DECEPTIVE TRADE PRACTICES AND WARRANTY

ATTORNEY MAY BE SUED UNDER DTPA BASED ON UNCONSCIONABILITY

K&L Gates LLP v. Quantum Materials Corp., ___ S.W.3d ___ (Tex. Ct. App. 2020).
https://public.fastcase.com/ppbqSQpNDaJE%2F8PlIk0b8MAj4Ec8JKX1eq0Hbs9kf8TD6xmshN6KgdQiSFIcHgAX

FACTS: Plaintiff technology manufacturer Quantum Materials Corp. retained Defendant law firm K&L Gates LLP for legal services. The parties memorialized their agreement with a letter of engagement ("Engagement Letter"). Affirmative statements made in the Engagement Letter included that K&L Gates would: (1) act in Quantum Materials's best interest; (2) notify Quantum Materials of the end of representation; (3) maintain confidence of any privileged information; (4) decline to engage any adverse clients on substantially related matters during the period of representation; and (5) advise Quantum Materials of certain conflicts following the termination of representation. K&L Gates rendered legal services through 2016. While K&L Gates never formally or expressly terminated its representation of Quantum Materials, it sent its last invoice on January 31, 2017, for services provided through December 31, 2016.

In September of 2017, a legal dispute arose involving Quantum Materials, two lenders, and Empire Stock Transfer ("Empire"). Quantum Materials sued Empire, seeking to enjoin Empire from transferring stock to the lenders. K&L Gates did not represent Quantum Materials at any stage of the litigation, however K&L Gates filed a petition in intervention on behalf of the lenders, with the Lenders alleging Quantum Materials had breached its respective contracts with the lenders. K&L Gates later voluntarily withdrew its representation of the lenders. The following year, K&L Gates later sent a notice to Quantum Materials requesting payment for the legal work provided in 2016. Quantum Materials filed suit against K&L Gates for multiple claims, including violation of the DTPA.

The court rejected K&L Gates's argument, explaining that, in the context of the practice of law, the DTPA prohibits any "express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion."

K&L Gates filed a motion to dismiss. The trial court denied K&L Gates's motion without explanation. K&L Gates appealed.

HOLDING: Affirmed.

REASONING: K&L Gates argued that the trial court erred by denying its motion because Quantum Materials could not make out a prima facie case for the elements of its claims.

The court rejected K&L Gates's argument, explaining that, in the context of the practice of law, the DTPA prohibits any "express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion," and any "unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion." The court further explained that "[u]nconscionable action or course of action" under the DTPA means "an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree."

The court held that K&L Gates's breach of the Engagement Letter and its denial to the trial court of having represented Quantum Materials, when paired with the allegations listed in the court's discussion of breached fiduciary duty, was sufficient to make out a prima facie case of unconscionable conduct. Additionally, the court stated that because these statements and conduct could not be characterized as "advice, opinion, or judgment," the allegations were not exempt from the DTPA's prohibition on unconscionable conduct. Because Quantum Materials had sufficiently argued that K&L Gates's alleged conduct could rise to the level of unconscionability, the court held that Quantum Materials had satisfactorily made out a prima facie case for the elements of its claims.

DTPA IMPLIED WARRANTY CLAIM AGAINST REMOTE MANUFACTURER PERMITTED

Mize v. BMW of N. Am., LLC, ___ F. Supp. 3d ___ (N.D. Tex. 2020)
https://www.leagle.com/decision/infdco20200427c99

FACTS: Plaintiff Dora Smith purchased a BMW vehicle with a certified pre-owned warranty. Smith later discovered the vehicle consumed excessive amounts of engine oil, requiring frequent oil changes and engine repairs which diminished the value of the vehicle. Smith filed suit against the vehicle's manufacturer, Defendant BMW of North America, LLC ("BMW"), claiming various violations of the DTPA, including breach of implied warranty.

BMW moved to dismiss for failure to state a claim.

HOLDING: Motion denied.

REASONING: BMW argued that Smith could not recover because she purchased her vehicle used, that she was "seeking damages based on alleged indirect representations," and claimed that she cited "no direct representation from BMW to herself in connection with her decision to purchase the vehicle." BMW cited to *PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship*, in which the Texas Supreme Court explained that a downstream buyer can sue a remote seller for breach of implied warranty, but not under the DTPA.

The court rejected BMW's argument as a mischaracterization of the holding in *PPG*, pointing out that the Texas Supreme Court was confronted with the issue of assigning rights to sue under the DTPA where a downstream purchaser brought express warranty DTPA claims against

a remote manufacturer, even though there was no privity of contract between them. In the instant case, however, the court noted that Smith alleged that she purchased the vehicle from BMW, in privity of contract, when she purchased her vehicle with a certified pre-owned warranty. Because Smith's allegations did not establish her as a "downstream purchaser," she was not prohibited from bringing her claims under the DTPA.

CONTRACT FOUND UNCONSCIONABLE UNDER DTPA BASED ON PRICE

PROMISSORY NOTE, DEED OF TRUST, AND VENDOR'S LIEN IN SPECIAL WARRANTY DEED DECLARED VOID PURSUANT TO DTPA

Sadeghian v. Jaco, ___ S.W.3d ___ (Tex. App. 2020).
https://law.justia.com/cases/texas/fifth-court-of-appeals/2020/05-18-00838-cv.html

The DTPA allows a consumer who prevails on a DTPA claim various remedies, including "any other relief which the court deems proper."

FACTS: Defendant-Appellant Khosrow Sadeghian leased real property to Plaintiff-Appellee David Jaco, and later sold the property to Jaco. For the sale, Jaco paid a $10,000 down payment, and the parties executed a real estate lien note, deed of trust, and special warranty deed with vendor's lien. The note reflected a principal amount due of $159,800. However, the property was appraised at a value of only $30,000 by the county tax assessor.

Jaco filed suit, alleging violation of the DTPA for selling the property at an unconscionable price. The jury returned a verdict in Jaco's favor and Jaco moved for entry of judgment. The trial court entered judgment in Jaco's favor and declared void the promissory note, deed of trust, and vendor's lien in the special warranty deed. Sadeghian appealed.
HOLDING: Affirmed.
REASONING: Sadeghian argued that the evidence was insufficient to show unconscionability. Sadeghian also argued that the relief entered by the trial court was improper because the DTPA required the jury to issue a finding specifically with regard to the sale and the DTPA only allowed Jaco to receive economic damages or mental anguish damages.

The court rejected Sadeghian's argument, holding that the property tax appraisal and sheriff's deed introduced by Jaco at trial were sufficient evidence to show unconscionability of price. Although both the appraisal and deed were hearsay, because Sadeghian did not object to the entry of either into evidence, its probative value could not be denied.

The court also rejected Sadeghian's argument that the relief entered was improper, explaining that the DTPA allows a consumer who prevails on a DTPA claim various remedies, including "any other relief which the court deems proper." Because the remedy provided by the trial court was allowed under the plain language of the DTPA, the trial court did not err in granting the declaratory relief.

CLEANING OF A VEHICLE IS NOT A "REPAIR OR MODIFICATION" UNDER THE TEXAS SUPREME COURT'S DEFINITION

Rogers v. Car Wash Partners, Inc., ___ F. Supp. 3d ___ (S.D. Tex. 2019).
https://law.justia.com/cases/federal/district-courts/texas/txsdce/4:2018cv04181/1591355/28/

FACTS: After washing and detailing Plaintiff Alison Rogers's car, an employee of Defendant Mister Car Wash struck and damaged Plaintiff's car with another customer's car in Defendant's parking lot. Plaintiff filed suit alleging several claims, including breach of an implied warranty of good and workmanlike performance for the repair or modification of existing tangible goods under the DTPA.

Defendant moved for summary judgment in regard to this claim.
HOLDING: Motion granted.
REASONING: Defendant argued that the service of cleaning Plaintiff's vehicle did not constitute a repair or modification for which a warranty of good and workmanlike performance is implied.

The court accepted Defendant's argument, citing *Archibald v. Act III Arabians*, wherein the Texas Supreme Court stated that the term "modification" broadly includes any change or alteration that "introduces new elements into the details of the subject matter or cancels some of them but which leaves the general purpose and effect of the subject matter intact." The court held that no reasonable jury would find that cleaning a vehicle was a modification under this definition. Because there was no repair or modification of Plaintiff's car, there was no implied warranty and the Plaintiff's argument-failed.

MORTGAGOR CHALLENGING HOW AN EXISTING MORTGAGE IS SERVICED IS NOT A "CONSUMER" UNDER THE DTPA BECAUSE THE BASIS OF [THE] CLAIM IS THE SUBSEQUENT LOAN SERVICING AND FORECLOSURE ACTIVITIES, RATHER THAN THE GOODS OR SERVICES ACQUIRED IN THE ORIGINAL TRANSACTION

Moore v. Lakeview Loan Servicing, ___ F.Supp.3d ___ (W.D. Tex. 2019).
https://www.leagle.com/decision/infdco20191224d70

FACTS: Plaintiff Stacie Moore obtained a home equity loan ("Loan") from Georgetown Mortgage, LLC. The Loan was later assigned to Defendant Lakeview Loan Servicing, LLC. After Plaintiff failed to make monthly payments on her Loan, another loan servicing company, Defendant LoanCare, LLC, notified Plaintiff that her Loan was in default. Plaintiff filed suit against Defendants alleging violation of the DTPA.

Defendants removed the case to federal court and

moved to dismiss for failure to state a claim on which relief can be granted, arguing that Plaintiff did not qualify as a consumer under the DTPA. The district court referred the motion to a Magistrate.
HOLDING: Recommended dismissal.
REASONING: Plaintiff argued that she satisfied the necessary element of consumer status because a mortgagor qualifies as a consumer under the DTPA if (1) her primary objective in obtaining the loan was to acquire a good or service, and (2) that good or service forms the basis of the complaint.

The court rejected Plaintiff's argument, holding that Plaintiff is not a consumer under the DTPA because her complaint is based entirely on Defendants' loan servicing and foreclosure activities, not the goods or services acquired in the original transaction, namely, the home she purchased with the Loan. Because Plaintiff is not a consumer, she may not assert a claim under the DTPA.

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DEBT COLLECTION

EVEN SIXTEEN MINUTES LATE IS TOO LATE FOR FILING AN APPEAL

Chung v. Lamb, ___ Fed. Appx. ___ (10th Cir. 2019).
https://www.accountsrecovery.net/wp-content/uploads/2019/12/Boscoe-Chung-v-Lamb.pdf

FACTS: Plaintiff-Appellant Emily Chung's attorney, Karen Hammer, (collectively, "Chung") filed the underlying case on behalf of her client to redress Defendant-Appellee Timothy Lamb's alleged violation of the FDCPA. The trial court subsequently granted summary judgment to Lamb and entered its final judgment on November 14, 2018. Under Federal Rule of Appellate Procedure 4(a)(1)(A), the deadline to file a notice of appeal expired on Friday, December 14, 2018. Chung filed a motion for an extension of the deadline to file a notice of appeal at 12:16 a.m. on Saturday, December 15, 2018, stating that she encountered several emergencies, including technological issues, that prevented her from filing a timely notice of appeal.

The trial court denied Chung's motion for an extension of time to appeal. Chung appealed the holding.
HOLDING: Affirmed.
REASONING: Chung argued that the clerk's office was "inaccessible" on December 14 because she made attempts to log in to the court's electronic filing system by first mistakenly logging onto the wrong website, and then by logging onto the correct website with incorrect credentials. Chung further argued that, because Federal Rule of Appellate Procedure 26(a)(3) states that the deadline for filing a notice of appeal "is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday" "if the clerk's office is inaccessible" "on the last day for filing," her appeal was timely.

The court rejected Chung's argument, holding that Chung's mistakes did not render the clerk's office inaccessible. The judge reasoned that Chung did not allege that she was attempting to file the notice of appeal when she mistakenly logged in to the wrong website and thereafter used the wrong credentials. Nor did Chung allege that the system would have prevented her from filing the notice of appeal at any time on December 14 had she accessed the correct site and used the correct credentials. Additionally, the court noted that Chung cited no case in which an individual litigant's errors or delays in attempting to file a pleading warranted a finding that the clerk's office was "inaccessible" on the day in question. Accordingly, the court held that the clerk's office was accessible on December 14 and Chung simply failed to access it, rendering her appeal untimely.

DEBT COLLECTOR USING THE TERMS "ORIGINAL CREDITOR" DOES NOT VIOLATE FDCPA

Dennis v. Niagara Credit Sols., 946 F.3d 368 (7th Cir. 2019).
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2019/D12-30/C:19-1654:J:Flaum:aut:T:fnOp:N:2451207:S:0

FACTS: Defendant-Appellee LVNV Funding ("LVNV") bought Plaintiff-Appellant Thomas Dennis's defaulted debt from Washington Mutual Bank. LVNV was a client of Defendant-Appellee Niagara Credit Solutions ("Niagara"), who sent a debt collection letter to Dennis on LVNV's behalf. The letter stated that Niagara's "client" had authorized Niagara to offer a payment plan or a settlement of the debt in full. The letter identified Washington Mutual Bank as the "original creditor" and LVNV as the "current creditor." Dennis filed a class action suit against LVNV and Niagara, claiming violation of the FDCPA by the defendants' failure to identify clearly and effectively the name of the creditor to whom the debt was owed.

The trial court granted summary judgement for the defendants, concluding that the letter adequately identified to whom the debt was owed. Dennis appealed.
HOLDING: Affirmed.
REASONING: Dennis argued that the debt collection letter violated FDCPA §1692g(a)(2)'s requirement that debt collectors send consumers a written notice containing the name of the creditor to whom the debt is owed. Dennis argued that the letter did not satisfy the FDCPA because identifying two separate entities as the "current creditor" and "original creditor" led to consumer confusion.

The letter provided information clearly enough that the recipient is likely to understand it.

The court rejected Dennis's argument, holding that the defendants did not violate the FDCPA standards because the letter provided information clearly enough that the recipient is likely