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## Texas Law Permits Fraud Claims Against Corporate Agents as Individuals

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## Recent Cases

breach of implied warranty claim. It noted that under Illinois law, failure to attach a copy of the contract from which the warranty arises, or an affidavit stating that a copy is unobtainable, warrants dismissal of the argument. Thus, the court concluded that although a written contract between the parties could have formed the basis of a warranty, Popp's failure to attach the appropriate documents justified dismissal of this claim.

### *Court Finds No Antitrust Violation*

The court also rejected Popp's claim that Cash Station's merger with Money Network violated the Illinois antitrust laws. The court emphasized that a monopoly is not per se illegal and that only the use of anti-competitive means to achieve or maintain a monopoly violates the antitrust laws. Thus, Popp could recover only if she established that Cash Station engaged in some type of prohibited anti-competitive conduct, which consequently caused economic injury. The court found that Popp failed to allege that Cash Station possessed monopoly power to control prices or to exclude competition. Instead, Popp only alleged that, but for the merger, there would be competition between providers of ATM services which could induce one or more competitors to provide ATM security systems. The court concluded that Popp's complaint lacked specific facts required for a claim under the Illinois antitrust laws. Furthermore, the court stated that since Popp's fear of criminal attack was not an economic injury, an antitrust claim is inapplicable. ♦

— *Bina Sanghavi*

## Texas Law Permits Fraud Claims Against Corporate Agents as Individuals

In *Walker v. F.D.I.C.*, 970 F.2d 114

(5th Cir. 1992), the Fifth Circuit Court of Appeals held that under Texas law, corporate officers are individually liable for their own deceptive and fraudulent representations, even if they acted within the scope of corporate authority. Furthermore, the court held that the Texas Deceptive Trade Practice-Consumer Protection Act, Tex. Bus. & Comm. Code Ann. sec. 17.41 et seq. (Vernon 1987), applies to loans if used to purchase specific items.

### *The Quid Pro Quo*

In October 1982, real estate developers Ted Walker and James Brunson (the "Developers") contacted defendant Ron Bearden, a Mainland Savings Association ("Mainland") officer and director. The Developers offered to sell the International Energy Center building (the "IEC Building") to Mainland. Months of negotiations ensued, during which the parties discussed a \$21 million project development loan to the Developers. The Developers contended that Mainland offered the loan, along with \$1 million, in exchange for the IEC Building. However, the parties never executed a written loan agreement.

On August 8, 1983, the Developers exchanged the IEC Building and surrounding property with Mainland for \$1 million in cash and the alleged \$21 million loan. Mainland's attorney, drafted the exchange agreement.

Mainland, however, never issued the loan to the Developers. Consequently, they sued Mainland and two of its directors, Bearden and Hill, in Texas state court, claiming that Mainland failed to provide a \$21 million dollar loan in return for the sale of the IEC Building.

A legal morass ensued involving two connected suits and Mainland's insolvency. Mainland's insolvency brought in federal agencies as parties and the consolidated suits went back and forth between state and federal court. At the point of this appeal, the only remaining defendants were Bearden and Hill as individuals. A

Texas state court had entered a judgment in favor of Bearden and Hill stating that they could not be personally liable for the alleged acts unless they performed or made fraudulent representations outside the scope of their employment. The Developers appealed, and a federal district court affirmed the decision. The Developers appealed a second time.

### *Agents May be Personally Liable*

On appeal, the developers contended that Bearden and Hill reneged on their promise of a \$21 million loan. The Developers charged that Bearden and Hill were liable for fraud, conspiracy, and on an estoppel theory. Additionally, the Developers claimed that Bearden and Hill violated the Deceptive Trade Practice-Consumer Protection Act (the "Act"). In response, Bearden and Hill asserted that corporate agents cannot be personally liable for acts committed within the scope of employment, and therefore, the court should dismiss the suit.

The Fifth Circuit rejected Bearden and Hill's argument. Instead, it found that under Texas law, corporate officers could be held individually liable for deception and fraud, even if it is committed within the scope of their corporate authority. The court based its decision on a Texas Supreme Court ruling, which held that under the Act, a corporate agent may be held personally liable for oral or written promises made by them, even if made within the scope of employment. The appellate court reversed, and a jury is set to decide this claim at trial.

### *Fraud Claim Against Bearden Reversed*

The appellate court next addressed the claim of fraud against Bearden. It stated that, although Bearden submitted evidence that he did not make material misrepresentations, the Developers rebutted this evidence with sufficient proof to create an issue of material fact as to fraud. Consequently, the court held that there was sufficient

evidence to allow a claim of fraud against Bearden go before a jury.

Among the evidence that the Developers produced were sworn affidavits stating that they would receive the multi-million dollar loan along with the \$1 million in exchange for the IEC Building. The affidavits also stated that at the closing, Bearden failed to disclose that Mainland would not provide the loan. The Developers also submitted a letter from Walker to Mainland, in which Walker clarified expectations the parties expected to see in writing at the closing.

#### ***Judgment Affirmed for Remaining Claims***

Nevertheless, the Fifth Circuit found that the Developers' evidence did not create an issue of material fact for the fraud claim against Hill. The court stated that their evidence of Hill's surprise of the loan problem and Hill's response that he would take care of the situation did not support the allegation that he committed fraud. Similarly, the appellate court did not find sufficient evidence regarding the conspiracy claims against both defendants to allow a jury decide the issue.

The court also affirmed the district court's judgment in favor of Bearden and Hill on claims under the Act. The appellate court stated that an action under the Act required the Developers to establish that they were consumers seeking or acquiring "by purchase or lease, any goods or services." Furthermore, where the borrower fails to allege a complaint regarding the items he intended to acquire with the loan, the Texas courts have ruled the complainant is not a consumer and therefore has no right to sue under the Act. Thus, since the Developers failed to allege a complaint regarding the specific project they intended to fund with the loan, they were not consumers within the scope of the Act. Accordingly, the Fifth Circuit affirmed the dismissal of this claim. ♦

— *Christine Cody*

## **General Business Law Regulates Insurance Company's Deceptive Acts**

In *Riordan v. Nationwide Mutual Fire Insurance*, 977 F.2d 47 (2nd Cir. 1992), the United States Court of Appeals for the Second Circuit held that a New York law prohibiting deceptive practices in business conduct applied to insurance companies. Additionally, the court stated that in appropriate cases, the insured can recover attorney fees.

#### ***Burned in More than One Way***

In 1988, John Riordan and his wife, Jane Fox, (the "Riordans") purchased a homeowner's insurance policy from Nationwide Mutual Fire Insurance ("Nationwide") for their home in Ossining, New York. The policy guaranteed the replacement cost of the building and its contents in the event of loss. On July 17, 1989, a fire occurred at the home, destroying most of the house and the personal property it contained.

The Riordans notified Nationwide and hired Steven Seltzer, an insurance adjuster, to assist them with their claim. John Hahn, Nationwide's claims adjuster, visited the site two days after the fire and obtained a contractor's estimate for the repair cost of the damage. The Riordans submitted an inventory list to Hahn. Hahn, however, failed to authorize the start of any repairs.

Eventually, the Riordans had the damaged effects cleaned and restored. Nationwide never sent a representative to evaluate the damages to those items, despite persistent requests. The Riordans submitted a timely Proof of Loss form, listing only the irreparably damaged items.

Nationwide advanced \$25,000 to the Riordans on the building portion of the claim. Nationwide stipulated, however, that the Riordans could not use the money for housing repairs without the prior approval of Citibank, the mortgagee of the property. Because Citibank would not release the money

until the building portion of the claim was fully settled, the Riordan's could not live in the unrepaired structure.

Although the parties attempted to settle, Nationwide refused to discharge the building part of the claim unless the Riordans accepted the offer for the contents portion as well. Since Nationwide's offer for the contents was approximately \$21,000 and the Riordan's sought more than \$160,000, the Riordans rejected the all-or-nothing settlement offer.

#### ***Suit For Contract Breach and Deceptive Acts***

The Riordans filed suit against Nationwide in the United States District Court for the Southern District of New York. They alleged that Nationwide violated § 349 of New York's McKinney's General Business Law (the "Law") by breaching their insurance contract and committing deceptive acts and practices in the claims settlement process. The Riordans sought compensatory and punitive damages as well as attorney fees. The district court entered a judgment in favor of the Riordans on their breach of contract claim.

At trial on the deceptive acts issue, the jury returned a verdict in favor of the Riordans, awarding sums for repair of the house, damage to the contents, and living expenses. In addition, the jury awarded \$1,000 for the deceptive acts and practices violations and \$150,000 in punitive damages. The court also awarded attorney fees. Nationwide appealed the judgment to the United States Court of Appeals for the Second Circuit.

#### ***General Business Law Binds Insurance Companies***

Nationwide first asserted that New York's Law did not apply to insurance companies since various state statutes already extensively regulated unfair and deceptive practices within the industry. The Second Circuit rejected Nationwide's reasoning because it found that § 349 clearly stated it ap-