DTPA UPDATE
Consumer & Commercial Law Section Program

Prof. Richard Alderman
Associate Dean
Director, Consumer Law Center
University of Houston
100 Law Center
Houston, Texas 77204
(713) 743-2165

Friday, June 11, 2010
2:00 p.m. – 2:30 p.m.
Richard Alderman

Associate Dean
Director, Consumer Law Center

B.A., Tulane University; J.D., Syracuse; LL.M. University of Virginia

Richard M. Alderman earned his B.A. from Tulane University in 1968 and attended Syracuse University Law School, where he was graduated first in his class. After a year practicing poverty law with a legal service office, he attended the University of Virginia Law School and was awarded a Master of Law degree.

Dean Alderman has been a faculty member at the University of Houston Law Center since 1973. He is currently the Associate Dean and holder of the Dwight Olds Chair in Law. He also serves as the director of the Center for Consumer Law. Dean Alderman is a prolific author who has authored 20 books and numerous articles. His most recent publications include Consumer Credit and The Law, Consumer Protection and The Law, Texas Consumer Law: Cases and Materials, and The Lawyers Guide to the Texas Deceptive Trade Practices Act. He also authored the 7th edition of Know Your Rights!, and the 2nd edition of Your Texas Business, for the layperson. Professor Alderman serves as the Editor-in-Chief of "The Journal of Commercial and Consumer Law," the quarterly newsletter of the Consumer Law Section of the State Bar of Texas. In 2007 Dean Alderman was awarded the University of Houston’s Teaching Excellence Award.

In addition to his responsibilities at the Law Center, Dean Alderman appears regularly as the "People’s Lawyer” on radio, television and the newspaper. He currently appears on KTRK-TV, Channel 13 and has a syndicated newspaper column, entitled “Know Your Rights.” Professor Alderman has twice received the highest honor given by the American Bar Association and the State Bar of Texas for his work in educating the public about the law. In 1999 the Mayor and City Council of Houston declared October 16th as Richard Alderman day in recognition of his contribution to the city.
RECENT DEVELOPMENTS UNDER THE TEXAS DECEPTIVE TRADE PRACTICES ACT

RICHARD M. ALDERMAN
Associate Dean
Dwight Olds Chair in Law
Director, Center for Consumer Law
University of Houston Law Center
(713) 743-2165
Alderman@uh.edu

State Bar of Texas
ADVANCED CONSUMER AND COMMERCIAL LAW COURSE
August 13-14, 2009
Houston

CHAPTER 1
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>TEXAS RESIDENTIAL CONSTRUCTION COMMISSION ACT</td>
<td>1</td>
</tr>
<tr>
<td>ATTORNEYS’ FEES</td>
<td>1</td>
</tr>
<tr>
<td>OTHER RECENT DECISIONS</td>
<td>2</td>
</tr>
<tr>
<td>CAR DEALER DID NOT MISREPRESENT THE NATURE OF THE DEALER’S INVENTORY TAX</td>
<td>2</td>
</tr>
<tr>
<td>DTPA CLAIM BASED ON SALE OF RETURNED PRODUCT SUSTAINED</td>
<td>2</td>
</tr>
<tr>
<td>DECEDENT’S CHILDREN DEEMED “CONSUMERS” UNDER DTPA</td>
<td>3</td>
</tr>
<tr>
<td>BORROWER OF LOAN TO PAY TAXES IS A DTPA CONSUMER</td>
<td>4</td>
</tr>
<tr>
<td>CONTRACT REPRESENTATIONS ACTIONABLE UNDER DTPA</td>
<td>5</td>
</tr>
<tr>
<td>“AS IS” CLAUSE DOES NOT NEGATE DTPA CAUSE OF ACTION</td>
<td>5</td>
</tr>
<tr>
<td>ONLINE “CLICKWRAP” AGREEMENT’S FORUM CLAUSE IS ENFORCEABLE</td>
<td>6</td>
</tr>
<tr>
<td>REFUSING TO SELL 100 HARD DRIVES AT THE ADVERTISED PRICE OF $1 EACH DOES NOT VIOLATE DTPA</td>
<td>7</td>
</tr>
<tr>
<td>RESTITUTION DOES NOT HAVE TO BE ORDERED TO AN IDENTIFIABLE PERSON</td>
<td>7</td>
</tr>
<tr>
<td>ONLY FDA CAN REGULATE DRUG ADVERTISING</td>
<td>8</td>
</tr>
</tbody>
</table>
WHAT’S NEW WITH THE DTPA?

TEXAS RESIDENTIAL CONSTRUCTION COMMISSION ACT

The Texas Residential Construction Commission Act [TRCCA], Title 16 of the Texas Property Code, was enacted in 2003. The Act deals with warranty law and the DTPA. It also created a new Commission, to which all complaints must be brought before litigation. Section 401.006 of the Act, however, provides:

The Texas Residential Construction Commission is subject to Chapter 325, Government Code (Texas Sunset Act). Unless continued in existence as provided by that chapter, the commission is abolished and this title expires September 1, 2009.

In 2009, the legislature failed to continue the Commission in existence, and therefore, all provisions included in Title 16 expire.

ATTORNEYS’ FEES

Attorney’s fee agreement not subject to oral modification. A written attorney fee contract that specified only hourly rates could not be modified by evidence of an oral agreement to cap fee. Sacks v. Haden, 266 S.W.3d 447 (2008). The court noted:

An unambiguous contract will be enforced as written and parol evidence will not be received for the purpose of creating an ambiguity or to give the contract a meaning different from that which its language imports. Only where a contract is ambiguous may a court consider the parties' interpretation and "admit extraneous evidence to determine the true meaning of the instrument." "Whether a contract is ambiguous is a question of law that must be decided by examining the contract as a whole in light of the circumstances present when the contract was entered." The plain language of the engagement letter demonstrates that Haden agreed to pay Sacks an hourly fee, and that no cap on fees was set. Haden argues that a fee agreement must specifically state that hourly fees will accrue without limit in order for the agreement to be unambiguous and enforceable. But the lack of such explicit language is irrelevant if the agreement can be reasonably interpreted only one way. We have never held that an open-ended hourly fee agreement will be enforced only if it expressly states there is no cap on fees, and we decline to do so now. If a contract is unambiguous, the parol evidence rule precludes consideration of evidence of prior or contemporaneous agreements unless an exception to the parol evidence rule applies.

Attorney’s fees are recoverable for breach of warranty. Claims for breach of warranty are in fact claims for breach of contract for which attorney’s fees may be awarded under Texas law. Medical City Dallas, Ltd. v. Carlisle Corp., 251 S.W.3d 55 (Tex. 2008). The court stated:

Because Texas Civil Practice and Remedies Code section 38.001(8) permits an award of attorney's fees for a suit based on a written or oral contract, and because we conclude that breach of an express warranty is such a claim, the court of appeals erred in reversing Medical City's attorney's fees award in connection with its successful claim for breach of an express warranty.

Implied warranty claim for personal injury may sound in tort. JCW Electronics v. Garza, 257 S.W.3d 701 (Tex. 2008). In an interesting companion to Carlisle the Texas Supreme Court held that although breach of an express warranty under the UCC is a breach of contract, breach of an implied warranty arising under the same statute may not be. The court noted that:

Garza's argument rests on the dubious proposition that breach of implied warranty is not, or can never be, "a cause of action based on tort." This, of course, is contrary to Texas law. We have often recognized that "[i]mplied warranties are created by operation of law and are grounded more in tort than in contract." Conceptually, the breach of an implied warranty can either be in contract or in tort depending on the circumstances. As Dean Prosser observed long ago, this area of the law is complicated "by the peculiar and uncertain nature and character of warranty, a freak hybrid born of the illicit intercourse of tort and contract." William L. Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099, 1126 (1960). The precise nature of the claim is ordinarily identified by examining the damages alleged: when the damages are purely economic, the claim sounds in contract, but a breach of implied warranty claim alleging damages for death or personal injury sounds in tort

Plaintiff’s attorney must segregate fees. If they relate solely to a claim for which such fees are
unrecoverable, a claimant must segregate recoverable from unrecoverable fees. Intertwined facts do not make tort fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated. Tony Gullo Motors v. Chapa, 212 S.W.3d 299 (2006)

Settlement under DTPA caps attorney’s fees. A consumer who rejects a reasonable settlement offer may have his attorney’s fees capped at a reasonable amount at the time of the offer.

DTPA 17.5052

(g) If the court finds that the amount tendered in the settlement offer for damages under Subsection (d) (1) is the same as, substantially the same as, or more than the damages found by the trier of fact, the consumer may not recover as damages any amount in excess of the lesser of:

1. the amount of damages tendered in the settlement offer; or
2. the amount of damages found by the trier of fact.

(h) If the court makes the finding described by Subsection (g), the court shall determine reasonable and necessary attorneys' fees to compensate the consumer for attorneys' fees incurred before the date and time of the rejected settlement offer. If the court finds that the amount tendered in the settlement offer to compensate the consumer for attorneys' fees incurred under Subsection (d) (2) is the same as, substantially the same as, or more than the amount of reasonable and necessary attorneys' fees incurred by the consumer as of the date of the offer, the consumer may not recover attorneys' fees greater than the amount of fees tendered in the settlement offer.

OTHER RECENT DECISIONS
CAR DEALER DID NOT MISREPRESENT THE NATURE OF THE DEALER'S INVENTORY TAX


FACTS: Billy Don Gifford purchased a vehicle from Don Davis Auto, Inc., which used a form retail installment sales contract for the transaction. The contract between Gifford and Don Davis included a small charge for a dealer’s inventory tax paid to seller. Gifford took possession of the car, became unable to pay and the vehicle was repossessed. Gifford sued Don Davis for fraud, violations of the Texas Finance Code and under the Deceptive Trade Practices Act (“DTPA”). Gifford asserted Don Davis misrepresented the nature of the dealer’s inventory tax because it misled him into thinking he owed the taxing authority instead of Don Davis. Don Davis moved for summary judgment. Without specifying the basis for its ruling, the trial court granted summary judgment for Don Davis and Gifford appealed.

HOLDING: Affirmed.

REASONING: Gifford contended the vehicle inventory tax was not a tax that could be included as an itemized charge in an installment contract. The court stated that if the dealer’s inventory tax is a tax within the meaning of any taxes as used in the Texas Finance Code, then the seller is authorized to include it as an itemized charge in an installment contract. The court agreed with Don Davis that the itemized charge was not a misrepresentation. The unit property tax value is a tax pursuant to the Texas Tax Code, and Texas Finance Code authorizes dealers to include the amount of the unit property tax value for a particular vehicle at the time of sale as an itemized charge. The court explained that Gifford’s subjective belief about what the words “dealer’s inventory tax paid to seller” meant was not dispositive of whether those words amounted to a misrepresentation. The language used in Don Davis’s installment contract was taken almost verbatim from the model contract published by the Office of the Consumer Credit Commissioner, which requires motor vehicle sales contracts include dealer’s inventory tax as an itemized charge. Accordingly, the court found Don Davis did not misrepresent the nature of the dealer’s inventory tax, and the trial court did not err by granting summary judgment for Don Davis.

DTPA CLAIM BASED ON SALE OF RETURNED PRODUCT SUSTAINED


FACTS: Randy Jackson bought a small angle grinder from Wal-Mart. The grinder was manufactured by Black & Decker, Inc. The grinder’s grinding wheel assembly dislodged while Jackson was using it and ripped into his leg, shattering his bone and causing severe injury. Jackson and his wife sued Wal-Mart. Jackson alleged Wal-Mart sold the grinder as new in violation of the Texas Deceptive Trade Practices Act
According to Jackson, Wal-Mart violated the DTPA because Wal-Mart did not disclose the grinder had been assembled and reassembled, and that it knew or should have known that the grinder used, deteriorated, and likely to fail. Jackson sought damages for past and future extreme emotional distress, mental anguish, loss of consortium, and medical expenses. Wal-Mart sought summary judgment as to all claims because contending there was no evidence of misrepresentation, defect, or that it was the proximate cause of Jackson’s injuries.

**HOLDING:** Granted in part, and denied in part.

**REASONING:** Summary judgment is proper when there is no genuine issue of material fact presented in evidence and pleadings. The court noted Wal-Mart must show the evidence was sufficient to support the resolution of all factual issues in their favor in order to grant its motion for summary judgment. In order to state a valid DTPA claim, plaintiff must be a consumer, and show that the defendant engaged in false, misleading, or deceptive acts that were the producing cause of plaintiff’s injury. In the present case, the court determined there were no genuine issues of material fact regarding misrepresentation as to price reduction nor bait advertising. A receipt entered into evidence showed the purchase was at full-price without any discounts, and invalidated claims that the defendant was misleading concerning the grinder’s price. Hence, Wal-Mart was entitled to summary judgment on these issues.

Jackson sufficiently raised fact issues as to whether the grinder was a used item returned with a defect, whether this was a material fact, and whether the misrepresentation of this fact was the producing cause of his injuries. There was sufficient evidence to establish Wal-Mart sold a defective product previously purchased that the plaintiff would not have purchased had he known of the defect. Wal-Mart’s motion for summary judgment was denied based on DTPA claims that raised genuine questions of material fact. The court concluded sufficient evidence was produced to present a fact issue as to whether the grinder was defective, and thus, unfit for its ordinary purposes at the time Jackson purchased it. Therefore, the court denied Wal-Mart’s motion for summary judgment on plaintiff’s claim for breach of implied warranty of merchantability.

**DECEDENT’S CHILDREN DEEMED “CONSUMERS” UNDER DTPA MENTAL ANGUISH DAMAGES UPHELD**


**FACTS:** Widow Estela Aragon, individually and on behalf of her children brought suit for damages against funeral home owner Service Corporation International (“SCI”). Aragons alleged the funeral home buried Estella Aragon’s husband in the wrong plot and then reinterred his body in the plot purchased without notifying her, requesting her consent or acknowledging their mistake. The jury found SCI violated the Texas Deceptive Trade Practices-Consumer Protection Act (“DTPA”) and awarded the plaintiffs mental anguish damages.

On appeal, SCI challenged the standing of Aragon’s children as plaintiffs. SCI argued that only a consumer has standing to sue under the DTPA. Estela Aragon was the only plaintiff who sought any services or signed any agreement with SCI. Hence, SCI argued her children were not consumers involved with the transaction that violated the act.

**HOLDING:** Affirmed.

**REASONING:** The DTPA defines consumer as one who seeks or acquires by purchase or lease, any goods or services. A plaintiff need not establish privity of contract to be a consumer. Instead, plaintiff’s standing as a consumer is established by her relationship to the transaction. A third-party beneficiary may qualify as a consumer as long as the transaction was specifically required by or intended to benefit the third party, and the good or service was sold or rendered to benefit the third party.

No Texas decision has determined who are the intended beneficiaries when a cemetery plot or funeral services are purchased. The court noted previous cases have allowed immediate family members to bring common law actions for mishandling a corpse. The court assumed a company taking possession of a body has a duty to the decedent’s children as well. The court found it reasonable to conclude SCI’s interment services were intended for the benefit of the deceased’s immediate family. Thus, each child was a consumer with standing to sue under the DTPA. The court affirmed the trial court’s decision and denied SCI’s challenge.

The court also considered whether the court should have awarded damages for mental anguish. Mental anguish requires a plaintiff to show a high degree of mental pain and distress beyond mere worry, anxiety, vexation, embarrassment or anger. Plaintiff must present evidence detailing the nature, duration...
and severity of the mental anguish, and show a substantial disruption in the claimant’s daily routine. SCI argued that plaintiffs’ complaints were not compensable as mental anguish damages as a matter of law. The evidence was legally insufficient to support the jury’s awards, and in the alternative, that the evidence was factually insufficient.

Each witness established that the incident caused some emotional impact and disruption in the plaintiffs’ daily lives. The court noted that even SCI’s former manager agreed one of the most devastating circumstances that could occur for an already-grieving family was to experience a wrongful burial. In reviewing the jury’s award, the court distinguished Estela, Christian, and Rebecca from Stephan and Erica in regards to damages. The court’s distinction was based on the degree of pain and impact suffered by each of the parties. The court found Stephen and Erica’s testimony failed to establish injury beyond mere emotions or significant disruption in their routine affairs as to constitute mental anguish. The court noted there must also be evidence to justify the amount awarded. In regards to Estela, Christian, and Rebecca the court upheld the jury’s award, and affirmed the finding of mental anguish. However, the court rendered Stephen and Erica take nothing, reversing the jury’s decision.

BORROWER OF LOAN TO PAY TAXES IS A DTPA CONSUMER
ATTORNEYS’ FEES MUST BE SEGREGATED


FACTS: Kyle Allen was served a citation for delinquent taxes on a San Antonio property deeded to him by his father. Upon learning of the citation, Allen came to Texas from his home in Oregon and sought a home equity loan from American General Finance (“AGF”) for the purpose of paying the property taxes. AGF assured Allen that it routinely paid customers’ delinquent taxes, and that it would “pay the taxes and handle the suit.” AGF loaned Allen the minimum loan amount of $15,000 and agreed to pay Bexar County for the delinquent taxes and the remainder to Allen. However, AGF underpaid Bexar County. As a result, Bexar County continued its tax suit and eventually foreclosed on the San Antonio property in late July. After the foreclosure sale, Allen filed a redemption action and recovered approximately $30,000, the excess proceeds of the foreclosure sale.

AGF filed suit against Allen seeking a constructive trust against Allen’s redeemed proceeds for his failure to pay the home equity loan. Allen counterclaimed on several theories including a DTPA action. Although Allen prevailed at trial on a breach of contract claim, the trial court dismissed Allen’s Deceptive Trade Practices Act (“DTPA”) claim. He was awarded damages for his breach of contract and negligence claims. He received $150,000 in attorney’s fees, but remitted $100,000 at the trial court’s suggestion. Both AGF and Allen appealed. Both AGF and Allen appealed.

HOLDINGS: Reversed and remanded.

REASONING: Recovery under the DTPA requires that the plaintiff qualify as a consumer. To qualify as a consumer under the DTPA, a plaintiff must “seek or acquire goods or services by purchase or lease” and those goods or services must form the basis of the complaint. When a person seeks only credit, he is not a consumer under the DTPA since money lending is not a good or service. However, when a borrower seeks services, such as financial counseling, from the lender as an independent objective, then the borrower is considered a consumer with respect to those services. The test is whether the borrower’s objective is solely to obtain a loan or to obtain a good or service. La Sara Grain v. First Nat’l Bank of Mercedes, 673 S.W.2d 558, 567 (Tex. 1984).

The court held that Allen presented more than a scintilla of evidence that his objective in going to AGF was service-based because Allen sought to have AGF “take care of” the tax suit. AGF failed to establish that Allen was not a consumer as a matter of law, thus the trial court erred in dismissing Allen’s DTPA cause of action on that ground.

Allen also argued the trial court erred in suggesting a remittitur and requested the court reinstate the jury’s award of $150,000 in attorneys’ fees. AGF challenged the charges because Allen’s attorneys failed to distinguish between claims for which attorneys’ fees were available. Allen’s attorneys testified that it was impossible to segregate time allotted to the varying claims due to the significant overlap and common facts.

The court first determined that Allen may complain about the remittitur he agreed to because he did not waive the right to appeal simply by following the recommendation of the court. The court then examined the question regarding segregation of attorneys’ fees incurred for claims which were recoverable. Because a party may only claim attorneys’ fees when statutorily or contractually authorized, Allen was only able to recover attorneys’ fees for the usury and breach of contract claims. The court noted that in Tony Gullo Motors I, L.P. v. Chapa, the Texas Supreme Court stated that “the mere fact that claims are based on common facts or are ‘intertwined’ does not make all fees incurred recoverable.” 212 S.W.3d 299, 313 (Tex. 2006). The court did not accept Allen’s argument of “double service” and denied his
appeal. Because Allen’s attorneys failed to segregate attorneys’ fees, the jury’s award was not reinstated.

**CONTRACT REPRESENTATIONS ACTIONABLE UNDER DTPA**


**FACTS:** Life Partners, Inc. facilitated the sale of life insurance policies to investors. The company had investors sign a contract entitled “policy funding agreement,” which stated the purchaser would not incur further costs of any type after paying a deposit for purchase of the policy.

When Life Partners mailed “demand letters” notifying Travis County investors that their escrow accounts were depleted and an additional fee must be paid to prevent the policy from lapsing, the State of Texas filed suit on behalf of the public interest.

The suit against Life Partners involved a Deceptive Trade Practices Act (“DTPA”) claim. The State of Texas argued that the contract’s language stating no further costs would be incurred after paying the deposit led purchasers to believe they would not be required to pay any further costs for the life of the transaction after submitting payment as a purchase deposit. The company argued that the word “costs” referred to fees for services and the contract provision meant the purchaser would not have to pay any other fees for Life Partners’ services. Life Partners moved for summary judgment claiming this was a contract claim, which was not actionable under the DTPA. The trial court agreed and granted Life Partners’ motion for summary judgment.

**HOLDING:** Reversed and remanded.

**REASONING:** According to the court, a mere breach of contract claim is not actionable under the DTPA. The distinction “between a DTPA violation and a breach of contract claim, properly lies when an alternative interpretation of the contract is asserted, and the dispute arises out of the performance of the contract.” The court stated that “in such a case the DTPA is not violated, and the legal rights of the parties are governed by traditional contract principles.”

The court held that Life Partners’ interpretation of the contract was not reasonable and the language in the contract was not ambiguous. Life Partners used two different terms, “fees” and “costs,” in the course of describing the purchaser’s financial obligations. The contract’s plain language expressly stated that the “PURCHASER will not incur costs of any type” and does not limit “costs” to fees for Life Partners’ services. The court stated when called upon to interpret a contract, it will give plain meaning to the words used in the writing, and that language may be given a certain and definite meaning that is not ambiguous. Because the language had a plain meaning, the State’s DTPA claim was actionable.

**“AS IS” CLAUSE DOES NOT NEGATE DTPA CAUSE OF ACTION**


**FACTS:** William Nardiello (“buyer”) brought suit against Ihor Kupchynsky (“seller”) for claims related to a home purchase. Buyer purchased a new home from seller. While inspecting the home, buyer noticed that water was not draining properly from the balconies. Seller assured buyer that the house had been built according to plan and the drainage issue was normal. Buyer later discovered that the balconies had not been built according to any plan, that they were defective and had to be replaced.

Buyer sued seller for negligent misrepresentation and under the Deceptive Trade Practices Act (“DTPA”). A jury found for buyer and awarded damages. Seller appealed.

**HOLDING:** Affirmed.

**REASONING:** The court analyzed Seller’s argument that buyer’s DTPA claim was negated because of the “as is” provision in the sales contract. Seller’s argument relied on Prudential Insurance Co. of America v. Jefferson Associates, Ltd. which concerned a commercial lease that contained an “as is” provision. 896 S.W.2d 156, 161 (Tex. 1995). The lessee later found asbestos that had to be removed and sued. The Prudential court found that the “as is” provision voided lessee’s claim.

Here, the court found that there was a difference between the two cases. In Prudential, the negotiations were carried out at arms length between sophisticated parties. The court in Prudential also thought that it was “too obvious for argument that an ‘as is’ agreement freely negotiated by similarly sophisticated parties as part of the bargain in an arm's-length transaction has a different effect than a provision in a standard form contract which cannot be negotiated and cannot serve as the basis of the parties' bargain.” Id. at 162. In this case, the court found that neither party had ever discussed the “as is” clause in the course of negotiations and that it was contained in a boilerplate agreement. For these reasons, the court found that the “as is” provision could not have “served as the basis of the parties' bargain” and thus could not negate the DTPA claim. There was also a “totality of circumstances” exception in Prudential. Here, the court found that seller’s representations regarding the
balconies called for that exception as well. For these reasons, the majority of the court affirmed the jury’s decision.

There was a strong dissent in the case by Justice Moseley. He argued that the Prudential exceptions quoted by the court were not supported by the facts. He also argued that buyers should have pled an affirmative defense to the “as is” clause at trial, and because they did not do so, they waived that defense on appeal. Thus, the “as is” clause should have precluded their claim, and Moseley would have had buyers take nothing.

The majority’s opinion accused Justice Moseley of “crafting an argument for [the Sellers] that they never briefed, argued, or otherwise urged in this appeal or in the trial court.” Justice Moseley stated that the seller did argue the “as is” claim on appeal and at the trial court level when it made it motions for summary judgment, directed verdict and judgment notwithstanding the verdict. Justice Moseley also noted that the “as is” clause is not itself an affirmative defense, but something that negates an element of the opposing parties’ claim. As such, it was not necessary for seller to affirmatively plead it.

ONLINE “CLICKWRAP” AGREEMENT'S FORUM CLAUSE IS ENFORCEABLE


FACTS: Adsit is a retailer of new, used, and rebuilt parts and accessories for Mercedes-Benz automobiles. Adsit does business over the phone and the Internet. Before placing an online order, a customer must click a button reading “I Accept,” which is located at the bottom of a web page describing the company policy. The policy, under the heading of “Warranty” states that there are no refunds or returns, the warranty exists for 30-days for exchanges only, and that all sales are final. The webpage also states that customers agree to file any lawsuits in Delaware County, Indiana and that Indiana state laws will govern the claims.

Mary Gustin lived in Texas and her daughter-in-law Julie lived in Alabama. Julie's husband, Kevin, owned a classic 1967 Mercedes-Benz roadster. On December 15, 2004, Mary placed an order on Adsit’s website for two camel-colored leather seat covers and two camel-colored leather armrest covers. Mary originally placed the order on her credit card with instructions to ship the goods to Kevin and Julie. Two days later, an Adsit employee called Mary to inform her that the credit card to which the order was billed needed to match the address to which it was shipped. Mary provided Adsit with Julie’s credit card number and information. After verifying the order, Adsit placed an order for camel-colored leather seat and armrest covers from its supplier, German Auto Tops in North Hollywood, California.

Julie and Kevin did not receive the goods until January 22, 2005. They discovered that the color of the seat covers did not match their vehicle's interior. Julie and Kevin also discovered that there were no armrest covers included in the package. Within six days of receiving the seat covers, Julie and Kevin returned them to the California address from which they were sent. They sent the seat covers via certified United States Mail and received confirmation of delivery. They also reversed the charge on their credit card. Kevin received a credit on his credit card for the amount of the armrest covers.

On July 12, 2005, Adsit filed a breach of contract complaint against Julie, later adding Mary as a defendant, seeking $1,100 for the price of the seat covers, $750 in attorney fees, and $600 in collection costs. Following a November 3, 2006, bench trial, the trial court entered its order on December 11, 2006, entering judgment for Adsit but also finding Adsit was only entitled to recover attorney fees of $500.00. Adsit appealed and the Gustins cross-appealed.


REASONING: This type of web-based contract is commonly referred to as a “clickwrap” agreement. A clickwrap agreement “appears on an internet webpage and requires that a user consent to any terms and conditions by clicking on a dialog box on the screen in order to proceed with the internet transaction.” Clickwrap agreements are considered to be writings because they are printable and storable. To determine whether a clickwrap agreement is enforceable, courts apply traditional principles of contract law and focus on whether the plaintiffs had reasonable notice of and manifested assent to the clickwrap agreement.

Here, the Adsit policy gave reasonable notice of its terms. To complete a transaction, a user must accept the policy and the user is required to take affirmative action by clicking on the “I Accept” button. Without clicking the button, the user cannot complete the transaction. The entire Adsit policy is three brief paragraphs in length. The paragraph also begins with the heading, “AGREEMENT ON JURISDICTION TO DAMAGES.”

Under these circumstances, the court found that Mary had reasonable notice of and manifested assent to the clickwrap agreement containing the forum selection clause. Mary was capable of understanding the terms of the agreement, she consented to them, and she could have rejected the agreement. Further, Mary had her day in court as she and Julie retained counsel, requested and obtained permission to participate telephonically in hearings, and actually participated telephonically. Based on these events, the forum
selection clause contained in Adsit's clickwrap agreement was valid, enforceable, and binding on Mary.

Whether the forum selection clause also binds Julie was a closer call. Julie's only role in the transaction was to provide Mary with her credit card number. Julie did not personally accept Adsit's policy, including the forum selection clause. If Mary was acting as Julie's agent, then Julie is bound to the terms of the contract, including the forum selection clause. The fact that Julie provided Mary with her credit card number so Mary could complete the purchase was clear. Under these circumstances, Julie's conduct was sufficient to give Mary actual authority to engage in the transaction on her behalf. Consequently, Julie was likewise bound by Adsit's forum selection clause. In sum, the trial court properly exercised personal jurisdiction over Mary and Julie.

**REFUSING TO SELL 100 HARD DRIVES AT THE ADVERTISED PRICE OF $1 EACH DOES NOT VIOLATE DTPA**

Perez v. Luu, 244 S.W.3d 444 (Tex. App.—Eastland 2007).

**FACTS:** Mario Perez was looking for hard drives on the internet and went to MicroCache's website where he found hard drives listed for $1 each. Perez ordered and paid for 100 hard drives. The next day Hung Kien Luu, an officer for MicroCache, e-mailed Perez advising him of a system error and refunded his payment. The actual price of the hard drives was $1,195 each. Perez declared to Luu that he did not want a refund and expected delivery within 10 days. Luu refused to deliver the hard drives.

Perez filed suit against MicroCache and Luu. Perez alleged three violations of the Deceptive Trade Practices Act (“DTPA”): (1) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities which they do not have; (2) advertising goods or services with intent not to sell them as advertised; and (3) representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve or which are prohibited by law. The trial court held that MicroCache’s website contained a pricing error; the website advised customers that MicroCache had the right to correct any pricing error; Perez was aware of this right; MicroCache refunded the purchase price, Perez accepted the credit; and, MicroCache did not violate the DTPA. Perez appealed the decision of the trial court.

**HOLDING:** Affirmed.

**REASONING:** The court reasoned that the legislature expressly required Perez to prove that MicroCache intentionally misrepresented the price of the hard drives because “[s]ubsection (9) prohibits advertising with intent not to sell them as advertised and subsection (10) prohibits advertising goods or services with intent not to supply a reasonable expectable public demand unless the advertisement discloses a limitation of quantity.” In the case of general advertising, as is the case here, the court held that Perez must prove MicroCache intended to misrepresent the price of the hard drive, and Perez failed to prove the required intent.

Additionally, “[t]he website advised customers that ‘[p]rices are for reference purposes only and are subject to change without notice. MicroCache is not held responsible for any errors or discrepancies...’” Consequently, Perez was on notice when he ordered… [the] hard drives that MicroCache could refuse to consummate the transaction if there was a pricing error.” MicroCache proved that the price was not an intentional misrepresentation because they were testing the website and put a $1 price on the website during the test run; and subsequently, MicroCache mistakenly failed to put the proper price on the website when it went live.

The court held that Perez had to prove that MicroCache intentionally misrepresented the price of the hard drives, which he failed to do and that Perez was aware of MicroCache’s policy that prices were subject to change if there was a pricing discrepancy.

**RESTITUTION DOES NOT HAVE TO BE ORDERED TO AN IDENTIFIABLE PERSON**


**FACTS:** The State of Texas (“appellee”), acting through the Consumer Protection Division of the Attorney General's Office, sued John and Ruth Thomas (“appellants”) for violations of the Notary Public Act (“NPA”) and the Deceptive Trade Practices Act. Specifically, the State alleged that by offering immigration services through their business, appellants engaged in the unauthorized practice of law.

Following a trial, the jury (1) found each appellant had acquired $469,416.50 by means of engaging in an unlawful act or practice; (2) assessed penalties in the amount of $20,000.00 as to each appellant, and (3) awarded attorneys' fees to the State in the amount of $22,000.00 as to each appellant. The trial court rendered judgment in the State's favor, ordered permanent injunctive relief as to each appellant, and ordered restitution, penalties, and attorneys' fees as awarded by the jury. The defendants appealed.
HOLDING: Affirmed.

REASONING: The appellants contended the trial court erred in rendering a judgment that violates section 17.47(d) of the DTPA because it ordered restitution to “consumers” without specifying the identifiable persons entitled to the restitution and the amount of money to be paid to each identified person. Additionally, appellants contended that the judgment violates section 17.47(d) because it ordered restitution in an amount that includes monies paid to appellants beyond a point two years prior to the filing of the lawsuit. The court concluded that the plain language of section 17.47(d) authorized the trial court to order the restoration of money or property acquired by unlawful means, without any requirement that the trial court specify “identifiable persons” or the amount of money to be paid to each consumer.

The court reasoned whether a particular remedy is available under a statute is a question of law for the court. In construing a statute, the objective of the court was to determine and give effect to the legislature's intent. If the statutory text was unambiguous, the court "must adopt the interpretation supported by the statute's plain language unless that interpretation would lead to absurd results." The court further reasoned that “[l]egislative intent is derived from the entire act, not just its isolated portions.” The court gave the cardinal rule of statutory construction, that is, “every word used must be presumed to have been used for a purpose. It is also presumed that words excluded were left out for a purpose.”

In concluding that the 2-year limitation period applied only to damages and not restitution, the court stated that the primary purpose of a statute of limitations was to ensure that a defendant is placed on notice of claims within a reasonable time. Here, the filing of the suit placed appellants on notice, not only of the specific claims being asserted, but also of the number of potential consumers who may ultimately participate in the final judgment.

ONLY FDA CAN REGULATE DRUG ADVERTISING

Pennsylvania Employees Benefit Trust Fund v. Zeneca Inc., 499 F.3d 239 (3rd Cir. 2007).

FACTS: AstraZeneca Pharmaceuticals, L.P. (“Zeneca”) conducted a clinical study to compare the effects of two drugs, Nexium and Prilosec. The study showed 40 milligrams of Nexium outperformed 20 milligrams of Prilosec when healing damage caused by erosive esophagitis. After receiving approval from the Food and Drug Administration (“FDA”) in February 2001, Zeneca started a large promotional campaign claiming Nexium was superior to Prilosec. The FDA’s endorsement pertained to Zeneca’s final labeling for Nexium. Plaintiffs filed suit in February 2005 against Zeneca claiming that Nexium’s superiority characteristic described on the advertisement was misleading.

The United States District Court for the District of Delaware heard the claims brought under the Delaware Consumer Fraud Act (“DCFA”) and other consumer protection statutes. However, the claim was dismissed when the court granted Zeneca’s motion for failure to state a claim. Plaintiffs appealed and the Third Circuit Court of Appeals ultimately affirmed the decision.

HOLDING: Affirmed.

REASONING: The court segmented the case into two main issues. First, the court addressed “whether the DCFA exemption for advertising regulated by the Federal Trade Commission (“FTC”) applies to the facts of this case.” The DCFA exemption clause excused advertisements from complying with Delaware standards so long as they were subject to and complied with the FTC statutes. Plaintiffs argued the exemption should have been read so narrowly as to restrict its application to advertisements. The plaintiffs asserted that Zeneca’s Nexium advertisements were not expressly endorsed by the FTC. The court stated that advertising simply based on approved labeling by the FDA was too far of an extension of the exemption. The court refused to allow states to interpose consumer fraud laws which would frustrate the purpose of the FDA. The court was hesitant to open doors which would allow “plaintiffs to question the veracity of statements approved by the FDA.” Even though Zeneca’s action did not fall within the state exemption clause, federal law protected their interests and the lower court’s decision was affirmed.