DECEPTIVE TRADE PRACTICES AND WARRANTY

THE TEXAS CITIZENS PARTICIPATION ACT (TCPA) APPLIED TO THE CLIENT'S LAWSUIT BECAUSE IT WAS BASED ON THE ATTORNEYS' ALLEGED COMMUNICATIONS

DTPA CLAIMS ARE EXEMPT FROM THE TCPA

PLAINTIFF MAY NOT FRACTURE A PROFESSIONAL-NEGLIGENCE CLAIM AND CREATE A DTPA CLAIM TO AVOID APPLICATION OF THE TCPA

Hanna v. Williams, ___ S.W.3d ___ (Tex. App.—Austin 2022). https://scholar.google.com/scholar_case?case=11136040207317593117&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Appellant Kirsten Hanna received a DTPA letter alleging misrepresentation of property defects after selling a property to homebuyers. Hanna hired Appellee, Leighton, Williams, Adkinson, & Brown, PLLC ("LWAB"), as defense legal counsel. Lengthy proceedings led to a settlement that incurred $120,000 in attorney's fees and expenses, contradicting Hanna's expressed desire to pursue a cost-effective dismissal of the lawsuit.

Hanna filed suit against LWAB, alleging gross negligence, negligence, breach of fiduciary duty, and DTPA violations. The trial court granted LWAB's TCPA motions dismissing Hanna's claims. Hanna appealed.

HOLDING: Affirmed.

REASONING: Hanna argued that the TCPA was not applicable because LWAB did not identify any specific communications they made in or pertaining to a judicial proceeding, thus not exercising their right to petition. Hanna further alleged that her claims were based on LWAB's failure to communicate and failure to act, exempting her DTPA claims from the TCPA.

The court noted that precedent held that an attorney's alleged failure to communicate or a court filing on behalf of a client can equate to the expansive exercise of the right to petition.

The court rejected these arguments, ruling that Hanna's allegations of unnecessary legal work and inflated fees largely rested upon affirmative actions and communications by LWAB, thus establishing their right to petition and TCPA applicability. The court noted that precedent held that an attorney's alleged failure to communicate or a court filing on behalf of a client can equate to the expansive exercise of the right to petition.

Although DTPA claims are exempted from the TCPA, the court reasoned that professional negligence claims may not be divided or "fractured" into independent claims to evade the TCPA. Cases concerning an attorney's alleged improper representation are derived from a complaint of lack of adequate legal representation. Hanna's varying claims were grounded in the sole complaint of negligent representation. Thus, the DTPA exemption was not applicable.

CONSUMER MAY NOT RECAST HER NEGLIGENCE CLAIM AS A DTPA CLAIM TO AVOID THE TEXAS MEDICAL LIABILITY ACT'S PROVISIONS

Loya v. Hickory Trail Hosp., L.P., ___ S.W. 3d ___ (Tex. App.—Dallas 2022).
https://law.justia.com/cases/texas/fifth-court-of-appeals/2022/05-20-00378-cv.html

FACTS: Plaintiff Marvella Loya went to a mental-health facility operated by Defendant Hickory Trail Hospital, L.P. ("Hickory") seeking medicine dosage advice and counseling services. Loya alleges Hickory admitted her against her will and forced her to remain in the facility. After admitting Loya, Hickory filed a temporary application for court-ordered mental-health services.

The mental-health court issued an order detaining Loya at Hickory's facility pending a probable cause hearing where it was found that Loya did not present a substantial risk of serious harm to herself. The mental-health court ordered her immediate release.

Loya sued Hickory for false imprisonment and unconscionable conduct under the Texas DTPA. The trial court granted Hickory's motion for summary judgment. Loya appealed.

HOLDING: Affirmed.

REASONING: Loya claimed that Hickory engaged in an unconscionable action by taking advantage of her and admitting her as an inpatient despite her seeking only merely a change to her medical prescription dosage. Loya argued that her DTPA claim was based on Hickory's intentional acts, not its negligence. The appellate court disagreed.

The appellate court held that Loya's DTPA claim was barred under Section 74.004 of the Texas Medical Liability Act ("TMLA") according to *Sorokolit v. Rhodes,* 889 S.W. 2d 239 (Tex. 1994). In construing the language of this TMLA provision, the Texas Supreme Court applied the common law meaning of "negligence." Using the common law definition, the court held that the TLMA precludes DTPA claims against a physician for damages for personal injury or death if the damages result, or are alleged to result, from the physician's negligence.

Under *Sorokolit,* a plaintiff may not recast her negligence claim as a DTPA claim to avoid the TMLA›s provisions. The lynchpin of Loya's DTPA claim is that Hickory took advantage of her by admitting her as an inpatient despite her seeking only a change to her prescription. Such a claim cannot be maintained without reference to Hickory's standard of care. Thus, because Loya's claim is that the physician was negligent as defined by the TMLA, she cannot sue under the DTPA.

A BREACH OF A PROMISE IS NOT A MISREPRESENTATION OF A MATERIAL FACT

AN OMISSION OF OR A FAILURE TO DISCLOSE INFORMATION DOES NOT MAKE A SEPARATE FACTUAL STATEMENT FALSE

Parsons v. Trichter & LeGrand, P.C, ___ S.W.3d ___ (Tex. App.—Houston [14th Dist.] 2022).
https://scholar.google.com/scholar_case?case=4550159416761549546&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Plaintiff-Appellant Paul G. Parsons, a commercial pilot, was arrested for driving while intoxicated and was concerned that this criminal charge would negatively affect the renewal of his pilot's license. Parsons signed a flat fee agreement with Defendant-Appellee Trichter & LeGrand, P.C., for representation in any hearings and necessary trials relating to his DWI. Parsons became dissatisfied with Trichter & LeGrand and terminated his relationship with the firm. Parsons hired a different law firm, received deferred adjudication for the criminal charge, and learned he would not have lost his pilot's license if convicted for a first DWI offense. Parsons sued Trichter & LeGrand, and Trichter individually, alleging Trichter misrepresented his extensive experience handling DWI cases for pilots and dealing with the FAA. Parsons claimed this misrepresentation was a violation of the DTPA.

Trichter filed a no-evidence motion for summary judgment. The trial court granted Trichter's motion. Parsons appealed.

HOLDING: Affirmed.

REASONING: Parsons argued that Trichter made a misrepresentation of material fact because Trichter promised Parsons that he would personally attend every hearing in Parsons's case but did not attend any hearing. Parsons also argued that Trichter misrepresented his extensive experience handling DWI cases for pilots and licensing issues with the FAA because Trichter never told Parsons he would not lose his pilot's license if he were convicted of the DWI charges filed against him. The court rejected both arguments.

To establish a cause for negligent misrepresentation, there must be proof of false representation of an existing fact. Proof of breach of a future promise is not a misrepresentation of a material fact and does not establish cause for negligent misrepresentation. An allegation of a mere breach of contract without more does not constitute a false, misleading, or deceptive act in violation of the DTPA. The court also held that an omission of, or a failure to disclose information, does not make a separate factual statement false. Because none of the evidence relied on by Parsons concerned a misrepresentation of a material fact, the court affirmed the granting of the no-evidence motion for summary judgment.

THE DISCOVERY RULE IS AN EXCEPTION TO THE GENERAL RULE OF ACCRUAL

Ryan v. TX RCG, LLC, ___ S.W.3d ___ (Tex. App.—Dallas 2022).
https://law.justia.com/cases/texas/fifth-court-of-appeals/2022/05-21-00382-cv.html

FACTS: Appellant-Plaintiff Shyla Ryan rented an apartment owned and managed by a succession of companies, including Defendant-Appellee TX RCG, LLC. During 2016, Ryan became ill with respiratory issues, headaches, fatigue, memory loss, shortness of breath, hives, and rashes after water leaks were found on the property. Ryan was notified in October 2016 that the property had been sold to TX RCG. Ryan found mold in her apartment during the last two weeks of November 2016. In December 2016, air quality test results showed that the apartment contained toxic molds.

Ryan filed suit in September 2018 and added TX RCG as a defendant a year later. Ryan asserted DTPA claims, among others. TX RCG filed a motion for summary judgment, asserting the applicable two-year statutes of limitations barred Ryan's claims. The trial court granted TX RCG's motion. Ryan appealed.

HOLDING: Affirmed.

REASONING: Ryan alleged that the statutes of limitations for her DTPA claims were tolled because the toxic mold was unknown, a proper mold assessment was not timely done, and she was not provided with the results. The court disagreed.

Although accrual occurs when a wrongful act causes a legal injury, the discovery rule is an exception to the general rule of accrual. It is limited to circumstances where the nature of the injury is inherently undiscoverable and the evidence of the injury is objectively verifiable. It defers accrual of a claim until the injured party discovers, or reasonably should have discovered, the nature of the injury and the likelihood that the injury was caused by the wrongful acts of another. The discovery of the injury, not the identification of an alleged wrongdoer, initiates the accrual.

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The court noted that Ryan discovered the nature of her injury and the likelihood it was caused by the wrongful conduct of another no later than December 2016. The court concluded that Ryan's causes of action accrued no later than December 2016 and thus were time-barred against Texas RCG by the two-year statutes of limitations.

CORPORATION IS NOT A CONSUMER WITH RESPECT TO TRANSACTION ENTERED INTO BY AN UNAUTHORIZED AGENT

Amaro Oilfield Automation, LLC v. Lithia CM, Inc., ___ S.W.3d ___ (Tex. App. 2023).
https://scholar.google.com/scholar_case?case=5116853827268665409&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Brian Herron, president of Plaintiff-Appellant Amaro Oilfield Automation, LLC, ("Amaro") attempted to purchase a pickup truck at the dealership of Defendant-Appellee Lithia CM, Inc., ("Lithia") by trading in a company car and using a company check as a down payment. Herron was listed as Amaro's sole officer, director, and manager in the public information report with the Texas Comptroller. In the corporate formation documents filed with the Secretary of State two years prior to the sale, Herron was listed as a managing member. Amaro sent Lithia a DTPA demand letter, arguing that Amaro did not authorize the transaction between Herron and Lithia and alleging damages in the form of the $10,000 down payment, loss of use of the company car, and the sum of $4,300 to secure the return of the company vehicle.

Amaro sued Lithia for violations of the DTPA, among other claims. The trial court granted Lithia's motions for traditional and no-evidence summary judgment. Amaro appealed.

HOLDING: Affirmed.

REASONING: Amaro argued that no-evidence summary judgment was improper on his claims because Amaro presented at least some evidence of every element of each claim. The court disagreed.

The court reasoned that because Amaro consistently urged that Herron was the person who presented payment to Lithia, Amaro was not a consumer under the DTPA. Although a DTPA consumer need not be the one who purchases the goods, the transaction must have been required by or for the benefit of the third party and the goods must have been purchased for the third party who seeks consumer status. Although Herron presented a check from Amaro and purported to act on behalf of the company, Amaro judicially admitted that Herron did not have authority to act on its behalf. Even if Amaro established that it came into possession of the truck at some point, Amaro failed to show under what circumstances it acquired the truck after Herron left the dealership with it. The court held that Amaro failed to produce evidence as to consumer status, the first element of its DTPA claim, and was therefore preluded to bring a claim for breach of contract and DTPA violations. The no-evidence summary judgment was properly granted.

PERSON WHO DENIES ANY CONNECTION TO A CONTRACT A DEBT COLLECTOR IS ATTEMPTING TO COLLECT CANNOT BE A DTPA CONSUMER

Bishara Dental, PLLC v. Morris, Lendais, Hollrah & Snowden, PLLC, ___ F.4th ___ (5th Cir. 2023).
https://www.ca5.uscourts.gov/opinions/unpub/21/21-20418.0.pdf

FACTS: Helen Bishara signed a contract with Outfront Media LLC ("Outfront") to provide a billboard advertisement for an entity the contract identified as "Bishara Dental." Outfront sued Plaintiff-Appellant Bishara Dental, PLLC ("Bishara"), alleging Bishara's failure to pay for its advertising services was a breach of contract. Defendant-Appellee Morris, Lendais, Hollrah & Snowden, PLLC ("Morris Lendais") later appeared as counsel for Outfront and made efforts to collect the debt it claimed Bishara owed to Outfront. In disputing the validity of the debt, Bishara argued it was not the correct party as it was never a party to the contract.

Bishara filed suit against Morris Lendais, alleging that Morris Lendais's debt-collection efforts violated the FDCPA and DTPA. Morris Lendais moved to dismiss for failure to state a claim. The district court granted Morris Lendais's motion. Bishara appealed only as to the DTPA claim.

HOLDING: Affirmed.

REASONING: Bishara alleged that it was a consumer under the DTPA because it is a business that seeks to acquire goods and services. The court disagreed, holding that Bishara failed to identify any specific goods or services that it sought or acquired from anyone.

The court identified two reasons why Bishara lacked consumer standing under the DTPA. First, Bishara denied any connection to the alleged advertising contract, and thus denied that it ever sought or purchased anything from Outfront. The court noted that the only specific good or service mentioned in Bishara's complaint was the billboard, which Bishara expressly disclaimed as having any link to its DTPA complaint.

Second, because the claim arose out of Morris Lendais's debt-collection efforts, the court reasoned that Bishara's failure to allege it ever sought or purchased any good or service from Morris Lendais meant it could not sustain an action under the DTPA. Even if Bishara had purchased services from Outfront – a fact that Bishara repeatedly disputed – it did not identify how that purchase formed the basis of its complaint against Morris Lendais. The court held that a person denying any connection to a contract a debt collector is attempting to collect cannot be a DTPA consumer.

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PLAINTIFFS MAY NOT SPLIT, OR "FRACTURE," WHAT ARE IN ESSENCE LEGAL-MALPRACTICE CLAIMS INTO SEPARATE CLAIMS UNDER NON-NEGLIGENCE THEORIES LIKE FRAUD, BREACH OF FIDUCIARY DUTY, BREACH OF CONTRACT, OR VIOLATIONS OF THE DTPA

Brickley v. Reed, ___ S.W.3d ___ (Tex. App. 2023).
https://law.justia.com/cases/texas/third-court-of-appeals/2023/03-22-00453-cv.html

FACTS: Plaintiff-Appellant James Allen Brickley was convicted of two counts of aggravated sexual assault and received a 35-year prison sentence. Brickley sued his defense attorney, Defendant-Appellee Justin Elliott Reed, for legal-malpractice, breach of fiduciary duty, breach of contract, and violations of the DTPA. Reed moved to dismiss for lack of a basis in law under Texas Civil Procedure Rule 91(a), arguing that all of Brickley's causes of action were improperly fractured legal-malpractice claims under the anti-fracturing rule. The trial court granted Reed's motion. Brickley appealed.

HOLDING: Affirmed.
REASONING: Brickley argued the trial court improperly dismissed each pleaded cause of action because they were truly separate claims from his legal-malpractice claim. He claimed that the anti-fracturing rule did not apply because his legal-malpractice claim, a negligence claim, was distinct from his non-negligence claims for breach of fiduciary duty, breach of contract, and violations of the DTPA. The court disagreed.

The anti-fracturing rule prohibits a plaintiff from splitting what are in essence legal-malpractice claims into separate claims under non-negligence theories like fraud, breach of fiduciary duty, breach of contract or violations of the DTPA. The claimant must do more than merely reassert the same claim for legal malpractice under an alternative label. The court examined whether the facts underlying the claims involved the attorney's duty of ordinary care or other independently actionable fiduciary, statutory, contractual or other tort duties. The acts and omissions that Brickley alleged by Reed all concerned Reed's preparation for, and conduct of, Brickley's criminal proceeding and the surrounding representation. Because the allegations still concerned allegedly improper legal representation or alleged bad legal advice, the alleged non-negligence claims were improperly fractured legal-malpractice claims.

MERE BREACH OF CONTRACT DOES NOT VIOLATE DTPA

MISREPRESENTATIONS MADE APART FROM THE CONTRACT MAY VIOLATE THE DTPA

CC&T Enters., LLC v. Tex. 1031 Exch. Co., ___ S.W.3d ___ (Tex. App.—San Antonio 2023).
https://caselaw.findlaw.com/tx-court-of-appeals/2191361.html

FACTS: CC & T Enterprises, LLC ("CC & T") contracted The Texas 1031 Exchange Company ("Texas 1031") to assist as the qualified intermediary in completing a like-kind exchange of real property pursuant to Section 1031 of the Internal Revenue Code. The Exchange Agreement described the different requirements for a basic exchange and an improvement exchange. After making the exchange, CC & T discovered that "the boot," or excess capital gains from the sale of the relinquished property not used to purchase the replacement property, could not be tax-deferred by making improvements to the replacement property because the requirements in the contract were not met under Section 1031.

CC & T sued Texas 1031, alleging violations of the DTPA. The trial court granted Texas 1031's motion to dismiss CC & T's DTPA claim. CC & T appealed.
HOLDING: Affirmed.
REASONING: CC & T argued that the trial court erred in dismissing its DTPA claim because a material issue of fact precluded summary judgment. CC & T claimed Texas 1031 breached its contract with CC & T when it failed to deliver what CC & T expected to receive, an improvement exchange. The court rejected CC & T's argument.

The court held that a mere breach of contract, without more, does not constitute a false, misleading or deceptive act in violation of the DTPA. The court reasoned that CC & T's action was one only for breach of contract because it depended entirely on pleading and proving the Exchange Agreement.

The court acknowledged that misrepresentations made apart from the contract may violate the DTPA. However, because the costs and responsibilities of a basic exchange and an improvement exchange were both set forth in the Exchange Agreement and CC & T did not allege misrepresentations apart from the Exchange Agreement, there was no violation of the DTPA.

CAUSATION-IN-FACT IS JUST ANOTHER TERM FOR PRODUCING CAUSE

Khechana v. El-Wakil, __ S. W. 3d __ (Tex. App. — Houston [14th Dist.] 2023).
https://scholar.google.com/scholar_case?case=13114800956181230396&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Plaintiff-Appellee Mohamed el-Wakil bought a vehicle from Defendant-Appellant Adel Khechana to use as a taxi. Khechana owned a car dealership. El-Wakil's applied for the vehicle's title, but, because the transfer was disputed as possibly involving fraud by one of its previous owners, the Texas Department of Motor Vehicles rejected his request. El-Wakil filed suit, alleging breach of contract, common-law fraud, and violations of the DTPA arising out of the delay in the title issuance. Six weeks before the case was tried, the title dispute was resolved in el-Wakil's favor.

The case proceeded to trial and the court rendered judgment in el-Wakil's favor on each cause of action. Khechana appealed.
HOLDING: Reversed and rendered.
REASONING: Khechana challenged the legal sufficiency of the trial court's findings as to liability and damages. The court of appeals accepted the argument, explaining that causation and damages are essential elements of each of el-Wakil's causes of action of which el-Wakil had none.

The DTPA requires a plaintiff to show that a violation of the DTPA was a producing cause of economic damages or damages for mental anguish. To be a producing cause, the DTPA violation must be a substantial factor in bringing about the injury, without which the injury would not have occurred. The court noted that the causation standards for each cause of action brought by el-Wakil included causation-in-fact, which is also referred to as "but-for" causation. The court further clarified that causation-in-fact is just another term for producing cause.

To be a producing cause, the DTPA violation must be a substantial factor in bringing about the injury, without which the injury would not have occurred.

Here, Khechana did not cause the delay in the issuance of title and could not issue the title himself. Khechana could only apply in the name of the purchaser of the vehicle, which he did.

Additionally, el-Wakil offered no evidence, made no argument, and pleaded no theory of liability under which Khechana could be held responsible for the delay in el-Wakil obtaining clear title. Thus, the court held that Khechana was not liable to el-Wakil.

SUMMARY JUDGEMENT REVERSED

DTPA DAMAGES EVIDENCE WAS CONJECTURAL AND LEFT UNRESOLVED A MATERIAL ISSUE OF FACT AS TO THE PROPER AMOUNT OF DAMAGES

Largent v. Cassius Classic Cars & Exotics, ___ S.W.3d ___ (Tex. App.—Fort Worth 2023).
https://law.justia.com/cases/texas/second-court-of-appeals/2023/02-22-00043-cv.html

FACTS: Plaintiff-Appellee Cassius Classic Cars & Exotics ("Cassius"), purchased vehicles from Defendant-Appellant Adam Largent, and paid Largent to restore those vehicles. Cassius became dissatisfied with Largent's restoration work on several of these vehicles.

Cassius sued Largent for breach of contract and DTPA violations, alleging Largent misrepresented the condition of the vehicles prior to Cassius purchasing them. Cassius also alleged Largent misrepresented his ability to perform the restoration services. Cassius moved for summary judgement, arguing that certain misrepresentations made by Largent were the producing cause of Cassius's damages and that Cassius was entitled to recover. Largent did not respond to the motion. The trial court granted summary judgment in favor of Cassius and awarded actual damages. Largent appealed.

Cassius did not present evidence establishing the value of the vehicles as purchased or as represented by Largent nor the value of the vehicles it received.

HOLDING: Reversed and remanded.
REASONING: Largent argued that the trial court erred because the evidence was not legally sufficient to support the trial court's summary judgment order as to both allegations. The court agreed.

In support of Cassius' summary judgment motion, the only evidence provided by Cassius was an affidavit where he listed each of the vehicles with a round dollar amount followed by a vague description of the misrepresentations. As such, the court concluded that Cassius did not present legally sufficient evidence, such as reasonable and necessary expenses incurred, to substantiate his DTPA claim. In fact, Cassius did not present evidence establishing the value of the vehicles as purchased or as represented by Largent nor the value of the vehicles it received. Therefore, because there was no attempt to show how these damages amounts were reasonable or necessary, the court determined the damages evidence related to the defective vehicles as conjectural and inappropriate for summary judgment relief. The court reversed the trial court's order granting summary judgment to Cassius.