

Sharon's claims are as follows:

1. To bring an action under the Deceptive Trade Practices Act (DTPA) there must be a consumer – an individual who seeks or acquires by purchase or lease any goods or services. For consumer standing, the goods or services must form the basis of the DTPA complaint. Privity is not required – what is important is the defendant's connection with the transaction – to bring an action under the DTPA, the defendant may engage in any of the following acts that constitute the producing cause (efficient, exciting, contributing cause which in natural sequence produced the injury or harm complained of) of economic damages or mental anguish damages – producing cause does not have to be the sole producing cause – it just has to be a producing cause – the following are claims under the DTPA-

- A. Any false, misleading, or deceptive act or practice specifically enumerated under the DTPA laundry list of violations & relied upon by consumer to their detriment.

- 1) Representing that the good was of a particular character that it wasn't.

Here, Sharon is a consumer because she sought to acquire & purchase a good – a boat - & that boat is the basis for her complaint. The boat is also the cause of her damages. Dean represented that the boat was “like new” and in “great condition” – these are alluding that the boat was of a particular character it was not. Further, the quality inspection checklist also indicated that boat was in “good working order.” Dean also assured Sharon the boat was ready for use.

- 2) Representing the goods are of a particular quality that they are not.

The same representations pointed out in 1) may also be said to represent that the boat was of a particular quality it wasn't.

- 3) Failure to disclose a fact known by the seller about the goods at the time of the transaction to induce the buyer into entering into the transaction they wouldn't have entered into had the information been disclosed.

Dean failed to disclose that he himself filled out the Inspection Checklist & the mechanic was no longer employed there – this was done to induce Sharon to buy the boat. All these representations were relied on by Sharon to her detriment.

- B. Breach of express & implied warranties: the DTPA does not create warranties, rather, the warranties are found under other law such as common law and the U.C.C.

- 1) Express warranties: any affirmation of fact or promise, description, or sample or model that forms the basis of the bargain.

Here, Dean told Sharon that the boat was in “great condition” and “like new.” While “great condition” may be ambiguous as to whether it is affirmation of fact or may be mere puffing, “like new” gives the buyer an expectation of what they are purchasing – thus Dean breached his express warranty when he made this

statement. Further, the inspection checklist also created affirmations of fact by saying the boat was in good working order.

2) Implied warranties:

- a. Merchantability: A warranty made by merchant (one who engages in selling goods of the kind) that the good is fit for ordinary purpose for which it is used.

Here, the boat did not work properly & Dean was engaged in selling boats, thus implied warranty merchantability was made.

- b. Implied warranty of fitness for particular purpose: warranty created when seller knows purpose for which goods acquired & buyer relies on seller's judgment & skill in selecting goods.

Sharon relied on Dean's judgment in which boat to purchase after she told him what she was looking for.

All of these warranties formed the basis of Sharon's bargain because she relied on them.

An "as-is" clause may operate to disclaim implied warranties where they are conspicuously displayed so consumer ought to have noticed it. Here, the "as-is" disclaimer was effective to disclaim both implied warranty of merchantability of fitness for particular purpose, so Sharon cannot bring those claims.

- C. Unconscionability: Unconscionable action or course of action which, to consumer's detriment, takes advantage of consumer's lack of knowledge, ability, experience or capacity to grossly unfair degree (flagrant, complete & unmitigated, glaringly noticeable).

Here, Sharon told Dean that she knew nothing about mechanical matters & Dean used that to his advantage to pass off the deception through his statements & the checklist.

- D. Ch. 541 of the Insurance Code; doesn't apply.

2. Remedies available to Sharon –

- a) Economic Damages – compensatory damages for pecuniary loss including cost of repaired replacement (doesn't include personal injury compensation).

Sharon can get her boat fixed as well as her medical bills paid.

- b) Mental anguish damages with knowingly (actual awareness of falsity, deception, unfairness) finding. Mental anguish is substantial disruption of daily routine more than mere worry, anxiety, vexation, embarrassment, or anger.

Sharon only claimed she had nightmares so she probably won't recover mental anguish.

- c) Additional damages up to 3 times economic damages with knowingly finding & up to 3 times economic plus mental anguish damages with intentionally finding (actual awareness plus intent to cause consumer to rely on falsity, deception).

Sharon can probably get actual damages because Dean appeared to be acting knowingly.

- d) Reasonable & necessary attorneys fees and court costs – Sharon may recover any reasonable and necessary attorneys fees and court costs expended in bringing her DTPA action against Dean.

END OF EXAM

10)

1. Sharon has a cause of action under the Texas Deceptive Trade Practices Act (DTPA) against Dean's Marine (D) for violation of the laundry list, unconscionable conduct and breach of express and implied warranties.

A consumer has a claim for a violation of the DTPA if it the violation is in connection with a consumer transaction and is the producing cause of the consumer's damages. A consumer is defined under the act as a person or entity that seeks or acquires goods or services by purchase or lease. A producing cause is a substantial factor in bringing about the harm to the party seeking relief. In this case, the DTPA applied to S's purchase of the boat because S was a consumer and the misrepresentations and violations of D were in connection with transaction and were the producing cause of her injuries.

Laundry List

First, S has a claim of action against D for violation of the laundry list. Under the DTPA, there are 28 violations that, if a consumer relies upon, create a cause of action. One violation is for general misrepresentations in a consumer transaction. In this case, S clearly relied on the misrepresentations of D in purchasing the boat. For example, D stated that it was like new and provided a fraudulent inspection report on which S relied in making the purchase. Furthermore, there may a violation of the laundry list for failure to disclose if it can be shown that D knew that the engine was faulty, that he did not disclose this fact in order to induce S into the transaction, and that S would not have purchased the boat if the condition of the engine were disclosed. Therefore, Sharon has a cause of action for D's violation of the laundry list upon which she relied.

Unconscionability

Second, the DTPA also provides a cause of action for unconscionable conduct. The DTPA defines unconscionable conduct as an act that, to the consumers detriment, takes advantage of the consumer's lack of knowledge, experience or ability to a grossly unfair degree. In this case, S made clear that "she knew nothing about mechanical matters." Taking advantage of this fact, D

misrepresented that the engine had been inspected by a mechanic and made other false claims about the quality of the boat. Thus conduct is clearly sufficient to provide a cause of action for D taking advantage of S to a grossly unfair degree.

Breach of Warranty

Finally, S also has a cause of action against D for breach of express and implied warranties. While the DTPA does not provide any warranties, it does provide an avenue for pursuing breach of warranty claims for warranties that are provided in other areas of the law. These warranties act as tie-in statutes to the DTPA. Thus, S would have a cause of action for breach of these warranties both independently and under the DTPA (but could only receive one full recovery).

Express warranties are statements of fact (not opinions) on which a person relies. In this case, there were two express warranties made by D. First, he said that the boat was in great condition and "like new." Furthermore, he provided the inspection checklist that indicated all parts were in good working order. Both of these would likely be considered express warranties, the breach of which provides a cause of action under the DTPA. It is clear from the facts that the boat was not like new and the parts were not in good working order since the boat failed the next day after only one hour of use.

Furthermore, there are also implied warranties for the sale of goods provided by the Texas Uniform Commercial Code. Under the UCC, there is an implied warranty of merchantability that goods are fit for their ordinary purpose. This applies when there is a merchant of goods of the kind who commercially sells the product. In this case, it appears D is a commercial seller of boats, and thus would be a merchant with regard to the sale of the boat to S. Since the boat was clearly not fit for ordinary purposes (even as a used boat), there may be a claim for breach of the implied warranty of merchantability.

Finally, the UCC also implies a warranty of fitness for a particular purpose when a seller knows of the buyers intended use and knows that the buyer is relying on the seller to provide a good fit for that use. In this case, S made clear she wanted a boat to use on the lake and state that she needed a boat in good condition because she knew nothing about mechanical matters and did not

want to get stranded on the lake. Thus, it is clear that D both knew her purpose and that she was relying on him to sell her a quality boat. Thus, S may have a cause of action for breach of the implied warranty of fitness for a particular purpose.

However, while S likely breached both these express and implied warranties, the receipt did contain a conspicuous disclaimer that the boat was being sold "As is. No warranties."

Disclaimers of warranties are not effective against express warranties under Texas law. The express warranties of D that the boat was "like new" and in good working order cannot be disclaimed by the receipt disclaimer.

On the other hand, implied warranties can be disclaimed by a "As is" warranty. Thus, the disclaimer may remove liability for D for breach of the two UCC implied warranties.

Finally, "as is" with "no warranties" disclaimers could affect whether S could recover under the DTPA because they could negate the producing cause element. However, since the DTPA is construed to protect consumers, it is unlikely that the misrepresentations by D were not a substantial factor in the transaction even with the disclaimer on the receipt.

2. There are several types of damages available under the DTPA. The primary damages available are economic damages. Economic damages are damages for pecuniary loss, but do not include non-economic, physical or emotional damages. In this case, S sustain economic damages for her repairs to the boat, in going to the doctor and in paying for a subsequent inspection for the boat.

Furthermore, additional damages are available under the DTPA if the conduct was knowingly or intentionally done. A person acts knowingly when they know that the information they are providing is a misrepresentation. A person acts intentionally when they knowingly misrepresent the good with the intent to induce the person into the transaction. In this case, D may be considered to have acted knowingly and/or intentionally. This is because D made the representations about the boat and its mechanical condition knowing that he had no basis for the representation and doing so with the intent to induce S into making the purchase.

If D is found to have acted knowingly, additional damages of up to three times economic

damages plus damages for mental anguish are available. Mental anguish damages are available when the conduct causes substantial disturbances to a person's daily routine and cause a high degree of anguish, not merely anxiety or stress. In this case, there is potential for S to recover for mental anguish as a result of her nightmares from being stranded on the lake as a result of the boat's failure.

Furthermore, if D is found to have intentionally misrepresented the boat to induce the sale, additional damages are available of up to three times economic damages and three times mental anguish damages.

In addition, actual damages are available for violations of the DTPA brought under tie-in statutes. Actual damages include all tort and contract damages, including economic and non-economic damages. Thus, if D is found to have breached the express or implied warranties, actual damages may be available. In addition to the economic damages and mental anguish damages available under the DTPA, this would allow S to recover for such injuries as her pain and suffering from the sunburn. Furthermore, if D is found to have acted knowingly, the DTPA allows for up to three times actual damages to be recovered.

Finally, the DTPA also awards a successful consumer plaintiff with all reasonable and necessary attorneys fees.

END OF EXAM

10)**1. Claims that Sharon has against Dean's Marine under the Texas DTPA**

In order to assert rights under the DTPA there must be consumer standing. The 2 requirements for consumer standing are that the consumer seeks or acquires, by purchase of lease, goods or services and that the good or service form the basis of the complaint. Here, Sharon purchased a boat from Dean's Marine and the boat broke down, which is why she is now suing. Therefore, Sharon has consumer standing under the DTPA.

Rights**1. Laundry List**

Under the laundry list, a consumer can assert claims for several things. The consumer must show reliance on the laundry list claims she asserts. The first type of laundry list claim that Sharon will have is that Dean's Marine misrepresented the "characteristics" and "quality" of the WaveSlasher. This laundry list violation arises when the seller represents that the good or service has "characteristics" and qualities that it does not have. Here, Dean told Sharon that the boat was in great condition and it ran like new. This misrepresented the fact that the boat ran like new because it in fact broke down after only 1 hour on the lake. The facts do not indicate whether Sharon relied on this misrepresentation, but assuming she did, then Dean's Marine violated these laundry list items. Also, Dean told Sharon that the boat had been inspected by a mechanic and showed Sharon the "30-point Quality Inspection Checklist." This laundry list violation is the failure to disclose. In order to maintain a laundry list violation for failure to disclose, the seller must have failed to disclose a material fact with the intent to induce the consumer into purchasing the boat, when the buyer would not otherwise do so had they known the fact. Here, the facts tell us that Sharon was reassured by the 30-point checklist and agreed to buy the boat after Dean had shown it to her. Dean knew that his mechanic had quit the day before and that he had conducted the inspection himself. Therefore, Dean had the intent to induce Sharon into buying the boat, and Sharon probably would not have purchased the boat without the 30-point checklist. Sharon's reassurance from the 30-point checklist is reliance on this laundry list violation. Therefore, Dean's Marine has committed another laundry list violation under the DTPA.

2. Breach of Warranty

Warranties are not created by the DTPA and are independent of the DTPA.

Therefore, a consumer must look to other law to find warranties. The most common source for warranty law is the UCC. Here, the boat is a good and is therefore covered by the warranties provided for in the UCC.

An express warranty is an affirmation of fact or promise or use of a sample or model. Here, Dean used the actual boat to show Sharon its great condition and even told her that it "ran like new." In order to be actionable as an express warranty it cannot be mere puffery. Puffery is an opinion of a salesperson that a reasonable person would not take into account when purchasing the good. Here, the statement that the boat "ran like new" is not mere puffery because it is something that a reasonable person would take into account when determining whether to purchase the boat or not. An express warranty can rarely be disclaimed. The reason that an express warranty can rarely be disclaimed is because it would be against public policy to state an express warranty verbally and then turn right around and disclaim it. Here, Dean's statement that the boat was in great condition and "ran like new" is a valid express warranty. The boat, after only an hour of use on the lake, broke down. Therefore, Dean's Marine has breached the express warranty given by Dean.

The implied warranty of merchantability can also be breached. This warranty requires a merchant. A merchant is someone who is in the business of selling goods of the kind that are complained of. Here, Dean's Marine is in the business of selling boats and marine items. Therefore, Dean is a merchant. Also, the implied warranty of merchantability requires that the good not be fit for its ordinary purpose. Here, a boat is to be used to go out on the water and to be used for extended periods of time. Sharon used the boat very briefly, only an hour, before it broke down. Therefore, the boat was not fit for its ordinary purpose and the implied warranty of merchantability has been breached by Dean's Marine.

There is also an implied warranty of fitness for a particular purpose. In order for this implied warranty to apply, the seller must know what the buyer is seeking the good out for and that the buyer has a particular purpose that it wishes to use the good for. Here, Sharon told Dean that she wished to buy a boat that she could use at her lake house in the Texas Hill Country. Therefore, Dean knew that Sharon wished to use the boat out on the lake. Therefore, the implied warranty of fitness for a particular purpose has been breached.

The implied warranties are subject to a valid disclaimer. A disclaimer is valid if it is conspicuous, large print and a font size of 10-point or larger. The contract of sale for the WaveSlasher contained an as-is disclaimer. An as-is disclaimer is valid if it is conspicuous and in

large print of size 10-point font or larger. Here, the facts tell us that the as-is disclaimer was conspicuous and in large print. Also, with an as-is disclaimer, the consumer must have had an opportunity to inspect the good or service. Here, Sharon had ample opportunity to inspect the boat while she shopped. She was shown the actual boat that she purchased. Therefore, the implied warranty of fitness for a particular purpose is validly disclaimed. The implied warranty of merchantability, however, is not validly disclaimed. In order to validly disclaim the implied warranty of merchantability, the disclaimer must be in writing and it must use the word merchant. This disclaimer is only an as-is disclaimer and therefore does not apply to the implied warranty of merchantability.

3. Unconscionability

Unconscionability is another cause of action that can be asserted under the DTPA. Unconscionability is defined as taking advantage of the consumer's lack of ability, skill, education, experience, or training to a grossly unfair degree. Here, Dean's Marine was aware that Sharon knew nothing about mechanical matters because she told Dean that during the course of the sale. Dean, with knowledge of Sharon's lack of knowledge of boats mechanical matters, assured her that the boat was perfectly tuned. Dean showed her the 30-point checklist and used that to get Sharon to purchase the boat. Therefore, Sharon has a cause of action for unconscionability under the DTPA.

4. Insurance Code

The insurance code does not apply.

2. Damages and other remedies that are available to Sharon for her claims under the Texas DTPA

In order for a consumer to receive damages under the Texas DTPA, the defendant's actions must have been the producing cause of the consumer's harm. The defendant's actions are not required to be the proximate cause. The actions must merely be a substantial factor of the consumer's harm. Here, defendant's actions are the producing cause of the Sharon's harm.

Remedies

1. Economic Damages

Economic damages are defined as compensatory damages for pecuniary loss, including the costs of repair and replacement. Economic damages do not include damages for pain and suffering. Here, Sharon can recover as economic damages, the cost she paid for the boat, \$3,000 and the the costs of repair, including what Sharon had to pay to have the boat inspected by the mechanic the day after the boat broke down. Sharon will also be able to cover

the medical expenses from her trip to the physician's office to treat her severe and painful sunburn.

2. Mental Anguish

Mental anguish damages can be recovered by a consumer if that consumer obtains a "knowingly" finding. "Knowingly" means actual awareness of the false or deceptive act at the time of the transaction. Here, Dean knew whenever he was selling the boat to Sharon that he was engaging in falsities and deception. He told Sharon that the boat ran like new and used a 30-point inspection that he was not qualified to give. There must be a substantial disruption in the daily routine of the consumer as a result of the "knowingly" conduct of the defendant. Here, Sharon suffered a severe and painful sunburn and she had nightmares for several weeks about being stranded on the lake. Therefore, Sharon will be able to recover mental anguish damages from Dean's Marine.

3. Additional Damages

A consumer can recover additional damages if the consumer obtains a "knowingly" or "intentionally" finding. "Knowingly" means actual awareness of the false or deceptive act at the time of the transaction. If the consumer gets a "knowingly" finding then the consumer can recover no more than 3 times the amount of economic damages recovered. "Intentionally" means actual awareness plus the intent to induce the consumer into the transaction. If the consumer receives an "intentionally" finding then they can recover no more than 3 times the amount of economic and mental anguish damages. Here, it is likely that Sharon will receive a "knowingly" and an "intentionally" finding. Dean's Marine knew that they were engaging in false and deceptive acts at the time of the sale of the WaveSlasher to Sharon. Also, Dean's Marine intentionally lied to Sharon about the 30-point checklist with the intent to reassure her that the boat was in great condition and that it "ran like new." Therefore, Sharon will recover additional damages.

4. Attorney's fees and court costs

A consumer under the DTPA will recover reasonable attorney's fees and court costs.

END OF EXAM