

6)

1. Quality should NOT prevail on its affirmative defense that Terry is not a consumer. Under the Texas Deceptive Trade Practices Act (DTPA), a consumer is someone who acquires or seeks to acquire goods or services by lease or purchase, and the goods or services form the basis of the complaint. The DTPA does not require privity between the seller of the good and the plaintiff. As long as the plaintiff was a beneficiary of the goods or services that were purchased or leased, the plaintiff will be considered a consumer under the DTPA's definition. Here, although Leonard purchased the alarm system from Quality, Terry was the intended beneficiary of the alarm. Because the DTPA has no privity requirement, as long as Terry was a beneficiary of the goods or services and the goods or services form the basis of the complaint, she has standing to sue under the DTPA, and is a consumer under the DTPA.

2. Quality should NOT prevail on its affirmative defense that Terry's suit is barred by the waiver signed by Leonard. Under the DTPA, for a consumer to waive his rights to bring actions under DTPA, the waiver must be in writing, voluntary, without disparate bargaining power, conspicuously written with bold face type, and the consumer must be represented by an attorney. Here, Leonard signed a waiver when he purchased the alarm system that was entitled "Waiver of Consumer Rights." And while the waiver was in large and bold print, Leonard was not represented by an attorney as required by the law, nor was he in equal bargaining power. His bargaining power was diminished because he needed to buy an alarm system and without signing the form he would not have been able to buy what he thought was the highest rated alarm system. But most importantly, a consumer must be represented by counsel when waiving his DTPA rights. Therefore the waiver was improper, and is not valid against Terry.

3. The Court should NOT grant Quality's Motion to Dismiss. Under the DTPA, a consumer is required to give presuit notice to the defendant 30 days prior to filing. The notice gives the defendant notice of the alleged claims and an opportunity to settle the claims. If suit is filed without pre-suit notice, the defendant may file a plea in abatement to stay the suit until after pre-suit notice is given. However, an exception to the general rule is that presuit notice may be waived after the defendant answers the suit. Additionally, raising the defense at trial is too late, and the requirement is waived, and the suit may proceed. Here, Terry was originally required to give pre-suit notice to give Quality. It would have allowed Quality an opportunity to investigate the alleged claims under the DTPA and offer a settlement prior to filing. However, when Quality answered the suit, and waited until trial to raise the defense that Terry had failed to give pre-suit notice, it waived its rights to such notice and the requirement was waived. Therefore, the Court should deny the Motion to Dismiss.

4. Terry has claims against Quality under the DTPA against Quality for the actions of its agent, Chester. A principal is responsible for the actions of its agent committed within the scope of their employment, which Chester was working for Quality when he sold the alarm system, and therefore Quality is liable. The DTPA provides four rights and claims for consumers against deceptive trade practices. Consumers may make claims under the DTPA's laundry list violations, which is a list of 27 deceptive misrepresentations and failures to disclose that are actionable under the DTPA. Consumers may also make breach of warranty claims under the DTPA. Although the DTPA does not provide warranties, it makes warranties created under other aspects of Texas law actionable. The third right consumers have under the DTPA is a claim of unconscionability, which means that the seller took advantage of the consumer's lack of knowledge or understanding. And finally, the DTPA provides a claim for violations of Chapter 541 of the Insurance Code, which is not applicable here, because there was no insurance involved.

Laundry List Violations:

Under the DTPA's laundry list, when a seller makes misrepresentations that the consumer relies upon to their detriment, those misrepresentations are actionable. Here, Quality misrepresented that the alarm system was the best and most reliable. Leonard relied on this representation in purchasing the system to protect Terry's apartment. Additionally, Quality misrepresented who would be installing the alarm, which Leonard detrimentally relied on Quality's team to install the alarm properly. Finally, Quality misrepresented that the alarm was awarded the highest rating from the Security Specialists Association of America, when it was in fact taken off the list and rated inferior. Although Terry was not directly told because she was a consumer, these misrepresentations are in turn her causes of action because Terry was the intended beneficiary of the system and the misrepresentations harmed her. Therefore, Terry has causes of action under the DTPA's laundry list.

Breach of Warranty:

As discussed above, the DTPA does not itself create warranties, but makes warranties created under other Texas Law actionable, such as UCC express warranties for the purchase of goods. Here, Quality made an express warranty by stating that it was the best and most reliable system on the market. Additionally, Quality stated that the alarm was awarded the highest rating by the Security Specialist Association of America. And that the alarm would be installed by experienced, licensed, and bonded specialists. In making these statements, Quality expressly made warranties that their product was the best on the market and would protect Terry. Quality may argue these were mere sales tactics and puffery, but

stating that this alarm was the most reliable and award winning was a warranty that the alarm would work. Finally, it expressly warranted that licensed specialists would install the system, and in fact, they were not licensed and had never done it. Because of their inexperience the system was not properly connected and it failed. Therefore, Quality breached its express warranty, and Terry has an action for breach of express warranty under the DTPA.

Unconscionability:

Under the DTPA, a consumer may bring an action for unconscionability when the seller takes advantage of the consumer's lack of knowledge or understanding to an unfair degree. Here, Quality in its efforts to sell the alarm system took advantage of Leonard's lack of knowledge about alarms, and sold him an alarm that was inferior and taken off the best ratings, as well as his lack of knowledge as to whether true licensed specialists would actually be installing the alarm system when in fact they were not. Based on these facts, Terry has a claim for unconscionability under the DTPA.

END OF EXAM

6)

1. No, Quality should not prevail because Terry has standing under the DTPA. At issue is whether Terry is an intended beneficiary or an incidental beneficiary. Tenants can be either with regard to goods or services purchased by their landlords. Under the DTPA, a consumer is a person who seeks or acquires by lease or purchase goods or services. That person does not have to be the purchaser but can acquire the goods later. Under the DTPA, intended beneficiaries are considered consumers. Given these facts, it is clear Terry is an intended beneficiary; further, Quality had notice of this. When they sent an employee to install the system, it was Terry who was present. Terry is an intended beneficiary for several reasons. Leonard bought the unit for Terry's apartment. A security system placed in an individual apartment is intended to benefit that resident, not the landlord or his property generally. As an intended beneficiary, not a mere incidental beneficiary, Terry is protected by the DTPA and can raise claims under it. As an intended beneficiary she can raise any claims the original consumer has. Terry has standing to sue under the DTPA and the motion to dismiss should not be granted based on her status.

2. No, Quality should not prevail because the waiver is invalid. At issue are the requirements for a valid waiver of the DTPA. The DTPA is to be liberally construed to protect consumers from false, deceptive or misleading trade and business practices. It should not be waived. For a waiver to be valid three things must be true. First, it must be signed by the consumer. Second, the consumer cannot be in an overly disparate bargaining position. Third, the consumer must be represented by an attorney. Even if the language of the waiver was adequate, it clearly fails in this case. Leonard did sign the waiver. It is unclear how experienced Leonard was but it is likely he was in an inferior bargaining position. Regardless of his relative bargaining power, the waiver fails because Leonard was not represented by counsel. The facts do not mention any representation. The waiver is invalid and cannot be asserted as an affirmative defense.

3. No, the court should not dismiss Terry's lawsuit. Under the DTPA, a plaintiff is required to give a defendant 60 days notice of the intent to bring suit. Failure to bring suit within the 60 days requires a 60 day abatement, not dismissal of the suit. Even if the claim was raised properly in Quality's answer to the complaint, the remedy still would not be outright dismissal. The remedy would be abatement. Here, Quality did not move to dismiss until trial. The court did not err in denying the motion. Quality waived their right to contest the failure to give adequate notice. The court, in its discretion, may grant a continuance. The purpose of the 60 day notice is to give the defendant time to make a reasonable settlement offer. If the defendant does so, and the plaintiff rejects the offer, the plaintiff's recovery at trial

is limited. Therefore, it is often in both parties' best interest to come to a settlement.

4. Terry has several claims against Quality under the DTPA. She has claims for violation of the laundry list, for breach of warranty and for unconscionability. A consumer may bring a claim under the DTPA as long as the goods or the services provided form the basis of the claim and the defendant's misconduct occurred in connection with the transaction. In this case, it is clear that the goods and services form the basis of the complaint. The quality of the alarm and its installation are goods and services forming the basis of the complaint. Quality provided both, their actions were clearly in connection with the transaction. The goods and services were the cause- under the DTPA, the causation standard is very low. The good or service just has to be a substantial factor to qualify as producing cause. As an intended beneficiary Terry is a consumer and can raise the claims that Leonard would. The DTPA is cumulative, and a consumer may bring many claims under it but can only recover once.

The DTPA laundry list includes general misrepresentations, misrepresentations of legal rights and failure to disclose. A consumer may sue for a misrepresentation if she relied on it. Quality made several misrepresentations through their salesperson, Chester. Quality is liable for the misrepresentations of its agent, Chester. Chester claimed that Quality system was the best and most reliable system available, that it would be installed and tested by experienced, licensed and bonded security specialist, and that it had been awarded the highest rating by the SSAA. The first statement is probably mere puffery or opinion and not actionable. However, the statements about installation and testing as well as the rating are both misrepresentations. Leonard relied on these representations in purchasing the faulty system and thus Terry can bring an action under the laundry list for misrepresentation. Terry also has a claim for failure to disclose. Not only was the particular system rated inferior, but also Quality had been stripped of its SSA rating two years before Leonard signed the contract. A consumer has an action for failure to disclose if the failure was intentional to induce the consumer to purchase the goods, and the consumer would not have purchased the equipment had it none the information that was not disclosed. In this case it is very likely that Leonard would not have purchased a system from Quality had he known that their SSAA rating had been stripped. It is also likely that Chester failed to disclose that on purpose, to induce Leonard to buy the system. Assuming she can show this, Terry has a claim for failure to disclose.

The DTPA also provides a cause of action for breach of warranty. The DTPA itself does not provide the warranties, but enforces those that come from other areas of law. For a sale of goods, the UCC provides an implied warranty of merchantability. That means that the goods are satisfactory for their intended purpose. In this case, the alarm failed to sound and was of inferior quality. This is a breach of the implied warranty of merchantability. For service contracts, Texas law supplies an implied warranty of good and workmanlike performance. The Quality employee surely breached that warranty.

The employee was not licensed and had never installed a security system, he did not properly connect the alarm and he never tested it. He did not perform good and workmanlike service; he breached the implied warranty. Finally, Chester made express warranties. He expressly warranted that the system would be installed **and** tested by an experienced, licensed, and bonded security specialist. The employee who installed the system was none of those things. The employee also did not test the system. Therefore, Quality breached express warranties also. Express warranties may not be waived. Waivers of implied warranties are valid if they would be valid outside of the DTPA context. Here, there are no allegations of a waiver of warranty.

Finally, Quality probably acted unconscionably. A practice is unconscionable if it takes advantage of a consumer's lack of knowledge, education, experience or expertise to a grossly unfair degree. The facts provide little information about the experience or knowledge of Terry or Leonard, but it is unlikely either had much. Leonard relied only on Chester's sales pitch. He did not know about the poor rating. Terry was an intended beneficiary of that transaction. Chester misrepresented the quality of the system. Quality sent an unlicensed employee with no experience to install the system. That employee did not install it correctly and did not even test it. Neither Terry nor Leonard had any knowledge of that. They trusted Quality to provide them with a quality product that would protect the apartment. Quality's actions were most likely unconscionable. Chester lied about the quality of the system and employee who would install and test it. It resulted in the loss of Terry's valuables. Quality knew that its system was inferior and that the employee was incapable of adequately installing it, yet they went forward with the transaction. It is probable this amounts to unconscionable conduct.

For these violations Terry can recover her economic damages- this includes the price of her valuables and the alarm. If she can show Quality acted knowingly, she can recover mental anguish damages and up to three times her economic damages. If she can show they acted intentionally, she can recover up to three times mental anguish damages and economic damages. She may also be entitled to equitable and injunctive relief.

END OF EXAM

6)

1. Quality Should Not Prevail On Its Assertion that Terry is Not a "Consumer" Because Terry was an Intended Beneficiary of the Transaction

Under the Texas Deceptive Trade Practices Act ("DTPA"), private causes of action are available to consumers. In order to be a consumer, a person must buy or seek to purchase or lease goods from a seller. A consumer must not actually purchase goods--as long as the individual has subjective intent and financial means and ability to consummate the transaction, they can be classified as a consumer. The Act also provides that intended beneficiaries may also be included in the definition of "consumer" and may bring suit under the Act. A consumer is an intended beneficiary if the transaction in question was made for the benefit of another.

Here, Terry is a consumer because Leonard contacted Quality specifically for the benefit of Terry. Terry was to move in to Leonard's apartment, and Leonard was concerned about safety, and requested that Quality install a security system into Terry's apartment. Even though it was Leonard actually negotiating with Quality and Leonard might also benefit having a security system in an apartment he owned, the transaction was intended to immediately benefit Terry, and she is thus a "consumer" under the Texas Deceptive Trade Practices Act.

Accordingly, Terry does have standing and Quality's assertion fails.

2. Quality Should Not Prevail on Its Defense that Terry Waived DTPA Rights Because the Waiver Was Insufficient

The Texas Deceptive Trade Practices Act is to protect consumers from deceptive business acts or practices. It is intended to allow consumers to have broad authority to enforce their rights as consumers and to prevent business wrongdoing. Because of the importance of the policy behind the Act, there is a strong presumption against a consumer's waiving of the act. The Act treats waivers of rights under the Act specifically and lays out detailed requirements that must be met before a consumer may actually waive his or her rights under the Act. In order to waive rights under the Act, 1) the waiver must be conspicuous and written in big, bold font; 2) the waiver must contain very specific language that is copied from the Act itself that notifies the consumer that they are waiving rights; 3) the consumer and the business must be in equal bargaining positions, and 4) the consumer must be represented by an attorney.

Here, the required conditions were not fully met and Leonard did thus not waive Terry's rights under the Act. Quality may argue that the waiver Leonard signed was indeed in large, bold print and even notified Leonard generally of his waiver of rights under the DTPA. But this was not enough. The waiver did not include the statutorily required specific language. There is no evidence that Leonard was represented by an attorney at the time of negotiation. Arguably, Leonard and Chester were not in equal bargaining positions. Chester was a salesman and as a representative of Quality would be more aware of the forms and waivers that he asked customers like Leonard to sign. Meanwhile, Leonard was merely a simple customer and there is no indication that he had any experience negotiating contracts or had any awareness of the gravity of his waiver.

Leonard did therefore not waive Terry's rights under the DTPA.

3. The Court Should Not Grant Quality's Motion to Dismiss Because Quality Did Not Receive Timely Notice, although Terry May Give Notice and Re-file

The Texas DTPA promotes consumer rights, but also seeks to encourage out of court settlement of claims arising out of the DTPA. According to the DTPA, before a consumer can file suit against a business for violations of the DTPA, it must give a 60 day notice to the business of its intention to file suit, and must also give notice of the alleged claims. This allows businesses an opportunity to correct mistakes by making settlement offers. In fact, it is a defense for a business if they offered the consumer a full settlement and the consumer rejected it. The notice and settlement provisions of the DTPA promote the saving of legal costs and the hassle of litigation. However, a business can waive its right to notice and opportunity to settle if it continues litigation and does not timely bring the failure of notice to the court's attention.

Here, though Terry gave no notice of its intention to file suit under the DTPA, Quality waived its right to contest the lawsuit on notice grounds when it filed an answer and proceeded to trial. Terry should have given 60 days notice and allowed Quality to make a settlement offer to Terry in order to avoid going to trial. Quality did not bring the issue to the court's attention until trial, however, and thus waived its right to object.

Accordingly, the trial court properly denied Quality's motion to dismiss.

4. Terry Has Claims under the Laundry List, Breach of Warranty and Unconscionable Act Provisions of the DTPA

In order for a private individual to bring a claim under the Texas DTPA, they must show that they are a consumer, that the defendant was involved in the transaction, that the defendant committed one of the DTPA prohibitions, and that the violation brought about the consumer's damages. The DTPA violations include: 1) violations of what is termed the "Laundry List," or a list of violations; 2) Unconscionable Acts or practices, and 3) a Breach of Warranty.

A. VIOLATIONS OF THE LAUNRY LIST

The DTPA Laundry List prohibits misrepresentations of standards, quality or care, and misrepresentations of sponsorship. These violations need not occur knowingly or intentionally, and the consumer must rely on the misrepresentations.

Terry has a claim under the Laundry List provisions because Chester misrepresented the quality of the security system and the sponsorship. While Chester said, for example, that the system was the highest quality and that it would be installed by experienced professional, the system was neither high quality nor installed by experienced professionals. Also, Chester said that it was sponsored by the SSAA, when actually the rating had been revoked. Leonard was convinced by Chester's pitch, which indicates his reliance on Chester's misrepresentations.

Thus Terry has a claim under the Laundry List.

B. BREACH OF WARRANTY

Texas law implies warranties in transaction, including a warranty of merchantability, which warrants use for ordinary purposes. Thus, Quality's system should have been warranted for its ordinary purpose, which is to prevent burglary and theft. Quality breached this warranty because the system failed--no alarm sounded when a burglar broke in.

thus Terry has a claim under the Breach of warranty provision.

C. DAMAGES

The DTPA allows recovery of economic damages. If the violation occurred knowingly, the DTPA allows for mental anguish damages and suffering. The DTPA also allows for discretionary damages up to three times the amount of the economic damages. Terry can expect to recover these damages based on what was lost in the theft.

END OF EXAM