

1507 - 21st Street, Suite 330
Sacramento, California 95814
Telephone: (916) 445-1888

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Petition of

BINGHAM TOYOTA, INC.,

Petitioner,

vs.

TOYOTA MOTOR DISTRIBUTORS, INC., and
TOYOTA MOTOR SALES IN U.S.A.,

Respondents.

Petition No. P-205-90

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the New Motor Vehicle Board as its Decision in the above-entitled matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 14th day of June, 1991.

By


MANNING J. POST
Vice-President
New Motor Vehicle Board

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and DOES 1 through 100, Inclusive.

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Petition No. P-205-90

PROPOSED DECISION

PROCEDURAL BACKGROUND

1. The petition in this matter was filed with the New Motor Vehicle Board ("Board") on March 23, 1990, pursuant to the provisions of Vehicle Code section 3050(c). Petitioner is Bingham Toyota, Incorporated ("Bingham") located at 895 W. Shaw Avenue, Clovis, California. The petition names as respondents Toyota Motor Distributors, Inc. ("TMD") located at 2451 Bishop Drive, San Ramon, California and Toyota Motor Sales, Inc. ("TMS") located at 19001 South Western Avenue, Torrance, California (collectively referred to as "Respondents").

2. In its petition, Bingham alleges that Respondents are liable to Bingham for damages sustained as a result of a series of communications between representatives of Respondents and Bingham which pertain to the proposed sale of a number of vehicles by Bingham to Anywhere America Rent-a-Car ("Anywhere America"), a daily rental business which was located in San Mateo county, California. The petition alleges that Respondents misrepresented to Bingham that Anywhere America had sufficient cash, assets, and credit to pay for the vehicles that it intended to purchase from Bingham, and that Respondents concealed the fact that Toyota Motor Credit Corporation ("TMCC") has on several occasions denied application for credit submitted by Anywhere America.

3. After consideration of the allegations of the petition, the Board referred the matter to an administrative law judge for a hearing on the issues raised by the petition.

4. Pursuant to stipulation of counsel for the parties, the issues of liability and damages were bifurcated. The hearing on the issue of liability was held before Douglas H. Drake, Administrative Law Judge for the Board, on December 10, 11, 12, 13, 14 and 18, 1990, and January 8, 9, 10 and 18, 1991. The hearing on the issue of damages was continued until a determination could be made with respect to the liability, if any should exist, of Respondents.

5. Bingham was represented by Samuel C. Palmer, III of Thomas, Snell, Jamison, Russell and Asperger, 2445 Capital Street, Fresno, California.

6. The Respondents were represented by Robert L. Ebe and Richard B. Ulmer of McCutchen, Doyle, Brown and Enersen, Three Embarcadero Center, San Francisco, California.

ISSUES PRESENTED

7. The issues raised at the hearing on this matter were limited to whether Respondents are liable to Bingham under any legal theory of recovery alleged by Bingham. The petition alleges facts intended to support six separate causes of action, specifically:

- (a) fraud;
- (b) constructive fraud;
- (c) negligent misrepresentation;
- (d) innocent misrepresentation;
- (e) breach of implied covenant of good faith and fair dealing; and
- (f) breach of contract.

THE APPLICABLE LAW

(a) Fraud.

California law recognizes a cause of action for fraud involving misrepresentation as well as for fraud involving nondisclosure. Bingham alleges that TMD and TMS actively engaged in both types of fraud. With respect to the fraud involving misrepresentation, Bingham alleges that Respondents intentionally misrepresented the creditworthiness of Anywhere America, allegedly by stating that Anywhere America had sufficient cash, assets and credit to pay for 148 new motor vehicles which it intended to purchase from Bingham. With respect to the nondisclosure, Bingham alleges that Respondents concealed from Bingham the fact that Anywhere America had on several occasions been denied credit from TMCC.

Fraud involving intentional misrepresentation requires the following elements:

1. The respondent must have made a representation as to a past or existing material fact;
2. The representation must have been false;
3. The respondent must have known that the representation was false when he made it or he must have made the representation recklessly without knowing whether it was true or false;
4. The respondent must have made the representation with an intent to defraud the petitioner, that is, he must have made the representation for the purpose of inducing the petitioner to rely upon it and to act or to refrain from acting in reliance thereon;
5. The petitioner must have been unaware of the falsity of the representation and acted in justifiable reliance upon its truth; and
6. As a result of his reliance upon the truth of the representation, the petitioner must have sustained damage.

Fraud involving nondisclosure requires the following elements:

1. The respondent must have concealed or suppressed a material fact.
2. The respondent must have been under a duty to disclose the fact to the petitioner;
3. The respondent must have intentionally concealed or suppressed the fact with the intent to defraud the petitioner;
4. The petitioner must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact;
5. As a result of the concealment or suppression of the fact, the petitioner must have sustained damage.

The duty of respondent to disclose the "material fact" to the petitioner (ie. element number 2 above), arises either when the party having knowledge of the facts is in a fiduciary or confidential relationship, or where the party with knowledge of the material facts also knows that such facts are neither known nor readily accessible to the other party.

(b) Constructive Fraud.

Civil Code Section 1573 defines "constructive fraud" as:

1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or,
2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.

It is essential to the operation of the principle of constructive fraud that there exist a fiduciary relation. In Mary Pickford Co. v. Bayly Bros, Inc. (1939) 12 Cal. 2d 501, 525, the court stated:

To constitute positive or actual fraud, there must be such fraud as affects the conscience, that is, there must be an intentional deception. Constructive fraud, on the other hand, is presumed from the relation of the parties to a transaction, or the circumstances under which it take place . . . Constructive fraud often exists where the parties to a contract have a special, confidential or fiduciary relation . . .

In Byrum v. Brand (1990) 219 Cal.App. 3d 926, 268 Cal. Rptr. 609, the court noted that "(t)he breach of duty referred to in (Civil Code) section 1573 must be one created by the confidential relationship, which is one of the facts

constituting the fraud." In addition, Byrum held that a cause of action for constructive fraud or breach of a fiduciary duty requires neither intent to deceive nor that the failure to disclose be intentional.

(c) Negligent Misrepresentation.

A cause of action for negligent misrepresentation consists of the following elements:

1. The respondent must have made a representation as to a past or existing material fact;
2. The representation must have been untrue;
3. Regardless of his actual belief the respondent must have made the representation without any reasonable ground for believing it to be true;
4. The representation must have been made with the intent to induce petitioner to rely upon it;
5. The petitioner must have been unaware of the falsity of the representation and justifiably relied upon it.
6. As a result of his reliance upon the truth of the representation, the petitioner must have sustained damage.

(d) Innocent Misrepresentation.

Bingham has alleged as its fourth cause of action "innocent misrepresentation", with purportedly consists of the following elements:

1. A misrepresentation and concealment;
2. The misrepresentation and concealment was of a material fact (Anywhere America's true financial condition and the fact that Anywhere America had been denied credit by TMCC);
3. TMD and TMS knew or should have known that Bingham would have relied on the misrepresentation or concealment,

4. Bingham's actually and reasonably relied on these misrepresentations and concealment, and
5. Bingham sustained actual damages.

Under existing law in California, there is no recognized cause of action for innocent misrepresentation. The facts plead under this "cause of action" fall short of establishing actual or negligent misrepresentation, constructive fraud or breach of fiduciary duty.

(e) Breach of the Implied Covenant of Good Faith and Fair Dealing.

California law recognizes two separate causes of action for breach of an implied covenant of good faith and fair dealing, one founded in contract law and the other in tort law. Although Bingham has failed to differentiate its cause of action as one based upon the contract or tort action, it is incumbent upon the Board to determine whether Bingham has met its burden of proof on either theory, irrespective of the label placed on the cause of action.

In case law involving insurance companies there is a well-developed history of recognizing a tort remedy for breach of the covenant. Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654. Recognition of the tort remedy was based upon the existence of the special relationship existing between the insurer and insured. Seaman's Direct Serv. Inc. v. Standard Oil Co. (1984) 36 Cal. 3d 752. The Seaman's Court suggested that "(n)o doubt there are other relationships with similar characteristics and deserving of similar legal treatment (as insurance relationships)." Id. at page 769.

Thereafter, in Wallis v. Superior Court (1984) 160 Cal. App. 3d 1109, the court announced a five-part description of the characteristics of the "special relationship" which must be present in a non-insurance case in order for a cause of action for breach of the implied covenant to lie:

1. The contract between the parties must be such that the parties are in inherently unequal bargaining positions.
2. The motivation for entering the contract must be a nonprofit motivation, i.e. to secure peace of mind.
3. Ordinary contract damages must not be adequate because (a) they do not require the party in the superior position to account for its actions, and (b) they do not make the inferior party 'whole'.
4. One party must be especially vulnerable because of the type of harm it may suffer and, of necessity, places trust in the other party to perform.
5. The other party is aware of the this vulnerability.

If the allegations of the petition or the proof offered at the hearing does not go beyond a mere breach of contract, then pleading a cause of action for tortious breach of the implied covenant is superfluous. Careau vs. Security Pacific Business Credit Inc. (1990) 222 Cal. App. 3d 1371, 1395. In order for Bingham to recover for breach of the implied covenant of good faith and fair dealing under the contract action, Bingham must prove all the elements of the cause of action for breach of contract, discussed infra. Under California law, existence of the covenant of good faith and fair dealing is implied in a contract even if such a covenant is not explicitly expressed.

(f) Breach of Contract.

The elements of a cause of action for breach of contract, as succinctly set forth in Reichert vs. General Insurance Co. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, are as follows:

1. that a contractual relationship existed between the parties;
2. that the petitioner either performed what it was required to do under the contract, or was legally excused from such performance;
3. that the respondent failed to comply with the terms of the contract;
4. that the respondent's failure to perform caused the damages that petitioner complains of; and
5. that petitioner sustained actual damages as a result thereof.

FINDINGS OF FACT

A. General Findings of Fact.

8. Bingham has been a Toyota dealer in Clovis, California since 1971. In 1980, Bingham first became involved in fleet sales. Craig Tucker, the general manager of Bingham, was responsible for fleet sales.

9. Neither TMS nor TMD is in the business of selling vehicles to retail purchasers or other end users. TMD sells vehicles to enfranchised dealers such as Bingham.

10. The relationship between TMD and its enfranchised dealers is created and governed by the Toyota Dealer Agreement (the "Dealer Agreement"). The language in the Dealer Agreement was not intended by the parties to create obligations beyond those expressly stated in the Dealer Agreement.

11. TMD annually enters into a Fleet Program Dealership Enrollment Agreement (the "Fleet Agreement") with each of its dealers that desires to sell vehicles at fleet. The TMD fleet manager responsible for the San Francisco Region is Ed LaRocque.

12. In early 1989, Jim Colon, a TMS national fleet representative, contacted LaRocque and informed him that a new rent-a-car company, Anywhere America, planned to open with headquarters in the San Francisco Bay area.

13. In mid-March 1989, LaRocque met for about 30 minutes with Anywhere America's principals, Steve and Ashley Jordan.

14. On March 28, 1989, LaRocque and Colon met with the Jordans for approximately 30 minutes. Steve Jordan mentioned Citicorp as one potential financing source. Colon mentioned TMCC as another possible source. The Jordans also said they wanted a "buy-back" agreement.^{1/}

15. In mid-April, 1989, LaRocque referred Anywhere America to the Piercey Toyota dealership in nearby San Jose. Piercey Toyota subsequently declined the Anywhere America referral as it had a policy of not entering into buy-back contracts.

16. LaRocque then referred Anywhere America to Bingham. Craig Tucker was impressed with the Jordans and found them to be

^{1/} A "buy-back" agreement, such as the one contemplated here, is one whereby Anywhere America would purchase vehicles from a dealer to be used as daily rentals and, at some subsequent point in time, would resell these vehicles back to the dealer from which they were purchased.

persuasive people. Tucker decided to sell Anywhere America 125 vehicles for \$35 over dealer invoice under a buy-back contract. Anywhere America applied to TMCC for financing of these vehicles.

17. On June 22, 1989, LaRocque telephoned Robert Christian, Assistant Branch Manager of TMCC, to ask the status of Anywhere America's TMCC credit application. Christian told LaRocque that he did not expect approval of Anywhere America's application due to lack of previous credit and lack of personal guarantees from the Jordans. By letter dated June 28, 1989, TMCC notified Anywhere America that its application had been denied.

18. On July 19, 1989, Bingham telefaxed a purchase order to Anywhere America which was executed by Anywhere America and returned to TMD.

19. By letter dated July 24, 1989, LaRocque confirmed with Tucker Bingham's order of 125 vehicles to be delivered to Anywhere America. The 125 vehicles were shipped by TMD directly to Anywhere America between July 26, 1989, and August 18, 1989. The bulk of these vehicles were delivered on July 27, 1989, and August 8, 1989.

20. TMD invoiced Bingham for the 125 vehicles as they were delivered and drafted payment for the vehicles from Bingham's bank under a flooring line of credit.

21. At approximately 4:30 p.m. on July 26, 1989, representatives of Anywhere America appeared at Bingham's facility and requested to purchase more vehicles off the retail lot in addition to the 125 previously ordered. It is Bingham's position that Tucker called LaRocque, and only after LaRocque specifically represented that Anywhere America had been approved

for credit to cover the 125 vehicle order, and that they were creditworthy, did Tucker release the extra vehicles. Tucker claims Bingham released an additional 23 vehicles on the basis of LaRocque's representations. However, the evidence shows that Bingham Toyota actually sold all 148 cars on July 19, 1989, a week before the alleged misrepresentations.

22. Anywhere America defaulted on the payments of the 148 vehicles causing considerable losses to Bingham.

23. On the initial registration applications Bingham filed with the Department of Motor Vehicles ("DMV") for the 125 vehicles ordered by Anywhere America on July 19, 1989, Bingham reported Anywhere America as registered owner. Furthermore, Bingham did not report the name of TMCC, TMD, or anyone else in the blank titled "Legal owner or Lien holder" on those initial applications. The same was true of the 23 vehicles Bingham sold to Anywhere America out of Bingham's existing retail inventory. Bingham subsequently reported itself as legal owner of all 148 vehicles.

24. It is the custom and practice of TMS and TMD that after they refer a fleet customer to one of their dealers, the dealer becomes responsible for working with the prospective fleet purchaser to negotiate the terms of the sale including the source of funding.

25. It is the custom and practice of the Toyota motor vehicle fleet business for dealers to make telephone calls to the fleet purchaser's prospective financing sources, including TMCC, to inquire as to the status of pending credit applications.

27. Tucker was never told by TMCC or by either Respondent that TMCC, TMD and/or TMS were the same company or that they were working together on the Anywhere America credit application.

28. The Respondents' actions regarding the Anywhere America transactions, including the financing arrangements (or lack thereof), did not go beyond the Fleet Agreement or any Toyota policy or practice. In that regard, Respondents took the following actions: (a) mentioned TMCC and Anywhere America to each other for a possible financing relationship; (b) dropped off an envelope of blank TMCC application forms while visiting Anywhere America to deliver a demonstrator car; (c) provided TMCC with the Anywhere America's telephone number at a point where TMCC needed more credit information; and (d) telephoned TMCC to ask about the status of the credit application.

B. Findings of Fact Pertaining to Allegation of Fraud.

(a) Fraud Involving Intentional Misrepresentation.

29. On July 19, 1989, Bingham purchased 125 vehicles from TMD for sale to Anywhere America, at which time Bingham sent the purchase order executed by Anywhere America to TMD. It was not until July 26, 1989, that the alleged misrepresentation was made by Ed LaRocque at TMD, some 7 days after the purported reliance. Tucker testified that there was no other prior misrepresentations made by TMD or TMS. As such, Bingham could not have relied on these statements in formulating its decision to sell these vehicles to Anywhere America. The same is true for the 23 cars.

30. None of the documents sent by Bingham to DMV reflected TMCC as the lien holder for any of these vehicles. In addition, Bingham did not bill or otherwise seek payment from TMCC, but instead billed Anywhere America directly. There was no evidence that Anywhere America would have paid Bingham; the evidence shows that Anywhere America would not have paid and had no intention of paying.

(b) Fraud Involving Nondisclosure.

31. There was no evidence presented to establish that TMD or TMS had any reason to suspect that Bingham could not obtain the status of Anywhere America's credit application or that obtaining this information was in any way hindered. The status of Anywhere America's credit application submitted to TMCC was as accessible to Bingham as it was to TMD and TMS. Furthermore, TMD and TMS labored under the belief that this information was readily available to Bingham.

32. There were no cases cited by the parties nor does the Board know of any law which would support a determination that the relationship of the seller and purchaser of vehicles is fiduciary or "special" to justify a finding of liability under an action for fraud involving nondisclosure. Nor are there any cases holding that a franchise relationship is confidential or fiduciary. Furthermore, there is nothing in the Dealer Agreement which can reasonable be interpreted as evincing a desire by the parties to create a fiduciary relationship, nor was there any evidence from Mr. Bingham that he contemplated a fiduciary relationship.

C. Findings of Fact Pertaining to Allegation of Constructive Fraud.

33. A cause of action for constructive fraud requires proof of the existence of a fiducial or confidential relationship. As noted, Bingham failed to establish that such a relationship existed between the parties.

D. Findings of Fact Pertaining to Allegation of Negligent Misrepresentation.

34. One element necessary to establish liability for negligent misrepresentation is that the aggrieved party relied on the misrepresentations to his or her detriment. The evidence presented supports a determination that Bingham did not rely on the statements allegedly made by LaRocque in formulating its decision to sell these vehicles to Anywhere America.

E. Findings of Fact Pertaining to Allegation of Innocent Misrepresentation.

35. No evidence or law was presented to establish that a cause of action for innocent misrepresentation is recognized in California.

F. Findings of Fact Pertaining to Allegation of Breach of the Implied Covenant of Good Faith and Fair Dealing.

(a) Breach Founded in Tort Law.

36 A finding of breach of the implied covenant of good faith and fair dealing founded in tort law requires the existence of a "special relationship" as defined in the five-part test set out in Wallis v. Superior Court (1984) 160 Cal. App. 3d 1109. Furthermore, a determination must be made that the relationship was not entered into or motivated by

profit. As found above, the relationship between the parties is not as fiduciaries or otherwise "special" to support an imposition of this cause of action. Furthermore, the motive for the relationship was substantially based upon a desire by both parties to acquire a financial profit rather than non-profit, such as peace of mind.

G. Findings of Fact Pertaining to Allegation of Breach of Contract.

37. Under California law, there is implied in every contract a covenant that the parties are to act in good faith towards and to deal fairly with each other. To breach the covenant there must have been a conscious and deliberate act which frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement. (Careau v. Security Pacific Business Credit Inc. (1990) 222 Cal. App. 3d 1371 at page 1395).

38. There was insufficient evidence presented to support a determination that the parties had agreed that TMD or TMS would collect the money for the vehicles which are the subject of this petition directly from Anywhere America. Furthermore, the Board finds that neither TMD or TMS breached any provision of the Dealer Agreement or of the Fleet Agreement.

39. DMV records show that Bingham repossessed Anywhere America's vehicles pursuant to a security agreement dated July 19, 1989. On that date, a contract to sell to Anywhere America was created, on credit, the 148 automobiles involved in this litigation. Certificates of Repossession - Security Interest were filed with DMV on the cars repossessed.

DETERMINATION OF ISSUES

1. Bingham failed to establish that Respondents TMD or TMS are liable to Bingham under a theory of fraud involving misrepresentation or fraud involving nondisclosure.

2. Bingham failed to establish that Respondents TMD or TMS are liable to Bingham under a theory of constructive fraud.

3. Bingham failed to establish that Respondents TMD or TMS are liable to Bingham under a theory of negligent misrepresentation.

4. Bingham failed to establish that a theory of innocent misrepresentation exists as a cause of action in California.

5. Bingham failed to establish that Respondents TMD or TMS are liable to Bingham under a theory of breach of an implied covenant of good faith and fair dealing.

6. Bingham failed to establish that Respondents TMD or TMS are liable to Bingham under a theory of breach contract.

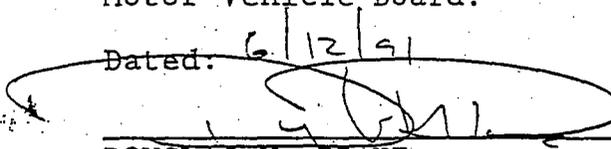
PROPOSED DECISION

THEREFORE, the proposed decision is respectfully submitted:

1. The relief sought by the petition is denied.

I hereby submit the foregoing which constitutes my proposed decision on the above-entitled manner, as a result of a hearing before me on the above dates and recommend adoption of this proposed decision as the decision of the New Motor Vehicle Board.

Dated: 6/12/91


DOUGLAS H. DRAKE
Administrative Law Judge
New Motor Vehicle Board