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# TEXAS HIGH COURT CONSIDERS CONTRACTUAL WAIVER OF RIGHT TO TRIAL BY JURY

The Texas Supreme Court, in *In Re General Electric Capital Corporation*, 2006 WL 2708466 (Sept. 22, 2006), addressed a litigant's right to waive a jury trial. In this case, the real party in interest, Neal Small, executed a promissory note payable to General Electric Capital Corporation to finance the purchase of a jet, and NCS Lear, Inc. executed a guaranty. Both the note and the guaranty contained jury waiver provisions. Some years later, Small defaulted on the note. GE thereafter repossessed the jet and sued Small and NCS Lear for the outstanding balance of the debt.

GE requested a non-jury trial in its original petition, attaching copies of the note and guaranty to document the jury waiver. The case was originally set on the court's non-jury docket. Several months later, Small filed a jury demand and paid the jury fee. However, GE claims that it did not receive notice of the jury demand. Subsequently, the case was reset twice for trial. Each time the case was reset, the court sent a form letter to the parties, indicating that the case was on the jury docket. About ten months later, GE finally noticed that its case was not on the non-jury docket. GE then moved to strike Small's jury demand, claiming that it had not been given notice. When the trial court refused to return the case to the non-jury docket, GE sought mandamus relief, but the court of appeals also declined to enforce the jury-waiver provision.

In its analysis, the Texas Supreme Court noted that GE had originally asserted its contractual right to a non-jury trial when Small filed his jury demand. Moreover, GE explained its delay in moving to quash the jury demand as a consequence of Small's failure to send notice. The Court noted that the issue was not whether GE was diligent in asserting its contractual right in the first place, but rather whether GE waived its right to a non-jury trial by failing to notice the docket change over a ten-month period.

Small suggested to the Texas Supreme Court that it should find that GE waived its contractual right to a non-jury trial by failing to notice the trial court's change in form letter from non-jury docket to the jury docket. GE countered that it did not immediately notice when the case was moved to the jury docket because it never received a copy of Small's jury demand. GE alleged that it did nothing inconsistent with its previous asserted right to a non-jury trial, other than fail to notice a subtle change in the court's form letter.

The Court then reviewed what constitutes "waiver" – either the intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right. Finding no evidence of GE's specific intention to waive its contractual right and no evidence that GE knowingly or voluntarily waived its right to a non-jury trial, the Court declined to impose any waiver. Also, the Court found that the jury waiver provision was valid.

# CONFLICTING VIEWS ON WHETHER FRAUD AND "KNOWING" CONDUCT MAY QUALIFY AS AN "OCCURRENCE"

In *National Union Fire Insurance Company of Pittsburgh, PA v. Puget Plastics Corporation*, 2006 WL 2583159 (Sept. 6, 2006), a Federal District Court Judge from Brownsville (in the Southern District of Texas) addressed whether a jury's finding that the insured engaged in harmful conduct "knowingly" precluded the insured from claiming its conduct was an "accident" for insurance coverage purposes. The insured argued the fact that it was found to have engaged in some conduct "knowingly" wasn't dispositive. The court had to determine whether it was possible for an "accident" to have been caused "knowingly" under the DTPA.

In addressing this issue, the court expressly noted the distinction between "knowing" conduct and "intentional" conduct. "When the DTPA's definitions of 'intentionally,' and 'knowingly' are compared the difference is clear – a finding of 'knowingly' only requires 'actual awareness' while a finding of 'intentionally' requires 'actual awareness . . . coupled with the specific intent that the consumer act in reliance.'" Finding such a distinction significant, the court determined that it "seems possible" for an individual to "knowingly" engage in conduct constituting falsity, deception or unfairness but not actually have intended or even foreseen the resulting harm. The court also noted a significant difference between a harm that an individual does not subjectively expect, foresee, or intend, and a harm which an individual does not foresee because it was not reasonably foreseeable or does not ordinarily follow. The court explained: "Texas courts can conceive of certain circumstances where a knowing violation of the DTPA still constitutes an accident for insurance purposes." The court also noted that it was "unwilling to accept the broad proposition that knowing violations of the DTPA can never be accidents for insurance purposes."

The court noted that "knowing" conduct can still constitute an "accident" for coverage purposes unless the actor either: (1) intended the harm that occurred; or (2) should have reasonably expected the harm. In determining whether there was an "accident" in regards to the property damage suffered by other parties, the question becomes whether the resulting harm was intended, was reasonably foreseeable, or was the type of harm which ordinarily follows. Conduct that does not constitute an "accident" as to the insured could still be construed as an accident as to a third party – even if the insured was aware that its conduct could result in a defective product "it does not necessarily follow that they expected or intended the destruction of the entire water heater or damage to the homes and businesses where they were installed." Where the evidentiary record lacked evidence that the insured knew the failure of its product would cause water to damage to the circuit boards in question and destroy a water heater, and where the evidentiary record also lacked any evidence that the insured reasonably anticipated that if its product failed it would cause water to leak outside of the water heaters causing damage to other property, the summary judgment record did not support a finding of no coverage due to the lack of an "occurrence" regarding the damages sustained by third-parties.

Finally, the court declined to find the fraud claims failed to qualify as an "occurrence." The court found both the fraud damages and the DTPA damages included the costs of repairing the insured's product and lost profits. However, without knowing what conduct formed the basis of the jury's finding of fraud, the Court declined to hold that the presence of a positive finding on fraud necessarily meant that all of the DTPA violations were intentional and thus not covered.

*Puget Plastics* may be compared to another very recent case: *Universal Underwriters Insurance Company v. New Braunfels Trans, Inc.*, 2006 WL 2707003 (Sept. 20, 2006). *New Braunfels* also involved an underlying lawsuit asserting various misrepresentations as the basis of alleged DTPA violations and fraud. The underlying lawsuit asserted that the insured "knowingly made false or misleading statements of fact" and committed "a total fraud on" the underlying plaintiffs. The underlying petition also alleged that the insured's conduct "was intentional, willful, wanton, malicious, without justification or excuse and constituted gross or conscious indifference to the rights and welfare of the" underlying plaintiffs.

The court in this case found “such intentional acts of fraud and knowing misrepresentations are excluded from coverage under the policy,” because such factual allegations fail to trigger any “occurrence.” Finding that the underlying petition asserted DTPA and fraud claims involving intentional misrepresentations, this court found such intentional acts did not fall within the scope of coverage under the policy.