DECEPTIVE TRADE PRACTICES AND WARRANTY

DTPA REQUIRES GOODS OR SERVICES ARE AN OBJECTIVE OF A QUALIFYING TRANSACTION OR NOT MERELY INCIDENTAL TO IT

PUBLIC RESTROOM SERVICE IS MERELY INCIDENTAL TO CUSTOMERS' GOODS PURCHASES

Campbell v. RaceTrac Petroleum, Inc., ___ F. Supp. 3d ___ (N.D. Tex. 2021).
https://www.leagle.com/decision/infdco20211007983

FACTS: Plaintiffs, David and Kori Campbell, stopped to buy gas, and David went into Defendant RaceTrac gas station to purchase cigarettes and use the restroom. The RaceTrac clerk told David the restrooms were closed. When David asked why the restrooms were closed, the clerk became confrontational and threatened the Campbells with two screwdrivers and a box cutter. After David called the police, the police arrested and charged the clerk with aggravated assault.

The Campbells sued RaceTrac in Texas District Court for Deceptive Trade Practices Consumer Protection Act ("DTPA") violations and various other claims. RaceTrac removed the case to Federal District Court and filed a Motion to Dismiss for Failure to State a Claim under Rule 12(b)(6).

HOLDING: Motion granted.

REASONING: The Campbells argue that they were injured under the DTPA because they relied on RaceTrac's "false, misleading, and deceptive" representations and statements regarding its goods and services, specifically that RaceTrac misrepresented to maintain clean public restrooms and friendly customer service—among other things. Campbells also argued David's desire to use the RaceTrac's bathrooms was an objective of their visit.

The court rejected these arguments stating that a "service" under the DTPA requires either (1) the customer sought or acquired the service by purchase or lease, or (2) that the service was furnished in connection with the sale of goods. The court held the first prong does not apply because the Campbells did not lease or purchase the use of the restrooms nor purchased or leased a larger service package that included the use of the restrooms. The second prong includes collateral services that directly relate to the specific sale and might enter into a consumer's consideration when buying a good. The court found that DTPA services do not include a superior shopping experience or friendly employees. The court held the use of restrooms was merely incidental to customers' goods purchases and not directly related to a specific sale, and that the Campbells are not consumers under the DTPA and dismissed their DTPA claims with prejudice.

DTPA DOES NOT WAIVE GOVERNMENTAL IMMUNITY, WHICH NECESSARILY MEANS A CLAIM UNDER THE DTPA IS A TORT

Owens v. City of Tyler, ___ S.W.3d ___ (Tex. App. 2021).
https://www.leagle.com/decision/intxco20211007418

FACTS: Defendant City of Tyler ("the City") constructed a lake of which they owned the land underneath the lake and the land surrounding the lake. The City had leased three contiguous lots surrounding the lake to Plaintiffs, Owenses, Chatelains, and Terrys (collectively the "Lessees"), which were the subject of this suit. The leaseholds do not extend into the lakebed. However, the City generally allows the Lessees to construct piers and boathouses subject to city approval. In September of 2015, Chatelains' requested to construct a new pier and boathouse. Shortly after, the City denied Terrys' request to construct a pier because it essentially would have prevented Chatelains' access to the lake. Around this time, Owens expressed their discontent with Chatelains' proposed plan because they believed the new boathouse would affect their view of the lake and the value of their property. Chatelains resubmitted a different plan to try and reconcile with Owenses concerns and the City issued a construction permit in February 2017. Subsequently, Owenses and Terrys filed suit against the City and Chatelains for various claims.

Eventually, the City filed motions for summary judgment, and the Lessees dropped their tort claims in conformity with prior representations that they would not be pursuing tort claims against the City. However, the Lessees later amended their pleading to assert new claims of statutory fraud and violations of the DTPA. The trial court granted the City's motion for summary judgment on the tort claims, and the Lessees appealed.

HOLDING: Affirmed.

REASONING: The Lessees argued that their new causes of action were not torts because they were "statutory," and for that reason, they were not estopped. The court disagreed with this argument and held that statutory claims under the DTPA can classify as a tort.

The court reasoned that the Texas Supreme Court has recognized that statutory torts do exist. Furthermore, several courts have held that the DTPA does not waive governmental immunity, which necessarily means a claim under the DTPA is a tort. Lastly, the court reasoned that the statutory fraud act does not waive governmental immunity and is considered a tort.

The Texas Supreme Court has recognized that statutory torts do exist.

Since the claims under the DTPA and statutory fraud act are torts and the Lessees represented they would not be pursuing tort claims against the City, the Lessees were estopped from bringing these actions.

DTPA DOES NOT APPLY TO THE CITY OR ITS SUBDIVISIONS BECAUSE THEY ARE NOT "PERSONS" AS DEFINED BY THE ACT

Payne v. Midcrown Pavilion Apartments, ___ F. Supp. 3d___ (W.D. Tex. 2021).
https://www.casemine.com/judgement/us/612e1c1b4653d03c20da49a7

FACTS: Plaintiff Don Payne signed a lease with Defendant, Midcrown Pavilion Apartments ("Midcrown") and agent Amy Carril-

lo of the San Antonio Housing Authority (SAHA). They contractually agreed to subsidize their rent under the Section 8 Program run by the U.S. Department of Housing and Urban Development (HUD). Payne claimed that they satisfied every payment obligation under the lease, but were nonetheless evicted in retaliation for their request for a reasonable accommodation for a disability.

"Person" means an individual, partnership, corporation, association, or other group, however organized.

Payne sued Defendants for violation of the DTPA. Carrillo moved for dismissal.

HOLDING: Dismissed.

REASONING: Plaintiffs argued that Carrillo violated the DTPA by making misrepresentations about Payne's Facebook page.

The court rejected that argument because the DTPA does not apply to the City or its subdivisions because they are not "persons" defined by the Act. Section 17.45(3) states, "Person" means an individual, partnership, corporation, association, or other group, however organized. The court concluded that SAHA is not subject to the DTPA, and Carrillo acted as an official agent of SAHA. Therefore, Carrillo is entitled to the dismissal of Plaintiffs' DTPA claim.

DTPA AND INSURANCE CODE CLAIMS DID NOT SATISFY THE HEIGHTENED PLEADING REQUIREMENTS UNDER RULE 9(B) BECAUSE THEY DID NOT ALLEGE WITH SUFFICIENT SPECIFICITY THE "WHO, WHAT, WHEN, AND WHERE" OF THE ALLEGED REPRESENTATION

Polinard v. Covington Specialty Ins. Co., ___ F.Supp.3d___ (W.D. Tex. 2021).
https://casetext.com/case/polinard-v-covington-specialty-ins-co

FACTS: Plaintiff Herbert Polinard Jr. leased his property to Club Essence under an agreement requiring the latter to insure the property and listing Polinard as an additional insured. Club Essence contracted insurance with Defendant Covington Specialty Insurance Company ("Covington").

In the middle of the supposed insurance coverage period, the property was damaged by a fire. Polinard submitted and was denied a claim by Covington because the policy was cancelled due to lack of payment from Club Essence.

Polinard sued Covington and the insurance agents for violations of the Texas Deceptive Trade Practices Act for misrepresentation of material facts. Covington removed the case to federal court based on diversity jurisdiction. Polinard moved to remand the case to state court.

HOLDING: Motion denied.

REASONING: Polinard asserted that the insurance agents misrepresented material facts about the policy and thus violated Texas Insurance Code and DTPA.

The court rejected the claims because they did not satisfy the heightened pleading requirements under Rule 9(b) on two grounds. First, Polinard failed to allege sufficient evidence to establish privity with the insurance agents. Polinard needed to show that he was entitled to recover from the policy despite not being the primary insured. Second, Polinard failed to identify in his complaint who of the insurance agents made the promise and how, when, or where it was made. His statutory claims did not allege the misrepresentation with sufficient specificity, and therefore failed to meet the heightened pleading requirement in Rule 9(b).

COUNSEL IS NOT A DTPA CONSUMER AS TO COURT REPORTER HIRED BY OPPOSING COUNSEL

OPPOSING COUNSEL IS NOT THIRD-PARTY BENEFICIARY OF COURT REPORTING SERVICES

Miller v. Kim Tindall & Assocs., LLC, ___S.W.3d___ (Tex. App. 2021).
https://casetext.com/case/miller-v-kim-tindall-assocs-2

FACTS: Defendant-Appellee Kim Tindall & Associates ("KTA") contracted with a defense attorney to provide court reporting services for the depositions of two plaintiffs. Plaintiff-Appellant Kevin Miller, the plaintiff's attorney, requested a copy of the depositions but never received the copy. Miller later learned that KTA had provided final copies to the defense counsel and represented to the court that Miller waived his right to review the transcripts.

Miller sued KTA, alleging DTPA claims based on the KTA's services. KTA filed a plea, arguing that Miller was not a "consumer" under the DTPA. The trial court granted KTA's plea and dismissed Miller's claims. Miller appealed.

HOLDING: Affirmed.

REASONING: Miller argued that he had consumer status under the DTPA, because KTA refused to send him a copy of the deposition transcripts without payment and sent him invoices. Miller also argued that a plaintiff without a direct contractual relationship with the defendant may still be a consumer under the DTPA.

The court rejected Miller's arguments, holding that a person qualifies as a DTPA consumer when he searches or procures goods or services through purchase or lease and the goods or services form the basis of the complaint. Because Miller never received the transcripts and refused to pay the invoices because he had never agreed to purchase them, he had no DTPA consumer status through any direct transaction with KTA.

In limited situations third party beneficiary may be a consumer as long as the transaction was intended for the third party's benefit, required by the third party, and actually found to benefit the third party. Miller did not specifically require KTA's services. Additionally, opposing counsel's procurement of court reporting services for the deposition of Miller's clients was not for Miller's benefit. Because Miller didn't require KTA's services and because they weren't for Miller's benefit, he was not a third-party beneficiary of KTA's services.

DTPA CONSUMER IS REQUIRED TO SHOW EVIDENCE THAT SHE IS A CONSUMER UNDER § 17.46(B) (12).

Elizondo v. U.S. Bank, N.A., ___ S.W.3d.___ (Tex. App. 2021).
https://casetext.com/case/elizondo-v-us-bank

FACTS: Plaintiff-Appellant Ada Elizondo obtained a loan to purchase her home, which Defendant-Appellee U.S. Bank eventually became the final entity to purchase the promissory note and deed of trust. Elizondo later received notice that payment was past due and that she needed to pay $4,207.29 within a month to cure the default and avoid acceleration of the loan. At an unspecified time, Elizondo made a payment of $4,500.00 that the Bank acknowledged would be applied as periodic payments.

Shortly after Elizondo received notice of acceleration, Elizondo filed suit alleging wrongful foreclosure, breach of contract, unfair debt collection practices, and eventually DTPA violations. U.S. Bank filed a traditional and a no-evidence motion for summary judgment, and the trial court granted both of them. Elizondo's motion for new trial was denied. Elizondo appealed.
HOLDING: Affirmed.
REASONING: U.S. Bank argued that Elizondo as a mortgagor was not a "consumer" under the DTPA. Elizondo admitted to her non-consumer status under the DTPA but argued that suing upon §17.46(b) (12) of the DTPA did not require proving consumer status following the holding in *Webb v. Int'l Trucking Co., Inc.*, 909 S.W.2d 220.

The court held that Elizondo's interpretation of *Webb* was misguided, and Elizondo had to prove her consumer status to succeed on her DTPA claim. In *Webb*, the court ruled that the plaintiff did not need to prove their status as a consumer because the plaintiff also brought a claim under the Texas Insurance Code, which was much broader than the DTPA, and thus the plaintiff did not need to prove their status as a consumer.

Here, Elizondo did not bring forth an insurance code action. Rather, her cause of action was a stand-alone DTPA claim. Thus, Elizondo was required to show evidence that she was a consumer under § 17.46(b) (12). Since she conceded her non-consumer status, the court affirmed the trial court's ruling that granted U.S. Bank's no-evidence motion for summary judgment on this claim.

THONG SANDAL REPRESENTED AS A "SHOWER SHOE" DOES NOT VIOLATE DTPA

English v. Aramark Corp., ___ F.4th ___ (5th Cir. 2021).
https://www.govinfo.gov/content/pkg/USCOURTS-ca5-19-20412/pdf/USCOURTS-ca5-19-20412-1.pdf

FACTS: Appellant Jake Anthony English, a Texas inmate, purchased from Appellees Aramark Corporation and Aramark Collective Services, L.L.C. (collectively, "Aramark") a pair of "thong sandals" that were represented in the jail commissary menu as "shower shoe V-Strap XL" (the "product"). The product was a spongy shoe with a strap affixed to the sole but not permanently fixed. English used it in the shower and fell after the strap popped out of the shoe while attempting to dislodge the product from the shower surface.

English sued Aramark seeking damages for his slip and fall, claiming that Aramark violated the DTPA §17.46(b)(5), (7), (9), and (24). After removing the suit to federal district court, Aramark moved for summary judgment. The court granted Aramark's summary judgment and dismissed the case with prejudice. English moved to alter or amend the judgment, but the court denied the motion. English appealed.
HOLDING: Affirmed.
REASONING: English maintained that he would not have purchased the product had it been listed in the commissary menu as "thong sandals." English argued Aramark falsely represented and advertised the product on the commissary menu as a "shower shoe" that could be safe for use in the shower when it was actually "thong sandals," as identified in the purchase order receipt and the new kiosk system for purchasing commissary items.

English argued Aramark falsely represented and advertised the product on the commissary menu as a "shower shoe" that could be safe for use in the shower.

The court upheld the district court's grant of summary judgment to Aramark. It determined that English fell short of meeting the burden of raising a genuine material fact issue on Aramark's material misrepresentation of the product. Specifically, the court explained that English had not alleged, or offered an argument on, what qualities were required for a shoe to serve as a "shower shoe" and why "thong sandals" did not meet that standard. The court recognized that, by listing the product as a "shower shoe," Aramark impliedly represented the product was safe to use in the shower. However, English failed to fully explain why an actual shower shoe would not get lodged on a shower surface and why his injury occurred because he was in a "shower environment." Because English did not raise a fact issue that demonstrated the significance of a shower shoe and how a true shower shoe would have prevented his injury, the court held that a "thong sandal" represented as a "shower shoe" did not violate DTPA.

MORTGAGOR CHALLENGING HOW AN EXISTING MORTGAGE IS SERVICED IS NOT A DTPA CONSUMER BECAUSE THE BASIS OF THE CLAIM IS THE SUBSEQUENT LOAN SERVICING RATHER THAN THE GOODS OR SERVICES ACQUIRED

AN ACTIVITY RELATED TO A LOAN TRANSACTION IS A SERVICE FOR DTPA PURPOSES ONLY IF THE ACTIVITY AT ISSUE IS, FROM THE PLAINTIFF'S POINT OF VIEW, AN OBJECTIVE OF THE TRANSACTION, NOT MERELY INCIDENTAL TO IT

HHH Farms, L.L.C. v. Fannin Bank, ___ S.W.3d ___ (Tex. App. 2021).
https://www.leagle.com/decision/intxco20211112614

FACTS: Appellee Fannin Bank executed a loan agreement with Appellant HHH Farms, L.L.C. ("H. Farms") in which it loaned $750,000 to H. Farms, conditioned on a security agreement in all

of the property described in the promissory note ("Note One"). Fannin and H. Farms later entered into a second loan but made no payments. Both promissory notes contained language saying that H. Farms could not use the collateral to grant further security interests without Fannin's consent. At the time of these two loans, H. Farms also had loans from American Bank. The loans from American predated the Fannin loans. Still, American's branch manager reached out to Fannin to notify it about its own lending relationship with H. Farms. H. Farms paid off the American loans, and American accepted loans without the knowledge that those proceeds were supposed to be used to pay off the Fannin loans.

Fannin filed suit and H. Farms filed a counterclaim alleging violations of the DTPA. The trial court granted summary judgment in favor of Fannin and ordered that Fannin recover the loan amounts from H. Farms. H. Farms appealed.

HOLDING: Affirmed.

REASONING: H. Farms claimed that they were consumers under the DTPA because this transaction was "inextricably intertwined" with the loan evidenced by Note One.

There was no evidence that the loan was made for the purpose of buying a good or service or that their complaint concerned the good or service they purchased.

The court disagreed with H. Farms, stating the loan acquired by H. Farms was simply a loan; there was no evidence that the loan was made for the purpose of buying a good or service or that their complaint concerned the good or service they purchased. The court further stated that the Farm Service Agency (FSA) guaranty and corresponding charges were incidental activities to making the loan, and such incidental activities did not equate to a service under the DTPA. H. Farms' complaint that Fannin violated the DTPA by requiring H. Farms to spend money to acquire an FSA guaranty was a complaint about an act incidental to making the loan. Therefore, the trial court's summary judgment motion in favor of Fannin with regard to the DTPA claim was proper.

DTPA CLAIMS FAIL UNDER FEDERAL RULES OF CIVIL PROCEDURE 9(b) AND 8(a)

Smiley Team II, Inc. v. Gen. Star Ins. Co., ___ F. Supp. 3d___ (S.D. Tex. 2021).
https://casetext.com/case/smiley-team-ii-inc-v-gen-star-ins-co

FACTS: Plaintiff Smiley Team purchased commercial property insurance from General Star Indemnity Company. After the purchase, a vehicle crashed into Plaintiff's building. Plaintiff alleged that when it tried to file an insurance claim with Defendant, the claim was improperly adjusted to issue a lower payment than the actual value of the damage.

Plaintiff sued for violations of the Texas Deceptive Trade Practices Act (DTPA. Defendant moved to dismiss the case.

HOLDING: Dismissed.

REASONING: Plaintiff alleged that Defendant violated DTPA in both fraud and non-fraud-related ways.

The court rejected this argument because Plaintiff's complaint did not provide any supporting details on these violations. The court stated that under Federal Rules of Civil Procedure Rule 9(b), plaintiffs must meet the "who, what, when, where, and how" heightened pleading requirements to state fraud-related DTPA claims. Here, Plaintiff failed to identify any false or misleading statements made by Defendant. Plaintiff also failed to identify the alleged speaker, when the false statements were made, and where. Therefore, the heightened pleading requirements of 9(b) were not met, and the fraud claims were not properly pleaded.

The court also held that there was a more relaxed standard in Rule 8(a) of the FRCP applying to non-fraud-related DTPA claims. In general, Rule 8(a) requires a short statement of the claim showing that the pleader is entitled to relief. Plaintiff's complaint alleged that Defendant violated the DTPA in several ways, but these allegations were nothing more than Plaintiff taking the DTPA's statutory text and pasting it into a complaint. A conclusory statement that there has been a statutory violation is insufficient for the purposes of Rule 8(a).

Since Plaintiff's DTPA claims were conclusory and didn't include any factual support, they were pleaded improperly and could not survive a motion to dismiss.

A "PROJECT" UNDER SECTION 17.49(g) ENCOMPASSES "PLANNED UNDERTAKING[S]" BETWEEN PARTIES

McCoy v. Valvoline, LLC, ___ F. Supp. 3d ___ (N.D. Tex. 2021).
https://www.govinfo.gov/content/pkg/USCOURTS-txnd-3_20-cv-03062/pdf/USCOURTS-txnd-3_20-cv-03062-0.pdf

FACTS: Plaintiffs Tommy McCoy and Tommy McCoy, Inc. contracted under two agreements with Defendant, Valvoline, LLC. Under the agreements, McCoy Inc. purchased approximately $1,300,000 Valvoline's products. After McCoy made three public racist social media posts and caused negative media attention to Valvoline, Valvoline terminated the agreements.

Plaintiffs sued under DTPA in Texas state court. Valvoline removed the case to the federal district court and filed a motion for summary judgment.

HOLDING: Granted.

REASONING: Valvoline argued that Plaintiffs' claims against Valvoline were exempted from the DTPA by §17.49(g) of the Texas Business and Commerce Code and should be dismissed, in light of McCoy's admissions that McCoy Inc. paid approximately $1,300,000 to Valvoline under the agreements. In response, Plaintiffs argued that Valvoline impermissibly totaled all of McCoy's purchases of product from Valvoline to invoke the §17.49(g) exemption and that the correct statutory interpretation only applied the exemption to a transaction or a set of transactions to the same project over $500,000.

The court agreed with Valvoline, stating that Plaintiffs' claims against Valvoline were exempted from the DTPA. The DTPA §17.49 does not apply to a "project" of less than $500,000 where the cost is construed cumulatively when there are a series of transactions. The DTPA does not define "project," but the courts have held that under §17.49(g), it was properly defined as a "planned undertaking" such as financial services, manufacturing, or distribution relationships.

In this case, a "planned undertaking" had occurred between McCoy Inc. and Valvoline through their purchase of various Valvoline products over the course of multiple transactions. Section 17.49(g) however exempted this "planned undertaking" because their total value over the course of multiple transactions surpassed the statutory limit of $500,000. DTPA §17.49(g) is meant to protect transactions smaller than the one at issue here.

DTPA CLAIM SUBJECT TO ARBITRATION AND CHOICE OF LAW CLAUSE

Tex. Star Nut & Food Co. v. Barrington Packaging Sys. Grp., Inc., ___ F. Supp. 3d ___ (W.D. Tex. 2021).
https://www.govinfo.gov/content/pkg/USCOURTS-txwd-5_21-cv-00444/pdf/USCOURTS-txwd-5_21-cv-00444-0.pdf

FACTS: Plaintiff, Texas Star Nut and Food Co. d/b/a Nature's Eats ("Nature's Eats"), entered into a contract with Defendant, Barrington Packaging Systems Group, Inc. ("Barrington"), to purchase a customized bagging machine. The contract required Barrington to deliver the bagging machine within 75 days of receiving a monetary deposit. After Nature's Eats paid the deposit, Barrington failed to deliver the machine within 75 days as promised.

Nature's Eats could not rely on the anti-waiver provisions of the DTPA to avoid the choice-of-law provision.

Nature's Eats filed suit, alleging DTPA violations, breach of contract, fraud and negligent misrepresentation. Barrington moved to compel arbitration, or alternatively, to transfer venue to the Northern District of Illinois for that court to make the arbitration decision.

HOLDING: Motion granted.

REASONING: Barrington argued that the parties entered into an agreement containing an arbitration clause and choice of law clause, and the agreement was enforceable. Nature's Eats argued, if compelled, the clauses would deprive them of their rights and remedies under the DTPA.

The court agreed with Barrington's argument, holding that the DTPA claim was subject to the arbitration and choice of law clauses. Applying state-law contract principles, the court held the parties entered into an enforceable arbitration agreement. First, the court reasoned that if Nature's Eats was challenging the contract as a whole, not just the arbitration provision, then the case would go before the arbitrator. Second, if Nature's Eats was challenging just the choice-of-law provision, then it was binding unless countervailing public policy demands otherwise. Nature's Eats could not rely on the anti-waiver provisions of the DTPA to avoid the choice-of-law provision. Third, if Nature's Eats was just challenging the arbitration provision, the case would go before the arbitrator because the DTPA claim was intertwined and related to the breach of contract claim.