DECEPTIVE TRADE PRACTICES AND WARRANTIES

AN INDIVIDUAL WHO TOOK A LOAN WITH PRIVATE MORTGAGE INSURANCE PREMIUM REQUIREMENTS WAS A CONSUMER FOR PURPOSES OF DTPA

NOT UNCONSCIONABLE FOR BANK TO DEMAND REPAYMENT OF PRIVATE MORTGAGE INSURANCE PREMIUMS

Bennett v. Bank United, 114 S.W.3d 75 (Tex. App.—Austin 2003).

FACTS: Eileen Bennett financed the purchase of a residence through Weyerhaeuser Mortgage Company. Weyerhaeuser required that Bennett reimburse Weyerhaeuser for the private mortgage insurance ("PMI") premiums on an insurance policy Weyerhaeuser obtained for its benefit. The deed of trust stated that Bennett was required to include the PMI payment as part of her monthly escrow payments until the note was paid in full.

Weyerhaeuser sold the Bennett loan to United Savings Association of Texas, which changed its name to Bank United. Bank United sold the loan to First Boston Capital Corporation, which in turn sold the loan to First Boston Mortgage Securities Corp. Bank United remained responsible for servicing the loan for First Boston Mortgage. Because of these transfers, Bennett's loan became subject to two agreements that contained no provisions allowing for termination of the PMI.

In 1998, Bennett requested that Bank United discontinue charging for the PMI because she had achieved a loan-to-value ratio of below eighty percent. Bank United denied the request. According to Bank United's mortgage escrow manager, Bank United would normally waive the PMI under these circumstances but First Boston Mortgage, the holder of the deed of trust, refused to cancel the requirement.

Bennett filed suit alleging violation of the Texas Deceptive Trade Practices Act ("DTPA"). The district court granted Bank United's motion for summary judgment, and Bennett appealed. On appeal Bennett argued that Bank United and First Boston Mortgage acted unconscionably and in violation of the DTPA when First Boston Mortgage, through Bank United, refused to cancel the PMI despite Bank United's statement that it would usually curtail such a requirement for someone in Bennett's position. Appellees argued that Bennett was not a consumer for purposes of the DTPA, and that even if she was, her claim failed because Bank United's actions were not unconscionable.

HOLDING: Affirmed.

REASONING: To qualify as a consumer under the DTPA, the plaintiff (1) must seek or acquire goods or services by purchase or lease, and (2) the goods or services purchased or leased must form the basis of the complaint. *Sherman Simon Enters., Inc. v. Lorac Serv. Corp.*, 724 S.W.2d 13, 14 (Tex. 1987). A plaintiff's standing as a consumer is established by the plaintiff's relationship to the transaction, not by a contractual relationship with the defendant. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 814 (Tex. 1997).

The court found that Bennett's objective was to purchase the residence and that this purchase was the basis of Bennett's complaint. Bank United became connected to Bennett's transaction and subject to the DTPA's provisions because they became the holders of her loan. *Federal Deposit Ins. Corp. v. Munn*, 804 F.2d 860, 865 (5th Cir. 1986). The court held that Bennett was a consumer because the loan containing the PMI requirement was connected to the purchase of a good.

The DTPA defines an "unconscionable action or course of action" as one 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." TEX. BUS. & COM. CODE ANN §17.45(5). The deed of trust executed by Bennett provided for PMI premium reimbursement until the note was paid in full. Although Bank United expressed that its policy may permit the termination of PMI payments, this policy had no effect on Bennett because First Boston Mortgage, the current holder of the deed of trust, had policies to the contrary. The practice of requiring the payment of PMI premiums was common practice in the mortgage industry. Because Bennett, in the deed of trust, had expressly agreed to pay PMI premiums as they became due and payable until the note was paid in full, it was not unconscionable for First Boston Mortgage, through Bank United, to require Bennett to do so.

ALL CLAIMS ARISING OUT OF HOME CONSTRUCTION CONTRACT MUST BE ARBITRATED

In re First Texas Homes, Inc., 120 S.W.3d 868 (Tex. 2003).

FACTS: April and Cornell Greene ("the Greenes") contracted to purchase a home to be built by First Texas Homes, Inc ("First Texas"). The contract contained an arbitration clause with very broad language. The Greenes subsequently sued First Texas for breach of contract, breach of warranty, fraud, negligence, violations of the Texas Deceptive Trade Practices Act, Texas Fair Housing Act, federal Fair Housing Act, and intentional infliction of emotional distress. Some of these claims stemmed from allegations of racial discrimination. First Texas moved to compel arbitration pursuant to the Federal Arbitration Act. The trial court granted the motion for all pleaded claims except for the claims arising from the allegations of discrimination. After being denied mandamus relief by the appellate court, First Texas petitioned the Texas Supreme Court to compel arbitration for the remaining claims.

HOLDING: Writ conditionally granted.

REASONING: In *Prudential Securities Inc. v. Marshall*, the court upheld an arbitration agreement in an employment contract that stated the parties agreed to arbitrate "any dispute, claim or controversy that may arise between [them]." 909 S.W.2d 896 (Tex. 1995). Citing *Prudential*, the court concluded the arbitration agreement between the Greenes and First Texas

was equally broad and enforceable. The Greenes' contract included an agreement to arbitrate all claims, "arising out of this Agreement or other action performed…by [First Texas]." The court ruled the claims of discrimination and conduct occurring after the execution of the contract were covered by the arbitration agreement. The other arguments presented by the Greenes were not considered because the Greenes did not petition the court for affirmative relief.

FEDERAL ODOMETER ACT REQUIRES PROOF OF INTENT FOR CIVIL DAMAGES

Gourrier v Joe Myers, 115 S.W.3d 570 (Tex. App.—Houston. [14 Dist.], 2002).

FACTS: Steven Gourrier (buyer) purchased a used car and an extended warranty from Joe Myers Motors, Inc. (seller). Three years later, after the buyer drove the car over 80,000 miles, the car began to leak engine oil. The buyer attempted to have the car repaired under the warranty, but was unable to do so because the car had been driven over the 100,000 mile limit contained in the warranty. Because the buyer could not get the car repaired under the warranty, he continued to drive it without any repairs until it became inoperable. The buyer then stopped making monthly payments on the car, and it was repossessed.

The facts of the purchase are as follows: The seller represented to the buyer that he, the seller, owned the car and had authority to sell it. The seller had given a signed draft to Dealer's Auto Auction for the car, but had not yet paid the draft. The buyer signed a Retail Installment Contract and a Power of Attorney while at the dealership. The seller then assigned the Installment Contract to Arcadia Financial Ltd., and used the money from Arcadia to pay the Dealer's Auto Auction sight draft. The seller received the car's certificate of title from the Dealer's Auto Auction, typed and signed buyer's name on the certificate, and forwarded it to buyer. The seller did all this under the power of attorney, which seller obtained for that purpose.

The buyer signed an odometer disclosure statement disclosing the car's correct mileage on the date of the sale. The buyer alleged errors in the documents relating to his initial purchase, and contends that he is entitled to a full refund (without offset for the three years of driving) plus additional damages. The buyer alleges violation of the Federal Odometer Act, Texas Certificate of Title Act, Federal Truth in Lending Act, Texas Deceptive Trade Practices—Consumer Protection Act, fraud, breach of fiduciary duty, respondeat superior, and negligence. The district court entered no-evidence summary judgment for the seller. The buyer appealed.

HOLDING: Affirmed.

REASONING: Intent to defraud under the Federal Odometer Act may be inferred if a transferor lacks knowledge of the disclosure violation only because he "displayed a reckless disregard for the truth" or because he "closed his eyes to the truth." *Suiter v. Mitchell Motor Coach Sales, Inc.*, 151 F.3d 1275, 1282 (10th Cir.1998). The seller did not act with requisite intent to defraud the buyer, despite the fact that the buyer did not personally sign the odometer section on certificate of title, and the form used by the seller did not comply with 49 C.F.R. section 580.13. When a lienholder has possession of the certificate of title at the time of the transfer of ownership, a dealership may use an odometer disclosure statement and power of attorney to complete the required section on the certificate of title once it is received. Although the form used by the seller did not comply with 49 C.F.R. section 580.13, this not evidence that the buyer was defrauded about the car's mileage. The trial court properly granted seller's motion on this ground.

DTPA PREEMPTED BY CARMACK AMENDMENT

Hoskins v. Bekins, 343 F. 3d 769 (5th Cir. 2003).

FACTS: Eugenia T. Hoskins ("Hoskins") contracted with Bekins Van Lines ("Bekins") to store her personal belongings in a storage facility in Houston, Texas, and then have them shipped to her new place of residence in Virginia. Hoskins alleged that at the time of delivery in Virginia she noticed some of her possessions were damaged or missing. She filed an insurance claim with Bekins and was paid the contractual liability limit of $70,000. Hoskins then filed suit in state court claiming negligence, breach of contract, and violations of the Texas Deceptive Trade Practices Act ("DTPA"), seeking an additional $108,437.00 in damages.

Bekins removed the case to federal district court based on the Carmack Amendment ("Carmack") to the Interstate Commerce Act and filed a motion to dismiss Hoskins' state law claims based on federal pre-emption. The district court ordered that Hoskins' state claims were pre-empted by Carmack and granted summary judgment to Bekins.

Hoskins appealed, alleging that the district court lacked subject matter jurisdiction because her case did not arise under Carmack or any other federal provision.

HOLDING: Affirmed.

REASONING: The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. *Richardson v. United Steelworkers of Am.*, 864 F.2d 1162, 1168 n. 6 (5th Cir.1989) (citing *Franchise Tax Bd. v. Const. Laborers Trust*, 463 U.S. 1, 8 n. 7, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983)). The Supreme Court recently stated, "a state claim may be removed to federal court in only two circumstances—when Congress expressly so provides, or when a federal statute wholly displaces the state-law cause of action through complete pre-emption." *Beneficial Nat'l Bank v. Anderson*, 123 S.Ct. 2058, 2062 (2003). This case, therefore, was only properly removed to federal court if the Carmack Amendment completely pre-empted all state law claims.

In order to demonstrate complete pre-emption over a plaintiff's otherwise purely state law claims, the defendant must show that there is a clear Congressional intent that claims brought under the federal law be removable.

In order to demonstrate complete pre-emption over a plaintiff's otherwise purely state law claims, the defendant must show that there is a clear Congressional intent that claims brought under the federal law be removable. The proper inquiry focuses on whether Congress intended the federal cause of action to be exclusive rather than on whether Congress intended that the cause of action be removable. The Supreme Court has stated "with the enactment in 1906 of the Carmack Amendment, Congress superseded diverse state laws with a nationally uniform policy governing interstate carriers' liability for property loss." *New York, N.H. & H.R. Co. v. Nothnagle*, 346 U.S. 128, 131, 73 S.Ct. 986, 97 L.Ed. 1500 (1953). The Carmack Amendment provides the exclusive cause of action for loss or damage to goods arising from the interstate transportation of those goods by a common carrier. *Air Products & Chems., Inc. v. Ill. Central Gulf R.R. Co.*, 721 F.2d 483, 484-85 (5th Cir.1983).

Because the Carmack Amendment provides the exclusive cause of action for such claims, the court found that Hoskins' claims against carrier for negligence, breach of contract, and violation of the Texas Deceptive Trade Practices Act only arose under federal law and were completely preempted by the Carmack Amendment. The court, therefore, held removal was proper.

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

Delta Air Lines, Inc. v. Black, ____ S.W.3d ____ (Tex. 2003).

FACTS: Robert Black ("Black") purchased two first-class roundtrip Delta Airlines ("Delta") tickets. The invoice from Black's travel agent showed two first class reservations for Black and his wife. However, the Delta gate supervisor, Al Perez ("Perez"), stated that while there was a confirmed first-class seat for Mr. Black, there was only a confirmed coach seat for his wife because Delta had over-sold the flight. Since Delta was not able to give Black's wife a first class seat, it offered the Blacks several alternatives, all of which included free travel vouchers. Instead of choosing one of the alternatives, the Blacks chartered a private plane at a cost of $13,150.

Black sued Delta and Perez for breach of contract, fraud, and negligent misrepresentation. Delta and Perez moved for summary judgment on four grounds, including pre-emption under the Airline Deregulation Act ("ADA"). The trial court granted summary judgment for Delta and Perez. The court of appeals reversed the trial court's judgment and remanded the case for trial. The Texas Supreme Court granted petition for review.

HOLDING: Reversed and rendered.

REASONING: The Airline Deregulation Act of 1978 provides that states "may not enact or enforce a law…related to a price, route, or service of an air carrier…" 49 U.S.C. § 41713(b)(1). These "specific federal regulations" have a national purpose in that they provide a uniform system of compensation to passengers. If passengers were permitted to challenge airlines' boarding procedures under state common law, the airline industry would potentially be subject to regulation by fifty different states. *Smith v. Am. W. Airlines, Inc.*, 44 F.3d 344, 347 (5th Cir. 1995). This could create extensive multi-regulation litigation, launching inconsistent assaults on federal deregulation in the airline industry every time an airline reassigned a passenger's seat. Because state claims relating to airlines' services would conflict with the purpose of the ADA, those claims are pre-empted by way of the Supremacy Clause. U.S.C.A. Const. Art. 6, cl. 2.

When Black bought the airline tickets, he formed a binding contract of carriage with Delta based on Delta's transportation services. Because the contract was based on Delta's services, the ADA applied and pre-empted Black's ability to bring a state breach of contract claim against Delta. Because the fraud and misrepresentation claims were also based on Delta's services, namely its ticketing and boarding procedures, they also were pre-empted by the ADA.

CLASS CERTIFICATION OF BREACH OF WARRANTY CASE REVERSED

Polaris Indus., Inc. v. McDonald, ____ S.W.3d ____ (Tex. App.—Tyler 2003).

FACTS: In May 1995, Larry McDonald purchased two personal watercrafts ("PWCs") manufactured by Polaris Industries, Inc. McDonald purchased the PWCs from American Outdoor Power, a Polaris dealership. Although McDonald conceded that neither he nor any member of his family had suffered a physical injury from the PWCs, McDonald felt the PWCs were inadequate in avoiding collisions because they did not have brakes, nor could they be maneuvered without application of the throttle.

McDonald filed a class action asserting causes of action for breach of the implied warranty of merchantability and violation of the Magnuson-Moss Warranty Act. McDonald requested the cost of repair or replacement, or the loss in value of the PWCs resulting from the claimed inadequacies.

The trial court certified the class. Subsequently, Polaris Industries and Randy Ballard of American Outdoor Power filed an interlocutory appeal.

HOLDING: Reversed.

REASONING: For a class certification to be appropriate, Texas rules of civil procedure section 42(b) requires that common questions of law or fact predominate over individual questions. For each determination as to the existence of an implied warranty, an individuaized inquiry must be made into the knowledge and particular circumstances of the buyer as well as the actions of the seller. This inquiry is necessary because there is no implied warranty of merchantability when the buyer, prior to entering into the contract, has examined the goods or has refused to

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examine the goods when that examination would have revealed the alleged defect to him. TEX. BUS. & COM. CODE ANN. § 2.316 cmt. 8 (Vernon 1994). The court found that in classes such as this, where actual knowledge of each class member is a key issue, individual issues will always predominate, and certification is inappropriate.

Texas Rules of Civil Prodedure Section § 42(b)(4) also requires courts to determine a class action to be "superior to other available methods for the fair and efficient adjudication of the controversy." In determining the superiority of a class action, the issue of collateral estoppel or claim preclusion must be considered. The court found certification of this class could result in a scenario where a purchaser of a PWC manufactured by Polaris injures himself, and by claiming under a breach of warranty or products liability theory, is collaterally estopped from claiming the PWC to be unreasonably dangerous due to a safety defect.

Finally, the court noted that under the Federal Boat Safety Act ("FBSA") 46 U.S.C.A. §§ 4301-4508 (West Supp. 2002), the United States Coast Guard has exclusive authority in regulating the design of PWCs. The Coast Guard is presently engaged in a review of the off-throttle steering design of the PWCs, which may result in a recall of the PWCs. In considering possible prejudice to class members, and the Coast Guard investigation, the court found a class action not to be the superior method of dispute resolution in this case.

TCPA APPLIES TO INTRASTATE CALLS

Omnibus International v. AT&T, 111 S.W.3d 818 (Tex. App.—Dallas 2003).

FACTS: Between January and April of 2000, AT&T sent seven or eight unsolicited facsimiles to Omnibus without prior consent. Omnibus brought suit under the Telephone Consumer Protection Act, 47 U.S.C. §277(b)(1)(C), which prohibits sending unsolicited facsimile advertisements, and the Texas Code, which permits a private right of action for violations of the TCPA. TEX. BUS. & COMM. CODE ANN. §35.47(g). The trial court granted AT&T's motion for summary judgment, finding that the TCPA did not apply to intrastate calls.
HOLDING: Reversed and remanded.
REASONING: Federal principles of statutory construction dictate that the TCPA applies to intrastate calls because the plain language, legislative history, and Federal Communication Commission's interpretation support such a finding. The TCPA originally restricted only interstate calls, but was amended to apply to intrastate facsimiles, showing congressional intent for intrastate application in its plain language. Legislative history divined through congressional records refers to the deliberate limitation of both interstate and intrastate unsolicited calls. Furthermore, the TCPA charged the FCC with promulgating rules and administration, and in a public notice, the FCC explicitly stated the TCPA applies to intrastate calls.

Construing the invoked state legislation required not rendering any part of the statute inoperative, superfluous or without legal effect. *In re Canales*, 52 S.W.3d 698 (Tex. 2001). Section 35.47(g) of the Texas Business and Commercial Code contained an amendment granting a private right of action against violations of section 35.47 or the TCPA. AT&T contended that a TCPA claim under subsection (g) must reach only interstate calls because construing a TCPA claim to reach intrastate calls would effectively supersede existing state legislation, leaving the state legislation without legal effect. However, a private TCPA claim under section 35.47 of the Texas Code needed not apply only to interstate calls because state-law regulations apply to all intrastate facsimiles, regardless of content, extending beyond the federal prohibitions of only unsolicited facsimiles.

DEBT COLLECTION

PRIVATE COLLECTIONS AGENCIES COLLECTING STUDENT LOANS ARE SUBJECT TO FAIR DEBT COLLECTION PRACTICES ACT

Kort v. Diversified Collection Servs., Inc., 270 F.Supp.2d 1017 (N.D.Ill. 2003)

FACTS: Defendant Diversified Collection Services, Inc. ("DCS") is a collection agency that collects delinquent student loans. DCS's collection services includes telephone contact with borrowers to negotiate repayment arrangements, and to recommend clients whose accounts should be put into administrative wage garnishment. When a client, either at DCS's recommendation or on its own initiative, requests that a defaulting borrower be subjected to wage garnishment, DCS prints and mails a 30 day notice to the defaulting borrower indicating that garnishment will occur unless specified actions are taken.

On February 5, 2000, DCS printed such a letter on behalf of DCS's client, the Illinois Student Association Commission ("ISAC") and mailed the letter to Elizabeth Kort on February 7, 2000, in an attempt to collect a loan to Kort by ISAC. The letter stipulated that unless Kort complied with the requirements of the letter by March 6, 2000, payroll deductions would be ordered. Specifically, Kort was required to establish a written repayment agreement with DCS or remit the balance in full. Kort may claim an exemption to the demand by submitting written proof that she has been involuntarily separated from employment. Wage garnishment may then be stayed until Kort has been continuously employed for twelve months. The letter is identical to a form notice of administrative wage garnishment drafted in 1998 by the Department of Education ("DOE").

Kort claims that the letter is in violation of sections 1692e and 1692e(5) of the Fair Debt Collections Practices Act ("FDCPA") by threatening garnishment sooner than Kort is legally entitled to do so and by requiring Kort to document or provide written proof of her eligibility for an exemption by