

Question 10 – February 2016 – Selected Answer 1

For reference, I shall use the following abbreviations: Pablo = P; Carolina = C.

1. Insureco and Agent violated Chapters 541 and Chapters 542 of the Insurance Code, as well as the Deceptive Trade Practices Act through misrepresentations, failure to pay C's claim, and failure to conduct a reasonable investigation of C's claim.

Chapter 541 of the Insurance Code

Chapter 541 of the Insurance Code provides a private cause of action arising from unfair methods of competition or fraudulent or deceptive trade practices in the industry of insurance. A cause of action under Ch. 541 requires the following: 1) the plaintiff must be a person; 2) defendant must be a person connected with the transaction (typically, an insurance company); 3) the defendant must have committed actionable conduct, as defined in Chapter 541; 4) that conduct must have been the producing cause; 5) of damages to the plaintiff. Examples of actionable conduct are the following: 1) misrepresentation of the rights and obligations under the policy; 2) failing to pay a claim when liability has become clear; 3) failing to conduct a reasonable investigation of a plaintiff's claim.

Here, C is a person and policyholder, and Insureco is clearly connected with the claim. Insureco (through Agent) committed multiple instances of actionable conduct. Agent misrepresented C's rights under the policy when he told her she had no legal right and that it was final and unappealable. In addition, the policy clearly states that in the event of P or C's death, Insureco would pay the amount remaining on the loan from Bank. Hence, Insureco's liability became immediately clear upon P's death. Furthermore, Insureco doesn't appear to have conducted any investigation into the claim, as they did not ask for any information regarding the claim. Agent states that P "obviously lied" about his health, but even if that were true (which is likely not the case given the unexpected nature of the heart attack), Insureco failed to conduct an investigation as to the veracity of that statement. Also, nothing in the facts says that the policy was conditioned on existing for a certain period of time. Additionally, Insureco will be liable for Agent's actions, as agent was acting in his capacity as an agent, C knew of the agency relationship, and Agent was acting for the benefit of Insureco. Hence, Insureco committed actionable conduct by failing to conduct an investigation, failing to pay the claim, and misrepresentation. Finally, C was so distraught about the result that she was unable to go to work and needed medical attention as a result. Insureco's and Agent's actionable conduct was a producing cause of damages to C. Therefore, Insureco and Agent committed violations of Chapter 541 of the Insurance Code.

Chapter 542 of the Insurance Code

In addition, Chapter 542 of the Insurance Code governs prompt payment of claims. These laws require any insurance company to follow various procedures to ensure prompt payment of claims. First, within 15 days of receipt of a claim, an insurance company must: 1) acknowledge receipt of the claim to the claimant; 2) begin an investigation of the claim; and 3) ask the claimant for any other information it may need to conduct the investigation. Upon receipt of the additional information, the insurance company then has 15 business days to determine whether they are going to accept or reject the claim. If the company accepts the claim, it has 5 business days to make payment of the claim. If it rejects the claim, it must notify the claimant of the rejection, as well as provide a sufficient description for why the claim was rejected; a simple rejection with no explanation will suffice.

Here, Insureco did not respond to C until 30 days (as opposed to 15) after receipt of the claim, and notified her of its rejection of the claim another 30 days after that (as opposed to 15 business days). Furthermore, the rejection of the claim came with no explanation; the letter stated only that the claim had been denied. Therefore, Insureco has clearly violated Chapter 542 of the Insurance Code.

DTPA

Finally, Chapter 542 is a cumulative remedy and can be obtained in addition to any remedy under Chapter 541. Chapter 541, in addition, is a tie-in statute of the Deceptive Trade Practices Act (DTPA). Under the DTPA, a private cause of action exists for the following: 1) plaintiff is a consumer; 2) defendant is connected with the transaction; 3) the defendant committed actionable conduct as defined under the DTPA; 4) that conduct was a producing cause; 5) of damages to the plaintiff. Actionable conduct under the DTPA includes violations of a tie-in statute such as Chapter 541 of the Insurance Code.

Here, it is clear that Insureco and Agent have committed violations of Chapter 541 as mentioned above. Under the DTPA, a consumer is someone who seeks, by sale or lease, goods or services. C is clearly a consumer, given that she is the policyholder. The other factors under DTPA are identical to that of Chapter 541. As such, Insureco and Agent have also violated the DTPA under a tie-in statute.

2. C may receive economic damages, actual damages, mental anguish, an interest penalty on the remaining balance of the loan, and reasonable and necessary attorney's fees.

Under the DTPA, a plaintiff can receive economic damages, which are typically measured by 1) the benefit of the bargain, 2) the out-of-pocket expense, 3) the cost to repair, or 4) the loss of use. Economic damages do include any lost wages and medical expenses that occur as a result of the conduct. DTPA also provides for mental anguish if the plaintiff can prove the actionable conduct was committed knowingly or intentionally and shows that the mental anguish was of such a degree, severity and extent as to substantially impair their life. DTPA also provides for reasonable attorney's fees. Chapter 541, unlike the DTPA, provides for actual damages, which are broader than the economic damages available under the DTPA. Chapter 542 provides the following remedies: 1) an interest penalty of 18% per annum on the amount to be paid under the claim; and 2) reasonable and necessary attorney's fees.

Here, given that C can provide violations of all three laws, C can recover economic damages (including lost wages and medical expenses) under the DTPA, actual damages under Chapter 541, an 18% penalty interest on the \$150,000 remaining on the loan under Chapter 542, and reasonable and necessary attorney's fees. Additionally, C can likely show that her mental anguish was to such a severe degree that it substantially impaired her life through her having to receive medical attention for it. Given Agent's statements that C had no legal right to pursue her claim -- a statement in blatant violation of the law -- it is likely she can show that this was a knowing violation as well. Therefore, C can likely recover mental anguish damages as well.

Question 10 – February 2016 – Selected Answer 2

1. In this situation, Insureco and the Agent committed violations of: (1) chapter 541 of the insurance code; (2) chapter 542 of the insurance code; (3) violations of the DTPA laundry list; (4) A breach of warranty; and (5) an unconscionable act that constitutes a violation under the DTPA.

Chapter 541 Violation

Insureco and its Agent committed a violation of chapter 541 of the insurance code. Chapter 541 protects consumers and those who purchase insurance policies from fraudulent and misrepresentative actions by insurance companies and their agents. In order to make a claim under Chapter 541, the plaintiff must be a person, which can mean an individual, entity or even the state of Texas. In addition, the defendant must be involved in the business of selling insurance. Next, the defendant must have committed either a violation of the DTPA laundry list or a violation of chapter 541, and that violation must be the producing cause of the plaintiff's injuries. A violation of Chapter 541 can include the claim of "bad faith." An insurance company has a duty to pay a claim and act in good faith when liability becomes reasonably clear. In addition, the insurance company has a duty to make a good faith investigation into a claim before denying it. Also, an insurance company has a duty not to misrepresent its policy, misrepresent the rights the policy confers, or deny liability without a prompt investigation.

Here, it can be said that Insureco and its Agent acted in bad faith. 541 applies in this situation because Carolina is a person and Insureco and its Agent are defendants who are engaged in the business of selling insurance. In addition, Insureco violated Chapter 541 of the insurance code. Here, Insureco promised that if either Pablo or Carolina died, then Insureco would pay the amount still owing on the home loan. However, once liability became reasonably clear, because Pablo died, Insureco failed to pay out the claim. Instead, it delayed reviewing the claim for thirty days, and then simply sent Carolina a statement that said the policy was denied. The insurance agency failed to explain why the claim was denied or on what grounds. In addition, the policy misrepresented the coverage that it offered to Carolina and Pablo, the policy holders. It stated that all liability would be paid for under the loan. When it came time to pay off the loan, however, Insureco refused to pay. This is a misrepresentation regarding an insurance agreement and goes against the very purpose of the insurance policy. In addition, this is the exact type of behavior that 541 is meant to protect against. This alone is grounds to show that 541 of the insurance code was violated, and as a result Carolina suffered mental anguish, reasonable and necessary attorneys fees, and still incurred the liability of the \$150,000 still owed on the home loan. Therefore, all the elements of a claim under 541 are met and Carolina will be successful on this claim

Chapter 542 Violation

Insureco violated Chapter 542 of the insurance code due to its delay in investigating Carolina's policy claim. Chapter 542 of the insurance code is meant to ensure that insurance claims are paid out in a timely manner and with due diligence taken on behalf of the insurance company. It is meant to protect consumers from undue delay and unnecessary delay. Chapter 542 states that within 15 business days of receiving a claim, an insurance company must send notice that it has received the policy holders claim, it must begin an investigation, and it must request all necessary information to conduct its investigation. Once this is done, the next time limit that comes into play is 15 business days after the insurance company receives all the necessary information for its investigation. After 15 business days have passed since receiving all the necessary information, the insurance company must either accept or reject the claim. Once this is done, the policy must be paid out within 5 business days after the company accepts it. If this is not done, then the insurance policy may be liable to pay 18% interest on the amount of the claim per year that the claim is not paid.

Here, the facts state that Insureco did not make any mention of receiving Carolina's claim until 30 days after Carolin properly filed the claim. This delay alone goes beyond the 15 day requirement to send notification to the policy holder to inform them that the insurance company received the claim. In this case Carolina received a later thirty days later stating that he claim was "under review." At no point did Insureco request additional information. Sixty days after that letter, Carolina received a letter from Insureco stating that the claim had been denied. Again, this is not within the 15 business day limit of receiving all the necessary information and conducting a reasonable investigation. Instead, Insureco never requested any information and failed to conduct a reasonable investigation because it relied on no additional information at all. The undue delay in Insureco's investigation is a complete violation of Chapter 542 of the insurance code and will allow Carolina to receive 18% interest on the amount of her claim for each year that it is not paid out, or pro-rated depending on when the claim is, in fact, paid.

DTPA Violation

The DTPA is intended to protect consumers from fraudulent, misrepresentative, and unfair dealings with manufacturers, producers of products, and even some service industries. In order to prevail under a DTPA claim, a plaintiff must show that the plaintiff is a consumer. A consumer is someone who seeks or acquires, through purchase or lease, goods or services for use. For use is given a broad meaning and it can simply mean that it is purchased to be sold again. Next, it must be shown that the defendant was connected to the transaction and that the defendant engaged in either a breach of the DTPA laundry list, a tie in statute, a breach of warranty, committed an unconscionable act, or violated chapter 541 of the insurance code. The DTPA laundry list includes a misrepresentation regarding goods or services by either misrepresenting their quality or characteristic, a misrepresentation regarding the rights and obligations conferred under a contract, a knowing misrepresentation by omission, a knowing misrepresentation regarding the repairs needed, and a misstatement regarding the service or work done. The plaintiff must rely on this misrepresentation to their detriment. In addition, the violation must be producing cause of the plaintiff's damages.

Here, Insureco and its agent committed violations of the DTPA laundry list include a misrepresentation regarding the characteristics of a service and a misrepresentation regarding the rights and benefits conferred by a contract. Insureco also committed a breach of an express warranty. It is also likely that Insureco committed an unconscionable act because it took advantage of Carolina's lack of knowledge of the insurance industry to a grossly unfair degree. A grossly unfair degree is when the violation is glaring, flagrant, and unmitigated.

Misrepresentation of Characteristics or Quantity

Carolina is a consumer because she wished to purchase the insurance policy for her and her husband to use. Insureco and its agent are proper defendants for this violation because both were connected with the transaction. Insureco committed a misrepresentation regarding the characteristics of its service because it promised that if Pablo or Carolina were to die, then Insureco would pay the remaining money on the loan. When it came time to pay this claim, however, Insureco's Agent refused and said that Pablo had died a mere 2 years since the inception of the policy, and therefore the claim would not be paid out. This was a pure misrepresentation of the characteristics of the service and Carolina relied upon it to her detriment. It was also the producing cause of damages because it caused her mental anguish, attorney fees, and she still incurred the \$150,000 debt.

Misrepresentation of Rights and Benefits Conferred by a Contract

Carolina is a consumer because she wished to purchase the insurance policy for her and her husband to use. Insureco and its agent are proper defendants for this violation because both were connected with the transaction. Insureco committed a misrepresentation regarding the rights and benefits conferred by a contract because it promised that if Pablo or Carolina were to die, then Insureco would pay the remaining money on the loan. When it came time to pay this claim, however, Insureco's Agent refused and said that Pablo had died a mere 2 years since the inception of the policy, and therefore the claim would not be paid out. This was a pure misrepresentation of the characteristics of the service and Carolina relied upon it to her detriment. It was also the producing cause of damages because it caused her mental anguish, attorney fees, and she still incurred the \$150,000 debt.

Breach of Warranty

Under the DTPA, a breach of warranty claim has the same elements as a DTPA laundry list violation. In addition a breach of warranty under the DTPA is different than a typical breach of warranty in a sales contract. Under the DTPA, any statement regarding the quality or characteristics of a good or service is an express warranty. There is no such thing as "mere puffery" under the DTPA. Instead, an express warranty is a statement of affirmation or promise that becomes the basis of the bargain. An express warranty cannot be waived once it is made. Instead, the disclaimer can only be read in a way that does not contradict the express warranty.

Here, Insureco made a promise to pay the remaining amount of the loan if either Pablo or Carolina died. When Pablo died, however, Insureco failed to pay out the claim as promised. This was a promise or affirmation of fact that Carolina relied on and there was no way for the Insurance company to waive it or disclaim it. In fact, Insureco made no effort to disclaim it. Instead, the agent simply told Carolina that Pablo had died too soon after getting the policy. This violation is again the producing cause of Carolina's injuries because of her mental anguish, attorneys fees, and the \$150,000 still owed under the loan. As a result, Insureco is liable for this breach of a warranty.

Unconscionable Act

As stated above, an unconscionable act occurs when a defendant takes advantage of a consumer's lack of knowledge, skill, or experience to a grossly unfair degree. A grossly unfair degree is when the violation is glaring, flagrant, and unmitigated. Insureco took advantage of Carolina's lack of knowledge of the insurance industry to a grossly unfair degree. Here, Insureco possibly took advantage of Carolina's lack of experience in the insurance industry when it promised to provide for the remaining amount on the loan. There is no evidence that she had experience in the insurance field and Insureco convinced her and her husband to get a plan with the company in order to take advantage of the policy that allowed the company to pay for the remaining outstanding loan in the event of Pablo or Carolina's spouse. Given the circumstances, it appears that Insureco had no intention of actually paying this claim and therefore unconscionability could be argued. As a result, Carolina did not have the requisite experience to ensure that this was possible. This is the weakest of the possible claims that Carolina has against Insureco.

2. Under the DTPA, a party who succeeds on a DTPA laundry list, unconscionable act, or breach of warranty claim may request damages in the form of economic damages. In addition, discretionary damages up to three times the amount of economic damages are available with these forms of claims. Plus, if the act was intentionally done then the plaintiff can often receive discretionary damages of up to three times the amount of economic and mental anguish damages. Mental anguish damages are available under the DTPA only if the acts are engaged in intentionally. If the act is done knowingly, the discretionary damages are limited to no more than three times the amount of economic damages. Also under the DTPA, if a defendant is successful on a claim, which does not require a net victory, the plaintiff can receive reasonable and necessary attorneys fees. When it comes to violations of Chapter 541 of the Insurance Code, however, damages may be awarded in the form of actual damages. This means that a plaintiff can recover economic and mental anguish damages. In addition, discretionary damages may also be awarded under 541 up to three times the amount of actual damages. Reasonable and necessary attorneys fees are also available with 541 claims. Violations of Chapter 542 of the Insurance code differ from the types of damages awarded for DTPA, 541, and breach of warranty claims because the deterrence factor differs. In 542, the purpose is to deter insurance companies from undue delay when paying out claims or investigating claims. As a result, the damages for 542 are 18% interest per year on the amount of the claim that is not paid out in a timely fashion. This is pro-rated if a full year does not pass from the time of the claim. Under 541 and the DTPA, reasonable and necessary attorneys fees may be recovered.

In Carolina's case, she will be able to receive discretionary damages up to three times the amount of her economic damages under the DTPA because the conduct was at least engaged in knowingly. If the court finds that the acts were engaged in intentionally, she will be entitled to receive discretionary damages up to three times the amount of mental anguish and economic damages if the conduct was found to be intentional. In addition, She will be entitled to recover her reasonable and necessary attorneys fees if she is successful on her claim. Finally, she will be able to receive 18% interest on the amount of her claim, the \$150,000 remaining on the loan, pro-rated for the time period that Insureco fails to pay out the claim. This form of damages is available under 542 of the Insurance Code.

(1) Insureco and Agent violated Ch. 541 of the Insurance Code and violated the Texas Deceptive Trade Practices Act.

A individual has standing to sue under the Insurance Code for any deceptive act or practice with regards to insurance violation. Third parties do not have standing under the Insurance Code. Violations of the Code include violation of the Prompt Payment Statute of Ch. 542, failure to investigate a claim, failure to give a reasonable explanation for denying a claim, misrepresenting the law or policy, and violation of the Duty of Good faith to effectuate a prompt payment or settlement of claim where prudent insurer would settle and/or pay.

The Prompt Payment Statute is as follows: Within 15 days of notice of claim an insurer must (1) acknowledge the claim, (2) begin the investigation into the claim, and (3) request any information that it might require to assess the claim. Within 15 days of receipt of the request information the insurer must either (1) inform the insured of the insurer's acceptance or denial of the claim; or (2) inform the insured that it needs more time to investigate (giving the insurer and additional 45 days to investigate. Further, the insurer must within 5 days of accepting the claim pay out/settle the claim.

Here, Insureco violated the Prompt Payment Statute. Carolina filled out the proper proof of claim and filed it with Insureco along with Pablo's death certificate and Insureco did not acknowledge the claim until 30 days after receipt of notice of the claim. There is no facts indicating the Insureco began its investigation, and there no facts indicating the Insureco requested any information from Carolina. The after 60 days Insureco denied Carolina's claim. These facts indicate a definite violation of the Prompt Payment Statute.

The Insurance Code also requires that insurer, upon denial of a claim give a reasonable explanation for the reason why the claim was denied. Here, the Agent told Carolina that based solely on the fact that "a mere two years" has passed since the inception of the policy, Pablo had obviously lied about his health condition. This is not a reasonable explanation at all.

The Insurance Code requires that the insurer conduct a reasonable investigation into the claim. Again, there are no fact indicating that Insureco investigated the claim at all. It almost seems like they just assumed he lied and decided not to pay out on the policy. This clearly a failure to reasonably investigate, especially since a reasonable investigation into Pablo's health history would provide that he had never had any serious health issue when he applied for the policy.

A misrepresentation of law or policy is also a violation under the Insurance Code. Here, the Agent told Carolina that Insureco's decision was "final and unappealable" and that Carolina had no "legal right" to pursue her claim any further. This is a definite misrepresentation of the law and of policy.

Any violation of the Insurance Code is also a violation of the DTPA and automatically action under the DTPA.

First we must determine consumer status under the DTPA. There is consumer status under the DTPA if an entity seeks or acquires by purchase or lease, goods or services and those goods or services that were sought or acquired form the basis of the complaint.

Here, Insurance is a service, and Carolina is a consumer because she sought and acquired insurance (service) from Insureco by purchase.

Under the DTPA a consumer may have a cause of action for (1) False, misleading, or deceptive acts or practices with are enumerated in the stated (The Laundry List) if she detrimentally relied on the false, misleading, or deceptive act or practice; (2) for Breach of Express or Implied Warranty; (3) for Unconscionability; and (4) Violation under the Insurance Code Ch. 541. On top of one of the above violations a consumer will also need to show that the violation was the producing cause of her harm.

Here, Carolina could have a cause of action against Insureco and Agent (joint and severally liable) for misrepresentation of the policy and saying that is conferred rights or obligations that does not have. This would be one of the laundry list violations under the DTPA.

Carolina could maybe have a cause of action for breach of express warranty, however there are not enough facts to indicate that any warranty was given about the policy itself. Breach of Implied warranty does not apply because breach of implied warranties applies only to the sale of goods.

Carolina could have a cause of action for unconscionability. "Unconscionability" is defined as: to the consumer's detriment, taking advantage of the consumer's lack of knowledge, capacity, ability and experience to a grossly unfair degree. "Grossly" is defined a glaringly noticeable, flagrant, complete and unmitigated. Here, the Agent's statements that Carolina has no legal rights and the no right to appeal when she obviously needed the money to be able to remain in her home could be seen as unconscionable, but Carolina will need to argue this very well.

Finally, Carolina does have a cause of action for violation of Chapter 541 of the Texas Insurance Code, and the analysis is above.

(2) Under the Insurance Code alone a consumer's remedies include (1) actual damages (which includes all common law damages including mental anguish; (2) additional damages upon a finding of "knowingly"; (3) reasonable and necessary attorneys fee; and (4) recovery under the Prompt Payment Statute which includes (1) damages in the amount of the claim; (2) 18% penalty; and (3) attorneys fees.

Under the DTPA, a consumer's remedies would include (1) Economic Damages (compensatory damages, does not including pain and suffering); (2) Mental Anguish Damages upon a showing of "knowingly" and a showing of substantial disruption of daily routine beyond mere anger and worry; (3) additional damages, up to 3X economic damages upon finding of "knowingly" and up to 3X both economic and mental anguish damages upon the finding of "intentionally".

"Knowingly" is defined as actual awareness. "Intentionally" is defined as actual awareness and the specific intent for the consumer to detrimentally rely. Carolina could show that Agent and Insureco acted knowingly when they reject her claim and perhaps intentionally if given more facts if they made misrepresentation with the specific intent to have Carolina and Pablo purchase the insurance.

Because the Agent is an employee of Insureco, Insureco will be held jointly and severally liable for the misrepresentations that Agent made on its behalf.

Because Carolina was severely distraught and required medical attention for the emotional distress caused she will meet the requirements for mental anguish because these would be signs of substantially disruption in daily routine beyond mere anger and worry.

Carolina may not want to bring the Insurance Code violations through the DTPA because she would either get the same or worse remedies under the DTPA but she may want to bring the laundry list violation of misrepresentation through the Insurance Code in order to get either the same or better remedies for the

misrepresentation.

In conclusion Carolina could recover as follows under the DTPA alone she could recover (1) her economic damages; (2) mental anguish damages because of a most likely finding of "knowingly"; (3) additional damages in the amount of up to 3X her economic and mental anguish damages upon "knowingly" and "intentionally"; and (4) reasonable and necessary attorneys' fees.

Under the Insurance Code alone, Carolina will recover (1) her actual damages; (2) additional damages because of the "knowingly" finding; and (3) attorneys' fees.

Under the Prompt Payment Statute, Carolina will recover (1) damages in the amount of the claim; (2) 18% penalty; and (3) attorneys fees.

If the insurance code violation is brought through the DTPA the remedies would be the same.