RECENT DEVELOPMENTS

DECEPTIVE TRADE PRACTICES AND WARRANTIES

DEFENDANT HAS BURDEN OF PROOF WITH RESPECT TO STATUTE OF LIMITATIONS DEFENSE

NO INTENT REQUIRED FOR GENERAL MISREPRESENTATIONS UNDER DTPA LAUNDRY LIST

FAILURE TO PERFORM TERMS OF CONTRACT WITHOUT MORE, IS NOT VIOLATION OF DTPA

CABLE TELEVISION SIGNAL IS NOT A GOOD WITHIN THE SCOPE OF UCC

Top Rank, Inc. v. Gutierrez, 236 F. Supp. 2d 637 (W.D. Tex. 2001).

FACTS: Defendant Gutierrez owned and operated a restaurant where he subscribed for cable television services in 1981. In September of 1997 the defendant ordered from AOL/Time Warner the right to view a boxing match and televise it at the restaurant. Plaintiffs J&J and Prostar alleged an exclusive license to exhibit the boxing match at commercial establishments and initiated communications with the defendant in August and September of 1998, as they had not authorized the Defendant's broadcast. J&J possessed a "PPVN Affiliation Agreement" with AOL, which did not permit selling the rights to view the fights to non-residential establishments. J&J informed the defendant that his cable service account was classified as residential despite his commercial use of the property. In October of 1997, in response to his inquiry, AOL verified that the defendant had been paying for a residential account, and records indicated AOL intended to disconnect defendant's cable service or reclassify it.

In September of 1998 the defendant ordered from AOL the right to view a second fight and televised it at his restaurant. Plaintiff Top Rank, Inc. alleged an exclusive license to distribute the second fight and served the defendant with complaints in September of 1999 for his second broadcast. In October of 1999, AOL informed the defendant that his cable service account was still classified as residential.

J&J and Top Rank brought suit against the defendant for broadcasting the fights without permission. The defendant sought indemnity and contribution from the third-party defendant AOL, claiming breach of implied warranty under the Uniform Commercial Code and violations of the Deceptive Trade Practices Act. The DTPA violations were based on misrepresentations regarding the authority to sell the rights to view the fights and the reclassifying of defendant's cable service account, as well as unconscionable acts. AOL filed a motion for summary judgment arguing that the UCC did not govern the transaction because it did not involve the sale of goods. It also moved for judgment on the DTPA claims asserting they were barred by the statute of limitations that misrepresentations require a showing of intent and that it did not engage in any unconscionable actions.

HOLDING: Partial summary judgment granted in favor of AOL.

REASONING: DTPA claims must be filed within two years of the false, misleading, or deceptive act or practice or within two years of the time the defendant discovered or should have discovered, by exercising reasonable diligence, the occurrence of the false, misleading, or deceptive practice or act. TEX. BUS. & COM. CODE ANN. § 17.565. Summary judgment based on expiration of the statute of limitations is an affirmative defense, so the third-party defendant, the moving party, has the burden of proof. The moving party must show the petitioner/plaintiff discovered or should have discovered the false, misleading, or deceptive practice or act. *Burns v. Thomas*, 786 S.W.2d 266 (Tex. 1990). AOL did not negate the defendant's evidence or respond to the defendant's argument that the defendant could not or should not have discovered the deceptive practice or act, so AOL failed to meet its affirmative burden of proof.

Section 17.47(b) of the DTPA, commonly referred to as the "laundry list", contains a list of practices considered to be false, misleading, or deceptive. Only subsections 9, 10, 13, and 17 of section 17.46(b) of the DTPA specifically require an intentional misrepresentation. If the specific subsection of section 17.46(b) does not expressly require intentional or knowing behavior, the representation must only be false to be actionable. *Smith v. Baldwin*, 611 S.W.2d 611 (Tex. 1980). Therefore, AOL's misrepresentations about its intent to reclassify the defendant's cable service or its authority to provide the defendant the right to view the fights did not have to be intentional or knowing to be an actionable violation of the DTPA under the subsection asserted by the plaintiff.

The failure to perform terms of a contract, however, without a violation of the DTPA laundry list of specific conduct, is not a violation of the DTPA because it is not a false, misleading, or deceptive act. Conduct that is merely the nonperformance of a contract is not actionable as a DTPA claim, neither as unconscionable conduct nor as a "laundry list" claim. *Crawford v. Ace Sign, Inc.*, 917 S.W.2d 12, 14, (Tex. 1996). AOL's failure to reclassify the defendant's cable subscription as a portion of their alleged implied-in-fact contract, without a separate false, misleading, or deceptive act, is not a misrepresentation actionable as a DTPA violation, but is instead actionable as a breach of contract claim.

Implied warranties arise under the Uniform Commercial Code, which governs the sale of goods, defined as moveable items. When both goods and services are exchanged in a single transaction or series of transactions, the dominant purpose of the transaction determines whether it involves a good or a service. Cable companies do not generate the products they provide. Rather, the dominant purpose of their transactions is to provide a broadcasting service; supplying transmission equipment is incidental to the service. *Kaplan v. Cablevision of PA, Inc.*, 448 Pa. Super. 306, 323, 671 A.2D 716 (Pa. Super. Ct. 1996). The transaction between AOL and the defendant did not involve AOL generating the fights' transmissions nor having the authority to modify them, but only transmitting the fights to viewers via its cable signals.

Thus, AOL was acting as a common carrier and providing a service, not a good, and is not subject to claims under the UCC.

BANK'S ACTIONS COLLECTING PMI WERE NOT UNCONSCIONABLE

Bennett v. Bank United, ___ S.W.3d ___ (Tex. App.—Austin 2003)

FACTS: Mortgagor homeowner brought action against Bank United and other banks ("Defendants") that serviced her home loan. Bank United refused to stop charging her for private mortgage insurance ("PMI") even though Mortgagor had been paying the premiums for over 20 years as part of the financing requirement. Bank United told Mortgagor that under the current circumstances, it would normally waive the insurance premiums; however, Bank United refused because the holder of the deed of trust, First Boston Mortgage, would not cancel the requirement. Mortgagor sued when she learned that her premium payments had been deducted out of her escrow account, alleging that the deductions were a violation of the Texas Deceptive Trade Practices Act ("DTPA"). The trial court granted Defendants' motion for summary judgment. On appeal, Mortgagor argued that (1) Defendants violated the DTPA by acting unconscionably and failed to provide required statutory notice concerning the PMI, (2) Mortgagor was a 3rd party beneficiary to the PMI contract between Bank United and the insurer, and is thus entitled to recover for wrongful payment, and (3) Bank United engaged in unfair discrimination in violation of the insurance code

HOLDING: Summary judgment affirmed.

REASONING: Mortgagor was a consumer under DTPA because her objective was to purchase her home. Tex. Bus. & Com. Code Ann. § 17.45. As a consumer, she may sue anyone who sought to benefit from the transaction, including the lender. *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 541 (Tex. 1981). Defendants, however, did not violate the DTPA by acting unconscionably. To hold the defendant's actions unconscionable, Mortgagor must show that Defendants took advantage of her lack of knowledge, and the resulting unfairness was glaringly noticeable, flagrant and unmitigated.

Mortgagor expressly agreed in the deed of trust to pay the PMI premiums until the note was paid in full.

Defendants did not take advantage of Mortgagor because the deed of trust executed by Mortgagor provides for the PMI premium reimbursement until the note is paid in full. Bank United's policy, which permitted the canceling of the mortgagor's requirement to pay PMI premiums, was option and did not require cancellation. In fact, the practice of requiring Mortgagor to pay PMI premiums for the lender has long been used in the mortgage industry. Mortgagor expressly agreed in the deed of trust to pay the PMI premiums until the note was paid in full. Defendants are free to contract for this type of insurance, and Mortgagor will not be harmed by living up to her end of the bargain. *White v. Mellon Mortgage Co.* 995 S.W.2d 795, 800 (Tex. App.—Tyler 1999, no pet.).

STATES MAY MAINTAIN FRAUD ACTIONS WHEN FUNDRAISERS MAKE FALSE OR MISLEADING REPRESENTATIONS

Madigan v. Telemarketing Associates, Inc, ____U.S.____, 123 S. Ct. 1829 (2003).

FACTS: The Attorney General of Illinois brought suit against Telemarketing Associates, Inc. and Armet, Inc. ("Telemarketers") for alleged fraudulent representations made to potential fundraising donors. VietNow, a charitable nonprofit corporation, entered into agreements with Telemarketers to solicit funds to advance the welfare of Vietnam veterans. The Attorney General's complaint alleged that Telemarketers stated that a significant amount of money raised would be paid to the veterans' organization for charitable purposes when the fundraisers knew that less than fifteen percent of monies raised would be contributed. The contracts between Telemarketers and VietNow stipulated that Telemarketers would retain 85% of the funds solicited, with 15% going to the charity.

The Attorney General filed affidavits from individuals solicited by Telemarketers. Specifically, one affiant was told at least 90% of the proceeds benefited the veterans. Another affiant was told that no part of her donation would be used for labor expenses because all members were volunteers. No employees of Telemarketers were volunteers, and all received payment for their services.

The trial court, appellate court, and the Illinois Supreme Court held that the allegations of fraud made by the Attorney General did not state a claim for relief that could survive a motion to dismiss.

HOLDING: Reversed.

REASONING: The First Amendment protects the right to engage in charitable solicitation because that right pertains to such speech interests as communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes. The Supreme Court explained that the First Amendment does not, however, insulate against instances of fraud. Categorical bans on solicitations where a substantial percentage of the donation would be used for costs associated with overhead and the fundraising campaign would impermissibly chill First Amendment. So long as the emphasis is not on the percentage of the donations retained by the solicitor, but on the fraudulent actions of the solicitors, the Court reasoned, there is no chilling effect on free speech.

The Court reasoned that nondisclosure of information to potential donors alone does not constitute fraud. When nondisclosure, however, is accompanied by intentionally misleading statements designed to deceive the listener, the First Amendment protections do not prohibit a claim based on fraud. In this case, the Court explained, Telemarketers attracted donations by misleading potential donors into believing that a substantial portion of their contributions would fund a specific program or service, knowing full well that was not the case.

RECENT DEVELOPMENTS

LIABILITY FOR FAILURE TO DISCLOSE UNDER DTPA REQUIRES INTENT

Robbins v. Capozzi, 100 S.W.3d 18 (Tex. App.—Tyler 2003).

FACTS: Defendant Capozzi purchased Unit C of a condominium project as a place for her daughter, Meghan Capozzi ("Meghan"), to live while attending Southern Methodist University ("SMU"). In order to enter the Unit C garages, a 90-degree turn must have been made from a driveway that runs along the side of the garages. Megan was able to park her Audi A4 sedan in one of the Unit C garages by backing up and maneuvering her vehicle into the garage. Meghan decided it would be more convenient for her to park her car in the driveway next to her front door instead of in the Unit C garages. The developer agreed, and executed and recorded a "Driveway Designation" providing for an additional parking space in the driveway of the complex to be used by the owner of Unit C.

Capozzi later decided to sell the condo to the plaintiff, Robbins. Capozzi checked boxes in the Seller's Disclosure Notice indicating that the garage was in "Working Condition" and had "no known defects." Robbins also received a copy of the "Driveway Designation" as part of a "Condominium Information Statement." Shortly before Robbins moved into Unit C, she discovered she could not maneuver her Toyota 4-Runner into Unit C's garages. Robbins then learned Meghan had experienced difficulties maneuvering her car into the parking spaces.

The plaintiff must also show that the information was withheld with the intent of inducing the consumer to engage in a transaction.

Robbins filed suit against Capozzi and other defendants, asserting a claim for violation of section 17.46(b)(5) and section (23) of the Deceptive Trade Practices Act ("DTPA"). Defendants asserted they did not know of anyone who claimed to be unable to park any particular vehicle in either of the Unit C garages. The lower court held against Robbins.

HOLDING: Affirmed.

REASONING: Robbins testified at her deposition that she would not have bought the property if she had known about Meghan's parking difficulties. However, mere nondisclosure of material information is not enough to establish an actionable DTPA claim. *Century 21 Real Estate Corp. v. Hometown Real Estate Co.*, 890 S.W.2d 118, 126 (Tex. App.—Texarkana 1994, writ denied).

In order to recover damages under the DTPA for the failure to disclose material information, the plaintiff must also show that the information was withheld with the intent of inducing the consumer to engage in a transaction. Tex. Bus. & Com. Code Ann. §§ 17.46(b)(23). In the instant case, the evidence is well established that defendant knew cars had been parked in the garage. There is no evidence in the record, however, that defendants knew Robbins's vehicle could not be parked in the garage. Moreover, there is no evidence that the defendant withheld any information regarding Meghan's parking difficulties with the intent to induce Robbins into purchasing Unit C. Robbins, therefore, had no DTPA claim based on the failure to disclose parking problems.

THE AIRLINE DEREGULATION ACT PRE-EMPTS A PASSENGER'S STATE LAW CLAIMS FOR AN AIRLINE'S ALLEGED FAILURE TO HONOR A CONFIRMED FIRST CLASS SEAT

Delta Airlines, Inc. v. Black, ____S.W.3d____ (Tex. 2003).

FACTS: Black purchased two round-trip airline tickets on Delta through a travel agent. The purchase invoice was for two first-class tickets. When Black arrived at the Delta departure gate, he was informed that he was confirmed for only one first-class ticket while his wife was confirmed on coach. The Blacks declined Delta's rescheduling offers and chartered a private jet to their destination. Black sued Delta for breach of contract and intentional and negligent misrepresentation. Delta moved for summary judgment based on, among other grounds, preemption under the Airline Deregulation Act (ADA). The trial court rendered summary judgment for Delta. Black appealed and the court of appeals reversed and remanded, holding that the ADA did not preempt Black's claims. The Texas Supreme Court granted Delta's petition for review.

HOLDING: Reversed.

REASONING: The ADA contains an express preemption provision to prevent states from undoing federal deregulation: "[A] state…may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier…" 49 U.S.C. § 41713(b)(1).

The Texas Supreme Court applied a two-part analysis to determine whether Black's claims amounted to enforcement of a state law and therefore were preempted by the ADA. *Continental Airlines, Inc. v. Kiefer*, 920 S.W.2d 274 (Tex. 1996). The court first determined the claims were related to the airline's rates, routes, or services within the meaning of the ADA's preemption provision. The court stated, seating and boarding procedures were inextricably linked and had a definite connection with or reference to airline services. *Morales v. Trans World Airlines, Inc.*, 504 US 374 (1992).

Second, the court determined that the claim, if allowed, would constitute an enactment or enforcement of a state law within the meaning of the ADA's preemption clause. *Kiefer*, 920 S.W.2d at 281. In deciding whether contract claims are preempted, it is necessary to distinguish between obligations dictated by the State and those voluntarily undertaken by the airline. When parties privately negotiate a contract's terms and then sue in state court for breach of those terms, there is generally no specter of state- imposed regulation. Thus, as noted in *Kiefer*, the enforcement of a contractual commitment voluntarily undertaken does not amount to state enactment or enforcement of a law that the ADA's preemption provision forbids. In the instant case, however, the parties' contract incorporated the DOT regulations on denied boarding compensation. Black, however, seeks to enlarge Delta's

obligations to him beyond those imposed under the ADA. He attempts to modify the contract terms to allow him and his wife to forego the regulatory remedies and instead sue in court. The Court noted that it is confined, "in breach-of-contract actions, to the parties' bargain." The court cannot enlarge or enhance that bargain based on state law or policies external to the agreement. Finding that nothing in the contract entitles Black to the external remedy of reimbursement for the cost of a private chartered jet, the court held that the regulations promulgated under the ADA, which are incorporated as part of the contract, control. These regulations provide the procedure and remedy in the event a passenger is denied boarding but offered specified accommodations, and, therefore, preclude the additional remedies Black has pursued in state court.

The court further noted that boarding regulation and compensation were codified in the ADA. These uniform federal regulations protect the airlines from individual state regulation. Because Federal regulations expressly provide for boarding procedures, the claims and additional remedies Black pursued were preempted.

Finally, the court considered Black's remaining claims for misrepresentation and fraud, which he argues survived ADA preemption. The court disagreed. Because Black's misrepresentation and fraud claims were premised on Delta's ticketing and boarding procedure, they were directly related to Delta's services. The court noted that a state's common law cannot operate against an airline in this context, when it would constitute state enforcement of a law relating to airline services.

CLASS CERTIFICATION DENIED

Tracker Marine, L.P. v. Ogle, ____S.W.3d____(Tex. App.—Houston [14th Dist.] 2003).

FACTS: Plaintiffs, a class of consumers who bought new wooden Tracker Marine pontoon boats between 1987 and 1998, filed suit against the manufacturer Tracker Marine, L.P. ("Tracker"). Tracker sold approximately 74,000 boats through independent retailers in all fifty states. The class alleged the plywood used on the boats had a propensity to rot when exposed to water. The class asserted that affirmative misrepresentations or omissions in Tracker's brochures violated Missouri law. Even though the class seeking certification existed nationwide, the class argued only Missouri law applied because Tracker made all boats and issued all brochures in Missouri. The trial court granted certification without requiring the filing of a trial plan.

Tracker filed an interlocutory appeal. After the appeal was filed, the Texas Supreme Court mandated such plans in *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425 (Tex. 2000). On remand, the trial court again certified the class, this time including a trial plan. Tracker Marine again appealed, and during the appeal the Supreme Court again issued a relevent opinion, *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675 (Tex. 2002),

HOLDING: Reversed.

REASONING: The Texas Supreme Court found that its decision in *Stromboe* rendered the trial court's certification unsustainable.

The court noted that no class action was proper unless all litigants were governed by the same legal rules. Further, certification could not be based on mere assurances or secret trial plans. On the instant case, multiple states' laws would have applied, and the trial plan did not indicate how fifty consumer protection statutes could be divided into six subgroups as put forth by Tracker.

Certification was also inappropriate because the individual state consumer protection statutes possessed different requirements of scienter and reliance in a misrepresentation claim. Moreover, the court asserted that although consumer protection suits were common, the suit in this case was novel. The primary common issue sounded in unfitness, and it was unclear whether most states would allow every claim of unfitness to be converted into a consumer fraud claim. The court also noted even if all fifty statutes could be sorted into general groups, it was unlikely a single judge could properly try them, or a single jury properly apply them. Therefore, fair and efficient adjudication as required for common issues class actions could not be provided.

Certification was also inappropriate because the individual state consumer protection statutes possessed different requirements of scienter and reliance in a misrepresent-ation claim.

Furthermore, the certification order required reversal even if the law of only one state applied. There was almost no history for the case, making litigation difficult because evidence was still being developed. Numerous mini-trials would likely be needed to ascertain applicable state law, and the trial court's order, which certified several competing theories of damages, raised many individual questions, such as benefit-of-the-bargain, cost of repair, rescission, and choice of damages. Fact issues turned entirely on credibility thereby rendering the class action bar on discovery unfair to Tracker.