

Question 4 – February 2020 – Selected Answer 1

Carla has a claim against Alex, and Complete Coverage Insurance under the DTPA, and 541 Insurance Code, and a breach of common law breach of good faith and fair dealing

DTPA

The DTPA protects consumers for misleading and deceptive conduct in connection to business transactions. The DTPA provides substantive recovery for breaches of its enumerated wrongful conduct known as the laundry list; breach of implied/express warranties/; Unconscionable Acts or Unconscionable Courses of Action; and under 541 of the Texas insurance Code.

To be a consumer, one must seek or acquire, by lease or purchase, any good or service. One cannot qualify as a consumer if it holds assets of over 25M or controlling interest in an entity over 25M.

Here, Carla is a consumer because she purchased insurance, which is a service. To recover after the defendant engaged in the aforementioned prohibited conduct in the DTPA, the consumer must show that the defendant's acts were the producing cause of the consumer's damage. Here, Carla can show that both Alex, and Complete Coverage Insurance (CCI) (collectively, "Defendants") actions were the producing cause of her damages suffered.

Laundry List which require reliance

The Laundry list provides that defendants may not engage in misleading or deceptive statements as to the: quality; and characteristics of the good/service; legal rights and remedies of an individual; fail to disclose information with the intent to induce. These wrongful acts all require an element of reliance.

Here, defendants have breached the laundry list when they misrepresented to Alex that they provided the most complete coverage available, 100% customer satisfaction, absolutely cover the house regardless of the extent or source of damage, denying her coverage after submitting her claim.

The above-referenced prohibited conduct is a violation of the DTPA's laundry list

Express Warranties

The DTPA does not create warranties but merely provides an avenue for vindication and recovery when a person has breached an express or implied warranty. Here, we

must look to the source of the law to see which warranty applies. Here, numerous express warranties were made and breached. An Express Warranty is a statement of material fact that is made as a basis of the bargain in connection to the transaction. It is more than mere puffery/opinion.

A party may not disclaim warranties either. Public policy will not allow a person to make such express warranties and then use the disclaimer to get around and disclaim such express warranties by using an "as-is" disclaimer for express warranties made.

Here, Defendants claim that each customer is entitled to 100% customer satisfaction and that defendants absolutely cover the house regardless of the extent or source of damage. Such statements are more than puffery/opinion and are actually statements of material fact that were made as a basis of the bargain in connection to the transaction when Alex relied on such statements to purchase the insurance coverage for her home and car. Therefore, Alex has a claim for breach of an express warranty under the DTPA.

Unconscionable Acts or Unconscionable Courses of Action

A person can prevail if the defendant has engaged in conduct that takes advantage of a person to a gross and unfair degree, especially when that person lacks experience and knowledge. This amounts to Unconscionable Acts or Unconscionable Courses of Action. A gross disparity can also be argued to show Unconscionable Acts or Unconscionable Courses of Action.

Here, Alex did not know much about Insurance and Defendants were the experts. Alex did not possess any special skill, experience, or training in the field of insurance so Defendant's wrongful aforementioned conduct would be such that take advantage of a person to a gross and unfair degree, especially when that person lacks experience and knowledge. Therefore, Alex may also DTPA claim for a Unconscionable Acts or Unconscionable Courses of Action by Defendants.

541 - insurance Code

The DTPA enumerates the 541 insurance code into the DTPA as a substantive claim. The insurance code is designed to govern conduct with respect to the practice and industry of selling insurance as a service. One, such as Alex here, must be a consumer to be able to sue under the DTPA for the breach of 541 insurance code. A person who prevails under the DTPA's insurance cause of action is entitled to damages as provided under the DTPA. (541 has its own set of damages under suing under the 541 act itself and not DTPA - discussed later)

The insurance code prohibits insurance carriers from Unfair Competition, Unfair or Deceptive Acts while providing insurance. Such prohibitions include all of the DTPA's substantive wrongful conduct as discussed above, in addition to, prohibiting carriers from misrepresenting terms about an insurance policy, fail to disclosure terms material to the insurance policy, fail to investigate a claim, fail to enact procedure to promptly investigate a claim, fail to communicate in a reasonable time and manner, and denying coverage when liability has become reasonably clear.

Here, Defendants have breached 541 when they misrepresented to Alex that they provided the most complete coverage available, 100% customer satisfaction, absolutely cover the house regardless of the extent or source of damage, denying her coverage after submitting her claim. All of this amounts to misrepresenting terms about an insurance policy, fail to disclosure terms material to the insurance policy, fail to investigate a claim, fail to enact procedure to promptly investigate a claim, fail to communicate in a reasonable time and manner, and denying coverage when liability has become reasonably clear.

DTPA Damages/Remedies

A consumer who prevails under the DTPA is entitled to her economic damages (pecuniary), Mental Anguish damages if the act was done knowingly (awareness of the falsity at the time of the transaction), and most importantly, can add additional damages up to 3x the amount for economic damages for a knowing violation, and up to 3x in mental anguish if done intentionally (knowingly coupled with the specific intent to induce). Also, a person who prevails is entitled to reasonable and necessary attorneys fees, costs of suit, and other appropriate relief (equity)

Here, if Alex will likely recover economic damages, but may not recover mental anguish due to mental anguish must be lead to severe mental distress + a substantial disruption of daily activities. Here, "very distraught" may not be sufficient for mental anguish,, however if Alex can show Defendants acted knowingly, she can be afforded up to 3x in additional damages plus her reasonable and necessary attorneys fees, costs of suit, and other appropriate relief (equity)

CLAIM UNDER 541 INSURANCE ACT

Here, such prohibitions include prohibiting carriers from misrepresenting terms about an insurance policy, fail to disclosure terms material to the insurance policy, fail to investigate a claim, fail to enact procedure to promptly investigate a claim, fail to communicate in a reasonable time and manner, and denying coverage when liability has become reasonably clear.

Here, Alex would be better suited to sue under 541 itself because while the prohibited conduct, less the dtpa substantive prohibitions, is similar, the remedies differ.

As discussed above, here, Defendants have breached 541 when they misrepresented to Alex that they provided the most complete coverage available, 100% customer satisfaction, absolutely cover the house regardless of the extent or source of damage, denying her coverage after submitting her claim. All of this amounts to misrepresenting terms about an insurance policy, fail to disclose terms material to the insurance policy, fail to investigate a claim, fail to enact procedure to promptly investigate a claim, fail to communicate in a reasonable time and manner, and denying coverage when liability has become reasonably clear.

541 Damages

Instead of economic, 541 provides for actual damages which by definition includes mental anguish (less burdens to show), in addition to 3x actual damages for knowing violation, plus attorneys' fees and costs.

Breach of Common Law Duty of Good Faith and Fair Dealing

The afformentioned is hereby incorporated by reference and part of this explanation. A breach of 541 is also a breach of the Common Law Duty of Good Faith and Fair Dealing.

The damages include actual, and punitive/exemplary if the defendant was aware, and the plaintiff suffered financial ruin or severe bodily injury

Question 4 – February 2020 – Selected Answer 2

Rights under Texas consumer protection laws

A person can sue a defendant under Chapters 541 and 542 of the Texas Insurance Code, as well as under the Texas Deceptive Trade Practices Act ("DTPA").

Texas Insurance Code

A person who has suffered actual injuries can sue an insurance company under the Texas Insurance Code for misleading or unfair acts or practices under Chapter 542 and for failure to follow statutory timelines under Chapter 541 and for failure to promptly pay when liability is reasonably clear.

Under Chapter 541, an insurance company and agent, who are joint and severally liable, are liable to a plaintiff if there is a failure to timely respond to a plaintiff's insurance claim. Within 15 days of receiving the plaintiff's claim, the insurance company must acknowledge the claim and request all required documents to decide whether to accept or deny the claim. Here, there are no facts to suggest CCI requested necessary documents to determine whether the claim was covered. Therefore, CCI, and Alex as an agent, are liable to Carolina.

Under Chapter 541, it is a violation of the insurance code for an insurance company to fail to reasonably investigate the plaintiff's claim, and it is a violation for the insurance company to deny a claim without a proper explanation. Here, the facts state that an investigator concluded that much of the damage was "pre-existing;" therefore, under these facts there is no violation.

Under the prompt payment statute, it is a violation for an insurance company to fail to pay a plaintiff's claim when liability has become reasonably clear. Here, it is unlikely Carolina has a claim because CCI provided an explanation for which its liability is not triggered.

Under Chapter 542, in which the DTPA laundry list misrepresentation (explained below) can be brought, it is a violation for an insurance company or an agent to make misrepresentations concerning the insurance policy coverage. Here, Alex misrepresented the scope of the policy. Here, Carolina purchased home insurance that Alex represented would "absolutely cover the house regardless of the extent or source of damage," but the coverage did not because the policy did not cover damages considered "pre-existing." Therefore, Alex violated the insurance code and is liable to Carolina.

Under the Texas Insurance Code, it is a violation for an insurance agent to misrepresent that an agreement includes or confers rights or obligations to the consumer that it does not have. Here, Alex represented that Carolina's policy with CCI provided "the most complete coverage available" and would "absolutely cover the house regardless of the extent or source of damage." These statements were misrepresentations in violation of the insurance code because the coverage did not cover the damage to her house caused by the frozen pipe, which CCI determined to be "pre-existing." Therefore, Alex violated the Texas Insurance Code and is liable to Carolina.

DTPA

In order to assert rights under the DTPA, a plaintiff must qualify as a consumer. To have consumer standing, the plaintiff must have acquired or sought, by purchase or lease, goods or services, and the good or service acquired must form the basis of the complaint. Here, Carolina can qualify as a consumer of the CCI insurance policy because she acquired a service (insurance coverage and protection) and that service forms the basis of her complaint.

A DTPA consumer can sue for misrepresentations enumerated in the DTPA's "Laundry List," breaches of warranty, unconscionable acts, and under the Texas Insurance Code.

Laundry List Misrepresentations

The DTPA Laundry List enumerates misleading, deceptive, or unfair practices that qualify as actionable misrepresentations. In order to establish a violation, the consumer must show detrimental reliance on the defendant's misrepresentation. If the defendant misrepresents the characteristic or quality of a good or service, then it is a violation of the DTPA Laundry List. Here, Alex represented that the insurance company provided "the most complete coverage available" which may constitute misrepresentations about the quality of the service CCI provides because they are factual assertions upon which Carolian relied in seeking insurance coverage. This language is not mere puffery because it is not based on opinion, but rather based on fact because Alex knows what is in the insurance policy. Therefore, Alex can be liable to Carolina for a violation of the DTPA laundry list.

Under the DTPA, it is a deceptive or unfair act or practice to misrepresent that an agreement includes or confers rights and/or obligations to the consumer that it does not. Here, Alex represented that Carolina's policy with CCI provided "the most complete coverage available" and would "absolutely cover the house regardless of the extent or source of damage," which was a misrepresentation because the coverage did not cover the damage to her house caused by the frozen pipe. Therefore, Alex violated the DTPA laundry list and is liable to Carolina.

Additionally, Alex violated the DTPA laundry list when he informed Carolina that she had auto liability coverage up to \$100,000; however, the policy actually had a limit of \$30,000. This is a misrepresentation about the rights that an agreement confers on the consumer; therefore, Alex is liable to Carolina for a violation of the laundry list.

Breaches of Warranty

Under the DTPA, a consumer can sue for breaches of warranty; however, the DTPA does not create warranty law so the warranties must be established by other law, such as the UCC for goods and common law for services. There are implied warranties for services under the common law; however, none apply in this case for insurance. Insurance coverage, as a service, still provides for express warranties, which are created by any affirmation of fact or promise or description of the service that forms, in part, the basis of the bargain. Here, Alex stated that CCI provided "the most complete coverage available" and that the CCI policy would "absolutely cover the house regardless of the extent or source of damage" which qualify as affirmations of fact upon which Carolian relied in seeking insurance coverage. These statements do not constitute mere puffery or "sales talk" because they are specific to the insurance coverage and can be measured, unlike the statement "impeccable reputation for paying claims" which is puffery because it is based on opinion and not fact, and therefore is a generic form of sales talk upon which a consumer cannot reasonably rely when acquiring the service. Alex cannot be liable for the "100% Customer Satisfaction" statement because he did not make it to Carolina, but rather she had seen it prior to speaking with Alex. Alex created an express warranty through the two statements that affirm facts about the coverage, and Carolina relied on those statements, at least in part, in purchasing the coverage; therefore, Alex is liable to Carolina for breaching the express warranty.

Unconscionability

Under the DTPA, a consumer can sue for unconscionability. An unconscionable act is one that, to the consumer's detriment, takes advantage of the consumer's lack of capacity, ability, knowledge, or experience to a grossly unfair degree. The defendant must have dealt directly with the consumer for the consumer to assert this cause of action. Here, Alex may be liable to Carolina for unconscionability because his job was an insurance agent; therefore, he had a greater understanding of insurance policies. Also, he informed Carolina directly about her coverage under the CCI policy and because the facts do not suggest Carolina was knowledgeable of insurance, it is likely that Alex's actions took advantage of Carolina's lack of understanding about insurance. For example, Alex told Carolina she would save "big" if she switched auto insurance, which Carolina did and obtained coverage of \$100,000 and her monthly payments decreased by 20%; however, in the long run, when involved in a car accident, her coverage was limited to \$30,000. Alex's action of convincing Carolina to purchase higher coverage and then not covering her for the full amount constitutes taking advantage to a grossly unfair degree; therefore, Alex is liable to Carolina for unconscionability.

Insurance Code

A DTPA consumer can also sue under the Texas Insurance Code, as described above. The DTPA laundry list misrepresentations can be brought in through Chapter 542 of the Texas Insurance Code, which may be more beneficial to the plaintiff because the insurance code provides for more inclusive remedies, like actual damages.

Remedies and Damages under Texas consumer protection laws

Texas Insurance Code

Under the Texas Insurance Code, a plaintiff can recover actual damages, additional damages and attorney's fees. Actual damages are damages recoverable under common law, including mental anguish. Carolina is likely able to recover actual damages she suffered due to the misrepresentations Alex made about her insurance policy coverage.

Mental anguish requires a predicate finding that the defendant had actual awareness of the misleading, deceptive, or unfair acts or practices. To recover these damages, the plaintiff must demonstrate the nature, duration, and severity of the mental anguish that amounts to a substantial disruption in her daily life caused by the defendant's actions. Here, it is unlikely that Carolina can recover mental anguish damages because there is no indication she suffered in this capacity.

Additional damages require a predicate that the defendant acted knowingly, or intentionally, which requires specific intent coupled with actual awareness to induce the plaintiff to rely. Attorneys fees include those that are reasonable and court costs. damages. Here, it is unlikely that additional damages would be awarded because the facts do not establish that Alex had actual awareness that her claim was deficient or if he intentionally made it deficient. Therefore, it is unlikely that Carolina can recover additional damages.

Under the prompt payment and prompt settlement provisions of the Insurance Code, Carolina may be able to recover attorneys fees on top of the amount of owed under the insurance policy plus 18% interest on the claim due to CCI's failure to promptly pay her claim when liability was clear, and CCI's failure to defend her against a third-party claim. However, these damages would not apply in a suit against

Alex because he is an agent of the insurance company and is not liable for the insurance company's failure; however, an agent may be liable for any gross negligence that is willful and wanton and causes the plaintiff a risk of serious grievous harm like financial ruin or death.

DTPA

A consumer who sues under the DTPA can recover economic damages, damages for mental anguish upon a knowingly finding, additional damages upon a knowingly or intentionally finding, and attorneys fees. DTPA damages do not include pain and suffering, loss or consortium, or disfigurement. The consumer must establish that the defendant's actions were the producing cause of the damages; producing cause means a substantial factor in bringing about the injury, without which the injury would not have occurred.

Economic damages are compensatory damages for pecuniary loss, including the cost of repair or replacement. Here, Carolina could recover the cost to repair her car and any damages associated with the car accident that CCI would not pay out.

As described above, mental damages require facts that are not established here. Therefore, Carolina would not recover mental anguish damages.

Additional damages may be awarded if Alex is determined to have acted knowingly or intentionally, which the facts do not establish because it is unclear whether he had actual awareness that her claim was deficient or if he intentionally made it deficient. Therefore, it is unlikely that Carolina can recover additional damages.

A prevailing DTPA consumer "shall" be awarded reasonable attorneys fees and costs. Therefore, if Carolina prevails in a suit against Alex, she will receive attorneys fees.

Question 4 – February 2020 – Selected Answer 3

Claim against Alex

Carolina can claim violations of the DTPA, particularly for misrepresentation of the character of the policy and misrepresentation of her legal rights to which Alex relied, unconscionability since she relied on Alex's expertise in insurance as an insurance agent, and breach of expressed warranties, violation of Chapter 541 of the

Insurance Code, a breach of the common law duty of insurers for good faith and fair dealing, and violation of the Prompt Payment of Claims Act.

Consumers dealing with Insurance companies in Texas are protected by the DTPA, its tie-in statutes, and Chapter 541 of the Insurance Code, and the common law duty for good faith and fair dealing. Consumers are categorized as individuals acquiring a good for lease or purchase. Under the DTPA, insurer's can be liable for breach of a laundry list violation and or unconscionability as long as the consumer justifiably relied. Additionally insurer's can be liable for breach of express or implied warranties, or a tie-in statute, or Chapter 541 of the Texas Insurance Code. Plus insurers have a duty of good faith and fair dealing to the consumer. And if liability is clear and insurer's do not promptly pay the claim, they can be held liable. The consumer protection violation must be a producing cause, which is a lower burden than proximate cause, of the consumer's damages. Under the DTPA the consumer may receive economic damages, plus mental anguish if physical manifestations are shown. If knowing, the consumer may receive 3x their mental anguish, if intentional, the consumer may receive 3x their economic damages and mental anguish. Plus through a tie-in statute, consumers can receive actual damages. And if successful they receive their court costs and attorney's fees.

Homeowners Policy

Alex told Carolina that their homeowner's policy would "absolutely cover the house regardless of "extent or source of the damage" and "the most complete coverage available." However, when a pipe in Carolina's house broke, CCI denied coverage. CCI concluded that much of the damage was pre-existing. Alex in his initial representations therefore misrepresented the true character of the policy and the legal rights that Carolina would have and Carolina relied on this misrepresentation in ultimately deciding to take out a policy with CCI. Additionally, Carolina is a consumer without insurance experience and Alex portrayed all this great info to Carolina to persuade her to enter into the contract. However, the information was not true and Alex took advantage of Carolina's lack of information on insurance, with Carolina actually entering into the insurance policy contract. Therefore the contract was unconscionable. Alex's statements above were expressed warranties. CCI's denial of Carolina's claim completely breached the expressed warranty that Alex gave to Carolina. Plus Carolina has a claim for the misrepresentations through Chapter 541 of the Insurance Code. And Alex in his misrepresentation violated his common law duty of good faith and fair dealing to Carolina.

In the violation of the DTPA and tie-in statutes, Carolina can receive economic damages, actual damages, and her court costs and attorney fees. The mental anguish

component of damages under the DTPA is unlikely since she did not manifest any physical symptoms. Because Carolina should have received payment of her claim for the broken water main, she should receive extra penalties for CCI's failure to promptly pay the claim.

Auto Insurance Policy

Alex told Carolina that she could save "big" if she switched auto insurance to CCI and Carolina justifiably relied on switching to CCI auto insurance of up to \$100,000 according to the policy. However after the wreck with Pablo, she discovered that her policy was only \$30,000. This again is a misrepresentation to the character of the policy by Alex and a misrepresentation of the legal rights that Carolina justifiably relied on. Additionally, Alex was aware of this and took advantage of Carolina's lack of knowledge of the lower policy, therefore the insurance contract was unconscionable. These are also violations of Chapter 541 of the Insurance Code and breach of good faith and fair dealing that insurers have to their insureds.

With the violation of the DTPA and tie-in states, Carolina can receive economic damages, actual damages, and her court costs and attorneys fees. Again mental anguish component of damages under the DTPA is unlikely since she did not manifest any physical symptoms.

Claim against CCI

Carolina can bring the same claims against CCI as she brought against Alex, since Alex is an insurance agent of CCI and was in the course and scope of employment with CCI when she violated the DTPA.

Consumers dealing with Insurance companies in Texas are protected by the DTPA, its tie-in statutes, and Chapter 541 of the Insurance Code, and the common law duty for good faith and fair dealing. Consumers are categorized as individuals acquiring a good for lease or purchase. Under the DTPA, insurers can be liable for breach of a laundry list violation and or unconscionability as long as the consumer justifiably relied. Additionally insurers can be liable for breach of express or implied warranties, or a tie-in statute, or Chapter 541 of the Texas Insurance Code. Additionally, if liability is clear, the insurer can be held in violation of the Prompt Payment of Claims act for failure to promptly pay a claim. Plus insurers have a duty of good faith and fair dealing to the consumer. The consumer protection violation must be a producing cause, which is a lower burden than proximate cause, of the consumer's damages. Under the DTPA the consumer may receive economic damages, plus mental anguish if physical manifestations are shown. If knowing, the consumer may receive 3x their

mental anguish, if intentional, the consumer may receive 3x their economic damages and mental anguish. Additionally, vicarious liability holds employers on the hook for negligent actions or DTPA violations of their agents whom are in the course and scope of employment when they commit the violation.

Homeowners Policy

Alex is an employee of CCI as an insurance agent and was in the course and scope of business when he violated DTPA, tie-in states, Chapter 541 of the Texas Insurance Code, Prompt Payment of Claims Act, and the common law duty of good faith and fair dealing in relation to the homeowner's policy. Therefore Carolina may bring the same claim against CCI as she brought against Alex (as stated above) and receive the same damages.

Auto Insurance Policy

As stated, Alex is an employee of CCI as an insurance agent and was in the course and scope of business when he violated the DTPA, tie-in states, Chapter 541 of the Texas Insurance Code, and the common law duty of good faith and fair dealing in relation to the Auto Insurance Policy. Therefore Carolina may bring the same claims against CCI as she brought against Alex (as stated above) and receive the same damages.

Additionally, as a side note if the CCI fails to settle with Pablo for \$30,000 considering his damages are \$100,000, and Pablo puts in a valid Stowers demand, Carolina could be exposed to more liability at trial. If more than the policy limit is awarded at trial, then Carolina is exposed to more liability and the insurer failed to settle a reasonable claim within the policy limits therefore breaching their duty to their insured, Carolina. And in this case Pablo could get a turnover order, allowing recovery of the full judgment or verdict over the policy limits.