

### Question 5 – February 2019 – Selected Answer 1

A. Yes. The actions of Agnes and Insureco violated the Deceptive Trade Practices Act by engaging in misrepresentations, and unconscionable acts, and it also violated the Insurance Code 451.

Under the Texas Consumer laws, a consumer may bring claims under the Deceptive Trade Practices Act and the Insurance Code 451. A consumer is a person who buys or obtains goods or services. The claims under the DTPA and Insurance code are actionable if the claims are in relation to the goods or services transaction. Claims against professionals may be exempted from liability, except when the professional made material misrepresentations, or unconscionable acts.

The Insurance code

The insurance code section 451 provides a cause of action for a consumer. A consumer is a person who buys insurance liability for personal, family or household reasons. Conrad is a consumer because he bought an insurance policy for personal reasons. The code prohibits Insureco from misrepresenting policy terms, and engaging in unconscionable acts. A misrepresentation is any mistatement of failure to disclose material facts, which induce the consumer to enter the transaction by relying on the statements to the consumer's detriment. An unconscionable act occurs when a party takes advantage of the consumer to a grossly unfair, due to the consumer's lack of experience, skill or knowledge. Here, Conrad relied on Agnes statements "just boiler plate stuff", "this is not in the contract, but if you buy this coverage today, you'll get a \$100 rebate" These are not opinions or puffery. Agnes lied about the rebate because Conrad "never received" it. Also, Agnes failed to disclose the policy terms because she did not inform Conrad that the policy did not cover prior back injuries.

Insureco also violate the insurance code by failing to handle Conrad's claim in good faith. Under the Prompt Payment of Settlement act, an insurance company must process a liability claim in good faith, and accept or deny to the claim within 15 days or 30 days if believes it does not have liability. Insuranco cannot deny any responsibility just because Agnes no longer works there.

DTPA

Under the DTPA, Agnes and Insureco violated several provisions from the laundry list such as misrepresentation, unconscionability and failure to disclose. Conrad's claim is actionable under the DTPA, because Conrad purchased disability insurance and his claims arise from such transaction. Conrad has a claim against Insureco and Agent for the misrepresentation and unconscionable acts. A misrepresentation is any mistatement of failure to disclose material facts, which induce the consumer to enter the transaction by relying on the statements to the consumer's detriment. An unconscionable act occurs when a party takes advantage of the consumer to a grossly unfair, due to the consumer's lack of experience, skill or knowledge. For a misrepresentation to be actionable, Conrad must had relied to his detriment. Conrad did since he purchased disability insurance after speaking to Agnes. Agnes made several misrepresentations of fact, when she said that the contract Canrad was signing was "just boiler plate stuff", "this is

not in the contract, but if you buy this coverage today, you'll get a \$100 rebate. Insureco's advertisement stated "all applicants eligible" and "all applications approved". These qualify as material facts and not opinions, thus they are actionable under the code. In addition, Agnes took advantage of Conrad's lack of experience to an unfair and gross degree. Conrad told Agnes about his recent back injury and that he wanted disability insurance coverage for any future injuries. Agnes knew that Conrad's situation and took advantage of that to sell him an insurance policy that did not even cover prior back injuries.

2. Conrad can bring a cause of action against Insureco and Agnes under the DTPA laundry list for misrepresentation, Insurance Code 451, and Prompt Payment of Settlement.

### Insurance Code and Prompt Payment

The insurance code section 451 provides a cause of action for a consumer. A consumer is a person who buys insurance liability for personal, family or household reasons. Conrad is a consumer because he bought an insurance policy for personal reasons. The code prohibits Insureco from misrepresenting policy terms, and engaging in unconscionable acts. A misrepresentation is any mistatement of failure to disclose material facts, which induce the consumer to enter the transaction by relying on the statements to the consumer's detriment. An unconscionable act occurs when a party takes advantage of the consumer to a grossly unfair, due to the consumer's lack of experience, skill or knowledge. Here, Conrad relied on Agnes statements "just boiler plate stuff", "this is not in the contract, but if you buy this coverage today, you'll get a \$100 rebate" These are not opinions or puffery. Agnes lied about the rebate because Conrad "never received" it. Also, Agnes failed to disclose the policy terms because she did not inform Conrad that the policy did not cover prior back injuries.

Insureco also violate the insurance code by failing to handle Conrad's claim in good faith. Under the Prompt Payment of Settlement act, an insurance company must process a liability claim in good faith, and accept or deny to the claim within 15 days or 30 days if believes it does not have liability. Insuranco cannot deny any responsibility just because Agnes no longer works there. Additionally, once liability is clearly established, insureco must process the claim in good faith and promptly.

Conrad can seek actual damages, which include economic (pecuniary losses), and mental anguish. If Conrad proves that Insureco and Agnes acted knowingly, he can recover treble actual damages. Mental anguish cannot just be mere distress. It must be shown by a substantial interruption of the person's daily activities. Economic damages include medical costs and any other damages that arose due to the claim. Conrad can also recover reasonable attorney's fees. Here, Conrad can recover for his back injury and lost wages. It is unlikely that he will recover for "distraught" since it does not raise to a level of substantial interruption in his daily activities. He may also recover attorney's fees. The insurance code also allows Conrad to recover interest for insureco's failure to process the claim.

### DTPA

Under the DTPA, Agnes and Insureco violated several provisions from the laundry list such as misrepresentation, unconscionability and failure to disclose. Conrad's claim is actionable under the DTPA, because Conrad purchased disability insurance and his claims arise from such transaction. Conrad has a claim against Insureco and Agent for the misrepresentation and unconscionable acts. A misrepresentation is any mistatement of failure to disclose material facts, which induce the consumer to enter the transaction by relying on the statements to the consumer's detriment. An unconscionable act occurs when a party takes advantage of the consumer to a grossly unfair, due to the consumer's lack of experience, skill or knowledge. For a misrepresentation to be actionable, Conrad must had relied to his detriment. Conrad did since he purchased disability insurance after speaking to Agnes. Agnes made several misrepresentations of fact, when she said that the contract Canrad was signing was "just boiler plate stuff", "this is not in the contract, but if you buy this coverage today, you'll get a \$100 rebate. Insureco's advertisement stated "all applicants eligible" and "all applications approved". These qualify as material facts and not opinions, thus they are actionable under the code. In addition, Agnes took advantage of Conrad's lack of experience to an unfair and gross degree. Conrad told Agnes about his recent back injury and that he wanted disability insurance coverage for any future injuries. Agnes knew that Conrad's situation and took advantage of that to sell him an insurance policy that did not even cover prior back injuries.

Conrad can seek economic damages, which include (pecuniary losses). If Conrad proves that Insureco and Agnes acted knowingly, he can recover treble economic damages and mental anguish. If Conrad shows that they acted intentionally, he can recover treble economic and mental anguish damages. Here, it can be shown that Agnes acted knowingly when making the misrepretantions and unconsonible acts, because she knew that the contract was not boiler plate, she also knew that Conrad was seeking disability insurance because he had been previously injured and the policy sold to him excluded anyone with a prior back injury. It may be shown that Agnes acted intentionally because under the same arguments but it may be difficult to prove. Mental anguish cannot just be mere distress. It must be shown by a substantial interruption of the person's daily activites. Economic damages include medical costs and any other damages that arose due to the claim. Conrad can also recover reasonable attorney's fees. Here, Conrad can recover for his back injury and lost wages. It is unlikely that he will recover for "distraught" since it does not raise to a level of substantial interruption in his daily activites. He may also recover attorney's fees. The insurance code also allows Conrad to recover interest for insureco's failure to process the claim..

### **Question 5 – February 2019 – Selected Answer 2**

1. Yes. Agnes and Insureco Violated the Deceptive Trade Practices Act, Chapter 542 of the Insurance Code, and their common law duty of good faith and fair dealing.

The DTPA

The Deceptive Trade Practices Act (DTPA) is to be liberally construed in favor of protecting the consumer. The DTPA protects consumers against unfair, deceptive, and unconscionable business practices. A "consumer" is anyone who acquires a good or service by sale or lease for personal use. A consumer is not a personal or organization with more then \$25

million in assets who acquires the goods or services for business purposes. The DTPA protects against violations of a laundry list of prohibitions, Chapter 541 of the Texas Insurance Code, express or implied warranties, unconscionable business acts, and any tie in statute. The DTPA requires that the consumer show a causal connection between the DTPA defendant and the harm the consumer suffered. If the DTPA defendant made a misrepresentation directly to the consumer, there is a causal connection. An agent of the DTPA defendant can bind the DTPA defendant if they have actual or apparent authority based on agency principles. Apparent authority arises when a third party reasonably believes that the agent has the authority to act on behalf of the principal based on the conduct or statements of the agent or the principal. The 'laundry list' includes making misrepresentations to induce a consumer to act. An agent may bind the DTPA defendant if the violations occurred prior to the agent's employment termination.

Here, Conrad qualifies as a consumer because the facts do not indicate that he has more than \$25 million in assets or that he acquired the disability insurance for business purposes. In fact, Conrad explained his motives for acquiring the disability insurance to Agnes. Agnes, as the Insureco Agent, has bound Insureco to her violations of the DTPA because she engaged in violations of the DTPA laundry list, including making false statements about whether or not the document that Conrad signed was a contract. Even though Agnes was fired by Insureco, her actions and violations bound Insureco.

Thus, Agnes and Insureco both violated the laundry list by making false representations about the existence of a contract.

#### Chapter 541 of the Insurance Code

Under Chapter 541 of the Insurance Code (Ch. 541) protects consumers against unfair deceptive competition practices by insurance companies. This includes protecting against false or misleading advertisements and misrepresenting whether a consumer qualifies for a rebate.

Here, Insureco violated Ch. 541 by advertising that "ALL APPLICANTS ELIGIBLE" and that "All Applications Approved." Conrad even made sure to clarify that he has a previous back injury and that he wanted coverage for future injury so that he could protect his family. Even with the knowledge of prior injury, Agnes bound Insureco by acting the initial premium payment and issuing a policy. Insureco and Agnes also misled Conrad by promising a rebate and not issuing one.

Thus, Insureco and Agnes violated Chapter 541 of the insurance code by making false advertisements and promising rebates that were never paid out.

#### Chapter 542 of the Insurance Code

Under Chapter 542 of the insurance Code (Ch. 542) protects consumers against an insurance companies unfair, deceptive, or misleading practices by insurance companies regarding policy coverage, payouts, or contractual obligations. Ch. 542 imposes strict time lines on insurance companies. These timelines require that once an initial claim is made, that the insurance company request any additional necessary documentation within 15 days. After that,

the insurance company has another 15 days to decide whether or not to pay out the claim or give notice of a 45 extension to conduct a more thorough investigation. If the insurance company decides to pay out the claim, they have 5 business days to pay. If the insurance company rejects the claim, they must notify the consumer in a writing and specify the reasons for rejection.

Here, Insureco did not request any additional documentation from Conrad and the facts do not indicate that they did or did not pay out in a timely manner. However, they violated Ch. 542 by voiding his policy under the coverage clause because of Conrad's prior injury. Either the voiding of Conrad's policy violates Ch. 542 or Agnes representation that Agnes made when she filed out the application violates Ch. 542 because one of these events directly misrepresents that payout requirements. Conrad even made sure to disclose his prior injury to Agnes so Insureco, through Agnes, was aware of the condition and still issued the policy knowing that it would likely not payout in the event of Conrad's claim.

Thus, Insureco and Agnes violated Chapter 542 by making a misrepresentation of the policy coverage and how Conrad's prior injury may impact his ability to recover for future injury.

#### Common Law Duty of Good Faith and Fair Dealing

Under Texas common law, insurance companies have a duty of good faith and fair dealing towards its customers. This requires that the insurance company makes a good faith effort to pay out the reasonable claim if liability for the claim is made reasonably clear.

Here, Conrad made it clear that Insureco is liable to payout under his claim because nothing in the facts indicate that he did not pay his premiums or do any other action that would violate his agreement with Insureco. So, Insureco has a duty to act in good faith and payout the claim.

Thus, by not paying out, Insureco violated its duty of good faith and fair dealing.

2. Conrad can receive treble actual damages, mental anguish damages, the actual amount of his policy, 18% interest, and attorneys fees for Agnes and Insureco's violation of the DTPA, Chapter 542 of the insurance code, and their common law duty of good faith and fair dealing. A consumer may also seek an injunction.

The DTPA authorizes a consumer to recover economic damages and attorneys fees upon a showing of a violation of the DTPA. If consumer can show a knowing violation of the DTPA, the consumer can recover treble economic damages as well as mental anguish damages as well as attorneys fees. Mental anguish is more than just anger and annoyance but it is a inability to continue or a disruption with normal every day activities. If the consumer can show an intentional violation of the DTPA, then the consumer can recover treble economic damages as well as treble mental anguish damages. Chapter 542 is a tie in statute, and it authorizes the payment of actual damages incurred, not just economic damages. A violation of Ch. 542 authorizes a consumer to recover the coverage amount plus 18% interest incurred up to that date plus reasonable attorneys fees. An insurance company is deemed to have knowledge of the violation because an insurance company operating in Texas is deemed to be aware of the

insurance code and any actions that would be considered a violation. A consumer can also seek an injunction to enjoin future violations.

Here, Conrad can recover treble actual damages for Insureco's violations of the DTPA, Chapter 542 of the insurance code, and their duty of good faith and fair dealing because of Insureco's actual knowledge of its numerous violations.

Thus, Conrad can receive treble actual damages, mental anguish damages, the actual amount of his policy, 18% interest, and attorneys fees for Agnes and Insureco's violation of the DTPA, Chapter 542 of the insurance code, and their common law duty of good faith and fair dealing. He may also seek an injunction.

### **Question 5 – February 2019 – Selected Answer 3**

A. Did the actions of Agnes and/or Insureco violate any Texas consumer laws?

Yes, the actions of Agnes and Insureco did violate Texas consumer laws.

i. Insurance Code

Under the Texas Insurance Code, there are two primary applicable sections. Section 541 and Section 542. Section 541 explains that misrepresentations of the insurance company are a breach of the insurance code. Puffery is not considered a misrepresentation and is an exception to misrepresentation. Puffery is a matter of opinion and boasting. The Insurance Company shall be held liable for misrepresentations of its agents, which includes its employees. Section 542 allows for damages to be collected under the insurance code when there has been a violation of the distribution of insurance proceeds. Specifically, the insurance company has 15 days to request evidence from the date a claim is submitted, then has 15 days to approve or deny the claim, and 5 days to issue to money to the insured.

Here, there was multiple misrepresentations by the insurance company. First is the advertisement which stated "ALL APPLICANTS ELIGIBLE!" While All applications may be approved, in fact it turned out that not all applicants are eligible because an individual with a prior back injury was supposed to be excluded from the policy. There was not mere puffery by the insurance company but was a straight up misrepresentation. Therefore, this was a misrepresentation on behalf of the insurance company. Secondly, Agnes represented that "if you buy this coverage today, you'll get \$100 rebate" however, Conrad never received a rebate. This was not puffery but instead a misrepresentation by an employee who is an agent of the insurance company.

Thus, there were two primary misrepresentations which took place with Conrad and the insurance company for which the Insurance Company will be held liable for under the Texas Insurance Code.

ii. Deceptive Trade Practice Act (DTPA)

Under the Deceptive Trade Practice Act, in order to have standing an individual must be a consumer. A consumer is a individual who purchase or leases goods or services. Then there are four different ways an individual can have under the DTPA: (1) laundry list, (2) unconsonability, (3) warranties, or (4) tie in claim. First, the laundry list includes several different claims all which amount down to acts of misrepresentation, fraud, etc. Second, unconsonability is the act of overpowering the consumer unfairly and grossly. Third, warranties includes: express warranties, implied warranties of fitness for a particular purpose, and implied warranty for ordinary purpose. Lastly, the tie is claim allows for a claim to obtain DTPA damages if it is a tie in claim, one of which is a claim which fits under Section 541 of the Texas Insurance Code.

Here, there is a violation of each of the four different ways an individual can have a claim under the DTPA.

First, there were two misrepresentations which constitute actionable misrepresentations under the laundry list. First is the advertisement which stated "ALL APPLICANTS ELIGIBLE!" While All applications may be approved, in fact in turned out that not all applicants are eligible because an individual with a prior back injury was supposed to be excluded from the policy. There was not mere puffery by the insurance company but was a straight up misrepresentation. Therefore, this was a misrepresentation on behalf of the insurance company. Secondly, Agnes represented that "if you buy this coverage today, you'll get \$100 rebate" however, Conrad never recieved a rebate. This was not puffery but instead a misrepresentation but an employee who is an agent of the insurance company.

Second, there was unconsonability which took place when Conrad stated that he had forgotten his reading glasses when he was presented with the insurance contract. It was unconsonable, and a misrepresentation for Agnes to state "No worries, It's just boiler plate stuff." It was unconsonable because Agnes knew that Conrad was able to see or read any part of the contract but overpowered him but suggesting that it was just boilerplate when it was in fact from from it. It was unjust and unconsonable to make such a misrepresentation to a man who forgot his reading glasses.

Third, there is a violation of each of the warranties. First, express warranties; the advertisement acts as express warranties because they were in writing. Second, Conrad took the time to explain why he was seeing her, about his recent bak injury, his desire for diability insurance to protect him and his family and Agnes reccomended and had Conrad sign up for the insurance plan which he did. This is an implied warranty of fitness for a particular purpose because Agnes was aware what Conrad was purchasing the insurance policy for, she had him sign the contract for the insurance code, likely knowing that it excluded those with a prior back injury. Lastly, there was a violation of the implied warrant for ordianry purpose because Conrad would not purchase and pay for an insurance policy which he was exlcuded from. Instead, it is clear that a cosumer purchasing a insurance policy from a company wants insurance and protection as that is the service a consumer expects to get from an insurance company and Conrad did not even get that because prior back injuries are excluded.

Lastly, tie in under the Insurance Code. See discussion in Section i regarding the Section 541 analysis. This alone allows CONrad to bring a DTPA claim against Insureco and Agnes.

Thus, the actions of Agnes and Insureco did violate the Texas Insurance Code, and Deceptive Trade Practices Act under the Insurance Code and each of the four grounds to bring a DTPA claim.

2. Under Texas consumer laws, what rights and remedies, if any, does CONrad have against Agnes and/or Insureco

Conrad will be entitled to economic damages, punitive damages, and attorney's fees in the event he is successful on his DTPA and Insurance Code claims.

Under the DTPA and insurance code, an individual is entitled to economic damages, punitive damages, injunctive relief, and attorney's fees. Economic damages are the pure money damages a plaintiff sustained as a result of the consumer law violation. Punitive damages are those that substantially affect the plaintiff's daily routine. Injunctive relief is available in the event that there is harassing, threats, etc. Attorney's fees must be awarded if the plaintiff succeeds on the claim. An individual is entitled to treble economic damages when the defendant knowingly breached the DTPA. An individual is entitled to treble economic and punitive damages if the defendant intentionally (knowledge and intent) breached the DTPA.

Here, Conrad has economic damages in the amount of the back injury he suffered that has left him disabled and unable to work that happened while moving furniture. Conrad has punitive damages because he is disabled and unable to work. Injunctive relief is not proper in these circumstances. If Conrad prevails, he is entitled to attorney's fees. Conrad has a strong argument for both treble damages because Agnes certainly acted knowingly because she expressly misrepresented information to Conrad and there is a decent argument that she intentionally did it as well because she overpowered and acted in such an unconscionable manner.

Thus, Conrad will be entitled to economic damages, punitive damages, and attorney's fees in the event he is successful on his DTPA and Insurance Code claims. Conrad is also entitled to treble economic damages (and potentially punitive damages) because of Agnes knowingly making the misrepresentations and signing him up for an insurance plan which he was excluded from.