

Question 6 – July 2014 – Selected Answer 1

I. Pat can assert claims under the Deceptive Trade Practices Act for a “laundry list” violation, unconscionability, and breach of warranty.

The DTPA was enacted to protect consumers from deceptive trade practices and acts. It is to be liberally construed in favor of a consumer. A consumer is a person who seeks or acquires by sale or lease, goods or services for use. If a merchant or other seller is the producing cause of the consumers injury because of a DTPA violation, the consumer has a cause of action.

A. Laundry List

The DTPA provides a list of conduct that violates the DTPA. Among these provisions is misrepresenting the quality of goods, the grade, or authenticity. Here Dan represented Discount Diamonds as being “top of the line” and of “highest quality” when they were actually fake. Pat relied on this information to his detriment. Roscoe also represented Discount Diamonds rings as “authentic” and “highest quality.” But the ring was fake and Pat relied on this statement. The DTPA laundry list also forbids fraudulent misrepresentation when the speaker knows the statement is false, makes the statement to induce the consumer to purchase, and the consumer would not have purchased the item but for the misrepresentation. Such conduct must be knowing. Dan had a deal with Discount to refer customers and it was “well known” to Dan that the ring was fake. Roscoe also probably knew the ring was fake but they both induced Pat to buy a Discount Diamond anyway. The Laundry List requires the customer rely on the violation to his detriment, which Pat did here.

B. Express & Implied Warranty

The DTPA does not create warranties it merely brings existing warranty law under its scope. Goods, such as the diamond ring are governed by the Uniform Commercial Code and services are governed by the common law.

1. Express Warranty

Express warranties are affirmative representations about the quality & characteristics of a good which can be made express orally, in writing, or by showing a sample. Dan expressly stated that the Discount diamonds were “top of the line” and “highest quality.” Even mere puffery such as this is an express warranty. Roscoe stated the diamonds were “authentic” and of “highest quality” and that there was a 90 day guarantee. This information was incorrect so Pat should have a claim for breach of warranty.

2. Implied Warranty

An implied warranty of merchantability arises when a merchant sells a good. The good should be fit for its intended purpose. Debatably, the ring was meant to be worn (which it could be) but was also supposed to be valuable. It was not. So the merchant (Roseco & Discount Diamond) could be liable.

C. Unconscionability

A claim for unconscionability arises under the DTPA when a salesperson takes advantage of a consumer’s lack of ability, knowledge, and experience to a grossly unfair degree. Pat knew nothing about diamonds as most people cannot tell the difference between a real & fake. Roscoe took advantage of him. In all these situations Discount Diamond & Big Bucks Diamonds are potentially vicariously liable for the acts of their employees making misrepresentations, breaching warranties and acting unconscionably.

II. Damages are available in the form of economic, treble, and mental anguish damages as well as attorney fees. When a defendant’s action is a producing cause (substantial factor) in bringing about the consumer’s injury, it will be liable for damages. Economic damages are available for the loss attributed to the violation. Pat can recover the value of the ring and the cost of his wedding and honeymoon if he sufficiently proves causation. Mental anguish damages are available for knowing & intentional conduct of the D that causes mental anguish that disrupts the consumer’s daily activities substantially. The breakup of the wedding and Pat’s visits to a psychologist might be enough to prove substantial disruption & to recover. Treble damages are discretionary damages of up to 3 times the amount of economic damages if conduct is knowing & intentional, which it was here. Also attorney fees & costs that are reasonable & necessary are recoverable when the consumer succeeds. He need not realize a net gain.

III. Defenses

Big Bucks will argue it was not vicariously liable because Dan was acting as Discount's agent, not Big Bucks. Discount & Roscoe can try to settle the claims in full which would prevent recovery if Pat refuses. Or it could state notice was not given 60 days before suit. Dan can argue disclaimer, which is likely to be effective because it was express even though he had verbally warranted the ring's quality. He can argue waiver of the DTPA, but this will be ineffective because although it was in writing and signed, it did not mention the DTPA, the two were not in equal bargaining positions. Moreover, Pat was not represented by an attorney so he cannot validly waive his rights under the DTPA vis-à-vis Dan. The only defenses likely to succeed is the disclaimer by Dan with regard to the express warranty only and Big Bucks claim that Dan was not acting as its agent. Otherwise Dan, Roscoe, & Discount Diamond should all be held liable for their deceptive acts and practices.

Question 6 – July 2014 – Selected Answer 2

1. Pat may assert that Dan, Big Bucks, Discount and Roscoe violated the Texas Deceptive Trade Practices Act.

The Texas Deceptive Trade Practices act protects consumers from proscribed conduct. A "consumer" under the DTPA is a person who acquires (or seeks to acquire) goods or services by either sale or lease. A consumer has a claim under the DTPA when there is actionable conduct that is a producing cause of damages. Actionable conduct occurs either when there is (a) a violation of the "laundry list" of conduct set forth in the DTPA; (b) a breach of a warranty; (c) unconscionable conduct; (d) a violation of insurance code; or (e) a violation of a "tie-in" statute which provides remedies under the DTPA. If the consumer alleges the actionable conduct is a violation of the laundry list, the consumer must also prove reliable on that actionable conduct. A "producing cause" refers to causation for damages - this is a lower standard than proximate cause.

Consumer

Pat is a consumer under the DTPA because he sought to purchase a diamond wedding ring from Dan / Big Bucks, and he sought to purchase a diamond wedding ring and purchased a wedding ring from Roscoe / Discount Diamonds.

Actionable Conduct

Pat can claim violations of the laundry list, warranty, and unconscionable conduct.

Laundry List Violations

The DTPA "laundry list" provides a list of actionable conduct including the misrepresentation that goods have a quality they do not have. The "laundry list" also prohibits misrepresentation of characteristics of goods or services. It is also prohibited to state that goods or services have a certification or classification they do not have. The laundry list also prohibits failure to disclose a material fact.

Dan & Big Bucks

Here, Pat can allege that Dan & Big Bucks violated the laundry list by misrepresenting the goods at Discount Diamonds as having a quality, characteristics, and certifications or classifications they did not have. Big Bucks, via Dan, violated these provisions when they said Discount Diamonds' rings were top of the line and of the highest quality because in fact, they have a bad reputation for shady practices and sub-standard products. Big Bucks, via Dan, also violated these provisions by failing to disclose material facts when Dan did not disclose Discount Diamond's bad reputation for shady practices and sub-standard products. Pat may also argue Dan and Big Bucks also failed to disclose material facts when Dan did not inform Pat that he received 10% of each sale made by a customer he referred. Pat can also probably allege a violation of the laundry list because Dan stated he was a "certified Gemologist" unless Pat is actually a certified Gemologist, because this misrepresents the quality of the services and his advice.

Roscoe & Discount Diamonds

Pat can allege that Roscoe and Discount Diamonds violated the laundry list by misrepresenting the quality, characteristics, and classifications of the goods because the Roscoe misrepresented the ring Pat purchased as being a diamond ring. Pat can also allege that Roscoe and Discount Diamonds violated the laundry list because Roscoe stated the diamonds were authentic and of the highest quality, when the ring was actually fake. Pat can also allege that they violated the laundry list by failing to disclose the material fact that the rings were fake. Further, Pat can allege that the store's name, which includes the word Diamonds, is a misrepresentation because the ring sold was not a diamond.

Reliance

To recover for violations of the laundry list, Pat must prove that he relied on actionable conduct. Here, Pat can prove that he relied on Dan because he followed Dan's advice and went to Discount Diamonds. Pat can also prove that he relied on Roscoe because he was reassured by Roscoe's statement the diamond was of the highest quality. Additionally, because Pat was seeking to buy a diamond of high quality, he can show that he relied on the statements of Dan that the Discount's diamonds were of the highest quality and Pat's statements that the diamonds are of the highest quality.

Breach of Warranty

The DTPA does not create new warranties, but will enforce warranties that exist under the UCC or common law. Warranties may be express or implied. Express warranties may be created by specific statements or samples. Breaches of implied warranties such as the warranty of merchantability and warranty of fitness for a particular purpose will also be enforced by the DTPA. Pat can claim that the sale of a non-diamond ring was a breach of the implied warranty of merchantability. This warranty is implied for the sale of new goods by a merchant, and requires that the goods are suitable for their normal purpose. Pat can claim that the usual purpose of the wedding ring would require that the ring be diamond. This argument is unlikely to prevail because a non-diamond ring may be used in a wedding. The implied warranty of fitness for a particular purpose requires that the party inform the salesperson the purpose for which he will use the goods. Here, there is no evidence that Pat expressed his purpose; even if being married is implied as a purpose, he did not express a need to purchase a diamond. So, the implied warranty of fitness for a particular purpose will not apply. An express warranty was created by Roscoe when he stated there was a 90-day money back guarantee. However, there is no evidence that Pat attempted to return the ring or that he was not permitted to, so there is no grounds to find that warranty was breached.

Pat may also claim that the statements from Dan and Roscoe created an implied warranty that the diamonds at Discount were not fake. This argument probable will prevail because both represented that the items being sold were diamonds and they were not.

Unconscionability

Unconscionability occurs when one party takes advantage of another party's lack of knowledge on a subject or unequal bargaining power. The unconscionability does not have to be intentional or purposeful. Here, Pat may claim that the Dan and Roscoe took advantage of him because he lacked knowledge about diamonds. Pat can argue that by representing himself as a "certified Gemologist" Dan took advantage of Pat's lack of knowledge about diamonds and his conduct was unconscionable.

Insurance Code & Tie In Statutes

The provisions of the insurance code and tie in statutes do not provide additional claims to Pat.

Producing Cause

Dan can successfully argue that the actionable conduct addressed above by Dan, Pat, Big Bucks, and Roscoe was a producing cause of his damages. A producing cause requires "but for" causation, but is an easier standard to prove than proximate cause. Here, Dan can successfully argue that the misrepresentations by Dan as an employee of Big Bucks was a producing cause of his purchase from Roscoe at Discount and they were both producing causes for the cancellation of his wedding and honeymoon due to the discovery of the fake ring.

2. Pat can recover actual damages, attorney's fees, court costs, emotional damages, and punitive damages.

The DTPA provides that a party prevailing under the DTPA must be awarded with attorney fees and court costs. The party is entitled to actual damages. The party is also entitled to emotional damages provided that the party suffers serious emotional distress that disrupts a daily routine. The party is also entitled to punitive damages if the Defendants acted intentionally or knowingly. If the Defendant acted knowingly, the punitive damages may be up to three times the actual damages. If a Defendant acted intentionally, the punitive damages may up to three times the actual damages plus the emotional damages. Here, Pat should prevail and obtain actual damages consisting of the difference in value between the fake ring and a diamond ring and the loss of the honeymoon. Provided he prevails, Pat will receive attorneys fees and court costs for the action. Additionally, Pat will receive emotional distress because he is distraught and visits a psychologist provided the emotional distress has been disruptive to him. Pat can receive punitive damages three times the actual damages and emotional damages from Dan because he acted intentionally because he was aware of Discount Diamond's bad reputation for shady practices and sub-standard products, and intended to induce Pat to deal with them to obtain 10% of each sale. Pat can recover punitive damages from Discount Diamond/Roscoe provided they knew or intended Pat to purchase diamonds that were fake or could be fake.

3. Defenses

Dan cannot successfully assert that the handwritten note waives Pat's claims

A waiver of claims under the Deceptive Trade Practices must adhere to strict requirements. The waiver must be signed by the party, the party must be represented by an attorney, and the waiver must be written in bold font of at least 10 point size. Here, the hand-written note that states Dan will not be responsible for Discount Diamonds does not adhere to any of these statutory requirements, and thus the note will not waive Pat's claims under the DTPA.

A waiver of a warranty must be conspicuous. Dan may argue that the handwritten note waives any implied warranty regarding the nature of the goods at Discount as Diamonds. This claim probably will not be effective because the note is not conspicuous as to waiving warranties, as it merely says Pat will not hold Dan responsible for the purchases.

Defendants cannot successfully assert that the statements about the diamonds were "mere puffery"

A statement about the quality or characteristics of a good that is "mere puffery" is not actionable under the DTPA. A statement is more likely to be found as 'mere puffery' if the statement is an opinion, vague, or not ascertainably true or false. Here, Dan may attempt to assert that his representation Discount's diamonds were "top of the line" "of the highest quality" and that the store is "well established" were mere puffery. This defense will likely fail because even if the statements were somewhat unspecific, they can be understood as representing that the diamonds are not fake and that the store is not known for poor practices. In this case, the diamonds were fake and Discount had a bad representation for shady practices and sub-standard products, so this defense will fail.

Roscoe may also argue that his statements that the diamonds were authentic and of the highest quality were mere puffery. This argument should not prevail because "authentic" is a characteristic that can be proven or disproven, and can be understood to mean that the diamonds for sale were not fake. Thus, the statements are actionable because they are specific enough to be more than mere puffery.

Question 6 – July 2014 – Selected Answer 3

1. At issue is what claims Pat may assert against Dan, Big Bucks, Discount and Roscoe under the Deceptive Trade Practice Act ("DTPA").

The DTPA is designed to protect consumers against false, misleading and deceptive business practices, breaches of warranty, and unconscionable acts. DTPA only applies to consumers. A consumer, under the DTPA, is anyone who seeks or acquires, by purchase or lease, goods or services. A consumer need not

actually purchase an item to be considered a consumer under the DTPA. There are four claims for violations under the DTPA: (1) violation of one of the prohibited acts in the Laundry List, (2) breach of warranty, (3) unconscionable acts, and (4) violation of Chapter 541 of the insurance code. Only the first three claims are implicated here. The main acts prohibited in the Laundry List are misrepresentations to the consumer and failure to disclose. In order to have a claim for misrepresentation, the consumer must have relied on the misrepresentation. In order to have a claim for the failure to disclose, there must have been an intent to induce the consumer - by way of the failure to disclose - to enter into the transaction. A breach of warranty could be a breach of either an implied or express warranty. However, the DTPA itself does not create any warranties, therefore, they must have been in existence independently before the breach occurred. Lastly, an act is unconscionable where the consumer is taken advantage of to a grossly unfair degree. This occurs where the seller takes advantage of the consumers lack of experience, knowledge, or education to a grossly unfair degree.

Here, Pat is a consumer because he sought to purchase a diamond ring from Big Bucks and Dan. Pat need not actually purchase the ring from Big Bucks, but need only seek to purchase in order to qualify as a consumer. Additionally, Pat is a consumer as to Discount and Roscoe because he actually did purchase a ring from Discount.

Dan and Big Bucks

Here, Pat may assert claims against Dan, individually, and against Big Bucks, through Dan as its employee, for (1) misrepresentation, (2) failure to disclose, and (3) unconscionable acts. Here, Dan misrepresented to Pat that Discount sold "top of the line" diamonds of the "highest quality." Dan made these statements knowing that they were false because he knew that Discount had a bad reputation in the diamond business for shady practices and sub-standard products. Additionally, Dan told Pat that Discount was well-established in the diamond business, yet another false statement of which Dan was aware of its falsity. Due to Dan's misrepresentations, Pat relied on them and went to Discount to purchase his diamond ring. Pat has a claim against Dan and Big Bucks because Dan made misrepresentations on which Pat relied.

Second, Pat may bring a claim against Dan and Big Bucks for the failure to disclose material facts with the intent to induce Pat to enter into the transaction. During Pat and Dan's interaction, Dan failed to disclose to Pat the true reputation on Discount and that it was known for shady practices and sub-par products. Dan induced Pat to enter into a transaction with Discount because Dan had a contract with Discount where Dan was to receive 10% of every sale made by Discount to a consumer referred by Dan. Pat has a claim against Dan and Big Bucks because Dan failed to disclose material facts to Pat coupled with the intent to induce Pat to enter into a transaction with Discount.

Third, Pat may bring a claim against Dan and Big Bucks for unconscionable acts that took advantage of Pat to a grossly unfair degree. Pat was not familiar with diamond rings, their qualities, nor where to purchase a "top of the line" diamond. Dan, in his interaction with Pat, took advantage of Pat's inexperience with diamonds and the purchase thereof and directed him to a purchase the ring from a place that was sub-par.

Roscoe and Discount

Here, Pat may assert claims against Roscoe, individually, and against Discount, through Roscoe as its employee, for (1) misrepresentation, (2) failure to disclose, (3) breach of warranty, and (4) unconscionable acts. First, Roscoe misrepresented to Pat that Discount diamonds were "authentic" and "of the highest quality." Roscoe made these statements knowing that they were false. Relying on Roscoe's statements, Pat purchased an expensive diamond ring that turned out to be a fake. Pat has a claim against Roscoe and Discount because Roscoe made misrepresentations on which Pat relied to his detriment.

Second, Pat may bring a claims against Roscoe and Discount for the failure to disclose material facts with the intent to induce Pat to enter into the transaction. Roscoe failed to disclose to Pat that the ring he purchased was fake. Presumably, Roscoe knew the ring was fake because he worked at Discount that had a bad reputation within the diamond selling industry. Additionally, because he worked at Discount it is likely that he was familiar with the products being sold, and the inadequacies of the products. Pat has a claim against Roscoe and Discount because Roscoe failed to disclose material facts to Pat coupled with the intent

to induce Pat to enter into a transaction with Discount.

Third, Pat may bring a claim against Roscoe and Discount for unconscionable acts that took advantage of Pat to a grossly unfair degree. Pat was not familiar with diamond rings, their qualities, nor where the purchase a quality ring. Roscoe took advantage of Pat's inexperience with diamonds and sold him a fake diamond.

Lastly, Pat may bring a claim against Roscoe and Discount for breach of express and implied warranties. An express warranty is a affirmation of fact that is the basis of the bargain. Here, Roscoe expressly stated that Discount's diamonds were "authentic" and "of the highest quality." Although mere puffery is not considered an express warranty, these two statements likely constitute a warranty because they go beyond mere puffing. Roscoe breached this express warranty because the diamond was fake, not authentic, nor of the highest quality. Additionally, Roscoe likely breached the implied warranty of merchantability.

2. Pat may seek both economic damages and mental anguish damages, attorney's fees, court costs, as well as injunctive relief. At issue is what remedies and damages Pat may seek under the DTPA.

A consumer who prevails on a DTPA claim is entitled to economic damages resulting from the violation. Economic damages are any pecuniary loss. However, if the consumer can establish that the seller acted "knowingly," then the consumer is entitled to up to three times the economic damages as well as mental anguish damages. Knowingly is understood to mean actual awareness, which can be inferred by objective manifestations. In order to obtain mental anguish damages, the consumer must establish a high threshold, namely, that there was a significant disruption with the consumer's daily routine. Moreover, if the consumer can establish that the seller acted "intentionally," then the consumer is entitled to up to three times the economic damages, as well as up to three times the mental anguish damages. In addition to the aforementioned, the consumer is also entitled to injunctive relief, attorney's fees and court costs.

Here, Pat is undoubtedly entitled to economic damages. Pat's economic damages resulting from the DTPA violations appear to be the thousands of dollars spent towards the wedding and honeymoon. However, if Pat can establish that the defendants acted knowingly, then he would be entitled to up to three times his economic damages, plus his mental anguish damages if he could satisfy the high threshold. Here, it is unlikely that Pat would be able to satisfy the high threshold necessary for mental anguish damages because the facts only indicate that he visited a psychologist. Without more, this is unlikely to reach the level of a significant disruption with the consumer's daily routine to justify mental anguish damages. Similarly, if Pat can establish that the defendants acted intentionally, he is entitled to up to three times both the economic and mental anguish damages.

In addition to the aforementioned, Pat is entitled to reasonable attorney's fees based on the number of hours worked, not the percentage of recovery. He is also entitled to court costs, and he may pursue other equitable relief, such as injunctive relief.

Dan, Big Bucks, Roscoe, and Discount may assert that Pat did not rely on any misrepresentations, that they were not involved in connection with the transaction, or that Pat waived his DTPA claim. None of the potential defenses are likely to succeed. At issue is which defenses are likely to succeed for the defendants. In order for a misrepresentation claim to succeed, the consumer must rely on the misrepresentation. The defendants may assert that Pat did not rely on any misrepresentations, however, as mentioned above, Pat only went to Discount due to Dan's misrepresentation. Additionally, Pat only purchased the diamond due to Roscoe's misrepresentation.

Dan may attempt to assert that Pat waived his DTPA claim. However, this will fail because waivers of DTPA claims are generally void and unenforceable. In order to obtain a valid waiver, there must be (1) a written and signed waiver, (2) consumer not be a disparate bargaining position, (3) consumer represented by counsel, (4) conspicuous waiver language, and (5) a heading titled "Waiver of DTPA Claims." The waiver signed by Pat was wholly inadequate to constitute a valid waiver of his DTPA

claims.

Lastly, Big Bucks and Discount may attempt to assert that each is a remote party who is not in connection with the transaction, and therefore, is not liable for the DTPA violations. Discount may not assert this because Pat purchased the ring from Discount's store. Big Bucks may have an outside claim to being a remote party, however, Big Bucks will be liable for its employees misconduct, and Dan is Big Buck's employee. Therefore, Big Bucks will likely be unable to find shelter here.