

Question 12 – February 2014 – Selected Answer 1

Pablo has rights against Insko under the Chapter 541 of the Texas Insurance Act.

Under chapter 541 of the Texas Insurance Act, a person may bring a claim against an insurance company for 1. false, deceptive, misleading, or fraudulent representations; 2. a violation of express or implied warranties, 3. unconscionability. A claim under the Texas Insurance Act automatically triggers a claim under the Deceptive Trade Practices Act. However, a person must be classified as a consumer to bring a cause of action under the DTPA. A consumer is someone who seeks or purchases goods or services. Here, Pablo sought and purchased an insurance policy and insurance services so he qualifies as a consumer under the DTPA and can bring a DTPA claim against Insko as well.

1. Laundry List of Items under Chapter 541 of the Texas Insurance Act/DTPA. Under chapter 541 of the Texas Insurance Act and the DTPA, a consumer affected by the adverse actions of an insurance company may bring a claim against the company under the laundry list of items of the DTPA. The laundry list includes fraudulent, deceptive, and misleading statements and actions that the consumer relied on.

Here, Alex, as Insko's agent made false, deceptive and misleading statements to Pablo regarding the terms of his insurance policy. Because Alex was working as Insko's agent when he made those statements, Insko is liable for Alex's actions.

Specifically Alex misrepresented to Pablo that Sam was added as an insured driver. The facts state that Alex "reassured" Pablo that the paperwork to add Alex to the policy had been submitted. After his phone call with Alex and relying on this misrepresentation that Alex provided about Sam being on the insurance policy, Pablo let Sam drive his car.

Therefore, Alex as Insko's agent made fraudulent, misrepresenting statements to Pablo and Pablo relied on those statements paying his insurance premiums and in letting his son Sam drive. Because of these misrepresentations Pablo can file a claim against Insko under Chapter 541 of the Texas Insurance Code

2. Unconscionability. Chapter 541 also allows an insurance consumer to file a DTPA claim against an insurance company if the insurance company or its representative acted with unconscionability in its dealings with the consumer. "Unconscionability" is defined as dealing with someone in a "grossly unfair manner" in a way that takes advantage of the consumer's lack of knowledge. Here, the facts do not seem to indicate that Insko or Alex acted in an unconscionable way when dealing with Pablo regarding his insurance company. Therefore Pablo would probably not be able to bring a claim for unconscionability against Insko.

3. Breach of Express Warranty. Chapter 541 of the insurance code allows someone to bring a claim against an insurance company for breach of an express warranty. An express warranty is a warranty that the representative of the insurance company communicates to the consumer and that the consumer relies on

Here, Alex, as Insko's agent made an express warranty to Pablo that Alex was covered by the policy when he "assured" Pablo over the telephone on November 15 that the paperwork adding Sam to Pablo's policy had been submitted to Insko. Because Alex made this express warranty to Pablo and then breached it by not actually submitting the paperwork to Insko, Pablo has a valid claim under Chapter 541 of the Texas Insurance Code.

4. Failure to investigate a claim. Pablo also a valid claim against Insko for its failure of its duty to reasonably investigate his claim regarding the accident that Sam had on November 11. Under Texas Insurance Law, an insurance company has an obligation to investigate an accident before denying coverage of the accident. Here, the facts clearly state that Insko denied that Sam was a covered driver

and "without investigating" the circumstances denied coverage stating that Sam was not covered by the policy. Insko had duty to investigate the circumstances of the policy before denying coverage of the claim for the accident. Because Insko breached its duty to reasonably investigate the claim and the liability coverage, Pablo has a cause of action against them under Section 541

5. Prompt Payment Claim. Under Chapter 541 of the Texas Insurance Code, an insurance company also has a duty to promptly deny liability coverage of a claim. An insurance company must provide a policy owner with a written denial of the claim within 15 days of when the policy owner submits a claim. Here Pablo forwarded the information about the lawsuit to Insko on November 14. Rather than provide Pablo with a written denial within 15 days, Insko instead denied coverage without further explanation. Because Insko failed to provide Pablo with a written denial of coverage for the lawsuit within 15 days after Pablo forwarded information about the lawsuit to them, Pablo has a cause of action against Insko under the Prompt Payment Act.

DAMAGES

Under Chapter 541 of the Insurance Code and the DTPA, Pablo has remedies in the form of actual damages, reasonable attorney fees. Actual damages under Chapter 541 and the DTPA include any economic damages as well as damages for mental anguish. Actual damages and economic damages are pecuniary damages. Mental anguish damages are damages available for severe mental distress which is described as substantially interfering with the daily routine of the person filing the claim. There is no indication that Pablo is suffering from mental anguish, but he might be entitled to a claim the actual and economic costs for repairs to the vehicles and medical costs resulting from the other driver's hospitalization because Insko failed to pay the costs, claiming that Sam was not covered. Pablo might also be able to receive three times his actual costs if he can show that Insko acted knowingly in making misrepresentations to him about his insurance policy. "Knowingly" means that the insurance agency and company knew that the statements they made to a consumer were false. Here, Alex, as Insko's agent knowingly made a statement to Pablo that the paperwork to add Sam to the policy was submitted when it was actually returned to Alex for "further detail". Therefore Pablo might have a valid claim against Insko for three times his actual damages.

Additionally, Pablo might be able to receive three times both his actual damages and any mental anguish damages if he can show that Insko or Alex as Insko's agent acted intentionally made misrepresentations to him regarding his policy. "Intentionally" means making misrepresentations with the knowledge that the person to whom they are made will rely on them. Here, Alex as Insko's agent Pablo also has a remedy under the Prompt Payment Act. If an insurance company fails to provide written notice of denial of a claim to the policy holder within 15 days, the policy holder is entitled to 18% interest on the policy. So Pablo can seek damages in the amount of 18% of the amount of his policy. Under Texas Insurance Law, an insurance company must supply a written denial of an insured's claim within 15 days of the date the claim is reported.

Question 12 – February 2014 – Selected Answer 2

This is a question about Texas Consumer Laws. Texas Consumer laws are governed by the Texas Insurance Code, the Texas Deceptive Trade Practices Act, and the Texas Debt Collection Act. Pablo has rights against Insko under the Texas Deceptive Trade Practices Act and the Texas Insurance Code. The issue is which claims a consumer may bring against an insurer for denying coverage. Under the Texas Deceptive Trade Practices Act (DTPA) a consumer has standing if the consumer is an individual who seeks or acquires, goods or services, by purchase or lease, and the goods or services are the basis of a complaint. Under the DTPA, possible claims are Laundry list violations (Representations that products contain characteristics that they do not possess), breach of express and implied warranty, unconscionability (taking advantage of the lack of knowledge of a consumer to a gross degree, and insurance code violations. Here, Pablo is a consumer, he sought insurance, a service, and the insurance serves as the basis of his complaint.

Laundry list: A consumer can bring a claim under laundry list if the consumer received representations from the opposing party that a good or service had characteristics that it in fact, did not possess or representations that an agreement contained clauses that it did not represent to the consumer. Here, when Pablo called Alex to order insurance, Alex assured Pablo that his paperwork had been submitted to Insko, that his son Sam had been added to the policy, and that an updated policy would arrive in a few days. In fact, Insko had returned the paperwork to Alex, the agent, and stated that the paperwork was so deficient that it required "further detail. Thus, Insko violated the laundry list provision and Pablo has a claim for laundry list violation under the DTPA.

Breach of express or implied warranty: Insko made no warranties to Pablo, therefore, there is no breach of warranty claims that Pablo can bring.

Unconscionability. Pablo may have a claim for unconscionability against Insko for taking advantage of his lack of knowledge with regard to his insurance policy. The issue is whether the insurer, considering the consumer's lack of knowledge to a grossly unfair degree, took advantage of the consumer. Here, Although Alex reassured Pablo that he had submitted Pablo's paperwork, there is no indication that there was a gross lack of knowledge on Pablo's behalf to claim that Insko's actions were unconscionable. Thus, Pablo probably does not have a claim for unconscionability against Insko.

Insurance Code violations. The majority of Pablo's claim will likely arise from violations of the Insurance Code. Pablo may have claims against Insko for the following: 1) Misrepresentation of Coverage 2) Unfair settlement practices 3) Failure to conduct a reasonable investigation of a claim 4) Failure to timely settle a claim. The issue is whether Insko committed Insurance Code violations and if so, what damages will Pablo be entitled to. Pablo will likely have a claim against Insko for misrepresentation of coverage. The issue is whether an insurance company who told a consumer that he was covered when he was not, should be held liable. Under the Insurance Code, an insurance provider is required to provide adequate confirmation of a policy after a consumer has paid a premium. Here, Pablo requested that his son Sam be added to his insurance, and sent the payment to Insko that was quoted by the agent, Alex. When Pablo received his statement and renewal notice, he noticed that his son Sam had not been added to his insurance policy. Alex, the agent, notified Pablo that Sam had been added to the policy. At the time Alex informed Pablo that Sam was added to the policy, but Insko had determined the paperwork was deficient. Sam had not been added to the policy, thus Pablo may have a claim for misrepresentation.

Pablo has a claim for unfair settlement practices. The issue is whether the insured properly settled the policyholders claim when coverage is denied immediately following a claim. Under the Insurance Code, the insurance provider must settle a claim by conducting a reasonable investigation and must deny a claim in good faith. Here, after the accident with Sam, Insko, without investigating, told Pablo that Sam had never been added to the policy, and that there was no coverage for the accident. Insko's denial that Alex was an agent of Pablo, plus its immediate denial of coverage without conducting an investigation, gives rise to an unfair settlement claim. Thus, Pablo may make a claim that this constitutes an unfair settlement of a claim. Pablo has a claim for failure to conduct a reasonable investigation of a claim. The issue is whether Insko's investigation was reasonable to deny Pablo's claim. Under the Insurance Code, an insurance provider must conduct a reasonable investigation of a claim. Here, Insko did not conduct an investigation of the accident, although Pablo reported the accident and property damage. In addition, when provided with the lawsuit for Pablo's personal injury action, Insko denied coverage for the lawsuit without explanation. Thus, Pablo will probably have a claim for failure to conduct a reasonable investigation of a claim. Pablo is entitled to actual damages if he prevails over Insko under the Insurance Code. Actual damages are appropriate when the consumer suffers property loss or damage. Here, Pablo suffered losses to his vehicle; Sam sustained injuries, and property damage. Thus, Insko if found liable, will be required to pay Pablo Actual Damages. Under the DTPA, Pablo will be entitled to economic damages for his property losses. In addition, reasonable attorney's fees.

Question 12 – February 2014 – Selected Answer 3

I. Claims

The Deceptive Trade Practices Act ("DTPA") was enacted with a purpose to be liberally construed to protect consumers against false, misleading, deceptive, unconscionable business practices that produce harm to a consumer. The act further includes protection against breaches of express or implied warranties, violations of Chapter 541 and 542 of the Texas Insurance Code, as well as other tie-in statutes, violations of which are direct violations of the DTPA. The DTPA does not itself create warranties; however, does provide an avenue for redress ability for any breaches of warranties created by other Texas laws. At issue is whether the transaction Pablo entered into violates any Texas consumer laws, and if so what are his remedies.

A) Pablo v. Insko

Insko will be liable for the direct misrepresentations of its agent, Alex. At issue is whether an agent may impose liability on its principal, for misconduct, acting within the scope of his employment. Under the Texas Insurance Code, section 541, any person who transacts for the purpose of obtaining insurance, may have a cause of action for any misrepresentations regarding coverage, rights under the policies, express warranties, and unconscionable acts.

Insko will be held vicariously liable for the tortious misconduct of its agent, Alex, if the agent was acting within the scope of his employment. Here, Alex was instituting and selling policies on behalf of Insko, clearly within the scope of his employment. Insko cannot deny liability simply because it subsequently terminated Alex. These misrepresentations were made while Alex was still employed with the company. This defense will fail and Insko will be liable for the misrepresentations as violations of the Texas Insurance Code.

Here, Alex represented that he would include Pablo's son on the policy. Alex further assured, upon Pablo discovering the policy did not include his son, that the paperwork had been submitted to Insko, that the son was added to the policy, and that the updated policy would arrive in a few days. These statements were material misrepresentations, made with regard to the policy for which the transaction is a basis of the lawsuit, and is the producing cause of Pablo's damages, resulting from Insko's assertion that there would be no coverage. Further, based on these misrepresentations as to the coverage of the policy, the consumer, Pablo relied on them to his detriment when, as the facts show, he allowed his son to drive. These statements impose liability under the DTPA.

B) Insko will also be liable for Alex's intentional failure to disclose a material fact that Alex intentional withheld for the purpose of inducing Pablo into the transaction, which Pablo relied on to his detriment. Pablo allowed his son to drive based on the fact that he believed he was insured under the policy. Alex failed to disclose the fact that the son was not actually on Pablo's policy and did so with the purpose of inducing Pablo into the transaction, which did induce Pablo to pay his premium. Such failure to disclose also amounts to a breach of the DTPA.

C) Insko will also be liable for the express warranties Alex made to Pablo. An express warranty is an affirmation of fact or promise that the policy contains something, which in fact it does not. Here, Alex promised that Sam, Pablo's son was added to the policy and that the updated policy would be arriving in the mail. This is actionable under the DTPA. There are several methods by which to raise a claim under the DTPA; the laundry list, breach of a warranty, either express or implied, unconscionable conduct, and violations of the Texas Insurance Code or other tie –in statutes. Consumer status, however, is required in order to prevail under a DTPA claim. A consumer is a person who seeks or acquires goods or services, through purchase or lease. Here, Pablo is a consumer because he purchased an insurance policy for his household vehicle use and this product in essence is a service. This purchase was also for the direct benefit of his son, and Alex was aware that the purpose of the transaction was to specifically include Pablo's son into the policy. Because Pablo can establish consumer status, all of the provisions and causes of action, for which there is a violation, are available

to him. Thus, the express warranty created by Alex will be actionable by Pablo in a DTPA claim. Insko will likely state that it is not liable for any express warranties since it did not deal directly with Pablo. This will likely prevent liability on Insko's behalf, but Alex will still remain liable for the breach.

Pablo may also assert that Alex and Insko, vicariously and Alex's employer, will be liable for unconscionable acts of Alex. Unconscionability is determined to be conduct that takes unfair advantage to grossly unfair degree, consumer's lack of knowledge, training or expertise. Gross unfairness is defined as flagrant, unmitigated, and glaringly noticeable. Here, Pablo was unaware of the common practices of insurance companies and stood in a position where he could not be fully aware whether the information he was presenting to Alex would be taken into account, thus he relied on this trust relationship. Alex was aware that the consumer could do nothing to fully establish protection for his son and could only trust that by communicating to Alex his desire to add his son, that Alex would further this interest. In fact, Alex did not. The consumer was unaware of this and because of this is now faced with substantial liability. A court will likely conclude that Alex's actions were unconscionable and further imposed this liability to Insko.

D) Insko will, on its own, be liable for unfair business methods, and unfair settlement practices, arising from its failure to pay a claim, when Pablo's son was involved in an accident. In Texas, chapter 542 of the insurance code provides a cause of action for unfair settlement practices, which include not effectuating a fair settlement when liability is reasonably clear. Here, Insko, without investigating the circumstances, told Pablo that it had no record of Sam being added as a covered driver; however the facts state that an application was submitted by its Agent, Alex, and by failing to efficiently file the paperwork, Insko's own agent caused it to be returned as deficient. Further, Insko, without investigating, denied coverage for the lawsuit subsequently initiated by the injured driver involved in Sam's accident. Section 542 requires that an insurance company maintain communication, initiate proper investigation of an accident within 15 days of being notified of the accident, notify the insured whether the insurer will accept or deny the claim, and reasons for rejecting the claim if rejected, and effectuate a fair settlement if liability is reasonably clear. Here, Insko did not do any of what it was required to do because immediately upon being notified of the accident denied coverage applicable to the son, and

immediately upon being notified of a suit against Pablo, denied liability and refused to defend Pablo in the lawsuit. Because of Insko's actions, Pablo will likely have to defend himself in the lawsuit. Insko will be liable for failing to effectuate a prompt, fair and equitable settlement under chapter 542 of the Texas Insurance Code.

E) Insko will also be held to have violating the common law duty of good faith in fair settlement practices. This provides that an insurer must use good faith in effectuating a fair and equitable settlement when liability is reasonably clear. Here, Pablo's son was at fault in the accident by running a stop sign. As such, liability is reasonably clear and had the policy been executed according to Pablo's request, liability would have been covered under the policy, and Insko would have been required to defend Pablo in any subsequent suit, or pay the damages resulting from the liability imposed from the accident. Insko did not investigate the reasons for Pablo's son lack of inclusion or the liability under the accident. It denied coverage without investigation. Thus, it can be established that Insko breach the common law duty of good faith in fair and equitable settlement practices.

II. Remedies:

Under the DTPA, economic damages are available to all who establish consumer status and are injured from the deceptive acts. This would include all damages except for mental anguish damages, pain and suffering and loss of consortium. If the consumer could establish that the actors acted knowingly, then mental anguish damages would be awarded and up to three times economic damages. Knowingly is defined as actual awareness but may be inferred based on the objective manifestations of the actor. If the consumer establishes that the actors acted intentionally, then damages up to three times mental anguish and up to three times economic damages would be awarded. Intentionally is defined as awareness with the specific intent to induce the consumer into the transaction, and may also be inputted by disregard of fair commercial practices. Here, Alex can be shown to have acted with awareness when he assured that the policy covered Sam, and stated that

the provisions of Pablo's policy included terms which it did not. Alex also acted with the specific intent to induce Pablo into the transaction when he failed to disclose that his son was not actually added to the policy, and did so with the specific intent to induce Pablo in remaining under the policy, i.e., continuing to pay his premiums and remain in the contract. Because a principal is liable for the tortious acts of its employee acting within the scope of his employment, Alex and Insko would be jointly and severally liable for all damages properly pled. Since the facts do not state that Pablo is asserting mental anguish damages, it is unknown whether these will be available. If Pablo does experience mental anguish, it must be shown to be more than just mere worry, anger, and vexation and must rise to the level of substantial disruption to his daily routine.

If the claim is brought under the Insurance Code, whether for the violations of section 541 misrepresentations or section 541 improper settlement practices, actual damages are awarded to anyone asserting such a claim, since the action is not reserved to consumers. Actual damages consists of any damages, including mental anguish damages, property damages, loss of work, pain and suffering. Here, Pablo will be entitled to representation in defending the claim against his insurance policy for the accident involving his son. Any loss which results from him having to defend himself in court against the claimant involved in his son's accident will be recoverable against Insko, due to the consumer violations. Under the Insurance Code, since actual damages are awarded, Pablo need not make a showing that defendants acted knowingly, but may show that the defendants acted intentional and recover up to three times actual damages. Further, Pablo will be entitled to the claim amount for which he was required to pay and was not settled by Insko, plus 18% interest per annum on the claim amount.

Reasonable and necessary attorney's fees, not on contingency basis, and court costs will also be awarded in either case. Pablo can also file an injunctive order requiring that Insko cease its unconscionable and misleading business practices.