DECEPTIVE TRADE PRACTICES AND WARRANTY

INSURED, EXERCISING REASONABLE DILIGENCE, SHOULD HAVE DISCOVERED THE MISREPRESENTATIONS AND THE INADEQUATE COVERAGE PROVIDED BY POLICY

Adaptive Modifications, LLC v. Atl. Cas. Ins. Co., ___F. Supp. 3d___ (E.D. Tex. 2019).
https://casetext.com/case/adaptive-modifications-llc-v-atl-cas-ins-co

FACTS: Plaintiff Adaptive Motors, LLC, owned by James Boren, was a business that converted living spaces into accessible homes for the disabled and elderly. Boren asked Defendant Dan Mitchell, an insurance agent for Defendant Trimark Insurance Group ("Trimark"), to procure a commercial general liability policy for Boren's business that covered various handyman work, including installing faucets. Mitchell applied to Defendant Delta General Agency Corporation, North Texas Branch ("Delta"), to underwrite the policy, which was then issued to Boren with Defendant Atlantic Casualty Insurance Company ("Atlantic") acting as the managing general agent. Mitchell told Boren that the policy would cover the requested work. However, the policy allegedly only covered carpentry work. After becoming insured, Boren was contracted to install a faucet in a customer's home, which later leaked. The customers filed the underlying suit in this case against Boren for property damage. Boren contacted Atlantic to defend and indemnify Boren in the suit, pursuant to the insurance policy. Atlantic denied Boren's claim.

Boren should have learned of Mitchell's alleged misrepresentations and the lack of coverage provided by the policy upon Boren's initial review of the policy through the exercise of reasonable diligence.

Boren filed suit against Defendants, alleging violations of Chapter 541 of the Texas Insurance Code, §17.46(b) of the DTPA, breach of contract, and negligence by failing to procure the appropriate insurance coverage. Defendants removed the case to federal court. Boren filed a motion to remand.
HOLDING: Motion dismissed.
REASONING: Atlantic argued that the case should not be remanded because Boren improperly joined the Texas Defendants to defeat diversity jurisdiction. To establish improper joinder, the removing party has the burden to demonstrate either: (1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court. Defendants argued that Boren could not establish a cause of action because his suit was barred by the Texas's two-year statutes of limitations.

Boren argued that he could establish a cause of action because, under the discovery rule, Boren's claims accrued when Atlantic denied coverage to Boren.

The court rejected Boren's argument, holding that the discovery rule did not apply. The court noted that under Texas law, an insurance agent has no duty to explain policy terms and the insured is bound by its terms. The court found that Boren should have learned of Mitchell's alleged misrepresentations and the lack of coverage provided by the policy upon Boren's initial review of the policy through the exercise of reasonable diligence. Because Boren failed to exercise reasonable diligence, the discovery rule was inapplicable to this case.

CONSUMER'S ALLEGATIONS ARE MORE THAN BREACH OF CONTRACT

Hart v. Tufenkian Artisan Carpets, ___F. Supp. 3d___ (N.D. Tex. 2019).
https://law.justia.com/cases/federal/district-courts/texas/txndce/3:2018cv02178/306189/20/

FACTS: Plaintiffs Milledge and Linda Hart contracted with Defendant Tufenkian for the purchase of seven rugs. The Harts relied on several guarantees, including the date of delivery, the quality of the rugs, and the ability to sample the rugs through strike offs. After the Harts ordered the rugs, the Harts placed purchase orders for other items for their home remodel, based around the appearance of the ordered rugs. The Harts rejected two sets of strike offs, and refused to take further delivery, alleging that Tufenkian had breached their contract and failed to live up to its promises. The Harts filed suit asserting claims of breach of contract and promissory estoppel.
The Harts amended their petition to include breach of the DTPA. Tufenkian moved to dismiss the Harts' DTPA claim pursuant to Federal Rule of Civil Procedure 12(b)(6).
HOLDING: Denied.
REASONING: Tufenkian argued that the Harts' DTPA claim should be dismissed because the claim was only a restatement of the Harts' breach of contract claim.

The court rejected the arguments, holding that the Harts had successfully alleged more than breach of contract. First, the court noted the Harts alleged that Tufenkian represented that it would provide the Harts with rugs similar in quality, pattern, color, and texture to the rugs viewed by the Harts in Tufenkian's Dallas showroom, but that Tufenkian failed to provide the aforementioned rugs. Because the Harts alleged that Tufenkian represented that it would provide a certain good or service and then failed to provide that good or service, they successfully pled a DTPA claim.

Second, the court noted that the Harts alleged Tufenkian had repeatedly failed to provide rugs that matched the samples provided, despite Tufenkian's representing that it would do so.
Because the Harts alleged that Tufenkian "never intended to fulfill the contract in the first place," the court found the Harts had stated a plausible claim for fraudulent inducement under the DTPA.

Finally, the court noted that, unlike the Hart's breach of contract claim, in which the Harts sought contractual economic damages for the rugs they purchased that were not delivered, the

Harts' DTPA claim also sought damages for items related to the Harts' remodeling plan that the Harts purchased in reliance on the defendant's misrepresentations concerning the quality of the rugs, and the Harts' ability to approve the strike offs before Tufenkian began full production. Because the Harts alleged that Tufenkian "caused confusion and misunderstanding about the approval of the strike offs prior to full production of the rugs," they had stated a plausible DTPA claim.

DTPA CLAIM MAY OVERLAP OTHER CLAIMS INCLUDING BREACH OF CONTRACT

DTPA UNCONSCIONABILITY CLAIM DOES NOT REQUIRE PROOF OF RELIANCE

Marek v. Lehrer, ___S.W.3d___ (Tex. App. 2018).
https://www.courtlistener.com/opinion/4568733/tom-marek-v-r-l-lehrer/

FACTS: Plaintiff-Appellee R. L. Lehrer was a rancher who entered into a contract to sell a ranch property ("Property") to Defendant-Appellant Tom Marek. A provision of the contract provided Lehrer the ability to lease the Property for five years. Marek did not sign the originally drafted lease, but instead presented Lehrer a subsequent draft that contained shorter lease durations and a termination clause. Lehrer filed suit against Marek alleging breach of the cattle grazing lease and violation of the DTPA.

The trial court found for Lehrer in both regards, with the jury finding that Marek knowingly engaged in an unconscionable action that was the producing cause of Lehrer's damages. Lehrer elected to recover under the DTPA, which provided additional compensatory damages. Marek appealed.
HOLDING: Affirmed.
REASONING: Marek argued that the case concerned mere breach of contract, not a DTPA violation, and that additional damages under the DTPA are improper.

The court rejected Marek's argument, holding that a DTPA claim may overlap with other causes of action, including breach of contract. The court noted that a primary purpose of the DTPA is to provide consumers a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in a common law fraud or breach of warranty suit. The court further explained that the DTPA provides consumers with a cause of action for either a false, misleading, or deceptive act or practice relied upon by the consumer and specifically enumerated in the "laundry list" included in section 17.46; or an unconscionable act. Although breach of contract alone is insufficient to demonstrate that a party did not intend to perform, a breach of contract combined with "slight circumstantial evidence" of fraudulent intent is "some evidence of fraudulent intent, enough to support a verdict." Because the court concluded that there existed at a minimum "slight circumstantial evidence" for the jury to infer that Marek did not intend to perform the agreement, the evidence was legally sufficient to support a DTPA verdict.

Marek further argued against the finding of an unconscionable act, asserting that Lehrer had failed to connect how Lehrer "relied to his detriment" on language allegedly added to a receipt he claims he never saw. The court rejected this argument, holding that, unlike the "deceptive" prong of the DTPA, the statute does not require reliance to support a finding of unconscionability nor did the jury charge include a reliance element. Because the court found the evidence was legally sufficient to support the jury's finding that Marek committed an unconscionable action, the trial court did not err in awarding additional damages under the DTPA.

DTPA APPLIES TO IMPLIED MISREPRESENTATIONS CONSUMER MAY RECOVER DIMINISHED VALUE

EMPLOYER IS NOT LIABLE FOR TREBLE DAMAGES WHEN EMPLOYEE ACTS BEYOND THE SCOPE OF HIS EMPLOYMENT

Parking Co. of Am. Valet, Inc. v. Fellman, ___S.W.3d___ (Tex. App. 2019).
https://www.courtlistener.com/opinion/4644717/parking-company-of-america-valet-inc-and-parking-company-of-america-love/

FACTS: Plaintiff-Appellee Bradley Fellman left his vehicle with Defendant-Appellants, Parking Company of America Valet, Inc., and Parking Company of America Love Field, Inc. (collectively, "PCA"), to be valet parked. The vehicle was undamaged when Fellman left his vehicle with PCA. The PCA's parking attendant took Fellman's vehicle for a joyride, ultimately crashing and damaging the vehicle. The parking attendant then modified the customer portion of Fellman's ticket to say that the vehicle had been damaged before being dropped off. Fellman filed suit alleging breach of the bailment contract and violation of the DTPA.

The court stated that, because part of diminishment in value comes from the stigma buyers attach to vehicles that have been in accidents, it was proper for Fellman to recover relative to the full diminishment.

The trial court entered findings that the appellants had breached the implied representations that PCA would park Fellman's car in the valet parking lot without taking it for unauthorized joyrides, PCA would take reasonable care of the car, and PCA would not modify Fellman's ticket stub as a deceptive ploy to accuse Fellman of making a fraudulent claim. Accordingly, the court granted summary judgement in Fellman's favor. PCA appealed.
HOLDING: Affirmed in part. Reversed and remanded in part. Reversed and vacated in part.
REASONING: PCA first argued that there were no representations made that could have been actionable under the DTPA, and that their nonverbal conduct could not constitute an implied representation actionable under the DTPA.

The court rejected this argument, as it had previously held that implied representations were actionable under the DTPA. The court noted that testimony provided at the trial supported the trial court's findings that appellants impliedly represented that they would park Fellman's car in the valet parking lot without taking it for joyrides and that they would take reasonable care of the car. Accordingly, the court held that this implied representation was actionable under the DTPA.

Next, PCA argued that because Fellman sold the damaged car to a buyer after the accident, the value of the sale should constitute the post-accident market value for determining diminished value. PCA further contended that the value of a vehicle can only go down, so the post-accident value should be higher than what the vehicle was sold for a year after the accident.

The court rejected this argument, instead citing an expert witness who testified at trial that diminished value is the loss in value of an automobile after a collision and repair of the damage. The court stated that, because part of diminishment in value comes from the stigma buyers attach to vehicles that have been in accidents, it was proper for Fellman to recover relative to the full diminishment.

Finally, PCA argued that the trial court erred in granting treble damages to Fellman, as PCA's employee was acting beyond the scope of his employment. The court accepted this argument, holding that PCA had only authorized the attendant to drive the car from the place where Fellman left to the parking place. No evidence in the record suggested that the attendant's use of the car was anything but a joyride. The court reasoned that a joyride is not of the same general nature as the conduct authorized by PCA, nor was it incidental to authorized conduct. Accordingly, the court held that the trial court erred in granting treble damages, as PCA was not responsible for what occurred when the attendant deviated from his assigned responsibilities.