DECEPTIVE TRADE PRACTICES AND WARRANTIES

DTPA REMEDY OF RECISSION REQUIRES CONSUMER RETURN BENEFITS RECEIVED

Chubb Lloyds Ins. Co. of Tex. v. Andrew's Restoration, Inc., 323 S.W.3d 564 (Tex. App.—Dallas 2010).

FACTS: Dr. Erwin Cruz hired a home restoration company, Andrew's Restoration, Inc. d/b/a Protech Services, after noticing a water leak in his home. Cruz notified his insurance carrier, Chubb Lloyds Insurance Company of Texas, and hired an attorney to deal with Chubb on his behalf. Chubb advised Cruz to prevent the mold from spreading so as to mitigate his losses. Cruz signed a document authorizing Protech to perform mold remediation services. The document indicated that Cruz understood he was financially responsible for payment of his deductible and any and all charges that were not paid by his insurance company. Protech supplied humidity-control services for which it was paid periodically. After one year, the mold conditions eventually stabilized. At some point, Protech stopped receiving payments for its services; it was later instructed by Cruz's attorney to stop the work on Cruz's house. Protech sent letters to Chubb requesting payment. Protech then placed mechanics' and materialmen's liens on Cruz's house. Protech sought to foreclose on the liens and sued Cruz and his insurance company under a number of theories. Cruz counterclaimed to void Protech's liens, for rescission of any contract with Protech, and for violations of the Texas Deceptive Trade Practices-Consumer Protection Act. Cruz asserted that Protech violated the DTPA by failing to include statutorily required language in the work contract indicating that a failure to pay Protech for services could result in Cruz losing ownership of his house. The trial court granted Cruz a partial summary judgment on the DTPA claim; however, it did not award him the restoration of the consideration that he sought.

HOLDING: Affirmed.

REASONING: The court interpreted Section 17.50(b)(3) of the DTPA to incorporate the equitable doctrine of rescission, including the requirement that the claimant must surrender any benefits received under the contract: "Restoration of the consideration paid . . . [is] based on the theory that the complaining party may elect to avoid the contract, *surrender any benefits received*, and recover that which he parted with." *Smith v. Kinslow*, 598 S.W.2d 910, 915 (Tex. Civ. App.—Dallas 1980). The court also cited its decision in *David McDavid Pontiac, Inc. v. Nix*, 681 S.W.2d 831 (Tex. App.—Dallas 1984), in which the plaintiff, Nix, sued under the DTPA and received actual damages as well as restoration. Taking into account Nix's use of the defendant's car for about a month, the court reversed the award of restoration and rendered judgment that Nix take nothing because she failed to prove any tender or offer of tender of the value of using the car for a month. The court refused to depart from *stare decisis*, "we are obliged to follow the law as set forth in our prior panel decisions . . . ." There was evidence that Cruz had derived some benefit from the services provided by Protech: the benefit of reduced mold levels in the house. Because Cruz failed to surrender or offer to surrender the value of the services he received from Protech, his request for restoration of consideration was denied.

DTPA CLAIM AGAINST ATTORNEY MAY REQUIRE PROOF OF "SUIT WITHIN A SUIT"

Finger v. Ray, 326 S.W.3d 285 (Tex. App.—Houston [1st Dist.] 2010).

FACTS: After Christine Finger obtained a judgment against a debtor, she was informed that the debtor planned to file for bankruptcy. Finger hired an attorney, Hugh Ray, to represent her in collecting the judgment. After the debtor filed for bankruptcy, Ray filed an action to block the debtor's bankruptcy discharge under Section 727 of the United States Code, 11 U.S.C. § 727 (2006). However, Ray did not file a Section 523 action, which seeks to remove a specific debt from the debtor's discharge. Ultimately, the bankruptcy court approved a settlement in the amount of $40,700. Out of the settlement, Finger had to pay Ray's attorney's fees and expenses, leaving her with a net amount of $17,200.

Finger then sued Ray for legal malpractice and violations of the Deceptive Trade Practices Act, specifically focusing on Ray's decision to file a 727 action instead of a 523 action. Ray moved for a no-evidence summary judgment, arguing that Finger could not meet the "suit within a suit" causation requirement to recover damages for her claims. Ray contended he had properly pursued a Section 727 action to collect Finger's judgment and obtained successful results. In addition, Ray argued Finger could not establish that, but for Ray's conduct, Finger would have obtained a better net result in the underlying suit. Finger argued that she did not have to prove "suit within a suit" causation, because whether she could have prevailed in the Section 523 action was irrelevant to her claims. The trial court granted summary judgment on Finger's DTPA claim, indicating Finger lacked the necessary expert testimony to establish causation and create an issue as to her ability to have collected more than she netted had she filed the claim on her own.

The plaintiff must prove that the defendant's statutory violation is a producing cause of the injury.

HOLDING: Affirmed.

REASONING: To prevail on a DTPA claim, the plaintiff must prove that the defendant's statutory violation is a producing cause of the injury. The producing cause standard encompasses causation in fact, which requires proof that the defendant's act or omission was a substantial factor in bringing about the injury, without which the injury would not have occurred. The court explained that where the decision maker, a bankruptcy judge in this case, did not testify as to how he might have ruled if the case had been presented differently, expert testimony is required to present direct evidence explaining the legal significance of Ray's acts and omissions.

Finger needed to show that the results she would have obtained without Ray's representation would have been better than she actually achieved with Ray's representation. In other words, a "suit within a suit" must be proven to establish causa-

tion. Although Finger testified as to her ability to get a settlement without Ray's representation, the court concluded that this case required an evaluation of alternative litigation strategies and outcomes in the bankruptcy court, which is within the ambit of a legal professional, not a layperson.

The court noted that a plaintiff's lay testimony may provide the trier of fact with some basis for understanding the causal connection. However, in this case, Finger's suit against her former attorney for his conduct in the capacity as Finger's attorney required proof about the success of alternative litigation through expert testimony. In essence, the court here believed that the bankruptcy matters and the legal representations that Ray made were too complex for the common understanding of the jury without having expert testimony.

COURT DISCUSSES STATUTE OF LIMITATIONS FOR DTPA, WARRANTY AND NEGLIGENCE

Hennen v. McGinty, ____ S.W.3d ____ (Tex. App. Houston. [14th Dist.] 2011).

FACTS: Thomas J. Hennen contracted with Villas By Design, Inc. to construct his residence. Owner and manager Jerry McGinty signed the contract on behalf of Villas. Nearing the completion of his home, Hennen sought to close on the home purchase for purposes of permanent financing. The parties entered into a second contract regarding the completion of specified "punch list" items.

Hennen moved into the house and began to experience numerous problems, including water intrusion. Hennen contended he had trouble getting Villas to complete the punch list items and repair the obvious defects. Hennen sent several emails to Villas, asking about the known water damage and stating he would begin the legal process. He then retained an attorney. About a year after moving into the house, Hennen had PE Services conduct a mold test, which revealed extensive molding throughout the house. Hennen filed suit against McGinty, Villas, and other defendants for breach of contract, breach of express and implied warranties, violations of the Texas DTPA, and negligence. In the pleadings, Hennen expressly excluded McGinty and Villas from his allegations of breach of the implied warranty of good and workmanlike performance of their services. Despite this, the trial court ultimately disregarded McGinty's no evidence claim and submitted separate breach of warranty questions to the jury, although no damages were entered for breach of express and implied warranties.

The 157th District Court granted Judgment Notwithstanding the Verdict in part and entered judgment for Hennen, finding that the DTPA and negligence claims were barred by limitations and Hennen's damages were limited to his breach of contract claim against Villas. Hennen appealed the judgment in his favor to include his other causes of action and damages for breach of express and implied warranties.

HOLDING: Affirmed in part, affirmed as modified in part, reversed in part, and remanded.

REASONING: A party must assert a claim for negligence no more than two years after the day the cause of action accrues. Tex. Civ. Prac. & Rem. Code Ann. § 16.003. DTPA claims must be brought within two years after the consumer discovered, or in the exercise of reasonable diligence should have discovered, the occurrence of the false, misleading, or deceptive act or practice. Tex. Bus. & Com.Code Ann. § 17.565. Generally, a cause of action accrues when a wrongful act causes an injury, regardless of when the plaintiff learns of the injury. The discovery rule may be applied if the injury is inherently undiscoverable and objectively verifiable. Once a plaintiff knows, or in the exercise of reasonable diligence should have known, of the injury, the limitations clock begins to run; even if the claimant does not yet know the specific cause of the injury, the party responsible for it, the full extent of it, or the chances of avoiding it. *PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship,* 146 S.W.3d 79, 93-94 (Tex. 2004). The court concluded the negligence and DTPA claims were correctly barred and the limitations clock did not begin, as Hennen contended, at the time he was aware of the full extent of the damage after the mold inspection, but actually when his emails revealed knowledge of water damage and threatened imminent legal action four months prior.

In regards to the breach of warranty claims, the court stated all jury questions must be supported by the pleadings. Tex. R. Civ. P. 278. The court concluded Hennen's claim for breach of implied warranties was insufficient because he failed to plead this cause of action against McGinty and Villas and expressly excluded them from a breach of warranty claim in the pleading. Therefore, the question should not have reached the jury. To satisfy a claim for breach of express warranty for service, the plaintiff must show that the defendant sold services to the plaintiff. *Paragon Gen. Contractors, Inc. v. Larco Constr., Inc.,* 227 S.W.3d 876, 886 (Tex. App.-Dallas 2007). The court held McGinty did not breach an express warranty because there was no evidence McGinty, individually, sold any services to the homeowner.

MEDICAL DEVICES AMENDMENTS TO FOOD, DRUG COSMETIC ACT PREEMPT STATE EXPRESS WARRANTY CLAIMS

In re Medtronic, Inc., 623 F.3d 1200 (8th Cir. 2010).

FACTS: Congress authorized the Food and Drug Administration to regulate the safety and effectiveness of medical devices under the Medical Device Amendments to the Federal Food, Drug and Cosmetic Act ("MDA"). The FDA requires a manufacturer to obtain approval before a new medical device may be marketed, and, once the device is approved, the manufacturer may not change any attributes that would affect safety or effectiveness without filing a Pre-Market Approval ("PMA") Supplement.

Medtronic, Inc. designed, manufactured, and sold the Sprint Fidelis Lead, a wire that delivers signals to allow an implantable cardiac defibrillator to detect an abnormal heart rhythm and deliver a shock to help the heart return to an appropriate rhythm. The FDA approved a PMA Supplement for the Sprint Fidelis Lead. Several years later patients implanted with the Lead began suffering unnecessary shocks. Medtronic applied for another PMA Supplement to make design and manufacturing changes, which the FDA approved; however, Medtronic continued to sell previously manufactured Leads. Eventually, it announced a world-wide recall of the products.

Plaintiffs, patients implanted with the leads, filed suit. They asserted some twenty distinct state law causes of action, including breach of express warranty. The district court concluded that the MDA preempted the express warranty claims.
HOLDING: Affirmed
REASONING: The court cited the MDA itself to establish that it contains a preemption provision: no state may establish or continue in effect with respect to a device…any requirement (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device. 21 U.S.C § 360k(a). The court explained that FDA pre-market approval is "federal safety review" that results in federal requirements specific to the approved device. *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 322-24 (2008). Common law product liability claims resulting in state requirements are preempted to the extent they relate to the safety and effectiveness of the device and are "different from or in addition to" the federal requirements established by PMA approval. *Id.* Although case law suggests that a breach of warranty claim is not expressly preempted by § 360k, as a state common law claim, it is preempted if it actually conflicts with the federal requirement, either because compliance with both federal and state requirements is impossible or because the state requirement stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 525 (1992), *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 507 (1996). The court reasoned that in order to prevail on the breach of express warranty claims, it would have been necessary for plaintiffs to persuade a jury that the Sprint Fidelis Leads were not safe and effective, which would have run contrary to the FDA's approval of the PMA Supplement. Consequently, the court held that the claims were preempted because they interfered with the FDA's regulation of the medical devices.

CONSUMER'S DECEPTIVE TRADE PRACTICES AWARD DISCHARGEABLE IN BANKRUPTCY

Reeves v. Davis (In re Davis), ____ F.3d ____ (7th Cir. 2011).

FACTS: Linda Reeves hired Gerald Davis to renovate her home. Davis began the work, but later walked off the job without completing the renovations. Reeves sued Davis in state court, and judgment was entered against Davis for violating a section of the Indiana Home Improvement Contracts Act. Under the Act, a home improvement supplier who violates the Act also commits a "deceptive act." The state court consequently found that Davis committed a deceptive act. Davis filed for bankruptcy before satisfying the state court judgment against him. Reeves sought to prevent Davis from discharging his debt against her in bankruptcy proceedings. Reeves initiated an action in the bankruptcy court pursuant to § 523 (a)(2)(A) of the Bankruptcy Code, which prevents a debtor from discharging any debt obtained by "false pretenses, a false representation, or actual fraud." Reeves argued that because the state court found that Davis had committed a "deceptive act," his debt to her was non-dischargeable under the principle of collateral estoppel

The bankruptcy court rejected Reeves' collateral estoppel argument and conducted its own trial because non-dischargability under § 523 (a)(2)(A) requires fraudulent intent, an element not required for a violation of the Indiana Home Improvement Contracts Act. The bankruptcy court noted there was no finding regarding Davis' intent in the state court proceedings. One of the disagreements between Reeves and Davis was whether Davis contracted to build a porch for Reeves. The bankruptcy court found that the contract may not have included the porch. The bankruptcy court accepted Davis' testimony that he took the job intending to finish it but refused to do so because Reeves was difficult to deal with. The bankruptcy court ruled that Davis' debt was dischargeable.

Non-dischargability under § 523 (a)(2)(A) requires fraudulent intent, an element not required for a violation of the Indiana Home Improvement Contracts Act.

On appeal, the district court affirmed the bankruptcy court's ruling, holding that, because the state court made no finding regarding Davis' state of mind, the bankruptcy court's factual finding regarding Davis' intent was not clearly erroneous.
HOLDING: Affirmed.
REASONING: For Reeves to preclude Davis from discharging his debt, Reeves was required to show that (1) Davis made a false representation or omission, which he either knew was false or made with reckless disregard for the truth; (2) that Davis possessed intent to deceive or defraud; and (3) that Reeves justifiably relied on the false representation. The court of appeals focused on the bankruptcy court's actions. The state court's finding that a porch was included in the contract properly created a collateral estoppel effect for breach of contract, not fraud. The key question in the case at hand dealt with Davis' intentions. Because the state court said nothing about Davis' intent at the time he entered the contract, the bankruptcy court's factual finding was permissible. Because the bankruptcy court concluded Davis had no fraudulent intent, Reeves could not preclude Davis from discharging his debt.

IMPLIED WARRANTY SUBJECT TO DTPA LIMITATIONS

Sw. Olshan Found. Repair Co., LLC. v. Gonzales, ____ S.W.3d ____ (Tex. App.—San Antonio 2011).

FACTS: In June 2001, Nelda Gonzales noticed cracking and other problems inside and outside of her house. Plumbing leaks were found to have caused foundation movement and the related damage. Gonzales hired Southwest Olshan Foundation Repair Company to stabilize the foundation. Olshan installed cable-locked pilings in July 2001. In April 2002, Gonzales noticed more problems with the house. Olshan attempted to repair the problems several times during the next three years. Gonzales eventually hired an attorney who hired Linehan Engineering to inspect the house. Linehan inspected the house and stated that the "pilings weren't working." Gonzales filed suit against Olshan on theories of breach of express and implied warranties, fraud, and DTPA violations. The parties disagreed on the appropriate statute of

limitations for the DTPA claim. The jury determined that Gonzales' claims were not barred by the statute of limitations, based on a factual determination of the accrual date of Gonzales' claims. Olshan appealed, arguing that the jury's findings regarding the accrual date were legally and factually insufficient.

HOLDING: Reversed.

REASONING: The court looked to *Melody Homes Mfg. Co. v. Barnes*, 741 S.W.2d 349 (Tex. 1987), where the Texas Supreme Court concluded "that an implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner is available to consumers suing under the DTPA." Although Gonzales alleged a claim for breach of a common law implied warranty and a claim for breach of the DTPA implied warranty, "consumers of services do not have the protection of a statutory or common law implied warranty scheme." A claim for breach of implied warranty to repair or modify existing tangible goods or property was only available under the DTPA. The DTPA and its two-year statute of limitations therefore applied.

CAUSE OF ACTION FOR FAILURE TO DISCLOSE REQUIRES ACTUAL KNOWLEDGE BY SELLER

Sheehan v. Adams, 320 S.W.3d 890 (Tex. App.—Dallas 2010).

FACTS: Home purchaser, Mary Lou Sheehan ("Buyer"), signed a purchase contract for the twenty-year-old home of Bruce E. and Sammi J. Adams ("Sellers"). Sellers delivered a "Seller's Disclosure Notice" indicating they were unaware of any defects or malfunctions in the foundation, but were aware of settling, which they characterized as "normal." After filling out the Disclosure Notice, but before the house was inspected, Sellers contacted their agent about a hairline crack in the brick on the outside of the house. Pursuant to their discussion, Sellers made no changes to the disclosure. Buyer hired a licensed house inspector to perform the inspection. The inspector saw but did not document the crack in the exterior brick, because he found it to be normal for a house of that age. The inspection specifically noted that there were no signs of significant cracks or movement in the foundation. Buyer and Sellers completed the sale of the house and Sellers signed a new notice that they had no knowledge of any defects outside of those in the Disclosure Notice or other written information. One month after moving in, Buyer discovered cracks in the interior and exterior walls of the house and filed suit against Sellers for violations of the Texas Deceptive Trade Practices Act ("DTPA"). After the jury returned a verdict for Buyer, the trial court granted motions for a judgment notwithstanding the verdict by Defendants and rendered judgment that Buyer take nothing. Buyer appealed, arguing that the record contained legally sufficient evidence to support the jury's findings.

HOLDING: Affirmed.

REASONING: The DTPA requires the plaintiff to prove that the seller failed to disclose information about the house that was known at the time of the transaction with the intention to induce the buyer into a transaction she otherwise would not have entered into if the information had been disclosed. Buyer was required to show that Sellers had actual knowledge that the foundation was defective at the time of the sale and did not disclose it in order to induce Buyer into buying the home and that she would not have bought the home if the foundation defect had been disclosed.

The DTPA requires the plaintiff to prove that the seller failed to disclose information about the house that was known at the time of the transaction.

The Court rejected the multiple inferences required of the jury to reach its verdict, because Sellers' actual knowledge was not demonstrated. Proof that Sellers should have known the information is not enough to prevail on a failure to disclose DTPA claim. The Court evaluated the testimony and found that no witness testified to seeing the crack as it appeared in Buyer's photo (taken two months after sale) when the transaction was actually done. The court found that testimony regarding prior repairs in the interior of the home before its sale was not linked to a foundation defect. The record also reflected that Buyer's own expert testified that a crack doesn't necessarily evince a foundation problem and did not offer an opinion as to when the foundation actually failed.