RECENT DEVELOPMENTS

DECEPTIVE TRADE PRACTICES AND WARRANTY

WHERE THE UNDERLYING TRANSACTION IS A LOAN, CONSUMER STATUS IS NOT CONFERRED BECAUSE MONEY IS NEITHER A GOOD OR SERVICE.

North v. Capital One, N.A., __ F. Supp. 3d __ (S.D. Tex. 2024). https://www.casemine.com/judgement/us/663affea83075d3d98346000

FACTS: Plaintiff Julius Lamunn North ("North") filed suit against defendant Capital One. Capital One received a letter requiring the company to accept the tender of payment to settle the debt owed. However, the debts were never removed, nor documentation was provided which resulted in default. North alleged that Capital One provided unverified inquiries and debts onto North's credit report which damaged North's credit reputation and worthiness. North also alleged that Capital One had been and actively reported inaccurate credit score ratings causing North great financial strain.

North asserted claims for breach of contract, civil rights violations, and Deceptive Trade Practices Act (DTPA). Capital One removed the case to the state court and filed motions to dismiss the action under the Federal Rule of Civil Procedure 12(b)(6).

HOLDING: Motion to Dismiss Granted.

REASONING: Capital One argued North failed to state a claim or timely respond. Because of the district's local rules, North's failure to respond to Capital One's motion to dismiss was interpreted as an intention of posing no opposition to the motion by North. The court here considered the merits of the motion to dismiss despite North's lack of response since the motion to dismiss was a dispositive motion.

North's claim for violation of the DTPA failed because North did not allege that he was a consumer as required by the DTPA.

North's claim for violation of the DTPA failed because North did not allege that he was a consumer as required by the DTPA. By reviewing North's allegations, the court discovered that North is indebted to Capital One and therefore when there is an underlying transaction as a loan, consumer status is not granted because money is neither a good nor a service according to *Reule v. M&T Mortg.* However, there is an exception to the general rule when the objective of the transaction was for purchase or lease of a good or service notwithstanding that the plaintiff borrowed money for the completion of the transaction. In this case, it was unknown to the court as to why North was indebted to Capital One and therefore, the court was unable to apply the exception. Therefore, the court reasoned North failed to show he is a "consumer" and cannot state a claim under the DTPA.

The court further explained that the Fair Credit Reporting Act (FCRA) would have preempted any DTPA claim. The FCRA states that a furnisher is obligated to investigate and report its results to the credit reporting agency, as well as modify or delete false information. When a plaintiff asserts an FCRA claim against a furnisher, the plaintiff must show in the allegation that they disputed the accuracy or completeness of information with a consumer reporting agency, notified the furnisher of the dispute, and that the furnisher failed to investigate, correct any inaccuracies, or notify the agency of the results of the investigation.

Here, the court explained that North did not provide any evidence to show he disputed the accuracy of the information with a consumer reporting agency, which is essential to properly plead the FCRA claim. North also failed to allege any of the essential elements of an FCRA claim. Therefore, the court concluded that Capital One is entitled to summary judgment on the FCRA claim. The court recommended that Capital One's Motion to Dismiss be granted and the matter dismissed.

GENERALLY, A BUSINESS IS AN INTANGIBLE, UNLESS IT ENCOMPASSES GOODS OR SERVICES PURCHASED FOR USE IN THE FUNCTION OF THE BUSINESS

Chotani v. Mohammad Khan, ___ S.W.3rd ___ (Tex. App.-Tyler 2024).
https://law.justia.com/cases/texas/twelfth-court-of-appeals/2024/12-23-00217-cv.html

Facts: Plaintiffs-Appellees were Mohammad Khan ("Khan"), Rafaqat Ali ("Ali"), and Mehak Investments, LLC ("Mehak"). Defendants-Appellants were Azib Chotani ("Chotani"), and Azam Chaudhry ("Chaudhry"). Chotani acted as a broker between Ali and Chaudhry in negotiating an agreement regarding lease of a convenience store in Kilgore, Texas. On May 28, 2018, an agreement was signed in which Menghi, an entity owned by Chaudhry, agreed to sublease its operational lease for the store to Mehak, a company formed by Khan. As part of this transaction, Mehak also purchased the store's existing inventory. However, the Texas Alcoholic Beverage Commission ("TABC") denied the store an alcohol license. Subsequently, Chaudhry transferred ownership of Menghi to Khan. Later attempts by Khan and Ali to renew Menghi's fuel permits with the Texas Commission on Environmental Quality ("TCEQ") were denied due to a previous fine levied against Menghi.

Khan and Ali filed suit with multiple causes of action, including DTPA violations. The jury awarded Khan and Ali damages for the causes of actions and the DTPA claim. Chotani and Chaudhry filed a motion to disregard the jury answers and a judgment notwithstanding the verdict. The trial court denied their motions and rendered judgment in accordance with the Jury's verdict. Chotani and Chaudhry appealed.

Holding: Reversed.

Reasoning: Under the DTPA, to prevail on a claim, a plaintiff must establish that (1) they are a consumer; (2) the defendant engaged in a false, misleading, or deceptive act or practice; (3) the consumer relied on this act or practice; and (4) the act or practice was a producing cause of the consumer's actual damages. TEX. BUS. & COM. CODE ANN. § 17.50(a)(1) (West 2021). To

qualify as a consumer under the DTPA, the plaintiff must demonstrate that (1) they sought or acquired goods or services by purchase or lease, and (2) the goods or services purchased or leased form the basis of the complaint. The DTPA excludes transactions involving purely intangible rights, such as money or accounts receivable, unless these are associated with collateral services.

The court found that the transaction between Khan, Ali, and Chaudhry satisfied the first requirement of the DTPA definition of a consumer because it involved the acquisition of "goods and services." Khan and Ali did not merely acquire an intangible right to operate a store; they also leased the physical premises and purchased physical assets, including the store's inventory. However, the court determined that the transaction did not satisfy the second requirement. The crux of Khan and Ali's claim was based on the transfer of shares in Menghi to Khan, which is considered an intangible asset and not a good or service under the DTPA. Consequently, the court held that Khan and Ali did not qualify as consumers under the DTPA.

A CONSUMER IS NOT REQUIRED TO PROVE INTENT TO MAKE A MISREPRESENTATION TO RECOVER UNDER THE DTPA

MISREPRESENTATION THAT MAY NOT BE ACTIONABLE UNDER COMMON-LAW FRAUD MAY BE ACTIONABLE UNDER THE DTPA

Merrikh v. Costa, ___ S.W. 3d ___ (Tex. App.-Houston[14th Dist.] 2024).
https://law.justia.com/cases/texas/fourteenth-court-of-appeals/2024/14-22-00312-cv.html

FACTS: Appellees Joseph and Johna Costa (the "Costas") purchased a replacement engine for their Range Rover from Quality Auto Dismantle, LLC ("QAD"). Appellant Bijan Merrikh ("Merrikh"), a QAD employee, was the only individual who communicated with the Costas about the repairs. At the time, Merrikh was aware and failed to disclose to the Costas that QAD did not employ any mechanics, did not have the proper tools and training to conduct an engine replacement, and that he had never done that sort of work before. The Costas paid QAD for the replacement engine and the next several replacement engines installed by Merrikh. After the last replacement engine was installed, the vehicle overheated and was taken to another repair shop. The repair shop owner testified that several sensors were unplugged or bypassed so the "check engine" light would not notify the Costas of any issues.

Merrikh failed to disclose important information about his services that induced the Costas to enter into the transaction.

The Costas filed suit for failure to disclose under the DTPA and for common-law fraud by misrepresentation and nondisclosure. The trial court ruled in favor of the Costas on their DTPA claim, finding that Merrikh engaged in "false, misleading, or deceptive acts or practices." Merrikh appealed.

HOLDING: Affirmed.

REASONING: Merrikh argued that the DTPA claim failed because the Costas offered no evidence to support the elements of the claim. The court rejected Merrikh's argument and held that the Costas offered legally sufficient evidence that showed Merrikh failed to disclose important information about his services that induced the Costas to enter into the transaction. The court held that the Costas proved that they detrimentally relied on Merrikh's nondisclosure by their actions in using QAD for the repair and by testifying at trial that they would have used another repair shop had they known the nondisclosed information.

The court supported its holding by citing case law that held that consumers do not need to prove a defendant's intent to make a misrepresentation to recover under the DTPA. The court held that claims for failure to disclose under the DTPA differ from claims for common-law fraud in two ways. A common-law fraud claim requires that a plaintiff prove that the defendant intended to deceive the plaintiff and the plaintiff's justifiable reliance. In contrast, DTPA claims require a plaintiff to prove detrimental reliance and that the defendant committed at least one of the acts in the DTPA's "laundry list"—a defendant's intent for his non-disclosure is irrelevant. Accordingly, if the misrepresentation is not one that may not be actionable under the common-law fraud claims of misrepresentation or non-disclosure, it may still be actionable under the DTPA.

SHOTGUN PLEADINGS THAT FAIL TO MEET THE PLEADING REQUIREMENTS OF RULE 8(a)(2) AND 10(b) SHOULD BE DISMISSED.

DTPA AND EXPRESS AND IMPLIED WARRANTY CLAIMS DISMISSED.

Bauer v. AGCO Corp., ___ F. Supp. 3d ___ (W.D. Tex. 2024).
https://law.justia.com/cases/federal/district-courts/texas/txwdce/5:2023cv00993/1172752175/29/

FACTS: Brandon Bauer ("Plaintiff") purchased a tractor from AGCO Corporation ("Defendant") that he alleged was defective in terms of material and workmanship under the manufacturer's warranty. Plaintiff brought claims under the Texas Deceptive Trade Practices Act ("DTPA") and the Magnuson-Moss Warranty Act for breach of express and implied warranties. Plaintiff sought damages for the diminished value of the tractor, the cost of repairs, attorney's fees, costs, and additional statutory damages.

Defendant filed a Motion to Dismiss. Plaintiff responded to the motion, and Defendant subsequently replied.

HOLDING: Motion to Dismiss granted.

REASONING: Defendant argued that Plaintiff failed to plead sufficient facts to establish prima facie claims and characterized the complaint as a "shotgun pleading" that did not state a proper cause of action, violating the Federal Rules of Civil Procedure 8(a)(2) and 10(b). Defendant also asserted that the complaint failed to meet Rule 9(b)'s heightened pleading standard, which was necessary due to the expiration of the statute of limitations. Additionally, Defendant argued that the express and implied warranty claims under the DTPA and the Magnuson-Moss Warranty Act should be dismissed because the complaint failed to provide

adequate notice of the claims and the grounds upon which each claim rested.

The court found that the Plaintiff's complaint failed to separate different counts, did not clearly state the elements of each claim, and did not connect these elements to the facts alleged. The court cited precedent from the Eleventh and Fifth Circuits to support the dismissal of the "shotgun pleading," which fails to meet the pleading requirements under Rules 8(a)(2) and 10(b). Because the Plaintiff combined all claims into a single paragraph without listing the elements or tying them to the facts, the court determined that all claims, including those under the DTPA and the Magnuson-Moss Warranty Act, must be dismissed. The court further noted that Plaintiff did not specify the content of the express warranty in a manner that would allow the court to deem the claims plausibly pled. Consequently, the court concluded that Plaintiff had not met the burden to establish a plausible breach of express warranty, implied warranty, and DTPA claims.

RULE 91 MOTION PROPERLY GRANTED AS TO DTPA CLAIM WHEN PLAINTIFF FAILED TO ALLEGE FACTS SHOWING HE WAS CONSUMER AS TO GOODS OR SERVICES PROVIDED BY DEFENDANT.

Burns v. Emd Supply Inc., ___ S.W. 3d ___ (Tex. App.-Houston [1st Dist.] 2024).
https://casetext.com/case/burns-v-emd-supply-inc-1

FACTS: In his second lawsuit against EMD Supply Inc. and its CEO, James White ("Appellees"), Eric Burns ("Appellant") alleged breach of a verbal contract and deceptive trade practices. Appellant claimed that Appellees misled him into believing he had effectively executed a binding agreement. According to Appellant, Appellees had offered $30,000 in services and 15-20% royalties from the production and sale of his invention, with an agreement to produce "a fully functional prototype" of the invention. The alleged agreement was based on an oral contract and a letter of intent. Appellant argued that Appellees' deceptive trade practices induced him to comply with the oral agreement and fraudulently induced him to provide his intellectual property.

Appellees filed general denials and a Rule 91a motion to dismiss, arguing that the breach of contract claim lacked merit due to the absence of essential terms. They also moved to dismiss the Texas Deceptive Trade Practices-Consumer Act ("DTPA") claim, asserting that the Appellant failed to establish the necessary elements of a DTPA claim and did not provide the proper notice required under Section 17.505(a) of the Texas Business and Commerce Code. Appellant appealed the trial court's Rule 91a dismissal of his breach of contract and DTPA claims. The trial court held a hearing on the motion to dismiss and granted the Appellees' Rule 91a motion, though it did not specify the grounds for its ruling.

HOLDING: Affirmed.

REASONING: Appellant contended that the trial court erred by dismissing the DTPA claim, arguing that there was probable cause to believe Appellees had violated the DTPA and that the claim was not time-barred. Appellant also asserted fraud and conspiracy, arguing that there was a binding oral agreement obligating Appellees to produce the functional prototype before his patent expired. Appellees countered that the DTPA claim was time-barred and that Appellant failed to establish the elements required for a DTPA claim.

Under Texas Rule of Civil Procedure 91a, a claim has no basis if the plaintiff fails to plead a legally cognizable cause of action or if the facts alleged negate the plaintiff's entitlement to relief. To properly plead a DTPA claim, a plaintiff must first establish that they are a "consumer," which requires proving that they sought or acquired goods or services by purchase or lease, and that the goods or services form the basis of the complaint. Additionally, the plaintiff must show that the defendant engaged in false, misleading, or deceptive acts as specified in Section 17.46(b) of the Texas Business and Commerce Code, acted unconscionably, breached an express or implied warranty, or violated Chapter 541 of the Texas Insurance Code, and that the defendant's actions were a producing cause of the plaintiff's injury.

Under Texas Rule of Civil Procedure 91a, a claim has no basis if the plaintiff fails to plead a legally cognizable cause of action or if the facts alleged negate the plaintiff's entitlement to relief.

The court determined that Appellant's claim did not establish that he was a consumer under the DTPA because he did not demonstrate that he sought or acquired goods or services from Appellees by purchase or lease. Furthermore, Appellant failed to identify any specific provision of the DTPA that Appellees allegedly violated. As a result, the trial court properly dismissed the DTPA claim under Rule 91a. The court also noted that Appellant waived his DTPA claim on appeal by failing to provide any analysis to support his arguments. Therefore, the trial court did not abuse its discretion in dismissing the DTPA claim, and the judgment was affirmed.

SERVICING OF A LOAN OR A MODIFICATION CANNOT SUPPORT A DTPA CLAIM BECAUSE IT DOES NOT INVOLVE THE PURCHASE OR LEASE OF A GOOD OR SERVICE

Boelter v. US Bank Tr. N. A., ___ F. Supp. 3d ___ (W.D. Tex. 2024).
https://www.govinfo.gov/content/pkg/USCOURTS-txwd-1_22-cv-01214/pdf/USCOURTS-txwd-1_22-cv-01214-0.pdf

FACTS: Plaintiffs Corey and Jennifer Boelter took out a home mortgage loan with Wells Fargo Home Mortgage, Inc. in 2003. The Boelters executed a note and deed of trust secured against their home as part of the transaction. The deed of trust was eventually assigned to Defendant US Bank Trust N. A., as owner trustee of Defendant VRMTG Asset Trust ("Trustee"). The Trustee appointed Defendant Fay Servicing, LLC as its mortgage servicer. The Boelters have been in default on their home loan since 2018. The Trustee sent the Boelters a notice of default, an intent to accelerate, and a notice of acceleration as the Trustee prepared for and scheduled a nonjudicial foreclosure of the Boelters' home.

In response, the Boelters, proceeding pro se, sued the Trustee, Fay Servicing, and others in separate suits, alleging various violations of the DTPA. The defendants removed both actions to federal court, where they were consolidated. The defendants filed a joint motion for summary judgment on all the Boelters' claims. The Boelters did not file a response.

HOLDING: Recommended granting the summary judgment motion.

REASONING: Since the Boelters did not file a response to the summary judgment motion, the Court accepted the Defendants' undisputed facts and evidence.

The Court noted that to prove a DTPA claim, a plaintiff must demonstrate that they are a consumer who suffered damages due to the defendant(s) committing a false, misleading, or deceptive act. To qualify as a consumer, the plaintiff must establish (1) that they sought or acquired goods or services by purchase or lease and (2) that the purchased or leased goods or services form the basis of their complaint. For a borrower of money to qualify as a consumer, the plaintiff's complaint must concern seeking a loan to buy or lease goods or services. The court reasoned that when a mortgagor uses a loan to buy a home, the mortgagor's servicing of the loan does not involve the consumer buying or leasing a good or service. Since the Boelters' claim only related to the Defendant's loan servicing, the court held that these facts could not support a DTPA claim and that the Defendants were entitled to summary judgment.

For a borrower of money to qualify as a consumer, the plaintiff's complaint must concern seeking a loan to buy or lease goods or services.