

1993

Under Texas Consumer Statute, Individual Must Benefit to be Consumer

Marc V. Richards

Follow this and additional works at: <http://lawcommons.luc.edu/lclr>

 Part of the [Consumer Protection Law Commons](#)

Recommended Citation

Marc V. Richards *Under Texas Consumer Statute, Individual Must Benefit to be Consumer*, 5 Loy. Consumer L. Rev. 99 (1993).

Available at: <http://lawcommons.luc.edu/lclr/vol5/iss3/12>

This Recent Case is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola Consumer Law Review by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

Under Texas Consumer Statute, Individual Must Benefit to be Consumer

In *Wellborn v. Sears, Roebuck & Co.*, 970 F.2d 1420 (5th Cir. 1992), the United States Court of Appeals for the Fifth Circuit held that although a minor in a products liability suit did not purchase the defective product, he was a consumer for the purposes of the Texas Deceptive Trade Practices-Consumer Protection Act. Furthermore, the court strictly construed the presuit notice provision and found a manufacturer not liable due to lack of proper pretrial notice.

Minor Dies While Pinned Under a Faulty Automatic Garage Door

In November 1988, Bobby Wellborn died while pinned under a garage door operated by an automatic opener. His mother, Chamberlain, sued the manufacturer of the opener and Sears, Roebuck and Co. ("Sears") which sold it. The parties disputed how the accident actually occurred, but agreed it happened at the Wellborn's home when Bobby was skateboarding in the driveway and his mother was away at work. The investigating officers deduced that Bobby was racing the closing garage door on his skateboard in an attempt to ride underneath the door before it closed. Sears' expert theorized that as Bobby passed under the closing door, he slipped and fell, hit his head against the concrete pavement, and knocked himself unconscious. The garage door then closed on his back. Wellborn's experts argued that Bobby struggled to free himself and was conscious anywhere from three minutes to several hours. Eventually, Bobby lost consciousness and died.

Bobby's mother bought the automatic garage door opener from Sears in late 1986. Her friend installed the opener on Wellborn's garage door in the spring of 1987. At that time, Wellborn successfully tested the automatic reversing mechanism by placing

a piece of lumber in the garage door's path. However, Wellborn did not perform the subsequent annual test of the automatic reversing feature as recommended by the opener instruction manual. The accident occurred approximately one and a half years after the installation of the opener. Police investigators at the scene of the accident tested the garage door and found that it properly reversed when hitting an obstacle two feet above the floor. However, it did not reverse when hitting an obstacle eight inches above the floor. An expert later determined that the opener failed to operate properly due to faulty installation and adjustment.

Jury Awards \$2.3 Million to Wellborn

Bobby's mother filed suit in November 1989 as the administratrix of her minor son's estate. The jury found in favor of Wellborn, and against both Sears and Chamberlain, awarding nearly \$2.3 million. Subsequently, both Sears and Chamberlain moved to set aside the verdict. The court denied this request for Sears, but granted a lessening of damages against Chamberlain because Wellborn failed to give proper notice to the manufacturer as required by the statute. Both Wellborn and Sears appealed the decision to the Fifth Circuit Court of Appeals.

Sears Must Pay

Sears appealed the decision on several grounds. First, Sears argued that the evidence did not support the jury's finding that neither Wellborn nor Bobby was contributorily negligent. The court, however, declined to review this contention on procedural grounds.

Second, the Fifth Circuit rejected Sears' argument that the statute of limitations barred the suit. The court noted that the Texas Deceptive Trade Practices-Consumer Protection Act (the "Act") provides a two year statute of limitations from the time the consumer first discovers the deceptive practice. Even though Wellborn installed the garage door opener three years before

filing the suit, the court held that the day of the accident, only one year before Wellborn filed the suit, was the discovery date of the improper installation. Thus, Wellborn commenced the suit within the two year statutory period.

Third, Sears contended that Bobby did not meet the statutory definition of a consumer and therefore lacked standing to sue under the Act. The Act defines a consumer as one "who seeks or acquires by purchase or lease . . . any goods or services . . ." Thus, Sears argued that Bobby was a mere incidental user and not a consumer. However, the Fifth Circuit rejected this argument stating that a direct contractual relationship is not a consideration in determining whether an individual can sue as a consumer under the Act. The court noted that Texas case law requires the court to look to the individual's relation to the transaction. An individual is a consumer if the product had at least been purchased or acquired for the individual's benefit.

In this case, the court acknowledged that Wellborn had not purchased the garage door opener directly for Bobby's benefit. However, he lived with the purchaser, Wellborn, and benefitted from the opener's use in various ways. The court ruled that these facts were sufficient to consider the garage door opener acquired for Bobby's benefit. Thus, the court held that under Texas case law, Bobby was a consumer for the purposes of the Act.

Fourth, Sears objected to a suit under the Act surviving the consumer's death. However, the Fifth Circuit declined to address the question of survivability of a suit under the Act. Instead, the court certified the question to the Texas Supreme Court because the Texas appellate courts evenly split on the question of survivability.

Fifth, Sears argued that the individual awards of damages could not be supported by the evidence in the record. Again, the Fifth Circuit rejected Sears' contentions for several reasons. The court did not find the \$1 million award

Recent Cases

for Bobby's pain and suffering prior to his death excessive. Sufficient evidence supported the jury's finding that Bobby remained conscious for anywhere from three minutes to several hours while pinned under the garage door. Moreover, the court noted that there was ample evidence in the record to support the \$1.2 million award to Wellborn for loss of companionship to her and society, and for mental anguish. In addition, the court held that the record supported the \$50,000 award for pecuniary losses.

Chamberlain Not Liable for Additional Damages Because of Improper Pretrial Notice

Finally, the Fifth Circuit addressed

Wellborn's appeal from the trial court's decision to set aside Chamberlain's verdict. The district court overturned the verdict against Chamberlain for additional damages because Wellborn failed to serve Chamberlain with proper pretrial notice of the claim as required by the Act.

The court noted that Wellborn sent a pretrial notice only to Sears, which forwarded the notice to Chamberlain. The notice did not mention Chamberlain's name as a defendant anywhere in the letter. Nevertheless, counsel responded to the demand letter by stating that he represented both Sears and Chamberlain in this matter.

On appeal, Wellborn stated that Sears forwarded a copy of the demand letter

to Chamberlain, which understood the letter to apply to it. Wellborn argued that since Chamberlain became aware of the matter, the pretrial notice requirement had been satisfied. The Fifth Circuit, however, ruled that this notice did not meet the technical requirements of the law because the letter did not mention any demand from Chamberlain, only from Sears. Thus, the manufacturer would not have known that it would be named as a defendant in the suit. Consequently, the pretrial notice was statutorily inadequate and the court barred Wellborn's recovery from Chamberlain for additional damages. ♦

— *Marc V. Richards*

Subscription Form

To Subscribe to the *Loyola Consumer Law Reporter* please detach, complete this form, then return it to the address listed below.

- Yes!** I want to subscribe to the *Loyola Consumer Law Reporter* (1 year/4 issues at \$12.00).
- My payment (check or money order) is enclosed.
- Please bill me.

Name _____

Address _____

City _____

State _____ Zip _____

Phone _____

Type of Organization:

- Law Library
 Law Firm
 Non-Profit
 Individual
 Other (please specify)

Please check those areas you would like to read about in future issues of the *Reporter*.

- food/drugs
 products liability
 consumer credit/loans
 insurance
 utilities
 health/medicine
 antitrust
 transportation
 housing
 professional services
 Others (please specify)

Mail this form to:

Loyola Consumer Law Reporter
Loyola University of Chicago
School of Law
One East Pearson Street
Chicago, IL 60611