DECEPTIVE TRADE PRACTICES AND WARRANTY

MERE BREACH OF CONTRACT DEFENSE IS THE APPLICATION OF THE ECONOMIC LOSS RULE TO THE DTPA

Salek v. SunTrust Mortgage, Inc., ___ F. Supp. 3d. ___ (S.D. Tex. 2018).
https://www.leagle.com/decision/infdco20180809e30

FACTS: Plaintiff, Lina Salek, and Defendant, SunTrust Mortgage, executed a Deed of Trust (the "Deed") in connection to Plaintiff's purchase of real property. Under the Deed, Plaintiff was required to purchase flood insurance. In the event of damage to the property, any insurance proceeds would be applied to the restoration or repair of the property. The Deed further specified that during such repairs and restorations, the Defendant had the right to hold such insurance proceeds until the Defendant had an opportunity to inspect the property, provided that such inspection was undertaken promptly. Pursuant to the Deed, when Plaintiff's property was damaged Defendant held on to the proceeds while the property was being repaired. Plaintiff alleged that her efforts to repair were inhibited by Defendant's "unusually burdensome" requirements, including that each contractor provide a copy of their license, W-9 forms, and sign a waiver of lien with respect to the property. Further, Plaintiff alleged that Defendant did not disburse the insurance funds in a timely manner.

An allegation of a mere breach of contract does not constitute a "false, misleading, or deceptive act" in violation of the DTPA.

Plaintiff filed suit, alleging that Defendant's actions violated Section 17.50(a)(3) of the DTPA, which allows for a claim against a person who commits an "unconscionable action or course of action" that causes economic damages or damages for mental anguish. Defendant filed a Motion to Dismiss.

HOLDING: Motion Granted.

REASONING: Plaintiff argued that Defendant's actions violated Section 17.50(a)(3) of the DTPA and that DTPA unconscionability claims were beyond the scope of the "economic loss rule." Defendant argued that Plaintiff's DTPA claim functionally reasserted her breach of contract claim and was barred by the "economic loss rule."

The court agreed with Defendant's claim, relying on the Texas Supreme Court's extension of the principles underlying the economic loss rule under the "mere breach of contract" defense. The court also relied on Texas law that stated an allegation of a mere breach of contract does not constitute a "false, misleading, or deceptive act" in violation of the DTPA. The inquiry is whether the alleged unconscionable conduct could have resulted in the absence of a contract between the parties.

Because there was no independent duty outside of the Deed regarding the Defendant's conduct, Texas law states that such claims may be asserted in contract only, and not in tort under the DTPA. Thus, the Motion to Dismiss was granted.

COURT FINDS CAR DEALER'S CONDUCT WAS UNCONSCIONABLE AND MORE THAN "MERE BREACH OF CONTRACT"

Yates Brothers Motor Company, Inc. v. Watson, 548 S.W.3d. 662 (Tex. App.–Texarkana 2018).
https://caselaw.findlaw.com/tx-court-of-appeals/1894474.html

FACTS: Appellee, Donna Watson, bought a motor vehicle from Appellant, Yates Brothers Motor Company, Inc. ("Yates"). Watson purchased and financed the vehicle from Yates, a car dealer, upon entering a Motor Vehicle Installment Sales Contract and an Insurance Addendum Agreement (collectively "the Contract"). Per the terms of the Contract, Watson was required to provide Yates written proof of insurance, make timely payments, and inform Yates of any change of address. Watson purchased insurance for the vehicle shortly afterwards and requested that proof of insurance be sent directly from the insurance company to Yates. After claiming they never received Watson's proof of insurance, Yates repossessed and later sold the vehicle. Watson brought suit against Yates for violations of Texas DTPA and DTPA unconscionability.

The trial court ruled in favor of Watson, concluding that Yates' treatment of Watson constituted unconscionable conduct. Yates appealed.

HELD: Affirmed.

REASONING: Yates argued the legal and factual insufficiency of the evidence to support a jury verdict on the DTPA unconscionability claim because Watson did not complain of any language in the contract that she did not understand and did not allege that the truck was misrepresented to her detriment. Yates also argued that there was a lack of evidence to support a DTPA unconscionability claim because a mere breach of conduct cannot constitute unconscionable conduct.

The court rejected Yates' argument by reasoning that their unconscionable conduct was outside of the Contract and took advantage of Watson's lack of knowledge to a grossly unfair degree. The court found that Yates engaged in unconscionable acts when it: (1) failed to contact Watson prior to the repossession of her vehicle for the alleged failure to provide proof of insurance, (2) installed an illegal GPS tracker in the vehicle without the knowledge and consent of Watson, (3) cited Watson's failure to make timely payments and update Yates on her new address as reasons for repossession while Watson was current on all due payments and had notified Yates of her change of address, and (4) demanded a repossession fee of $500 without any stipulation of the repossession in the Contract or proof of the actual cost of the repossession.

DTPA DOES NOT APPLY TO A TRANSACTION IN EXCESS OF $100,000

Lakepointe Pharmacy #2, LLC v. PM Forney MOB, LP, ___ S.W.3d ___ (Tex. App.—Dallas 2018)
https://law.justia.com/cases/texas/fifth-court-of-appeals/2018/05-16-01413-cv.html

FACTS: Lakepointe Pharmacy #2, LLC, Raymond Amaechi, and Valerie Amaechi (collectively, "Appellants") and PM Realty Group, LP, PM Forney MOB, WRAM Investments, LLC, Richard Allen and Richard Spires (collectively, "Appellees") executed an Assignment Assumption and Amendment to a Medical Office Building Lease ("assignment") involving a total consideration in excess of $100,000. Under the assignment, Appellant's assumed Appellee's lease obligations for the purpose of operating a pharmacy in the building and signed a personal guaranty of the pharmacy's obligations under the lease.

After a dispute arose between Forney Deerval LLC and Forney Willeta, LCC (collectively, "Landlord') and Appellees over rent and other charges due under the lease, the Landlord filed suit against Appellants for breach of the lease and guarantee. Appellants filed countersuits against Landlord and Appellees for fraud, fraud by misrepresentation, and violations of the DTPA alleging that they had been fraudulently induced to assume the lease. Appellees filed various motions for summary judgment on Appellant's claims against them. The trial court granted summary judgment in favor of Appellees. Appellants appealed.

Appellants argued that Appellees relied on unreliable witness testimony, rent, and other costs charged under the lease to show that the amount in controversy was over $100,000.

HOLDING: Affirmed.

REASONING: Appellants argued that the trial court erred in granting Appellees summary judgment on Appellant's DTPA claims because Appellees did not offer competent summary judgment evidence that the lease assignment was exempt from the DTPA by showing consideration over $100,000. Section 17.49(f) of the DTPA provided that nothing would apply to a claim arising out of a written contract if the contract was related to a transaction involving a total consideration by the consumer of more than $100,000, the consumer had legal counsel during negotiation, and the claim did not involve the consumer's residence. Appellants argued that Appellees relied on unreliable witness testimony, rent, and other costs charged under the lease to show that the amount in controversy was over $100,000. Appellants claimed the evidence was unreliable because the witness did not review or confirm whether any of the data for the bills was input correctly or based on any actual invoice or cost incurred.

The court rejected that argument reasoning that the Appellees' witness, who produced the affidavit, was qualified in her capacity as custodian of Appellee's records to attest to the amounts due by Appellants to the Landlord under the lease. Therefore, Appellees' affidavit and attached exhibits constituted competent summary judgment evidence. The court was persuaded by the fact that the Appellee's witness' affidavit showed Appellants paid over $92,765.43 under the lease and were sued for unpaid rent of at least $33,452.49. The evidence also included a statement made by Appellant's own attorney that Appellant's total obligation under the lease appeared to be $106,080.00. All elements of §17.49 were established as matter of law and Appellants did not produce evidence to raise a genuine issue of material fact as to the applicability of the DTPA.

DTPA NOTICE NOT REQUIRED WHEN NOTICE IS RENDERED IMPRACTICABLE BY REASON OF THE NECESSITY OF FILING SUIT IN ORDER TO PREVENT THE EXPIRATION OF THE STATUTE OF LIMITATIONS

In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig., ___ F. Supp. 3d ___ (N.D. Cal. 2018).
https://www.leagle.com/decision/infdco20181004f03

FACTS: Plaintiffs were a class of consumers who had purchased "clean diesel" cars from Defendant Volkswagen, but had sold their cars prior to public knowledge that the EPA had issued a Notice of Violation to Volkswagen for violating the Clean Air Act. Volkswagen installed defeat devices in order to pass emissions testing and settled with customers who owned their cars at the time of the scandal. Plaintiffs were excluded from the settlement. Volkswagen contended that these consumers were not injured by the fraud because they did not experience a drop in resale value because the cars were sold before the knowledge was public.

Plaintiffs filed suit for relief after the settlement with consumers who leased or sold the cars after the EPA issued that the notice had been approved. Volkswagen filed for a motion to dismiss on the grounds that Plaintiffs did not provide written notice at least 60 days before filing the suit, which failed to comply with the notice requirement under the DTPA.

HOLDING: Motion denied.

REASONING: Plaintiffs argued that while they did not comply with the notice requirement under the DTPA, an exception applied because notice was rendered impracticable by the necessity of filing suit in order to prevent the expiration of the two-year statute of limitations on DTPA claims. By the time the Plaintiffs filed this suit, they were within 60 days of when the limitations period reasonably could have been expected to expire given the EPA's notice was made public on September 18, 2015. The proper notice of 60 days under the DTPA was, therefore, not practicable at the time the Plaintiffs filed suit, making them eligible for the §17.505(b) exception.

The court found that because the plaintiffs filed suit within the 60 days of when the limitations period reasonably could have been expected to expire, notice was not practicable and therefore the exception applied. The court did not abate the DTPA claims.

CONSUMER MAY PURSUE A CLAIM UNDER CHECK VERIFICATION PROVISIONS OF THE TEXAS CONSUMER CREDIT REPORTING ACT (TCCRA)

THE TCCRA IS A TIE-IN STATUTE

Walters v. Certegy Check Servs., ___ F. Supp. 3d ___ (W.D. Tex. 2018).
https://www.leagle.com/decision/infdco20181003i14

FACTS: Defendant, Certegy Check Services, Inc., provides check authorization recommendations to merchants, who use them to determine whether to honor a check presented by a consumer. Plaintiff, Mark Walters, was denied check-cashing privileges on four occasions based on Certegy's recommendations. Walters requested a reinvestigation of the denied transactions. Certegy responded with a letter indicating "the checks fell outside of approval guidelines." However, Certegy declined to disclose the guidelines it had used. Walters filed suit in state court.
Certegy removed to federal court. Walters filed an amended complaint alleging Certegy violated TCCRA, Business and Commerce Code, §20.021 and §20.06(f), and that Certegy was also liable under the DTPA. Certegy moved for judgment on the pleadings.
HOLDING: Denied.
REASONING: Certegy argued it is exempt from §20.06 because it is a "check verification company." The court rejected that argument by stating that §20.06(h) explicitly notes that §20.06 applies to a business offering check verification services. Because Certegy conceded it was such a business, it was not exempt from §20.06.
Walters argued that that Certegy was liable under the DTPA via a tie-in provision recognizing any violation of the TCCRA as "a false, misleading, or deceptive act or practice" for purposes of the DTPA. The court held that the TCCRA's tie-in provision to the DTPA allowed a plaintiff who properly alleged a violation of the TCCRA to bring a corresponding claim under the DTPA based on the conduct that gave rise to liability under the TCCRA. Because Walters had properly plead Certegy violated §20.021 and §20.06(f) of the TCCRA, the court found the violations formed the basis for two corresponding DTPA claims.

COURT APPLIES TIE-IN STATUTE OF LIMITATIONS PERIOD IN CASE BROUGHT THROUGH THE DTPA

Vine v. PLS Fin. Servs., ___ F. Supp. 3d ___ (W.D. Tex. 2018).
https://docs.justia.com/cases/federal/district-courts/texas/txwdce/3:2016cv00031/793811/90

FACTS: Plaintiffs Lucinda Vine and Kristy Pond both obtained short-term loans through Defendants PLS Financial Services, Inc. and PLS Loan Store of Texas. The Defendants were loan brokers in the business of connecting customers with lenders. The Plaintiffs both executed Credit Services Agreements in relation to their loans and customarily provided signed and postdated checks for the loan amount along with interest and fees. The Defendants allegedly assured the Plaintiffs that the checks would never be deposited but instead would only be used to verify that the borrowers had operational bank accounts.

The Plaintiffs defaulted on their loans shortly thereafter, and the Defendants deposited the checks despite allegedly knowing that the accounts lacked sufficient funds. When the checks bounced, the Defendants submitted "Worthless Check Affidavits" to the District Attorney's office (the "DA") pursuant to a program implemented to prosecute the writing of "hot checks." Because the program's policy prohibited the submission of an affidavit pertaining to a postdated checks offered as security for loans, the Defendants were required to swear that the checks were not postdated. The Plaintiffs received letters from the DA in March and October of 2012 demanding full payment of the check amounts—along with DA service fees—on pain of prosecution. The Plaintiffs avoided prosecution by paying in full, but asserted that the Defendants' use of the DA's program was a fraudulent and improper attempt at debt collection. In December 2015, they filed several claims against the Defendants, including a violation of the Texas Finance Code §393, which is a "tie-in" claim actionable under the DTPA that provides its own four-year statute of limitations.

A general statutory rule only governs when there is no more specific rule to supersede it.

After a brief discovery period, the Defendants filed a motion for summary judgment on the Plaintiff's §393 claim arguing that it was time-barred under the DTPA's default two-year statute of limitations.
HOLDING: Motion denied.
REASONING: The Defendants argued that, despite §393's specific four-year statute of limitations for violations tied into the DTPA, the DTPA's default two-year limitation trumps the longer one.

The court rejected this argument because there was no precedence that implicated either §393 or other tie-in statutes having their own limitations periods. To address which limitations period controls the claim, the court resorted to the statutory construction principle—that a general statutory rule only governs when there is no more specific rule to supersede it. With that in mind, the court concluded that the more specific four-year limitations period attached to §393 controls over the general two-year provision of the DTPA. The court further confirmed this conclusion by pointing out that the more specific limitation period in §393 was passed by the legislature almost twenty years after it passed the DTPA.

COURT CORRECTLY CALCULATES DTPA ADDITIONAL DAMAGES

Apple-Sport Chevrolet v. Rolston, ___ S.W.3d___ (Tex. App.—Waco 2018).
https://law.justia.com/cases/texas/tenth-court-of-appeals/2018/10-17-00046-cv.html

FACTS: Appellee Rolston brought a DTPA claim against Appellant, Apple Sport Chevrolet, Inc. claiming that he sought services on his car which were "not done properly causing the vehicle to be towed." Rolston claimed that Apple had clearly misrepresented its repair bill and did not fix the problem after billing Rolston $706.31. In response, Apple filed an answer asserting numerous affirmative defenses and motions for summary judgment, which

were denied. The case proceeded to trial. At the conclusion of the trial, the jury awarded Rolston $706.31 in benefit-of-the-bargain damages, $75 in out-of-pocket damages, $50 in expenses, $250 in lost profits, $80 in lost time, $5,000 in exemplary damages, and $2,500 in attorney's fees. The final judgment included damages of $8,661.31 against Apple. Apple appealed.
HOLDING: Affirmed, in part, modified, in part, conditioned on remittitur.
REASONING: Apple claimed that Rolston could not recover both out-of-pocket ("OOP") and benefit-of-the-bargain ("BOTB") damages. A prevailing consumer is able to recover only one – whichever is greater. To recover on both would be impermissible double recovery. A prevailing consumer may only recover the greater of either OOP or BOTB damages. In this case, BOTB damages were greater so the OOP damages of $75 were impermissible double recovery.

Apple also contended that the $5,000 "exemplary damages" award was improper because a plaintiff cannot recover exemplary damages in an action for violation of DTPA. The court explained that while the DTPA does not authorize the recovery of exemplary damages under Chapter 41, one can recover treble damages for conduct that was committed knowingly. Here, Apple did not challenge the calculations done by the jury. After trebling the sum of the proper damages, however, the sum came to $3,258.93—a number that was significantly lower than the jury's $5,000. The court concluded that the jury's exemplary damages award exceeded the statutory maximum, and, thus, lacked evidentiary support. Based on the lack of evidentiary support, the court suggested a remittitur of that part of the damages.

CONSUMER CREDIT

GEORGIA SUPREME COURT HOLDS LEGAL SETTLEMENT CASH ADVANCES ARE NOT LOANS.

Ruth et al. v. Cherokee Funding, LLC et al., ___S.E.2d ___ (Ga. 2018).
https://law.justia.com/cases/georgia/supreme-court/2018/s17g2021.html

FACTS: Appellees Ronald Ruth, Kimberly Oglesby and a punitive class of similarly situated persons obtained cash advances from appellant Cherokee Funding, LLC to cover legal fees stemming from personal injury lawsuits. The financing agreements extended by Cherokee Funding would provide Ruth and Oglesby funds for personal expenses amassed during their pending lawsuits. The obligation to pay back the funds was contingent on the success of their lawsuits, with no obligation to pay if they were unsuccessful. If they were successful, however, Ruth and Oglesby would pay back the funds to Cherokee Funding, plus interest and various fees. In each case, the party's settled their lawsuits for an undisclosed amount.

Following the settlement, Cherokee funding attempted to collect $84,000.00 from Ruth after lending him $5,550.00 and $1,000 from Oglesby after lending her $400.00. Ruth and Oglesby alleged that their financing agreements with Cherokee Funding violated the Georgia Industrial Loan Act and the Payday Lending Act. They sought relief against Cherokee Funding pursuant to the remedial measures of those statutes. Cherokee Funding filed a motion to dismiss, stating that neither statute applied to their financing agreements with Ruth and Oglesby.

The trial court held that the Payday Lending Act applied, but that the Industrial Loan Act did not. The Georgia Court of Appeals concluded that neither the Industrial Loan Act nor the Payday Lending Act applies to this transaction.
HOLDING: Affirmed.
REASONING: Because Ruth and Oglesby alleged violations under the two Acts, the court stated their claims depended on whether their transactions with Cherokee Funding amounted to "loans." The Industrial Loan Act defines a loan as "any advance of money… under a contract requiring repayment." The Payday Lending Act does not expressly define "loan" but implicitly gives meaning to the term by its provision stating that the Act "shall apply with respect to all transactions in which funds are advanced to be repaid at a later date."
The court stated that when funds are advanced under an agreement where repayment is only on a contingent and limited basis, and not required to be repaid, the funds are not "loans" according to the two definitions set forth in the Acts. Ruth and Oglesby argued that the advances made by Cherokee Funding were, in fact, loans because they only extended to those advances when there was no risk that the contingency would fail to arise, thus making the terms illusory. The court agreed that would be a possible scenario but stated that because evidence to combat a motion to dismiss must be "within the framework of the complaint," it was not the case here. Ruth and Oglesby's original complaint did not allege the financing agreements were illusory. The court concluded that the funds provided by Cherokee were not "loans" pursuant to the Payday Lending Act or the Industrial Loan Act and, therefore, must be dismissed.

The Industrial Loan Act defines a loan as "any advance of money… under a contract requiring repayment."

NEW YORK CREDIT CARD LAW REQUIRES FULL CREDIT PRICE BE POSTED

Expressions Hair Design v. Schneiderman, 808 F.3d 118 (2nd Cir. 2018).
https://law.justia.com/cases/new-york/court-of-appeals/2018/100.html

FACTS: Section 518 of New York General Business Law prohibits credit-card surcharges. Plaintiff, Expressions Hair Design,