

Question 7 – July 2018 – Selected Answer 1

(A) Under the Texas Deceptive Trade Practices Act (DTPA), Carl can assert a claim for a misrepresentation under the laundry list provision, as well as a breach of warranty claim, and an unconscionability claim. At issue is what claim is available under the DTPA to a consumer, when an accountant makes misleading and false statements about his services that induce a customer to buy those services. The DTPA protects “consumers” from false, misleading, and deceptive statements or business practices. A “consumer” is defined under the DTPA as any person, who seeks to acquire by lease or purchase, goods or services. The definition of a consumer does not include a person or entity with more than \$25 million in assets (or wholly owned by an entity with \$25 million in assets) that seeks to acquire goods or services for its business. The causation standard that a DTPA consumer must prove is that the representations were a “producing cause” of their injuries. Additionally, the DTPA defendant’s actions must be “in connection with” the transaction. If a party made representations directly to a consumer, their actions are “in connection with,” the transaction.

Under the DTPA a consumer can sue for a misleading, false, or deceptive statement that falls within one of the statutory “laundry list” violations, if the consumer can show that they relied on the statement. Here, Carl had just inherited a large sum of money and was looking for someone to prepare his annual income tax return. Carl found a website for “Dan’s CPA Services” that stated “BEST IN THE BUSINESS!.” Carl spoke with Dan himself who said he was a “very successful CPA” with “over 30 years in the tax preparation business” and had “tons of clients.. extensive staff.. and an updated computer system capable of handling any online filing.” Additionally, Dan reassured Carl that his return would be timely filed. Because Carl was impressed by Dan’s representations about his accounting business, he hired Dan and paid him \$5,000. The fact that Dan claimed he was a CPA, had tons of clients, extensive staff, and an updated computer when none of it was true amounts to a multitude of actionable laundry list violations. Dan’s dealt immediately with Carl, so his actions were “in connection with” the transaction. The facts state that Carl entered into the arrangement with Dan because he was impressed by the representations, so he satisfied the reliance requirement. Therefore, based on the false or misleading representations above, Carl has a laundry list claim.

Under the DTPA, another available claim available to consumers is a breach of express warranty. A breach of warranty claim can arise when there is a false or misleading description about the goods or services that a consumer is going to receive. Here, Dan’s website that was titled “Dan’s CPA Services,” and that he was a “very successful CPA” when in fact Dan was not a certified public accountant at all, was a direct breach of warranty based on the description of the services that Dan was supposed to provide. Therefore, based on the “CPA” representation, Carl also has a breach of warranty claim.

Additionally, Carl potentially has a claim for unconscionability. Under the DTPA, a consumer can have a claim for unconscionability when a seller of goods or services takes advantage of the consumer to a grossly unfair degree. Here, the claims on Dan’s website described above, in conjunction with his oral representations over the phone, were made without Carl having any way to verify the things that he said. Carl simply had to rely on Dan’s

statements, and Carl could argue that Dan's conduct and representations took advantage of him to a grossly unfair degree, and thus bring an unconscionability claim.

(B) Dan can attempt to assert two defenses: (1) that professional advice is exempt from DTPA claims, and (2) that his statements were opinion or mere puffery instead of statements of fact. Both of these defenses are likely to fail. At issue is what defenses are available to someone claiming to be an accountant that was sued under the laundry list of the DTPA for false or misleading statements. Under the DTPA, professionals who provide services to a consumer requiring their personal skill, advice and judgment are exempted from the scope of the DTPA. However, one of the exceptions to that general rule is that misrepresentations of fact are never within the exemption, and therefore are subject to the DTPA. Here, Dan will attempt to argue that he was acting in a professional capacity as an accountant for Carl, so his representations fall within the business professional exemption to the DTPA. However, as discussed above Dan made multiple misrepresentations of fact, such as claiming he was a certified public accountant, that he had extensive staff, tons of clients, and an updated computer system, and that Carl's return would be filed on time. Because these were misrepresentations of fact they do not fall within the professional advice exception, and are subject to the DTPA.

The other argument that Dan is likely to make is that his statements were not false statements of fact, but were mere puffery or opinions. In order to be actionable under the DTPA, a statement must be a false misrepresentation of an existing or past fact. Here, Dan is likely to argue that his statements such as, "BEST IN THE BUSINESS" and that he was a "very successful CPA" are nothing more than puffery. It is arguable that these things are mere puffery (other than the representation that he was a "CPA," which was in fact a false representation that he was a certified public accountant, when he was in fact not). Additionally, there were multiple other false statements of fact that were either true or not true made by Dan that Carl can base his claims on. For example, the statement that Dan had an "updated computer system capable of handling any online filing," when Dan only had a single laptop that in fact he claimed "crashed" when he tried to file, is a false statement. And a claim of "extensive staff" when in fact Dan had no staff, are both examples of actionable false statements of fact. Therefore, both of Dan's defenses are likely to fail.

(C) If Carl prevails on his DTPA claim he is entitled to attorney's fees, and any injunctive relief the Court may award, and Carl's damages depend on which mental state he proves. If Carl proves Dan acted "knowingly" he can recover up to three times his economic damages, plus mental anguish damages, or if Carl can prove Dan acted "intentionally" then up to three times of both his economic and mental anguish damages. At issue is what remedies a consumer can seek for a violation of the DTPA laundry list, breach of express warranty, or unconscionability. The DTPA authorizes any prevailing plaintiff to recover attorney's fees and any injunctive relief that the court awards. "Knowingly" is defined as something that the defendant knew or should have known was false. And "intentionally" is essentially the knowingly standard, plus an intent to induce the action. Here, Carl spoke directly with Dan on the phone where Dan made assertions about his own business that he knew were not true, so Carl can definitely establish "knowingly." Carl can also probably show that Dan made those false and misleading representations with the intent to induce Carl to do business with him to show "intentionally." Here, Carl's economic damages would include the substantial penalties

he received from the IRS for failure to file his tax return on time. In order to recover mental anguish damages the plaintiff must show a substantial disruption in their daily routine, along with a high degree of mental distress. This is a very high burden to meet. Carl's mental anguish damages would include the cost of the medical treatment that he required from the anxiety attack he had, if it rises to the standard to award mental anguish damages. Because Carl can probably show Dan acted "intentionally," then he can recover up to three times both

Question 7 – July 2018 – Selected Answer 2

A. Claims under Texas Deceptive Trade Practice Act

Carl can make 3 types of claims under DTPA against against Dan : (1) misrepresentation; (2) breach of implied and express warranty; and (3) unconscionability. At issue is the claim of consumer under DTPA against service provider.

Carl is a consumer as defined under DTPA. DTPA defines "consumer" very broadly to include anyone who purchases or leases for services or goods. Here Carl purchased service from Dan for tax return accounting services. Carl is a consumer and can bring claim against the service provider Dan.

DTPA allows consumer to bring claims against the provider for misrepresentation. DTPA provides a laundry list under which the consumer can sue. Generally, such list includes (1) misrepresentation of the characteristic, nature of the service; (2) misrepresentation of the quality of the goods or services, the certification of the service provider; (2) misrepresentation of the remedies available for the consumer; and (4) failure disclose of material information with the intent to induce reliance of the consumer. In the present case, Dan made a series of misrepresentation online. First, Dan calls it service as "Dan's CPA services," however, in fact, Dan does is not a certified public accountant. Second, Dan claimed that the business is "very successful CPA" with over 30 years in a preparation business and had tons of clients." However, in fact, the business is only had very few clients and a bad reputation. Third, Dan claimed that he had extensive staff and updated computer system, nevertheless, the business is only run by Dan and it only has a single laptop computer that is not properly functioning. All of these mentioned constitute a misrepresentation or failure to disclose of material information that would lead a reasonable consumer to rely on to decide to purchase such service. Therefore, Dan violates the DTPA by making misleading representation.

DTPA also allows the consumer to sue under breach of warranty. A service provider is bound by implied warranty to make reasonable and workman like service to consumers. Under Texas law, such service should be of the reasonable and acceptable standard by the ordinary providers in the same field. However, service provided by Dan is of low quality. Despite Carl provided all relevant information and materials well ahead the IRS tax filing date, Dan failed to provide proper report. In addition, the work product of Dan has a bad reputation in general. Dan also made series of representation for the quality of his service, as discussed above. Failure to comply with his representation and promise also constitutes a breach of express warranty. Carl can sue the service provider under DTPA for breach of express warranty at the same time. Such express warranty cannot be disclaimed.

DTPA further allows consumer to sue the service provider for unconscionable action. Unconscionability is defined as taking advantage of the consumer's lack of knowledge, inexperience, lack of education to a grossly unfair degree. Here, Dan took advantage of Carl's inexperience in accounting and tax filing and delayed the filing process, which causes Carly to be subjected to the penalty of IRS. It also caused Carl to experience an anxiety attack that required medical treatment. It's likely that court would find Dan's practice is extremely unfair and constitute a breach of the DTPA.

Overall, Carl has at least three claims under DPTA: (1) misrepresentation; (2) breach of warranty; (3) unconscionability. In addition, Carl may be allowed to sue under the tie-in statutes as provided under DTPA to acquire actual damages.

B. Defense of Dan

Dan may intend to argue that his service falls within the professional service exception under DTPA and therefore, DTPA does not apply to his case. However, such defense is unlikely to be successful. DTPA does not apply to professional service providers, who provide opinions, judgments, or evaluations for the clients. An accounting service or advice is likely to fall within the exception, however, it does not apply to Carl's case. Such exception does not apply to professional service provider who made misrepresentation of the nature, reputation, or quality of the service. Here Carl claimed that he has good reputation, sufficient staff, and updated facilities. None of these statements are advice, opinion or suggestion of the substantive accounting matter. Therefore the professional service exception does not apply. Carly has legitimate claims against Dan under DTPA.

Dan may further raise the argument that statement made by him is not about fact, but just opinion. For instance, he mentioned in the advertisement that his business is "very successful," "BEST IN THE BUSINESS," all of which are merely advertisement instead of material description of facts. However, Dan's misrepresentation did not stop from merely puffing. Instead, as discussed above, Dan made material and substantive statements that go into the specific quality and nature of the service, which are misleading factual descriptions. Therefore, court is unlikely to find Dan entitled to these defenses.

C. Remedies for Carl

Under DTPA, the consumer can sue for (1) economic loss; (2) mental anguish; (3) attorneys fee and reasonable costs of the court proceeding; and (4) treble damages if the defendant had intent or knowledge of the violation. Furthermore if Carl can file under tie-in statute of DTPA, Carl can get actual damage instead of economic loss, which allows claim for pain and suffering and loss of consortium.

Here, Carl can sue for economic loss under DPTA. Such claim also includes consequential damages as well as incidental damages. Therefore, C can recover the \$5000 payment he made to Dan. In addition, Carl can recover all the additional fees he would otherwise paid for finishing the tax filing. Had IRS issued any penalty on Carl, he can also recover these penalties from Dan, including the interest. In addition, because the serious delay in IRS filing, Carl was having an anxiety attack which required mental treatment. Therefore, Carl can sue Dan to recover such medical payment.

Second, DTPA allows recovery for mental anguish, if the defendant was found to have intentionally or knowingly caused the reliance of consumers by making misrepresentation or breach the warranties. And such wrongful act of the defendant severe mental distress. Under DTPA, knowingly means act with actual awareness of the wrongfulness of the misrepresentation. Intent means that the defendant made the misrepresentation with the purpose to induce the reliance of consumers. Facts in this case indicate Dan made wrongful misrepresentation with the intent to induce the reliance of Carl to purchase his service. Dan clearly knew that his business is not as described in the ads but made such wrongful statement with the intent to get more customers. Because of the delay in filing, Carl is facing IRS penalty, which caused him anxiety attack. Consumer can claim mental anguish only when such emotional distress is severe, including an interruption of the routine life of the consumer. Here, the anxiety attack requires medical treatment for Carl, which constitutes a significant interference with the routine life of Carl of great severity. Therefore, courts are likely to find Carl can bring claim of mental anguish against Dan, to recover the medical bill and any further treatment reasonably need and caused by the wrongful act of Dan.

Third, under DTPA, courts shall grant the consumer attorneys fee and other costs for the court proceeding.

Fourth, DTPA allows the consumer to recover for treble damages. Treble damages for economic cost is allowed if the defendant acts at least knowingly. Treble damages for the mental anguish is allowed if the defendant acted intentionally. As discussed above, evidence and facts indicate that Dan has the intent to induce reliance of consumers and the knowledge of wrongfulness of the statement he made. Therefore Carl should be allowed recover 3 times for the overall economic loss and mental anguish.

Question 7 – July 2018 – Selected Answer 3

A. Carl can assert multiple laundry list violations such as General Misrepresentation, and Failure to Disclose. Additionally, Carl can establish a breach of express warranty and that Dan's actions were unconscionable.

Laundry List.

In Texas to establish a claim under the DTPA one must first qualify as a consumer. A consumer is any person who seeks or acquires any goods or services by purchase or lease. In order to be successful on this DTPA claim the consumer must show that the actions in question were the producing cause of the consumers injury by showing: (1) a laundry list violation (such as general misrepresentation, misrepresentation of legal rights or failure to disclose; (2) a breach of warranty (the DTPA does not create any warranties but merely provides a remedy for the breach of express or implied warranties such as the warranty of merchantability, or fitness for a particular purpose; (3) the actions were unconscionable (the business took advantage of the consumers lack of knowledge, skill, or ability to a grossly unfair degree; or (4) show an insurance code violation. Lastly, the consumer must rely on the actions to the consumers detriment and the actions in question must be "in connection with" the resulting injury.

Here, Dan made multiple general misrepresentations through his statements regarding his “tons of clients” his “extensive staff” and his “updated computer system capable of handling any online filing.” While statements such as Best in the Business will likely fall under the category of mere puffing and exaggeration which would not establish a violation, the previously aforementioned statements in quotes were the polar opposite of the truth. Dan in reality has very few clients, a bad reputation, and only one computer that crashed and caused the tax return not to be filed. The facts also tell us that Dan made his \$5,000 payment because he was impressed by these representations so he clearly relied on these statements to his detriment and those statements were in connection with his injury. Certainly a representation that he is in fact a CPA when he is not will satisfy these terms as well and is likely the most egregious.

The fact that he failed to disclose that he had no staff, only had a single laptop computer in his office and Dan relied on his earlier misrepresentations also establish that Dan failed to disclose pertinent information that would have likely influenced Carl’s decision. **Because** Dan’s failure to disclose this information is in connection with Carl’s injury he also breached the laundry list with a failure to disclose.

Breach of Warranty

Under Texas consumer law an express statement made with the intent of luring another into a business transaction that is relied on by the consumer to their detriment that is ultimately false and causes injury will result in a breach of express warranty. **Here**, as described above, while some statements such as best in the business are mere puffing, other representations and in this case warranties that he has over 30 years experience an extensive staff are not. Certainly a representation that he is in fact a CPA when he is not will satisfy these terms as well. Additionally, these statements when made expressly to a consumer with the intent to lure them into a business transaction constitute an express warranty. Those warranties are breached when they are incorrect or false (as described above) and the consumer relied on them to his detriment (as discussed above). **Therefore**, Dan has also breached an express warranty.

Unconscionable Act

Under Texas law where an individual takes advantage of the consumer’s lack of knowledge, skill, or ability to a grossly unfair degree, it will be found to be unconscionable. **Here**, Carl has inherited a substantial amount of property and is not comfortable preparing his annual tax return. He turns to what he believes is a CPA with extensive knowledge and resources to accomplish his desired tax return and instead ends up with an unlicensed individual with none of the promised services. These facts will easily establish that Dan’s actions were unconscionable. **Therefore** for the reasons above Carl can assert multiple laundry list violations such as General Misrepresentation, and Failure to Disclose. Additionally, Carl can establish a breach of express warranty and that Dan’s actions were unconscionable.

B. Dan would likely attempt to raise the professional services defense and would be unsuccessful because he is not a professional CPA and the basis of the claim is not from any opinion rendered by Dan.

At issue is what defenses if any are available to Dan. **Under Texas Consumer Laws** where a licensed professional renders a service based on opinion, they are normally not liable under the

DTPA for those opinions. However, if that individual is not a professional, or the services provided that are the basis of the claim and injury were not due to any opinion but fraud this defense will not save the “professional.”

Here, not only is Dan not a CPA, but the actions giving rise to the injury was not some tax advice he had given to Carl. Instead it was his misrepresentations of being a professional at all, and the ability to perform the task. Dan not only isn't a CPA he didn't have the resources or ability to even submit the tax return due to one computer crashing (despite his misrepresentation that he had an “updated computer system capable of handling any online filing.”

Therefore, Dan will be entirely unsuccessful at raising a professional services defense.

C. Carl can likely obtain 3 x his economic damages, 3 x his mental anguish damages (if a substantial disruption in his daily routine occurred), reasonable attorneys fees, court costs, and any injunctive relief where proper.

At issue is what type of remedies and damages are available under the DTPA.

Under the DTPA a consumer who establishes a claim may be entitled to 3 x their economic damages (which here would include the damages arising from the failure to file, the payment for services, and the medical expenses for treatment of anxiety attack) if he is able to establish Carl acted knowingly. He will further be able to obtain 3 x his mental anguish damages if he is able to show that Dan acted intentionally. Mental anguish damages are available where the anguish causes a substantial disruption in the consumers daily routine

Here, Carl can likely show that Dan acted intentionally because Dan is fully aware that he is not a licensed CPA, he is further aware that he has very few clients, a bad reputation, and only one computer despite all his contrary claims. While showing intent is a high bar to reach, facts such as these clear the hurdle with ease.

The question will be whether an anxiety attack that required medical treatment is sufficient to establish mental anguishes. One visit alone is likely insufficient to show a substantial disruption in his daily routine, but the facts are silent any further damages. If Carl had to seek treatment frequently, and is having ongoing attacks this could be enough. If however this is the entire extent of his damages he may be limited to 3 x his economic damages if the mental anguish test is not found to be met by the jury.

Also in actions of this kind, the consumer is entitled to reasonable attorneys fees and court costs as well as injunctive relief where appropriate. **Therefore**, because he is a consumer entitled to bring a claim, and should win on this claim, Carl should be entitled to the damages listed above.