

1. Under Texas Consumer Laws, one can bring a claim against an insurance agent under the Texas Deceptive Trade Practices Act (TDTPA) or under a violation of the Texas Insurance Code. To bring an action under the TDTPA the party must be a consumer. A consumer is an individual, partnership, or corporation that seeks to acquire goods or services by purchase or lease for use as a consumer good. To bring an action under the Insurance Code, one does not have to be a consumer, merely a person with a claim arising from a violation of the Insurance Code by the Insurance company representative. A party can bring a claim under both the TDTPA and the Insurance Code. However, one is not entitled to a double recovery.

Under the TDTPA, a mere violation of the Insurance code is a violation of the TDTPA. A claim under the Insurance code should be made as an unfair claim settlements violation or an unfair deceptive and misrepresentation claim.

Under, the Unfair Claim settlements violation a party has a valid claim if one of the following occurs:

- 1) Insurer does not respond to notice of claim (15 days)
- 2) Insurer does not readily accept or reject the claim (15-45)
- 3) Insurer does not readily attempt to settle the claim
- 4) Insurer does not pay the claim within 5 days of settlement

A claim under the deceptive and misrepresentation portion simply requires an act of falsity, express mis-representation, discrimination in rates, or knowingly taking advantage of the insured.

Here, Jenny the insured can assert a claim under the Insurance code for the express misrepresentation by the agent regarding the included coverage of the policy. Jenny can make the same claim of misrepresentation under the TDTPA. Jenny also has a valid claim against the insurer for the lack of communication regarding the claim. Jenny made a claim on July 5, 2009 but did not receive any communication from the insurer until August 15, 2009, over 30 days.

Additionally, the Insurer did not attempt to investigate the claim and the reason for the fire. The insurer noted that it "suspected" the fire was caused by arson. Coincidentally, arson was not covered by the policy. These acts appear to be a lack of good faith by the insurer to settle the claim or negotiated fairly.

In addition, to the claims asserted above, Jenny can bring a claim of fraud. Jenny was told she had one type of coverage but upon acceptance and payment she did not receive that particular coverage.

2. Jenny is entitled to all applicable remedies under the TDTPA and the Insurance code. Under the TDTPA Jenny can receive economic damages (repair & replacement). In addition, if Jenny can prove the insurer acted intentionally or knowingly or both, she can qualify for mental anguish and treble damages. However, if Jenny brings an action under the Insurance code, she can gain actual damages. Under either claim, Jenny is entitled to receive attorney's fees. The attorney's fees must be reduced to an actual dollar amount. The TDTPA does not allow the awarding of attorney's fees by a percentage. Jenny can also seek an injunction to keep the Insurer from operating, particularly under false pretenses.

END OF EXAM

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1. Classic has causes of action against Insurance under the Texas Insurance Code ("Code"), Texas tort law, and the Deceptive Trade Practices Act (DTPA)

Insurance Code

Under the insurance code, a "person" has a cause of action against an insurance company or its agents for violations that include misrepresentations, unfair claims settlement practices, and violation of the Code's prompt payment provisions. A furniture store such as Classic would have standing under this definition.

Here, Myra, as Insurance's agent, made misrepresentations about the policy that encouraged Jenny to buy the policy. Specifically, Myra told Jenny not once but twice that the policy would cover the entire business and its contents, which included the Restoration Building, which Classic specifically told her she wished covered. It's unclear whether Myra knowingly or just negligently made these misrepresentations, but they are actionable under the Insurance Code against both her and Insurance, whom she bound as agent.

In addition, Insurance violated the Code by failing to conduct an investigation of the cause of the fire. Then, it further violated the Code by arguing the fire was caused by arson--based on no evidence of its own and in the face of evidence from the fire department that the cause was the short circuit. It is a violation of the Code for the insurance company to fail to effectuate prompt settlement of a claim when its liability has become reasonably clear.

Furthermore, Insurance has violated the prompt payment provisions in the Code. The Code requires insurers to acknowledge receipt of a claim and to inform the insured of any other documentation it might require within 15 days of receipt of the claim. Here, Classic sent in the claim on July 5, but after repeated calls, she heard nothing back. Only on August 15 was her claim officially rejected. This additionally violated the prompt payment statute because after acknowledging the claim, the insurance company only has another 15 days in which either to pay or deny the claim. If it needs more time, it may notify the insured of this fact and receive another 45 days. However, Insurance simply failed to communicate with Jenny at all until August 15.

Finally, Classic may bring its DTPA laundry list claims through the Code. As will be discussed below, laundry list claims are various misrepresentations and deceptive practices listed in the DPTA as actionable by consumers under the DTPA if they are relied on. Here, Myra made misrepresentations that the policy covered Jenny's entire property and its contents, and Jenny's reliance on these misrepresentations is seen in Classic's payment of the premiums.

Texas Tort Law

Classic also could pursue a common law tort claim against Insurance for its unfair claims settlement practice in failing to effectuate a prompt settlement when its liability became reasonably clear.

DTPA

Classic also can assert claims under the DTPA. To have standing under the DTPA, one must be a "consumer." A consumer is one who seeks or obtains goods or services by purchase or lease, and these are the basis of the claim. A company has consumer standing provided its assets do not exceed \$25 million. Presumably Classic's do not. (If it did, Insurance would have to assert Classic's lack of standing in its answer.) There are four primary claims under the DTPA:

- Laundry list claims - As discussed below, the DPTA contains a long list of deceptive practices that are actionable by consumers if consumers relied on them. Here, Jenny relied on Myra's misrepresentations regarding her insurance coverage. In addition, it's possible that Myra violated another laundry list provision by failing to disclose information to the consumer to induce her to take action she would not otherwise have taken, i.e., purchased the property. This provision requires intent, and it's not clear what Myra's intent was here.

- Unconscionability - The plaintiff has a cause of action if the defendant treats the plaintiff in an unconscionable manner, which is to take advantage of the consumer to a grossly unfair degree ("unmitigated," "flagrant") to her detriment. Here, Jenny has a (fairly weak) case that she knew precious little about insurance and that Myra took advantage of that lack of knowledge. Unconscionability is based on an objective standard, so it does not require intent.

- Breach of warranties - Warranties do not exist in the DTPA, but a consumer may have a cause of action through the DTPA for warranties created outside of it, either in another statute or in the agreement. A primary source of warranties is the UCC. Although it applies to goods, by

analogy Jenny could argue breach of an express warranty. An express warranty is an affirmation of promise or fact (more than "puffing") that became part of the basis of the bargain. Here, one could argue Myra breached an express warranty in stating that the insurance covered the property when it did not. That coverage was part of the basis of the bargain. Indeed, it was exactly what Jenny was seeking. Two other warranties commonly actionable through the DTPA are the implied warranty of merchantability and the implied fitness warranty, neither of which is relevant in this fact pattern.

- Insurance Code - Finally, a consumer may bring actions under the Insurance Code through the DTPA. However, as discussed below, this would typically not be the best option for most plaintiffs.

2. Classic may obtain the following damages against Insurance:

For violations of the Insurance Code:

For violations of the Insurance Code, Classic may obtain the following damages:

- Actual damages, which are all the damages available at common law, including economic damages as well as damages for pain and suffering, disfigurement, mental anguish, etc. To obtain damages for mental anguish, under Texas law Jenny would have to show a substantial disruption in her daily routine and that the defendant's actions were committed "knowingly." "Knowingly" means with actual awareness. Here, the only damages Classic seems to have are economic damages for the loss of the building and its contents.

- Additional damages - Classic can recover additional damages for a total of three times her actual damages with a "knowingly" finding. Here, it's not clear whether Myra knew or not that the policy did not cover all the property. (She was asked twice, so one would think that the second time she would have checked if she was just mistaken the first time.) However, Insurance surely knowingly refused to pay the claim, in light of the fire department's finding of the short circuit. Therefore Classic probably can obtain additional damages.

- Penalties for violation of the prompt payment provisions - Here, under the Code, Classic could obtain the amount of the claim for the property damage plus an 18% penalty.

- Attorney's fees. If Classic prevails, it can also obtain attorney's fees. Although a contingent fee agreement was reasonable for Classic under the circumstances, the lawyer will now be required to determine the value of his fees at a reasonable hourly rate, which the court

will then award.

For tort violations: Classic could obtain the claim and punitive damages for violations of the common law tort. However, it could not obtain attorney's fees.

For DTPA violations:

Under the DTPA, the Classic could obtain the following damages if Insurance's actions were a "producing cause" of them. A producing cause is a cause in fact; it does not require foreseeability as proximate cause does.

- Economic damages, which are compensatory damages for pecuniary loss. These differ from actual damages in that they do not include damages for pain and suffering, loss of consortium, and such. However, in this fact pattern, the economic damages allowed under the DTPA will be the same as the actual damages under the Code because Jenny does not appear to have suffered any "softer" damages, only the damage to the property.

- Mental anguish damages - which require a "knowingly" finding and a finding of substantial disruption of daily routine. We don't seem to have any of those here.

- Additional damages - The DTPA would allow Classic to obtain no more than three times economic damages with a "knowingly" finding. As discussed above, we can probably find "actual awareness" by Insurance in regard to the refusal to pay the claim based on the assertion of "arson." Classic could obtain no more than three times economic plus mental anguish damages with an "intentionally" finding. "Intentionally" means knowingly plus actual intent to cause detriment to the plaintiff. Here, it seems likely that Insurance did refuse to pay the claim intentionally, given the fire department's finding and its own utter lack of investigation of the claim. However, because Jenny and Classic didn't seem to have any mental anguish damages, this intentionally finding will not help them.

- Attorney's fees - The successful plaintiff "shall" obtain attorney's fees under the DTPA. Again, the court will not base them on the contingent fee agreement but on a reasonable hourly basis for Albert's work.

END OF EXAM

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1) Texas consumer law focuses on protecting consumers from unfair or deceptive trade practices. In this situation Classic would have multiple claims under the Deceptive Trade Practices Act (DTPA), the Texas Insurance Code, and the Texas Unfair Settlement Practices Act.

First, Classic would have two different claims under the Deceptive Trade Practices Act. First she would have a normal claim under the DPTA against Myra and the Insurance Company. To have a claim under the DPTA you must be an entity who seeks or acquires goods or services. Here Classic clearly fits this guideline as it is an business (entity) who seeked or acquired services of insurance coverage. There are two possible claims that Classic could make under the DPTA. One would be a laundry list violation of the DPTA and second would be a potential breach of warranty. To make claim for a violation of the laundry list there must have been a misrepresentation given to cause someone to purchase goods or services and that person must have relied on those services to their detriment. This misrepresentation could be a misrepresentation of fact, or legal rights. This same claim would be able to be brought against the Insurance Company itself through vicarious liability because Myra was an employee of the company and made the misrepresentation while acting in the scope of her employment

Here it is obvious that there was at least one misrepresentation on the part of Myra the Insurance agent. When Myra delivered the insurance policy to Jenny she assured Jenny it would cover the entire business and its contents. This could be viewed as a misrepresentation of fact and/or legal rights considering that the policy did not cover her "restoration building". Also, when Jenny failed to notice the inclusion of her restoration building on her actual insurance policy and called Myra to discuss the matter Myra informed her that the omission was simply a mistake and that the policy did include coverage for the restoration building. This statement too could be viewed as a misrepresentation of fact or legal rights in that Myra was representing to Jenny that her insurance coverage included her restoration building when it in fact did not. Jenny obviously relied on these misrepresentations, and this can be seen in the fact that she acquired the "coverage" and paid premiums for the coverage. Therefore, Classic would have an actionably laundry list claim under the DPTA

Next, Classic would likely have a claim for breach of an express warranty against Myra. The DPTA does not create any warranties in itself. Warranties enforceable through the DPTA must come from independent sources, but can be used under a DPTA claim for damages. Here there could have been a breach of an express warranty. An express warranty exists when there is an assertion of fact concerning the sale of services. In this case, Myra "assured Jenny it would cover the entire business and its contents." This is certainly an assertion of fact concerning the insurance coverage. There will be no finding of express warranty when a statement made by a salesman can only be said to amount to mere puffery or opinion. However, asserting to a consumer that an insurance policy would cover their entire business and its contents cannot be viewed as puffery and is surely an assertion of fact that the coverage does extend to all things. The insurance policy did not cover the Restoration Building and therefore this amounted to a breach of express warranty.

The second claim under the DPTA that Classic could bring would be through the violation of article 541 of the Insurance Code as a tie in statute against Myra and the Insurance Company. The DPTA states that a violation of section 541 of the Texas Insurance Code is actionable under the DPTA. This claim arises when one makes a misrepresentation concerning the issuance of insurance coverage. The misrepresentations listed above concerning the actual coverage of the insurance policy would all be actionable under section 541 of the Insurance Code.

Next, Classic would be able to bring a claim against Myra and Insurance Company through section 541 of the Insurance Code itself. Section 541 of the Insurance Code seeks to protect consumers from unfair or deceptive practices in the sale of insurance. The code states that any violation by an insurance company of anything listed in the laundry list of the DPTA would be a violation of the Insurance Code and actionable under the Insurance Code as such. Here, Myra (an insurance agent) made misrepresentations to Jenny about the extent of her coverage under her insurance policy which Jenny relied upon to her detriment. These misrepresentations are classic violations of the laundry list and as such are actionable under section 541 of the Insurance Code. The main difference and crucial point of the claim being actionable under the Insurance Code would be that damages for violations of the Insurance Code are measured much differently than a strict DPTA claim. As mentioned above, the claim could also be raised against the Insurance Company itself through vicarious liability because Myra was acting in the scope of her

employment to the insurance company.

Finally, Classic would be able to bring a claim against the Insurance Company for unfair settlement practices under the Unfair Settlement Practices Act. The Unfair Settlement Practices Act seeks to protect a holder of an insurance policy from unfair or deceptive practices involved with settlements of valid claims held by an insured person. Under the Unfair Settlement Practices Act (USPA) when a insurer is faced with a valid insurance claim they have an affirmative duty to attempt to settle the claim fairly. This includes a duty to investigate a claim, make timely responses to requests for claims, and to make timely payments of claims. When Jenny reported the fire to Insurance COmpany a fire department investigator had already conducted an investigation of his own and determined tha tthe fire was started by an electrical problem. However, when Insurance Company received Classic's claim they made no effort to investigate the fire on their own and instead unilaterally decided that the claim would be denied because it was suspected that the fire was caused by Arson. This would be a clear breach of INsurance Company's duty under the USPA.

Further, when an insured makes a claim for insurance on a policy the insurance company is REQUIRED to respond to their claim within 15 days. Then, the insurance company will have the ability to decide whether they will accept or deny the claim and inform the insured of their decision within 15 days. If necessary (likely for investigation) the insurance company cannot decide whether or not to grant the settlement they can request additional time to up to 45 days. Finally, in the event the insurance company decides to honor the claim, they will have a duty to pay the claim in full in 5 days. Here Jenny sent the claim forms to Insurance on July 5. Insurance made no effort to respond to Jenny's claim until over 30 days from that date, and at which time they informed her that the policy would not be honored because they suspected the fire resulted from arson without even investigating. This is a clear example of an unfair settlement practice and thus is actionable against the Insurance Company.

2) There are multiple theories of remedy that Classic can obtain. First, for the strict DPTA claim discussed first for laundry list violations and perhaps breaches of express warranties Classic, if successful will be entitled to recover their economic damages. Economic damages are purely pecuniary loss. However, if it is found that the Myra or the Insurance Company acted

Knowingly then can recover additional damages of up to 3x their economic damages. In addition, Jenny (representative of Classic) could recover for any emotional damages she may have suffered from the incident if Myra or Insurance Company acted knowingly. Further, if it can be proven that Myra or the Insurance Company acted Intentionally then Classic/Jenny could recover an amount that is up to 3x the combination of her economic damages and emotional distress. Also, under this claim the injured party will be awarded reasonable costs for their attorneys fees.

For the other claims brought through the DTPA as a tie in statute and the Insurance Code the damages will be calculated differently. As opposed to DPTA economic damages, damages for these claims will be measured by Classics ACTUAL DAMAGES. This is a more broad approach to damages and will award damages for any injury actually caused be it pecuniary or mental. Like the DPTA if it is found the guilty party acted knowingly the injured party can be awarded an additional amount up to 3x their actual damages. In these claims the injured party is also entitled to be awarded a reasonable amount of attorney's fees.

For the claims brought under the unfair settlement practices act, the awards will be similar to the claims brought under the insurance code. The injured party will be entitled to receive actual damages and up to 3x actual damages if the guilty party acted knowingly. The injured party will also be allowed to receive reasonable attorney's fees related to pursuing their claim.

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