

Consumer Rights 2009-2010

February 2009

QUESTION 10

Bill owned a rent house that was completely destroyed by a fire. The house was insured by Insko Insurance Company (“Insko”) under an insurance policy with \$100,000 policy limits for fire loss. The house and the land recently had been appraised at a value of \$120,000. Bill reported the loss to Stace, the Insko agent who had sold him the policy, and Stace made a timely report of the loss to the home office of Insko as required by the policy.

The Fire Marshall, an independent investigator hired by Insko, and an in-house adjuster employed by Insko all inspected the site of the fire and concluded that the cause of the fire had been a faulty electrical outlet. They all filed reports with Insko to that effect.

Anxious to rebuild the house so he could rent it again, Bill asked Stace when he could expect to receive a settlement from Insko. Without first contacting Insko to ascertain the status of the matter, Stace said, “Everything looks fine. You should be getting your check soon – certainly within 90 days.”

Relying on Stace’s representation, Bill obtained a 90-day construction loan in the amount of \$100,000 from First Bank, secured by a first deed of trust on the property. He also hired Alamo Construction Co. to rebuild the house at a price of \$100,000.

Several times during the next two weeks, Bill placed phone calls to Stace and wrote letters to Insko to inquire into the status of his claim. Neither Stace nor Insko responded. Finally, about two months later, Stace phoned Bill and told him, “Your claim is out of my hands. Insko thinks it’s a suspicious fire.” After leaving several unreturned phone messages, Bill finally reached Insko’s in-house adjuster, who told him that Insko was denying the claim because Insko believed the fire was caused by arson.

In the meantime, construction on the house was proceeding, and, after 90 days, Bill exhausted the \$100,000 he had borrowed from First Bank. When the loan became due, First Bank demanded payment, and, when Bill could not pay, First Bank foreclosed on its deed of trust. Bill had to take a lot of unpaid time off work, he became emotionally upset, and incurred medical bills resulting from his stress.

Nine months later, Insko told Bill it had reconsidered the claim, saying that, although it did not believe it was liable, it offered to pay \$45,000 in full satisfaction of Bill’s claim. Bill refused the offer and hired an attorney to sue Insko. Under the threat of suit, Insko tendered the full policy limits of \$100,000. Assume that Bill is a “consumer” under all applicable Texas consumer laws.

- 1. Under Texas consumer laws, what causes of action can Bill assert against Stace, and what types of damages can he recover from Stace? Explain fully.**
- 2. Under Texas consumer laws, what causes of action can Bill assert against Insko, and what types of damages can he recover from Insko? Explain fully.**

July 2009

QUESTION 8

Wes, a salesperson employed by Personal Kitchen, sold Mary a set of kitchen knives and copper pans, both manufactured by Top Shelf. With only Wes and Mary present, Wes told Mary that the pans and the knives carried “a full, unlimited one-year warranty” and that as part of the warranty, Mary had a 60-day “trial period” to “cancel the transaction” for any reason.

The sale contract Mary signed was a Personal Kitchen form, which contained the following terms and no others: a description of the pans and knives; the purchase price; a “limited warranty” providing for repair or replacement of the pans at the discretion of the manufacturer; a statement that the knives were covered by a manufacturer’s unconditional warranty; and, in small print in the signature block of the form, a statement that “purchaser waives all rights under the Texas Deceptive Trade Practices Act.”

The first time Mary used the pans, the copper began to flake. She also used the knives and found that the cutting edges quickly became dull.

Forty-five (45) days later, relying on Wes’s statement that she could cancel the transaction within 60 days, Mary called Personal Kitchen’s owner and said she wanted to cancel the transaction and get her money back. The owner told Mary that, under company policy, she had missed her deadline because she had only five business days from the date of purchase to cancel the transaction. He refused to cancel the transaction or make any other accommodation.

When Mary presented a warranty claim to Top Shelf, that company rejected her claim, telling her that her retention of the pans and the knives for several weeks constituted a waiver of the manufacturer’s warranty.

Mary sued Personal Kitchen and Top Shelf for relief under the Texas Deceptive Trade Practices Act (“DTPA”). Both defendants asserted as a defense that Mary had waived all rights under the Act. Personal Kitchen, separately, asserted as a defense that Mary’s effort to cancel the transaction failed because she had missed Personal Kitchen’s five-day deadline. Top Shelf, separately, asserted the defense of waiver based upon Mary’s retention of the merchandise for several weeks.

- 1. What facts can Mary assert to overcome the defense asserted by Personal Kitchen and Top Shelf that she waived all rights under the DTPA? Explain fully.**
- 2. Can Personal Kitchen prevail on its defense that Mary did not seek to cancel the contract within five business days? Explain fully.**
- 3. Under the DTPA, what claims can Mary assert, what relief can she obtain, and is she likely to prevail against either of the defendants? Explain fully.**

February 2010

QUESTION 5

Patty purchased a big screen TV on a monthly payment credit plan from Big Box Electronics (“Big Box”) in San Antonio. Patty made monthly payments until she lost her job. Big Box hired Dubious Debt Collections, Inc. (“Dubious”) to collect the money owed by Patty. Dubious’ agent, Rocky, made numerous phone calls to Patty’s home phone, including calls early in the morning and late at night, but could not reach Patty. Rocky left several threatening messages on Patty’s answering machine.

Frustrated with his inability to contact Patty directly, Rocky contacted Patty’s mother, Marge, by phone, and told her that Patty owed his company a great deal of money and was shirking her financial obligations. He told Marge that if she refused to help him contact Patty, he would take immediate action to have Patty arrested for failing to pay her debts. Upon hearing this, Marge became so upset that she fainted, hitting her head on the coffee table. Her injuries required medical attention in the emergency room.

Larry, Big Box’s in-house collector, became impatient when Dubious’ debt collecting methods proved unsuccessful and promptly fired Dubious. Larry located Patty and told her during a phone call that Big Box would file a lawsuit against her if she failed to pay the amount owed. Additionally, although Larry knew that Patty’s monthly payment agreement did not provide for collection of any amounts over and above the consumer debt, Larry told Patty that she would have to reimburse Big Box for the fees the company had incurred in hiring Dubious to collect on the debt. Patty felt so intimidated by the call from Larry that she suffered anxiety attacks.

Patty and Marge retained Ann, an attorney, to advise them on their legal options.

- 1. What consumer law violations, if any, did Dubious and Rocky commit in their efforts to collect from Patty? Explain fully.**
- 2. What consumer law violations, if any, did Larry and Big Box commit in their efforts to collect from Patty? Explain fully.**
- 3. What remedies, if any, are available to Patty and Marge for any such violations? Explain fully.**

July 2010

QUESTION 10

Sharon went to Dean's Marine intending to purchase a boat to use at her lake house in the Texas Hill Country. Dean, the sole proprietor of Dean's Marine, told Sharon that he had a previously owned 2007 WaveSlasher that had just been placed on the lot. He told Sharon that, although it was used, the WaveSlasher was in great condition and ran "like new." He also told her that the purchase price was \$3,000.

Sharon told Dean that she knew nothing about mechanical matters, and that she needed a boat that was in good condition because she didn't want to get stranded on the lake. Dean assured her that the WaveSlasher was ready for use and showed her the Dean's Marine "30-point Quality Inspection Checklist," which indicated that all parts of the WaveSlasher had been inspected by his mechanic and were in good working order. Sharon, reassured by the inspection report, agreed to buy the WaveSlasher. The contract of sale included a statement in conspicuous, large print that the WaveSlasher was being sold "As is. No warranties."

In fact, the mechanic employed by Dean's Marine had quit the day before Dean's Marine acquired the WaveSlasher. Dean, who is not a mechanic, had filled out the "30-point Quality Inspection Checklist" himself, never having started the engine and after having done only a cursory, visual inspection of the exterior of the WaveSlasher.

The day after she purchased the WaveSlasher, Sharon went to the lake to try it out. After running it for about an hour, she heard a grinding noise and smelled smoke. A few minutes later, the WaveSlasher's engine stopped running. Sharon was stranded on the lake for several hours and had to flag down a passing boater to tow her to shore. Her wait in the sun caused her to suffer a severe and painful sunburn, which had to be treated by her physician. She was so upset about being stranded on the lake that she experienced nightmares about the incident for weeks afterwards.

Sharon took the WaveSlasher to a mechanic the following day and paid him to inspect it. The mechanic told her that any competent inspection would have revealed that there were obvious signs that the WaveSlasher's engine had been poorly maintained for a long period of time.

- 1. What claims, if any, might Sharon assert against Dean's Marine under the Texas Deceptive Trade Practices Act? Explain fully.**
- 2. What damages and other remedies are available to Sharon for her claims under the Texas Deceptive Trade Practices Act? Explain fully.**