

Question 10 - Selected Answer

1. Stacie →

Any person can sue under the insurance code for unlawful and unfair trade practices committed by an insurance company or its agent. One need not be a consumer. If Bill brings an action under the insurance code, he can claim violations consisting of:

- 1) misrepresentation of the agent, Stacie, that he would get his check soon (within 90 days) and that everything was fine – which he relied on;
- 2) Failure to respond within 15 days of completing its investigation of its acceptance or rejection of the claim
- 3) failure to pay promptly after Stacie represented he would be paid. Must pay within 45 days. These violations constitute harm to Bill and Bill can recover for the breaches. He can, under the insurance code, recover for his actual damages which are damages recoverable at common law and include economic, compensatory, and even mental anguish if he can show physical manifestations. Thus, the value of his home being foreclosed on, medical bills, and even emotional upset (if he shows physical manifestations). He can recover up to three times his actual damages if he proves the violations were made knowingly. He also can get reasonable court costs and attorney fees. Also, 18% for violations of failure to timely pay.

If Bill brings the action under the DTPA, assuming consumer standing, he can recover for laundry list violations including 1) representing an agreement confers rights it doesn't 2) failure to disclose when intended to induce the consumer – both from Stacie's representing the contract will go through and he will get his check. He can also recover for breach of warranty. Although an independent cause of action, it can be brought through the DTPA. Here, Stacie breached an express warranty that the contract was valid and would be paid. Bill can also allege unconscionability under the DTPA when Stacie took advantage of his knowledge, ability, experience, and capacity to a grossly unfair degree by stringing him along without an explanation and telling him he would get his money. If he brings the DTPA causes of action, he only gets economic damages, an injunction, reasonable court cost and attorneys fees – and – if he prove knowingly – up to 3x economic damages (lost money from house) and if intentionally, up to 3x economic plus mental anguish. Thus, he will do better under the insurance code. He could also bring the insurance code violations through the DTPA tie in statute, but he would only get the exact same damages as if brought through the insurance code itself, less the 18% violations. Also mental anguish alone if physical manifestations and knowingly found.

2. Bill can sue Insko under the insurance code, too, for insurance code violations. On top of the violations of Stacie, which Insko is also liable for, Insko is further liable for the unreasonably low settlement offer it offered Bill until Insko realized it was being sued. He could also allege failure to accept responsibility when it was reasonably clear and unreasonable rejection of a valid claim and misrepresenting the results of the investigation. Again, under the insurance code, Bill could recover for actual damages, up to 3x actual damages with a knowing finding of a violation, and reas. court cost and attorneys fees. He could get 18% interest from the money he should have gotten if properly handled.

Assuming consumer standing since insurance is a service, Bill can assert claims under the Deceptive Trade Practices Act for misrepresentations made by Stacie, its agent. Also, for the warranty violations since at common law, agency law applies.

Also, for unconscionability of Stacie plus InSCO when InSCO took advantage of Bills lack of knowledge, ability, experience, and capacity to a grossly unfair degree. This means complete, flagrant, and unmitigated.

Again, if merely under the DTPA, he will only get economic damages –(reliance damages) plus reasonably court costs and attorney fees, in injunction, and mental anguish if these violations were “knowingly” committed. He can get up to 3 times economic damages with the knowingly finding or 3 times economic plus mental anguish if “intentionally” made. Of course, mental anguish will require physical manifestations.

Bill could bring his insurance code violations under the DTPA itself (not as good damages) or via the tie in statute which will allow him the actual damages, up to 3 times actual damages if “knowingly” violations, including mental anguish with physical manifestations, and court costs/attorney fees.

*Note “knowingly” means actual awareness of the falsity and “intentionally” means actual awareness of the falsity with the intent the other rely.”

END OF EXAM

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Because the relevant laws apply to both Stacie and Inco I will lay out the law once and discuss each's individual liability.

Bill has possible causes of action against both Stacie and Inco under Texas' deceptive Trade Practices Act (DTPA), the insurance code, and DTPA tie-in. Bill has standing because he is a consumer and the goods or services form the basis of his complaint. A party is liable under the DTPA when their false, deceptive acts or practices are the producing cause of economic damages or mental anguish.

There are four categories of rights under DTPA

1. The laundry list violations that Plaintiff relies on
 - (i) representing characteristics of good or services if they are no
 - (ii) representing standard if it is another
 - (iii) failure to disclose with intent Plaintiff definitely rely
 - (iv) representing rights benefits when something does not have
2. Unconscionability – An act the to the consumers detriment takes advantage of the consumers lack of Knowledge, Ability, experience, capacity to a grossly unfair degree.
3. Breach of warranty – must be established outside the DTPA
4. Insurance Code violation

Facts giving rise to possible DTPA violations.

Stacy – When Stacy said “everything looks fine” this could be considered a representation of rights or characteristics it did not have. Additionally when she said “check certain in 90 days” this was a misrepresentation.

Inco – there actions of denying coverage could be considered unconscionable, furthermore Priority is not required in the DTPA, but Stacie as Inco's agent creates liability for Inco. The other obvious straight DTPA violation is the Insurance code violations discussed below.

If Bill succeeds on his straight DTPA claim he is entitled to Injunctive relief. Economic damages – compensatory damages for pecuniary loss including repair and replacement, Mental anguish if shown a substantial disruption in his daily routine – being “emotionally upset” is not enough. Mental Anguish also requires a “knowingly” finding. A Knowingly (Actual awareness of the false act at time of transaction) finding gives Bill up to 3 times economic damages and an Intentional finding (actual awareness with specific intent the consumer detrimentely rely) Bill could get 3 times economic and mental anguish. Because damages under the insurance code and tie-in are better Bill probably won't sue under straight denied. Because they failed Bill can recover the amount of the claim plus 18% interest a year, and fees and cost.

Now under the insurance code violations Both Stacie and Inco are liable to Bill. Specific violations: Misrepresentations of the status of a claim, failing to accept or deny within a reasonable time, failing to attempt to settle in good faith after only the claim has become reasonably clear (the fire marshal told them). Failing to give adequate basis for denial. Because of these violations Bill can recover:

1. Actual damages – anything recoverable at common law ie the \$100,000 of the claim, \$100,000 owed the bank, medical expenses, time off work. Mental Anguish if shown – (unlikely here).
2. Up to 3 times Actual with a knowingly finding
3. injunctive relief
4. Court cost and reasonable attorney fees. These damages are comparable to the DTPA – tie-in therefore the need to go through the DTPA has less utility, but if Bill did he could get Actual Damages, 3x with a knowingly finding and Cost plus fees.

Stace as agent for Insco and working in the scope of her employment makes Insco liable to all damages that she is liable for. On the other hand violations not individually attributable to Stace cannot bind her there fore she may seek indemnification for some of the claims brought by Bill.

END OF EXAM

SELECTED ANSWER

10)

1. Assuming consumer status, Bill has a cause of action against Stace and Insco under the DTPA as follows:

Rights:

1. Insurance Code: Any violation of the Insurance Code is actionable under the DTPA. Here, Stace, as agent for Insco and Insco violated the Insurance Code as follows:

a. Failure to timely pay a claim - here it took over nine months for Insco to even make an offer to pay;

b. Failure to communicate timely with the insured - here, Bill made several calls to both Stace, as agent for Insco both of whom failed to call him back and communicate with him in a reasonable time period. In addition to the phone calls, neither Stace or Insco responded to Bill's letters.

c. Failure to acknowledge coverage. Here, Insco repeatedly denied coverage to a legitimate claim. Has Insco stood on their assertion that the claim was not valid, they are required to communicate with Bill regarding same and provide adequate proof for their belief in the fact that the claim was not covered by the policy.

2. Laundry List: The DTPA sets out what has become known as the laundry list provisions which is violated will be actionable under the DTPA. Here, the following laundry list violations were made:

a. The policy conferred rights upon the consumer which he actually did not. Here, Bill will rely upon the rights set forth in his insurance policy which he believed would cover fire damage to his home if in fact a fire ever occurred. Stace's comment to Bill that everything was fine and you should be getting your check within 90 days was also relied upon by Bill. To be actionable under the laundry list, the consumer must have relied on the rights he thought were conferred upon him. Here after receiving the word from Stace, Bill set out to rebuild his home causing him \$100,000 in debt which he thought he could repay.

3. Breach of Warranty: It is unlikely that Bill will raise a warranty claim. Warranty claims are not created by the DTPA. Rather, common law breach of warranties are actionable under the DTPA. There is no implied warranty of merchantability or fit for ordinary use raised by the facts here. Bill might be able to claim that the "payment in 90 days" was a breach of an express warranty as it was a misrepresentation upon which Bill relied upon. However, that argument is more successful

under a laundry list violation.

4. Unconscionability. It is unlikely that Bill will raise this claim but the facts do not present an issue as to Stace or Insko using Bill's lack of knowledge, education, or abilities to a grossly unfair degree.

Remedies for Damages under the DTPA:

Provided that Bill is successful under the rights above, the following damages are recoverable under the DTPA:

1. Economic loss. Economic loss is compensatory damages for pecuniary loss; cost of repair and cost of replacement. Here Bill is entitled to the cost of loss - \$120,000 for his home as well as the loan of \$100,000 which caused the foreclosure on his property.

2. Mental Anguish. Bill is entitled to mental anguish if he can prove a substantial disruption to his daily routine. Here, the facts indicate that Bill was unable to work, loss money for employment and incurred medical bills as a result of his stress. A finding of mental anguish requires the factfinder to make a "knowingly" finding - that is that the actions of Stace and Insko were made despite the fact they knew the policy should be paid.

3. Additional Damages: Bill will be entitled to additional damages as follows:

- a. knowingly finding by the court - up to three times the amount of economic damages;
- b. an intentional finding by the court - up to three times the amount of economic damages and mental anguish.

4. Attorneys fees: When a party proves that his rights have been violated under the DTPA he is entitled to reasonable attorneys fees and expenses.

2. Bill also has a cause of action against Insko for violation of the Insurance Code.

Bill has standing to sue under the insurance code because (1) he had a policy with Insko; and (2) the policy purported to cover the property damaged.

Bill will have to and can show that Stace, as agent of Insko, and/or Insko violated the the Insurance Code as follows:

a. Failure to timely pay a claim - here it took over nine months for Insko to even make an offer to pay;

b. Failure to communicate timely with the insured - here, Bill made several calls to both Stace, as agent for Insko both of home failed to call him back and communicate with him in a reasonable time period. In addition to the phone calls, neither Stace or Insko responded to Bill's letters.

c. Failure to acknowledge coverage. Here, Insko repeatedly denied coverage to a legitimate claim. Has Insko stood on their assertion that the claim was not valid, they are required to communicate with Bill regarding same and provide adequate proof for their belief in the fact that the claim was not covered by the policy.

On a related note, Stace's action directly impact the liability of Insko because Stace was an agent of Insko. A principle is liable for the action of his agent when the agent is acting in the course and scope of his employment. Under this analysis, I am assuming that Stace was acting within the scope of his employment as nothing in the facts would indicate otherwise.

Bill damages, upon a finding that the Insurance Code provisions had been violated are as follows:

1. Actual damages. Actual damages are anything recoverable at common law, including mental anguish.
2. Additional damages. Upon a finding that Stace and/or Insko knowingly violated the Insurance Code provisions - that is, they knew the procedures to follow regarding Bill's claim and chose not to follow them, Bill can recover up to three times the amount of actual damages.
3. Attorneys fees: Bill will also be entitled to recover reasonable attorneys fees and expenses.

END OF EXAM