DECEPTIVE TRADE PRACTICES AND WARRANTIES

PARTIES MAY SHORTEN STATUTE OF LIMITATIONS PERIOD FOR BREACH OF WARRANTY

WARRANTY CAUSE OF ACTION ACCRUES AT TENDER OF DELIVERY

Conquest Drilling Fluids, Inc. v. Tri-Flo Int'l, Inc., 137 S.W.3d 299 (Tex. App.—Beaumont 2004).

FACTS: Tri-Flo executed a contract to build oilfield equipment for Coastal Mud, Inc., who sold the equipment and litigation rights concerning the equipment to Conquest Drilling ("Conquest"). Conquest subsequently sued Tri-Flo alleging that the equipment never worked.

The trial court granted summary judgment for Tri-Flo on a variety of claims, and the jury returned a verdict for Conquest on its breach of contract and breach of warranty claims, and awarded Conquest $553,172.48 in damages on each claim. The trial court granted Tri-Flo's JNOV motion in part, and signed a judgment in favor of Conquest for $188,851 in actual damages for the breach of express warranty claim. Tri-Flo also argued that the breach of warranty and contract claims presented by Conquest were barred by the two-year statute of limitations provision contained in the contract. The trial court denied a directed verdict on the limitations issue. Tri-Flo also argued that the court erred in not submitting a question asking the jury to find what date tender of delivery occurred for the purpose of determining the statute of limitations. Both parties appealed the trial courts decision.

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

REASONING: Texas law states, "By the original agreement the parties may reduce the period of limitation to not less than one year...." Tex. Bus. & Com.Code Ann. § 2.725(a) (Vernon 1994). The two-year statute of limitations set in the contract was more than the one year required by the Texas Business and Commercial Code, so the court allowed the statute of limitations provision to stand.

For the purpose of determining when the statute of limitations stared to run on the breach of warranty claim, the court construed the term "tender" to refer to an offer of goods "under a contract as if in fulfillment of its conditions even though there is a defect when measured against the contract obligation." Tri-Flo argued that they offered the goods up for tender on February 15th, 1996. The suit was filed on June 22nd, 1998, outside of two years. Conquest presented evidence that in June of 1996 they were still performing tests on the equipment, prior to taking possession and the equipment was not completed in February. The court of appeals held that a fact issue regarding the time of tender existed and that a directed verdict on statute of limitations would have been improper.

The court also held that the trial court erred in failing to include a question about when the date of tender occurred. "The manner of due tender of delivery is subject to the parties' agreement and the Code provisions governing shipping terms, as well as the Code's official provisions." The court construed "tender" in this context to mean "an offer of goods under a contract as if in fulfillment of its conditions even though there is a defect when measured against the contract obligations." The court concluded that, for purposes of determining when the statute of limitations on the breach of warranty claim began to run, the appropriate date was the date of tender of delivery.

COURT DISCUSSES THE RCLA'S REQUIREMENTS

F & S Constr., Inc. v. Saidi, 131 S.W.3d 94 (Tex. App.—San Antonio 2003).

FACTS: In September of 1997, Max and Elsa Saidi executed a construction contract with F & S Construction ("F & S") to build their home. After the Saidis failed to get F & S to remedy problems with the construction, the Saidis sent a letter to F & S instructing the builder not to return to the property. In December of 1998, F & S filed suit to collect on the debt owed under the contract. The Saidis filed an answer and a counterclaim within that same month. The counterclaim listed four specific allegations of defects in support of a breach of contract allegation. In June of 2001, F & S filed a "Request for Inspection and Entry Upon Property" to gain access to the Saidis' home. F & S and their expert were subsequently allowed to inspect the property. In May of 2002 F & S filed a plea in abatement, alleging that the Saidis had not complied with the Texas Residential Construction Liability Act ("RCLA") by failing to provide reasonable specificity of the construction defects alleged in their counterclaim and by failing to provide a reasonable opportunity to inspect the property. The plea in abatement was denied.

Following a trial, the jury found for the Saidis and awarded them $170,000 in damages, attorney's fees, and interest. F & S appealed the trial court's denial of its plea in abatement and the judgment of the trial court.

HOLDING: Affirmed.

REASONING: The Court began by noting that although the RCLA required that a claimant seeking damages arising from a construction defect must give the contractor written notice of the defect sixty days before filing suit, such notice was not required when the complaint regarding the construction defect was asserted as a counterclaim. Absent such notice, the counterclaim must specify in reasonable detail each construction defect that was the subject of the complaint. The Court also noted that the RCLA additionally required that a contractor had to be given: 1) reasonable opportunity to inspect and have inspected the property that was the subject of the complaint and; 2) the opportunity to make a reasonable offer of settlement, including an agreement by the contractor to repair or have repaired any construction defect described in the counterclaim and a description, in reasonable detail, of the kind of repair which would be made. Both the inspection and the offer had to be made within 60 days of the service of the counterclaim. Analyzing each of the issues raised by F & S, the Court held: 1) There was more than a scintilla of evidence to support the jury's determination that the Saidis' counterclaim described the

defects with enough specificity to meet the RCLA's requirement, and the finding by the jury was not so against the great weight and preponderance of the evidence as to be manifestly unjust; thus the jury's determination was both legally and factually sufficient. 2) Since F & S was given access to the property following its request to inspect, there was more than a scintilla of evidence to support the jury's finding that the Saidis met the RCLA's reasonable opportunity to inspect requirement, and the finding by the jury was not so against the great weight and preponderance of the evidence as to be manifestly unjust; thus the jury's determination on the second issue was also both legally and factually sufficient. 3) Since F & S was given proper notice and opportunity to inspect, and since the Saidis timely filed a response to the plea with controverting affidavits (preventing an automatic abatement), the necessary RCLA requirements were met. Absent evidence of abuse of discretion by the trial court regarding the RCLA prerequisites, the plea in abatement was properly denied. 4) Since F & S failed to make a reasonable settlement offer after its inspection describing in reasonable detail the repairs to be effected, the RCLA mandated the loss by F & S of the benefit of all limitations on damages and defenses to liability provided for by the RCLA. This included limitations on both the types and amount of damages recoverable by the Saidis.

DTPA WARRANTY CLAIM IS NOT ASSIGNABLE

IMPLIED WARRANTY ACTION UNDER DTPA MAY NOT BE BROUGHT AGAINST MANUFACTURER

PPG Industries, Inc. v. JMB/Houston Centers Partners Limited Partnership, ____ F.3d ____ (Tex. 1994).

FACTS: Houston Center Corporation ("HCC") built a forty-six-story skyscraper in downtown Houston in April 1978. The exterior included more than 12,000 Twindows, a dual-pane glass window unit manufactured and installed by PPG. By July of 1982, a large number of the Twindows showed fogging and discoloration. At HCC's request, PPG manufactured and installed replacements for one-fourth of the building's windows pursuant to a contractual warranty. Several years later, HCC entered negotiations to sell the skyscraper to JMB. During its due diligence, JMB learned of the earlier window problems, and when JMB inquired whether any warranties still applied, PPG replied that all had expired.

JMB bought the building "as is" in December 1989 as part of a $375 million purchase. HCC assigned to JMB all warranties relating to the building, and JMB waived all Deceptive Trade Practices Act ("DTPA") claims against HCC. When extensive Twindows problems appeared in 1991, JMB sued PPG for violating the DTPA and breaching warranties issued to HCC. A jury found for JMB on all claims, assessing the cost to replace every Twindow in the building with comparable but nondefective window units at $4,745,037. The trial court trebled the award under the mandatory provisions of the 1973 DTPA. The appellate court upheld the ruling and PPG appealed.

REASONING: Reversed and remanded.

HOLDING: The DTPA, unlike the UCC, is silent on the assignability of claims, so the court looked to the legislative intent and common law for guidance. The legislative intent of the DTPA is to encourage aggrieved consumers to seek redress and to deter unscrupulous sellers who engage in deceptive trade practices. Woods v. Littleton, 554 S.W.2d 662, 669 (Tex.1977). Making DTPA claims assignable would have just the opposite effect: instead of swindled consumers bringing their own DTPA claims, they would be brought by someone else. The Legislature did not intend the DTPA for everybody; it limited DTPA complaints to "consumers," and excluded a number of parties and transactions from the DTPA. If DTPA claims can be assigned, a party excluded by the statute (such as JMB here) could nevertheless assert DTPA claims by stepping into the shoes of a qualifying assignor. This would frustrate the clear intent of the Legislature.

The court also stated that, first the DTPA's treble-damage provisions were intended to motivate affected consumers, not provide the opportunity to traffic such claims. Second, appraising the value of a chose in action is never easy, due to the absence of objective measures or markets. Consumers are likely to be at a severe negotiating disadvantage with the kinds of entrepreneurs willing to buy DTPA claims cheap and settle them dear. The result of making DTPA claims assignable is likely to be that some consumers will be deceived twice. Third, in many cases consumers may not even know they have DTPA claims when they sign a general assignment included in contractual boilerplate. If such assignments are valid, the claims meant to protect consumers will quite literally be gone before they know it. If DTPA claims may be assigned to subsequent buyers like JMB, treble damages will often go to wealthy entrepreneurs rather than the consumers who were actually defrauded. Additionally, assignability of DTPA claims may encourage some buyers to cooperate—if not collude—with a seller who may have been the one that actually misled them. For these reasons the DTPA claim was not assignable.

Unlike most other states, Texas adopted the UCC without choosing any of its three options concerning who may sue on warranties; instead, the Legislature expressly delegated that choice to the courts. Pursuant to that mandate, the court has held a downstream purchaser of a mobile home could bring implied warranty claims directly against a remote manufacturer, even though there was no privity of contract between them. Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77, 81 (Tex.1977). However, in Amstadt v. U.S. Brass Corp., this court held downstream purchasers of non-mobile homes could not bring DTPA claims against remote manufacturers and suppliers of a defective plumbing system, because the deceptive acts alleged were not committed against or communicated to them in connection with their own purchases. 919 S.W.2d 644, 649 (Tex.1996). JMB also asserted no DTPA claims in its own right, as it had no connection with PPG's original Twindows sale, and never saw any PPG advertisements or warranties before it bought the building. Thus, the court established a clear distinction between DTPA and warranty claims: a downstream buyer can sue a remote seller for breach of an implied warranty, but cannot sue under the DTPA. Clearly, if warranty claims are assignable because they are "property-based," DTPA claims must be something else; there must be a "personal" aspect in being "duped" that does not pass to subsequent buyers the way a warranty does.