However, Plaintiff missed his January 2009 payment. Plaintiff contacted Wells Fargo and informed them he lost his job. According to Plaintiff, Wells Fargo stated that he qualified for governmental assistance.

To qualify as a consumer under the DTPA, Plaintiff must have sought or acquired goods or services by purchase or lease.

Plaintiff applied for a loan modification with Wells Fargo. Plaintiff then received a notice of acceleration and a notice of trustee's sale in March 2009. When Plaintiff contacted Wells Fargo, they asked him to re-submit the loan modification materials and agreed to postpone the foreclosure sale by one month. Plaintiff continued to contact Wells Fargo regarding his loan modification. The property was eventually sold at a foreclosure sale to HSBC in June 2009. Plaintiff filed this lawsuit in July 2009, claiming that Wells Fargo made a false representation that assistance was available and that it intentionally concealed material facts from him. Plaintiff also claimed that Wells Fargo waived their right to sell the property under the deed of trust while Plaintiff's loan modification was being reviewed. Plaintiff claimed Wells Fargo led him to believe they would extend the foreclosure date. Plaintiff alleged several causes of action against Wells Fargo, including violation of the Texas Debt Collections Act ("TDCA"). Plaintiff believed he was also entitled to damages under the Texas Deceptive Trade Practices Act ("DTPA") but did not bring his claim pursuant to the provisions of the DTPA. Instead, plaintiff attempted to use the TDCA as a tie-in statute to recover under the DTPA. Plaintiff argued that he was a "consumer" as defined by the Texas Finance Code, and the debt in question was a "consumer debt." Wells Fargo claimed that Plaintiff must show that he was a "consumer" as defined under the DTPA, to recover pursuant to a "tie-in" statute.
HOLDING: Dismissed.
REASONING: The court agreed with the Plaintiff that the TDCA ties itself into the DTPA, providing for a private right of action through the DTPA. However, to maintain an action under section 17.50(h) of the DTPA, the "tie-in" provision, Plaintiff must quality as a "consumer." To qualify as a consumer under the DTPA, Plaintiff must have sought or acquired goods or services by purchase or lease. The court stated that borrowing money did not constitute the acquisition of a good or service; therefore, the Plaintiff was not a "consumer" as defined under the DTPA. Because he was not a consumer, he could not maintain a DTPA action under a tie-in statute, including the TDCA.

PERSON WHO ATTEMPTS TO MODIFY A MORTGAGE IS NOT A CONSUMER

Gomez v. Wells Fargo Bank, N.A., ____ F. Supp. 2d ____ (N.D. Tex. 2010).

FACTS: Plaintiff Angela Gomez ("Gomez") was the owner and resident of a house located in Dallas County, Texas (the "Property"). Wells Fargo Bank, N.A. ("Wells Fargo") was the mortgagee of the note and deed of trust associated with the Property; it also acted as the mortgage servicer. After her husband separated from her, leaving her with one income to pay the mortgage, Gomez began loan modification negotiations with Wells Fargo. In August 2009, a Wells Fargo agent told Gomez that she was pre-approved for her loan modification, that she should discontinue making payments, and that her husband's signature was not needed for approval of the loan. About two months later, Gomez inquired as to the status of her application. Wells Fargo informed her that she was denied because the application did not contain her husband's signature. She then reapplied and was denied twice. She reapplied after the third denial, only to learn that her loan was in default, Wells Fargo had elected to accelerate, and there would be a substitute trustee sale in January 2010.

After the sale, Gomez filed a petition for a temporary restraining order to prevent Wells Fargo from taking possession of the property. She asserted claims against Wells Fargo for violations of the Texas Property Code, the Texas Deceptive Trade Practices Act ("DTPA"), and the Texas Debt Collection Act. Wells Fargo removed the case and filed a Partial Motion to Dismiss (the "Motion") for failure to state a claim upon which relief may be granted. Wells Fargo's motion sought to dismiss Gomez's claims under the DTPA and the Collection act. Specifically, it argued that she did not qualify as a consumer because she was attempting to modify an existing mortgage, and borrowing money does not constitute a good or service under the DTPA. Wells Fargo further argued that even if Gomez was purchasing financial services from Wells Fargo, any services that Wells Fargo provided in connection with a mortgage were only incidental to facilitating the loan – the actual service. Therefore, Wells Fargo contended that Gomez was not purchasing any good or service as required to establish consumer status under the DTPA.
HOLDING: Granted.
REASONING: Under the DTPA, consumers have a cause of action for another's false, misleading, or deceptive acts or practices. Tex. Bus. & Com. Code § 17.50(a)(1). The elements of a DTPA claim are: 1) the plaintiff is a consumer; 2) the defendant engaged in false, misleading, or deceptive acts; and 3) these acts consti-

tuted producing cause of the consumer's damages. *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 478 (Tex. 1995). A consumer is "an individual . . . who seeks or acquires by purchase or lease, any goods or services . . . ." Tex. Bus. & Com. Code § 17.45(4). The question of whether a party is a consumer is a question of law.

A party who borrows money may not satisfy the first requirement for consumer status under the DTPA because money is not a good or service. However, when a party obtains a loan "inextricably intertwined" with the purchase or lease of a good or service, such as a mortgage loan intertwined with a contractor's agreement to build a house, then that party may qualify as a consumer.

The court agreed with Wells Fargo that Gomez was not a consumer. She was not seeking a loan to purchase any other good or service. She sought only to borrow money to avoid repossession of her house. Because Gomez was attempting to only borrow money and not purchase a good or service, she did not satisfy the requirements for consumer status under the DTPA.

DTPA CLAIM DOES NOT SURVIVE DEATH OF CONSUMER

McCoy, et al. v. Pfizer, Inc., et al., ____ F. Supp.2d ____ (E.D. Tex. 2010).

FACTS: Plaintiffs are the parents of Jon Andrea Roberts ("Andrea") who shot and killed her husband and two children. The complaint alleges that the prescription antidepressant Zoloft caused Robert's actions. The suit is partially based upon the Texas Deceptive Trade Practices Act ("DTPA"), seeking actual and punitive damages. The manufacturer of Zoloft ("Defendant") filed a motion to dismiss because DTPA claims do not survive death of consumer.

HOLDING: Granted

REASONING: The Texas Supreme Court has sidestepped any discussion on the topic of the survivability of a DTPA claim and the appellate courts in Texas are split on the issue. The court based its opinion on a federal case from the Northern District of Texas, *Launius v. Allstate Ins. Co.*, No. 3:06-cv-0579-B, (N.D.Tex. Apr.17, 2007). In *Launius*, the court held that a DTPA claim does not survive death. If DTPA claims cannot be assigned because of their personal and punitive attributes, then it would be impossible for such claims to survive the death of the consumer given the common law rule holding that actions to vindicate personal rights terminate with the death of the aggrieved party.

The court in the instant case stated that if the Texas Supreme Court were faced with this issue, it would hold that a consumer's cause of action under the DTPA does not survive the death of the consumer.

CONSUMER CREDIT

CREDIT CARD CUSTOMERS MAY MAINTAIN CLASS ACTION UNDER THE FACTA

Bateman v. American Multi-Cinema, Inc. 623 F.3d 708 (9th Cir. 2010).

FACTS: To protect against identity theft, the Fair and Accurate Credit Transactions Act ("FACTA") prohibits merchants from printing more than the last four digits of a consumer's credit or debit card number on a receipt. Michael Bateman filed a putative class action suit alleging that American Multi-Cinema, Inc. ("AMC") violated the FACTA when its box office kiosks printed more than 29,000 receipts that included the first four and last four digits of consumers' credit or debit card numbers during December 2006 and January 2007. The FACTA incorporates the Fair Credit Reporting Act's ("FCRA") statutory damages provision, which allows a consumer to recover damages between $100 and $1,000 for each willful violation of the FACTA without having to prove actual damages. On behalf of himself and other consumers who received such receipts, Bateman sought to recover statutory damages ranging from $100 to $1,000 for each willful violation of the FACTA. The United States District Court for the Central District of California denied class certification under Federal Rule of Civil Procedure 23(b)(3) ("Rule 23(b)(3)"), without prejudice. That court found that a class action was not the superior method of litigating the case because AMC had made a good faith effort to comply with FACTA after the lawsuit was filed, and the magnitude of AMC's potential liability - $29 million to $290 million – was enormous and out of proportion to any harm suffered by the class. In fact, Congress subsequently amended the FACTA to address misunderstandings about the FACTA's requirements and to provide businesses some measure of protection from lawsuits resulting from those misunderstandings. The district court requested and considered supplemental briefs, and then denied, with prejudice, Bateman's renewed motion for class certification for largely the same reasons as before, with the additional reason that he had alleged no actual harm. Bateman appealed.

HOLDING: Reversed and remanded.

REASONING: The court found that none of the district court's three grounds—the disproportionality between the potential liability and the actual harm suffered, the enormity of the potential damages, or AMC's good faith compliance—justified the denial of class certification on superiority grounds, and that the district court abused its discretion in improperly relying on them.

Of the factors Rule 23 provides regarding the superiority of a class action, none authorizes a court to consider whether certifying a class would result in damages that are disproportionate to any harm suffered by a plaintiff. Rather, the plain text of the statute and congressional silence on the issue of class relief strongly suggest that Congress intended class relief to be available, and that a court cannot deny class certification, to plaintiffs who have otherwise met the requirements of Rule 23. In fashioning the FACTA, Congress aimed to restrict the amount of information available to identity thieves. That FACTA allows consumers to recover statutory damages furthers this purpose by