

Q3 – July 2016 – Selected Answer 1

1. Carlos may assert Claims under the laundry list and breach of Warranty under the DTPA against Security. The DTPA provides protection for consumer's in dealings with business practices. The DTPA allows recovery under the laundry list, breach of warranty, unconscionability, 541 insurance code and any relevant tie in statutes. In order for one to have a claim under the DTPA they must be a consumer. A consumer is one who seeks or acquires, goods or services by purchase or lease. A consumer may sue immediate parties as long as the good or service is the basis of their claim and may sue a remote party as long as there is a connection with the transaction. Carlos may assert claims against both Sam and Security for the following claims and reasons:

Sam

Laundry List: Under the Laundry list, a consumer may assert claims against another based on misrepresentation made to the consumer that induced reliance. The consumer however does not have to have privity with the defendant in order to pursue a claim under the laundry list

a. Misrepresentation of characteristics and qualities

Carlos may assert a claim against Sam based on the misrepresentations he made concerning the characteristics and qualities of the security system. Sam told Carlos the the company Security's security system was the best the in the business, he claimed they used state of the art equipment and only employed licensed and bonded security experts. Further he claimed they had an excellent reputation in the security community. This was untrue however, because the security alarm system was installed improperly by a security employee who in fact was unlicensed. Further, Security's reputation in the "security community" was a bad one and it was common knowledge that security was the exact opposite of what Sam claim they were.

b. Failure to Disclose

Failure to disclose under the laundry list has an intent requirement. It requires that the person making the representation about the service know information about the service, fail to disclose that information because they intended to induce the consumer and they knew that if they disclosed the information the consumer would not have purchased the service. Here, Carlos has a strong argument for failure to disclose because of the fact that Sam was a professional security consultant. It is highly likely that he knew of Security's bad reputation and just wanted Sam's business. So he failed to tell him the bad information about Security because he knew that Sam wouldn't seek his advice

Breach of Warranty

a. Breach of Express warranty

An express warranty is an express affirmation or fact. Here Sam made statements of express warranty by saying that Security had licensed and bonded security experts as employees as well as an excellent reputation in the security community which were all not true. Since the statements were untrue, Sam breached his express warranties.

b. breach of warranty of fitness for particular purpose

A warranty of fitness for particular purpose arises when a seller knows of the consumers purpose for buying something and knows that the consumer is relying on the seller's advice to make the purchase. here it was clear that Carlos was relying on Sam and that sam knew that because his profession was a consultant for security alarm systems. He hired him specifically for his advised. Further, the facts state that Sam purchased the security system in reliance on Sam's advice. here there was breach fo warranty for particular purpose.

Unconscionability

Unconscionability is an act that, to the consumer's detriment, takes advantage of the sellers lack of knowledge, experience or education to an unfair grossly degree. Here' although Sam's breach several warranties and misrepresented things, they didnt reach to the height of unconscionability, therefore, this does not apply

Insurance Code 541

It should be noted that Insurance code does not apply in this situation.

Security

Breach of express warranty

a. Security proided an express warranty because in its installation agreement, the agreement stated that all worked was performed by licensed and trained professionals. Here' security's employee that installed Carlos's security system was in fact not licensed and probably not well trained because e had been on the job for only one day. Therefore the warranty was breached.

Breach of implied warranty of workmanship

a. When a company or contractor does work or sevicees for a consumer there is an implied warranty that the work will be done professionally. here there was an installation of a security system which is enough to imply the warranty. The work was not done profession, it was done improperly by an untrained and unlicensed employee of security. Therefore the warranty was breached

2. Under the DTPA, a consumer can seek an injunction, and economic damages. Also, if they are successful they can get attorney's fees for the amounts reasonably related to the case. A consumer can get up to three time economic damages if he proves that the defendants acted knowingly as well as get damages for mental anguish. Knowingly means that the defendant was actual aware of their deceptive practice. Mental anguish is proved by a high degree of anguish and a substantial disruption in one's daily routines. If a consumer can prove that the D acted intentionally, they can get up to three times both economic damages and mental anguish damages. Intentionally requires the mental state of knowingly (actual awareness) plus an intended to that the consumer rely to their detriment. Economic damages include things like medical expenses or lost wages but they do not include things like pain and suffering or loss of consortium. In order to seek recovery for those types of damages, a consumer must initiate another claim such as negligence.

Here, Carlos, if successful, can get awarded attorneys fees and expenses reasonably related to his claim as well as economic damages. If he proves knowingly, which he likely can with Sam because of the fact that he was a security professional he can get up to three times economic damages and mental anguish. If he can prove intentionally which again he may be able to prove with Sam, because it is likely Sam withheld the information purposes to get him to buy a security system, he can get up to three times both economic and mental anguish. He has a good chance of proving mental anguish because he was deeply distraught and able to go to work for a week which is sign of high anguish and definitely a disruption in his regular routine. His economic damages will be the loss of teh entire art collection he lost, as well as for any lost wages he suffered from missing work.

3. Security may assert several the following defenses

a. Waiver

Security may assert that they are not liable because the installation agreement contained a waiver that said the customer waived all legal rights. However, under the consumer law waivers are generally unenforceable. the only exception is if the waiver is in writing, signed by the consumer, the consumer is represented by the attorney, the consumer cannot be in a disparate bargaining position and the waiver is in the form required by statute. Here, Carlos did not sign the waiver, nor is he represented by an attorney and the waiver language is highly deficient because much of the language required by statute such as a statement that the person has discussed with an attorney is missing. Therefore, the defense will fail.

b. No notice

Security may assert that carlos gave them no notice. Consumer is required to give notice to the defendant 60 days before initiating suit. however, defendant must file a plea of abatement within 30 days of their answer in order to stop the proceedings to get notice. pleas of abatement don't stop the suit however, they just suspend it for proper notice. Here, since the defendant didn't act, the no notice claim fails and is not helpful to them.

c. No the producing cause

In order to have a remedy against the defendant, their actions must be the producing cause. Security will argue that since Sam was not their agent they are not liable for his misrepresentations and breaches and therefore not the producing cause of Carlos's injuries. Security won't be liable for Sam's bad acts, however they committed their own bad acts which was substantial to the producing cause to the injuries because had the installation been done correctly, Carlos' stuff likely wouldnt have been stolen and he wouldn't have missed work and suffered mental anguish.

1)
Sam

Carlos may assert a DTPA claim against Sam, under the Laundry List, the unconscionability provision, as well as a breach of warranty (although this is unlikely to be successful). At issue is what DTPA claims Carlos may assert against someone who was working as a consultant, whose service was to provide professional judgement or opinion to Carlos.

Any consumer may bring a claim under the DTPA. A consumer is a person who, by purchase or lease, seeks or acquires goods or services. A DTPA claim may be brought against any party directly involved in the transaction in issue, as well as any party remotely involved in the transaction if they played a substantial role in the transaction. Potential defendants are exempt from DTPA liability if the service in question is their providing of professional judgement or opinion. A claim under the DTPA is generally not waivable unless the consumer waives in writing, the waiver is clearly labeled a waiver of consumer rights, there is not significantly unfair bargaining power, and the consumer was represented by his own attorney when signing the waiver (not an attorney provided by the seller of the goods or services). There are four provisions under the DTPA that can create liability. First, the "Laundry List", which includes a claim for general misrepresentations, misrepresentations of legal rights, and failure to disclose. A violation of the laundry list must have been relied on by the consumer to his detriment. Second, you can sue under the DTPA for a breach of warranty. This includes both express and implied warranties. Implied warranties include the implied warranty of merchantability, which means that the good sold is suitable for its intended purpose. Third, a consumer may sue for unconscionability. Unconscionability is applicable if the consumer is taken advantage of by the seller of the good or service based on the seller's taking advantage of the consumer's lack of particular knowledge regarding the good/service in transaction to a significant disadvantage of the consumer. Lastly, a claim under the DTPA can be brought under Ch. 541 of the Insurance Code or a tie in statute. It is a defense to the DTPA if the seller relied in good faith on a writing prepared by a third party, the 2 year statute of limitations has run, there is a mandatory arbitration clause in the contract, one party requests mediation within 90 days, if the consumer did not give 60 day notice before filing suit, or the seller's action was not a significant factor in causing the consumer's harm.

Carlos would have claims for general misrepresentation under the Laundry List, breach of express warranty, and unconscionability. He would be most likely to be successful on his general misrepresentation claim, and perhaps his unconscionability claim. He will likely not be successful in his claim against Sam for breach of warranty. Sam made several statements to Carlos that would not give rise to a DTPA claim. Talking about Security Company's excellent reputation, being the best in the business, and their state of the art equipment would likely be seen as a professional opinion or judgment, which is excluded from the DTPA. However, Sam's claim that Security Company employed only licensed and bonded security experts would not likely receive this protection, as is it a statement of fact, not opinion. This would likely be seen as a general misrepresentation, as it is common knowledge in the industry that Security Company uses inexperienced, unlicensed employees. This could also be construed as a violation of the unconscionability provision, since Carlos knew very little about the security system industry (hence he hired a consultant), and Sam did. It is likely Sam knew that the general public, like Carlos, would not be aware that Security uses bad employees, while his insider knowledge would make him aware of this fact. Thus, it could be argued that he took advantage of Carlos's lack of knowledge to an unconscionable degree. If Sam can show that he made these statements in good faith based on statements from a 3rd party that he relied upon, then he would have a successful defense to these claims. Similarly, Carlos could try to claim breach of warranty against Sam for his express claim that Security uses licensed employees, but this would almost certainly fail because Sam does not work for Security, thus cannot make a warranty for them on their behalf.

Thus, Carlos would likely be successful in claims for general misrepresentation under the laundry list and unconscionability.

Security Company

Carlos would likely be successful in making a DTPA claim against Security Company for general misrepresentation under the laundry list and breach of express and implied warranty.

Any consumer may bring a claim under the DTPA. A consumer is a person who, by purchase or lease, seeks or acquires goods or services. A DTPA claim may be brought against any party directly involved in the transaction in issue, as well as any party remotely involved in the transaction if they played a substantial role in the transaction. Potential defendants are exempt from DTPA liability if the service in question is their providing of professional judgement or opinion. A claim under the DTPA is generally not waivable unless the consumer waives in writing, the waiver is clearly labeled a waiver of consumer rights, there is not significantly unfair bargaining power, and the consumer was represented by his own attorney when signing the waiver (not an attorney provided by the seller of the goods or services). There are four provisions under the DTPA that can create liability. First, the "Laundry List", which includes a claim for general misrepresentations, misrepresentations of legal rights, and failure to disclose. A violation of the laundry list must have been relied on by the consumer to his detriment. Second, you can sue under the DTPA for a breach of warranty. This includes both express and implied warranties. Implied warranties include the implied warranty of merchantability, which means that the good sold is suitable for its intended purpose. Third, a consumer may sue for unconscionability. Unconscionability is applicable if the consumer is taken advantage of by the seller of the good or service based on the seller's taking advantage of the consumer's lack of particular knowledge regarding the good/service in transaction to a significant disadvantage of the consumer. Lastly, a claim under the DTPA can be brought under Ch. 541 of the Insurance Code or a tie in statute. It is a defense to the DTPA if the seller relied in good faith on a writing prepared by a third party, the 2 year statute of limitations has run, there is a mandatory arbitration clause in the contract, one party requests mediation within 90 days, if the consumer did not give 60 day notice before filing suit, or the seller's action was not a significant factor in causing the consumer's harm.

Carlos would be successful in his claim under the DTPA for a general misrepresentation under the Laundry list because Security told him that their employees were all licensed and trained. This is also an express warranty that was made that they breached. Further, Security breached the implied warranty of merchantability because the security system was not suitable for its intended use. The waiver signed by Carlos would not be found to be valid, because DTPA claims can generally not be waived, except for in very specific circumstances. Here, the waiver was not clearly, in bold and conspicuous writing, labeled a waiver of consumer rights, and Carlos was not represented by an attorney when he signed. Thus, he did not waive any rights under the DTPA.

2) Carlos may seek economic damages, mental anguish damages, and punitive damages. Under the DTPA, a consumer may recover economic damages. If the defendant acted knowingly, the consumer may recover mental anguish damages, and treble economic damages. If the defendant acted intentionally, the consumer may recover no more than treble economic and mental anguish damages. Carlos would likely be able to recover mental anguish damages because he became deeply distraught and was unable to go to work for a week. Because Security knew it had told Carlos that their employees were licensed, and that this was not true, they would likely be found to be acting intentionally, and at the very least knowingly. Thus, Carlos would be able to recover up to three times economic damages and three times mental anguish damages.

3) As explained above, Security may assert that Carlos waived his rights under the DTPA by signing the waiver of all legal rights, but this will not be successful. At issue is whether a consumer can waive a claim under the DTPA.

A claim under the DTPA is generally not waivable unless the consumer waives in writing, the waiver is clearly labeled a waiver of consumer rights, there is not significantly unfair bargaining power, and the consumer was represented by his own attorney when signing the waiver (not an attorney provided by the seller of the goods or services).

The waiver signed by Carlos would not be found to be valid, because DTPA claims can generally not be waived, except for in very specific circumstances. Here, the waiver was not clearly, in bold and conspicuous writing, labeled a waiver of consumer rights, and Carlos was not represented by an attorney when he signed. Thus, he did not waive any rights under the DTPA.

Q3 – July 2016 – Selected Answer 3

(1) Under the DTPA, Carlos may assert the following claims against Sam: violation of the DTPA laundry list for failure to disclose and misrepresentation; he can also assert the claim of unconscionability and finally, a breach of express warranty. Under the DTPA, Carlos may assert the following claims against Security: violation of the DTPA laundry list for misrepresentation and failure to disclose, unconscionability and breach of warranty.

When asserting a claim under the DTPA, you must first determine if the plaintiff is in fact a proper plaintiff. Under the DTPA, a consumer is an entity who seeks or acquires, through purchase or lease, goods or services. In order to be considered a consumer, you need not go through with the purchase. You must simply have a good faith intent to go through with the transaction. A consumer is not only the one who actually purchased the goods or services. It also extends to intended beneficiaries, but NOT to incidental beneficiaries. Here, the facts clearly show that Carlos seeks or acquires, through purchase, Sam's advice, which is considered a service. Therefore, Carlos is a proper plaintiff. In regards to Security, Carlos is also a proper plaintiff because he acquired, through purchase the alarm system and also the services that came with the installation portion of the transaction.

The second step is to determine whether the defendant's are considered proper defendants. Under the DTPA, immediate parties to the transaction who were directly involved with the consumer are proper defendants, specially when such communication was part of the basis of the bargain. Therefore, Sam is a proper defendant because he is an immediate party. As for Security, both their employee and Security are proper defendants. The employee is Security's agent and therefore even if Security claims that they are too remote, they would still be proper defendants. Also, you must consider the in connection with rule, which states that if the remote party's conduct directly reached the consumer, then they will be proper defendant's. In this case, Security would be a proper defendant under agency principles and also because of the in connection with rule.

Next, under the DTPA conduct that violated the DTPA and is false, deceptive or misrepresented information is actionable under the DTPA. For a DTPA laundry list violation, the plaintiff must show that he relied on such representation. However, the consumer does not need to show that there was intent - only some violation under the DTPA laundry list require a showing of intent such as failure to disclose. Sam can assert the claim of misrepresentation and failure to disclose against both Sam and Security. In regards to misrepresentation, Sam specially represented to Carlos that Security was in fact the best in the business and that they had an excellent reputation. Carlos did in fact rely on such misrepresentations. Therefore, there was a violation of the DTPA. However, Sam could assert the defense of professional services. Sam would be protected from liability if his advice would fall under professional advice, judgment or opinion. However, there are exceptions to the defense where the professional: (1) expressly misrepresents material facts; (2) breaches an express warranty; (3) fails to disclose; (4) and the advice is unconscionable that it cannot be considered professional advice, opinion or judgment. Here, Sam did in fact breach an express warranty and misrepresented material facts. Therefore, he would not be able to use this defense. As for Security, Carlos could also assert misrepresentation of the fact that they state that all work was performed by licensed and trained personnel. Carlos would also argue that he relied on such information when deciding whether or not to sign a contract with Security.

Next, under the DTPA a consumer can assert a claim of failure to disclose if he can show: (1) the defendant knew of the information; (2) failed to disclose such information; (3) with the intent to induce the consumer; and (4) the consumer was in fact induced into completing the transaction. Carlos could assert this claim against both Sam and Security because both knew the information they were providing was false and misleading. Both failed to disclose that in fact the work was not performed by licensed and trained personnel. Both Sam and Security failed to disclose the information because they intended to induce Carlos into finalizing the transaction. And finally, Carlos was in fact induced by both into finalizing the transaction. Had it not been because of the failure to disclose, Carlos would not have gone to Security (as Sam had advised him) nor would he have signed the contract given to him by Security.

Next, Carlos can assert the claim of unconscionability against both Sam and Security. For unconscionability, you have to show that it was to the consumer detriment and that the defendant's took advantage of the consumer's lack of knowledge, expertise, skills and capacity to a grossly unfair degree. For unconscionability, you do not need to prove intent. Here, both Sam and Security took advantage of Carlos. In regards to Sam, Carlos went to Sam for advice in helping him find a reliable security company. Sam knew that Carlos had a particular purpose. Sam also knew and could have inferred that Carlos had no knowledge of security companies. This could have been inferred because Carlos did in fact hire Sam for the sole purpose of finding a reliable security company. Sam could argue the defense mentioned above and claim that it was a professional service. However, even if he does argue this defense, his conduct would fall under the exception to the defense because it was unconscionable and could not be considered a professional advice, judgment or opinion. Sam was a professional security consultant, so he should have known that Security was well known by other security companies for using inexperienced and unlicensed employees. As for Security, they were aware that their services were not the best and they knew that they were well known for using inexperienced unlicensed employees. The facts even state that the general public had no idea. Therefore, the facts support the argument that their actions were in fact unconscionable and they took advantage of Carlos' lack of knowledge as to security.

Finally, Carlos can assert breach of warranty against both. The DTPA does not create warranties. Therefore, the warranties have to exist outside of the DTPA. In regards to Sam, Carlos can argue that Sam made an express warranty when he states that Security was the best in the business, that it used state of the art equipment, that it used only licensed employees and that they had an excellent reputation. Nevertheless, Sam could claim that it was just his mere opinion and that it was simply puffery. However, these were in fact express warranties and therefore, Carlos could in fact assert such a claim. In regards to Security, Carlos could argue that they breached an implied warranty of merchantability because such a warranty is implied in every sale of goods when the seller is a merchant of the goods of that kind. Here, Security was in fact a merchant who sold security cameras and therefore such a warranty is present. Such warranty warrants that the good is fit for ordinary purpose. Here, the goods were not fit. Also, Carlos could assert a breach of express warranty because the contract specifically stated that all work was performed by a licensed and trained personnel. Unless Security has a good defense, Security would be liable for breach of warranty. As to the defense, it will be discussed below.

(2) Under the DTPA, Carlos may seek the following remedies: economic damages, which include lost wages, property damages and health expenses, as well as reasonable attorney's fees and equitable relief. The possibility of obtaining additional damages depends on whether the defendant's acted knowingly or intentionally, and if proved to have acted knowingly he would be able to get treble economic damages and mental anguish. If they acted intentionally, then Carlos would be able to get additional damages of treble both economic AND mental anguish.

Carlos may seek the damages mentioned above, however, it is important to note that conduct may violate several DTPA provisions, but there will be no double recovery. He could assert the damages mentioned above against both Sam and Security.

When there is a DTPA violation, the consumer is entitled to economic damages which include lost wages, property damages and health expenses. Therefore, Carlos would get damages for the lost wages he lost when he was not able to go to work. He would also get medical expenses that he incurred because he became deeply distraught and he would also get damages for his lost rare art.

Also, if he prevails, he would be entitled to reasonable attorney's fee and costs.

Also, if Carlos can show that the defendant's acted knowingly, which is defined as to having actual awareness of the falsity at the time of the transaction, Carlos would also be entitled to economic damages, and additional damages of up to three times economic damages and mental anguish. If Carlos could show that the defendant's acted intentionally, which is defined as having actual awareness plus the intent, the Carlos would be entitled to economic damages and mental anguish, plus additional damages of up to three times both economic and mental anguish damages. However, for mental anguish, he would have to prove that the defendant's conduct substantially impaired his daily routine. He must show that it was more than simply being distraught. If he can show mental anguish, then he will be entitled to receive the additional damages.

(3) Among the defenses Security may assert are the waiver of warranty and that they should not be liable for its agent's conduct and that they are too remote to be proper defendants.

Under the DTPA, warranties cannot be waived because its against public policy. However, you can waive a warranty if the consumer signs and at the time he signs, he is represented by counsel. The consumer also cannot be in a disproportionate bargaining power. If these elements are met, then it is possible for the consumer to waive a warranty. If a contract was a waiver, under Texas law, it must be a conspicuous statement. It must be in different font and size. It must be in bold, underlines and italicized. Here, the facts show that the entire contract was in uniform type. Therefore, it did not meet the requirements. Also, in order to waive the implied warranty of merchantability, the waiver must specifically state that you are waiving the implied warranty of merchantability. Here, there are no facts indicating that the waiver said that. Therefore, Security would not be likely to succeed.

Finally, in regards to the possible defense that Security should not be liable for its agent's conduct and that they are too remote to be considered proper defendants, its important to note that it was Security the one who provided the contract stating that all work was performed by licensed and trained personnel. They are not too remote. They are in connection with the transaction because their conduct directly reached the consumer. They would also be liable under agency principles because they hired someone who was not licensed nor was he trained. Therefore, Security would not be able to succeed in either defense.