DECEPTIVE TRADE PRACTICES AND WARRANTIES

DTPA FAILURE TO DISCLOSE REQUIRES DIRECT EVIDENCE OF INTENT

Arlington Home, Inc. v. Peak Envtl. Consultants, Inc., 361 S.W.3d 773 (Tex. App.—Houston [14th Dist.] 2012).

FACTS: Naela Kaki assigned her rights under an earnest money contract to Arlington Home. Arlington requested that Coldwell Banker arrange a mold inspection for the home prior to closing. Coldwell arranged the inspection with Peak Environmental Consultants, which does business as Live Oak. Live Oak set forth a proposal to Arlington that presented the costs and procedures that would be followed before and after the inspection. At first, Live Oak was unaware of the previous mold issues and water damage but later identified the problem. Live Oak executed the inspection as stated in the proposal, but collected one fewer interior air sample.

Live Oak emailed Coldwell the results, which indicated there was no significant mold amplification expected to pose a threat to the property or its occupants. Coldwell relayed this information to Arlington. Arlington subsequently closed on the home after Hurricane Rita had struck. While remodeling the home, significant mold problems were discovered. Arlington sued Coldwell Banker and Live Oak collectively. Arlington sued for violations of the Deceptive Trade Practices Act, alleging that Defendants failed to disclose and made misrepresentations of facts that induced Arlington to buy the home. The jury found that Live Oak had engaged in false, misleading, or deceptive acts; that Arlington had relied on these acts; and that these acts were a producing cause of Arlington's damages. Live Oak filed for a judgment notwithstanding the verdict, which the trial court granted. The jury's award for Arlington was rescinded. Arlington challenges the trial court's entry of the JNOV in favor of Live Oak.

Because the complainant failed to direct the court to any evidence that the alleged violator intended to induce the complainant to purchase, the trial court did not err in granting the JNOV.

HOLDING: Affirmed.

REASONING: The court reasoned that to prevail on a claim for failure to disclose under the DTPA, a complainant must have presented evidence of 1) a failure to disclose material information concerning goods or services, 2) which was known at the time of the transaction, 3) if such failure was intended to induce the consume into a transaction, 4) which the consumer would not have entered had the information been disclosed. *See* Tex. Bus. Comm. Code Ann. § 17.46(b)(24). During trial, Arlington put forth an email that outlined a conversation between Coldwell Banker and Arlington. The court explained that the conversation and the surrounding circumstances gave Arlington an opportunity to cancel its purchase of the home and have its earnest money returned at the time that Arlington read Coldwell's email. All parties claimed that they were not aware of any defects or threats of mold at the home and Arlington failed to demonstrate evidence to the contrary. The court rejected Arlington's claim that the email was evidence of Live Oak or Coldwell Banker inducing them to purchase the home. The email only consisted of the results of the mold inspection and was written in good faith.

The court held that there must be direct evidence of the intent to induce under the relevant subsection of the DTPA. The court went on to conclude that because the complainant failed to direct the court to any evidence that the alleged violator intended to induce the complainant to purchase, the trial court did not err in granting the JNOV on the DTPA claim.

BUYER OF USED GOODS CAN SUE MANUFACTURER FOR BREACH OF IMPLIED WARRANTY

Shows v. Man Engines, 364 S.W.3d 348 (Tex. App.—Houston [14th Dist.] 2012).

FACTS: Defendant Man Germany manufactured engines that were installed in a yacht in 2000. In 2002, Plaintiff Doug Shows purchased the yacht knowing that it and its engines were used. In 2004, the yacht suffered major engine failure due to a defective valve. In 2005, the same defects caused engine failure and the engine had to be replaced.

In 2006, Plaintiff filed suit, asserting various claims including breach of the implied warranty of merchantability. At trial, the jury found Defendant liable for breach of the implied warranty of merchantability. Defendant filed a motion for judgment notwithstanding the verdict arguing that there was no implied warranty because Plaintiff bought the yacht knowing it and its engines were used. The trial court granted the motion and Plaintiff appealed.

HOLDING: Reversed and remanded.

REASONING: Defendant relied on the "Chaq Oil Rule" that states implied warranties do not arise when a buyer knowingly purchases used goods. *Chaq Oil v. Gardner Machine Corp.*, 500 S.W.2d 877, 878 (Tex. App.—Houston [14th Dist.] 2000). The court refused follow the line of cases supporting the "Chaq Oil Rule" because they address whether an implied warranty arises between a subsequent seller and a subsequent buyer in the subsequent sale. The court noted that these cases do not address whether the subsequent buyer may sue the original manufacturer of the goods for a breach of the implied warranty that occurred when the goods left the manufacturer's possession as part of the first sale of the goods. Because Plaintiff brought suit against the manufacturer of the engines, the "Chaq Oil Rule" does not apply.

The court recognized that a warranty of merchantability may be implied in a contract for the sale of new goods by the manufacturer. *Nobility Homes of Texas v. Shivers*, 557 S.W.2d 77, 81 (Tex. 1977). The Supreme Court of Texas held in *Nobility Homes* that there is no "privity" required for implied warranties, and a downstream buyer of a mobile home may bring a claim for breach against a remote manufacturer. The court in

Nobility Homes did not expressly state whether a consumer who knowingly purchased used goods could bring suit against the manufacturer for breach of the implied warranty, but did not exclude that possibility.

The court in the instant case extends *Nobility Homes*, and holds a subsequent buyer who knew the goods were used could sue the manufacturer of the goods for a breach of the implied warranty, provided the breach occurred when the goods left the manufacturer's possession as part of the first sale of the goods.

UCC REQUIRES NOTICE OF BREACH OF WARRANTY

FAILURE TO NOTIFY SELLER OF BREACH OF WARRANTY BARS RECOVERY OF ONLY WARRANTY CLAIMS

Hull v. South Coast Catamarans, L.P., 365 S.W.3d 35 (Tex. App.—Houston [1st Dist.] 2011).

FACTS: Plaintiff Edgar Hull, Jr. purchased a new boat from Defendant South Coast Catamarans, L.P., a boat dealer. About five months later, Aksano Catamarans, LLC, the boat manufacturer, delivered the boat to a third party facility. Hull hired a truck driver to transport the boat to him, and the driver notified Hull that the boat had cracks, small holes, and dents in its fiberglass. Hull notified Aksano about the boat, and was told to have the boat inspected. The technician estimated that it would cost $3,000 to $5,000 to determine the extent of the fiberglass problem. Hull notified Aksano that he would not accept the boat based on its condition. Aksano informed Hull that it would fix any problem with the boat if it was determined to have been caused by them. The surveyor hired to inspect the boat concluded that the boat's poor structural integrity precluded its safe use. Hull demanded a full refund and other costs he had incurred in relation to the boat. Hull refused to accept repair of the boat or a replacement. Hull made phone calls to South Coast, but with no answers. Aksano refused to examine the boat but offered to help Hull resell it.

Hull sued Aksano and South Coast for violations of the Texas Deceptive Trade Practices Act, fraud, negligent misrepresentation, breach of contract, negligence, and breach of warranty. The jury returned a unanimous verdict in favor of Hull on all of his claims, but before entry of judgment, Aksano and South Coast moved for a new trial. The district judge ordered a new trial for violation of the court's discovery and docket control order and a juror error. Subsequently, Aksano and South Coast filed a traditional motion for summary judgment. The district judge granted the motions and entered final judgment. Hull appealed.

HOLDING: Reversed.

REASONING: Hull argued that the trial court erred in granting summary judgment to Aksano and South Coast regarding Hull's breach of warranty claim related to the defective condition of the boat. Aksano and South Coast claimed that Hull did not provide them with an opportunity to cure the boat's defects because Hull asked for a refund and stated that he would not accept repair or replacement of the boat. The court disagreed. It noted the general rule that a buyer must notify the seller of a breach of warranty within a reasonable time after he discovers or should have discovered any breach in order to maintain an action for breach of warranty. *See* Tex. Bus. & Com. Code Ann. § 2.607(c)(1) (West 2009). The court explained that notification is intended to give the seller an opportunity to cure any defects in the product. Additionally, the court recognized that the notice does not need to be formal; a general expression of dissatisfaction may be sufficient to meet the notice requirement under section 2.607. *U.S. Tire-Tech, Inc. v. Boeran, B.V.*, 110 S.W.3d 194, 200 (Tex. App. — Houston [1st Dist.] 2003). The court explained that ordinarily the question of notice is a question of fact to be determined by the trier of fact – thus inappropriate for summary judgment unless "no room for ordinary minds to differ exists."

Notification is intended to give the seller an opportunity to cure any defects in the product.

The court, after reviewing the record, determined that Aksano and South Coast received appropriate notice under section 2.607(c)(1) when Hull notified them of problems with the fiberglass. Also, because the record showed that Aksano refused to examine the boat, disputed the damage reports sent by Hull, and made no attempt to repair the boat or to pay for repairs or replacement, the court found there were issues of material fact as to whether Aksano and South Coast were given an opportunity to cure, and thus summary judgment was improperly granted to the breach of warranty claims.

Finally, the court addressed the applicability of section 2.607(c)'s notice requirement on Hull's DTPA non-breach of warranty claims. Citing *Mobil Min. & Minerals Co. v. Texas Auto Pool, Inc.*, 01-09-00093-CV, 1992 WL 211503 (Tex. App. — Houston [1st Dist.] 1992), the court found that section 2.607(c) does not bar DTPA non-breach of warranty claims even if the notice requirement had not been met. The court concluded that the trial court erred in granting the summary judgment motion in favor of Aksano and South Coast.

DTPA LAUNDRY LIST REQUIRES PROOF OF RELIANCE

DTPA RESCISSION AWARD NOT AVAILABLE WITHOUT PROOF OF ACTUAL DAMAGES

DTPA RESCISSION REQUIRES CONSUMER RETURN VALUE RECEIVED

Cruz v. Andrews Restoration, Inc., 364 S.W.3d 817 (Tex. 2012).

FACTS: Erwin Cruz insured his home property with Chubb Lloyd's Insurance Company of Texas. After a big storm, Cruz discovered several roof leaks that caused significant water damage throughout the house and called to file a claim with Chubb. Andrews Restoration, doing business as Protech, was called to the home to evaluate the damage of the storm. Chubb authorized Protech to perform mold remediation services and verbally agreed to pay for them. Cruz formally demanded policy limits, but Chubb suggested hiring a contractor to evaluate and estimate the reconstruction cost of the projected damages resulting from remediation activities. After a foray into

dehumidification by Protech to fix the mold issue, Cruz's claim was still unresolved more than two years after the storm. At that time, the outstanding invoices totaled over $700,000, which Chubb had verbally agreed to pay earlier. Chubb ultimately tendered policy limits about two and a half years after the storm, and the house was demolished two years later.

Protech brought suit against Chubb and Cruz to recover the outstanding balance. Chubb counterclaimed for fraud, and Cruz counterclaimed for fraud, fraudulent inducement, negligent misrepresentation, and violation of the Texas Deceptive Trade Practice Act. The jury found that Chubb breached his agreement with Protech, and awarded damages to Protech in the amount of its unpaid invoices. The jury also found that Cruz breached its contract with Protech, and awarded the same damages of the unpaid invoices. The jury did not, however, find that Protech committed fraud against Chubb or Cruz, or that Protech was at fault for the DTPA claims brought by Cruz.

All parties appealed and the appellate court held that Cruz was not entitled to restoration of consideration because Cruz had failed to prove entitlement to rescission. Protech and Cruz filed petitions for review.

HOLDING: Affirmed.

REASONING: The court noted that the DTPA authorizes consumer suits when deceptive acts are the producing cause of "[actual damages] or damages for mental anguish." Tex. Bus. & Com. Code Ann. § 17.50(a)(1). Cruz claimed that he was entitled to the money he paid to Protech because one of his remedies under the DTPA is to restore illegally acquired money or property. Maintaining its holding that a party who failed to recover actual damages or damages for mental anguish was not entitled to attorney's fees under the DTPA, the court held even a rescission award requires a showing of actual damages. *See Russell v. Indus. Transp. Co.*, 258 D.E. 462, 465 (1924). The court found that Cruz could not satisfy section 17.50(a)(1) because the statute clearly provides a cause of action only to consumers who have sustained damages, and the jury found none.

Additionally, the court noted that, under Tex. Bus. & Com. Code Ann. §17.50(a)(1), a consumer loses his claim without proof of reliance to his detriment on the deceptive act. The court pointed out that the trial court jury found no reliance in the DTPA claim submitted by Cruz, and Cruz's subsequent filings did not mention reliance. Although Cruz presented facts that Protech engaged in a false, misleading or deceptive act, the court found he did not meet all the statutory requirements to recover on his DTPA claim because reliance is a necessary element.

Finally, the court applied Tex. Bus. & Com. Code Ann. §17.50(b)(3) to evaluate Cruz's claim of entitlement to all amounts paid under contract without deducting value received under the agreement. Cruz argued that he is entitled to all the money paid by him under the agreement, without surrendering the benefits he received. However, the court noted that rescission is not a one-way street. The court reasoned that it requires a mutual restoration and accounting, in which each party restores property received from the other. However, Cruz argued that the term "restore" was a broader remedy than "restitution" and did not require him to account for the benefits he was afforded. The court looked to the definitions of the terms and determined that restitution was merely the "act of restoring" and the terms were essentially the same. Cruz claimed that the DTPA authorizes restoration only to the consumer, without requiring that he disgorge any benefit received. The court held that section 17.50(b)(3)'s restoration remedy contemplates mutual restitution.

The court held that the trial court was correct in deciding not to award Cruz any remedy on his DTPA claims, and that the DTPA does not authorize an order restoring to Cruz amounts paid by him under the contract.

CIGARETTE REWARDS PROGRAM PROMISES MADE IN ADVERTISEMENTS MAY BE ENFORCED

Sateriale v. R.J. Reynolds Tobacco Co., ___ F.3d___ (9th Cir. 2012).

FACTS: Defendant R.J. Reynolds Tobacco Co. (RJR) operated a rewards program for consumers called Camel Cash until 2007. Under the program, consumers could purchase packages of Camel cigarettes containing certificates called C-Notes, which could then be exchanged for merchandise advertised in a catalog provided by Defendant. Certain (but not all) catalogs stated that the program could be terminated without notice, and in October 2006, Defendant mailed a notice to program members announcing that the program would terminate as of March 31, 2007.

Plaintiffs complained that in October 2006, Defendant no longer allowed for redemption of C-Notes for merchandise despite its promise to continue the program through March of 2007, and because it so abruptly ceased accepting C-Notes for redemption the C-Notes were rendered worthless. Plaintiffs brought their action for breach of contract, promissory estoppel, and violation of two California consumer protection laws. The district court granted Defendant's motion to dismiss for failure to state a claim upon which relief could be granted.

HOLDING: Affirmed in part and reversed in part.

REASONING: The court examined the claims in turn beginning with the breach of contract claim. Defendant contended that there was no contract because there was no offer, but merely invitations to make an offer under common law's general rule that advertisements of goods are not ordinarily intended or understood as offers to sell. The court rejected that argument because that rule includes an exception for offers of a reward, including offers of a reward for the redemption of coupons. Defendant also argued that if there were an offer, any contract arising from it would be too indefinite to be enforced. The court explained that terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy. It held that the existence of a breach could be readily discernible; and though an appropriate remedy would be more difficult to ascertain, public policy dictates that the court should go to great lengths to find a construction of the agreement to salvage the contract. The court found that there was enough in the agreement to show the existence of a unilateral contract, and the question of whether there was a breach should have survived the motion to dismiss. The court next examined the promissory estoppel claim and determined that although it should have survived the motion to dismiss, the claim rises and falls with the existence of a contract. The court upheld the dismissal of the California consumer law complaints.

COMMON LAW, NOT DTPA, APPLIES TO UNCONSCIONABILITY ASSERTED AS AN AFFIRMATIVE DEFENSE

Philadelphia Indem. v. SSR Hospitality, 459 Fed. App. 308 (2012).

FACTS: Plaintiff, SSR Hospitality, was a corporation formed to purchase the Hawthorn Suites Hotel in Austin, Texas. SSR purchased an insurance policy, which included coverage for property damage, contents, and income, from Defendant, Philadelphia Indemnity Insurance Company (PIIC). During the covered period, the floor in a conference room in the hotel collapsed. After SSR submitted an insurance claim, PIIC investigated and discovered property damage to the hotel that predated the policy's inception. PIIC determined that the costs of repairs could exceed $450,000. It issued a letter partially denying SSR's claim. SSR then executed a release of liability in exchange for $13,984.39, which was the cost of the floor repairs minus the deductible. After receiving payment, SSR filed additional claims for the cost of the remainder of the repairs. In response to these claims, PIIC filed a declaratory judgment action seeking a declaration of its obligations under the policy with respect to the cost of the damages. PIIC then moved for summary judgment, insisting that the release barred all of SSR's claims. SSR filed a response and countermotion for summary judgment arguing that the release was unconscionable. The district court granted PIIC's motion.

HOLDING: Affirmed.

REASONING: The parties disagreed about whether the Texas Deceptive Trade Practices Act (DTPA) applied to SSR's affirmative defense of unconscionability. SSR argued that the DTPA, which includes unconscionability as a cause of action and allows consumers to collect damages for unconscionable conduct by sellers, should apply. PIIC urged the court to apply common law, which conceives of unconscionability strictly as an affirmative defense to contractual performance. The Fifth Circuit agreed with PIIC that common law should apply, citing the Texas Practice Code of Consumer Rights and Remedies § 4.8 (3d ed. 2009) (explaining the traditional common law view of unconscionability and the concept under the DTPA). The court then considered the facts of the case and determined that the release was neither substantively nor procedurally unconscionable.

INSURANCE

BENEFICIARY OF INSURANCE POLICY IS NOT DTPA CONSUMER

Kocurek v. CUNA Mut. Ins. Soc'y, 459 Fed. App'x. 371 (5th Cir. 2012).

FACTS: Louis Kocurek purchased an accidental death and dismemberment insurance policy naming Plaintiff as the primary beneficiary and Mr. Kocurek's children from a previous marriage as contingent beneficiaries. Defendant issued the policy, valued at $200,000, on November 1, 2004. Approximately four months after purchasing the policy, Defendant sent Mr. Kocurek a mailing, offering him additional coverage. The second policy, which was issued April 1, 2005 in the amount of $300,000, named Mr. Kocurek's children as primary beneficiaries and Plaintiff as the contingent beneficiary. Mr. Kocurek paid the premiums on both of these policies until his accidental death on July 27, 2006.

After Mr. Kocurek's death, Plaintiff attempted to collect benefits under the 2004 policy and his children attempted to collect benefits under the 2005 policy. Defendant refused to pay benefits on the earlier policy, pointing to a "one policy only" provision found in both policies. Plaintiff claimed the provision was unfair and misleading, as Defendant often solicited customers with mailings offering additional coverage without mentioning the "one policy" provision. The Plaintiff also contended that the "one policy only" clause was misleading because it was placed at the end of the list of policies under a "General Provisions" heading instead of elsewhere in a more appropriate place among other policies.

Plaintiff alleged three causes of action: false, misleading or deceptive acts or practices; fraud/misrepresentation; and negligence/gross negligence. Defendant filed a motion to dismiss the claim arguing, among other things, that the Plaintiff was not a consumer under the Texas Deceptive Trade Practices Act (DTPA). The district court granted the motion and Plaintiff appealed.

Plaintiff alleged three causes of action: false, misleading or deceptive acts or practices; fraud/misrepresentation; and negligence/gross negligence.

HOLDING: Affirmed in part, reversed in part, and remanded.

REASONING: The court found that as far as Plaintiff's claims under the DTPA were concerned, the motion to dismiss was properly granted. According to Tex. Bus. & Com. Code § 17.50, only a consumer may maintain a cause of action directly under the DTPA. In this case, the court found that Plaintiff's husband actually purchased the policies; therefore he was the customer for DTPA purposes, not the Plaintiff. To that point, Plaintiff argued that she was a consumer by virtue of her community property interest in the policies, which were paid for with community funds. The court declined to consider this argument on appeal however, as it was not timely raised in the district court.