

1. The primary defense that Mary can assert is that the DTPA is generally not waivable at all. The requirements for waiving rights under the DTPA include being represented by counsel, and here Mary has at no time been assisted by counsel. Therefore, the waiver she may have signed is invalid. In addition, the efforts made to secure her waiver were not obvious and were hidden in fine print on the contract. This violates the need for the waiver to be known by the consumer by a conspicuous or clear writing evidencing the waiver. Top Shelf and Personal Kitchen both are unable to claim a defense of waiver under these circumstances.
2. No, Personal Kitchen cannot be allowed to prevail by asserting the 5 day cancellation policy. The discussion with Wes probably created an express warranty that is superior to the 5 day policy. An express warranty is any promise related to the exchange that forms part of the bargain. Here, Wes promised Mary that the items actually carried a warranty that included 60 days to cancel the purchase for any reason. This promise was likely part of the bargain and what induced Mary to make the purchase. The fact that Wes & Mary were not in another person's presence is not necessary for the creation or enforcement of express warranties. In addition, express warranties cannot be disclaimed by merely asserting that there is a contravening policy in place, i.e. the 5 day return rule. The express warranty requires much more explicitly to be printed and noticed by the consumer before it can be waived. The fact that the express warranty was merely an oral promise goes to the difficulty of proving that such a promise was made.
3. Mary can claim several DTPA claims. First, she may claim under the DTPA because she is a consumer, since she has sought to acquire "goods or services" by "lease or purchase." She could claim misrepresentation under the DTPA laundry list provision, unconscionability, breach of implied warranty of merchantability, and breach of the express warranties.

To claim a DTPA misrepresentation, she may need to prove knowledge if she claims the misrepresentation was meant to induce her into the transaction. Otherwise, no knowledge is needed to be proved. Here, the promise of the 60 day trial period and the unlimited one year warranty may be possible proof of knowing misrepresentation. In any case, she may claim general misrepresentation was made. Proof of reliance must also be demonstrated by Mary to claim misrepresentation, and here she certainly relied on Wes' promises of the coverage of the items.

Mary may also claim unconscionability under the DTPA. Unconscionability is when the seller takes advantage of the consumer to a grossly unfair degree because of their customer's limited knowledge, experience, capability. Here, the effort to get her to waive DTPA protection in fine print might be an effort to unconscionably obtain waiver without her being able to notice. This claim, however, is weaker than her other DTPA claims.

Mary may also claim breach of the implied warranty of merchantability since the goods sold were of extremely poor quality. This implied warranty promises that goods will be fit for their ordinary use, and arises by common law when sold by a merchant who deals in goods of that kind. Here, the seller meets these requirements.

Also, the promised express warranty of 60 days to return has been violated, and the "unconditional" warranty. Mary may get economic damages if she can succeed in her DTPA claims. Economic damages are pecuniary, so that would likely include getting her money back. Also, she may get consequential damages, but here none appear in the facts. If she proves that either Top Shelf, Wes or Personal Kitchen acted knowingly she may get up to triple economic damages and mental anguish damages (unlikely any of these here).

She is likely to succeed in a personal claim against Wes individually for his misrepresentations. And likely to succeed against Top Shelf and Personal Kitchen for breach of implied and express warranties.

1. Mary can assert that the DTPA is to be liberally construed and generally may not be waived. The DTPA is to protect consumers. To waive a DTPA claim, the waiver must be in writing, with counsel present, and signed by the consumer. Here, Mary signed a contract with a statement that she waives all rights under the Texas DTPA. This is insufficient to waive her rights. Mary was not represented by counsel when the writing was signed. Also, the sentence was in small writing where a consumer would most likely not ever have seen the waiver. The waiver that Mary signed in the sales contract is insufficient to waive her rights under the DTPA. Mary may still assert DTPA actions against both Personal Kitchen and Top Shelf.

2. No, Personal Kitchen will not prevail with this defense. The DTPA makes no warranties. But warranties existing outside the DTPA may be brought through the DTPA. Those same warranties may be disclaimed the same way they could have been disclaimed outside the DTPA. Here, there was no disclaimer of warranty. Although the sales contract provided for a "limited warranty," Wes, a salesperson for Personal Kitchen, made express warranties to Mary. Wes told Mary she had a 60 day trial period to cancel the transaction. This was an express warranty made to Mary that trumps any implied warranty in the sales contract or limited warranty in the sales contract. Mary relied on Wes' statement when purchasing the knives and Personal Kitchen cannot assert a company policy to prevent Mary from bring her claims.

3. Under the DTPA, a consumer may bring a cause of action alleging (1) a laundry list violation, (2) breach of express or implied warranty, (3) an unconscionable action, or (4) a violation of the insurance code chapter 541. A consumer is one who seeks or acquires by purchase or lease any good or service. Mary is a consumer under the act because she purchased the knives which are the basis for her complaint.

Mary can assert a laundry list violation that she relied on to her detriment. The laundry list prohibits misrepresentations. Wes told Mary the knives could be returned for any reason during the 60 day trial period. This was a misrepresentation because the stores policy Mary only had five days to cancel the transaction.

Mary may also assert breach of warranty claims against Personal Kitchen for the statements made by Wes. Wes made express warranties that the knives had a full one year warranty and a 60 day trial period where they could be returned for any reason.

Mary may also assert a breach of implied warranty of merchantability. Mary purchased the knives from Personal Kitchen – a merchant who sells goods of that kind. A merchant makes an implied warranty that the goods are fit for their intended purpose. Here, the pans began to flake the first time Mary used them and the knives quickly became dull. Both of these facts tend to show the pans and knives were not merchantable because they were not fit for their intended purpose.

Mary could assert breach of warranty claims against Top Shelf, the manufacturer, if Top Shelf's warranties actually reached the consumer. The facts are unclear whether a statement of promise by the manufacturer actually reached Mary. The sales contract discussed a manufacturer warranty, but it is unclear whether this was made by Top Shelf or if this was put in the contract by Personal Kitchen. If the misrepresentations or warranties reached the consumer then Mary could sue Top Shelf under the DTPA as well.

Mary could also assert on claim of unconscionability. A seller of goods acts unconscionable when it takes advantage of the consumer to a grossly unfair degree. It takes advantage of the consumer's lack of knowledge, experience, or education. Here, if Mary had little experience with kitchen goods and Wes took advantage of this lack of knowledge, Mary could prevail on an unconscionability claim under the DTPA.

The consumer must show that the misrepresentations of warranties were the producing cause of the consumer entering the transaction. Here, Mary will most likely prevail on her DTPA claim based on the breach of express warranties made by Wes, an employee of Personal Kitchen.

The relief given to Mary under the DTPA is economic damages and reasonable costs and attorney's fees. If Mary can show she suffered mental anguish, a substantial disruption of her daily routine she may be able to recover those damages as well. Economic damages include compensatory damages including cost of repair and replacement. Additional damages are also available under the DTPA. If Mary can prove Personal Kitchen acted knowingly then Mary may recover up to three times her economic damages. If Mary can show the Defendant acted intentionally, she can recover up to three times economic damages plus mental anguish damages. Mary will most likely recover for her DTPA claim against Personal Kitchen.

END OF EXAM

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Selected Answer #3

1. The Texas Deceptive Trade Practices Act (DTPA) has a broad purpose of protecting consumer rights. In general, rights under the DTPA may not be waived unless several conditions are met. Waiver of the DTPA rights may only occur by the consumer if the consumer is represented by an attorney in the transaction giving rise to the claim, if there is not a great disparity in bargaining power between the consumer and the seller in question, and if the consumer waives the DTPA in a signed writing. A consumer is one who seeks or acquires by purchase or lease goods or services.

Here, Mary bought a set of kitchen knives and copper pans from Personal Kitchen (a store), and the goods were manufactured by Top Shelf. She acquired goods through a purchase, so she is a consumer under the DTPA. The facts that she may raise are: she was not represented by an attorney in this transaction and that Top Shelf and Personal Kitchen have much more bargaining power over her because they are enterprises in the business of selling these goods, while she is just one consumer. She will not be able to deny that she might have waived the rights in a signed writing because the sale contract stated that purchaser waived all DTPA rights and she signed it. However, the fact that she wasn't represented by an attorney will save her from having waived DTPA rights.

2. Personal Kitchen will not prevail on its defense that Mary did not seek to cancel the contract within five business days. Under the DTPA, a seller may be liable under warranty for express statements of fact regarding the transaction. A seller can also be liable for misrepresentations made that were relied upon and that were the producing cause of a consumer's damages.

In this case, Mary is a consumer because she acquired goods (tangible chattels) by purchase. The sales representative of Personal Kitchen provided her with a warranty that she could return the goods within 60 days. Though the contract tried to provide a limited warranty at the manufacturer's discretion, this appears to be different from the express warranty granted by seller. Therefore, the defense that she did not cancel would not work for this defendant.

In addition, this statement was a misrepresentation of the transaction because the company did not wish to give her that many days to cancel. However, she relied on the

statements coming from Personal Kitchen, and damages resulted in the form of malfunctioning pans and knives. Because she relied on his statements and it caused damages, they cannot successfully raise this defense.

3. Mary can assert warranty claims and laundry list claims under the DTPA and she is likely to prevail against Personal Kitchen and perhaps Top Shelf. She may also use the DTPA to make a claim that these businesses acted unconscionably. The DTPA allows for several causes of action to be brought by a consumer. A consumer is one who seeks or acquires by purchase or lease goods or services. This person or entity can sue anyone whose actions in violating the DTPA gave rise to the transaction. A consumer can even sue a remote manufacturer under the DTPA if the remote manufacturer's violations (such as a misrepresentation) made it all the way down to the consumer. The DTPA provides for a cause of action under warranty, unconscionability, the insurance code, or for a laundry list violation. A laundry list violation is one of 27 items of prohibited conduct, such as misrepresentation of legal rights or misrepresentation of the quality of goods or services. This part of the DTPA requires that the consumer relied on the misrepresentation and that the misrepresentation was a producing cause of damages suffered. One acts unconscionably if he or she takes advantage of another's lack of experience, skill, or knowledge to a grossly unfair degree. A DTPA claim can also be brought by using a "tie-in" statute, which is any number of Texas statutes that have the same purpose of the DTPA--to protect consumers--but for a specific area, such as health spas. Any warranty claim may be brought by determining that there is a breach of warranty outside of the dtpa; the dtpa itself does not make warranty law.

An express warranty is one that is a statement of fact, or a model of some good. It is more than just stating the seller's opinion on or puffing about some goods. It may arise from the statements made by a sales representative. An implied warranty of merchantability arises from the sale of goods in the normal course of business, and it allows a claim if the goods don't conform to their ordinary purpose. An implied warranty of fitness for a particular purpose arises when the buyer has a certain purpose for the goods, this is communicated to the seller, and the buyer relies on the seller's expertise in buying the goods.

Personal Kitchen: Here, Mary bought a set of kitchen knives and copper pans from Personal Kitchen. The sales rep told her that the knives carried a full unlimited one year warranty and she accordingly had a 60 day trial period to cancel the transaction. Later, the pans began to flake and the knives became dull, so she presented the warranty to Personal Kitchen to cancel the transaction. Personal Kitchen refused to do this because they said she only had five

days to cancel. Here, the sales representative gave her a full one year warranty and a 60 day trial period to return the goods. These are statements of fact, so he gave her express warranties that she could now use to sue on in the DTPA. Further, the sales contract from Personal Kitchen had a description of the pans and knives, which probably also amounted to an express warranty that she could sue under. The goods also wore out soon after buying them; because they did not comport to the way pans and knives ordinarily work, she will also probably be successful in an implied warranty of merchantability claim against the store, and this can be brought using the DTPA.

She will also be able to use the laundry list against Personal Kitchen. One claim in the laundry list is a violation for misrepresenting legal rights. Here, the store said she had several warranties but later refused to honor them. Because they represented she had a warranty at one point and now deny it, they likely misrepresented her legal rights and she can sue under the DTPA.

She may also prevail against Personal Kitchen because their actions were unconscionable. An ordinary consumer likely does not have the education, skills, or experience to understand when a seller is trying to limit its rights under a Texas statute such as the DTPA. She might also not comprehend all of the varying warranty terms provided by the sales representative and on the written form. Because Personal Kitchen seems to have taken advantage of her lack of knowledge to the high degree that she can no longer obtain a refund or replacement from anyone, they seem to have acted unconscionably and she may be successful in this suit under the DTPA.

Top Shelf: Mary might recover against Top Shelf. A consumer may sue a remote manufacturer if the manufacturer DTPA violation made it down to the consumer. In this case, it seemed as though there was a manufacturer's warranty for repair or replacement of the pans. However, this statement was made on a Personal Kitchen form. Because it does not seem to stem from the remote manufacturer itself, this consumer could probably not bring an express warranty claim against the manufacturer.

Similarly, no misrepresentations made it from the remote manufacturer to the consumer; therefore, she may not bring a laundry list claim against Top Shelf.

An implied warranty of merchantability arises for the sale of goods, such that the goods will perform as they ordinarily should. If manufacturer is considered a merchant of these goods,

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she might have an implied warranty of merchantability claim against Top Shelf because the goods did not act as they ordinarily should work.

END OF EXAM