DECEPTIVE TRADE PRACTICES AND WARRANTIES

STATE LAWSUITS FOR DAMAGES STEMMING FROM PESTICIDE USE ARE NOT PREEMPTED BY FEDERAL LAW

Bates v. Dow, 125 S.Ct. 1788 (2005).

FACTS: Twenty-nine Texas peanut farmers alleged that in the 2000 growing season their crops were severely damaged by the application of Dow Agrosciences LLC's ("Dow") newly marketed pesticide named "Strongarm." Petitioners claimed that Dow knew or should have known that this particular pesticide would stunt the growth of peanuts with Ph levels of 7.0 or greater. The initial label for the pesticide for the 2000 season read: "Use of Strongarm is recommended in all areas where peanuts are grown." When farmers began to report the problems with their peanuts to Dow, the company sent its own experts to inspect the farmers' crops. At the beginning of the 2001 season, the EPA approved a supplemental label which read: "Do not apply Strongarm to soils with a Ph of 7.2 or greater." The new label applied to distribution and use only in the states of New Mexico, Oklahoma, and Texas; the three states where peanut farmers experienced crop damage. After unsuccessful negotiations, petitioners gave Dow notice of their intent to sue. Dow filed a declaratory action in federal district court claiming petitioners were preempted by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA").
HOLDING: Vacated and Remanded.
REASONING: The court held that FIFRA did not preempt claims for defective design, defective manufacture, negligent testing, breach of express warranty, and violation of the Texas Deceptive Trade Practices Act. The court took a narrow interpretation of Section 136v(b) of FIFRA that favored petitioners, finding that Section 136v(b) pre-empted competing state labeling standards that would create significant inefficiencies for manufacturers. *Bates v. Dow*, 125 S.Ct. 1788, 1803 (2005). The provision also pre-empted any statutory or common-law rule that would impose a labeling requirement that diverged from those set out in FIFRA and its implementing regulations. Section 136v(b) did not pre-empt a state-law requirement that is equivalent to and fully consistent with FIFRA's labeling standards. Thus, a manufacturer should not be held liable under a state labeling requirement, subject to Section 136v(b), unless the manufacturer was also liable for misbranding as defined by FIFRA.

Although FIFRA did not provide a federal remedy to those injured as a result of a manufacturer's violation of FIFRA's labeling requirements, nothing in Section 136v(b) precluded states from providing such a remedy. Under the "parallel requirements" reading of Section 136v(b), a state-law labeling requirement must be equivalent to its federal counterpart to avoid pre-emption. State law need not, however, explicitly incorporate FIFRA's standards as an element of a cause of action. Since the Court had not received sufficient briefing on whether the Texas law governing petitioners' fraud and failure-to-warn claims were equivalent to FIFRA's misbranding standards and any relevant regulations, the court left this issue to the Fifth Circuit to be resolved in the first instance.

LESSEE CAN ENFORCE AUTO WARRANTY UNDER MANGUSON-MOSS

Ryan v. American Honda, 869 A.2d 945 (N.J. Super. Ct. App. Div. 2005)

FACTS: Plaintiff, Christopher Ryan, entered into a closed-end lease for a 1999 Honda Passport with Burns Honda, an authorized dealer and repair facility for defendant, American Honda Motor Corporation. With the lease, came a 3-year/36,000 mile manufacturer's new vehicle limited warranty, as well as several parts and equipment warranties. The lease agreement stated, "1) If the Vehicle is new, it is covered by the Manufacturers New Vehicle Warranty, and 2) Lessor assigns to me all of its rights in the above specified warranties." Ryan began having engine problems with the vehicle in the first fifteen months of the lease term and had the car towed to Burns Honda for repair. Ryan was told the problems were due to external damage or tampering; therefore, damages were not covered by the manufacturer's warranty. Ryan was told later that the warranty did not even apply to him because he had leased rather than purchased the car. Ryan filed a lawsuit under the Magnuson-Moss Warranty Federal Trade Commission Improvement Act (the "Act"), 15 U.S.C.A. §§ 2301 to 2312, *inter alia*. The issue was whether the Act allowed a cause of action for breach of warranty to a lessee of a new car or only to a purchaser.
HOLDING: Reversed and remanded.
REASONING: The court held that a lessee is a "consumer" who is entitled to the protections of the Act and can enforce the promises under the warranty given with the lease of a vehicle. The Act provided that a consumer who is damaged by the failure of a warrantor to comply with any obligation under a written warranty or implied warranty may bring suit for damages and other legal and equitable relief. A consumer has three possible definitions under the Act, which are: 1) a 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", that is, any person who receives the product while a warranty on that product is in force; 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," that is, any person who is entitled to enforce a warranty on the product under its terms or under applicable state law. The Act defines a "written warranty" as "A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer…or B) which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product." An implied warranty under the Act is defined as one "arising under State law…in connection with the sale by a supplier of a consumer product." Thus an implied warranty under the Act can arise out of any sale of a consumer product by the supplier such as American Honda, without regard to the nature of the buyer. The court found that a lessee such as Ryan fell within both the second and the third categories.

The warranties by the supplier attached to the product, not the transferee, and are therefore in existence when the lessee takes possession under the lease. There would be no reason for the Act to provide three alternative definitions of "consumer" if the protection provided by the Act was intended to apply only to a new car buyer, and not to one who leased a new car. A common sense approach led the court to believe that Burns intended Ryan to rely on the promises contained in American Honda's warranty when it presented the new car and the warranty to him and obtained his signature on the lease.

MAGNUSON-MOSS CREATES PRIVATE CAUSE OF ACTION THAT INCLUDES ATTORNEY'S FEES

Milicevic v. Fletcher Jones Imports, Ltd., 402 F.3d 912 (9th Cir. 2005).

FACTS: In May of 2001, Marina Milicevic bought a new Mercedes automobile from Fletcher Jones Imports. Shortly thereafter the car began requiring frequent repairs and spent an extensive period of time in the repair shop. After her complaints were not resolved, Milicevic sued Mercedes-Benz and Fletcher Jones Imports for breach of warranty, seeking relief under Nevada's lemon law and the Federal Magnuson-Moss Act. Mercedes removed the case to federal court. The trial court found that the defendants had breached the warranty and awarded Milicevic the purchase price of the car and attorneys' fee, less her reasonable use of the vehicle. Mercedes appealed, arguing, among other things, that the lower court incorrectly applied the Magnuson-Moss Warranty Act, and that the award of attorneys' fee was improper. Milicevic cross-appealed the attorneys' fee awarded as insufficient while also claiming that Mercedes' payment of the judgment rendered their appeal moot.

HOLDING: Affirmed.

REASONING: The court began by denying Milicevic's claim of mootness, citing the usual rule that absent an agreement restricting appeal, "payment of a judgment does not make the controversy moot." *Woodson v. Chamberlain*, 317 F.2d 245, 246 (4th Cir. 1963). The court also found, *inter alia*, that subject to certain conditions with which Milicevic complied, the Magnuson-Moss Act created a federal private cause of action for a warrantor's failure to comply with the terms of a written warranty. 15 U.S.C. Section 2310(d)(1)(B). The court determined that the express warranty given by Mercedes did qualify as a written warranty under the act, and it made no difference that it was a limited warranty. The District Court's findings that Mercedes was in breach of the warranty were not clearly erroneous. The attempts to repair the rear window seal and the brakes under warranty amounted to an admission by the defendants of the existence of covered defects, and the failure to successfully correct these problems caused a breach of the warranty. The court also found the trial court did not abuse its discretion by reducing the rate requested by Milicevic's attorneys and eliminating hours billed it found unnecessarily duplicative, because the act gives courts discretion to award "reasonable" fees "based on actual time expended." 15 U.S.C. Section 2310(d)(2).

The Magnuson-Moss Act created a federal private cause of action for a warrantor's failure to comply with the terms of a written warranty.

DTPA CLAIM AGAINST AIRLINE NOT PRE-EMPTED BY AIRLINE DEREGULATION ACT

DTPA CLAIM AGAINST TRAVEL AGENT NOT PRE-EMPTED BY AIRLINE DEREGULATION ACT

Black v. Delta Airlines, Inc., et al, 160 S.W.3d 68 (Tex. App. - Waco 2002).

FACTS: Black purchased two first-class Delta airline tickets through a travel agent, Smith Travel & Limousine, owned by Abe Haddad, to Las Vegas, Nevada. The trip was planned to help repair his damaged marriage and ensure a romantic weekend with his wife. The invoices Black received from Smith Travel reflected the two first-class reservations on Delta Airlines departure to Las Vegas, Nevada and the return flight back to Dallas, Texas. Inspection of the invoices showed seat assignments for Robert Black for both directions. Mary Black's invoice reflected first-class reservations for both directions, but only a seat assignment on the return flight. The manager of Smith Travel personally represented to Black that both tickets were confirmed for first-class travel. Each ticket indicated "issued by DELTA AIRLINES INC." and reflected first-class travel. The Blacks arrived at the gate prior to departure and requested the gate agent to seat them together.

As the plane boarded, the Delta supervisor, Al Perez, advised the Blacks that there was a problem with the reservation and that one of their tickets was not confirmed for first-class travel. Mary's ticket was a confirmed ticket for a seat in coach and had merely been placed on a "priority wait list for first-class." First-class was completely filled and the Blacks were offered several alternatives that were unacceptable to Black and defeated the purpose of the trip. The Black's brought claims against the airline and travel agency for beach of contract and intentional and negligent misrepresentation, and an additional claim against the travel agency under the Texas Deceptive Trade Practices Act ("DTPA"), in connection with the denial of first-class seating to Mary Black, who had a confirmed first-class ticket, due to airline overbooking.

HOLDING: Reversed and remanded.

REASONING: Federal law may preempt state law under the supremacy clause of the U.S. Constitution. Thus, the Airline Deregulation Act ("ADA") should preempt the DTPA. However, the court carved out exceptions in *American Airlines v. Wolens*, 513 U.S. 219, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995). *Wolens* held that in a breach of contract claim, where the parties sought redress in state court for violations of the contract terms that were set by the parties themselves, the breach of contract did not constitute "state imposed regulations," but a violation of the Illinois Consume Fraud and Deceptive Business Practices Act. Likewise, the appellate court held that Black's claims of intentional and negligent misrepresentations, more related to a breach of contract claim, do not turn on any requirement imposed on Delta by any Texas legislative body, but on alleged representations personally

made to Black by Delta through Perez, and Delta's alleged agent, Haddad. {Black's appeal was a unique and common condition to the airline industry—a confirmed ticket holder denied seating because of overbooking and who declined compensation and seating in coach, was not preempted by the ADA.}

The court held that by the same reasoning the ADA would not preempt the DTPA in the claim against the travel agency even if the ADA was meant to cover travel agencies. But the court reasoned that a fair reading of the statute shows that Congress did not intend for the ADA to cover travel agencies, and even if it did, Haddad did not meet his burden of showing congressional intent in enacting ADA to shield travel agencies. The court found Black's claims against Haddad to involve "privately ordered undertakings . . . to tenuous . . . to have preemption affect." Consequently, the Court held that the DTPA claims against the travel agency were not preempted by the ADA.

NEGLIGENCE CLAIM CANNOT BE SIMPLY RECAST AS A DTPA CLAIM

Scott v. Beechnut Manor, ____ S.W.3d _____ (Tex. App. – Houston [14th Dist.] 2005).

FACTS: In 1993, Dorethea Scott suffered a stroke that left her dependent on a ventilator. In October 1994, she was admitted by the Scott family to Beechnut Manor nursing home, where she was under the care of Dr. Teague. The Scotts claimed they were assured by the Administrator that Ms. Scott was going to be kept on oxygen at all times. The Scotts alleged Dorethea was taken off oxygen in December 1994 while routine maintenance was being performed on the ventilator, and then the technician failed to reconnect the ventilator after the maintenance was complete. Ms. Scott died later that day.

In December 1996, the Scotts sued Beechnut Manor, Dr. Teague, and the respiratory unit staff administrator (the "appellees") on claims of negligence under the Medical Liability and Insurance Improvement Act (the "Act"), common law negligence based on *res ipsa loquitor*, and violations of the DTPA. In June 1997, the trial court dismissed the liability claims under the Act. In November 1997, the trial court granted appellees' motion for summary judgment on the Scotts' remaining claims, finding that the Act precluded negligent-based claims under the DTPA. The Scotts appealed.

HOLDING: Affirmed.

REASONING: The Scotts alleged that the appellees' expressly warranted and represented that Ms. Scott would be kept on oxygen, but appellees' breached that express warranty and representation and allowed Ms. Scott to have no oxygen, or inadequate oxygen, to her detriment. The Scotts claimed the breach of the warranty and the knowing misrepresentation constituted deceptive trade practices, which were a proximate cause of the actual damages alleged. Such allegations and claims, if true, would bring the matter under the DTPA umbrella.

The court rejected the Scotts' argument, finding essentially the claims were negligence-based claims rather than DTPA claims. *See Mulligan v. Beverly Enters.-Tex., Inc.,* 954 S.W.2d 881, 884 (Tex. App. – Houston [14th Dist.] 1997). The allegations by the Scotts were an impermissible attempt to recast a negligence claim as DTPA claim, because the claim concerned a departure from the accepted standards of medical care, health care, or safety. The court concluded that any determination that the representations and warranties were breached would necessarily require an inquiry into whether appellees breached the applicable standard of care for Ms. Scott. Thus, the trial court properly granted summary judgment based on the prohibition of recasting a negligence claim as a DTPA claim.

FINANCE CHARGES ARE NOT PART OF AMOUNT IN CONTROVERSY FOR WARRANTY CLAIM

Golden v. Gorno Bros., Inc. 410 F.3d 879 (6th Cir. 2005).

FACTS: In May 2001, Gorno Ford sold a new, customized Ford Mustang to Golden via a retail installment contract totaling $61,709. This amount included more than $14,000 in finance charges. Almost immediately, Golden had to return the Mustang for repairs and in the five months after purchase the vehicle was at Gorno Ford's repair facility for 44 days. Because of the constant problems with the Mustang, Golden determined that he could no longer risk driving the vehicle and Golden filed suit in the Eastern District of Michigan. Gorno Ford filed a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). The basis for the motion was that Golden's Magnuson-Moss Warranty Act claim failed to meet the $50,000 amount in controversy required under the statute's jurisdictional limitations. 15 U.S.C. Section 2310(d)(3)(B).

HOLDING: Affirmed.

REASONING: The Magnuson-Moss Warranty Act (the "Act") provided that "a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief." 15 U.S.C. Section 2310(d)(1). The Act provided for federal district court jurisdiction of certain claims, but the jurisdiction of such claims was subject to an amount in controversy requirement. The applicable portion of the Act provided, "No claim shall be cognizable in a suit brought under paragraph (1)(B) of this subsection (B) if the amount in controversy is less than the sum or value of $50,000 computed on the basis of all claims to be determined in this suit." 15 U.S.C. Section 2310(d)(3)(B).

Golden contended that the district court erred in failing to consider revocation of acceptance as an available remedy under the Act and under Michigan law. Golden asserted that because revocation of acceptance was an available remedy under Michigan law for breach of warranty, it was therefore an available remedy under the Act and therefore Golden may cancel the entire contract. Golden alleged that the amount in controversy was the entire amount of the contract, including the finance charges. Therefore, he contended that the $50,000 amount in controversy requirement was easily satisfied.

In *Schimmer v. Jaguar Cars, Inc.,* a similar Seventh Circuit case, it was held that the following formula was used to determine whether a claim was in compliance with the Act's minimum limit: the price of a replacement vehicle, minus both the present value of the allegedly defective car and the value that

the plaintiff received from the use of the allegedly defective car. *Schimmer v. Jaguar Cars, Inc.*, 384 F.3d 402 (7th Cir. 2004). The price of a replacement vehicle, when computed as directed by *Schimmer* and the Act, did not involve finance charges.

The present case revealed that the purchase price of $42,903, not including finance charges, was below the $50,000 limit such that the formula did not even have to be carried through. Because the amount in controversy between the parties was less than $50,000, the court lacked jurisdiction under the Act.

AUTO LESSEE CAN SUE FOR BREACH OF WARRANTY UNDER MAGNUSSON-MOSS

Peterson v. Volkswagen of America, Inc., 697 N.W.2d 61 (Wis. 2005)

FACTS: Peterson leased a new 1999 Volkswagen Beetle from North Shore Bank (Bank). An authorized Volkswagen dealer sold the Beetle to the Bank immediately prior to Peterson's leasing of the car. As part of the consideration for the sale of the Beetle, Volkswagen issued the Bank a written warranty that included "a two year or twenty thousand mile bumper to bumper coverage." On the day of the lease to Peterson and during the warranty period, the Bank assigned its rights under Volkswagen's written warranty to Peterson. Shortly after taking possession of the Beetle, Peterson experienced numerous problems with the vehicle that significantly impaired its value and utility. Authorized Volkswagen dealers asserted that the repairs were covered under the warranty and serviced the vehicle numerous times, but were unable to correct the defects. Consequently, Peterson attempted to revoke acceptance of the vehicle in writing, and Volkswagen refused this demand. Peterson then sued Volkswagen under the Magnuson-Moss Warranty Act (MMWA) alleging breach of warranty. The circuit court granted Volkswagen's motion to dismiss. Peterson appealed, and the court of appeals reversed and remanded.
HOLDING: Affirmed.
REASONING: The MMWA provides relief for a consumer against a warrantor in any state for failure to fulfill duties under a written or implied warranty. *Mayberry v. Volkswagen*, 692 N.W.2d 226 (2005). In order to seek relief under the MMWA, one must qualify as one of three categories of consumer under the act, and there must be a written warranty in effect. 15 U.S.C. §§ 2301(3), and 2301(6)(B). The court held that Peterson pled sufficient facts as an automobile lessee to qualify as a category two consumer under the MMWA. The court determined that the Volkswagen warranty assigned to Peterson met the definition of a written warranty. Additionally, the court found that the vehicle in question was transferred to her while the warranty was in effect, and the warranty was issued by Volkswagen in connection with the sale of the vehicle as part of the basis of the bargain between the dealer and the bank. As a consequence, Peterson was entitled to enforce the warranty against Volkswagen, since the court reasoned that "it would be unreasonable, if not illogical to conclude that a lessee does not enjoy the same right to enforce a warranty as a purchaser enjoys."

INSURANCE

ATICLE 21.55 APPLIES TO DUTY TO DEFEND

RX.com, Inc. v. Hartford Fire Ins. Co., 364 F.Supp.2d 609 (S.D.Tex. 2005).

FACTS: Rx.com was sued and notified its liability insurer, Hartford Fire Insurance Co. Hartford acknowledged receipt of the notice but refused to indemnify or defend Rx.com. Rx.com hired its own attorney to defend the underlying suit, and in this suit claimed that Hartford refused to pay for work that the attorney performed. Rx.com sued for breach of contract and violations of Articles 21.21 and 21.55 of the Texas Insurance Code. Hartford moved to dismiss the Article 21.55 claim on the basis that it applied only to "first party claims" but not to third-party suits.
HOLDING: Denied.
REASONING: Hartford argued that Article 21.55 of the Prompt Payment of Claims Act did not apply to the duty to defend a lawsuit. The court, recognized that a number of Texas state courts and federal courts have addressed the same question and arrived at different answers. Only one decision of the Texas Supreme Court considered this issue, and that was in dicta, stating that Article 21.55 applies to the duty to defend. The court in the instant case made an *Erie* guess, and disagreed with Hartford's arguments.

First, the court disagreed with Hartford's contention that by its terms, Article 21.55 cannot apply to a claim for a defense because such claim was a third-party claim, not a first-party claim. Section 1 of Article 21.55 defines "claim" as "a first-party claim…." A "first party claim" was defined by the Texas Supreme Court as "one in which an insured seeks recovery for the insured's own loss." By contrast, in a third-party claim, "an insured seeks coverage for injuries to a third party." The court examined authority which held that because an insured does not receive any direct payment as required by Article 21.55, a demand to defend a suit is not a first party claim but rather a breach of the duty to defend is a common-law contract claim for damages. The court rejected this line of reasoning and held that the duty to defend component of a liability policy is a first-party claim under Article 21.55.

The court next addressed Hartford's argument that Article 21.55 cannot apply to defense claims because the statute defines "claims" to require payment "by the insurer directly to the insured or the beneficiary," and a demand for defense requires only that the insurer provide defense, not pay claimant any amount of money. The court disagreed, reasoning a claim for defense costs is either paid to or for the benefit of the insured. The "paid directly" language distinguishes first-party from third-party claims, but does not make a claim for a defense a third-party claim. In the typical third-party liability claim, the insurer pays the claimant of behalf of the insured who has wronged the