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1. Under Texas consumer laws, Cedric has claims under the Deceptive Trade Practices Act (DTPA) against Brenda for laundry list violations (misrepresentations of material facts) and possibly of unconscionable acts. Cedric has claims against Albert under the Deceptive Trade Practice Act for a laundry list violation and unconscionable act. At issue is the Deceptive Trade Practices Act and warranty claims.

The DTPA is to be liberally construed. The DTPA applies to consumers bringing claims in which the basis of the claim arises from a sale or transaction. A consumer is an entity who seeks or acquires to purchase or lease a good or service. Here, Cedric is a consumer. Cedric acquired the house, purchased the house, and the house qualifies as a good. Also, Brenda's real estate services are services.

There is an exception to consumers purchasing large transactions. If the transaction is over \$500,000, the DTPA does not apply. If the transaction is over \$100,000 and the consumer is represented by an attorney and a written contract is involved, the DTPA does not apply. However, both of these exceptions are subject to the exception for the purchase of a residence. Here, Cedric's purchase is of a residence and so the exceptions will not apply and Cedric is a consumer.

Cedric v. Brenda

Under the DTPA, Cedric has claims against Brenda for: (1) laundry list violations - use or employment of acts that misrepresent and deceive that the consumer relies upon; (2) unconscionable acts; and (3) breach of warranty.

The DTPA provides for claims of (1) laundry list violations - use or employment of acts that misrepresent and deceive that the consumer relies upon; (2) unconscionable acts; and (3) breach of warranty. The DTPA also allows for claims under the Texas Insurance Code (541) but that is not applicable here.

Brenda is a proper defendant because her services form the basis of the complaint and her actions "reached" Cedric. Her misrepresentations are a producing cause of Cedric's damages because she did not fully research the house. Brenda is a licensed professional real estate agent. Under appropriate Texas law, Brenda has a duty to complete a good faith inspection of the house and to conduct a due diligent search. Here, her approximation was substantially off (1/6) and she was unaware of the significant damage to the foundation that negatively affected the house's value.

Cedric has a claim for a laundry list violation. A laundry list violation exists where a seller engages in an act or practice that misleads or deceives the consumer and a consumer detrimentally relies upon it. This can stem from misrepresentation of fact, misrepresentations of legal rights or failure to disclose. No intent or culpable state of mind is necessary.

Brenda's listing of the house as 3,000 square feet when the house was 2,500 square feet is a misrepresentation of a material fact that Cedric relied upon. Her statement "reached" Cedric. Her statement to Cedric that the "cracks appeared to be cosmetic and would likely have no effect on the house's value" was also a misrepresentation of a material fact. Even if she was innocent in her belief, she is still liable for these misrepresentations.

Failure to disclose occurs when a seller knows something, does not disclose it, with the intent to induce the consumer into a transaction he would not enter had he known of the fact. It actually does require a culpable intent level. However, here there is no indication that Brenda had any

knowledge of her mistake regarding the size, whether the cracks affected the house or of the foundation damage. If so, she is not liable for any claim of failure to disclose

A court could find that Brenda's actions rise to the level of unconscionable acts. An unconscionable act is an act that detrimentally takes advantage of a consumer's lack of knowledge, skill or experience - measured at the time of the transaction and by an objective standard - to a grossly unfair degree. Grossly unfair degree is defined as flagrant and unmitigated. Here Brenda made misrepresentations of the size of the house that took advantage of Cedric's lack of knowledge, skill and experience. If a court found that her statements were objectively grossly unfair, she would be liable for her unconscionable acts.

The DTPA does not create warranties, however warranties are enforceable through the DTPA. Warranties often include UCC warranties such as express warranties, implied warranty of fitness for particular purpose, implied warranty of merchantability as well as implied warranty of good and workman like conditions and the implied warranty of habitability. Here, Cedric would argue that Brenda is liable for:

1. a breach of her express warranty that "the cracks appeared to be cosmetic" and that the house was 3,000 square feet; and
2. a breach of the implied warranty of fitness for particular purpose. Brenda was aware that Cedric specifically was interested in Albert's house because of its location and size. Cedric relied on Brenda's knowledge to select a house for his particular purpose (including size).

Brenda could be liable for a breach of express warranty because of express statement regarding the size of the house. However, her statement regarding the cracks appearing to be cosmetic is not sufficient. Brenda would likely argue that this mere opinion in that she said "likely have no effect on the house's value." Brenda would also not likely be liable for the breach of implied warranty of fitness for particular purpose because Brenda is not a "commercial seller" and so this warranty does not apply.

Brenda would likely raise a number of defenses including:

1. She is not a proper defendant because she is a professional providing a service;
2. Cedric did not rely on her statement; and
3. She was not a producing cause (negating causation).

Here, Brenda would argue that she is a professional (licensed real estate agent) providing a service where the essence involves professional skill or judgment. However, the Professional service exception does not apply to Brenda because the exception does not apply to professionals when making misrepresentations, failing to disclose, or acting unconscionably. Here, Cedric would likely defeat her defense.

Brenda would also raise the defense that Cedric did not rely on her misrepresentations. Again, this defense is not likely because "based on Brenda's Statements", Cedric purchased the home. Furthermore, Cedric could establish that he based his decision on Brenda's listing.

Lastly, Brenda would raise the defense that she was not a producing cause. A producing cause is one that but for the act, the damage would not have occurred. It is an easier burden of proof to meet than proximate cause. She would attempt to negate causation by noting that had Cedric contacted and viewed the house without her and relied on Albert's "3,000 square feet" assessment, Cedric's damages would still have arisen. However, here, Albert did not initially make the 3,000 square foot assessment. Brenda did.

Brenda is liable under claims for laundry list violations for her misrepresentations and for unconscionable acts.

Cedric v. Albert

Under the DTPA, Cedric has claims against Albert for: (1) laundry list violations - use or employment of acts that misrepresent and deceive that the consumer relies upon; and even (2) unconscionable acts. At issue are the claims under the DTPA.

The DTPA provides for claims of (1) laundry list violations - use or employment of acts that misrepresent and deceive that the consumer relies upon; (2) unconscionable acts; and (3) breach of warranty. The DTPA also allows for claims under the Texas Insurance Code (541) but that is not applicable here.

Albert is a proper defendant because his actions of not correcting Brenda's square footage measurements and allowing his house to be put on the market with the incorrect listing "reached" Cedric. His misrepresentations are a producing cause of Cedric's damages.

Cedric has a claim for a laundry list violation and an unconscionable act. A laundry list violation exists where one engages in an act or practice that misleads or deceives the consumer and he detrimentally relies upon it. This can stem from misrepresentations of fact, misrepresentations of legal rights or failure to disclose.

Failure to disclose occurs when a seller knows something, does not disclose it, with the intent to induce the consumer into a transaction he would not enter had he known of the fact. It actually does require a culpable intent level. Here, Albert knew the correct listing, did not disclose it to either Brenda or to Cedric. Arguably, his intent in not disclosing was to increase the listing price and induce consumers into entering into transactions that they may not have entered into had they known of the correct size. Cedric's claim arises from Albert's allowing his house to be listed with the incorrect listing when Albert was aware of the correct measurements.

A court could also find that Albert's actions are unconscionable. An unconscionable act is an act that detrimentally takes advantage of a consumer's lack of knowledge, skill or experience - measured at the time of the transaction and by an objective standard - to a grossly unfair degree. Here, Albert's failure to disclose was arguable grossly unfair degree - flagrant and unmitigated. Further, as seller, he took advantage of consumer's including Cedric's lack of knowledge about the house.

Thus, Cedric has claims against Albert for a laundry list violation and unconscionable act.

2.

The remedies available to Cedric under Texas consumer laws against Brenda are (1) economic damages; (2) attorneys fees; and (3) injunctive and equitable relief where appropriate. The remedies available to Cedric under Texas consumer laws against Albert are (1) economic damages; (2) mental anguish damages; (3) attorneys fees; and (4) injunctive and equitable relief where appropriate.

Economic Damages: Economic damages are compensatory damages for pecuniary loss. Here, Cedric paid \$250,000 for the house when it was really only worth \$190,000. Thus, he can recover \$60,000. He can recover this \$60,000 from either Brenda or from Albert but not from both.

Mental Anguish Damages: If Cedric can prove that he suffered substantial disruption to his daily routine that rises above the level of mere annoyance or vexation he can recover mental anguish damages. There is no evidence that Brenda acted knowingly so he would not be able to recover mental anguish damages from Brenda. However, because Albert knew the listing was incorrect and failed to correct it, Cedric could likely prove that Albert acted knowingly (actual awareness standard). Thus, Cedric would be able to recover mental anguish damages (his medical bills likely)

plus up to 3 times his economic damages from Albert. Thus, because Cedric's economic damages are \$60,000, he can recover up to an additional \$120,000.

Attorneys Fees: If Cedric is successful he can recover his reasonable attorneys fees. If either Brenda or Albert win, they could recover attorneys fees only upon a showing that Cedric acted in bad faith or solely to harass - which there is no evidence of either.

Injunctive and Equitable Relief: In appropriate cases, courts may award injunctive and equitable relief.

From Albert, Cedric could recover:

1. \$60,000 in economic damages;
2. Mental anguish damages of his hospital bills;
3. Up to an additional \$120,000; and
4. attorneys fees.

From Brenda, Cedric could recover:

1. \$60,000 in economic damages; and
2. Attorneys fees.

END OF EXAM

7)

1. Cedric may assert claims against Albert and Brenda under the Texas Deceptive Trade Practices Act (DTPA).

The DTPA provides remedies for consumers adversely affected by deceptive trade practices that are the producing cause of the consumer's harm. To have standing under the DTPA, a person or entity must qualify as a consumer. A consumer is any person or entity who acquires, by purchase or lease, goods or services. Real estate is considered a good under the DTPA. Here, Cedric is a consumer as he acquired real estate by purchase. Albert and Brenda's actions caused Cedric's loss, so their conduct is a producing cause of Cedric's harm.

There are five ways to recover under the DTPA: (1) violation of the Laundry List, (2) breach of warranty, (3) unconscionability, (4) violation of the Texas Insurance Code Chapter 541, and (5) violation of a tie-in statute. The first three options are available to Cedric, as the Insurance Code and tie-in statutes do not apply.

Laundry List. The Laundry List of the DTPA proscribes 27 different types of conduct. Included in the List is misrepresentation of a good's quality or characteristic. Here, Albert and Brenda represented that the house was 3000 square feet instead of its actual 2500 square feet. Brenda also stated that, in her opinion, the warped floors were only the result of cosmetic damage. In order to impose liability under the Laundry List, the consumer must have relied on the seller's actions to his detriment. Misrepresenting the square footage of a house clearly constitutes misrepresentation of a characteristic and Cedric relied on the representation to his detriment. Cedric can likely bring a successful claim against Albert and Brenda under the Laundry List regarding the size of the house. Misrepresenting the nature of a defect would constitute misrepresentation of a characteristic, but Brenda explicitly stated that her knowledge of the floors was her opinion only. Thus, Cedric probably cannot succeed on a Laundry List claim based on the warped floors because Brenda stated that it was her opinion, her conduct was probably not a producing cause of Cedric's injury.

Breach of Warranty. The DTPA does not provide any warranties for consumers; rather, it is a vehicle through which breach of warranty claims can be brought. UCC Article 2 warranties, including express and implied warranties, can be brought under the DTPA. However, the UCC Article 2 does not apply to real estate because real estate is not considered a good under UCC Article 2, so Cedric cannot bring UCC warranties. Common law warranties may also be brought under the DTPA, including the implied warranty of good and workmanlike construction and the implied warranty of good and workmanlike repairs. However, the warranty of construction applies only to new homes and there were no repairs made, so Cedric cannot likely bring a claim of breach of warranty under the DTPA.

Unconscionability. Unconscionability occurs when the consumer's lack of knowledge or capacity is taken advantage of to a grossly unfair degree. Gross unfairness must be flagrant and unmitigated. Here, the listing of the house at 2500 square feet took advantage of Cedric's presumed lack of knowledge of real estate. There is no indication that Cedric had the ability to measure the size of the house, particularly since he was represented by Brenda, the same agent who listed Albert's house. This likely rises to gross unfairness because Brenda did not verify the size of the house like she probably would have if Cedric bought a house listed by another agent. Thus, Cedric can probably recover under the DTPA for unconscionability regarding the size of the house. Cedric can bring a claim of unconscionability regarding the warped floors if he can prove that Brenda took advantage of his lack of knowledge to a grossly unfair degree. However, since Brenda stated that it was her opinion only, Cedric will probably not succeed. Cedric was informed that this was only Brenda's opinion and probably could have hired a contractor or another expert to examine the house before he

bought it. Thus, Cedric will likely not succeed on an unconscionability claim regarding the floors.

2. Cedric can recover economic damages and attorney's fees and court costs from Albert and Brenda, and he can recover mental pain and treble damages from Albert.

The DTPA provides for economic damages on recovery of a claim. Economic damages include pecuniary loss, so here, Cedric could recover the price difference resulting from Albert and Brenda's conduct. The DTPA also provides for mandatory recovery of attorney's fees and court costs when a consumer succeeds on a claim, so Cedric could get his attorney's fees and court costs from Albert and Brenda. Damages for mental pain and treble damages are available when the conduct was done intentionally or knowingly. In order to recover mental pain damages, the mental pain must be manifested. When conduct is done knowingly, the consumer recovers three times the amount of economic damages, and when conduct is done intentionally, the consumer recovers three times the amount of economic and mental pain damages. Here, Cedric's mental pain was manifested through an ulcer. Albert's conduct probably rises to the level of knowingly, because he knew that Brenda calculated the square footage wrong and did nothing to correct it. While Albert himself did not list the property, Brenda was Albert's agent as he expressly gave her authority to list his house for sale. Since Cedric's mental pain was manifested and Albert's conduct was knowing, Cedric will be able to recover mental pain damages and three times his pecuniary loss.

END OF EXAM

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1. Cedric has claims against Brenda and Albert under the DTPA.

Under the DPTA, a consumer is a person (or business consumer) who acquires or seeks to acquire a good through lease or purchase. The violation must be in connection with the sale. Here it is a mixed contract for services and goods. The services (which normally would not apply to the DTPA) is Brenda being Cedric's real estate agent, the goods is buying the house. Here the goods are the predominate reason for the relationship so the DTPA will apply. The law prohibits seller from making false or misleading representations about the good.

There are 4 basis for a claim under the DTPA:

1. the laundry list: requires actual reliance on the
 - a. misrepresentation of a material fact
 - b. omission of a material fact that is likely to induce the purchase to purchase the goods, and the omission actually does induce the purchase where the consumer would not have purchased had the fact been told to him. He needs to not have actual knowledge of the fact and the seller must not have given him the omitted material fact.
2. Breach of warranty: the DTPA does not create any warranties it only offers a remedy for those warranties that have been breached. This applies to both express and implied warranties.
3. Unconscionable actions: actions that seek to take advantage of cedric's lack of knowledge, skill, abilities, etc that are flagrant and unmitigated.
4. Violation of the chapter 541 of the insurance code: not relevant here.

Cedric has claims under the laundry list, express and implied warranties, and probably unconscionable actions.

A. the laundry list:

1. Brenda made a representation of material fact that the house was 3000. The DTPA does not require that she know the fact is incorrect, just that the fact is incorrect. The house was not 3000, it was only 2500. Cedric relied on this misrepresentation in buying the house. He said he bought the house because the location and size were good for the price. Cedric has a claim against Albert can also be held liable because he failed to correct the material fact when he knew about it. Brenda showed him the listing sheet. He knew it was only 2500 and he didn't correct it. Cedric relied on the misrep.

2. Cedric has a claim against Brenda for the misrepresentation of the cracks. While, opinion or puffing is not actionable under the DTPA, she made a statement of fact when she told Cedric cracks were cosmetic and "would likely have no affect on the house's value." Again, as shown above he relied on these statements. He purchased the house because he thought it was a good value for the size and location given the condition. That was based on his understanding there was no foundation damages. Ultimately this is a fact question, court finds this is opinion and not fact, this statement will not be actionable. It is a question of fact. Cedric will not have a separate cause of action against Albert for these claims.

3. Cedric has a claim against Brenda and Albert for omission of a material fact that: 1) the house was only 2500 and 2) there was no foundation damages: Both of the facts were not disclosed to Cedric. Brenda has a duty to disclose both. The facts were not known to Cedric. He entered into the purchase of the house, but had he known either of the facts above, he would not have purchased the house. Reliance has been met. The facts were material (would not have purchased had known). Albert will be liable only for the omission of the material fact that the house is 2500 not 3000 square feet. There is a duty to correct a misrepresentation of material fact as well. Both would be liable for

that.

B. Breach of warranty: There is a breach of an implied warranty of merchantability and two express warranties: 1. the house is 3000 square feet and 2. the crack will have no effect on the value of the home, they are just cosmetic.

Any time a seller sells a good there is an implied warranty the item is good for its ordinary use and purpose. Here there were undisclosed foundation damage that Brenda knew about (or had reason) to know about. Albert is in the same position. If an implied warranty is found through other law (perhaps through the deed, etc), then they are liable for breaching those warranties. It is not clear which implied warranties were given at the time of purchase.

Express warranties, Cedric has a separate cause of action against both Brenda and Albert for the express warranty that the house was 3000. It was only 2500 so they breached that warranty. Each made the warranty separately (Albert through listing sheet, Brenda through listing sheet and talks with Cedric). Brenda is liable for a second breach of express warranty that the cracks are only cosmetic and would not affect the value of the home. The value was affected because they were foundation problems. Cedric only has a cause of action against Albert for this breach to the extent agency law allows.

C. Unconscionable acts: The facts do not give us much information about the skill, education, and knowledge of Cedric. From the questions he asked the cracks, it sounds like he does not have much background in homebuilding and inspection. Additionally, he did not notice when he showed up the house was only 2500. Cedric might have a claim against each Albert and Brenda for taking advantage of his lack of knowledge (Albert for listing the house at 3000 and Brenda for listing the house at 3000 and for telling him the cracks were cosmetic and would not decrease the value). The court must find these actions were flagrant, unmitigated, etc.

2. Available remedies

Under the DTPA, a consumer can recover economic damages plus attorneys fees and any other equitable/injunctive relief the court sees fit. For example the court may order the contract for sale is rescinded in this case.

If Cedric proves any of the above actions were done knowingly, he can recover up to 3 times economic and mental anguish damages. If Cedric proves any of the above causes of action were done intentionally (knowingly with the intent to cause the purchase) then he can recover up to three times economic and 3 times mental anguish damages. In any event, if he wins he SHALL receive attorneys fees and costs and the court may award any other equitable or injunctive relief it sees are in the interest of justice.

Although each claim is an independent cause of action, Cedric can recover one time, not for each claim independently.

END OF EXAM
