

Question 12 – February 2015 – Selected Answer 1

1. Under Texas consumer laws, she may seek recover under both the Deceptive Trade Practices Act (DTPA) as well as the Texas Debt Collection Act (TDCA) as well as under a tie-in statute, the Health Spa Act.

DTPA:

The DTPA creates a cause of action for false or misleading practices concerning consumer goods and services. In order to have standing under the DTPA, there must be consumer standing, meaning that the person sought or acquired, good or services, by purchase or lease and those goods or services became the basis of the complaint. Consumer standing is met here because Polly sought gym membership services which formed the basis of her complaint.

The DTPA authorizes recovery for four classes of violations: (1) enumerated "laundry-list" violations, (2) breaches of implied or express warranties, (3) unconscionable acts, and (4) violations of the insurance code ch. 541. The insurance code does not apply here. These violations must be the producing cause of the consumer's damages.

(1) Laundry List: One enumerated laundry list violation that is actionable under the DTPA is for a material misrepresentation of the services sought with the intent that the consumer rely on the misrepresentation. Here, that occurred when Polly signed a contract under the impression that there was a three day trial period yet failed to include it in the contract. Specific intent is defined as actual awareness coupled with the specific intent that the consumer rely on the misrepresentation to their detriment. Because Dan knew that Fred had offered the policy, and Fred is Dan's agent, Dan is vicariously liable for the violation.

TDCA:

The TDCA creates a cause of action for unfair debt collection practices. Unfair debt collection practices are acts that can be categorized as (1) harassing or abusive, (2) unfair or unconscionable, or (3) fraudulent, deceptive, or misleading. For standing under the TDCA, the actor must be a debt collector, one collecting a consumer debt on their own behalf, or a third party debt collector, one whose business is primarily engaged in collecting debts on behalf of others. The consumer is an individual who has a consumer debt, which is an obligation for personal or household goods or services. Because this is a personal gym membership, it would qualify. Dan also qualifies as a debt collector under the statute.

(1) The phone calls describing Polly as a fraud and a crook as well as the continuous phone calls were made by Dan with the intent to harass Polly. It is a violation.

(2) The misrepresentations that she would be subject to "massive additional fines," more than the contract permits, is a violation.

(3) The threat of criminal penalties that are not available at law, telling Polly she was "going to jail," is a violation.

(4) The calls to her employer and the voicemail disclosing her debt to them and the representation that she does not pay debts, is a violation.

Tie-In Statute:

Polly may also recover for a violation of the Health Spa Act, which is a tie in statute of the DTPA. A tie-in statute is a separate statute that also allows for recovery under the DTPA. The Health Spa Act provides for a remedy for violations of procedures that gyms and health spas must adhere to, such as offering a certain amount of time to rescind the membership contract.

2. The remedies available to Polly are as follows: DTPA:
Under the DTPA, a consumer may recover (1) economic damages, that is, damages for pecuniary loss,

(2) mental anguish damages, or extreme disruptions to daily life caused by distress as a result of the violation, predicated on a finding that the violation was knowing, (3) additional damages, no more than 3 times the economic damages if a knowing violation, and no more than 3 times the economic and mental anguish damages if intentional, and (4) the plaintiff shall recover reasonable attorneys fees and court costs.

TDCA:

Under the TDCA, a consumer may recover (1) actual damages, that is, any damages recoverable at common law, (2) additional damages no more than 3 times actual damages with a knowing violation, and (3) the plaintiff shall recover reasonable attorneys fees and court costs. There is also a minimum recovery of \$100 per violation of the TDCA.

Also, violations of the DTPA may be brought in under the TDCA, whether the consumer may recover the more favorable remedial scheme. Likewise, a violation of the TDCA may be brought under the DTPA, although the issue of consumer standing may be a problem and the remedies will be less favorable. In addition, injunctive relief is available under both statutes.

Tie-In Statute:

The remedies for a violation of the Health Spa Act, a tie-in statute, mirror those under the TDCA.

Question 12 – February 2015 – Selected Answer 2

1. Polly can invoke violations of the Texas Deceptive Trade Practices Act (DTPA), the Texas Debt Collection Act (TDCA), and the Texas common law tort of harassment associated with wrongful and debt collection.

Polly's claims under the DTPA

The DTPA is a statute designed to protect consumers against deceptive and unfair actions and misrepresentations by businesses. The Act is always to be liberally construed in order to afford greater protections to consumers. In order to be a plaintiff under the DTPA, one must be a "consumer," which is a person or entity who seeks or acquires goods or services for purchase or lease. In this case, Polly both sought and acquired to purchase a service from the gym, namely a membership for the use of the gym. Polly thus qualifies as a consumer. Moreover, the actions of the service provider or seller that violate the DTPA must have been "in connection with" the transaction. Here, Fred's statements to Polly were clearly in connection with the transaction of getting the gym membership, since they described the duration, the price, and her option of canceling the membership within three days of signing the contract to Polly, and they also formed part of the basis of the bargain. The DTPA provides for a number of causes of action that are applicable in this case.

First, Polly can have a cause of action under the DTPA's "laundry list." The laundry list is a list of prohibited behaviors that all have to do with misrepresentations and failures to disclose. In order to make a valid claim under this cause of action, the plaintiff has to show that she relied on the misrepresentations or failures to disclose to her detriment. In this case, we are told that Polly signed the contract "based on Fred's comment" regarding the three-day free trial. In reliance on that comment, Polly subjected herself to a two-year, \$1,200 contract, clearly a legal "detriment" since Polly had no legal duty to enter the contract otherwise. She incurred the obligation only in reliance of the fact that she could change her mind within three days.

The next cause of action under the DTPA is for breach of warranties. The DTPA itself does not provide for any warranties, but enforces warranties found elsewhere in the common law or statutes. Unfortunately, Polly most likely can not meet this cause of action's requirements, because the only warranties that would be remotely applicable are the UCC's warranties for express warranties, implied warranties of merchantability, and the implied warranty of fitness. Polly's transaction, however, was most likely not a "sale of goods" transactions, as the essence of the contract was one for services. Polly could have a claim under the DTPA's cause of action for unconscionability. The DTPA's definition

of unconscionability involves transactions that are unfair to a gross degree. It is possible that, based on additional facts, Polly could establish proof of such a claim. Unconscionability more often involves procedural unconscionability than substantive unconscionability. Under these facts, Polly was at a bargaining disadvantage because the gym no doubt had a pre-made contract form that it used for all members, and most likely that is the type of contract almost all gyms have, which may make Polly almost forced to accept certain terms and conditions if she wants to be a member of any major gym at all. Moreover, Fred did tell Polly that he left the gym because of its "shady business practices," which may give some evidence about its business practices in general that are unconscionable.

The fourth cause of action under the DTPA is related to Insurance Code violations, which are not relevant under these facts.

Polly's claims under the TDCA

Polly also has claims under the TDCA. The TDCA makes certain debt collection practices illegal, whether someone is collecting a debt on their own behalf or on someone else's behalf. Specifically, the TDCA applies to collecting debts for consumer goods. Consumer goods are those that are for personal, household or family purposes. A gym membership qualifies as for a personal purpose.

The TDCA makes the following types of actions violations of the law: threats or coercion, misrepresentation of legal rights or amounts of debt, threats regarding putting someone in jail without legal process, threats regarding judgment against someone without legal process, harassment over the telephone or the mail system (but not email), unconscionable acts. Dan has violated a number of these rules. He called Polly at all times of the day and night, multiple times over and over, leaving her harassing voicemail messages. He threatened that he could sue her for the entire amount of the contract, without indicating that she would be entitled to legal protections and proceedings. He threatened that she would have to pay massive additional fines, which were probably not true, without legal process. He indicated she could go to jail for a debt, which is not provided for anywhere in the law. These were all violations of the TDCA.

The TDCA is what is referred to as a tie-in statute, as in it indicates that violations of the statute itself are also violations of the DTPA. Tie-in statutes afford special damage remedies to plaintiffs.

Polly's claims under the Health Spa Act

The Health Spa Act, which is another tie-in statute with the DTPA, also provides for causes of action for misrepresentations and false advertising and failures to disclose related with business that offer health and spa type services, such as Workout.

Polly's claim under the common law

Texas also provides a cause of action for harassment in wrongful debt collection under its common law tort claims. This is just a regular tort action, where Polly will have to prove that the harassment was extreme and unusual, and that it led to emotional distress. It is akin to an intentional infliction of emotional distress claim.

All the claims Polly has against Dan she can also establish against Workout through agency principles because Dan was an employee of Workout and was acting in the course and scope of his employment.

2. There are multiple remedies available to Polly under the above claims; however, Polly will only collect one ultimate judgment, so she will most likely the highest of these remedies, not all the remedies in the aggregate.

The damage model of the DTPA itself provides that violations lead to the recovery of economic damages, attorneys fees, and costs. Here, Polly has economic damages of lost pay because of the time she had to miss from work due to her panic attacks, as well as attorneys fees and court costs. If the plaintiff can prove that the defendant acted knowingly (Fred's comment that Dan knew about the three day free trial agreement will go a long way in establishing this) the plaintiff can recover up to three times her economic damages, as well as any mental anguish damages. So Polly can recover for the panic attacks she got, as well as her medical bills. If the plaintiff can prove that the defendant acted intentionally (which is knowingly plus the intent to induct the plaintiff into the transaction by the violation) she can recover up to three times both economic and mental anguish damages, plus attorneys fees and

court costs.

The TDCA provides for certain remedies depending on the nature of the violations, such as \$100 or criminal misdemeanor offenses. But more significantly, because it is a tie-in statute, it will give Polly the right to collect her actual damages (economic damages plus mental anguish damages) and attorneys fees and courts, and if Polly can prove Dan acted knowingly, Polly can recover up to three times her actual damages plus attorneys fees and court costs. Polly is entitled to a similar damage model under the Health Spa Act, which is also a tie-in statute. Under the common law claim, she can recover typical tort claim amounts of economic damages, or nominal damages since this is an intentional tort. Ultimately, however, Polly will only collect one judgment.

Question 12 – February 2015 – Selected Answer 3

1. The issue is what claims Polly can file against Dan and Workout.

Texas Deceptive Trade Practices Act

The Texas Deceptive Trade Practices Act ("DTPA"), is meant to protect a consumer from wrongful business practices (violations of the laundry list), unconscionability, and breaches of warranty. A consumer under the DTPA is a individual who seeks or acquires by purchase or lease any goods or services. The goods or services must for the basis of the consumer's complaint. The deceptive practice of the defendant must have been committed in connection with the consumer's transaction. Further, the defendant's actions must be a producing cause of the consumer's damages. To establish a violation of the laundry list, there must have been actionable misrepresentation and failure to disclose in which the consumer detrimentally relied. The misrepresentations must be more than mere puffery. They must be actionable facts that state that the goods or services have a quality, quantity, characterization, grade, or form in which they do not have. Further, the consumer may have an action for misrepresentation of legal rights if those are not properly stated. If the defendant does not disclose a material fact with the intent that the consumer rely on this failure to disclose, the consumer can sustain a claim too. Unconscionability occurs when the defendant takes advantage of the consumer's lack of knowledge, ability or skill in a grossly unfair way. The DTPA does not create warranties in which the consumer can sue on. The warranties must be established based on other law like Chapter 2 of the Texas Business and Commercial Code. Such warranties include breach of an express warranty (an affirmation of fact or a description of the goods).

Laundry List

It is likely that Polly can invoke the DTPA for violation of the laundry list. Fred told Polly that "there was a three-day free trial period. Based on this comment, Polly signed the contract. However, in fact, the contract did not include such three day trial period. Polly detrimentally relied on such affirmation, which was not included. Thus she has a claim.

Unconscionability

It is likely that Polly cannot invoke the DTPA for the acts of Fred in getting Polly to become a member. Stating that the membership includes a trial period when it does not may be viewed as taking advantage of Polly's lack of knowledge about contracts, reading contracts, health club member ships, her rights therein. If the court views the acts of Fred as taking advantage of Polly to a grossly unfair degree then she will have a claim here too. However, under these facts there is nothing to suggest that Polly was taking advantage of to a grossly unfair degree. As such she may not likely have a claim.

Warranty

Since the DTPA does not create the warranties, Polly would have look elsewhere. Polly can use breach of an express warranty to sustain a claim under the DTPA. Here, Fred told Polly that there was a three day trial free period. This statement was not mere puffery and formed the basis of the bargain. Thus it is actionable as a breach of express warranty. it is unlikely that Polly will be able to establish a breach for

the implied warranty of merchantability or implied warranty of fitness for a particular purpose as this is not a sale of goods transaction.

Thus, based on the above, Polly has a claim under the DTPA.

Health Care and Spa Act

Texas has a health care and spa act that is intended to protect consumers from unlawful and deceptive practices in regards to running health care and/or spa. Important to this factual situation is that the Health Care and Spa Act mandates that the consumer have a free three-day trial period in which the consumer can recover his or her money before the expiration of such trial period. More importantly, this free three day trial period must be specifically provided for in the contract. Failure to do so is actionable as a violation of the Health Care and Spa Act. Here, the contract did not include the "trial period" provision in the contract. Thus, Polly has an actionable claim to sue under the Health Care and Spa Act.

Debt Collection Practices Act

A consumer has a claim under the Debt Collection Practices Act ("DCPA") when a debt collector is attempting to collect consumer debt. A consumer is any person who has consumer debt. Consumer debt is debt for personal, family or household purposes. A debt collector is a person who attempts to collect consumer debt. A violation of the DCPA occurs when the debt collector uses threats, coercion, fraud or false statements in its attempt to collect on consumer debt.

Here, it is a close call as to whether Polly has incurred an obligation for consumer debts. While a health care membership is for personal purposes; there facts suggest that Polly was still within her three day members trial free period which was required under the Health Care and Spa Act (as discussed above). Assuming Polly does have consumer debt, it is likely that a court would view the acts of Dan and Workout as a violation of the DCPA. This is because, Dan shouted at Polly to pay, accused her of being a crook and fraud, that she would be subject to an immediate lawsuit plus massive fines, consistently called Polly at all times of the day. Dan even went so far as calling Polly's employer. Therefore, it is clear that based on the actions of Dan that Polly would have a viable claim against Dan and Workout.

Tie-In Statute

Under the DTPA, a consumer can bring a claim through a "tie-in statute" under the DTPA. One of the statutes that ties-in to the DTPA is the Health Care and Spa Act. If the consumer has a viable claim under the Health Care and Spa Act he or she should bring that claim as a tie-in through the DTPA. The DCPA is also a tie-in statute to the DTPA. This becomes important in awarding damages to a prevailing consumer. Here, as discussed above, since Polly has a claim under the Health Care and Spa Act, she can bring the claim as a tie-in statute under the DTPA. Further, Polly can bring a claim under the DCPA as a tie in to the DTPA. This is important because Polly may be able to recover actual damages, as discussed below.

2) The issue is what damages are recoverable for violation of the DTPA, Health Care and Spa Act, DCPA, and bringing a claim as a tie-in through the DTPA.

Under the DTPA, a consumer that prevails may recover her economic damages which are damages for pecuniary loss, as well as court costs and reasonable attorney's fees. If the consumer proves knowingly, the consumer can recover up to three times economic damages and damages for mental anguish. Knowing is proven when the defendant is actually aware that what he or she is doing is false or deceptive. Mental anguish are those damages that are more than a mere sensitive and result in severe emotional distress. If the consumer proves intentional (knowingly coupled with the specific intent to cause determinial reliance) the consumer may recover up to three times economic damages and up to three times mental anguish. However, as mentioned above, if the consumer brings a claim for a violation of a tie-in statute through the DTPA, the consumer may recover her actual damages as well as court costs and attorney's fees. Actual damages are all damages at common law. This is broader than economic damages because it includes all economic damage, mental anguish and pain and suffering. If the consumer proves knowingly then the consumer may recover up to three times actual damages.

If a consumer prevails on a claim under the Health Care and Spa Act she can recover her actual damages. If the consumer prevails on a claim under the Debt Collection Practices Acts she can recover her actual damages.

Here, Polly can recover her economic damages because it is likely that she would prevail on her claim under the DTPA. Further, it is likely that she can prove knowingly in that Dan was actually aware that Fred had offered the three-day trial period. Thus she can recover her mental anguish damages for the time she required medical attention because that is above and beyond normal mental stresses. Polly may be able to prove intentional. However it is likely under these facts in that there is Polly can show that Fred was actually aware of deceptive act and had the specific intent that Polly detrimentally rely on it. Polly's best maneuver is to bring a claim for a tie-in through the DTPA.

This will allow her to recover all her actual damages as well as up to three times her actual damages if she prove knowingly.