MISCELLANEOUS

CONSUMER RECOVERS $20,000 UNDER FEDERAL ODOMETER ACT

Rivera Castillo v. AutoKirey, 379 F3d 4 (1st Cir. 2004).

FACTS: A husband and wife ("Plaintiffs") purchased a car from Autocentro ("Defendant") in late 1999 for $13,000. Defendant disclosed to Plaintiffs that the car had been previously titled, but the Defendant also represented to plaintiffs that the car had never been used. When Plaintiffs purchased the car, the odometer registered less than ten miles. According to Plaintiffs, the car developed various rattles and mechanical problems soon after they purchased it. Suspicious that their newly purchased car might not be so new, Plaintiffs investigated the car's title history and discovered that the car was imported by the distributor Toyota de Puerto Rico, then "consigned, delivered, and/or sold" to Defendant, who then sold the car to a car rental agency. Eventually, the car was sold back to the Defendant. Having determined that the prior owner was a car rental agency, Plaintiffs' suspicions were heightened, and they retained a master mechanic to inspect the car. The mechanic concluded that the car's odometer might have been altered. Plaintiffs filed suit in federal court, alleging violations of both Article 1802 of the law of Puerto Rico, and the federal Odometer Act.

The jury awarded the two plaintiffs $20,000 each in damages. According to the jury verdict form, the jury found that Autocentro intentionally defrauded Plaintiffs regarding the reading of the odometer. As a result, the district court trebled the award. After the district court entered judgment for Plaintiffs, the Defendant filed a post-trial motion for judgment as a matter of law and a motion for new trial or remittitur, both of which were denied. Defendant appealed from the jury verdict, the award of damages, and the district court's denial of defendant's post-trial motions for relief.

HOLDING: Affirmed in part, and reversed in part.

REASONING: The federal Odometer Act states, inter alia, that "[a] person may not...disconnect, reset, alter, or have disconnected, reset, or altered, an odometer of a motor vehicle intending to change the mileage registered by the odometer." 49 U.S.C. § 32703(2). In a case where the issue was properly raised, a substantial argument could be made that violations of the Odometer Act should be treated as a species of fraud, and the actual damages recoverable should be limited to pecuniary damages, which might include lost wages. In this case, however, the Defendant failed to preserve the evidence for appeal because it moved after judgment was issued, which was procedurally too late. The Plaintiffs called an expert witness to testify regarding the husband's economic losses caused by the problems with the car. According to the expert witness, who based his conclusions on information provided by the husband, the damages were as follows: $145 for repairs that would not have been incurred if the car was new; $4,532 that plaintiffs paid in excess of the actual value of the car; $1,000 in job-related taxi fares the husband incurred because of the unavailability of the car; $14,400 in lost income because the husband, a freelance court interpreter who charged $60 per hour, lost 240 working hours due to this case and a related administrative complaint; and $156 in simple interest at 6%. Defendant introduced no rebuttal witnesses regarding the extent of the husband's damages. Although the court characterized the award to the husband as generous, it was grounded in evidence adduced at trial and did not shock the conscience of the court. Therefore, the court could not conclude that the district court abused its discretion by refusing to disturb the jury verdict to the husband either by ordering a new trial or granting a remittitur of the damages.

However, with respect to the wife, the court found that her award was not supported by the evidence. The only evidence she provided was testimony that she "felt bad" about the whole situation, and the court deemed her award of $20,000 not supported by the evidence and remanded to the district court to award damages appropriate in light of the evidence.

TEXAS LAW BARS STATUTORY RECOVERY OF ATTORNEY'S FEES IN PROMISSORY ESTOPPEL CLAIM

Doctors Hosp. 1997, L.P. v. Sambuca Houston, L.P., ____ S.W.3d ____ (Tex. App.—Houston [14th Dist.] 2004).

FACTS: Show Business Entertainment, a music band, played at a Christmas party hosted by the Doctors Hospital at Sambuca, a restaurant. Doctors Hospital and Sambuca disputed who should have paid Show Business Entertainment for playing at the Christmas party. When no one paid, Show Business Entertainment brought suit against both parties. Sambuca ultimately paid the band and cross-claimed against Doctors Hospital, alleging that Doctors Hospital was responsible for the band's fee. At trial, Sambuca prevailed on its promissory estoppel theory, although it had also pleaded breach of contract. Sambuca's counsel then received permission from the court to reopen briefly to testify, over Doctors Hospital's objection, about anticipated attorney's fees in the event of an appeal. After trial, the court found Doctors Hospital liable based on promissory estoppel, and awarded statutory attorney's fees to Sambuca. Doctors Hospital appealed the award of attorney's fees.

HOLDING: Affirmed as modified to delete attorney's fee award.

REASONING: The Court held that as a matter of first impression, a statute allowing recovery of attorney's fees for a valid claim on oral or written contract, did not allow recovery of attorney's fees by a party that prevailed on a promissory estoppel theory. The Court modified the judgment to delete the attorney's fee award because Sambuca recovered on its promissory estoppel claim, which, under Texas law, is available to a claimant only when a valid contract does not exist. Under Civil Practice & Remedies Code section 38.001 (8), promissory estoppel does not create a contract, and a party can be successful on a promissory estoppel claim only when no valid contract exists. The plain language of section 38.001(8)

allows a court to award attorney's fees only when a party has a valid oral or written contract claim.

For many years, Texas courts have held that promissory estoppel becomes available to a claimant only in the absence of a valid and enforceable contract. See *Montgomery Indus. Int'l, Inc. v. Thomas Constr. Co.*, Inc. 620 F.2d 91, 95 (5th Cir. 1980). Thus, a claim for promissory estoppel and a contract claim are mutually exclusive claims under Texas Law, and a litigant cannot recover on one if it recovers on the other. Since they are mutually exclusive remedies section 38.001(8) cannot include a promissory estoppel claim. If the court were to hold otherwise, it would have had to: (1) ignore a long line of cases holding that a recovery under promissory estoppel means no valid contract existed; and (2) add a cause of action that the statute's plain language does not include. The court intended neither of these actions.

The court concluded by considering the reason some courts have given for allowing attorney's fees on a promissory estoppel claim: the statute's requirement that it should be construed liberally. When the legislature mandates the courts to construe a statute liberally, it does not give the courts authority to substantively change the statute. Adding an entirely new cause of action to the statute would substantively change it. In this instance, when the legislature required the courts to liberally construe the statute allowing recovery of attorney's fees for valid claims on oral or written contract, the legislature contemplated procedural issues, not substantive issues.

BUYERS IN THE ORDINARY COURSE OF BUSINESS TAKE TITLE FREE OF CREDITOR'S SECURITY INTEREST IN VEHICLE

First Nat. Bank of El Campo, TX v. Buss, 143 S.W.3d 915 (Tex. App.—Corpus Christi, 2004).

FACTS: Greg Dota, d/b/a Greg's Auto Sales, is a used car dealer. The First National Bank of El Campo, Texas ("FNB") provided Dota with inventory financing through a floor-plan loan agreement. The agreement gave FNB a first lien on all current and subsequently acquired inventory. FNB retained possession of the original certificates of title for the inventory of used cars. For each vehicle Dota sold he was to apply the sales proceeds to the loan and arrange for the release of the title from FNB. FNB perfected its security interest in Dota's inventory by filing a UCC-1 with the Texas Secretary of State.

In a series of separate transactions, Michael Buss and others ("Buyers") bought vehicles from Dota. Dota deposited the funds he received from the Buyers into his account at FNB. Dota was to obtain issuance of new certificates of title in the Buyers' names.

Thereafter, Dota defaulted on his promissory note to FNB. FNB made demand on both Dota and the Buyers to return the vehicles. Dota filed bankruptcy. The Buyers filed suit against FNB seeking a declaratory judgment that their purchases cut off FNB's security interest in the inventory. The trial court entered summary judgment in favor of the Buyers. FNB appealed.

HOLDING: Affirmed.

REASONING: The court found a conflict between two statutory schemes affecting the issue. The Texas Certificate of Title Act ("Act") provides that a motor vehicle may not be the subject of a subsequent sale unless, at the time of the sale, the owner designated in the certificate of title transfers the title. A sale in violation of this Act is void.

The Texas Business and Commerce Code ("Code"), on the other hand, provides, unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes performance with reference to the physical delivery of the goods. Title passes despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place. The Code protects a "buyer in the ordinary course of business" even though a security interest is perfected. Under the Code a "buyer in the ordinary course of business" is a person, who in good faith, and without knowledge that the sale violates the rights of another person in the goods, buys in the ordinary course of business from a person in the business of selling goods of that kind.

The court agreed with the Buyers' argument that the Code controls any conflict between the Act and the Code with regard to transfer of title and the effect on FNB's security interest. The court found the Legislature's mandate, in the event of conflict, is that the provisions of the Code apply. The court cited section 501.005 of the Act, "Chapters 1-9, Business and Commerce Code, control over a conflicting provision of this chapter."

The court rejected FNB's assertion that because the sales were not completed in accordance with the Act and were therefore void under the Act, the provisions of the Code did not come into play. The court examined cases which found no conflict between the Act and the Code with regard to third-party rights so as to trigger the preemption provision in the Act. Under this analysis, a third party's perfected security interest is not interrupted when a purported buyer attempts to purchase an automobile without receiving title as required to complete a sale under the Act. The court found that these cases did not address the situation presented by a priority dispute between a floor-plan financier and individuals claiming to be buyers in the ordinary course of business.

The court concluded that application of the Code in this case would facilitate the creation of a uniform system of laws that would meet the reasonable expectations of those who engage in commercial transactions. The court found the Act and the Code conflicted with regard to when legal title passed in the circumstances of this case and held that the provisions of the Code controlled to establish the relative rights of a floor-plan financier and a purchaser of a used vehicle from a dealer. The court affirmed the trial court's judgment in favor of the Buyers.

A CONSUMER SUIT BETWEEN A TEXAS RESIDENT AND A NATIONAL BANK CAN BE REMOVED TO FEDERAL COURT

Horton v. Bank One, N.A., ____ F.3d ____ (5th Cir. 2004).

FACTS: Sarah Jenkins Horton filed suit against Bank One in Texas state court alleging violations of several consumer-

protection-type statutes in regards to an installment contract she had with Bank One. In February 2003, Horton sent a settlement offer to Bank One. This offer put Bank One on notice for the first time that the amount of controversy exceeded $75,000. Bank One immediately removed the case to federal district court. Horton moved to remand to state court, arguing that there was no federal jurisdiction because complete diversity of citizenship was lacking. The district court rejected Horton's reasoning and denied her motion to remand to state court. The 5th Circuit accepted Horton's interlocutory appeal.

HOLDING: Affirmed.

REASONING: The specific issue certified for this appeal was whether national banking associations were citizens of every state in which they had a branch. 28 U.S.C. § 1348 provides that for purposes of diversity jurisdiction, "[a]ll national banking associations shall . . . be deemed citizens of the States in which they are respectively located." The court had to decide the meaning of "located." Horton argued that Bank One was a citizen of Texas because it had branches in Texas. Bank One claimed that it was a citizen only of Illinois: the state of its principal place of business and the state listed in its organization certificate.

In *Firstar Bank, N.A. v. Faul*, 253 F.3d 982, 994 (7th Cir. 2001), the 7th Circuit held that "for purposes of 28 U.S.C. § 1348 a national bank is 'located' in, and thus a citizen of, the state of its principal place of business and the state listed in its organization certificate." Firstar analyzed the text, history, and purpose of section 1348 and its predecessors. The history of section 1348 and its predecessors made plain Congress's intent to grant national banks and state banks and corporations equal access to diversity jurisdiction. A state bank under 28 U.S.C. § 1332(c)(1), may be a citizen of no more than two states: the state where its principal place of business is located and its state of incorporation. Maintaining jurisdictional parity between a national and state bank require that the national bank have no more than two possible states of citizenship.

The 5th Circuit followed the logic of Firstar. The court reasoned that because section 1348 did not have any language modifying or rejecting the interpretive understanding that came with its predecessors, it should presume that Congress intended to retain and incorporate the existing interpretive backdrop. The court held that the definition of "located" in section 1348 was limited to the national bank's principal place of business and the state listed in its organization certificate and its articles of association. Therefore, under 28 U.S.C. § 1348, a national bank is not necessarily "located" in every state in which it has a branch. The court affirmed the district court's ruling.

A CHAPTER 7 DEBTOR DOESN'T HAVE AN ABSOLUTE RIGHT TO CONVERT HIS CASE TO CHAPTER 13

In re Copper 2004, 314 B.R. 628, (6th Cir. B.A.P Tenn. 2004).

FACTS: John Copper ("Debtor") and his wife ("Ms. Copper") divorced in 1993. As part of the divorce settlement, Ms. Copper was awarded $2,000 per month alimony in future interests in several annuity contracts. In early 1997, Debtor was found in contempt of court and ordered to pay over $150,000 to Ms. Copper after misappropriating the funds for his own use. Debtor took advantage of several aspects of the Bankruptcy System to prevent Ms. Copper from collecting on the judgment, including a Motion to Set Aside Installment Payments on Garnishment (granted January 1997), and five different Chapter 7 petitions, which were all dismissed. In January 2002, Ms. Copper had garnishment of Debtor's wages reissued. Debtor filed his sixth Chapter 7 bankruptcy petition five weeks later. Ms. Copper subsequently filed an adversary action. The day before the trial on which the adversary action was set to begin, Debtor filed a motion to convert his case to Chapter 13. The bankruptcy court denied the motion to convert, stating Debtor would no longer be able to manipulate the Bankruptcy Code to avoid his obligations to his ex-wife and Debtor did not propose Chapter 13 in good faith. Debtor appealed.

HOLDING: Affirmed.

REASONING: The appellate court agreed with the bankruptcy court that Debtor's motion to convert to Chapter 13 should be denied because the proposal to convert was not made in good faith. Two lines of cases interpret this issue. One line holds that a debtor has an absolute right to convert to Chapter 13 if; (1) the case has not already been converted, and (2), the debtor meets the financial eligibilty requirements. *Miller v. U.S. Trustee*, 303 B.R. 471, 473 (10th Cir. BAP 2003). This court chose to use the second line of cases, which hold that the right to convert is not absolute and can be denied in extreme circumstances, such as bad faith. *Pequeno v. Schmidt*, 307 B.R. 568, 580 (S.D.Tex. 2004). If, upon review of the facts, the bankruptcy court finds the debtor's requests for conversion were made in bad faith or were an attempt to abuse the bankruptcy process, the court may deny the conversion. The court adopted a "totality of the circumstances" analysis when determining whether a debtor should be granted Chapter 13 conversion. In this case, the Debtor's motion to convert was made solely by a desire to avoid determination that Debtor was not entitled to a discharge and a desire not to repay his creditors. These desires were an improper attempt to manipulate the Bankruptcy Code.

The court adopted a "totality of the circumstances" analysis when determining whether a debtor should be granted Chapter 13 conversion.

RULE 68 OFFER INCLUDES ATTORNEY'S FEES UNLESS SPECIFICALLY EXCLUDED

McCain v. Detroit II Auto Fin. Ctr., 378 F.3d 561 (6th Cir. 2004).

FACTS: Rebekah McCain had experienced numerous difficulties with Detroit II Auto Finance Center and Bank One

while purchasing and financing a new automobile. As a result, she filed suit against Detroit II and Bank One seeking to invoke numerous federal and Michigan state consumer protection statutes. In both Count I and the "Request for Relief" section of her multi-count, amended complaint, McCain expressly requested the award of costs and attorney's fees.

Several months into litigation, Detroit II made an offer of $3,000 to allow judgment to be taken against it under Rule 68 of the Federal Rules of Civil Procedure as to all claims and causes of action in the case. McCain's timely acceptance of the offer triggered the entry of a $3,000 judgment in her favor. Shortly afterwards McCain filed a Petition of Taxation of Costs of $150 and a Petition for Attorney's Fees of $7,652.50. The District Court ruled against McCain in both respects, and McCain appealed

HOLDING: Affirmed in part, reversed in part.

REASONING: The court began by noting that Rule 68 speaks plainly of the consequences of acceptance or rejection of an offer on the award of costs, but is completely silent on the subject of attorney's fees. The only way that Rule 68 could directly implicate the award of such fees would be in situations where the fees were made an element of costs by statute (e.g., under 42 U.S.C. § 1988), or as a matter of contract. The court pointed out that under *Marek v. Chesny*, 473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985), a Rule 68 offer allows judgment to be entered against the defendant both for damages caused by the challenged conduct and for costs, regardless of whether or not the offer refers to cost at all. Thus, all costs properly awardable in an action are to be considered within the scope of Rule 68 costs. If a statute underlying an action defines costs to include attorney's fees, such fees may be included as costs for purposes of Rule 68.

In the case at bar, none of the statutes underlying McCain's amended complaint, nor any of the common law claims that McCain sought to advance, treated potentially awardable attorney's fees as costs. The offer by Detroit II, which echoed the language from McCain's own complaint and expressly embraced "all claims and causes of action for this case," left no room, in the court's opinion, for a post-offer effort by McCain to collect attorney's fees.

The court affirmed the district court's rejection of McCain's petition for attorneys' fees, but reversed the denial of McCain's request for an award of $150 in true costs.

MENTAL ANGUISH DAMAGES MAY NOT BE AWARDED FOR BREACH OF CONTRACT

Royal Maccabees Life Ins. Co. v. James, ____ S.W.3d ____ (Tex.App.—Dallas 2004).

FACTS: Vicki James ("James") is the surviving spouse of Donnie James, who died on June 5, 1998. Donnie James, was employed as a police officer for the City of Mesquite. This dispute arose out of a group life insurance policy issued by Royal Maccabees for City of Mesquite employees, including Donnie James. James contended that her husband was eligible for, elected, and paid premiums for $100,000 in benefits. Royal Maccabees paid a total of $50,000 in benefits after Donnie James' death and denied the additional $50,000 in benefits for which Donnie James had paid premiums.

James sued and at trial the jury found Royal Maccabees had breached the contract, violated the Deceptive Trade Practices Consumer Protection Act, violated the Insurance Code, breached its duty of good faith and fair dealing, and committed fraud. The trial court entered a judgment in the amount of $665,450.25, which included insurance benefits, mental anguish damages, damages for violation of the Insurance Code, punitive damages, attorneys' fees, and interest.

Royal Maccabees appealed, claiming that the evidence was legally and factually insufficient to support the award of mental anguish damages and that the trial court erred in submitting the mental anguish damages question.

HOLDING: Reversed and remanded.

REASONING: The court agreed with Royal Maccabees claim that the jury question on mental anguish damages contained error. In *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2000), the Texas Supreme Court held that it was error to submit a single, broad form damages question that contained both proper and improper elements of damages. In the present case, question 12 of the jury charge allowed the jury to award an amount for mental anguish if it answered "yes" to any one of several questions, among which was the question whether Royal Maccabees had breached the contract. The court recognized that a jury may not award mental anguish damages for a breach of contract. The court, found that the trial court erred in overruling Royal Maccabees objection. Such error was harmful because it was not possible for the court to determine that the jury did not improperly consider the breach of contract in deciding to award mental anguish damages and it prevented Royal Maccabees from isolating the error and presenting its case on appeal.

The court remanded the award of mental anguish damages to the trial court, and therefore did not need address Royal Maccabees' complaint that the evidence was factually insufficient to support the award of mental anguish damages.