DECEPTIVE TRADE PRACTICES AND WARRANTY

ATTORNEY'S REPRESENTATIONS WERE PART OF THE "RENDERING OF A PROFESSIONAL SERVICE" AND ARE MATTERS OF "ADVICE, JUDGMENT, OR OPINION" EXCLUDED FROM THE DTPA

DTPA EXEMPTIONS FOR UNCONSCIONABLE CONDUCT AND "AN EXPRESS MISREPRESENTATION OF A MATERIAL FACT THAT CANNOT BE CHARACTERIZED AS ADVICE, JUDGMENT, OR OPINION" DO NOT APPLY

Wells v. Saumier L. Firm PC,___F. Supp. 3d___ (Tex. App.—Dallas 2023).
https://law.justia.com/cases/texas/fifth-court-of-appeals/2023/05-22-01285-cv.html

FACTS: Appellant Tammy Gail Wells ("Wells") hired appellee Saumier Law Firm PC ("SLF") to represent her in her divorce proceedings. The parties signed a "Letter of Representation", stipulating the terms of legal representation, including the responsibility for attorney fees and expenses. Following the conclusion of the divorce proceedings, the trial court awarded attorney's fees and SLF sought payment for legal fees incurred beyond the court's awards in the final decree. Wells failed to pay following her divorce proceedings. SLF filed suit for breach of contract. Wells counterclaimed alleging multiple claims including deceptive trade practices and usury.

The trial court granted SLF's motion for a directed verdict on Wells' counterclaims. Wells appealed.

HOLDING: Affirmed.

REASONING: Wells argued that SLF made several representations to her regarding her divorce proceedings, including assurances about attorney's fees, custody of her children, and the division of community property. She argued that these representations constituted deceptive trade practices under the DTPA because she lost custody of her children, did not receive an equitable division of property, and SLF did not collect all its attorney's fees from her husband. SLF argued in response that the DTPA did not apply to Wells' claims. The court held that SLF's representations fell within the criteria of professional services and were matters of advice explicitly excluded from the DTPA.

The DTPA exempts claims related to professional services that are matters of advice, judgment, or opinion from its provisions. Here, SLF provided written explanations and advice to Wells, which she accepted and agreed to, regarding various aspects of her divorce proceedings. The court held Wells' reliance on SLF's advice and representations constituted matters of professional services and are matters of "advice, judgment, or opinion" excluded from the DTPA.

Wells further asserted the DTPA exemptions for unconscionable conduct apply because SLF's actions were "an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion". The DTPA defines an "unconscionable action or course of action" as "an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree." Here, SLF provided a written explanation that contained an express provision informing Wells of her obligations to pay SLF and she knowingly accepted and agreed to these terms by signature. The court further agreed there was no evidence SLF took advantage of Wells' lack of knowledge or unfairness. Similarly, the alleged representations made by SLF were deemed to be within the realm of professional advice, judgment, or opinion, rather than express misrepresentations of material facts.

There was no evidence SLF took advantage of Wells' lack of knowledge or unfairness.

The court held the DTPA exemptions for unconscionable conduct and for "an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion" did not apply. Therefore, the court upheld SLF's motion for directed verdict on the DTPA violation including the unconscionable conduct exemption.

COURT FINDS DTPA VIOLATION BASED ON TIE-IN STATUTE, TEX. PROP. CODE § 5.085(A), AND DTPA § 17.46(b)(12) AND (24)

De Jesus Rodriguez v. Tovar, 2023 Tex. App. LEXIS 8947 (Tex. App.—Houston [14th Dist.] 2023, no pet. h.).
https://casetext.com/case/rodriguez-v-tovar

FACTS: Maria Rodriguez and Luis de Jesus Rodriguez (Appellants) are appealing a judgment against them for violations of the Texas Deceptive Trade Practices-Consumer Protection Act ("DTPA") and the Property Code in relation to a real estate transaction with David Martinez Tovar (Appellee).

Appellants and Appellee signed a contract for the sale and finance of real estate purportedly owned by Appellants. The agreement stipulated that after seven years of payments, the Appellants would transfer title to the Appellee, who would then own the property. Before the seven years were over, Appellee learned that Appellants did not own unencumbered fee simple title to the property and could not convey title. Appellee was eventually evicted from the property and Appellants did not reimburse him any money. Appellee sued the Appellants for breach of contract, negligent misrepresentation, fraud, and DTPA violations.

The trial court found that Appellants violated Property Code §5.085, which provides that "[a] potential seller may not execute an executory contract with a potential purchaser if the seller does not own the property in fee simple free from any liens or other encumbrances." Tex. Prop. Code § 5.085(a). The court also found that Appellants separately violated the DTPA by "representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law," and, "failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed." Tex.

Bus. & Com. Code § 17.46(b)(12), (24). Appellants appealed.
HOLDING: Affirmed
REASONING: Appellants contended that the trial court erred by failing to direct a verdict or otherwise enter judgment in their favor and by denying their post-trial motion to vacate the judgment or for a new trial. The Appellants argued that because Appellee failed to maintain insurance coverage and pay property taxes, this should have precluded him from prevailing on his claims. The court disagreed.

The court found that the trial court did not abuse its discretion in denying the Appellants' motion for judgment and their post-judgment motions. The court concluded that the trial court granted Appellee relief under the DTPA and the Property Code, and Appellee's failure to comply with the contract does not pertain to or negate any element of his DTPA and Property Code claims.

The tie-in statute, as provided in Tex. Prop. Code § 5.085(a), and Tex. Bus. & Com. Code § 17.46(b)(12), (24), explicitly prohibits a seller from executing a contract if they do not own the property in fee simple free from any liens or other encumbrances. The court determined that Tovar's failure to comply with these provisions constituted a violation of the DTPA. Therefore, the trial court's decision to grant relief under the DTPA and Property Code was consistent with the statutory requirements, and the Appellants' argument was without merit.

STATE LAW EXTRA-CONTRACTUAL CLAIMS BROUGHT IN CONJUNCTION WITH A FEDERAL NFIP BREACH OF CONTRACT CLAIM ARE PREEMPTED BY FEDERAL LAW

Langston v. Am. Nat'l Prop. & Cas. Co., ___ F. Supp. 3d (S.D. Tex. 2023).
https://casetext.com/case/langston-v-am-natl-prop-cas-co

FACTS: Plaintiff Eric Langston's home was insured by Defendant ANPAC for federally funded flood insurance. The previous homeowner transferred a valid flood insurance policy to Langston, which was valid until June 12, 2021. To renew the policy, Langston had to make premium payments either by (1) the expiration date, (2) within 30 days of the expiration date, or (3) after the 30-day grace period but before 90 days after the policy expired. For the third option, there would be a 30-day waiting period beginning on the date that the premium payment was to be received.

Langston received a Renewal Notice in April 2021, with a clear statement that the payment was due by June 12, 2021. Langston did not renew the policy and it expired. ANPAC mailed another notice to Langston stating that the policy expired. Eight months after the policy expiration date, Langston claimed that he did not receive renewal notices and requested reinstatement. ANPAC rejected the request. In response to the rejection, Langston filed a lawsuit for breach of contract, declaratory judgment, and violations of the Texas Deceptive Trade Practices Act (DTPA). ANPAC moved for summary judgment on each cause of action.
HOLDING: Granted.
REASONING: Langston argued that ANPAC represented to sell a product or service with the intent not to sell the product as advertised, which did not constitute "claims handling." The court disagreed.

The Fifth Circuit has "unmistakably held that state law extra-contractual claims brought in conjunction with a federal NFIP breach of contract claim are preempted by federal law." *See Grissom v. Liberty Mut. Fire Ins. Co.*, 678 F. 3d 397, 401 (5th Cir. 2012). The key factor to determine if an interaction with an insurer is "claims handling" is the status if the insured at the time of the interaction between the parties. Here, Langston received notices in the midst of a non-lapsed insurance policy. As such, the interactions between Langston and ANPAC, including renewals of insurance, are "claims handling" subject to preemption. Therefore, Langston's DTPA claim was preempted by federal law.

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BECAUSE PLAINTIFFS MADE NO ARGUMENT THAT AN EXTENSION, MODIFICATION, OR REVERSAL OF THE STATUTE OF LIMITATIONS WAS WARRANTED, THE COURT CONCLUDES THAT PLAINTIFFS' DTPA CLAIM WAS GROUNDLESS

COURT FINDS THAT DEFENDANTS' COUNSEL REASONABLY EXPENDED NO MORE THAN SIX HOURS OF THE TOTAL 39.25 HOURS ON THEIR ARGUMENTS ADDRESSING PLAINTIFFS' DTPA CLAIM.

DEFENDANTS ARE AWARDED $1,796.45 FOR REASONABLE AND NECESSARY ATTORNEYS' FEES INCURRED IN SUCCESSFULLY DEFENDING PLAINTIFFS' GROUNDLESS DTPA CLAIM

Marquis v. Sadeghian, ___F. Supp.3d___ (E.D. Tex. 2024).
https://casetext.com/case/marquis-v-sadeghian-9

FACTS: Plaintiffs Billy Marquis, Alexis Marquis, and Anthony Marquis filed a lawsuit against defendants Khosrow Sadeghian and Amy Jo Sadeghian, claiming that they negligently maintained their premises and violated the DTPA and FLSA laws. Defendants filed a motion for summary judgment seeking dismissal of plaintiff's DTPA claim since it was beyond the two-year statute of limitations.

Because the DTPA claim was barred by the statute of limitations and the plaintiffs did not otherwise counter this fact, the court granted summary judgment in favor of the defendants and dismissed the DTPA claim. Though the defendants also requested that the court find the plaintiffs' DTPA claim groundless upon dismissal of the DTPA claim, the court left the issue pending before the court. The defendants filed another motion renewing their request that the court find the DTPA claim groundless and award them their reasonable attorney's fees according to Texas Business and Commercial Code §17.50(c). The plaintiffs filed a response.

HOLDING: Granted and denied in part.
REASONING: Because the DTPA claim was one of the three claims brought by the plaintiffs, the defendants proposed that one-third of the attorney's fees their clients incurred preparing their MSJ should be allocated as the total time spent obtaining the dismissal of the DTPA claim. Per their proposal, the defendants incurred $3,525.53 of reasonable attorney's fees in defending themselves against the plaintiffs' groundless DTPA claim. The plaintiffs contended that an award of more than $1,500 would be excessive because the DTPA claim was only given a small amount of attention in the defendants' MSJ.

Given that the statute barred the DTPA claim, the court found the plaintiff's DTPA claim groundless since it lacked a basis in law and because the plaintiffs failed to advocate for a good faith modification or repeal of the existing law once made aware of the statute of limitations issue. The court rejected the arguments proffered by both parties regarding the defendants' award for attorney's fees. The court noted the defendants' DTPA arguments in their MSJ and reply supporting that MSJ only spanned four pages, included minimal citations to statutory and case law, and was supported by two pieces of evidence. Accordingly, the court held the defendants' one-third allocation was inaccurate and instead awarded the defendants $1,796.45 in attorney's fees.

AN AWARD OF ATTORNEY'S FEES UNDER THE DTPA IS MANDATORY IF THE TRIAL COURT MAKES CERTAIN FINDINGS

PARTY IS NOT REQUIRED TO PLEAD FOR ATTORNEY'S FEES UNDER THE DTPA IN ITS COUNTERCLAIM

Intelitrac, Inc. v. UMB Fin. Corp., 2024 Tex. App. LEXIS 1949 (Tex. App.—Dallas, no pet. h.).
https://casetext.com/case/intelitrac-inc-v-umb-fin-corp-4

FACTS: Defense contractor InteliTrac, Inc., sought to obtain a loan through UMB Bank, a subsidiary of UMB Financial Corporation. InteliTrac was to purchase DECO's outstanding shares in a merger. The agreement was conditioned on InteliTrac securing financing. InteliTrac managed and invested into DECO during the process, and representatives from InteliTrac, DECO, and UMB all met. The loan process was delayed multiple times, and InteliTrac paid DECO to extend the deadline to secure financing. The loan was submitted six days before the deadline, and InteliTrac was notified that the loan was denied two days before the deadline. DECO refused to extend the deadline again, and the merger did not happen. InteliTrac sued UMB on multiple claims relating to the failed funding, including for violating the DTPA.

InteliTrac's claims were unsuccessful. The court found that InteliTrac owed UMB attorney's fees. The parties signed a Rule 11 agreement, which included UMB's agreement not to pursue attorney's fees on a declaratory judgment counterclaim. In a separate motion, UMB pursued attorney's fees on InteliTrac's DTPA claim. UMB argued that the claim was groundless and brought in bad faith or to harass UMB. The court awarded UMB the attorney's fees. InteliTrac's motions for judgment notwithstanding the verdict and motion for new trial failed, and InteliTrac appealed.

HOLDING: Affirmed.
REASONING: InteliTrac argued that UMB failed to timely seek attorney's fees under the DTPA because it pled for the fees after InteliTrac voluntarily dismissed the DTPA claim. The court rejected InteliTrac's argument and reasoned that UMB was not obligated to specifically plead for attorney's fees under the DTPA because the statute mandates that attorney's fees be awarded.

The phrase "the court shall award" is mandatory and UMB was not required to plead for attorney's fees under the DTPA.

The DTPA requires that the court shall award a defendant reasonable and necessary attorney's' fees and court costs if the court finds that an action brought under the DTPA was groundless in fact or law, brought in bad faith, or brought for the purpose of harassment. The court reasoned that the phrase "the court shall award" is mandatory and UMB was not required to plead for attorney's fees under the DTPA. The court ultimately held that the trial court did not abuse its discretion and affirmed the trial court's ruling.

IN FEDERAL COURT, A COMPLAINT ALLEGING VIOLATIONS OF THE DTPA IS SUBJECT TO THE REQUIREMENTS OF FEDERAL RULE OF CIVIL PROCEDURE 9(b).

DTPA COMPLAINT DOES NOT HAVE TO ALLEGE THE IDENTITY OF THE PERSON WHO MADE THE FALSE REPRESENTATIONS.

Kumar v. Panera Bread Co., ___F.3d___ (5th Cir. 2024).
https://casetext.com/case/kumar-v-panera-bread-co-1

FACTS: Selva Kumar, was a devout Hindu who was required by his faith to abstain from eating meat. Kumar dined at Panera Bread Company, where he ordered the broccoli-cheddar soup and asked whether it was made with chicken broth. Each time he asked, the response was no, leading to him consuming meat.

Kumar alleged Panera misrepresented its broccoli-cheddar soup as free of meat byproducts and therefore he was fraudulently induced into purchasing Panera's products. Kumar alleged numerous tort claims, including violating the Texas Deceptive Trade Practices Act ("DTPA").
HOLDING: Affirmed in part, vacated, and remanded in part.
REASONING: Kumar alleged that Panera fraudulently misrepresented the ingredients in the soup, which caused him pain and suffering and provided him with a cause of action under the DTPA. Panera argued that Kumar waived every issue on appeal because he did not adequately brief his arguments and failed to identify any court error. The court agreed partly with Panera and partly with Kumar.

The DTPA protects consumers from "false, misleading, or deceptive acts or practices." In evaluating Kumar's claim, the court reiterated the requirements to establish a prima facie DTPA claim. The requirements are: (1) plaintiff must establish that he or she was a consumer within the meaning of the Act; (2) the defendant violated a specific provision of the Act; and (3) the violation caused the plaintiff's injury. Moreover, Rule 9(b) requires

the fraud to be pled "with particularity." A proper pleading satisfies the particularity requirement when it alleges the time, place, contents of the false representations, identity of the person who made the misrepresentation, and what the alleged offender gained from the misrepresentation.

Because Kumar is pro se he may properly amend and include the name of who made the misrepresentation, as he properly represented his brief on the other DTPA elements.

The court found that Kumar's initial complaint lacked specific identification of the person who made the misrepresentations. However, due to his initial inadequate counsel, the court considered Kumar's pro se status and found dismissal solely on that basis unwarranted. Because Kumar is pro se he may properly amend and include the name of who made the misrepresentation, as he properly represented his brief on the other DTPA elements. Because Kumar plead the third element of the DTPA claim that Panera's actions caused his injury, the court accepted his claim for the DTPA claim as properly pled.

The court remanded the case and allowed that the plaintiff to amend his DTPA claim.

INTERTWINED DTPA CLAIMS ARE SUBJECT TO $500,000 EXCLUSION

DTPA CLAIMS ONLY INCLUDE THOSE "RELIED ON BY A CONSUMER TO THE CONSUMER'S DETRIMENT"

Crewfacilities.com, LLC. v. Humano, LLC, ___F. Supp. 3d___ (W.D. Tex. 2024).
https://casetext.com/case/crewfacilitiescom-v-humano-llc

FACTS: Plaintiff/Counter-Defendant CrewFacilities.com, LLC ("CrewFacilities"), a lodging and logistics company, entered into a Masters Service Agreement ("MSA") for lodging services with Defendant/Counter-Plaintiff Humano, LLC's ("Humano") Humano, a transportation company. Both parties signed a MSA where CrewFacilities booked hotel rooms for Humano for two years at a total cost of $34,664,204.28. CrewFacilities alleged that Humano failed to timely pay the remaining balance of $1,635,300.89 and filed a breach of contract claim for unpaid invoices under the MSA.

Humano responded and countersued alleging various breaches by CrewFacilities, including failure to return rebates and indemnify Humano from third-party claims. Most notably, Humano asserted a claim under the Texas Deceptive Trade Practices Act ("DTPA"), arguing that CrewFacilities made false representations causing Humano to rely to its detriment on promises regarding the MSA. CrewFacilities filed a Motion to Dismiss Humano's counterclaims.

HOLDING: Motion to dismiss granted.

REASONING: CrewFacilities argued the DTPA does not apply to projects or series of transactions involving the same project that exceed $500,000 and therefore the DTPA claim must be dismissed. Humano argued the DTPA counterclaim is based on the occurrences unrelated to the MSA and that CrewFacilities' practices of knowingly, falsely and with malicious intent, represented to hotels that Humano had not paid their invoices and attempted to assign the right to collect payment from Humano to hotels which are outside the scope of being barred by the DTPA.

The court evaluated what a plausible 12(b)(6) motion to dismiss requires. To survive a 12(b)(6) motion to dismiss, the complaint does not need detailed factual allegations, but rather, the plaintiff must show grounds for entitlement to relief. However, the factual allegations, when assumed to be true, must 'raise a right to relief above the speculative level.'"

Further, the court described how the Texas DTPA prohibits claims involving transactions for more than $500,000. Humano contended the dispute over the MSA and the DTPA are unrelated, but the court was not convinced. The amount at issue was over a series of $500,000 transactions, which exceed the threshold and the DTPA claim appeared highly intertwined with the MSA. Humano's core argument was that its DTPA claims did not relate to the MSA but to the wrongful collection of unpaid invoices from the MSA. The court noted however, the issue of unpaid invoices did not arise unless CrewFacilities and Humano entered a contract in the first place. Without the MSA, CrewFacilities could not assign payment collection to third parties.

Second, the court explained Humano's DTPA claim did not plausibly allege detrimental reliance. The court stressed that the purpose of this exclusion is to remove large business transactions from the scope of the DTPA. Texas courts maintain the DTPA as a viable source of relief for consumers in small transactions. Therefore, the dispute between these parties encompassed exactly what the DTPA intentionally bars.

Even though the court agreed that Humano could plausibly find DTPA claims outside of the MSA, Humano failed to plead facts which would allow the court to believe the claims to be plausible under *Twombly*. Because the DTPA claim either arises under the MSA or it involves statements made to third parties, there is no evidence of detrimental reliance. Therefore, the claim must be dismissed. The court granted CrewFacilities' counterclaim and dismissed Humano's counterclaim for DTPA violations without prejudice.

IMPLIED FINDING OF A FALSE, MISLEADING, OR DECEPTIVE ACT BASED ON REPEATED REPRESENTATIONS OF PERFORMANCE IS A VIOLATION OF THE DTPA.

C4 Food Truck, LLC v. Lewis, 2024 Tex. App. LEXIS 1686 (Tex. App.—Houston [14th Dist.] 2024, no pet. h.)
https://law.justia.com/cases/texas/fourteenth-court-of-appeals/2024/14-21-00292-cv.html

FACTS: Keith Lewis and Cha'Quania Lewis ("Appellees") sued C4 Food Truck, LLC, and Andy Cardenas ("Appellants") for breach of contract, fraud, and violations of the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA).

Specifically, Appellants had accepted Appellees' $25,000 deposit for the purchase of a certain food truck, identified with a vehicle identification number, to be updated and delivered within 12 weeks. Appellants repeatedly promised Appellees that work was being performed on the truck and that it would be delivered

within the given time frame. Appellants also showed Appellees purported progress on the truck during in-person visits and in pictures via text message. Appellants failed to deliver the truck within the given 12 weeks, so the parties agreed to an extension of the delivery date in exchange for Appellants providing Appellees a warranty on the truck. Appellants failed to deliver the truck that was the subject of the contract and instead attempted to provide Appellees with a different truck that was in worse condition and not drivable. Appellees asked for a refund for their $25,000 deposit, and Appellants refused.

The trial court found in favor of Appellees. On appeal, Appellants challenged the trial court's judgment on six issues, one of which asked the court to reverse and remand because "this was a simple breach of contract case that did not rise to the level of actionable Deceptive Practice Act."

HOLDING: Affirmed.

REASONING: The court held that because the DTPA requires evidence of a false, misleading, or deceptive act, a simple breach of contract, without more, does not constitute a violation of the DTPA. However, a defendant may nonetheless be liable under the DTPA if the defendant represents that the plaintiff will receive one model of a vehicle when in fact the defendant intended to provide another model, or the defendant never intended to deliver.

Here, the court looked to testimony from the trial court where Keith Lewis testified that, based on his interactions with appellants, he believed appellants' behavior was fraudulent and violated specific sections of the DTPA because Appellants could not perform "all along," intentionally led appellees along, and made material misrepresentations to receive extensions of the contract. Additionally, Cha'Quania Lewis testified that appellants did not have the title for the truck, could not get the title, and tried to give appellees the title for a different truck.

Because the DTPA requires evidence of a false, misleading, or deceptive act, a simple breach of contract, without more, does not constitute a violation of the DTPA.

Based on this evidence, the court held that the trial court's implied finding of a false, misleading, or deceptive act in violation of the DTPA was supported by the record. After overruling each of Appellants' issues, the court affirmed the trial court's judgement.