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(1) Yes, both Bank and Emma violated Texas consumer laws under the DTPA and the TDCA. At issue is whether the Bank and their employee engaged in deceptive trade practices and unfair debt collection practices as set forth in Texas consumer laws.

#### TDCA

In Texas, the Texas Debt Collection Act was created to encourage fair debt collection practices and to protect consumers from harmful and harassing actions by debt collectors. Unlike the federal law, Texas defines debt collectors very broadly. Debt collectors are any person or company collecting their own debt or any person or company collecting a debt on behalf of a third person. The debtor under the TDCA is referred to as a consumer. If the person in question constitutes a debt collector as defined, they may not engage in certain actions as prescribed by the TDCA. The TDCA provides an exclusive list of acts that are prohibited. Some of these prohibited actions include the following: harmful or threatening actions while engaged in debt collection, misrepresentation of legal actions and rights, harassing behavior on behalf of the debt collector, and generally any action that should be considered unconscionable or malicious. Examples of these acts include continuous calling, name calling, threats to take legal action that one cannot take, and other acts that are prohibited by the TDCA. It is important to also note that any of these actions apply to both the entity collecting the debt or an agent acting on their behalf. Thus an employee engaging in these actions will impute liability to the entity as well.

Here, the Bank and Emma clearly violated portions of the TDCA. Since the bank was collecting their own debt, they fall within the definition of a debt collector as defined under the TDCA. Emma began violating this act by calling Carolina and accusing her of stealing \$10,000 although Emma never actually stole anything since Emma misrepresented the status of her account to her. This in itself is a violation since this is an accusation that is harmful and offensive. Next, Emma called Carolina a thief and a crook which is also harmful and offensive language that is violated as described by the TDCA. Emma also claimed that they would prepare to file criminal charges if Emma did not pay immediately. Although threatening legal action that the debt collector may reasonably take is allowed, this was an action that Emma likely could not take. It is unlikely that if Carolina did not repay the debt immediately she would immediately be subject to criminal charges. Thus this was a clear misrepresentation of Emma's legal rights. Further, the continuous calling of Carolina was also a violation of the TDCA. This was invalid because a debt collector cannot repeatedly call the consumer especially if the consumer has voiced that they wish to be left alone. Thus Emma's actions were a violation of the TDCA and were extremely harassing and threatening to Carolina. Thus, Emma has a clear cause of action under the TDCA.

#### DTPA

In Texas, to protect consumers from unfair and deceptive trade practices Texas has relied on the Deceptive Trade Practices Act (DTPA). The DTPA protects consumers from unfair practices while purchasing goods and services. To receive the protection from the DTPA, the injured person must be considered a consumer. A consumer is defined as a person who seeks or acquires goods or services for purchase or lease. If the consumer meets the definition they must officially plead into the DTPA by one of the four possible methods. These methods are: (i) a violation of the laundry list, (ii) breach of warranty, (iii) unconscionability, or (iv) a violation of the insurance code. The laundry list consists of 27 provisions; however the most common are misrepresentations of the quality or condition of a good or service or failure to

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disclose with intent for the consumer to enter into the transaction. The consumer must rely to her detriment on the laundry list violation. Warranties can either be in the form of express or implied warranties. An express warranty is an affirmation of fact about a good that becomes the basis of the bargain. Implied warranties can include either an implied warranty of merchantability or an implied warranty of fitness for particular performance. Unconscionability is when a consumer is taken advantage of to a grossly unfair degree. This involves glaring or flagrant unfairness towards the consumer. Finally the consumer must be able to show that the actions taken by the defendant were the producing cause of their harm. This is a very relaxed standard of causation that just requires the defendant's actions to be the substantial factor in the harm.

Here, Carolina can likely rely on violations of the laundry list, warranties, and unconscionability so long as she can prove consumer status. The possible issue that Carolina will run into is that she sought the bank's service solely for the purpose of loaning money and closing her account. This traditionally has not been held to acquire consumer status if the sole purpose of the plaintiff is to seek money from the bank. Thus, this is something that Carolina will have to prove to cover under the DTPA. If she can prove her consumer status, she can argue that the Bank misrepresented that their verification system was 100% accurate and that she had \$15,000 in her account. The 100% accurate statement was a promise of a certain condition of bank's system that obviously was inaccurate due to the later error. Carolina could argue that Emma failed to disclose the fact that Emma had less than \$15,000 in her account with the intent to induce Emma follow through on requesting the check; however this would be a tough burden for Carolina to prove based on the circumstances. Further, Carolina can also try to argue unconscionability since Emma and the Bank took advantage of Carolina's trust in the bank's system to a grossly unfair degree. However all of this will hinge on whether or not Carolina is able to prove her consumer status and get into the DTPA. If she is unsuccessful the TDCA is a tie-in statute to the DTPA. A tie-in statute will allow someone with a claim under the TDCA to have a valid claim under the DTPA. Thus, if Carolina can rely on this, she will be able to use the TDCA to get into the protection of the DTPA.

(2) Carolina is entitled to actual damages, possible treble damages for a knowing violation, injunctive relief, and attorneys fees under the TDCA. Under the DTPA she would be entitled to economic damages, possibly mental anguish, a possible treble of mental anguish damages and/or economic damages, injunctive relief, and attorney's fees.

## DTPA

The DTPA generally allows consumers to recover economic damages as the minimal level of recovery. Economic damages are limited to just compensatory damages for pecuniary loss. It does not cover any pain and suffering. However, if the consumer can prove a knowing violation - which is actual awareness of a violation - she can recover mental anguish damages. To prove mental anguish damages it requires a strong showing of a substantial disruption in the consumer's daily life. A knowing violation will also potentially lead the consumer to recover up to three times economic damages. If the consumer can prove an intentional violation - which is actual awareness plus a clear intent of the violator - then the consumer can recover up to three times economic and mental anguish damages. A consumer may also get injunctive relief if it is equitable under the circumstances. The consumer will also be able to recover attorney's fees.

Here, if Carolina successfully proves consumer status, she may recover at the least economic damages, possibly injunctive relief and attorney's fees. However, if Carolina can prove a knowing violation of the bank and Emma she can attempt to recover mental anguish damages. The facts show that Emma suffered extreme anxiety and she had to stay home for several days and seek medical attention. If the jury finds that this rises to the level of an extreme disruption then she may recover mental anguish plus up to three times economic damages. If

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she can prove an intentional violation she can prove up to three times both economic and mental anguish damages. Further, Carolina can also recover attorney's fees.

## TDCA

The TDCA allows for recovery of actual damages, injunctive relief and attorney's fees. Actual damages covers much more than economic damages because it includes everything at common law. This includes mental anguish damages, economic damages and other types of compensatory damages. Injunctive relief is also available to stop the debt collector from engaging in the harrasing actions. The TDCA is a tie-in statute to the DTPA. This means that in addition to actual damages, the consumer may also recover trebled damages of all of their actual damages for a showing of a knowing violation. Thus an intentional violation is not necessary to treble everything.

Here, if Carolina under the TDCA can recover actual damages. This automatically includes any damages she has for mental anguish. In addition to this, she also can recover up to three times all of her actual damages if she can prove a knowing violation. She does not have to prove an intentional violation to get three times her damages, which makes it an easier burden and virtue of being a tie-in statute to the DTPA. Further Carolina can seek an injunction to prevent Bank and Emma from harassing her and can recover attorney's fees.

In conclusion, Carolina can utilize the TDCA as a tie in statute and get trebled actual damages, injunctive relief, and attorney's fees for the consumer violations.

(3) No, Bank's claim of a waiver is invalid under Texas consumer laws. At issue is whether waiver of consumer rights are valid in Texas.

Generally, it is considered a violaiton of public policy if there is an attempt to waive consumer protection as provided by the DTPA or acts such as the TDCA. Thus, if there is an attempt to do so it will be presumed valid. To effectively waive the rights, certain and very specific requirements must be met. First, the waiver must be conspicuous and in at least 10 point font. The consumer also must be represented by their own counsel in signing the waiver. The consumer must make a voluntary waiver and must do so fully aware of the consequences of doing so. Thus the waiver must include a bold warning of what the consumer is waiving to be effective. If these requirements are not met any attempt to waive consumer protections are invalid.

Here, the Bank's waiver is ineffective for multiple reasons. First it starts off as presumptively invalid since it is an attempt to waive consumer protections, clearly against Texas public policy. Next, it does not meet the statutory requirements of being at least 10 point font. It is only 9 point font and since the requirements should be strictly complied with this is not effective. Further, there is no indication that Carolina was represented by an attorney in the process and knew exactly what she was waiving when she signed the waiver. Because these requirements are not clearly satisfied, the bank's waiver is invalid pursuant to Texas public policy and the statutory requirements.

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Yes, the actions of Bank violated both the DTPA and the TDCA. The Deceptive Trade Practice Act (DTPA) is liberally construed to protect consumers from false, misleading, and deceptive trade practices. A consumer is an entity who seeks or acquires by purchase or lease goods or services. The DTPA does not apply to certain professionals or when a bank is *loaning* out money. Under the DTPA, a private cause of action arises from acts or practices that violate: (1) the laundry list, (2) are unconscionable, (3) breach express or implied warranties, or (4) violated Chapter 541 of the Texas Insurance Code.

A violation of the laundry list can be any of 31 violations where a entity misleads or fails to disclose to a consumer to their detriment. Second, an action is unconscionable where a entity takes advantage of a consumer's lack of knowledge, ability, or education to a grossly unfair degree. Third, an express warranty is an affirmation of fact or promise which the consumer relies on at the time it is made. Warranties are not created under the DTPA but rather arise from contractual or other agreements. Lastly, an violation of the DTPA that violates the Chapter 541 of the Insurance Code is actionable under the DTPA.

Here, the bank violated the DTPA by likely breaching an express warranty and also violating the laundry list. When Carolina asked the bank what he balance was when withdrawing, the teller told her that the verification system was "100% accurate." This appears on its face to be an affirmation of fact but might be construed simply as puffery or the teller's opinion. However, Carolina relied on the statement that she relied on when taking the money out of her account.

Also, the bank likely violated the laundry list by making a misrepresentation to Carolina about the amount of money in her account. The teller told her that she had confirmed the amount in her account when she in fact had not. This is a material misrepresentation was relied on by Carolina, in combination with that statement that the system for counting money was "100% accurate." Therefore, the bank violated the DTPA in at least two material ways.

Under the Texas Debt Collection Act (TDCA), any party who collects consumer debt is a debt collector. This definition is broader than the definition for the federal debt collection act which includes only 3rd party debt collectors. The TDCA protects consumer from debt collectors trying to collect personal, consumer, or household debts. Conduct that is prohibited under the TDCA includes: (1) threats or coercion, (2) harassment and abuse, (3) unfair or unconscionable actions, and (4) false, misleading or deceptive collection methods.

Here, the Bank is considered a debt collector because they are attempting to collect money they claimed it owed to them. When Emma called Carolina she used threats such as the bank filing criminal charges against her which is improper. Emma also used abusive language when she called Carolina a "thief" and a "crook." In addition, the Bank continued to harass her with calling repeatedly over the next few days attempting to collect money from Carolina. Although the TDCA is not as broad in describing what constitutes harassment, calls throughout the day repeatedly would likely violate the TDCA.

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Under the DTPA, the standard form of damages is economic damages for pecuniary loss. A consumer can recover mental anguish damages where they have suffered mental pain and anguish that is more than anxiety or stress. If the defendant acted knowingly, the consumer can

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recover up to 3x economic damages and damages for mental anguish. If the defendant acted intentionally, the consumer can recover up to 3x economic damages and up to 3x mental anguish damages. The consumer is also entitled to reasonable attorneys' fees. In addition, in the appropriate case, the consumer can obtain an injunction and recover equitable damages.

Here, the bank does not appear to have acted intentionally in making false misrepresentation and causing Carolina damages. However, she may be able to recover because of the teller's knowingly false statement. In addition, she may be able to recover for mental anguish caused by the debt collection attempts through a DTPA and tie-in claim.

Under the TDCA, the standard form of damages are actual damages (economic, mental anguish, equitable). The consumer can recover under the TDCA and the DTPA as a tie-in statute. This is beneficial where the defendant acted knowingly or intentionally. In addition, to actual damages, the consumer can recover statutory damages up to \$1000, attorneys' fees, an injunction, and possibly under the tort of wrongful debt collection.

Here, Caroline will likely be able to recover for lost wages, mental anguish since he mental pain and suffering seems serious because she sought medical attention, and an injunction to stop the collection attempts. She is only entitled to one recovery but she can make at least 3, (1) DTPA claim, DTPA as tie-in, and TDCA claim. Thus, Carolina is likely to recover damages from the action of the bank.

(3)

The Bank's claim of waiver will fail. Under the DTPA, waiver is generally not valid unless: (1) in a writing, (2) signed by a consumer not in a disparate bargaining position, and (3) who is represented by an attorney. Texas law purposefully makes it difficult to waive the DTPA to protect consumers for deceptive and misleading attempts by businesses or entities to avoid liability.

Here, the Carolina was not represented by counsel and may have been in a disparate position. The waiver was in small print and not conspicuous to alert her to its presence. It is unlikely that a court would find that this was a proper waiver under the DTPA because Texas disfavors waiver unless the specific provisions above are met. Thus, the Bank will fail on its waiver claim.

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### **DTPA**

The Deceptive Trade Practices Act was created with the purpose to protect consumers from false, misleading, or deceptive trade practices (listed under the laundry list), unconscionable acts, breaches of expressed or implied warranties and violations of section 541 of the Insurance Code. The DTPA protects consumers from breaches of these actions. A consumer is a person who seeks or acquires, for purchase or lease, goods or services. Here, Carolina would qualify as a consumer. Carolina sought to maintain a Bank checking account with Bank.

The actions taken by Bank would violate the DTPA under the laundry list misrepresentation of fact, unconscionability, and potential breach of an expressed warranty. Further, Carolina will be able to bring a tie-in claim under the Texas Debt Collector's Act.

Under the DTPA Laundry list, a company, such as Bank, can be liable for misrepresenting facts. Here, Bank's employee, Emma, in the course and scope of her employment with Bank, misrepresented a material fact about the current balance of Carolina's Bank account. When Carolina decided to close her account at Bank, she asked Emma for the account balance. Emma told her that the balance was \$15,000. Carolina again asked Emma to confirm the balance of the account and Emma said that she had. Emma had in fact not confirmed the balance of the account. Both Emma and Bank will be liable for the misrepresentation. Emma made a misrepresentation to Carolina about her account balance and stated that she had confirmed the balance, when in fact she had not. Bank will be liable under vicarious liability because Emma made this misrepresentation in the course and scope of her employment with Bank. This misrepresentation that Carolina's account contained \$15,000 instead of the true amount of \$5,000 led to Emma issuing a cashier's check for \$15,000 and caused Carolina issues with the Bank later on.

Further, both Bank and Emma could be liable to Carolina under the DTPA for unconscionability. An action is unconscionable when it takes advantage of a consumer's lack of knowledge, ability, or experience to a grossly unfair degree. As Bank and Emma were the only people who had access to the Bank files regarding Carolina's account and Emma assured her that the \$15,000 balance was accurate, Carolina lacked the knowledge or ability to confirm her account balance herself. Further, Emma stated to her that the account verification system was 100% accurate. Emma and Bank (as Emma is their employee and her actions were in the course and scope of her employment with Bank) may be liable for unconscionability because they took advantage of Carolina's lack of knowledge and ability regarding her account balance to a grossly unfair degree.

Emma and Bank could potentially be liable for breach of an express warranty but this result is unlikely. An expressed warranty is one that is expressly made orally or in writing. An express warranty regarding a product or service cannot just be an expression of opinion or mere puffery. Here, the court will consider whether Emma's statement that the Bank's account verification system is "100% accurate," is an expression qualifying as an expressed warranty or just opinion or mere puffery.

### **TEXAS DEBT COLLECTORS ACT**

The actions that Emma and Bank took after they had issued the \$15,000 cashier's check will make them liable under the Texas Debt Collectors Act (TDCA). Under the TDCA, a debt collector is anyone attempting to collect a consumer debt. Under the TDCA Carolina will also have standing because she has a consumer debt. The TDCA has a list of prohibited acts that a debt collector must not engage in or they will be liable to the debtor/consumer for breaches under the TDCA. The TDCA prohibits harassment and abuse caused by repeated phone calls, threats of harm to person or property, threatening to have them thrown in jail for a long, long

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time, or using obscene or profane language when discussing the consumer. Further, the debtor misrepresents the amount of the debt or states that they are acting on behalf of the police or the government they may be held liable under the TDCA.

Here, Bank will qualify as a collector because they are attempting to collect a consumer debt from Carolina. The consumer debt arises due to a misrepresentation by Bank about Carolina's account balance, which resulted in her being issued a cashier's check for more money than she was owed. As previously discussed, Emma, the employee of Bank, told and assured Carolina that her current account balance was \$15,000. Emma then issued a cashier's check to Carolina in the amount of \$15,000. Bank, several days later, discovered that Carolina's account only held \$5,000 and attempted to get the \$10,000 back from Carolina.

Emma, in her course and scope of employment with Bank, called Carolina and demanded the return of \$10,000. Emma told Carolina that she had stolen \$10,000, called her a "thief" "crook" and said that Bank was preparing to file criminal charges unless the money was paid back immediately. Further, Emma called Carolina repeatedly over the next several days demanding the \$10,000.

When considering all of these actions by Bank and its employee Emma some violated the TDCA and are actionable while others are permitted. First, Emma's first call to Carolina which demanded the returning of \$10,000 which they allege Carolina stole is a violation of the TDCA. This was a misrepresentation. Carolina did not steal the money but was given the money as a result of an error by Emma. Second, Emma calling Carolina a thief and crook is a violation of the TDCA. The debtor collectors cannot use obscene or profane language and cannot harass the consumer by calling them names such as crook and thief. Emma's repeatedly calls can qualify as harassment and abuse if they were numerous and at inappropriate times such as late at night or early in the morning. Bank and Emma, however, did not violate the TDCA when Emma stated that Bank was preparing to file criminal charges unless the money is paid back immediately. Under the TDCA, this is not a violation if the debt collector is able to bring a civil suit or file criminal charges to enforce the consumer debt. If Emma had stated, "you are going to go to jail for a long time because of the crimes you have committed," this would have been a violation under the TDCA.

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### **DTPA DAMAGES**

Under the DTPA, a consumer may recover for violations for economic damages and potentially mental anguish damages. Mental anguish is proven when the consumer is more than just upset. Mentally anguish is proven when the consumer is severely upset or disturbed, anxious, becomes physically ill. Here, Carolina will be able to recover mental anguish damages. As a result of the actions of Bank and Emma, Carolina became extremely anxious, stayed home from work a week, and ultimately sought medical attention. These facts would establish that Carolina would be able to recover for mental anguish. Normally, under the DTPA, the consumer can recover only damages for economic damages. If the consumer shows that the defendant acted knowingly, she may recover 3 times economic damage and mental anguish. A defendant acts knowingly when he knows or reasonably should when he/she/it has actual awareness of their actions. For example, they have actual awareness that they are misrepresenting a fact or legal action or remedy. Here, Emma and Bank will be held to have acted knowingly. Emma knew that she was misrepresenting a fact when she told Carolina that she had confirmed her account balance when in fact she had not. Therefore, Carolina will be able to recover 3x economic damages plus mental anguish.

A consumer can recover additional damages if they can prove that the defendant acted intentionally, which is more difficult to prove. If Carolina is able to establish that Bank and Emma acted intentionally she will be able to recover 3x economic damages plus 3x mental anguish.

Further Carolina will be entitled to injunctive relief plus reasonable attorney's fees.

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## **TDCA DAMAGES**

The TDCA will allow Carolina to recover actual damages (which includes compensatory damages and mental anguish), reasonable attorney's fees and injunctive relief. Further under the TDCA, the debt collector can be charged with a misdemeanor with a fine up to \$100 for their actions. If the consumer can prove that the Defendant acted knowingly (Actual awareness), they can recover 3x actual damages. Carolina will likely be able to prove that Emma and Bank acted knowingly and be able to recover 3x actual damages.

## **DTPA/TDCA TIE IN DAMAGES**

The TDCA is a tie-in statute to the DTPA. As a tie in statute the consumer is entitled to collect more than just economic damages and is given the better option of actual damages. Under the DTPA-TDCA Tie-In, Carolina is entitled to recover actual damages. If Carolina proves knowingly (as discussed above), she will further be entitled to 3x actual damages, plus reasonable attorney's fees and injunctive relief.

3) Bank's claim that Carolina signed a waiver is not valid. A valid waiver can be signed and waive all rights to recover under the DTPA if the consumer is represented by counsel and the waiver is bold and conspicuous. Here, the waiver was not valid because Carolina was not represented by counsel and the facts state that although the written waiver was bold, it was printed in size 9 font. Therefore, Carolina did not validly waive her rights to recover under Texas Consumer's laws.

**END OF EXAM**

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