DECEPTIVE TRADE PRACTICES AND WARRANTIES

DTPA DOES NOT APPLY TO TRANSACTION WHERE CONSIDERATION EXCEEDS $500,000

Citizens National Bank v. Allen Rae Investments, 142 S.W.3d 459 (Tex. App.—Fort Worth 2004).

FACTS: Allen Rae Investments ("ARI") was formed for the purposes of building, owning, and operating a Motel 6 in Decatur, Texas. ARI's principal, Ruth Ann Taylor, spoke by telephone with Don Lawson, a business development officer with Citizens National Bank ("CNB"), regarding financing the construction of the Motel 6, indicating a preference for a loan with a 10 percent down payment. Lawson met with Taylor and indicated to her that CNB could not finance a $1.8 million Motel 6 project with only 10 percent down, although a less expensive project was possible through another motel chain, Bed & Bath. Lawson also informed Ruth Ann that CNB would extend a U.S. Small Business Administration ("SBA") loan on the Bed & Bath project, but not on the Motel 6 project.

After several meetings with Bed & Bath, ARI submitted a detailed investment proposal to CNB and CNB approved a $600,000 loan for the project. After construction on the project began, subcontractors began to appear at the homes and places of employment of the ARI principals, complaining that they had not been paid and demanding payment. Materialmen and mechanic's liens were filed against the property, and the project ultimately failed after Bed & Bath abandoned it. CNB foreclosed and was eventually reimbursed by the SBA for 75% of the money advanced to Bed & Bath.

ARI filed suit against Bed & Bath, CNB, its affiliate Lender Asset Recovery ("LAR"), Lawson, and FAS Disbursments (a construction management firm hired by CNB), alleging DTPA violations, fraud, negligence, and negligent misrepresentation. At trial it was revealed that FAS had raised concerns about the Bed & Bath project, particularly with regard to advancing money before any work was performed. Ignoring the warnings by FAS, CNB authorized an initial $162,500 advance to Bed & Bath. CNB paid the advance as well as a second draw in February of 1999 without ever obtaining any documentation from Bed & Bath concerning how the money would be spent. ARI was never informed of FAS's concerns, and Lawson had convinced ARI to waive a performance bond because "FAS was just as good as a performance bond."

The trial court rendered a directed verdict that Don Lawson was acting in the course and scope of his employment at CNB and that CNB was thus vicariously liable for his acts. The trial court also held that CNB and Bed & Bath were each liable for each other's acts, and Bed & Bath was ordered to pay CNB 38% of any amount paid by or on behalf of CNB to ARI, plus interest. The judge entered a default judgment against Bed & Bath, and ARI and its principals were awarded approximately $1.2 million in damages, including attorney's fees. CNB, Lawson and LAR appealed.

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

REASONING: CNB contended on appeal that the trial court abused its discretion by allowing ARI to recover under the DTPA since the construction project in question involved total consideration of more than $500,000, making the DTPA inapplicable. ARI contended that because CNB had advanced less than $500,000 to ARI, the DTPA did apply. The court noted that the DTPA provides an exception to a cause of action arising from a transaction, a project, or a set of transactions relating to the same project, involving total consideration by the consumer of more than $500,000, other than a cause of action involving a consumer's residence. Though the issue thus seemed to be whether "consideration" involved only detriment actually incurred by the consumer or detriment that the consumer promised to incur, the court concluded that it was not necessary to reach this issue. At the time of foreclosure, the balance of principal and accrued interest due on the note was $463,193.45. Further, ARI paid $22,006.08 in interest on the note prior to default, and also paid CNB $122,096.81 at closing. As a result, at the time of foreclosure ARI's overall consideration actually incurred on the Bed & Bath project had exceeded $500,000. Because the project did not involve a consumer's residence, the court held that the DTPA did not apply to ARI's cause of action, and the trial court had abused its discretion in submitting the DTPA jury question, and in allowing ARI to recover from CNB under the DTPA.

DTPA ADDITIONAL DAMAGES ARE USED WHEN DETERMINING SMALL CLAIMS COURT JURISDICTION

Garza v. Chavarria, 155 S.W.3d 252 (Tex. App.—El Paso 2005).

FACTS: Hugo Chavarria ("Chavarria") took his vehicle to Manuel Garza ("Garza"), the owner of Sun City Cab Company, to have it repaired. Garza allegedly kept Chavarria's vehicle for over two months, failed to repair it, and caused additional damages to the car. Initially, Chavarria brought a pro se claim against Garza in justice court for $2,355. The original petition requested the full $2,355, which included $1,305 paid to Garza for repairs, $35 for towing, $600 for transportation costs, and $395 for repairing damages caused by Garza. Subsequently, Chavarria retained counsel and filed an amended petition claiming breach of contract and Deceptive Trade Practices Act ("DTPA") claims. In the amended petition, Chavarria sought $7,005 which included $1,305 paid to Garza for repairs, $430 for out-of-pocket expenses, $600 for loss of use of the vehicle, two times the portion of actual damages that did not exceed $1000, treble damages in excess of $1,000, and reasonable attorney's fees. The justice court rendered judgment for Chavarria in the amount of $5,000 plus $1,500 in attorney's fees. Garza appealed to the county court of law arguing the justice court and county court lacked jurisdiction over the issue because it exceeded the jurisdictional limit of $5,000. The court found Garza's argument unpersuasive and rendered judgment for Chavarria for $5,000 plus $2,500 attorney's fees. Garza appealed, arguing the county court erred by denying his

lack of jurisdiction argument.
HOLDING: Reversed and dismissed.
REASONING: The court recognized that neither damages which increase due to the passage of time nor an amended petition which increases the amount of damages affect the court's jurisdiction, unless the amended petition alleges a new cause of action for damages that exceed the court's jurisdictional limit. The justice court's jurisdiction was statutorily limited to cases less than $5000 excluding interest. The statute does not expressly exclude punitive damages or attorney's fees and therefore should be included when calculating the amount in controversy. The increased damages alleged in the amended petition were from the new DTPA cause of action and were not the result of the passage of time alone. The court found the amended petition damages of $7,005 clearly exceeded the justice court's jurisdictional limit. Chavarria argued that treble damages should not be considered in calculating the amount for the court's jurisdictional limit because they are punitive in nature. The court refused to apply this reasoning in their jurisdiction. Even though the county court's jurisdictional limit was $100,000 which would be more than enough for damages in this case, in its appellate court role, the county court was limited by the $5,000 limit of the justice court since the suit was originally filed with that court. Finally, Chavarria argued that the court should presume the defects in the original pleading were corrected by oral pleadings, but the court relied on the written amended petition stating all pleadings must be reduced to writing once the case is appealed to the county court.

Neither damages which increase due to the passage of time nor an amended petition which increases the amount of damages affect the court's jurisdiction.

COURT DISCUSSES PROFESSIONAL SERVICE EXEMPTION UNDER THE DTPA

SERVICE PROVIDER MAY MAKE EXPRESS WARRANTIES

LIMITATION OF LIABILITY CLAUSE UPHELD

Head v. U.S. Inspect DFW, Inc., 159 S.W.3d 731 (Tex.App.—Fort Worth 2005).

FACTS: Head entered into a written agreement with U.S. Inspect DFW, Inc. f/k/a Affordable Inspections, Inc. ("Affordable") for inspection of a home to be purchased by Head as a residence. The contract provided that a "licensed real estate inspector" would perform the inspection. The agreement also contained a clause that limited liability for "errors and omissions" to the amount paid for inspections, not to exceed $500.00. The contract was signed by Head and by John Fox, the inspector.

Fox, assisted by Jim Blaeser, an apprentice inspector, performed the inspection. According to Head, Blaeser inspected the roof and attic without supervision from Fox. Following the inspection, Fox prepared and signed a report. Blaeser did not sign the report. The report noted that the roof was performing its function as intended. After the purchase of the home, it was discovered that there was extensive damage to the home from leaks in the roof and that the roof had been improperly constructed and would likely have to be replaced. Reports obtained by Head stated that the extent of damage to the roof must have been developing over several years and would have been obvious to anyone familiar with proper roof construction methods and materials.

Head sued Affordable and Fox ("Appellees"), asserting: (1) breach of contract; (2) breach of implied warranty; (3) negligence; and (4) violations of the DTPA including violation of the laundry list provisions, breach of express and implied warranties, and unconscionable action or course of action.

The trial court granted summary judgment for Appellees, holding that they were exempt from the DTPA causes of action under the professional Services exemption. The court held, however, they were liable for negligence and breach of contract, but such claims were limited to $348.27, the amount paid for the inspection. The trial court disposed of the breach of implied warranty claim. Head appealed.
HOLDING: Affirmed in part, reversed in part, and remanded.
REASONING: The court first addressed Head's argument that the conduct of Appellees fell within four exceptions to section 17.49's professional Services exemption to DTPA liability.

First, the court disagreed that the inspection report misrepresented facts. Head asserted that Appellees made misrepresentations by promising in the inspection report to provide a "licensed real estate inspector" when, in fact, they did not, and by stating in the inspection report that inspected items were performing their intended function. Appellees expressly agreed to provide an inspection report that would "contain the opinion of the inspector." The court held the essence of the Services to be provided by Appellees was to render professional opinions. Likewise, in determining whether Head's misrepresentation claim concerning the promise to provide a licensed real estate inspector was barred by the professional Services exemption, the court looked to the underlying nature of the claim, which was breach of contract and negligence. Head did not raise a fact issue within the exception for misrepresentations not constituting "judgment, advice, or opinion."

Second, the court found that Appellees' failure to disclose information such as Blaeser's lack of qualifications did not fall within the second exception to the professional Services exemption. Mere nondisclosure of material information is not enough to establish a DTPA claim. Head had to show that Appellees intentionally withheld such information with the intent to induce her into the written agreement to inspect her house. The failure to disclose in this case occurred after entering into the transaction.

Third, the court held Head did not establish unconscionability, the third exception to the professional

services exemption. She failed to show how her lack of knowledge about residential construction was taken advantage of to a grossly unfair degree. Head was represented by an attorney while engaged in the purchase of her residence and was not without choice in selecting another company.

Fourth, the court examined Head's claim that Appellees breached an express warranty that did not constitute advice, opinion, or judgment and that her claim therefore fit within the fourth exception to the professional services exemption. Warranties actionable under the DTPA, both express and implied, must first be recognized by common law or created by statute. Texas law provides "any affirmation of fact or promise… which relates to the goods and becomes part of the basis of the bargain creates an express warranty…." Tex. Bus. & Com. Code Ann. § 2.313(a)(1) (Vernon 1994). The court distinguished between breach of warranty and breach of contract. When a party fails to deliver goods as promised, a breach of contract occurs, but when a seller delivers nonconforming goods, it is a breach of warranty. In this case, the contract provided that a "licensed real estate inspector" would conduct the inspection. Additionally, although Head did receive inspection services, they arguably did not conform to the quality of the services bargained for. The court concluded there was a fact issue as to whether Appellees breached an express warranty that a licensed inspector would perform the inspection in conformity with industry standards. Thus, summary judgment was not proper on this issue.

The court next addressed the limitation of liability clause and found it was not unconscionable. In the absence of controlling public policy to the contrary, contracting parties can limit their liability in damages to a specified amount. The court looked to the entire atmosphere in which the agreement was made, including the relationship of the parties and their bargaining power and whether there were legitimate commercial reasons for allowing limited liability. The limitation of liability clause was conspicuously set apart, enclosed in a box, and separately initialed by Head. Furthermore, Affordable was not the only home inspection Service available, Head obtained other inspections of the house during this time, and she was represented by a board certified real estate attorney.

The court affirmed summary judgment for the DTPA claims based upon misrepresentation, failure to disclose and unconscionability, as well as on the negligence and breach of contract causes of action. The court reversed the summary judgment as to the claim for breach of express warranty as a violation of the DTPA, and remanded that portion to the trial court.

DTPA DOES NOT APPLY TO TRANSACTION INVOLVING THE CONVEYANCE OF WHOLLY INTANGIBLE PROPERTY

Jabri v. Alsayyed, 145 S.W.3d 660 (Tex. App.—Houston [14th Dist.] 2004).

FACTS: Jabri ("Owner") owned several convenience stores in the Houston area. The Corporation operated most of the convenience stores. Owner leased Beltway Fast Stop to the Khatibs and in August 1998 he leased Broadway Fast Stop to Alsayyed. Both lessees paid the Corporation for the "goodwill" of the stores, paid a separate amount for the inventory, and paid to lease the premises. Owner represented to the lessees that the Fast Stop convenience stores were ongoing businesses with a good customer base and each would generate a profit of approximately $10,000 per month. Lessees did not realize the profits promised by Owner, instead they found themselves operating a businesses that did not have a substantial customer base. The stores were in unsavory locations, and were experiencing thefts and other crimes. The Khatibs filed suit against Owner and the Corporation ("Appellants") for alleged fraud and violations of the DTPA. Alsayyed intervened in the lawsuit, also suing Appellants for alleged fraud and violations of the DTPA. The jury found that Appellants had knowingly engaged in an unconscionable action or course of action that was a producing cause of damages to the lessees. Appellants appealed and among several points of error, contended the DTPA did not apply to Alsayyed's purchase of goodwill.

HOLDING: Affirmed.

REASONING: Appellants contended the trial court erred in upholding the jury's award of damages under the DTPA because the lessees were not consumers as contemplated by that statute. To pursue a DTPA cause of action, a plaintiff must be a consumer. The question of consumer status under the DTPA is a question of law for the court to decide. *Lukasik v. San Antonio Blue Haven Pools, Inc.*, 21 S.W.3d 394, 401 (Tex.App.—San Antonio 2000). To qualify as a consumer a plaintiff must meet two requirements: (1) the person 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. The DTPA excludes those transactions that convey wholly intangible property rights, which are not associated with any collateral services or goods. *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, 174-75 (Tex. 1980). In evaluating the lessees' consumer status, the court examined whether their objective was the purchase or lease of a good or service. Appellants contended that the lessees' DTPA claim was based solely on his purchase of the goodwill of the business, which was an intangible.

The court rejected Appellants' contention that the lessees were not consumers as contemplated by the DTPA. The court found that when the lessees acquired the businesses, they not only purchased goodwill, but also purchased the inventory of the store and services associated with operating it. Owner represented that he would help lessee learn how to operate the business including reporting sales tax and ordering inventory. Owner further provided the services of his brother to act as a bookkeeper during the first month lessee operated the business. These goods and services were an objective of the transaction and not merely incidental to it. Therefore, because the purchase included goodwill, inventory, and services, the court found the transaction between Appellants and the lessees involved the purchase or lease of goods and services for purposes of the DTPA.