

Question 1 – July 2019 – Selected Answer 1

(A)

Under, the Texas Debt Collection Act, Connie may assert several claims under the exclusive list of prohibited actions included in the statute. Because the TDCA is also a DTPA tie-in, she may bring the claims under the TDCA individually, the DTPA as a tie-in, or she could assert claims under the DTPA alone. The issue is whether Lawyer qualifies as a debt collector, whether the debt qualifies as consumer debt, and if there was a violation of the exclusive list.

The TDCA provides a remedy for consumers against "debt collectors" who collect consumer debt in a manner that violates the exclusive list included in the statute. To come within the purview of the statute, the person collecting debt must be a "debt collector" as defined by the statute. A debt collector under the TDCA, unlike the federal definition, is anyone who collects debt, including attorneys. Here, Lawyer collecting his own debt is a debt collector. Consumer debt would also include personal services. Because Connie paid money for personal legal services, the defense of a contract claim, the debt comes within the purview of the statute as a consumer debt.

The TDCA provides an exclusive list of actions that violate the statute. Included in this list is harassment, abuse, causing the phone to ring incessantly, threats, threats of legal action where there is no actual right to do so, calling the person's place of work seeking information beyond identification, and disclosing information or seeking information beyond identification from third parties. First, the statement, "Pay now or go to jail!" and his latter voicemail threatening to file criminal charges and have her thrown in jail are both threats and threats of legal action which the lawyer has no right to enforce. This is a violation of the TDCA. Additionally, calling Connie repeatedly at home likely constitutes harassment or causing the phone to ring incessantly. This is a violation of the TDCA. Calling Connie at work, if included in the statute as a violation, is also impermissible particularly where the collector has knowledge that his was not permitted. Leaving voice mails that call her a "deadbeat" or "loser" additionally likely constitutes harassment or abuse and is a violation of the statute. Finally, leaving a voicemail, if a machine to which others had access, would be disclosure of information to third parties, which is unauthorized by the statute. For the foregoing reasons, Lawyer has made several violation of the TDCA.

DTPA Claim

The consumer also has claims under the DTPA for violations of the laundry list, breach of warranty, unconscionability, and failure to disclose information. The issue is whether

Connie is a consumer under the DTPA and whether Lawyer's actions violate the DTPA's laundry list or constitute a breach of warranty, unconscionability, or failure to disclose.

Under the DTPA, the person bringing a claim must be a "consumer." A consumer is one who seeks or acquires by purchase or lease goods or services and the violation occurred in connection with the sale/lease or acquisition of these services. Here, as mentioned above, Connie sought personal services from Lawyer by purchase of \$1000 for defense of her contract claim. She is therefore a consumer and has standing under the Act.

The DTPA includes a laundry list of actions that violate the statute. Included in this list are misrepresentations and misrepresentations of legal rights. A consumer must rely on these misrepresentations. Here, Larry "guaranteed" a victory and told her that the case was "going great," when in fact, Larry did nothing. This is a misrepresentation. Connie relied on these misrepresentations by not further checking on the status of the case, and her reliance was to her detriment because now she has a default judgment entered against her.

Larry may try to raise the professional services exception/defense to the DTPA claim, but will not likely succeed. The professional services defense only applies where the information given constitutes pure advice or opinion or puffery, not misrepresentations of fact. Here, Larry may argue that "guaranteed" and "going great" were pure opinion and puffery, not representation of fact. However, in light of the actual circumstances, both representations indicated that he was taking care of the case by defending as necessary in court, when in fact he was not. The circumstances likely make this a representation of fact for which he will be liable under DTPA.

Additional DTPA Claims & Defenses

Additionally, she may have a claim for failure to disclose under the DTPA because Larry had knowledge that he was not defending the case and failed to disclose that to her. Further, she may have a breach of warranty claim under the DTPA. Where a person "guarantees" something, there is an express warranty made that cannot be disclaimed. However, because the guaranty here was a guarantee of "victory," Larry will argue that this was mere puffery which cannot constitute a warranty. Additionally, she may have an "unconscionability" claim under the DTPA, which occurs when one with superior knowledge takes advantage of another in unequal bargaining position to an unfair degree. Because he is an attorney, and she is not, he will likely be one with superior knowledge and bargaining position who took advantage of one without that knowledge to a grossly unfair degree by causing a default judgment to be entered against her.

Finally, Larry may argue that Connie's failure to pay excused him of further performance. However, this defense would not apply to past conduct as here. He did nothing on the case for six months and will be liable.

(B) Remedies

Connie will have remedies under the TDCA including damages and injunctive relief as well as damages and injunctive relief under the DTPA, and finally actual and exemplary damages if brought as a tie in through the DPTA.

Under the TDCA, Connie may recover actual damages including court costs and attorneys' fees as well as statutory damages of no less than \$100 per violation.

Under the DTPA, she may recover economic damages and injunctive and equitable relief upon a showing of harm, this would include the \$1000 fee paid and any court costs and attorneys fees unless the defendant can show that this was brought in bad faith or for the purpose of harrassment. However, if she can show that Lawyer acted knowingly (conscious awareness), she can recover 3x her economic damages and mental anguish. Mental anguish must be severe--must interrupt her daily routine and life. Here Larry was aware that he did not doing anything in the case, was aware that he didn't file and still misrepresented to her that everything in the case was going well. This is likely knowing conduct. Further, if her anxiety attacks that required medical attention interrupt her daily routine severely, she likely can prove mental anguish damages. Thus she will have 3x her economic damages + mental anguish. Additionally, if she can prove that the violative conduct occurred intentionally (intending the consequences of his actions), she will have up to three times her economic and mental anguish damages.

If the TDCA claim is brought as a tie in through the DTPA, Connee will recover actual damages including mental anguish, and up to 3x that if done knowingly or intentionally. She may also seek injunctive or equitable relief.

Question 1 – July 2019 – Selected Answer 2

A. The issue here is determining what claims Connie can assert against Larry.

The Deceptive Trade Practices Act (DTPA) protects consumers from deceptive business practices. A consumer is anyone, an individual or a corporation, who buys goods or services. A consumer cannot have assets of over \$25 million. The DTPA includes a "laundry list" of prohibited acts. When a business engages in these acts, a consumer has a private right of action agaist the business under the DTPA. The DTPA specifically

prohibits businesses from making false or deceptive representations to consumers in the conduct of their business. The DTPA also includes "tie in" statutes. If the tie in statutes are violated, the consumer can bring suit under the DTPA to collect damages. The Texas Debt Collection Act is one such tie in statute.

The Texas Debt Collection Act (TDCA) is a statute intended to protect consumers from harmful behavior by debt collectors and creditors. It protects any party that experiences a violation of the Act. Under the TDCA, the prohibitions on certain behavior apply to debt collectors, in the business of collecting debts, and to creditors who collect debts. This is a distinction from the Federal Debt Collection Practices Act. The TDCA provides an exclusive list of prohibited conduct that debt collectors may not engage in. In general, this includes threatening behavior, harassment and abusive behavior, unfair or unconscionable conduct, and fraudulent or misleading acts. The list specifically prohibits using profane or harassing language towards the debtor, calling at inconvenient times for the debtor, calling their place of work if their employer does not allow such calls, calling repeatedly to harass or annoy the debtor, and falsely threaten criminal action.

Here, Larry represented to Connie that he would accept her case for legal representation and guaranteed she would win. Larry then proceeded to do no work on the case, but continued to represent to Connie that the case was "going great" and that she need not worry. These representations made by Larry were false and misleading and damaged Connie as a consumer causing her to incur a debt and make payments for work that was never done. Larry violated the DTPA.

Additionally, Larry is an attorney, not a third party debt collection agency, however, he is acting as a creditor in this case to collect the debt Connie purportedly owes for his legal services, so Larry is a creditor engaging in debt collection. Thus, the TDCA governs his actions. While attempting to collect the debt, Larry has called Connie at home and at work repeatedly. This is a violation of the TDCA, as Larry is calling her at prohibited times and places and calling frequently to harass Connie. Larry also left Connie voicemails calling her a deadbeat and a loser. Calling to use this kind of harassing language is also a violation of the exclusive list under the TDCA. Further, Larry has threatened to file criminal charges against Connie and have her thrown in jail for non-payment of the debt. It is a violation of the Act to threaten legal action that cannot be taken. Connie cannot be arrested or put in jail for non-payment of this debt. Therefore, Larry is falsely threatening legal action against Connie in violation of the TDCA. Larry has committed several violations of the exclusive list of prohibited conduct under the TDCA in his attempts to collect a debt from Connie, and Connie is entitled to pursue legal action against Larry under the Act.

B. The next issue is to determine the remedies Connie has against Larry for his violations of the DTPA and TDCA.

The DTPA allows a private action by the consumer against the party that violated the act. The consumer may be awarded economic damages, injunctive relief, attorney's fees, mental anguish damages if the violation was committed knowingly and intentionally or if it caused the consumer emotional distress that disrupts her everyday life, and last, the court may award any other remedy it sees fit. If mental anguish is present additional damages may be awarded in the amount of the economic damages, trebled.

The TDCA provides both criminal and civil penalties for violations. The criminal penalty for a violation of the TDCA is a fine of no less than \$100 and no more than \$500 per violation. It also allows for private civil suits where the consumer can collect actual damages, injunctive relief and attorney's fees. As this is a tie in statute with the DTPA, remedies under the DTPA can also be collected in a suit for a TDCA violation.

Connie suffered actual damages or economic damages because she paid Larry's monthly fee for work he did not do. Additionally, she began having anxiety attacks that required medical attention, so she incurred medical expenses. Under either Act, Connie will be able to collect for her damages, although she cannot collect a duplicative amount. Additionally, Connie can show mental anguish because the anxiety she suffers from is emotional distress that interrupts her daily routine. Further, Larry committed these violations knowingly and intentionally, so Connie is entitled to mental anguish and treble damages. Larry may also be criminally liable for a fine between \$100 and \$500, in addition to the other things Connie can collect in a suit including attorney's fees and any other remedies the court deems proper. Therefore, Connie is entitled to economic or actual damages, which will be trebled because Larry's violation was knowing and intentional, and mental anguish damages, which will also be trebled, in addition to attorney's fees and injunctive relief.

Question 1 – July 2019 – Selected Answer 3

A. Connie can assert claims against Larry for violation of the Texas Deceptive Trade Practices Act (DTPA) and the Texas Debt Collection Practices Act (TDCPA).

(A)(1) The issue is whether Connie has a claim under the DTPA against Larry. The DTPA is a consumer protection statute. Under the DTPA, a consumer may assert claims against any person in connection with a transaction whose conduct with respect to the transaction has violated its terms. To be a consumer for the purposes of the DTPA, the claimant must be a person or entity that seeks or acquires goods or services for sale or lease. Ordinarily, there is an exception for certain types of professional

services the nature of which is consulting, opinion-based, or judgment-based. However, a professional rendering such services may still be liable for certain violations of the DTPA, including misrepresentations of material facts or legal rights, fraud, deception, and the like.

A claimant can assert claims against a defendant under the DTPA for four types of violations: (1) violation of the DTPA's laundry list of per se violations, which includes general misrepresentations of facts, misrepresentations of legal rights, or failure to disclose material information; (2) violation of the DTPA's prohibition on unconscionable business practices, which applies to any conduct or practice which takes advantage of a consumer's lack of knowledge, skill, or sophistication with respect to a transaction to a grossly unfair degree and to the detriment of the consumer; (3) violations of the Insurance Code; or (4) breach of a warranty. While the DTPA does not create any warranties, the breach of a warranty that arises under another statute or under common law is an actionable claim under the DTPA. Also, violations of the DTPA require reliance by the consumer in order to show that the defendant's conduct was a producing cause of the claimant's damages.

Here, Connie was a consumer, because she is an individual who sought legal service for pay. Although legal services often fall under the exception from liability for services in the nature of judgment and advice, there is an exception to that exception when the service provider acts unconscionably, or makes factual misrepresentations or misrepresentations of legal rights. Here, Larry is a lawyer, but his conduct would likely eliminate his protection under the professional services exception. He made a factual representation to Connie at the outset by promising her a "guaranteed victory," and this was a misrepresentation as he could not have guaranteed a victory. This factual misrepresentation is a violation of the laundry list, and his failure to meet it is a breach of express warranty. He also failed to disclose to her the status of her claim, or that he had made no efforts to bring her claim, which is a violation of the laundry list. He further misrepresented her legal rights when he told her that he could file criminal charges for her failure to pay. All of these violations of the DTPA are actionable.

(A)(2) Connie could also bring claims against Larry for violation of the TDCPA. Under the TDCPA, any person attempting to collect a debt, whether the debt is owed to them or to a third party, is considered a debt collector and subject to the prohibitions on certain conduct under the TDCPA. Any person injured by a debt collector whose conduct violates the TDCPA may bring a claim against that debt collector for that violation. The TDCPA provides an exhaustive list of the kinds of conduct that are actionable under its terms, and this list includes harassment or abuse, threats or coercion, and misrepresentations.

Here, when Connie stopped paying Larry for his services after finding out that he was not pursuing her claim in good faith, he began trying to collect unpaid legal fees. He sent her an email that said "Pay now or go to jail," and that he would file criminal charges against and have her "thrown in jail," which constitute threats of legal action for which there was no basis in law, and therefore in violation of the TDCPA's prohibition of using threats or coercion to collect a debt. He also called her a "deadbeat" and a "loser," which is abusive conduct in violation of the TDCPA. He also called her repeatedly at home and work, which could be considered harrasment in violation of the TDCPA. Connie may assert claims against Larry for all of these violations of the TDCPA, as well as the many violations of the DTPA outlined above.

B. Connie can recover up to three times her actual damages, as well as her reasonable attorney's fees, and possibly appropriate equitable remedies like an injunction against Larry's conduct. The issue is what rights and remedies Connie has against Larry.

Under the DTPA, a consumer, after having provided 60 days notice of the claim to the defendant and giving the defendant an opportunity to make a settlement offer, may sue for her economic damages and mental anguishes damages. Because the TDCPA is a tie-in statute under the DTPA, Connie can also bring a violation of the TDCPA under the DTPA, and because the TDCPA allows for recovery of actual damages, she could recover actual damages on her claim. Actual damages include all economic and non-economic damages recognized under common law, including pecuniary damages, mental anguish damages, and damages for pain and suffering. Additionally, the DTPA authorizes the recovery of treble economic damages if the defendant's conduct was knowing. If the defendant acted knowingly, the Connie can also recover any mental anguish damages she suffered. However, under the tie-in statute, since Connie can recover actual damages under the TDCPA, if she brings her TDCPA under the DTPA, and if she can prove Larry acted knowingly, she can recover up to three times her actual damages, as well as reasonable attorney's fees measured by an hourly pay rate, and any equitable remedies the court deems appropriate.