RECENT DEVELOPMENTS

DECEPTIVE TRADE PRACTICES AND WARRANTIES

AUTO WARRANTY CANNOT EXCLUDE CONSEQUENTIAL DAMAGES

Razor v. Hyundai Motor Am., ___N.E.2d ___ (Ill. 2006).

FACTS: Plaintiff Shante Razor purchased a new Hyundai Sonata from Gartner Buick, Inc. ("Gartner"). As part of the purchase, Razor opted to add a remote starter and an alarm system. These optional upgrades were installed by Professional Sound Installers ("ProSound") *after* the original purchase date. One month after purchase, Razor encountered repeated failures in starting the vehicle using the key, resulting in Razor missing days of work. Gartner unsuccessfully attempted various repairs, all without charge to Razor. On the last of such occasions, the vehicle was in service for over two weeks. Afterwards, she experienced no problems with the vehicle. Four months after purchase, Razor sued Defendant Hyundai Motor America ("Hyundai") for breach of written warranty and breach of implied warranty of merchantability pursuant to the Magnuson-Moss Warranty Act. Razor also claimed violations under the Illinois New Vehicle Buyer Protection Act. The parties entered into arbitration, and the arbitration panel awarded Razor $6,500 plus attorney fees and costs. Hyundai rejected the arbitration award.

At trial, the warranty was entered into evidence. The warranty included a disclaimer of incidental and consequential damages. Razor testified at trial that she first saw the warranty after she had taken possession of the vehicle. The warranty was contained in the owner's manual, but the purchase contract itself did not refer to or contain the warranty. In response to Hyundai's directed verdict motion, the trial court ruled the warranty disclaimer was unconscionable and unenforceable. The jury found in favor of Razor and awarded her attorney fees and $8,500 in damages, of which $3,500 was for consequential damages. The jury found in Hyundai's favor on Razor's claim pursuant to the Illinois New Vehicle Buyer Protection Act. The appellate court affirmed. Hyundai appealed to the Illinois Supreme Court.

HOLDING: Affirmed.

REASONING: The Magnuson-Moss Warranty Act (the "Act") sets forth the requirements only for "full" warranties and supersedes state law to the extent that state law is inconsistent with the Act. Because the warranty in this case is "limited," the enforceability of the disclaimer is determined under the Illinois Uniform Commercial Code ("UCC"). Section 2—719 of the UCC states in part:

> (2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.
> (3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

In the instant case, the warranty included limitations to remedies and consequential damages. The jury found that the warranty's limited remedy failed its essential purpose and was unenforceable. The court focused on whether the failure of the limited remedy also defeats a disclaimer of consequential damages under subsection three.

To resolve the question, the court adopted the independent approach discussed in *Chatlos Sys. v. Nat'l Cash Register Corp.*, 635 F.2d 1081 (3d Cir. 1980). The independent approach considers disclaimers of consequential damages independent from other limitations on remedies. This approach is based on the different standards applicable to the two limitations; disclaimers of consequential damages are unenforceable if "unconscionable" while remedy limitations are unenforceable based on "failure of essential purpose." Thus, the two limitations are not mutually exclusive, and disclaimers of consequential damages should be upheld unless they are unconscionable.

The court focused on whether the failure of the limited remedy also defeats a disclaimer of consequential damages

While the independent approach is more aligned with the UCC and contract law, the court acknowledged the criticisms against the independent approach: that it is unfair to buyers who may not intend to renounce consequential damages when the limited remedy has failed its essential purpose and that it "encourages overly formalistic [contract] drafting." The court responded that another interpretation would render the disclaimer meaningless, because the disclaimer would be unenforceable when the limited remedy fails its essential purpose and the disclaimer would be inapplicable when the limited remedy does not. Moreover, under the independent approach, a seller's bad faith would still render the disclaimer of consequential damages unconscionable and thus, unenforceable. Also, the court considered encouragement of careful drafting a beneficial byproduct of using the independent approach.

Based on a combination of procedural and substantive factors, the court ruled that the disclaimer in the Hyundai disclaimer was unconscionable, thus affirming the lower court's ruling.

FILED RATE DOCTRINE BARS CONSUMER CLAIM OVER PHONE CHARGES

Balthazar v. Verizon Hawaii, Inc., 123 P.3d 194 (Haw. 2005).

FACTS: Verizon was authorized by the Hawai'i Public Utilities Commission ("HPUC") to charge a specific tariff, Tariff No.3, to customers electing to acquire Touch Calling service. The tariff was intended to apply to Touch Calling rates and whenever a customer was served by exchange lines equipped with Touch Calling capability. These lines possessed the ability to terminate on a Touch Calling instrument, regardless of whether or not that instrument was provided by the Telephone Company or by

the customer. Because Touch Calling service was optional for customers, Verizon offered the service to Hawaiian customers for an extra monthly fee. Consumers, however, were able to access and enjoy the Touch Calling services from their touch tone phones without paying the additional fee.

Plaintiffs' claimed that Verizon engaged in false, unfair, and/or deceptive practices in violation of Hawaii statutes because identical telephone services were provided to consumers who pay the fee and consumers who do not pay the fee. Plaintiffs, individually and on behalf of a class, filed a civil complaint against Verizon. Verizon filed its motion to dismiss, arguing that the complaints were barred by the filed rate doctrine. The court ultimately entered final judgment in favor of Verizon. Plaintiffs appealed.

HOLDING: Affirmed.

REASONING: The dual aim of the filed rate doctrine is to prevent service or rate discrimination among consumers and prevent courts from intruding upon the rate-making authority of federal agencies. The principal tenet of the filed rate doctrine is that a public utility can enforce payment for its services in accordance with its established tariff, notwithstanding an agreement to charge less. The doctrine eventually had been applied beyond the interstate transportation industry and across the spectrum of regulated utilities.

The court agreed with Verizon's argument that the filed rate doctrine barred Plaintiff's claims because the filed rate doctrine was applicable to public utilities. The Hawaii statutes expressly empowered the HPUC to fix rates, charges and practices of any public utility and to prohibit rebates and unreasonable discrimination between users and customers. The statutes provided that rates and charges should be filed with the HPUC and should not be departed from except on prior approval of the HPUC. The court held that pursuant to the filed rate doctrine, Plaintiffs claims fails as a matter of law because Verizon had complied with HPUC. The Plaintiffs could not demonstrate that Verizon's allegedly inadequate disclosures constituted an unfair or deceptive trade practice under Hawaii statutes. Plaintiffs were deemed to have constructive knowledge that the fees in question were properly chargeable by Verizon regardless of any misrepresentations Verizon may or may not have made. Moreover, the plain and unambiguous language of the tariff evinces the requirement that Touch Calling rates be paid in return for receipt of that service and under the filed rate doctrine, Plaintiffs were presumed to have knowledge of Verizon's tariff disclosures. For these reasons, the judgment in Verizon's favor was upheld.

THE MAGNUSON-MOSS WARRANTY ACT APPLIES TO CAR LEASES

Ryan v. Am. Honda Motor Co., Inc., ____ A. 2d ____ (N.J. 2006).

FACTS: Christopher Ryan entered into a vehicle lease with Burns Honda, an authorized dealer and repair facility for American Honda Motor Co., Inc. ("American Honda"). The vehicle carried a three-year/36,000 mile manufacturer's warranty. Ryan's lease agreement included the following relevant provisions: (1) "If the Vehicle is new, it is covered by the Manufacturer's New Vehicle Warranty," and (2) "Lessor assigns to me all of its rights in the above specified warranties." Fifteen months and 22,000 miles into the lease term, the vehicle developed engine problems. Burns Honda denied coverage under the manufacturer's warranty. Ryan's insurance company paid for the repairs, less a $2000 deductible. Ryan continued to have problems with the vehicle despite numerous repairs, and it was eventually repossessed.

In July 2001, Ryan filed a complaint against American Honda alleging that it violated the Magnuson-Moss Warranty Act and the New Jersey Consumer Fraud Act by failing to properly repair the vehicle. The trial judge dismissed these claims, holding that Ryan, as a lessee, was not a consumer under Magnuson-Moss and thus was not entitled to warranty protection. Because the judge found no breach of warranty, Ryan's New Jersey Consumer Fraud Act claim also failed. Ryan appealed and the appellate court reversed, declaring that a lessee is a consumer under Magnuson-Moss and because Ryan's Consumer Fraud Act claim was dismissed without analysis, it required further explanation by the trial judge. American Honda responded by filing a petition for certification to the New Jersey Supreme Court.

HOLDING: Affirmed.

REASONING: The Magnuson-Moss Warranty Act ("the Act") was enacted in response to the growing number of automobile owners complaining that automobile manufacturers and dealers were not performing in accordance with the warranties on their automobiles. The Act extends to "consumer [s] who [are] damaged by the failure of the supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract." 15 U.S.C.A. §§2310(d)(1). The Act permits a consumer to sue warrantors for damages and other relief including attorneys' fees. To bring an action under the provisions of the Act, the plaintiff must fall within one of three definitions of "consumer": (1) buyer (other than for purposes of resale) of any consumer product, (2) any person to whom such product is transferred during the duration of an implied or written warranty applicable to the product, and (3) any other person who is entitled by the terms of such warranty or under applicable state law to enforce against the warrantor the obligations of the warranty. 15 U.S.C.A. §2301(3).

In its decision to reinstate Ryan's Magnuson-Moss claim, the appellate court held that he satisfied the second and third definitions in the Act. The New Jersey Supreme Court affirmed the appellate court on the narrower basis that a lessee satisfies only the third definition: "any other person who is entitled by the terms of the warranty or under applicable state law to enforce the warranty." In its decision, the supreme court deferred largely to *Voelker v. Porsche Cars N. Am. Inc.*, 353 F.3d 516 (7th Cir. 2003) as persuasive authority. *Voelker* held that a new car lessee falls within the third definition of consumer under Magnuson-Moss because when the dealer assigned plaintiff the rights under the manufacturer's warranty the plaintiff was entitled under Illinois law to enforce the warranty. The defendant contended that the transaction was not within the scope of the "written warranty" because § 2301(6) of the Act specifically limits a "written warranty" to purposes other than

resale. The *Voelker* court acknowledged that the transaction was for resale, but held that the third definition of consumer under the Act does not require that the warranty meet the Act's definition as long as the warranty is enforceable under state law. Because Voelker was able to enforce the warranty at issue under Illinois state law, he was considered a consumer under the third definition of the Act and could pursue a Magnuson-Moss claim. Similarly, the New Jersey Supreme Court held that Ryan met the third definition of consumer under the Act because as the assignee of the dealer's warranty, he was entitled to enforce the warranty under New Jersey law.

FAXES SENT BEFORE SEPTEMBER 1, 1999 ARE NOT ACTIONABLE IN TEXAS STATE COURTS UNDER THE TCPA

The Chair King, Inc. v. GTE Mobilnet of Houston, Inc., 184 S.W.3d 707 (Tex. 2006).

FACTS: Plaintiffs brought suit against GTE Mobilnet and several other companies ("Defendants") in federal court after they allegedly received illegal faxes beginning in 1992 from Defendants advertising their products. The Fifth Circuit determined that the state court's jurisdiction was exclusive of, not concurrent with, federal jurisdiction. Plaintiffs then filled suit against Defendants in state court alleging, *inter alia,* a private damage claim under the Telephone Consumer Protection Act ("TCPA"). The court granted Defendants' individual and joint summary judgment motions and denied Plaintiff's motion for partial summary judgment.

The court of appeals affirmed the decision in part, and reversed in part. The claims affirmed included all the common law claims and certain plaintiff's TCPA claims which were deemed barred by the statute of limitations. Claims reversed by the court included the remaining plaintiffs' TCPA claims against GTE MobilNet. Both sides petitioned for review. The plaintiffs' challenged the statute of limitations and Defendants' argued the TCPA offered no cognizable private action claim because it lacked enabling legislation in Texas until 1999.

HOLDING: Affirmed in part, reversed in part.

REASONING: Section 227(b)(3) of the TCPA creates a private right of action for recipients of illegal faxes to recover monetary and injunctive relief. Section 227(b)(3) states "[a] person or entity may, *if otherwise permitted by the laws or rules of court of a state*, bring in an appropriate court of that state" an action for monetary and/or injunctive relief. 47 U.S.C. § 227(b)(3)(emphasis added). Defendants contended that the private right of action was not "otherwise permitted" by the state of Texas until enabling legislation was passed in 1999, while Plaintiffs' contended the federal statute needed no enabling legislation.

Congress chose to make the private action exclusive to state court proceedings.

After analyzing three approaches to interpretation of the statute, the court favored the "opt-in" interpretation. The court rejected the "acknowledgment approach", which asserts that states may not refuse to enforce a federal cause of action, finding that it's proposed interpretation of "otherwise permitted" as similar to the phrase "in an appropriate court of that state" would render the former phrase redundant and meaningless. The court rejected the "opt-out" interpretation, which allows the TCPA to immediately authorize a private right of action but allows states to legislatively decline to entertain them, finding the interpretation ignores the nature of the TCPA action that the federal statute created. This is because Congress chose to make the private action exclusive to state court proceedings.

In applying the "opt-in" approach, the court believed that "otherwise permitted" implied that the federal statute alone does not create an immediately enforceable right. The Congressional intent favored giving deference to the states because Congress was wary that states might immediately be flooded with unsolicited fax suits. The court rejected Plaintiffs' argument that the TCPA's limited preemption language precluded an "opt-in" approach. Accordingly, the court reversed the lower court's ruling in so far as it sustained claims against the Defendants.

UNSOLICITED TEXT MESSAGE VIOLATES TELEPHONE CONSUMER PROTECTION ACT

Joffe v. Acacia Mortgage Corp., 121 P.3d 831 (Ariz. Ct. App. 2005).

FACTS: In January and March 2001, Rodney Joffe received un-requested text message solicitations from Acacia Mortgage Corporation ("Acacia") on his cellular telephone. Acacia had sent e-mails to Joffe's cellular carrier's domain, and his carrier automatically converted the content of the solicitations into a format that could be transmitted to Joffe's cellular telephone number. Acacia was thus able to take advantage of a service provided to Joffe by his cellular telephone carrier known as Short Message Service ("SMS").

In April 2001, Joffe filed a complaint alleging Acacia had violated the Telephone Consumer Protection Act's ("TCPA") prohibition on using "any automatic dialing system" to make "any call" to "any telephone number assigned to a …cellular telephone service." Acacia moved for summary judgment arguing the TPCA was inapplicable because it had simply sent Joffe emails. The superior court denied the motion stating, "By using an email address composed primarily of a telephone number, [Acacia] initiated a telephone message to a telephone number assigned to a cellular telephone service…By doing advertising in this manner, [Acacia] shifted some of the cost of its advertising to those receiving the telephone calls." Acacia filed a second motion for summary judgment and argued the TCPA was directed at telephone calls that involved two-way voice communications and not at the sending of text messages. Relying on its prior ruling, the court held Acacia liable under the TCPA. Acacia appealed.

HOLDING: Affirmed.

REASONING: Whether the TCPA applied to Acacia's actions turned on the wording of the act and the resolution of two issues: whether Acacia called Joffe and, if it did, whether Acacia used an "automatic dialing system" to do so. Given that the TCPA was designed to regulate the receipt of automated telephone calls, Congress used the word "call" to refer to an attempt to

communicate by telephone. The court reasoned that a call subject to the TCPA occurs when the caller has made an attempt to communicate by telephone, even if the attempt does not present the potential for a two-way voice intercommunication. Therefore, a text message may constitute a call subject to the TCPA if the other requirements of the statute are met.

Congress prohibited calls made using "any automatic telephone dialing system." Congress described such a system in functional terms: "equipment which has the capacity - - (A) to store or produce telephone numbers to be called . . . and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). This wording demonstrated Congress anticipated the TCPA would be applied to advances in automatic telephone dialing technology. Acacia took advantage of Internet-to-phone SMS technology - technology that guaranteed its computer generated text messages would be delivered to Joffe's cellular telephone. By pairing its computers with SMS technology, Acacia did what the TCPA prohibits. It used an automatic telephone dialing system to call a telephone number assigned to a cellular telephone.

Congress prohibited calls made using "any automatic telephone dialing system."

INSURANCE

INSURER CAN INTERVENE IN CASE FOR FIRST TIME ON APPEAL

In re Lumbermens Mut. Cas. Co., 184 S.W.3d 718 (Tex. 2006).

FACTS: Cudd Pressure Control ("Cudd"), an oil well servicing company, entered into a Master Service Agreement ("MSA") contract with Sonat Exploration Company ("Sonat") to provide well servicing. The contract provided that Cudd and Sonat would defend and indemnify each other for claims brought by their respective employees. The contract also contained language requiring Cudd to provide insurance coverage to Sonat. Lumbermens Mutual Casualty Company ("Lumbermens") was Cudd's excess-liability insurer at the time the parties entered into the MSA contract.

In 1998, an explosion occurred during Cudd's operations for Sonat. The explosion killed seven people including four Cudd employees and seriously injured three others. Cudd employees and their families brought personal injury and wrongful death lawsuits in Texas against Cudd and Sonat. Cudd refused to indemnify Sonat and Lumbermens refused to provide coverage to Sonat. Sonat filed a cross-claim against Cudd for indemnity for the lawsuits, and the indemnity cross-claim was severed into a separate action. Sonat also filed a breach of contract action against Lumbermens and Cudd claiming that it was an additional insuree under Cudd's policy and, alternatively, that Cudd had breached a contractual obligation to procure insurance coverage for Sonat.

Sonat eventually settled the personal injury suits and the underlying indemnity action proceeded. One of the issues presented was whether Louisiana or Texas law applied to the indemnity claim. This issue was considered dispositive because under Louisiana law, the contract's indemnity provision was void, but was valid under Texas law. The trial court granted partial summary judgment in Sonat's favor, holding that Texas law applied and as a result, Sonat was entitled to indemnity for damages it had paid to settle the Cudd employees' lawsuits. The case went to trial to determine damages only, and a jury returned a verdict in favor of Sonat for $20.7 million. Cudd then filed a notice of appeal and Lumbermens posted a bond in the amount of $29 million on Cudd's behalf.

After perfecting its appeal in the indemnity case, Cudd and Sonat entered into an agreement under which Cudd agreed to forgo any further challenge to the trial court's choice of law ruling and Sonat agreed to nonsuit its breach of contract claim against Cudd. Two days later, Cudd filed its appellate brief in the indemnity appeal, which did not raise the choice of law issue. Ten weeks after Cudd filed its appellate brief, Lumbermens sought leave to intervene in the court of appeals in order to preserve the choice of law issue. The court of appeals denied Lumbermens' motion.

HOLDING: Reversed.

REASONING: The court concluded Lumberman should have been allowed to intervene and participate in the appeal pursuant to the virtual representation doctrine. The court dsicussed two cases in which it had previously determined that a person or entity who was not a named party in the trial court may pursue an appeal in order to vindicate important rights. *Motor Vehicle Bd. of Tex. v. El Pas Indep. Auto. Dealers Ass'n*, 1 S.W.3d 108 (Tex. 1999); *City of San Benito v. Rio Grande Valley Gas Co.,* 109 S.W.3d 750 (Tex. 2003). The court disagreed with Sonat's contention that Cudd and Lumbermens' identity of interest had diverged. The court believed that the identity of interest upon which the virtual representation doctrine turned was related to protecting the funds that the underlying judgment put at risk. That different legal theories could be asserted to defend those funds did not defeat the identity of interest and did not result in a conflict between Cudd's and Lumbermens' interests.

Sonat argued that Lumbermens should not be allowed to invoke the virtual-representation doctrine because Lumbermens could ultimately avoid coverage or the judgment by invoking a non-cooperation clause in Cudd's policy. The court thought Sonat's argument was irrelevant, stating that even if Lumbermens could eventually recoup the amount it had pledged through a potential coverage suit against Cudd, its obligation to pay the underlying judgment to Sonat was immediate and binding in the event that Cudd's appeal was unsuccessful.

The court noted that virtual representation was best understood as an equitable theory rather than as a crisp rule of law, and that a party's status as a virtual representative of a nonparty must be determined on a case by case basis. As a result, the court addressed the timing consideration as related to the intervention. Sonat contended that Lumbermens' intervention should have been denied because Lumbermen attempted to intervene after the final judgment. The court, however, held that Lumbermens