

JOURNAL OF **Consumer & Commercial Law**

OFFICIAL PUBLICATION OF THE CONSUMER & COMMERCIAL LAW SECTION OF THE STATE BAR OF TEXAS



**Teaching Consumer
Credit Law
in an Evolving
Australian Economy**

**Consumer Status
and Tie-in Statutes
Under the DTPA**

**Dumping the Fair
Debt Collection
Practices Act**

**The New Medical
Records Privacy
Laws in Texas**

**Recent
Developments**

Journal of Consumer & Commercial Law

Volume 16, Number 1

Fall 2012



State Bar of Texas Consumer & Commercial Law Section

University of Houston Law Center 2012-2013 Editorial Board

Student Editor-in-Chief

David Gantz

Chief Managing Editor

Justen Barks

Chief Articles Editor

Paul Kharmatz

Chief Recent Developments Editor

Jade Ortego

Senior Editors

Jennifer Park

Erin Yang

Lesley O'Connor

Jerry Mason

Contributing Editors

Ariell Hardy

John Riggs

Mili Gosar

Justine Lin

Niki Roberts

Noah Meek

Editor-in-Chief

Richard M. Alderman

Associate Dean for Academic Affairs

Dwight Olds Chair in Law

University of Houston Law Center

713-743-2165

713-743-2131 (Fax)

alderman@uh.edu

OFFICERS

CHAIRPERSON

Chad Baruch
Law Office of Chad Baruch
3201 Main Street
Rowlett, TX 75088
972-412-7192
972-412-4028 (Fax)
BaruchEsq@aol.com

CHAIR-ELECT

D. Esther Chavez
Office of the Attorney General
Consumer Protection Division
P.O. Box 12548
Austin, TX 78711-2548
512-475-4628
esther.chavez@oag.state.tx.us

TREASURER

Melanie Phipps
Kustoff & Phipps, LLP
4103 Parkdale St.
San Antonio, TX 78229
210-614-9444
210-614-9464 (Fax)
mphipps@kplegal.com

SECRETARY

Michael O'Connor
Law Offices of Dean Malone, P.C.
900 Jackson St, Ste. 730
Dallas, TX 75202
214-670-9989
214-670-9904 (Fax)
Michael.oconnor@deanmalone.com

IMMEDIATE PAST-CHAIR

Richard Tomlinson
Lone Star Legal Aid
1415 Fannin St, 3rd Floor
Houston, TX 77002-7632
713-652-0077, ext. 1154
713-652-3815 (Fax)
rtomlinson@houstonconsumerlaw.com

EDITOR-IN-CHIEF OF THE JOURNAL OF CONSUMER & COMMERCIAL LAW

Professor Richard M. Alderman
Dwight Olds Chair in Law
University of Houston Law Center
100 Law Center
Houston, Texas 77204-6060
713-743-2165
713-743-2131 (Fax)
alderman@uh.edu

COUNCIL

TERMS EXPIRE 2012

Jessica Lesser
Lesser & Jordan PLLC
15443 Knoll Trail Dr. Ste. 100
Dallas, TX 75248
214-855-9355
jessica@warybuyer.com

Rick McElvaney
100 Law Center
Houston, TX 77204-6060
713-743-1236
713-743-2131 (Fax)
rmcelvaney@central.uh.edu

Michael O'Connor
Law Offices of Dean Malone, P.C.
900 Jackson St, Ste. 730
Dallas, TX 75202
214-670-9989
214-670-9904 (Fax)
Michael.oconnor@deanmalone.com

TERMS EXPIRE 2013

Steve James
Attorney at Law
521 Texas Ave.
El Paso, TX 79901
915-543-3234
sjamatty@aol.com

Rebecca Knapik
Davis & Wilkerson P.C.
1801 S. Mopac, Suite 300
Austin, TX 78746
512-482-0614
rknapik@dwlaw.com

Eliot Shavin
4514 Cole Ave, Ste. 1015
Dallas, TX 75205
214-522-2010
214-522-7944 (Fax)
eshavin@mail.smu.edu

TERMS EXPIRE 2014

Mark Frenkel
Frenkel & Frenkel, L.L.P.
12700 Park Central Drive, Ste. 1900
Dallas, TX 75251
214-333-3333
214-265-9360 (Fax)
mark@frenkelfirm.com

Chad Pinson
Baker Botts, LLP
2001 Ross Ave, Ste. 600
Dallas, TX 75201-2980
214-953-6621
214-661-4621 (Fax)
chad.pinson@bakerbotts.com

Tina Torres
The Torres Law Firm, P.C.
110 Broadway St, Ste. 370
San Antonio, TX 78205
210-737-2672
tinactorres@aol.com

JOURNAL OF **Consumer & Commercial Law**

VOLUME 16, NUMBER 1, FALL 2012



The editors welcome unsolicited lead articles written by practicing attorney, judges, professors, or other qualified individuals. Manuscript length should be approximately 15-30 typed, double-spaced pages. Endnotes should conform to the Sixteenth Edition of A Uniform System of Citation, published by the Harvard Law Review Association.

Manuscripts should be forwarded to:

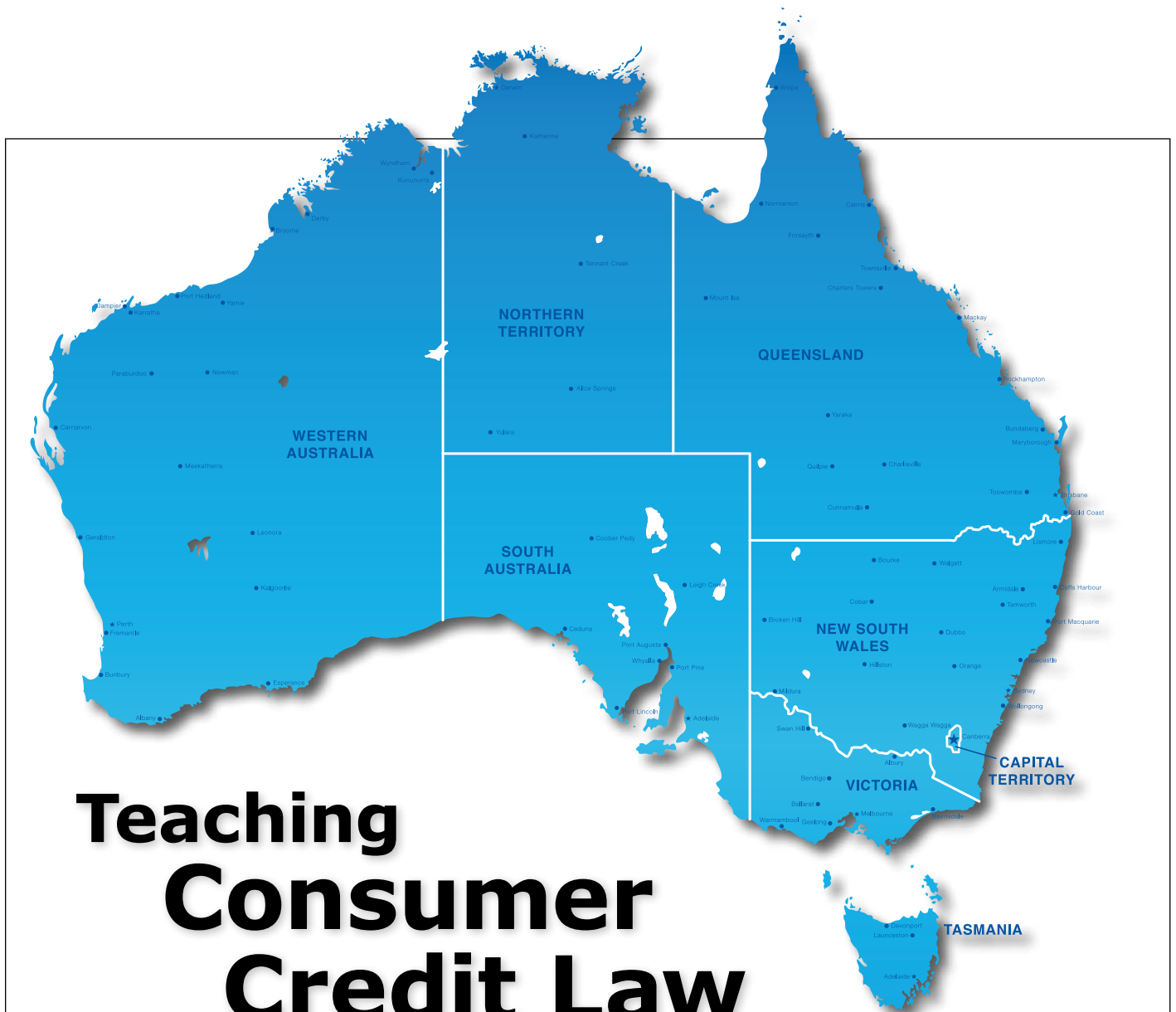
Richard M. Alderman
University of Houston Law Center
100 Law Center
Houston, Texas 77204-6060
www.alderman@uh.edu

Articles

- Teaching Consumer Credit Law in an Evolving Australian Economy
The Consumer Credit Law Practicum**
By Eileen Webb 2
- “I Think They Mean It” The New Medical Records Privacy Laws in Texas**
By B. Joyce Yeager 9
- Consumer Status and Tie-in Statutes Under the DTPA: Or a Claimant’ Right to Sue Under the DTPA**
By Andrew E. Sattler 18
- Dumping the Fair Debt Collection Practices Act: The Case for Using State Law to Fight Abusive Debt Collection Practices**
By Justin P. Nichols 26
- Consumer News Alert-Recent Decisions** 34
- Is Sending Notice Within Three Years Sufficient to Preserve Rescission Rights Under Truth-in Lending? Why Not?**
By Steven Herrera 37

Recent Developments

- Deceptive Trade Practices and Warranties 42
- Insurance 45
- Consumer Credit 46
- Debt Collection 47
- Arbitration 50
- Miscellaneous 53
- The Last Word 56



Teaching Consumer Credit Law in an Evolving Australian Economy

The Consumer Credit Law Practicum

By Eileen Webb*

"...[W]hile there is some debate about the role of university education, it is generally agreed that the basic function of a law school is to prepare students for the practice of law...and that legal education should focus on what lawyers need to be able to do."¹

Australian consumer and credit law has experienced a metamorphosis with the implementation of the National Consumer Credit Protection Package (NCCPP)² and the Australian Consumer Law (ACL). The scale of these developments has necessitated that Australian consumer law academics review (and substantially rewrite) their courses and, in some cases, reconsider traditional teaching approaches. Against a background of a "patchwork" domestic economy and lingering global financial uncertainty, it is more important than ever to link course content to contemporary events and highlight the significant role that Consumer Law plays in these unfolding events.

This paper focuses on a Consumer Credit Practicum that has been developed by the Consumer Law teaching team on the Faculty of Law at the University of Western Australia.³ The Practicum was developed to enhance the study of Consumer Credit Law in the undergraduate law curriculum. The project was undertaken for two reasons. First, the scale of the NCCPP reforms necessitated a wholesale review of the consumer credit component of the consumer law course. This review revealed that more time would be required to teach consumer credit law in a meaningful way. Second, the UWA Law School has not, until relatively recently, embraced practical components in most undergraduate units.⁴ The Practicum was regarded as a step in this somewhat neglected direction.

Practical Skills Within the Law School Curriculum

The face of legal education in Australia is evolving.⁵ There is pressure to provide quality professional education within an environment of shrinking budgets and rising student numbers. Increasingly, students expect that they graduate "work-ready" and, more and more, legal firms are demanding the same. Indeed, research into legal education has noted the efficacy of using the acquisition of work skills as a framework for organizing the legal curriculum.⁶ Practical legal skills are an essential part of such a framework.⁷

Such views are reflected in recent enquiries into legal education in Australia and abroad. In 2007, *Best practices for legal education: A vision and a road map* (the Stuckey report) recommended a number of best practices in legal education, many of which referred to legal skills.⁸ More recently, *Educating Lawyers - Preparation for the Profession of Law*, a report from the Carnegie Foundation for the Advancement of Teaching, called for integrated learning experiences, which combine the teaching of legal doctrine, legal skills and professional identity.⁹ In this respect it has been noted recently that:

This report reinforced what many in the legal academy believe about the traditional curriculum in American law schools: that law schools have focused too much on teaching students to "think like lawyers" and not enough on applying those thinking skills in the complexity of professional practice or on other critical social skills necessary for effective practitioners.¹⁰

In an Australian context, similar discussions have been taking place for some time. For example, in 1999 the Australian Law Reform Commission¹¹ noted that legal education should focus on what lawyers need to be able to do rather than on what they need to know.¹² It was noted that clinical and high-order

skills training programs were required to supplement classroom instruction on substantive law, and to provide students with an appreciation of the nature of "law as it is actually practiced"—including the social dimension and the ethical dilemmas which may arise.¹³

In the not too distant past, Australian law school curriculums were predominantly doctrinal, with the responsibility of imparting professional skills relegated to practice courses or legal firms during clerkship. The past 20 years have seen a heightened recognition of the desirability of teaching skills within undergraduate programs, although putting this ideal into practice is inconsistent. Some universities offer a comprehensive clinical experience through on-site legal clinics,¹⁴ or placements in community legal centers¹⁵ or law firms.¹⁶ Others may incorporate skills within units in varying ways. At the other end of the spectrum, many law schools offer little in the way of practical experience.¹⁷ It is fair to say that, to date, UWA has been one of the latter instances. The approach has been very traditional and "black letter"; the exception being the excellent "Commercial Practice" and "Procedure" units undertaken in the final year of the undergraduate program. Although these latter units are comprehensive and taught by experienced practitioners, the problem is that there have been few practical or clinical activities in other units. The consumer credit practicum is a small step in, what the consumer law teaching team regards as, the right direction.¹⁸

The Consumer Credit Practicum – An Overview

The Consumer Credit Practicum seeks to enhance and enliven student learning by importing a practical, case-based component into the undergraduate consumer law unit. Consumer credit legislation and case law are important elements of the consumer law unit. Their inclusion as a practical component will necessarily mean students will need to research, understand and apply the law to real life situations. Groups of four students are required to familiarise themselves with a particular aspect of substantive consumer credit law while working through a simulated file, from initial instructions to a final letter of advice. The consumer credit practicum runs alongside the tutorial program over a period of eight weeks. As well as requiring students to work through the relevant law, the project introduces a variety of basic legal skills, such as client interviewing, file management, and drafting letters of advice. Other desirable skills, such as time management, communication, and working within a team will also be integral to the project.

As an interesting aside, the practicum has been introduced during a period of considerable national and international tension regarding the misuse of credit, and in an Australian context, an almost unprecedented overhaul of consumer and consumer credit laws. It is instructive at this stage, therefore, to provide some explanation of the recent developments in the Australian legal landscape in relation to consumer credit.

Recent Developments in Australian Consumer and Consumer Credit Law – An Overview

Consumer Credit

In this context it is useful to note that although Australia did not suffer the worst of the Global Financial Crisis, Australians have increasingly become indebted through credit taken out for,

inter alia, housing loans, personal loans, and credit cards. Indeed, Australians have one of the highest rates of per capita indebtedness in the world.¹⁹ The NCCPP has been introduced in two tranches. The first tranche was introduced in 2009. In summary, the *National Consumer Credit Protection Act 2009*²⁰ has seen responsibility for the regulation of credit ceded by the states and territories to the Commonwealth; the Uniform Consumer Credit Code (UCCC) replicated in Commonwealth legislation as the National Credit Code (NCC); the imposition of both licencing and responsible lending requirements on lenders, brokers and associated persons, and an expansion of the Australian Securities and Investments Commission's (ASIC) powers of investigation and enforcement. The second tranche is in the process of being implemented and will address unsolicited credit card limit extension offers, interest rate caps, and reverse mortgages.²¹ It is anticipated there will also be some form of regulation of credit to small businesses.²²

The Australian Consumer Law

After 35 years, the *Trade Practices Act 1974* was replaced by the *Competition and Consumer Act 2010* (CCA). Schedule 2 of the CCA contains the Australian Consumer Law, now the preeminent piece of consumer protection law in Australia. The ACL introduced a prohibition of unfair contract terms in standard form contracts,²³ enhanced product liability, and consumer guarantee provisions. It has also enhanced protections, remedies, and enforcement powers. In many cases the *Australian Securities and Investments Commission Act 2001* has been amended to include these equivalent provisions in relation to financial services. For example, unfair contract terms in financial agreements are prohibited.

The Impact of These Recent Developments on Consumer Law Courses

General Observations

For academics teaching consumer law courses, these developments have necessitated a substantial revision of the content of the courses and materials. This is especially the case in relation to consumer credit, which, unjustifiably, has often been regarded as a "Cinderella" component of the broader consumer law courses.²⁴ Consumer credit is a discrete area often taught towards the end of the semester. The law is, for the most part, separate from that which the students study throughout the semester, although there is some overlap.²⁵ For example, while the *National Consumer Credit Protection Act 2009* operates separately from the ACL, there are equivalent provisions in the *Australian Securities and Investments Commission Act 2001* prohibiting unconscionable conduct, misleading or deceptive conduct, unfair contract terms, and harassment. These prohibitions are dealt with in depth while discussing the ACL and the equivalent provisions referred to in the NCCPP.

The UWA Experience

UWA offers two elective units relevant to consumer law. The first is the standard undergraduate unit that is required to cover most of the generic consumer laws and some consumer credit law. Traditionally, assessment took the form of a tutorial presentation and an end of semester examination. The other course is "Current Issues in Consumer Law and Policy" (Current Issues). Current Issues is available to undergraduate and postgraduate students and is offered as a four-day intensive

program. This unit changes annually to reflect variations in consumer law and delves deeply into topical consumer issues. There is much more freedom in this unit in relation to content in comparison to the undergraduate program. Each year there is a theme, and a distinguished visitor teaches a portion of the course. For example, in 2010, there was an international focus, with Professor Christine Reifa teaching classes involving consumer laws in the European Union and making comparisons to the "harmonization" of Australian consumer laws in light of the NCCPP and ACL. In 2011, the focus was on unfair contract terms, a significant innovation for the Australian consumer law, and salient points regarding the NCCPP. Assessment is by a research essay. Most students who study Consumer Law choose to also take Current Issues in either the same year or the following year.

While the Current Issues course is highly interactive, the Consumer Law course has, to date, been taught in a traditional lecture style. This is of necessity because the numbers are large for an elective unit (around 120) and the classes are scheduled in lecture halls. There is an awareness of the necessity of covering an ever increasing and weighty bank of material. Consumer Credit was becoming increasingly consigned to the final two weeks of the semester and tended to be regarded by students as almost a separate subject, detached from other aspects of consumer law regulation.

With the new consumer credit regime in Australia, it is essential that students acquire an understanding of the new legislation and its practical application. To this end, we have removed the consumer credit component from the final weeks of the Consumer Law course and replaced it with a practical group exercise. The exercise requires each group to research a particular aspect of consumer credit law, write a memorandum of advice addressing that problem, and perform (depending on the problem) an additional task (completing a hardship variation, for example). Our objective is that consumer credit will now become a focal point of the course rather than a hurried add-on at the end of the course.

The Consumer Credit Practicum

Development

For the reasons outlined above, in 2011 the Consumer Law teaching team resolved to raise the profile of consumer credit within the consumer law unit. We also had some reservations about the lack of practical components in UWA's graduate program. Developments in the law provided an impetus to introduce teaching strategies that addressed the new regulatory framework in a meaningful way. Because we would not be allocated more teaching hours, we pondered whether the students could, to some extent, teach *themselves* consumer credit through a practical exercise. There were a number of factors that encouraged us. Our close involvement with the Consumer Credit Legal Service (WA)²⁶ meant we could access the expertise of the legal practitioners and a bank of practical material. The Centre for Advancement of Teaching and Learning (CATL) at UWA was encouraging academics to develop innovative teaching strategies within traditional units. The evolving domestic and global economic situation, and in particular the emphasis on consumer credit and debt, offered a topical contemporary context against which the operation of the laws could be examined and



a practical exercise designed.

In late 2011, the consumer law teaching team received a small grant from CATL to develop a consumer credit practicum. The Consumer Credit Legal Service (WA) embraced the project and offered advice and assistance in order to ensure that scenarios were as true to life as possible and that the student matters would run in a realistic way. The team resolved that in 2012, the assessment in Consumer Law would include a practical exercise based on consumer credit law and legislation.

Potential Impact on Student Learning

One of the difficulties encountered when teaching law is how to provide an effective teaching method to relate substantive law to real world problems. Unfortunately, in Australia, there is often a debate as to the desirability of student participation as opposed to substantive content, and they are often seen as mutually exclusive. In this project we hope to achieve both. The practicum aims to introduce clinical aspects into a traditional consumer law course. Student learning will be enhanced by:

- Developing legal skills within a realistic scenario;
- Experiencing realistic scenarios based on actual cases;
- Enhancing understanding of substantive content; and
- Considering the interrelation of legal and non-legal issues.

Students will be exposed to a variety of skills, including client interviewing, legal research, thinking strategically, and writing letters of advice. Students will be required to work in teams, as is often the case in legal practice. Class participation will increase the substantive coverage because students will have an incentive to engage in active learning.

There is another factor that we anticipate will impact student learning and perspectives. The nature of the project, which will draw scenarios from a community legal center, will expose students to the problems experienced by a broad spectrum of clients, including low-income and the elderly. This is important, as often students' initial response to a legal problem is to go to court without considering other avenues, or the fact that, quite simply, their client may not be able to afford to do so. An emphasis in this project is for students to look for alternatives to court proceedings, whether through a negotiated settlement, seeking assistance from a relevant ombudsman or financial counsellors.

Students' Aversion to Group Projects

Some students were very concerned that the consumer credit practical exercise was a group assessment. It seems many students had had bad experiences with group projects. One of the main concerns was that some group members would not work as hard as others.²⁷

To address that concern, we recommended that, before the first group meeting, students work through the Communication and Research Skills (CARS) "Work in Teams" tutorial. The content is based on the UWA Communication Skills Framework and was developed by Information Services and the StudySmarter team in consultation with academics.²⁸

What is CARS?

CARS1000 is one of three online units that are compulsory for new UWA students. Students in Consumer Law are not new students so they are

not obligated to complete CARS or to undertake the associated assessment. Nevertheless, we strongly recommended that the students avail themselves of the facility. The online units are:

- ACE - Academic Conduct Essentials,
- ISE - Indigenous Study Essentials, and
- CARS - Communication and Research Skills²⁹

CARS content is openly available via www.cars.student.uwa.edu.au. There are five modules in CARS, the fifth of which is titled *Working in Teams*.³⁰ There are five tutorials in *Working in Teams* including: Understanding personal approaches, team interaction, and using feedback to improve performance.

While not all of these matters are relevant to the Consumer Credit Practicum, the feedback so far has been that the modules were of assistance. We are anticipating a positive response about CARS when we embark upon the feedback session in week 13 of the semester.

The Logistics and Presentation – Organizing the Exercise and “Getting it Out There”

One of the conditions of the grant was that we had to utilize the university's online learning facilities. One of the aims was to make the Practicum as paperless as possible. Therefore, all materials, communications, and activities had to be online and the final assessment items would also be submitted online. To this end, we embraced the resources offered by CATL through the Moodle system. The University of Western Australia has recently moved from WebCT to Moodle. UWA's Moodle platform provides staff and students with a wider array of learning tools, and a simpler, cleaner user interface than WebCT.

Rather than a separate website for the exercise, we decided to link the practicum to the Consumer Law LMS site. A special area was allocated to the practicum. The website features an overview of the project, its aims and objectives, a week by week timetable, and links to the relevant legislation, government and community sector reports, and pertinent websites. The manual (see below) and the various tasks are placed on the website. Submissions are made online and not in hard copy.

Apart from the details explaining the exercise, the website also provided the opportunity to organize our "groups within groups." Each tutorial group of 12 was divided into groups of four for the exercise. Each group (30 in all) were allocated their own space on the website and could communicate regarding their particular tasks in confidence. Although students were encouraged to meet and discuss the exercise, it was possible for them to chat online with other group members or instructors about their tasks.

The Course of the Exercise

The exercise required a considerable amount of preparation prior to going "live" online.

Preparation of Basic Scenarios Based on Case Studies Provided by Consumer Credit Legal Service of WA

We were fortunate to have the assistance of CCLSWA in designing the practicum. Solicitors at CCLSWA reviewed their completed files and identified a considerable number that were appropriate for students and which contained pertinent issues affecting credit consumers. Faculty reviewed the files and chose 15 different files



(two groups would undertake the same tasks) on which problem scenarios were based. Obviously, names were changed and facts altered to ensure client privacy and to make the tasks manageable for the students.

The Preparation of a Manual for Use by the Students During the Exercise.

The manual includes a summary of the substantive law, material relevant to file management, client interviewing, and legal writing. Clearly, a priority for us was to ensure the students received a basic introduction to the new laws before undertaking the practicum. We were mindful that we needed to provide an appropriate introduction to the area without undermining the self-directed learning we wanted to achieve.

To this end, we prepared summaries and resources to assist students in embarking on their tasks. We included an overview of Australian Consumer Credit Law, historical material, extracts of the legislation, and an overview of the new legislative scheme. The following materials specific to particular problems were provided:

- Responsible lending
- Hardship variation
- Asset lending
- Debt collection
- Payday lending
- Banking Code of Practice
- Financial Ombudsman Service
- Credit Ombudsman Service
- Telecommunications Ombudsman Service
- Financial Counsellors

One (2-hour) Introductory Lecture

To ensure students understood the nature of the practicum and the basic material, we held one introductory lecture. This was the only formal lecture on consumer credit for the semester. During the first hour of the lecture, the academic staff spoke about the project, its aims, and the assessment process, and provided a brief framework of Australian consumer credit laws and associated legislation. The second hour was a presentation from a representative of the CCLSWA regarding its role in dealing with clients and case management. The purpose of this presentation is to provide students with practical insights and information from a practitioner in the field. We anticipate the presentation will assist this process through an introduction to the nature of CCLSWA's responsibilities and client base, as well as the importance and practice of "day-to-day" tasks such as file management and client interviewing.

Preparation and Submission of the File and Letter of Advice

Students were required to keep a paper file and an e-file. The paper file contains relevant correspondence, documents, and research, and is reviewed by the academic staff throughout the project. A small portion of the marks allocated for the project will be for file management. Students are required to submit the assessable items from the exercise (in their e-file) online.

Provision of Feedback

The first memorandum of advice was prepared and submitted in April. It will be used as a model to assist students in preparing their own memorandums.

Presentation of Findings by Student Groups

Upon completion of the project, each group will present a brief overview of their problem and their findings. Also, to ensure

Although at the time of writing the practicum was yet to be completed, we are already looking forward to improving, supplementing, and streamlining the project for 2013.

that students receive a bank of material on consumer credit, the submissions for all the problems will be posted online. Therefore, students will have access to a considerable amount of material involving a variety of consumer credit scenarios.

Assessment of the Project's Effectiveness

After completion of the practicum, we will reflect on the project by:

- (i) Seeking written feedback from all students;
- (ii) Organising a small discussion group of students (perhaps one from each group and others, if interested);
- (iii) Discussion and review from the Teaching and Learning Committee (Law)

Dissemination of Information About the Project

We hope to share our experience in developing the practicum with others and seek advice so we can improve it in years to come. This conference is a wonderful start and we are grateful for the opportunity to be involved. We are writing a journal article about the practicum and are speaking about it at local and national teaching forums.

Project Sustainability

Once established, the project will be able to continue in subsequent years without continued funding. The manual will simply require annual updating by members of the faculty. New case examples will be provided annually by CCLSWA. After working with CCLSWA representatives to initiate the project in 2012, the academic staff will be well equipped to prepare new scenarios from case studies in subsequent years. The specialist lecture will be recorded for repeated use, although CCLSWA has offered to attend each year. The manual will be available online, so there will be no upfront or recurring printing costs; and the Consumer Law teaching team are members of the Management Committee of CCLSWA and are in regular contact with the organization.

Hopes for the Future

Although at the time of writing the practicum was yet to be completed, we are already looking forward to improving, supplementing, and streamlining the project for 2013. We have already discovered several matters we will approach differently in coming years and we are sure we will learn more after the feedback sessions with the students. So far we have recognized:

- The importance of very specific instructions. This sounds obvious, but even with the most careful crafting of instructions, students are likely to come up with multiple interpretations;
- The benefits of working in groups. Despite some grumbling about the group allocations, which were for the most part random, we believe this is a useful exercise, as practitioners must learn to work with a variety of people and personalities.
- The need to make scenarios as lifelike as possible. For example, we hope to improve the client-interviewing component to make it more realistic, and include an assessable component for client interviewing.
- The importance of making students feel "part" of the project and place emphasis on their feedback

and ideas. In 2013, a reflective component may be included in the assessable items.

For the most part, however, we are pleased with how the practicum has progressed.

Conclusions

We realize that, given the sophisticated legal clinics many of you are involved with, our practicum may seem rather elementary. It is, however, a significant step for the UWA law school and a sign, we hope, of much more to come. We welcome any feedback or advice as to how we could improve our practicum and enliven our students' learning and engagement with consumer credit law.

** Eileen Webb is on the Faculty of Law in the Consumer Research Unit at the University of Western Australia. The author would like to thank Aviva Freilich, Faculty of Law UWA and Julian Mould Trainer/Educational Developer Centre for Advancement of Teaching and Learning UWA (CATL) for their advice and comments on an earlier draft of this paper. All errors are the responsibility of the author.*

1 McNamara, Judith *A Collaborative Model for Learning and Assessment of Legal Placements* (2009) World Conference on Collaborative Education and Work Integrated Learning, 23-26 June 2009, Vancouver Canada http://www.apjce.org/files/APJCE_10_3_229_240.pdf accessed 10 May 2012 citing R. Stuckey, **Best Practices for Legal Education: A Vision and a Road Map**. 2007 Columbia, SC: Clinical Legal Education Association and Australian Law Reform Commission **Report No. 89 Managing Justice: A Review of the Federal Civil Justice System** (2000) Canberra.

2 Sometimes also referred to as "The National Consumer Credit Reform Package" or "The National Consumer Credit Project." Stage one of the implementation process comprised three pieces of legislation: *The National Consumer Credit Protection Bill 2009 (Credit Bill)* which replicates the current UCCC as the National Credit Code; *The National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009*; and *The National Consumer Credit Protection (Fees) Bill 2009*.

3 The Consumer Law teaching team at UWA is comprised of Aviva Freilich and Eileen Webb.

4 The Consumer Credit Practicum is a step in this direction. Also, the Contract Law teaching team has implemented a substantial negotiation component into the Contract Law program.

5 See generally, Jeff Giddings *Clinical Legal Education in Australia: An Historical Perspective* (2003) 3 Int'l J. Clinical Legal Educ. 7; Jeff Giddings, *Contemplating the Future of Clinical Legal Education*. Griffith Law Review, 2008 17(1), 1-26.

6 K Douglas and B Johnson *Legal Education and E-Learning*; 2010 17(1) eLaw Journal: Murdoch University Electronic Journal of Law 29

7 "...[I]nterviewing clients; legal analysis and problem solving; legal research; writing clear and concise letters and legal documents; advising clients on dispute resolution options; representing clients in negotiations and mediations and presenting a client's case persuasively in court." Bobette Wolski, **Legal Skills: A Practical Guide for Students** (Law Book Company 2006) preface cited by Douglas and Johnson cit n 7.

8 Stuckey, op cit n 2.

9 William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond, Lee S. Shulman *Educating Lawyers: Preparation for the Profession of Law*, 2007 Jossey-Bass, USA.

10 Turning Law Students into Lawyers, <http://www.thecompletelawyer.com/turning-law-students-into-lawyers.html> accessed 10 May 2012.

11 ALRC op cit n2.

12 McNamara op cit n 2.

13 National Probono Research Centre Information Paper: *Pro Bono and Clinical Legal Education Programs in Australian Law Schools* 2004 www.nationalprobono.org.au accessed 10 May 2012, page 6.

14 For example: the University of NSW, University of Newcastle and Murdoch University. Please note these universities are noted as examples— this is not to say that other institutions are not operating similar programs.

15 For example: Griffith University. Please note these universities are noted as examples— this is not to say that other institutions are not operating similar programs.

16 For example Queensland University of Technology and the Work Integrated Learning (WIL) program. See generally Judith McNamara, *Internships: Effective Work Integrated Learning for Law Students*, Special Issue: 10th Anniversary Edition of the Asia-Pacific Journal of Cooperative Education.

Selected Papers From the 2008 Biennial Asia-Pacific Conference on Cooperative Education – Manly, Australia. http://www.apjce.org/files/APJCE_10_3_229_240.pdf accessed 10 May 2012. Please note these universities are noted as examples— this is not to say that other institutions are not operating similar programs.

17 These are often in the more established law schools. National pro bono Research Centre Information Paper: *Pro bono and clinical legal education programs in Australian law schools* 2004 www.nationalprobono.org.au

18 See generally, K Barton, P McKellar and P Maharg *Authentic fictions: Simulation, professionalism and legal learning* (2007-2008) *Clinical Law Review*, 14.

19 See generally, Van der Eng, P, *Consumer Credit in Australia during the 20th Century* 2008 18 *Accounting Business and Financial History* 243; Singh, S, Myers, P, McKeown, W and Shelly, M, *Literature Review on Personal Credit and Debt in Australia - Families at Risk Deciding on Personal Debt* 2005 RMIT <http://mams.rmit.edu.au/fjefpb2zv2q7.pdf>.

20 *National Consumer Credit Protection Act 2009 Cth*

21 It is anticipated that the second phase will be implemented by mid-2010. http://www.treasury.gov.au/documents/1381/PDF/NCC_Brochure_02102008.pdf; Keynote Speech at 2009 National Consumer Congress, Adelaide 13 March 2009.

22 Commonwealth Treasury, *Consumer Credit Reform Green Paper, National Credit Reform - Enhancing confidence and fairness in Australia's credit law* <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2010/085.htm&pageID=003&min=ceba&Year=&DocType> accessed 10 May 2012.

23 *Australian Securities and Investments Commission Act 2001 (Cth)*.

24 This is a generalization; indeed the Consumer Law course at Monash University focuses on consumer credit law. The treatment of consumer credit law in the Griffith University undergraduate program is also comprehensive.

25 For example, the ASIC legislation contains equivalent prohibitions in relation to misleading or deceptive conduct, unconscionable conduct and unfair contract terms.

26 Consumer Credit Legal Service (WA) Inc. (CCLSWA) commenced operation in February 1991 as a specialist community legal center advising Western Australian consumers in the area of banking and financial services. CCLSWA is a not-for-profit charitable institution. The Service provides legal advice to the Western Australian public over the telephone through the credit helpline. The Service also provides telephone advice to financial

and rural counselors. Where appropriate, the Service represents clients in legal proceedings in the courts and State Administrative Tribunal. The Service also assists consumers to access dispute resolution bodies such as the Financial Ombudsman Service, Credit Ombudsman Service and the Magistrates Court.

CCLSWA is also active in the area of community legal education. Through the use of the media, seminars and publications, the Service is able to raise general public awareness of consumer rights in the area of credit, banking and financial services. In addition to educating the general community, the Services takes an active role in training financial counsellors and other community workers through seminars on legal issues and input into training materials.

27 N Webb, *Group Collaboration in Assessment: Competing Objectives, Processes, and Outcomes* 1994 CSE Technical Report 386 (Los Angeles: National Centre for Research on Evaluation, Standards, and Student Testing).

28 http://www.catl.uwa.edu.au/projects/communication_skills_framework

29 You can see information about these 3 units at <http://www.student.uwa.edu.au/learning/resources>.

30 1. Start your assignment <<http://www.cars.student.uwa.edu.au/module1>>

2. Find the best evidence <<http://www.cars.student.uwa.edu.au/module2>>

3. Write your assignment <<http://www.cars.student.uwa.edu.au/module3>>

4. Deliver your oral presentation <<http://www.cars.student.uwa.edu.au/module4>>

5. Work in teams <<http://www.cars.student.uwa.edu.au/module5>>



“I Think They Mean It”

By B. Joyce Yeager*

The New Medical Records Privacy Laws in Texas

A. Introduction

Revisions to the Texas Medical Records Privacy statute¹ which take effect on September 1, 2012, expand existing requirements for those who have access to medical information pertaining to others.² House Bill 300 (hereinafter, “HB 300” or “the Act”) provides that covered entities, as defined in the statute, must comply with expanded responsibilities pertaining to health information.³ The Act imposes upon these covered entities additional duties beyond those which are dictated by the federal Health Insurance Portability and Accountability Act of 1996 (hereinafter, “HIPAA”).⁴ Because the state statute affords additional protections beyond those provided by HIPAA, no federal preemption issue should exist.⁵

Penalties for failure to comply are substantial and include civil monetary penalties, the potential for loss of professional licensing, and even the potential for state law criminal felony prosecution. Entities and individuals within the State who have access to medical information of others have significant new responsibilities. It appears as though the legislature is serious about the protection of state residents’ personal medical information and identifying demographics.

B. The Purpose of the Act? Protection

Expressing a concern for the potential for sale or unauthorized disclosure of personal health information, the legislature places tight restrictions on the manner in which patient data may be shared. The legislature noted:

“Provisions of recent federal legislation establish incentives designed to increase the adoption of electronic health record systems among certain health care providers. The expanded use of such systems is likely to lead to the expansion of the electronic exchange of protected health information, which may require stronger state laws to better ensure the protection of that information. [H.B. 300] seeks to increase privacy and security protections for protected health information.”⁶

In light of the concerns, the legislature mandates authorization before a provider may transfer patient data.⁷ H.B. 300 is intended to provide Texans with significant additional protections beyond those provided by the federal HIPAA privacy, rule and Texas intends to be among the vanguard in health privacy regulation.⁸

The need for protection is obvious. One private, national study estimates that as many as 96 percent of all 72 health care providers which it surveyed indicate that they experienced a data breach in 2011, and that lost and stolen security devices and employee actions account for almost half of the breaches.⁹

C. The Statute’s Elements, an Overview

C.1. What is Covered? What is PHI?

The Act defines an individual’s protected health information, for a governmental entity, to include any information that reflects that an individual received health care from a covered entity that is not public information subject to disclosure by Chapter 552 of the Government Code.¹⁰ For others, the definition of “protected

health information” is engrafted from HIPAA.¹¹

The Act incorporates the HIPAA provisions in effect as of September 1, 2011.¹² The Executive Commissioner of the Texas Health and Human Safety Commission is to determine whether it is in the best interest of the State to adopt any amendments made to these federal provisions which might be made at the federal level after September 1, 2011.¹³ As defined in HIPAA, individually identifiable health information includes demographic data and health information created or received by a health care provider, a health plan, or health care clearinghouse which relates to:

1. An individual’s past, present or future physical or mental health or condition;
2. The provision of health care to an individual;
3. The past, present or future payment for the provision of health care to the individual; and
4. The identity of the individual or with respect to which there is a reasonable basis to believe it can be used to identify the individual.¹⁴

Health information means any information, whether oral or recorded *in any form or medium*, that:

1. Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and
2. Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.¹⁵

HIPAA defines a health care provider as “a provider of medical or health services and any other person or organization who furnishes, bills, or is paid for health care in the normal course of business.”¹⁶ Protected health information, in turn, is defined as individually identifiable health information that is:

1. Transmitted by electronic media;
2. Maintained in electronic media; or
3. Transmitted or maintained in *any other form or medium*.¹⁷

Excluded from this definition of protected health information is information within certain educational records and in employment records.¹⁸

Because the Act incorporates the provisions of HIPAA, a more thorough discussion of HIPAA is required for this article. This article will not directly address, however, provisions of related federal laws commonly referred to as HITECH, the AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 (AARA), PUB. L. NO. 115-5, 123 STAT. 115, HEALTH INFORMATION TECHNOLOGY FOR ECONOMIC AND CLINICAL HEALTH (HITECH ACT), SECT. 13000, *ET SEQ.* (FEB. 17, 2009). Detailed analysis of the HITECH provisions and the Act are beyond the scope of this overview article. For a discussion of HITECH and the Texas Privacy Laws, see, Patricia Gray, *Implementing Privacy and Security Standards in Electronic Health Information Exchange*,

C.2. Who is covered? Who is a covered entity?

Section 181 in the Medical Records Privacy statute, will continue to define a “covered entity” to be *any person* who:

1. For commercial, financial, or professional gain, monetary fees, or dues, or on a cooperative, nonprofit, or pro bono basis, engages, in whole or in part, and with real or constructive knowledge, in the practice of assembling, collecting, analyzing, using, evaluating, storing, or transmitting protected health information;
2. Comes into possession of protected health information;
3. Obtains or stores protected health information under the federal statute and regulations; or
4. Is an employee, agent, or contractor of one of these persons who creates, receives, obtains, maintains, uses, or transmits protected health information.¹⁹

This includes a business associate, health care payer, governmental unit, information or computer management entity, school, health researcher, health care facility, clinic, health care provider, or person who maintains an Internet site.²⁰ The Texas Medical Records Privacy statute, then, regulates anyone who comes into possession of personal health information (“PHI”) or is an employee, agent, or contractor who creates, receives, obtains, maintains, uses, or transmits PHI. There are exemptions in the state act for:

1. Workers compensation plans and self-insured workers compensation plans;
2. Employee benefits plans;
3. Educational records covered by the Family Educational Rights and Privacy Act;²¹
4. Non-profits who pay for indigent medical care but have no medical primary purpose;
5. Processors of payment transactions in financial institutions; and
6. Handlers of criminal offenders with mental impairments.²²

After the effective date of HB 300, also excluded from coverage of the Act will be those involved with crime victim compensation.²³

C.3. What activities are restricted? Disclosure, sale.

C.3.1. Disclosure

It is important to note one key provision of the Act. The Texas statute contains one profoundly impactful, although seemingly innocuous, provision. The state statute defines the word “disclose” to mean any action to “release, transfer, provide access to, or otherwise divulge information outside the entity holding the information.”²⁴ It is critical to fully absorb the impact of this definition. Anyone who transfers information, divulges information, or provides access to information must be aware of the implications for doing so without an authorization. Taken in its literal meaning, the definition of disclosure is so broad that it would encompass almost any activity whereby health information or demographics of others is involved. Any information about an individual’s condition, care, payment, or identity is protected from being divulged or being accessed, no matter the form in which it might be maintained. Any covered entity, including associates of a covered entity, is affected by the statute in some manner. Exceptions are limited and the breadth of the statute’s reach is staggering.

C.3.2. Sale of information

Of even greater significance is the Act’s strict ban on the sale

of protected health information. A covered entity may not disclose an individual’s protected health information to any other person in exchange for direct or indirect remuneration.²⁵ Exceptions only allow disclosure to another covered entity under the statute or a covered entity under the Insurance Code for treatment, payment, health care operations, and insurance or certain HMO functions or as otherwise authorized or required by law.²⁶ Further, any charges for the disclosure for treatment, payment, health care operations, or to perform an insurance function cannot exceed the covered entity’s reasonable costs in preparing and transmitting the PHI.²⁷

Because the Act restricts *disclosure* of health information for even *indirect* remuneration, more than an outright ban on the sale of information is restricted. The Act restricts any transfer which results in even indirect financial gain which is not associated with treatment, payment, operations, insurance, or for compliance authorized by law or required by law.²⁸ The outright ban on disclosure for even indirect remuneration does not have any mechanism for allowing for disclosure, not even after notice and consent or authorization. Rather, the disclosure for remuneration is flatly banned. Because the Act would ban even indirect remuneration, it is possible that the Act would implicate, for example, social media interactions or advertising in the form of patient testimonials even if these are the result of patient consent or even the result of patient initiated activity.

The ability to engage in activities which might result in indirect remuneration with the consent or authorization of the owner of the information and to do so because those actions are protected constitutionally as, for example, free speech or commercial speech, is beyond the scope of this overview article. For discussion of such principles, *see, e.g., Sorrell v. IMS Health, Inc.*, ___ U.S. ___, 131 S.Ct. 2653 (2011). In *Sorell*, the United States Supreme Court determined that restrictions on the sale, disclosure, and use of pharmacy records as attempted by implementation of VERMONT’S PRESCRIPTION CONFIDENTIALITY LAW, Vt. Stat. Ann., Tit. 18, 4631(d), was unconstitutional because the statute, which imposed content-based and speaker-based burdens on protected expression, banned sales of the information to only some potential users.

D. What additional duties are imposed? Consumer Access, Notice, Training

D.1. Patient access to records

The Act provides that if a health care provider is using an electronic health care records system that is capable of fulfilling the request, the health care provider, no later than 15 business days following the written request for an electronic health care record, must provide the information electronically unless the person making the request agrees to accept the record in another form.²⁹ An exception is available for records exempt pursuant to 45 C.F.R. § 164.524 for specific types of records such as certain psychotherapy notes, information compiled for use in certain legal proceedings, and certain select laboratory records.³⁰

The Executive Commissioner of Texas Health and Human Services, in consultation with the Department of State Health Services, the Texas Medical Board, and the Texas Department of Insurance may recommend a standard electronic format, but any format recommended must be consistent with federal law regarding the release of medical records.³¹ As of this writing, the Executive Commissioner’s Office had not yet made a determination concerning the undertaking of this unenviable task.³² There can be no doubt that the choice of the word “may” in the statute was an intentional one.

D.2. Notice and authorization requirements

Any covered entity that create and receive personal health information must provide notice to individuals if their personal health information is subject to electronic disclosure.³³ The duty to provide notice is, however, only a general one and the notice can be provided by:

1. Posting written notice in place of business; or
2. Posting notice on web site; or
3. Posting notice in place where individuals whose PHI is subject to electronic disclosure are likely to see the notice.³⁴

According to Texas Health Services Authority General Counsel Jocelyn Dabeau, this notice must be conspicuous and understandable.³⁵

Of greatest significance, perhaps, to medical practitioners, is the requirement that a covered entity may not electronically disclose an individual's protected health information to *any* person without a separate *authorization* from the individual, or the individual's legally authorized representative, for *each* disclosure.³⁶ The authorization for electronic disclosure is not required, however, if the disclosure is made to another covered entity under the Act or to any covered entity as defined by Section 602.001 of the Insurance Code *solely* for purposes of treatment, payment, health care operations, if performing health maintenance organization functions as defined by the Insurance Code, or if otherwise authorized or required by state or federal law.³⁷ The authorization for this disclosure may be made in written form, in electronic form, or in oral form *if* the request is documented in writing by the covered entity.³⁸ The State Attorney General will adopt a standard form for use with obtaining authorizations and the form will also comply with the Health Insurance Portability and Accountability Act and Privacy Standards, if possible.³⁹ As of this writing, the State Attorney General did not yet have an anticipated release date but noted that Section 22 of the Act provides for a date of January 1, 2013.⁴⁰

This author assumes that for any such oral authorization to be valid, it would require contemporaneous documentation of the request at the time it was made. As a practical matter, given the audit functions provided in the Act,⁴¹ it would be a best practice to maintain a separate chart for all such patient HIPAA and state privacy law interactions, if possible. In addition, when orally accepting a request for disclosure or accepting a written request in person or electronically, it would be a best practice to again provide general notice about the electronic disclosures.

D.3. Training required

Covered entities must provide a training program on state and federal law pertaining to protected health information as it relates to the covered entity's particular course of business. Each employee must be trained, but only trained so as to function within their scope of employment.⁴² This training must be completed within 60 days of employment and at least once every 2 years.⁴³ The covered entity shall require employees who attend training to sign an electronic or written statement verifying attendance at the training program, and the covered entity is to maintain the signed statement.

Unfortunately, the Act does not indicate that any governmental or educational entity will provide input into the content of any training programs or provide certification for those who will provide the training. However, as of September 15, 2011, no state agency was contemplating oversight of training programs.⁴⁴ The State Attorney General's Office is planning no such function.⁴⁵

The Act does not provide a deadline for a covered entity to

provide training for those employees who are already employed as of the effective date of the Act. However, given the mitigation available as to the potentially onerous penalties for non-compliance (*see*, herein, Section E, *infra*), a covered entity would be engaged in best practices if all employees were provided, at a minimum, training applicable to their job function as soon as practicable.

It can be logically assumed that less substantive training would be required for someone who merely filed a patient's paper chart onto the proper place on a shelf than would be required for someone who was responsible for the electronic transmission of records or someone who was responsible for the covered entity's privacy policies or administration.⁴⁶ However, anyone who has access to patient records or gains access to patient information is capable of disclosure or breach.⁴⁷ In the event that any resulting civil penalty could be mitigated by the existence of a training program (*see*

discussion, infra), providing training to employees and requiring that vendors and business associates, and, particularly, those providing information technology services, also demonstrate compliance with training requirements would be very beneficial. In the event one finds himself or herself with a need, in the future, to argue for mitigation of any civil penalties to be imposed, the existence of evidence of uniform, substantive training will be helpful. In the event training is undertaken from within an organization, best practices would involve retaining records of the training content as well as those who were trained.

Anyone who has access to patient records or gains access to patient information is capable of disclosure or breach.

E. What are the penalties for non-compliance? Audits, monetary fines, felony criminal charges, loss of professional licenses

E.1. Audits

The Texas Health and Human Services Commission, in connection with the State Attorney General, the Texas Health Services Authority, and the Texas Department of Insurance, may request that the United States Secretary of Health and Human Services conduct an audit of a covered entity as to the compliance of the covered entity with HIPAA.⁴⁸ The Commission is also charged with periodic monitoring and review of the results of audits of covered entities from within the state which are conducted by the United States Secretary of Health and Human Services.⁴⁹ It is unclear what authority the federal auditors would have to monitor for state law violations or whether federal auditors would even be aware of state law violations, given that the state law requirements are more extensive than the federal. According to the U.S. Department of Health & Human Services, a pilot program of federal audits was scheduled to begin in November 2011, and the pilot is to be completed in December 2012.⁵⁰

If the Texas Health and Human Services Commission becomes aware of egregious violations which demonstrate a pattern and practice, the Commission may require a covered entity to submit to the Commission any federal risk analysis which the covered entity prepares in order to comply with HIPAA.⁵¹ In addition, if the covered entity is licensed by a state agency, the Commission may request the licensing agency to conduct an audit of the covered entity's system to determine compliance with the Act.⁵²

A significant number of potentially overlapping regulatory schemes and enforcement authorities could be implicated by this requirement in the Act.⁵³ The Act does not require training for any state or federal agency enforcement personnel.

E.2. Civil Penalties for Non-compliance

In addition to the injunctive relief already available pursuant to the current Health and Safety Code Section 181.201(a), the State Attorney General may, after the effective date of the Act, institute an action for civil penalties for violations of the Act not to exceed:

1. \$5,000 per violation per year if negligent;
2. \$25,000 per violation per year if knowing or intentional, regardless of the length of time of the violation within the year; or
3. \$250,000 for each violation if knowing or intentional and for financial gain.⁵⁴

In the event an adjudicator finds that the violations have occurred with a frequency so as to constitute a pattern or practice, the total amount of any civil monetary penalty which the court may assess is not to exceed \$1.5 million annually.⁵⁵

A discussion of applicable definitions for the terms “negligence” or “knowing and intentional” is beyond the scope of this overview article. Language contained within the regulations applicable to the Social Security Act seem helpful in describing levels of culpability in civil administrative functions.⁵⁶ Penalties may be limited or mitigated, in the event the disclosure was made only to another covered entity for purposes of treatment, payment, health care operations, or performing functions of a health maintenance organization; if the information disclosed was encrypted or transmitted using encryption technology; or, if at the time of the disclosure, the covered entity had maintained proper procedures including implementation of security procedures and training.⁵⁷ Factors are also provided by the Act for determining the appropriate financial penalty and include:

1. The seriousness of the violation;
2. The entity’s compliance history;
3. Whether the violation poses a significant risk of financial, reputational or other harm to the individual whose protected health information was involved in the violation;
4. Whether the covered entity was working with or as a certified entity, that is, certified to be in compliance with privacy and security standards being developed by the Texas Health Services Authority as per Section 182.108 of the Health and Safety Code for the electronic sharing of protected health information;
5. The amount necessary to deter future violations; and
6. The covered entity’s efforts to correct the violation.⁵⁸

It is this author’s contention that one should not have to establish harm to the victim in such instances. To determine the financial penalty, adjudicators will consider, in the event of disclosure, both monetary and *non-monetary* losses.⁵⁹

Non-monetary losses include humiliation, embarrassment, mental anguish, fear of social ostracism, and other severe emotional distress.⁶⁰ Non-monetary victim losses also include the increased risk that personal health facts will continue to be disclosed, the increased risk of identity theft, and the increased risk of medical identify theft.⁶¹ Patients themselves express the concern that their data will be misused for commercial gain, that disclosure will result in embarrassment, that disclosure will compromise their personal safety, that their data will be used in a discriminatory fashion impacting their lives and care, that there will be no opportunity to correct any false information circulated, and that there will be loss of their data or loss of access to their data.⁶²

Losses to a health care provider in the event of an unauthorized disclosure are also significant and include the costs associated with the potential loss of the economic value of a patient who no

longer associates with an organization following a breach.⁶³ At least one study identifies the lifetime economic value, on average, of one patient or customer to fall within a range from \$10,000 to over \$1,000,000.⁶⁴

In addition to civil penalties, a covered entity which is licensed by a state agency is subject to investigation and disciplinary proceedings, including probation or suspension by the licensing agency.⁶⁵ A license may be revoked if the violations are egregious and constitute a pattern and practice. The attorney general of the state may institute an action for violation of the Act against a covered entity that is licensed by a licensing agency of this state for a civil financial penalty only if the licensing agency refers the violation to the attorney general.⁶⁶

F. What other resources will be available? Websites, Standards

F.1. Websites

The Texas Attorney General is to develop and provide a consumer information website which will include information on the manner in which to make a complaint.⁶⁷ As of this writing, the State Attorney General did not yet have an anticipated release date, but noted that Section 22 of the Act provides for a date of May 1, 2013.⁶⁸ The author notes that the Act becomes effective September 1, 2012. Certain materials are directed, by statute, to be included on the website.⁶⁹ The Texas Attorney General is also charged with monitoring consumer complaints and with reporting on the complaints after de-identifying the protected health information.⁷⁰

F.2. Standards

The Texas Health Services Authority is tasked with rulemaking for the certification of entities undertaking the electronic exchange of protected health information.⁷¹ The Texas Health Services Authority is to establish standards for the secure electronic exchange of protected health information.⁷² The Authority must develop, and submit to the Health and Human Services Commission for ratification, the privacy and security standards for electronic sharing. The Authority is also tasked with developing voluntary operations and technical standards for health information exchanges in Texas.⁷³ Concern has been expressed by some concerning the *consent* options which will be required in health information exchanges when the Act’s requirement is for *authorization* for the release of information.⁷⁴

G. What Other State Statutes Are Amended or Affected? Breach notification laws, the Insurance Code

G.1. Breach notification

In HB 300, the legislature also expanded the state’s breach notification requirements already existing in the Business and Commerce Code at Sections 521.053 and 521.151.⁷⁵ The expanded notification will require notice not only to state residents in the event of a breach, as previously required, but to *all* affected individuals.⁷⁶ Because notice is to be given to all individuals and not only state citizens, the reach of the statute in its regulation of any covered entity within the state will undoubtedly have nationwide or even global impact. The Dallas Regional Chamber of Commerce estimates the health care industry contributes \$52 billion dollars annually to the Dallas–Fort Worth area alone, supporting an estimated 601,000 regional jobs and driving up to 15 percent of the area economy.⁷⁷ In addition to time and productivity losses in the event of a breach, the economic impacts identified in one study estimated costs for data breach incidents to hospitals being surveyed to be in a range from \$10,000 to over \$10,000,000 per entity in a two year period.⁷⁸

Texas’ Business Code already includes notice requirements for breaches of information pertaining to “personal identifying infor-

mation,” identified in the Business Code breach notification provisions to include biometric data, the physical or mental health or condition of an individual, the provision of health care to an individual, or the payment for the provision of health care to the individual.⁷⁹ HB 300 added to the breach notification penalty provisions of Business and Commerce Code Section 521.151 the ability to recover additional civil penalties of up to \$100 per day, per individual affected, for an unreasonable delay in notification or failed notification of a breach of data.⁸⁰ Although the breach statute does not incorporate the Act’s definition of PHI, the definition employed in the Business Code breach statute is broad enough to include PHI.⁸¹ Including enhanced fines for the failure to notify in the event of a breach within the Act, without revising the Business Code to include a revised definition of PHI, demonstrates the legislature’s intent that the two statutes are to work in an interrelated fashion.

Offenses for the use of a scanning device or re-encoder to access, read, scan, store, or transfer information encoded on the magnetic strip of a payment card without the consent of an authorized user of the payment card and with intent to harm or defraud another were previously codified as a Class B misdemeanor under the Business & Commerce Code.⁸² Now, however, if such an offense also involves protected health information, as defined by HIPAA, the offense is defined as a felony.⁸³ If an element of the crime was committed prior to September 1, 2012, the offense was committed prior to the effective date of the act.⁸⁴ It is worth noting again that payment processors at financial institutions are not covered entities, however.⁸⁵

G.2. The Insurance Code

The State Insurance Code, Chapter 602, was amended by HB 300 to require those covered by Chapter 602 of the Insurance Code to comply with Chapter 181, the Medical Records Privacy statutory provisions.⁸⁶ Consequently, the Act now also pertains to insurance companies which are exempt from HIPAA,⁸⁷ including:

1. County mutual insurance companies;
2. Farm mutual insurance companies;
3. Fraternal benefit societies;
4. Group hospital service corporations;
5. Lloyd’s plans;
6. Local mutual aid associations;

7. Mutual insurance companies;
8. Reciprocal or interinsurance exchanges;
9. Statewide mutual assessment companies;
10. Stipulated premium companies;
11. Health maintenance organizations; and
12. Insurance agents.⁸⁸

These individuals and organizations must comply with Act’s provisions when it becomes effective on September 1, 2012. The distinctions in the Insurance Code between “health information” and “nonpublic health information,” defined by Section 602.001 of the Insurance Code, is beyond the scope of this overview article. Section 602.002 of the Insurance Code provides that this chapter of the insurance code does not apply to a covered entity that is required to comply with the standards governing the privacy of individually identifiable health information adopted by the United States Secretary of Health and Human Services under Section 262(a), HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996 (42 U.S.C. § 1320d, *et seq.*). Section 602.003 of the Insurance Code indicates the chapter does not preempt or supersede state law in effect on July 1, 2002 that relates to the privacy of medical records, health information, or insurance information. Section 602.053 of the Insurance Code provides exceptions which allow a covered entity to disclose nonpublic personal health information to the extent that the disclosure is necessary to perform the specified insurance or health maintenance organization functions, as identified in that provision, on behalf of the covered entity. The definition of “health information” in the Insurance Code does not include age and gender.⁸⁹

H. Do other privacy laws exist as well? Yes.

Other state statutes and common law principles are not implicated by the Act and are not subsumed by the Act’s provisions, including the existing body of legal and ethical principles pertaining to patient privileges.⁹⁰ There are a myriad of additional privacy statutes and regulations which will not be subsumed within the Act.⁹¹ There are other state statutes which contain restrictions on the disclosure of records currently applicable to a variety of health care facilities such as nursing facilities, rehabilitation facilities, surgery centers, and emergency rooms. Mental health professionals also have their own patient privilege laws and ethical codes, particularly as to psychotherapy notes from a patient which the professional feels that it would not be in the

patient’s best interest to disclose. HIV and AIDS records and records pertaining to other communicable diseases are also subject to their own distinct disclosure provisions. Genetic information is separately regulated, as are substance abuse records, certain health study records, occupational condition reporting, and records pertaining to minors, inmate records, and school records. Biometric identifiers, Medicaid, State Children’s Health Insurance Program Beneficiaries, other government records containing health information, and peer review committee investigation records are all given separate treatment in Texas law as well. Some of these laws, unlike the Act, provide individuals with a cause of action for unauthorized disclosure.⁹²

It is clear that attorney client privileges would apply as to disclosures



between an attorney and the attorney's own client. It seems far less clear that attorneys would not be considered a covered entity when handling the protected health information of others in other instances. The legislature clearly carved such exceptions where it thought them to applicable and the legal profession was not provided with an exception.⁹³

I. Conclusion

The Texas Medical Records Privacy statute is indeed aggressive in its reach. Its penalty provisions, if and when enforced, will almost certainly be a solid deterrent to all except the most unscrupulous and most careless. It is unfortunate that the burdens of compliance could further exacerbate the already burdensome administrative overlay existing for those in the state who provide health care and related services. Given the enormity of the need for the protection of health information and patient demographics, however, state governments can do no less than take an aggressive approach to supplement federal law pertaining to medical privacy. The provisions of House Bill 300 could create enormous exposure to covered entities as well as licensed individuals and groups. It should follow, then, that associations and individuals will be highly motivated to comply with the Act and to protect personal health information. The legislature was clearly serious, and the citizens of the state now await to see whether enforcement will bare out legislative intent.

** Ms. Yeager is a licensed attorney and Certified Information Privacy Professional. She prepared this article while practicing law in Texas. Ms. Yeager is now an Assistant Attorney General for the Office of the Attorney General of Missouri. Ms. Yeager is also the founder of Amenable Though, LLC, an organization committed to education and the arts. She can be reached at b.joyce.yeager@gmail.com. This article was originally published in the International Association of Privacy Professionals' monthly member newsletter, The Privacy Advisor, and is reprinted here with permission.*

1 Texas Health and Safety Code, Chapter 181, § 181.001, *et seq.*, amendments effective September 1, 2012.

2 House Bill 300, enacted June 17, 2011, and codified at Health and Safety Code Sections 181.001, 181.004, 181.005, 181.006, 181.059, 181.101, 181.102, 181.103, 181.104, 181.153, 181.154, 181.201, 181.202, 181.205, 181.206, 181.207, 182.002, 182.108; Business and Commerce Code Sections 521.053, 521.151, 522.002; Government Code Section 531.0994; and Insurance Code Section 602.054. Available at <http://www.legis.state.tx.us/tlodocs/82R/billtext/html/HB00300F.htm>, last visited March 5, 2012. Hereinafter, "HB 300".

3 See, herein, Sections A through E, *infra*.

4 Compare, HB 300, with, Title II, Subtitle F, 42 U.S.C. § 1320d, *et seq.*, Pub. L. No. 104-191; 45 C.F.R. Part 160 and 45 C.F.R. Part 164, Subparts A and E.

5 See, *Brown v. Mortensen*, 253 P.3d 522 (Cal. 2011) (CALIFORNIA CONFIDENTIALITY OF MEDICAL INFORMATION ACT, Cal. Civ.Code, § 56, *et seq.* not preempted by HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA), 42 U.S.C. § 1320d *et seq.*, and the FAIR CREDIT REPORTING ACT (FCRA), 15 U.S.C. § 1681, *et seq.*). See also, Cynthia Marietta and Patricia Gray, *Medical Information Privacy in Texas*, University of Houston Health Law & Policy 11, page 45, fn. 271, fn. 272; Patricia Gray, *Implementing Privacy and Security Standards in Electronic Health Information Exchange*, University of Houston Health Law & Policy Institute, August 2011; *Preemption Analysis*

of Texas Laws Relating to the Privacy of Health Information & the Health Insurance Portability & Accountability Act & Privacy Rules (HIPAA), Report of the Office of the Attorney-General of Texas, November 1, 2004, available at www.oag.state.tx.us/notice/hipaa.pdf, last visited May 7, 2012 (analysis prior to enactment of HB 300).

6 Bill Analysis, Committee Report, C.S.H.B. 300, Naishtat Kolkhorst, available at <http://www.legis.state.tx.us/tlodocs/82R/analysis/html/HB00300H.htm>, last visited May 5, 2012.

7 HB 300 Initial House Research, Naishtat Kolkhorst, May 2, 2011, available at <http://www.capitol.state.tx.us/tlodocs/82R/analysis/pdf/HB00300H.pdf#navpanes=0>, last visited May 5, 2012.

8 HB 300 Initial House Research, Naishtat Kolkhorst, May 2, 2011, available at <http://www.capitol.state.tx.us/tlodocs/82R/analysis/pdf/HB00300H.pdf#navpanes=0>, last visited May 5, 2012; See also, legislative history available at <http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=HB300>, last visited May 5, 2012. (California also has a health privacy state law which supplements the protections afforded by federal law. See, CONFIDENTIALITY OF MEDICAL INFORMATION ACT, Calif. Civ. Code, § 56 *et seq.*)

9 *Second Annual Benchmark Study on Patient Privacy and Data Security*, Ponemon Institute Research Report, Ponemon Institute, December 2011, pp. 1-3, 20, 22.

10 HB 300, Section 4, codified at Health and Safety Code § 181.006.

11 Health and Safety Code § 181.001(a) provides that terms which are not identified in the Act are to be defined as per HIPAA. See also, HB 300, Section 1, codified at Health and Safety Code § 181.001.

12 *Id.*; ADMINISTRATIVE SIMPLIFICATION SUBTITLE OF THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996 (Pub. L. No. 104-191) contained in 45 C.F.R. Part 160 and 45 C.F.R. Part 164, Subparts A and E.

13 HB 300, Section 3, codified at Health and Safety Code § 181.005.

14 45 CFR § 160.103, revised as of October 1, 2007 and available at <http://edocket.access.gpo.gov/cfr/2007/octqtr/45cfr160.103.htm>, last visited March 2, 2012. (See also, California Civil Code § 56-56.07, "Individually identifiable" means that the medical information includes or contains any element of personal identifying information sufficient to allow identification of the individual, such as the patient's name, address, electronic mail address, telephone number, or social security number, or other information that, alone or in combination with other publicly available information, reveals the individual's identity.")

15 45 C.F.R. Sect. 160.103, revised as of October 1, 2007 and available at <http://edocket.access.gpo.gov/cfr/2007/octqtr/45cfr160.103.htm>, last visited March 2, 2012 (emphasis added).

16 45 C.F.R. § 160.103, revised as of October 1, 2007, available at <http://edocket.access.gpo.gov/cfr/2007/octqtr/45cfr160.103.htm>, last visited March 2, 2012.

17 45 C.F.R. Sect. 160.103, revised as of October 1, 2007 and available at <http://edocket.access.gpo.gov/cfr/2007/octqtr/45cfr160.103.htm>, last visited March 2, 2012 (emphasis added).

18 *Id.*

19 Health and Safety Code § 181.001(b)(2).

20 *Id.*

21 FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA), 20 U.S.C. § 1232g; 34 C.F.R. Part 99.

22 Health and Safety Code § 181.051; see also Jocelyn Dabeau, International Association of Privacy Professionals Privacy

Academy, September 15, 2011, https://www.privacyassociation.org/events_and_programs/2011_iapp_privacy_academy, last visited March 5, 2012.

23 HB 300, Section 5, Codified at Health and Safety Code § 181.059.

24 HB 300, Section 1, codified at Health and Safety Code, § 181.001(b)(2-a).

25 HB 300, Section 7, codified at Health and Safety Code, §181.153(a).

26 HB 300, Section 7, codified at Health and Safety Code, §§ 181.153(a)(1) and (a)(2). *Compare*, Insurance Code §§ 602.001 and 602.002, as amended by the Act, *with*, Health and Safety Code § 181.015, as amended by the Act.

27 HB 300, Section 7, codified at Health and Safety Code § 181.153(b).

28 *Id.*

29 HB 300, Section 6, codified at Health and Safety Code § 181.102.

30 *See*, 45 C.F.R. § 164.524 <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=7c7d0776f660da26d642766386867e6d&rgn=div8&view=text&node=45:1.0.1.3.79.5.27.12&idno=45>, last reviewed May 5, 2012.

31 HB 300, Section 6, codified at Health and Safety Code § 181.102.

32 *See*, notes of interview with Stephanie Goodman, Texas Health and Human Services Commission conducted March 2, 2012, interview notes on file with author.

33 HB 300, Section 7, codified at Health and Safety Code § 181.154.

34 HB 300, Section 7, codified at Health and Safety Code § 181.154(a).

35 Jocelyn Dabeau, International Association of Privacy Professionals Privacy Academy, September 15, 2011, available online at https://www.privacyassociation.org/events_and_programs/2011_iapp_privacy_academy, last visited March 5, 2012.

36 HB 300, Section 7, codified at Health and Safety Code § 181.154(b) (emphasis added).

37 HB 300, Section 7, codified at Health and Safety Code § 181.154(c) (emphasis added).

38 HB 300, Section 7, codified at Health and Safety Code § 181.154(b).

39 HB 300, Section 7, codified at Health and Safety Code § 181.154(d).

40 *See*, Interview, Thomas Kelly, Office of the Texas Attorney General, Interview March 6, 2012, interview notes on file with the author. The author notes that the Act becomes effective September 1, 2012.

41 *See*, discussion *infra* concerning auditing requirements imposed by the Act.

42 HB 300, Section 6, codified at Health and Safety Code § 181.101(a).

43 HB 300, Section 6, codified at Health and Safety Code § 181.101(b).

44 Jocelyn Dabeau, General Counsel, Texas Health Services Authority, International Association of Privacy Professionals Privacy Academy, September 15, 2011, available on line at https://www.privacyassociation.org/events_and_programs/2011_iapp_privacy_academy, last visited March 5, 2012.

45 *See*, Interview, Thomas Kelly, Office of the Texas Attorney General, Interview March 6, 2012, interview notes on file with the author.

46 Jocelyn Dabeau, General Counsel, Texas Health Services Authority, International Association of Privacy Professionals Privacy Academy, September 15, 2011, available on line at https://www.privacyassociation.org/events_and_programs/2011_iapp_privacy_academy, last visited March 5, 2012.

47 *See*, discussion on breaches, *supra*. *See also*, *Second Benchmark Study in Patient Privacy & Data Security*, Ponemon Institute Research Report, Ponemon Institute, December 2011, pp. 3-6.

48 HB 300, Sect. 11, codified at Health and Safety Code 181.206(a).

49 *Id.*

50 *See*, *HIPAA Privacy & Security Audit Program*, available online at <http://www.hhs.gov/ocr/privacy/hipaa/enforcement/audit/index.html>, last visited March 6, 2012.

51 HB 300, Section 11, codified at Health and Safety Code § 181.206(b).

52 HB 300, Section 11, codified at Health and Safety Code § 181.206.

53 For a discussion of the state laws impacting health information regulation, see Cynthia Marietta and Patricia Gray, *Medical Information Privacy in Texas*, University of Houston Health Law & Policy Institute, February 11, pp. 34-44 and accompanying footnotes. *See also*, discussion in Section H, *infra*.

54 HB 300, Section 8, codified at Health and Safety Code § 181.201(b).

55 HB 300, Section 8, codified at Health and Safety Code § 181.201(c).

56 *See*, 42 USC 1320d-5 (General penalty for failure to comply with requirements and standards).

57 HB 300, Section 8, codified at Health and Safety Code § 181.201(b-1).

58 HB 300, Section 8, codified at Health and Safety Code § 181.201(d).

59 *Id.* (emphasis added.).

60 *FAA v. Cooper, Concerning Emotional Injury as Harm Under the Privacy Act*, Electronic Privacy Information Center, available at <http://epic.org/amicus/cooper/>, last visited March 6, 2012.

61 *Second Annual Benchmark Study on Patient Privacy & Data Security*, Ponemon Institute Research Report, Ponemon Institute, pp. 15-16, December 2011.

62 Patricia Gray, *Implementing Privacy and Security Standards in Electronic Health Information Exchange*, University of Houston Health Law & Policy Institute, August 2011, p. 4. Patients are also concerned about the ability of organizations to accurately provide notification. *Id.*

63 *Second Annual Benchmark Study on Patient Privacy & Data Security*, Ponemon Institute Research Report, Ponemon Institute, p. 13, December 2011.

64 *Id.*

65 HB 300, Section 9, codified at Health and Safety Code § 181.202.

66 HB 300, Section 8, codified at Health and Safety Code § 181.201(e).

67 HB 300, Section 6, codified at Health and Safety Code § 181.103.

68 *See*, Interview, Thomas Kelly, Office of the Texas Attorney General, Interview March 6, 2012, interview notes on file with the author.

69 HB 300, Section 6, codified at Health and Safety Code § 181.103.

70 HB 300, Section 6, codified at Health and Safety Code § 181.104.

71 *See*, footnote 13, *supra* and footnotes 52 to 53, *infra*.

72 HB 300, Section 13, codified at Health and Safety Code § 182.108; HB 300, Sections 19 to 25.

73 *See*, Patricia Gray, Texas Human Health Services and Texas Health Services Authority and State Health Information Exchange Cooperative Agreement, *August 2011 Implementation*

Report, University of Houston, available at http://thsa.org/media/2272/privacy%20and%20security%20task%20force%20presentation_6-1-2011-1.ppt, last visited, March 7, 2012; *Texas Health Services Authority Privacy and Security Task Force, Presentation*, June 1, 2011, available online at http://thsa.org/media/2272/privacy%20and%20security%20task%20force%20presentation_6-1-2011-1.ppt, last visited March 6, 2012 (including discussion of HITRUST Alliance for health information exchanges).

74 *Id.* See also, Matt Murray, M.D., *Life in the Trenches*, International Association of Privacy Professionals Privacy Academy, September 15, 2011, available online at http://www.thsa.org/media/2951/consent%20options%20for%20hie%20in%20texas_june%202011.pdf, last visited March 6, 2012.

75 HB 300, Sections 14 and 15, codified at Business and Commerce Code §§ 521.053 and 521.151, respectively.

76 *Id.*

77 *The Health Care Impact, Assessing the scope and depth of the health care industry in Dallas-Ft. Worth*, Dallas Regional Chamber, March 2011, p. 4.

78 *Second Annual Benchmark Study on Patient Privacy & Data Security*, Ponemon Institute Research Report, Ponemon Institute, December 2011, pp. 11 and 14.

79 Business & Commerce Code, § 521.002.

80 HB 300, Section 15, codified at Business and Commerce Code, § 521.151(a-1).

81 *Compare*, Health and Safety Code § 181.001(b)(2), with Business and Commerce Code, § 521.151(a-1).

82 Business and Commerce Code § 522.022(b).

83 HB 300, Section 16 codified at Health & Commerce Code § 522.002(b).

84 HB 300, Section 26.

85 See, exemption discussion, *supra*.

86 HB 300, Section 18, codified as Insurance Code § 602.054 as amended effective September 1, 2012.

87 Insurance Code § 602.002.

88 Insurance Code §§ 602.001 and 602.002.

89 Insurance Code § 602.001(2).

90 Cynthia Marietta and Patricia Gray, *Medical Information Privacy in Texas*, University of Houston Health Law & Policy Institute, February 2011, pp. 34–36 and footnotes 156 to 186 therein. This report provides an overview of other state laws and ethics principles pertaining to medical information privacy in Texas. *Id.*, p. 34-43 and accompanying footnotes 156 to 258 therein.

91 See, *Id.*

92 *Id.* at pp. 43-45 and accompanying footnotes 259 to 273 therein.

93 See, discussion, *supra* on exemptions.

Consumer Status and Tie-in Statutes Under the DTPA



Or A Claimant's Right to Sue Under the DTPA

By Andrew E. Sattler*

I. Preface

This article examines the relationship between The Texas Consumer Protection and Deceptive Trade Practices Act (The DTPA)¹ and independent Texas statutes that give rise to a claim under the DTPA known as “Tie-In Statutes.”² It discusses the relatively recent case law holding that a tie-in statute plaintiff must also be a consumer under the DTPA. It is asserted that this notion is relatively recent, incorrect, and in contrast to the plain language of the DTPA as well as general rules of statutory construction.

II. Background of the DTPA

The DTPA³ is a statutorily enacted response to the unfair playing field that was so prevalent prior to consumer protection laws. The DTPA is a consumer protection statute that arose in the 1960s riding on a wave of consumer oriented protections put in place

by both the federal government and state governments as a result of a perceived imbalance of power between consumers and merchants. The imbalance has been attributed to many factors such as disproportionate information, unequal bargaining power, repeat player, and general ignorance or naivety of consumers.⁴ The rise of consumerism resulted in many Federal laws such as the Truth in Lending Act (1968), The Consumer Product Safety Commission Act (1972), Fair Credit Reporting Act (1974), The Magnuson-Moss Warranty Act (1975), FTC “Holder rule” (1975), and the Fair Debt Collection Practices Act (1977).⁵ The legislative activism was mirrored in the state legislatures as well, and in Texas resulted in the DTPA, originally only actionable by the Attorney General.⁶ In 1973, however, the DTPA was transformed by the legislature into a consumer protection statute with a private right of action.^{7,8}

The maxim of *caveat emptor* or “Let the buyer beware” was replaced by a statute designed to require full and truthful disclosure. The DTPA remains Texas’s most powerful consumer oriented statute despite the remarkable transformation it has undergone since its inception in 1973. Although the DTPA’s consumer protection provisions have been lessened, the Act still offers consumers many advantages in court, including a statutory mandate that the Act:

shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranties and to provide efficient and economical procedures to secure such protections.⁹

Although the recent past has shown a certain level of judicial activism that appears to be in contrast to the legislative mandate, the DTPA is still able to achieve its stated purpose by fostering a climate that favors a consumer. But in the mid 1990s public sentiment began to change sharply. No longer were the drums of consumerism pounded loudly; rather the harsh cries of lawsuit abuse began to reverberate throughout legislatures helped in part by stories of “runaway” juries such as the famous McDonald’s cup of coffee.¹⁰

The most significant changes to the DTPA occurred in 1995. Under the guise of tort reform, the Texas legislature substantially amended the DTPA, generally weakening the statute with the passage of H.B. 668.¹² H.B. 668 did, however, make one significant change that has the potential to substantially help consumer—the enactment of subsection 17.50(h) providing for increased damages for a violation of a “tie-in” statutes. Having summarized the history of the DTPA, a detailed analysis of the tie-in provisions follows.

III. DTPA Grants of Power—Tie-in Statutes

The tie-in statute interplay with the DTPA is innovative and quite brilliant. It allows future legislatures to identify and protect groups that have unequal power, and incorporate them into the DTPA, without altering the Act itself. Tie-in provisions also allow additional laundry list type items to be incorporated into the DTPA under limited scenarios, thus giving the legislature a razor-sharp tool to fine-tune perceived inequities.

As is always the case, the statutory right to bring suit is specifically spelled out in the statute, and the DTPA is no exception to the rule. The DTPA has three distinct grants of authority to bring lawsuits:

1. The original grant is to the state through the Texas Attorney General – Consumer Protection Division;
2. A direct private grant is to consumers, which is the most used method of bringing a claim under the DTPA; and
3. A seldom-used tie-in grant to claimants who are au-

thorized by other laws to bring claims through the DTPA.

A. Directly to the Consumer

The primary grant of power for bringing claims *directly* under the DTPA by a private litigant is section 17.50(a), which states “A consumer may maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish...”¹³ Section 17.50(a) is expressly limited to a “consumer,” which is defined as more than just a person who buys something. A consumer is defined as “an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services.”¹⁴ Thus the DTPA provides for business consumers as well as individuals. Courts have broadened the definition of consumer by enlarging it in some cases such as by the use of “intended beneficiaries”¹⁵ and significantly narrowed it, for example by holding that borrowing money in and of itself is not a good or service under the DTPA.¹⁶ There are a number of other areas in which the common use of the word “consumer” does not satisfy the DTPA’s definition of consumer such as the purchase of intangibles¹⁷ like lottery tickets,¹⁸ certificates of deposit,¹⁹ and option contracts.²⁰

B. To the State

The State can act in the capacity as a consumer according to the definition of consumer that includes “this state, or a subdivision or agency of this state” when it “seeks or acquires by purchase or lease, any goods or services.”²¹ The DTPA also gives broad powers exclusively to the State under sections 17.47, 17.48, 17.58, 17.60, and 17.61. The State, through the Attorney General – Consumer Protection Division, can seek injunctive relief despite lack of consumer standing when it has “reason to believe that any person is engaging in, has engaged in, or is about to engage in any act or practice declared to be unlawful by” the DTPA when such action would “be in the public interest.”²² Under this authority, the State can seek injunctive relief and may seek penalties of up to \$20,000 per violation (\$270,000 per violation when the practice was calculated to deprive money from senior citizens).²³ A district or County Attorney can also bring suit for injunctive relief with prior notice to the Attorney General – Consumer Protection Division.²⁴

C. To a Claimant When Authorized by Another Law

The DTPA provides a framework for other statutes to make their provisions enforceable under the DTPA, and this provision gives rise to the so-called “tie-in” statutes under section 17.50(h).²⁵ The tie-in provision results in a mosaic of interrelated laws that are actionable under the primary vehicle of the DTPA but with enhanced damage provisions. There are two basic features of the tie-in subsection. First is the claimant provision that allows a plaintiff to bring a claim from another statute through the DTPA. Second is the enhanced damage provision that substitutes actual damages for economic damages. The specific grant of authority in section 17.50(h) provides that:

“[n]otwithstanding any other provision of this subchapter, if a claimant is granted the right to bring a cause of action under this subchapter by another law, the claimant is not limited to recovery of economic damages only, but may recover any actual damages incurred by the claimant, without regard to whether the conduct of the defendant was committed intentionally.”²⁶

IV. Tie-in Statute Specifics

There are a number of significant differences between a direct action under the DTPA through 17.50(a) and a tie-in action under 17.50(h). The most obvious and perhaps most significant difference is the difference between economic damages and actual damages. Under section 17.50(a), the general damage standard

is “economic damages;” to recover damages for mental anguish it must be shown the defendant acted “knowingly.” On the other hand, when a claim is brought through section 17.50(h) pursuant to a tie in statute, the general damage standard is “actual damages.” Economic damages are pecuniary and are defined under the DTPA as:

compensatory damages for pecuniary loss, including costs of repair and replacement. The term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.²⁷

The term “actual damages” is not defined by the DTPA but case law shows that they are those damages recoverable at common law²⁸ and are determined by the total loss sustained by a plaintiff.²⁹ Actual damages include all economic damages, as well as damages for mental anguish and pain and suffering. In other words, claims for “physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society” that are specifically excluded under the definition of economic damages are no longer excluded as they are included as part of actual damages. Significantly, mental anguish recovery under the actual damage standard for a tie-in statute does not require an elevated mental state of knowing or intentional conduct.

V. DTPA Standing Under a Tie-in Statute

Standing under the DTPA has always been an area of significant activity because it is one of the few defenses available to defendants. The question of who may maintain a claim under section 17.50(h) of the DTPA when brought through a tie-in statute has become a hot topic, and the focus of a number of court opinions. It has been argued that subsection 17.50(h) requires consumer standing under the DTPA. This argument has only recently surfaced, notwithstanding the fact that there does not appear to be a requirement that a tie-in plaintiff be a consumer, but rather only that any tie-in plaintiff or “claimant” is authorized to bring the action under another law.

A. Standing Under a Direct DTPA Claim

It is clear that under section 17.50(a), a “consumer may maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish...”³⁰ Under the DTPA a consumer is defined as more than just a person who buys something. A consumer is defined as “an individual, partnership, corporation... who seeks or acquires, by purchase or lease, any goods or services.”³¹

1. Seek or Acquire

The phrase “seek or acquire” is rather straightforward, but deserves some analysis to dispel common myths about the DTPA, for example that the DTPA requires a contract, a sale, or exchange of consideration. The focus is on a person’s relation to the transaction rather than privity or contractual relationship.³² When one seeks, but does not acquire, there will not be a contract or sale and thus no privity,³³ but the person will still be a DTPA consumer. Proving that a client acquired a good or service is an intuitive task, whereas, proving that a person sought a good or service is more challenging. The two-pronged test for “seek” is based on a common sense approach and requires 1) a good faith intention to purchase or lease coupled with 2) the ability to do so.³⁴

2. By Purchase or Lease

To achieve consumer status under the DTPA, one must not only seek or acquire, but also purchase or lease. Although the terms “purchase” and “lease” are not defined by the DTPA, the definitions are intuitive. A purchase is defined as a voluntary

transmission of property or services from a seller to a buyer with valuable consideration.³⁵ A lease is described under the U.C.C. as a transfer of the right to possession and use of goods for a term in return for consideration.³⁶ Gratuitous goods and services do not generally give rise to consumer status.³⁷

3. Goods or Services

The third requirement for consumer status is that the transaction must be for goods or services. Both “goods” and “services” are defined by the DTPA. “Goods” is defined as tangible chattels or real property purchased or leased for use.³⁸ Determination of what is and what is not a good generally is an easy process. A number of items have been determined to be intangible, and not goods, such as money, lending money,³⁹ accounts receivable,⁴⁰ stocks,⁴¹ option contract,⁴² insurance policy,⁴³ certificate of deposit,⁴⁴ lottery tickets,⁴⁵ and intangible property rights.⁴⁶ However, intangible property that is merely incidental to a purchase or lease of goods or services does not disturb consumer status.⁴⁷

B. Standing to Bring a Tie-in Claim Under the DTPA

Unlike bringing a claim pursuant 17.50(a), a tie-in claim under 17.50(h) has no requirement that it be brought by a consumer. Section 17.50(h) speaks in terms of a “claimant.”⁴⁸ There is not a single use of the word “consumer” in subsection (h), but the word “claimant” is used three times. Contrast that with the fact that the word consumer is used over 100 times throughout the DTPA.

The Legislature knew what the term “consumer” meant because it was defined within the Act and used so many times, and yet it chose to use another term, “claimant,” in granting the enhanced rights of section 17.50 (h). The scheme shows remarkable forethought by the Legislature in that by a change to the enabling language in the tie-in statute, the legislature can and did change who could bring an action and expand or diminish the claims that could be made while still maintaining a basic consumer protection law for the benefit of its citizens.

C. Analysis of the term “Claimant”

To determine who is authorized to bring a tie-in claim, section 17.50(h) looks to the individual tie-in statutes rather than to any other language located in the DTPA. This is not only evinced by the use of the word claimant rather than consumer, but is bolstered by its opening language “[n]otwithstanding any other provision of this subchapter.”⁴⁹ Such language is akin to a road sign announcing to the reader that the following will be in conflict with some other language in the subchapter, but that this language will control. In other words “claimant” trumps “consumer” for the purposes of section 17.50(h). Had the legislature wanted this provision to be read as “consumer,” it could have very easily limited 17.50(h) to consumers, but it did not. It is improper to ignore the Legislature’s choice of language and fail to harmonize the language so as to give every word meaning.⁵⁰

To give the word “claimant” the same meaning as “consumer” strains the reading and is inconsistent with established rules of statutory construction. “It is a rule of statutory construction that every word of a statute must be presumed to have been used for a purpose . . . [and] we believe every word excluded from a statute must also be presumed to have been excluded for a purpose.”⁵¹ “When the Legislature has employed a term in one section of a statute and excluded it in another, we presume that the Legislature had a reason for excluding it.”⁵² Any attempt by the courts to marginalize the Legislature’s choice to use the term claimant instead of consumer (and thereby enable 17.50(h) to vary standing requirements under the DTPA based on the later intent expressed in the various tie-in statutes) is disingenuous.

D. Case Law That Gets it Wrong

This seems to be a case where one Court got it wrong and the others are reading head-notes or otherwise failing to make an independent analysis. The task of the courts is to analyze the law with an emphasis on proper principles of statutory construction. A critical examination of section subsection 17.50(h) is long overdue.

The plain language of the tie-in provision makes the DTPA available to plaintiffs other than just consumers, yet the clear intent of the legislature is under attack by a number of courts who have glossed over the direct and unambiguous language of the tie-in authority found in subsection 17.50(h) and have blindly followed the oversimplified mantra that the DTPA requires consumer status.⁵³

If the stakes were not so very high, the inartful analysis that has led to a number of Texas Federal Courts and a couple of State Courts to get this wrong would be comical. Unfortunately, each of the decisions has a plaintiff being denied some remedy that should be available and so rather than comical the entire movement is tragic. What started out as one Court misinterpreting a statute has snowballed into an unfortold trend that ignores the clear language of the statute.

The story begins in the Federal District Court for the Northern District of Texas with the decision in *Marketic v. U. S. Bank Nat'l Ass'n*. The *Marketic* Court stated:

Plaintiff fails to recognize that Tex. Bus. & Com. Code § 17.50(h) does not exempt claimants from showing that they qualify as a “consumer” under Tex. Bus. & Com. Code § 17.45(4). *In all cases, a plaintiff must qualify as a “consumer” in order to have standing to bring an action under the DTPA.*⁵⁴

Interestingly, section 17.45 is the definitions section of the DTPA. Section 17.45(4) simply supplies the definition of consumer. It places no requirement to be a consumer under the DTPA. The consumer requirement comes from section 17.50(a) which states that “A consumer may maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish...”⁵⁵ This is the primary grant of authority to bring a direct action under the DTPA and it does require consumer status for direct claims, but this by no means limits other parts of the Act from allowing an action to be brought by persons other than a consumer under the DTPA where authorized. In other words, 17.50(a) does not preclude non-consumers from bringing actions, but rather grants authority for consumers to bring actions.

The cases that are cited to by the *Marketic* Court, including *Mendoza* and *Figuroa*, are both cases that involved direct claims under 17.50(a) and thus actually did require consumer status.⁵⁶ Tie-in statutes were not even involved in these cases. Tie-in statutes get their grant of authority to bring a cause of action under the DTPA from 17.50(h) not 17.50(a). Subsection “(h)”, in a separate and distinct grant of authority dispenses with the “consumer” requirement found in subsection “(a)” and instead focuses on the intent as expressed in another law to allow claims for violations of that law to be brought through the DTPA. This does not prevent a consumer from seeking redress under subsection (h); it simply dispenses with the requirement of consumer status under the DTPA and substitutes the standing requirements as expressed in the enabling language of each tie-in statute. Such a reading of co-existent rights to bring an action is compatible with the language of the statute and apparent by the enabling language of the various tie-in statutes.

The line of cases⁵⁷ following the *Marketic* case significantly limit the application of a tie-in statute, the Texas Debt Collections Act, yet when properly analyzed, the cited precedents do

not stand for the propositions for which they are cited. Rather than making an independent analysis under the rules of construction, even the Fifth Circuit Court of Appeals has climbed on the bandwagon,⁵⁸ as has the San Antonio Court of Appeals.⁵⁹ There is a general proposition regarding DTPA standing and it is based upon the premise that a plaintiff must bring a claim under section 17.50(a). However, the broader language under section 17.50(h) unequivocally allows a “claimant” to bring an action under the DTPA for a violation of a tie-in statute. If a statute is unambiguous, we seek the intent of the legislature as found in the plain and common meaning of the words and terms used.⁶⁰ Section 17.50(h)

provides that an “act or practice that is a violation of a provision of law other than this subchapter may be made the basis of an action under this subchapter if the act or practice is proscribed by a provision of this subchapter or is declared by such other law to be actionable under this subchapter.”⁶¹ Courts should simply apply this language.

The most logical way to read the language of 17.50(h) is to understand that the legislature intended for the DTPA provisions to be available to plaintiffs other than consumers when another law intends for violation to be actionable under the DTPA.

E. Analysis of a 17.50(h) Claim

1. “Claimant” is Defined by the Tie-In not the DTPA

The language of 17.50(h) states “if a claimant is granted the right to bring a cause of action under this subchapter by another law...” Nowhere in the *Marketic* decision does the Court recognize this language, yet *Marketic* and its progeny simply equate the word claimant with consumer, and fail to address or otherwise disclose why the legislature did not use the word consumer if that is what it meant. This reading completely ignores the fact that the legislature could have said consumer if that is what it meant, but it did not. Thus a claimant *must* be something different than a consumer.

The most logical way to read the language of 17.50(h) is to understand that the legislature intended for the DTPA provisions to be available to plaintiffs other than consumers when another law intends for violation to be actionable under the DTPA. So to answer “what is a claimant” one must look to the referring statute and the answer will vary depending upon which statute ties into the DTPA. A “Claimant” is not specifically defined under the DTPA other than generally as one granted to bring a claim under the DTPA by another statute because it is not a static definition like consumer but rather a dynamic definition that will be different depending upon which tie-in statute is being referenced. The court is obligated to look to the enabling language of the specific tie-in statute to ascertain the Legislature’s intent as to what group of persons is a claimant with respect to this tie-in statute. In those situations wherein a claimant under a tie-in is not a consumer under the DTPA, there are still many similarities between the groups such as unequal bargaining power, lack of knowledge and the perception of generally being the weak party. The greatest commonality is the apparent Legislative intent for both groups to be conferred standing under the DTPA. Thus the same justifications that lead to a need to level the playing field for consumers will apply to claimants under 17.50(h).

An evaluation of a number of typical tie-in statutes follows to demonstrate the analysis and emphasize the differences be-

tween a consumer under the DTPA and a claimant.

(a) Kosher Food Claimant

Some statutes are quite straightforward such as the Kosher Food Act⁶², which has a tie-in that states “A consumer aggrieved by a violation of this chapter may maintain a cause of action for damages in accordance with section 17.50 of this code.”⁶³ Therefore under the Kosher Food Act, a claimant would be a “consumer” and arguably it would be the same type of consumer as defined by the DTPA. This tie-in statute is mentioned first because it is the only tie-in statute that specifically limits the tie-in claimants to consumers by announcing the requirement in the enabling language.

(b) Unfair Claims Settlement Practices Act Claimant

The Insurance Code creates a tie-in to the DTPA for the very limited claim that occurs when an insurance company requires the production of a claimant’s federal income tax return as a condition to settlement.⁶⁴ The statute states that such a violation is “a deceptive trade practice under Subchapter E, Chapter 17, Business & Commerce Code” and that a “claimant affected by a violation of this section is entitled to remedies under Subchapter E, Chapter 17, Business & Commerce Code.”⁶⁵ *The only private remedy granted is through the tie-in to the DTPA.* The Act grants a right to claimants, making it clear that the Legislature intended to give a private cause of action to anyone making a claim under an insurance policy, not just a DTPA consumer.

When the flawed *Marketic* analysis is followed, claimants other than those falling into the narrow confines of a DTPA consumer would be denied any recourse. This result is obviously unintended and fails to follow the intent of the Legislature as expressed in the words of the Act.

(c) Rental Purchase Agreements Claimant

Some tie-in statutes are not as obvious but still require consumer status, yet the definition of consumer is much more restrictive than that under the DTPA. For example, the Rental Purchase Agreement statute⁶⁶ does not specifically require consumer status in its tie-in language, yet a reading of the act seems to limit the field of claimants to consumers, and the act defines consumer as “an individual who leases personal property under a rental-purchase agreement.”⁶⁷

(d) Home Solicitation Act Claimant

With some tie-in statutes the definition is somewhat murky, such as with the Home Solicitation Act,⁶⁸ which makes a violation of the act a “false, misleading, or deceptive act or practice as defined by section 17.46(b).”⁶⁹ The Act discusses who can be a claimant by implication and also expands what is actionable. The act defines a “consumer” as “an individual who seeks or acquires real property, money, or other personal property, services, or credit for personal, family, or household purposes.”⁷⁰ This definition seems to exclude partnerships, corporations, and the state unlike the DTPA⁷¹ while at the same time including individuals who seek or acquire loans, which DTPA case law has long held is not covered under the DTPA.⁷²

(e) Contest and Gift Giveaway Act Claimant

With a tie-in statute such as the Contest and Gift Giveaway Act,⁷³ the act or practice may or may not be made in conjunction with the seeking or acquiring of goods or services because the contest or giveaway is being used to lure persons into watching a presentation that they would presumably not be interested in watching without the promise of a gift or potential prize. Thus if the sales presentation is persuasive, there may be a sale and consumer status under the DTPA will be had; However, when there is not a sale, it is doubtful that the attendee would qualify under the two- pronged test for “seeking.”

Interestingly, the tie-in language, which states “[a] violation of this chapter is a deceptive trade practice in addition to the prac-

tices described by Subchapter E, Chapter 17, and is actionable under that subchapter”⁷⁴ makes a violation actionable...period. There is no requirement that one must be a consumer. Such limitation would have been very easy to make, but it is conspicuously absent. The clear and direct language says if this act is violated then the violation is actionable under the DTPA, thus a claimant is one who has been damaged by a violation of the Contest and Gift Giveaway Act.

(f) Private Child Support Enforcement Agencies Claimant

Private Child Support Enforcement Agencies⁷⁵ are agencies that seek to enforce child support obligations under a writ or order from a court.⁷⁶ The tie-in states that a “violation of this chapter is a deceptive trade practice under Subchapter E, Chapter 17, Business & Commerce Code, and is actionable under that subchapter.”⁷⁷ Just as with a Contest and Gift Giveaway Act Claimant, the language makes a violation actionable without any qualifications. A large part of the chapter deals with conduct that is prohibited from use against the obligor, who could never be a consumer under the DTPA, yet is granted a standing as a claimant under 17.50(h). A claimant with respect to this chapter is one who has been damaged by a violation of the chapter, including those obligors that could not ever be considered a consumer.

(g) Texas Debt Collection Act Claimant

All of the case law from *Marketic* and its progeny deal with the Texas Debt Collection Act (TDCA).⁷⁸ The Act has the same mandatory tie-in language, “A violation of this chapter is a deceptive trade practice under Subchapter E, Chapter 17, Business & Commerce Code, and is actionable under that subchapter.”⁷⁹ Under its clear and direct language the statute says that a violation of the TDCA is actionable... it doesn’t say might be actionable or may be actionable nor is there any other limiting language.

But as to who may be a claimant under the TDCA, that is quite different than a “consumer” as defined by the DTPA. In fact, the claimant may not have any consumer-like qualities depending on the circumstances. The answer to the question of who is a claimant for TDCA purposes under the DTPA is an easy one to answer. The TDCA provides that, “A person may sue” § 392.403 Consumer status is not required to be a claimant under the DTPA by the unambiguous words of the Act. Under the TDCA, the focus is on the type of debt not the person seeking relief. The Act requires a certain type of debt, which is defined as “an obligation, or an alleged obligation, primarily for personal, family, or household purposes and arising from a transaction or alleged transaction.”⁸⁰ Significantly, it is the collection of that debt that triggers coverage under the TDCA.⁸¹

Thus *any person* who is damaged by the collection of a consumer debt is a claimant under the DTPA with respect to the TDCA.⁸² This would include the consumer debtor, their spouse, kids, neighbors, co-workers, parents and literally anyone else who has been improperly harassed by an overzealous debt collector. It is these persons whom the Legislature has determined need to be protected and it is these persons who have been conferred claimant status under the DTPA with respect to the TDCA.

As with the Home Solicitation Act, a claimant under the TDCA is both narrower than a DTPA consumer in that it is limited to individuals and broader than a DTPA consumer in that it would also include those individuals who just borrowed money and the borrowing was not in conjunction with some other good or service and would additionally cover any other persons damaged by a violation of the TDCA. It is noteworthy that the abusive debt collections practices set forth in the TDCA rises to the level of criminal conduct.⁸³

(h) Identity Theft Enforcement and Protection Act Claimant

This identity theft statute does not require a merchant/con-

sumer relationship, but rather makes it actionable under the DTPA to “obtain, possess, transfer, or use personal identifying information of another person without the other person’s consent and with intent to obtain a good, a service, insurance, an extension of credit, or any other thing of value in the other person’s name.”⁸⁴ The tie-in states “[a] violation of Section 521.051 is a deceptive trade practice actionable under Subchapter E, Chapter 17.”⁸⁵



A claimant with respect to the Identity Theft Enforcement and Protection Act is one who has had their identity taken without their consent and with intent to obtain a good, a service, insurance, an extension of credit, or any other thing of value in the other person’s name. There is no need for any type of consumer/merchant relationship pursuant to the plain language of this Act.

(i) The Regulation of Certain Electronic Mail Claimant

This chapter of the Business and Commerce Code makes actionable certain unsolicited commercial emails.⁸⁶ Interestingly an established business relationship (such as a merchant/consumer relationship) precludes a commercial email from being unsolicited.⁸⁷ This chapter generally addresses emailed solicitations that are not authorized by the recipient. Thus not only is there no need for a consumer/merchant relationship under this chapter, the existence of one may well undermine a claim brought under this chapter. To argue that only a “DTPA consumer” is a proper claimant when the tie-in statute itself precludes “DTPA consumer” status leads to an absurd result. This is contrary to established rules of statutory construction that state “we must not construe statutes in a way that would lead to an absurd result.”⁸⁸

2. Flaws in Reasoning by the *Marketic* Court and its Progeny

The cases that follow *Marketic* suffer from a number of serious flaws. The following is a brief summary of some of these points.

(a) “Claimant” Rather than “Consumer”

Neither *Marketic* nor its progeny explain why the legislature used claimant rather than consumer. The language used in section 17.50(h) provides:

[n]otwithstanding any other provision of this subchapter, if a *claimant* is granted the right to bring a cause of action under this subchapter by another law, the *claimant* is not limited to recovery of economic damages only, but may recover any actual damages incurred by the *claimant*, without regard to whether the conduct of the defendant was committed intentionally.

The Legislature could have said:

[n]otwithstanding any other provision of this subchapter, if a *consumer* is granted the right to bring a cause of action under this subchapter by another law, the **consumer** is not limited to recovery of economic damages only, but may recover any actual damages incurred by the *consumer*, without regard to whether the conduct of the defendant was committed intentionally.

Section 17.50(h) of the DTPA is the only section of the Act that uses the word “claimant,” and it is used repeatedly. The legislature was clear and unambiguous when it said that a claimant is entitled to bring a claim under the DTPA and can recover up to

three times actual damages. This is plain on the face of subsection 17.50(h). “[A] cardinal rule of statutory construction is that each sentence, clause and word is to be given effect if reasonable and possible.”⁸⁹ When, as here, “the statute unambiguously demonstrates the Legislature’s intent and thus the statute’s meaning, the Court must not resort to extrinsic aids to hypothesize about an intent the statute does not express.”⁹⁰

Substituting the word consumer for the word claimant also violates another general statutory construction principle that courts should not insert words in a statute except to give effect to clear legislative intent.⁹¹

(b) Pre Tie-In Case Law

The tie-in statute, section 17.50(h), was enacted in 1995. References to cases that predate the 1995 amendment or that use the old law are improper. Prior to the 1995 enactments, the only private cause of action under the DTPA was for a consumer. Thus quotes from cases such as *Melody Home Mfg. Co. v. Barnes*,⁹² *Mendoza v. American Nat’l Ins. Co.*,⁹³ and *Figueroa v. West*,⁹⁴ are improper in that they reference a prior version of the DTPA, requiring consumer status. That is not the case after the enactment of subsection 17.50(h).

(c) “Notwithstanding” Language

As with the use of claimant rather than consumer, the use of “[n]otwithstanding any other provision of this subchapter” language at the beginning of subsection (h) demonstrates the legislature’s intent that the provisions of subsection (h) are to control in the event that there are any inconsistencies between it and any other provisions in the subchapter.⁹⁵ The requirement of consumer status for standing under the DTPA as provided under subsection 17.50(a) is, therefore, inferior to the specific language of subsection (h). Because subsection (h) was enacted in 1996 and the consumer requirement was enacted in 1973, the subsection (h) language should control as being drafted later in time under the rules of statutory construction.⁹⁶

VI. THE BOTTOM LINE

The language of subsection 17.50(h) is either ambiguous or it is not. In this author’s opinion it is not, and clearly gives a claimant standing to maintain a claim under the DTPA when authorized by another statute. But even if it is ambiguous, there is a mandate to construe the legislature’s use of the word “claimant” as something other than “consumer.” The only interpretation that harmonizes the legislature’s choice of “claimant” rather than “consumer” is the one that provides an alternative to consumer status by piggybacking a claim onto the DTPA through subsection (h). All that a tie-in plaintiff should have to allege to maintain an action as a claimant under subsection 17.50(h) is that he or she is authorized to do so by another statute.

Standing under the DTPA’s subsection 17.50(h) should be determined by looking at the individual tie-in statute to determine what group of plaintiffs were intended by the legislature to bring those claims under the DTPA and through that specific tie-in statute. This construction is the only one that gives meaning to the legislature’s specific choice of language and is consistent with the controlling language at the beginning of subsection (h).

Any other interpretation not only strains the language of section 17.50, but also results in arbitrary and apparently unintended

results based on the language of each of the various tie-in statutes. An interpretation as in the *Marketic* case would render some of the tie-ins as meaningless or at the very least give rise to what seem to be unintended results.

Section 17.50(h) should be read as creating a third class of persons with standing to maintain claims under the DTPA, so that in addition to the state and direct claims by consumers, the DTPA allows claimants to maintain actions under the DTPA when specifically authorized to do so by the tie-in statute upon which they rely. This will allow, for example, a debt collection violation to be brought under the DTPA even when the plaintiff is not, technically speaking, a consumer under the DTPA but does have a consumer loan under the Debt Collection Act. Likewise, it will allow a person who is a consumer under the Home Solicitation Act but not under the DTPA to maintain a DTPA claim. This interpretation comports with the plain language of 17.50 and complies with the legislative intent as disclosed in each tie-in statute.

VII. CONCLUSION

The Texas legislature showed rare foresight in enacting the tie-in language under subsection 17.50(h). It allowed future legislatures to identify groups of persons needing DTPA-like protections without disrupting the established scheme of the DTPA, and without having to reinvent the wheel. There is only one interpretation that does justice to the specific language granting a claimant a right of action rather than simply a consumer. Whether one is a claimant for purposes of tying-in to the DTPA is determined by the language contained in the various tie-in statutes as each of them seeks to protect a different subset of persons. Any other interpretation is contrary to established rules of statutory construction and disenfranchises many of those persons intended to benefit from the DTPA tie-in.

* John Dwyre & Associates, PLLC, 4207 Gardendale, Suite 104-B, San Antonio, TX 78229, (210)736-1772, andy@dwyre.com

1 TEX. BUS. & COM. CODE, § 17.41, et seq.

2 TEX. BUS. & COM. CODE, § 17.50(h)(tie-in grant of power under the DTPA).

3 The DTPA is found in Chapter 17, Subchapter E of the TEX. BUS. & COM. C.

4 The justifications for the perceived inequalities of power and knowledge between merchants and consumers is beyond the scope of this paper; However, what is important is an understanding that such imbalances are not exclusive to consumers and merchants but exist in other relationships that may not fit into the narrow definition of consumer/merchant as it exists under the DTPA.

5 Ralph J. Rohner, *Multiple Sources of Consumer Law and Enforcement (Ro: "Still in Search of a Uniform Policy")*, 9 Ga. St. U. L. Rev. 881, 885 (1992).

6 The DTPA was originally passed in 1967 as chapter 10 to the Consumer Credit Code but lacked a private right of action. See, Act of May 23, 1967, 60th Leg., R.S., ch. 274, §2, 1967 Tex. Gen. Laws 608, 658.

7 Act of May 21, 1973, 63rd Leg., R.S. ch. 143, § 1, 1973 Tex. Gen. Laws 322.

8 For a more complete background on the creation of the DTPA See, Philip K. Maxwell & Joe K. Longley, *History of Article 21.21 and Deceptive Trade Practices Act*, located at http://www.joelongley.com/historya21.htm#_ftnref81

9 TEX. BUS. & COM. C. § 17.44.

10 Stories like the McDonald's coffee were often incomplete

and unfairly portrayed a system of justice that, although sometimes may reach too far, is necessary to protect the interests of the public. An excellent article on the McDonald's coffee written by Kevin G. Cain was printed in the Journal of Consumer & Commercial Law. It is located at <http://www.jtexconsumerlaw.com/V11N1/Coffee.pdf>.

11 Act of May 19, 1995, 74th Leg., R.S., ch. 414, 1995 Tex. Gen. Laws 2988.

12 Act of May 19, 1995, 74th Leg., R.S., ch. 414, 1995 Tex. Gen. Laws 2988.

13 TEX. BUS. & COM. CODE § 17.50(a).

14 TEX. BUS. & COM. C. § 17.45(4).

15 *Wellborn v. Sears, Robuck & Co.*, 970 F.2d 1420, 1426-27 (5th Cir. 1992)(Citing to *Kennedy v. Sale*, 689 S.W.2d 890, 892 (Tex. 1985) and *Birchfield v. Texarkana Mem. Hosp.*, 747 S.W.2d 361, 368 (Tex. 1987) for the proposition that even if one does not directly purchase or lease, he may still be a consumer if he was an intended beneficiary of the lease or purchase.)

16 *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, 174 (Tex.1980) (Holding that an attempt to borrow money is not an attempt to acquire either work or labor as contemplated in the DTPA.)

17 *Hendricks v. Thorton*, 973 S.W.2d 348, 356 (Tex.App.– Beaumont 1998, pet. denied).

18 *Kinnard v. Circle K Stores*, 966 S.W.2d 613, 617-18 (Tex. App.– San Antonio 1998, no pet.).

19 *Canfield v. Bank One*, 51 S.W.3d 828, 838-39 (Tex.App.– Texarkana 2001, pet. denied).

20 *Hand v. Dean Witter Reynolds Inc.*, 889 S.W.2d 483, 500 (Tex. App.– Houston [14th] 1994, pet. denied).

21 TEX. BUS. & COM. C. § 17.45(4).

22 TEX. BUS. & COM. C. § 17.47.

23 *Id.*

24 TEX. BUS. & COM. C. § 17.48.

25 TEX. BUS. & COM. C. § 17.50(h).

26 TEX. BUS. & COM. CODE § 17.50(h).

27 TEX. BUS. & COM. CODE § 17.45(11).

28 *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 939 (Tex. 1908).

29 *Smith v. Baldwin*, 611 S.W.2d 611, 617 (Tex. 1980).

30 TEX. BUS. & COM. CODE § 17.50(a)(Emphasis mine).

31 TEX. BUS. & COM. C. § 17.45(4).

32 *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 649 (Tex.1996).

33 *Nast v. State Farm Fire & Cas. Co.*, 82 S.W.3d 114,122 (Tex. App.– San Antonio 2002, no pet.).

34 *Martin v. Lou Poliquin Enterprises, Inc.*,696 S.W.2d 180,184-85 (Tex. App.– Houston [14th Dist.] 1985).

35 *Houston Livestock Show & Rodeo, Inc. v. Hamrick*, 125 S.W.3d 555, 572 (Tex.App.– Austin 2003, no pet.).

36 TEX. BUS & COM. C. § 2A. 103(11).

37 *Exxon v. Dunn*, 581 S.W.2d 500 (Tex. Civ. App.– Dallas 1979, no writ)(gratuitous services on car did not confer consumer status); *Rayford v. Maselli*, 73 S.W.3d 410, 411(Tex.App.– Houston [1st Dist.] 2002, no pet.)(Gratuitous legal services did not confer consumer status).

38 TEX. BUS. & COM. C. § 17.45(1)

39 *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, 175 (Tex. 1980).

40 *Snyders Smart Shop, Inc. v. Santi, Inc.*, 590 S.W.2d 167, 170 (Tex. Civ. App.– Corpus Christi 1979).

41 *Swenson v. Engelstad*, 626 F.2d 421, 428 (5th Cir. 1980).

42 *Hand v. Dean Witter Reynolds Inc.*, 889 S.W.2d 483, 497 (Tex. App.– Houston [14th Dist.] 1994).

43 *English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983).

44 *First State Bank v. Chesshir*, 634 S.W.2d 742, 747 (Tex. App.– Amarillo 1982).

- 45 *Kinnard v. Circle K Stores*, 966 S.W.2d 613-617-18 (Tex. App.— San Antonio 1998, no pet.)
- 46 *Hendricks v. Thorton*, 973 S.W.2d 348, 356 (Tex.App.— Beaumont 1998, pet. denied).
- 47 *Knight v. International Harvester Credit Corp.*, 627 S.W.2d 382, 389 (Tex. 1982).
- 48 TEX. BUS. & COM. CODE § 17.50(h).
- 49 *Id.* (Emphasis mine).
- 50 *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 257 (Tex. 1999).
- 51 *Ojo v. Farmers Group, Inc.*, 356 S.W.3d 421, 427 (Tex. 2011) (Quoting *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981)).
- 52 *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 629 (Tex. 2011) (Quoting *Fireman's Fund Cnty. Mut. Ins. Co. v. Hidi*, 13 S.W.3d 767, 769 (Tex. 2000)).
- 53 *See, Marketic v. U. S. Bank Nat'l Ass'n*, 436 F. Supp. 2d 842, 854-855 (N.D. Tex. 2006).
- 54 *Id.* (Citing to *Mendoza v. American Nat'l Ins. Co.*, 932 S.W.2d 605, 608 (Tex.App.— San Antonio 1996, no writ) (emphasis mine)).
- 55 TEX. BUS. & COM. CODE § 17.50(a) (emphasis mine).
- 56 *Marketic*, 436 F. Supp. 2d at 854-855 (citing to *Mendoza*, 932 S.W.2d at 608 (Citing to *Figueroa v. West*, 902 S.W.2d 701, 707 (Tex. App.— El Paso 1995, no writ))).
- 57 A number of cases have followed this flawed reasoning and include *Hanna v. RFC Deutsche Bank Nat'l Trust Co.*, 2012 U.S. Dist. LEXIS 76314, 8-9 (N.D. Tex. May 31, 2012); *Sanghera v. Wells Fargo Bank, N.A.*, 2012 U.S. Dist. LEXIS 21399, 25-26 (N.D. Tex. Feb. 21, 2012); *Swim v. Bank of Am., N.A.*, 2012 U.S. Dist. LEXIS 6846 (N.D. Tex. Jan. 20, 2012); *Foster v. Ocwen Loan Servicing, LLC*, 2011 U.S. Dist. LEXIS 154107, 30-32 (N.D. Tex. July 26, 2011); *Bray v. Cadle Co.*, 2010 U.S. Dist. LEXIS 109470, 24-30 (S.D. Tex. Oct. 12, 2010); *Burnette v. Wells Fargo Bank, N.A.*, 2010 U.S. Dist. LEXIS 24686 (E.D. Tex. Feb. 16, 2010); and *Eads v. Wolpoff & Abramson, LLP*, 538 F. Supp. 2d 981, 989 (W.D. Tex. 2008).
- 58 *Cushman v. GC Servs., L.P.*, 397 Fed. Appx. 24, 27-28 (5th Cir. Tex. 2010)
- 59 *Dodeka, L.L.C. v. Garcia*, 2011 Tex. App. LEXIS 8101, 6-7 (Tex. App.— San Antonio Oct. 12, 2011) (“Garcia’s causes of action under the DTPA ‘tie-in’ provision necessarily fail because she did not establish her consumer status under the DTPA.”); and *Hansberger v. EMC Mortg. Corp.*, 2009 Tex. App. LEXIS 5792, 7-8 (Tex. App.— San Antonio July 29, 2009 pet. denied) (“the party bringing a claim under the DTPA for a violation of a tie-in statute must still satisfy the requirement of being a “consumer.”).
- 60 *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 352 (Tex. 1990).
- 61 TEX. BUS. & COM. CODE § 17.43.
- 62 TEX. BUS. & COM. CODE §§ 17.821- 17.826.
- 63 TEX. BUS. & COM. CODE § 17.825.
- 64 TEX. INS. CODE § 542.004. Not to be confused with Unfair Methods of Competition and Unfair or Deceptive Acts or Practice in TEX. INS. CODE Ch. 541, which does have a private right of action and is actionable by consumers under section 17.50(a) (4) rather than as a tie-in.
- 65 *Id.* (emphasis mine).
- 66 TEX. BUS. & COM. CODE Ch. 92.
- 67 TEX. BUS. & COM. CODE § 92.001 (3).
- 68 The Home Solicitation Act is officially known as the “Cancellation of Certain Consumer Transactions” and is found in Chapter 601 of the TEX. BUS. & COM. CODE.
- 69 TEX. BUS. & COM. CODE § 601.204.
- 70 TEX. BUS. & COM. CODE § 601.001(1).
- 71 TEX. BUS. & COM. CODE § 17.45(4).
- 72 *See, e.g., Riverside Nat'l Bank v. Lewis*, 603, S.W.2d 169, 174 (Tex.1980).
- 73 TEX. BUS. & COM. CODE Ch. 621.
- 74 TEX. BUS. & COM. CODE § 621.252 (emphasis mine).
- 75 TEX. FIN. CODE Ch. 396.
- 76 TEX. FIN. CODE § 396.001.
- 77 TEX. FIN. CODE § 396.353.
- 78 TEX. FIN. CODE Ch. 392.
- 79 TEX. FIN. CODE § 392.404 (emphasis mine).
- 80 TEX. FIN. CODE § 392.001(2).
- 81 TEX. FIN. CODE § 392.403.
- 82 *Id.*
- 83 TEX. FIN. CODE § 392.402.
- 84 TEX. BUS. & COM. CODE § 521.051.
- 85 TEX. BUS. & COM. CODE § 521.152
- 86 TEX. BUS. & COM. CODE Ch. 321
- 87 TEX. BUS. & COM. CODE § 321.001 (8) “Unsolicited commercial electronic mail message” means a commercial electronic mail message transmitted without the consent of the recipient **by a person with whom the recipient does not have an established business relationship.**” (Emphasis mine)
- 88 *See, Utts v. Short*, 81 S.W.3d 822, 832 (Tex. 2002) (Citing to *C&H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 322 n.5 (Tex. 1994)
- 89 *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 257 (Tex. 1999).
- 90 *Rocor Int'l v. Nat'l Union Fire Ins. Co.*, 77 S.W.3d 253, 269 (Tex. 2002).
- 91 *Laidlaw Waste Sys., Inc. v. City of Wilmer*, 904 S.W.2d 656, 659 (Tex. 1995).
- 92 *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349 (Tex. 1987) (“DTPA plaintiffs must qualify as consumers . . . to maintain a private cause of action under section 17.50 of the DTPA”) cited by *Cushman v. GC Servs., L.P.*, 397 Fed. Appx. 24, 27-28 (5th Cir. Tex. 2010) and *Figueroa v. West*, 902 S.W.2d 701, 706-707 (Tex. App.— El Paso 1995).
- 93 *Mendoza v. American Nat'l Ins. Co.*, 932 S.W.2d 605, 608 (Tex. App.— San Antonio 1996) (using pre-1994 law) cited by *Marketic v. U. S. Bank Nat'l Ass'n*, 436 F. Supp. 2d 842, 854-855 (N.D. Tex. 2006); *Dodeka, L.L.C. v. Garcia*, 2011 Tex. App. LEXIS 8101, 6-7 (Tex. App.— San Antonio Oct. 12, 2011).
- 94 *Figueroa*, 902 S.W.2d at 707 cited by *Mendoza*, 932 S.W.2d at 608.
- 95 TEX. BUS. & COM. CODE § 17.50(h).
- 96 *See, TEX. GOV'T CODE § 311.025* (When two statutes conflict, the later-enacted provision controls.)



Dumping the Fair Debt Collection Practices Act

The Case for Using State Law to Fight Abusive Debt Collection Practices

By Justin P. Nichols*

Introduction

Corruption runs rampant in the debt collection industry and federal law has proved ill equipped to stop it.¹ This article explores the history and prognosis of the debt collection industry, compares and contrasts federal debt collection laws with Texas law, examines the effectiveness of seeking redress under each statutory scheme, and advocates Texas practitioners use state law rather than federal law to pursue relief for Texas consumers aggrieved by debt collectors.

History & Background

From 1950 to 1971 consumer credit in the United States rose from \$21.5 billion to \$137.2 billion.² In November 1957, when Americans owed \$48.4 billion in consumer debt,³ the Georgia Supreme Court held “a consumer who voluntarily applies for and obtains credit impliedly consents for her creditor to take all reasonable action needed to collect the bill.”⁴ Today, Americans owe some \$2.5 trillion in consumer debt,⁵ and the business of collecting the debt has grown exponentially.

In 1976 there were 5,000 debt collection firms across the country, collectively returning some \$5 billion in outstanding debt; each firm employing an average of eight employees.⁶ By 2005 there were 6,500 debt collection agencies, collectively returning \$39.3 billion in debt, and each hiring an average of 70 debt collectors.⁷ While many industries are contracting, the debt collection industry is expected to continue to grow steadily; by 19.34% from 2008 to 2018.⁸

The path to the massive consumer credit and debt collection industries is not without a colorful history. In 1973 the Texas Legislature, citing the need to address unethical debt collection practices and harassment of consumers⁹ by “control[ing] and curtail[ing] the practices used in the collection of debts,”¹⁰ enacted the Texas Debt Collection Act (“TDCA”).¹¹ In 1978 Congress took up the issue. While some felt a federal law would infringe on states’ rights, others argued state laws intended to protect consumers from debt collectors were inadequate.¹² In the end Congress, finding “abundant evidence” of abusive, deceptive, and unfair debt collection practices,¹³ enacted the Fair Debt Collection Practices Act (“FDCPA”).¹⁴ Prior to the enactment of the FDCPA, states were left to their own devices to regulate debt collection practices.¹⁵ Today, it is not so much the right to collect a debt in issue, but rather the manner in which the right is exercised.¹⁶

Two major events triggered the furious growth of the debt collection industry. During the 1980’s the Federal Deposit Insurance Corporation began selling the debts previously owed to failed banks to third parties.¹⁷ Secondly, the nation’s largest bank at the time, Bank of America, also began selling and assigning old credit card debt to third party collectors.¹⁸ Thus began the widespread practice of trading old debt, which continues to grow today. And, because hundreds of companies buy old debt with outdated, insufficient, or inaccurate information about debtors,¹⁹ the number of consumer complaints about the debt collection industry is growing faster than the industry itself.²⁰

The Federal Trade Commission (“FTC”) receives more complaints about the debt collection industry than any other category,²¹ and complaints are on the rise. In 2009 the FTC received 119,609 complaints about in-house debt collectors; a number which increased by 17% to a whopping 140,036 complaints in 2010.²² As for complaints involving third-party debt collectors, the FTC processed 88,326 complaints in 2009 and 108,997 complaints in 2010; an increase of 23.4% in just a year’s time.²³ All in all, nearly half of all consumer complaints handled by the FTC involve debt collectors.

Comparison of the FDCPA and the TDCA

There are some important similarities, differences, advantages, and disadvantages to the FDCPA and Texas law, which includes the TDCA and common law torts unique to our state.

Application

The FDCPA applies to a person who “collects or attempts to collect debts... owed... or asserted to be owed [to] another.”²⁴ In short, the FDCPA applies only to third party, professional

debt collectors.²⁵ Conversely, the TDCA applies to both debt collectors (anyone who collects debts²⁶) with special designation for third party debt collectors.²⁷ In 1995 the Supreme Court extended the definition of “debt collector” in the context of the FDCPA to include attorneys who regularly collect debts,²⁸ and the TDCA largely follows the Supreme Court’s decision when attorneys become subject to law regulating debt collection practices.

Licensing and Bonding

The FDCPA does not have any licensing requirement for third party debt collectors. Conversely, the TDCA requires any third party debt collector that collects debts from Texas consumers to obtain a \$10,000 surety bond in favor of any person damaged by a violation of the TDCA, and register the bond with the secretary of state.²⁹ Texas law also allows the surety to be sued along with the third party debt collector,³⁰ and a consumer need not show a cognizable interest in the bond to maintain a cause of action for relief.³¹

Verification & Disputes

Both the federal and Texas statutes provide procedures for a consumer to dispute a debt. While both statutes only apply to disputes with third-party debt collectors, the procedures vary significantly.

The FDCPA provides that a consumer may, within 30 days of receiving an initial communication from the collector, write the collector and demand verification of the alleged debt and the name and address of the original creditor.³² Generally, a debt collector must disclose the right to demand verification in its initial communication to a consumer.³³ However, debt collectors always want consumers to pay more attention to the demand for money than to the notice of the right to demand validation,³⁴ which can create confusion for consumers. Once the initial 30-day period passes the debt collector is no longer obligated to provide verification, and the consumer loses the means by which to dispute a debt; a problem which has led the FTC to recommend Congress amend the FDCPA to require a more conspicuous notice to consumers of their rights.³⁵

In contrast, the TDCA permits a consumer to dispute the accuracy of an alleged debt being collected by a third party debt collector, but does not prescribe any particular timeframe.³⁶ Upon receipt of a dispute under the TDCA the debt collector has 30 days in which to admit the alleged inaccuracy, deny the alleged inaccuracy, or state it has not had enough time to complete its investigation (in which case the debt collector must correct its file as requested by the consumer).³⁷ While the debt collector may not have to produce validation documents to the consumer under the TDCA, the absence of a time period in which to file a dispute allows Texas consumers to demand a debt collector investigate the alleged debt at any point during the debt collection process – a significant advantage over the FDCPA.

Enforcement Schemes and Remedies of the FDCPA, the TDCA, and Texas Common Law

Both the FDCPA and the TDCA create a private cause of action for a consumer aggrieved by violations and also provides a mechanism of administrative enforcement.

Administrative Enforcement

Until recently, the FTC was charged with enforcing the FDCPA. Following the enactment of Dodd-Frank, the FTC and the Consumer Financial Protection Bureau [CFPB] share responsibility for enforcing the Act, with the CFPB having primary authority.³⁸ Because the CFPB has just begun to function,

however, the FTC is still very active in its enforcement role. Conduct by debt collectors that peaks the interest of the FTC, however, must typically be extreme and repetitive, and individual complaints, no matter how valid, may often go unnoticed or unaddressed.³⁹ Although the FTC is forbidden from issuing additional rules beyond the language of the FDCPA,⁴⁰ the CFPB now has the authority to do so. The FTC, unlike the CFPB, may only treat violations of the FDCPA as violations of trade rules and seek injunctive relief.⁴¹ And while the FTC may seem to have great power to stop abusive debt collection practices by turning to the courts, the FTC filed only three debt collection enforcement actions in 2010 and seven in 2011.⁴² Only time will tell if the CFPB takes a more active enforcement role.

Similarly, the TDCA allows the attorney general to sue for injunctive relief to prevent a violation of the TDCA.⁴³ However, though receiving 3,390 consumer complaints regarding debt collectors in 2010,⁴⁴ the attorney general's office estimates it filed only one suit in 2010 based on the TDCA.⁴⁵ There is also at least one administrative regulation, applying only to lenders regulated by the Office of the Consumer Credit Commission, which prohibits using physical force or violence in an attempt to collect a debt.⁴⁶

While both federal and state statutes authorize action to be taken by administrative agencies, in practice, an extremely small number of suits are ever filed against debt collectors.

Private Causes of Action, Torts, & Remedies

Strict Liability & Statutory Damages

Both the FDCPA and the TDCA are generally strict liability statutes; that is, a consumer need not show actual damages to be entitled to a statutory award for a violation.⁴⁷ The FDCPA allows a court to award up to \$1,000 *per case* involving debt collection violations,⁴⁸ even without any proof of damages.⁴⁹ Conversely, the TDCA allows a court to award not less than \$100 *per violation* of certain provisions of the TDCA.⁵⁰ Unlike the FDCPA, which establishes maximum relief, the TDCA establishes only a minimum statutory award for violations of certain provisions. It should be noted, too, that the statutory award of not less than \$100 per violation only comes into play when a violation is proven but actual damages are not shown,⁵¹ though a plaintiff is entitled to statutory damages when she sues for and obtains injunctive relief irrespective of damages.⁵² However, the bounds of how high the maximum can go has not been tested in Texas courts. An important difference between the two laws is that a single FDCPA case, without a showing of actual damages, is worth only up to \$1,000, while a TDCA case is worth not less than \$100 per certain violation, which can easily amount to more than \$1,000 per case.

Further, both statutes allow for actual damages to be awarded to a consumer,⁵³ but actual damages can be difficult to prove. For example, it may be difficult to quantify the cost of a debt collector who calls at 7:00 a.m. on a Sunday, or a debt collector who threatens a consumer with arrest if he fails to pay his phone bill. This is where Texas law has a leg up on the FDCPA.

The Common Law Tort of Unreasonable Collection in Texas

Because of Texas's long-standing statutory provisions protecting debtors (e.g. homestead provisions and a wide range of property exempt from levy upon judgment⁵⁴), interstate creditors are more likely to rely on harassment, abuse and high interest rates when collecting from Texas consumers.⁵⁵ So, in addition to the remedies prescribed by the TDCA, Texas recognizes the common law cause of action of wrongful/unreasonable debt collection.⁵⁶

In the beginning, the cause of action for unreasonable collection was an intentional tort with unlimited room to grow and develop.⁵⁷ But in 1953, *Duty v. General Finance*,⁵⁸ the Texas Supreme Court recognized a debt collector may not resort to any cruel device which can be imagined simply to collect a debt.⁵⁹ By 1956, Texas appellate courts had held reckless conduct, combined with malice, but absent intent, was sufficient to sustain an award for unreasonable collection.⁶⁰ In 1963, in *Moore v. Savage*,⁶¹ Texas courts held a plaintiff who proves negligence, coupled with physical injury, could be entitled to judgment without any showing of recklessness.⁶² Modern cases hold the elements of a claim for unreasonable collection amount to "a course of harassment that [is] willful, wanton, malicious, and intended to inflict mental anguish and bodily harm,"⁶³ though courts have not foreclosed on the possibility of a consumer obtaining a judgment based on a lesser measure of culpability.

Injunctive Relief

While both the FDCPA and the TDCA grants standing to a state agency to sue for injunctive relief, only the TDCA entitles an individual consumer to seek an injunction against a debt collector.⁶⁴ And, unlike the traditional requirements imposed on a plaintiff seeking injunctive relief, under the TDCA no proof of irreparable injury need be presented – only that a violation occurred in the past.⁶⁵ An injunction, when properly pled, can be quite broad, and extend beyond a debt collector's action toward a single consumer, and apply to a debt collector's general activity within the state.⁶⁶ In this sense, and in terms of injunctive relief, the TDCA gives individual consumers equal power as the attorney general to enforce the TDCA. And, with the lower threshold necessary to be entitled to an injunction, the likelihood of prevailing and recovering attorney fees (discussed below) is much higher than other civil suits.

Culpability, Exemplary & Punitive Damages

One of the most pronounced ways in which the Texas tort of unreasonable debt collection differs from the statutory scheme of the FDCPA is in the area of exemplary damages and damages for emotional distress. The FDCPA does not provide any explicit authorization for exemplary damages. Conversely, exemplary damages may be awarded for unreasonable debt collection⁶⁷ if the offending conduct is proven by clear and convincing evidence.⁶⁸ In considering whether to award exemplary damages and the amount, if any, courts are to consider 1) the nature of the wrong, 2) the character of the offender's conduct, 3) the situation and sensibilities of the parties, 4) the extent to which



the conduct offends the public's senses, and 5) the culpability of the offender.⁶⁹ Ultimately, the amount of damages to which a party is entitled is left to the jury.⁷⁰ Further, reckless behavior by a debt collector, coupled with a showing of proximate cause can support an award for mental suffering.⁷¹ Also, in addition to the common law tort for wrongful debt collection, a violation of the TDCA's is automatically a violation of the Texas Deceptive Trade Practices Act⁷² ("DTPA"), which entitles a consumer to mental anguish damages and treble economic damages if the offender acted knowingly, and both treble mental anguish and economic damages if the offender acted intentionally.⁷³ Further, a dispute over the degree of culpability is enough to survive a motion for summary judgment and proceed to trial to resolve the intent issue.⁷⁴ In *Household Credit v. Driscoll*,⁷⁵ the court held even if a debt collector stops abusive conduct after a consumer complains, evidence of prior conduct is factually sufficient to find gross or reckless conduct.⁷⁶ The ultimate correction of the error does not excuse a debt collector's previous compounding of the problem.⁷⁷ In short, Texas law specifically contemplates consideration of the degree of culpability of an offending debt collector – an element notably absent from the FDCPA.

Modern Methods of Evading Debt Collection Laws and Possible Remedies

Deregulation of the credit industry, resulting largely from the Supreme Court's decisions in two important cases effectively nullifying state usury laws,⁷⁸ enables subprime borrowers to easily obtain credit, and high risk borrowers (including minorities, rural, poor, and elderly consumers⁷⁹) are often the targets of deceptive debt collection practices.⁸⁰ And, more and more debt collectors are using creative tactics to minimize the effectiveness of the FDCPA.⁸¹ The FDCPA has simply become ineffective and incapable of protecting consumers from unscrupulous debt collectors.⁸²

Debt collectors are using technology to identify and target vulnerable debtors,⁸³ which can yield a higher rate of return on collection efforts versus more sophisticated consumers. This method of pseudo discrimination is prohibited by the ACA International's (the largest trade organization for the debt collection industry) code of ethics,⁸⁴ but the ACA recently ended its practice of facilitating and investigating complaints filed by consumers against members of ACA International.⁸⁵ In the past ACA International proactively pursued complaints, made findings, and conditioned membership in the association on compliance with ethical practices, including not discriminating against certain groups of debtors. Now, the ACA merely forwards the complaint to the company without any follow-up or investigation whatsoever. Perhaps if the FDCPA was supplemented to include the ethical provisions of ACA's Code of Ethics,⁸⁶ the consumer or the CFPB may have a means of prosecuting discriminatory practices which intentionally target unsophisticated consumers who are more likely to pay.

Another means by which debt collectors are circumventing the FDCPA is the use of small claims courts. Debt collectors hire lawyers, many of which are paper-mill law firms, who use the lax pleading requirements of small claims courts to obtain default judgments that would surely be more thoroughly scrutinized in a court of record.⁸⁷ Consumers are starting to fight back, and learning they can often win suits brought by third party debt assignees by simply contesting the suits.⁸⁸ But by filing suit, debt collectors are often exempt from the disclosure requirements.⁸⁹

Finally, while the FDCPA may have been effective against combating the debt collection abuses of the past, it needs to be amended to account for the new modern-day tricks.⁹⁰ Collectors are now outsourcing activities overseas, where foreign debt collectors flatly ignore the provisions of the FDCPA and

consumers have little or no recourse.⁹¹ And, where the FDCPA fails to offer adequate remedies to consumer's whose debts are collected on foreign soil, the TDCA offers a special opportunity for relief. Not only does the TDCA create liability for debt collectors, but a rarely used provision also creates liability for a creditor who hires a debt collector when the creditor has actual knowledge that the debt collector repeatedly violates the TDCA.⁹² By imposing liability on the creditors who hire the unscrupulous debt collectors, even if the debt collector is overseas, a consumer is far more likely to be able to reach a viable defendant in the United States under the TDCA instead of the FDCPA.

Attorney Fees

As a final note on remedies, and of great importance to practitioners, both the FDCPA and the TDCA prescribe the mandatory recovery of attorney fees to a prevailing party.⁹³ And, under the TDCA and its tie-in to the DTPA, even when a creditor countersues for money owed, the mere establishment of the violation will justify an award for attorney fees, regardless of whether the case yields the consumer a net recovery.⁹⁴

Forums in Which to Litigate and Their Implications

Consumer Awareness

In the past, a major hindrance to the effectiveness of the FDCPA was unawareness of the act.⁹⁵ Until recently, the FTC engaged in a comprehensive consumer education program, including an animated video regarding consumer rights,⁹⁶ and in 2010, the FTC distributed more than 65,000 brochures to consumers, and the electronic version of the brochure was accessed online approximately 680,000 times.⁹⁷ The brochure encourages consumers to file complaints with their state attorney general,⁹⁸ but that can often be unhelpful for consumers. For example, even though there were more than 50,000 visits in 2010 to the Texas attorney general's website on debt collection, which yielded 3,390 complaints,⁹⁹ only one debt collection case was filed for certain.¹⁰⁰ The attorney general's website advises consumers to send written notification to collectors to cease communications, and explains they may sue collectors for injunctions and damages,¹⁰¹ but no information is given on how exactly to accomplish this task. Thus, many consumers enter the courts without representation in an attempt to obtain relief.

Proceeding Pro Se

Many practitioners are reluctant to accept debt collection cases because fees are typically contingent and lawyers will not front costs if they do not feel there is a likelihood of success.¹⁰² In many cases, even though consumers are aware of the FDCPA they remain unwilling to bring lawsuits.¹⁰³ But there are plenty of consumers who do sue on their own, and they are faced with doing battle against large debt collection firms with disproportionate resources, and a plethora of procedural challenges.

There is a perception pro se lawsuits lack merit because of a belief that good claims attack legal representation and bad claims do not.¹⁰⁴ But this may not be the case. However, while the pleadings of pro se complaints are viewed with some leniency,¹⁰⁵ they are held to the same procedural requirements as attorneys.¹⁰⁶ Now, after the Supreme Court's holding in *Bell Atlantic v. Twombly*¹⁰⁷ in 2007, which requires trial courts to disregard conclusory allegations in pleadings without any presumption of truth,¹⁰⁸ and more recently, *Ashcroft v. Iqbal*¹⁰⁹ in 2009, which effectively emasculated the doctrine of liberal construction of pro se pleadings under *Haines*,¹¹⁰ pro se lawsuits are dismissed in federal courts 85% of the time based on FED. R. Civ. P. 12(b)(6)¹¹¹ – twice the rate of other suits.¹¹² And, if a litigant survives initial motions to dismiss, courts are generally reluctant to provide any further leniency, especially at the summary judgment stage,

and hold pro se litigants to strict procedural rules.¹¹³ This trend gives little assurance that pro se litigants will have adequate access to the courts.¹¹⁴

Pro se claims comprise a substantial portion of federal court dockets¹¹⁵ – 37% to be exact¹¹⁶ – and often find themselves confused, scared, and uncertain when trying to navigate the complicated federal court system,¹¹⁷ or when negotiating with big debt collection companies. These consumers need legal representation, and it is worthwhile for lawyers to accept these types of cases if they carefully develop a strategy in approaching suits against debt collectors.

Selecting a Forum in Which to File Suit

Consumers can sue a debt collector under state law, federal law, or both,¹¹⁸ but the forum and law chosen can have a profound impact on the outcome of a lawsuit. Typically, plaintiffs regard federal courts as a less favorable forum¹¹⁹ and instead prefer state courts.¹²⁰

When filing a debt collection lawsuit in state courts, lawyers should be careful not to include any claim based on the FDCPA. Because the FDCPA is based on federal law, a defendant sued in state court for violations of the FDCPA will likely remove the suit to federal court¹²¹ and invoke the court's federal question jurisdiction.¹²² Only 37%

of plaintiffs whose cases are removed to federal court based on federal question jurisdiction prevail on their FDCPA claims.¹²³ Federal courts have not been expansive when interpreting the FDCPA,¹²⁴ and, there-

fore, it is better to rely solely on state law claims, which, in the case of the TDCA are often more stringent than the provisions of the FDCPA.¹²⁵

Also, to avoid federal court a suit must seek realistic damages when suing a diverse defendant. A diverse debt collector can remove the case to federal court and invoke the court's diversity jurisdiction if the suit seeks more than \$75,000 in damages.¹²⁶ In cases removed to federal court based on diversity, only 34% of plaintiff's win.¹²⁷ Diversity may be destroyed in suits against third party debt collectors by adding TDCA claims against the debt collector's surety,¹²⁸ if any, and the original creditor,¹²⁹ which may be Texas citizens for diversity purposes.

Because plaintiffs tend to be so unsuccessful in federal court, whether based on FDCPA claims or diversity, practitioners filing suit against debt collectors (and other parties, if need be) should do so in state court, for reasonable damages, and for state law claims.

Conclusion

When the FDCPA was enacted critics complained it would preempt state laws, and arguing Congress should stay out of an issue that, in the 1970's, was viewed as only affecting a small portion of the population.¹³⁰ But the consumer credit industry has always been plagued with abuses,¹³¹ and the problems are only getting worse as consumer credit card debt continues to grow.¹³² While creditors do have a right to expect to be paid, their right to collect is not unlimited.¹³³ No ethical or professional business interest justifies the outrageous conduct¹³⁴ so many consumers witness today. Texas has been on the forefront of protecting consumers through the TDCA, its tie-in to the DTPA, and the common law tort of unreasonable collection. By carefully drafting a pleading to include only state law claims, practitioners can avoid a costly federal forum and pursue remedies unique to Texas

law, including injunctive relief, statutory and treble damages, exemplary damages, and attorney fees. The TDCA is a far better choice for consumers, pro se or otherwise, and practitioners, who might otherwise be leery of accepting such a case. The TDCA and the common law tort of unreasonable collection offers Texas consumers all the tools necessary to successfully combat abusive debt collectors, and makes it worthwhile for practitioners to accept debt collection cases.

* Justin P. Nichols received his undergraduate degree from Southern Methodist University and his J.D. from St. Mary's University School of Law. He currently owns The Nichols Law Firm, PLLC. Special thanks goes to Genevieve Hebert-Fajardo, clinical professor of law at the Center for Legal and Social Justice at St. Mary's University School of Law, for her advice, insight, and guidance on this project.

1 Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 713 (2006).

2 William R. Crow, Jr., Comment, *The Texas Debt Collection Practices Act: Relief for the Harassed Consumer?*, 8 ST. MARY'S L. J. 773, 773 n.1 (1977).

3 FED. RES., *Federal Reserve Statistical Release: G.19 Consumer Credit* (Dec. 7, 2011), available at <http://www.federalreserve.gov/releases/g19/Current/> (last visited Dec. 27, 2011).

4 *Gouldman-Taber Pontiac, Inc. v. Zerbst*, 100 S.E.2d 881, 883 (Ga. 1957) (concluding a creditor who wrote a consumer's employer regarding a private debt did not act unreasonably).

5 FED. RES., *Federal Reserve Statistical Release: G.19 Consumer Credit* (Dec. 7, 211), available at <http://www.federalreserve.gov/releases/g19/Current/> (last visited Dec. 27, 2011).

6 Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA is Failing America's Elderly Debtors*, 16 ELDER L. J. 135, 141 (2008).

7 Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA is Failing America's Elderly Debtors*, 16 ELDER L. J. 135, 141 (2008).

8 U.S. BUREAU OF LABOR STATISTICS, *Nat'l Employment Matrix, Bill and Acct. Collector: 2008 and 2018, Projected (2009)*, available at ftp://ftp.bls.gov/pub/special.requests/ep/ind-occ.matrix/occ_pdf/occ_43-3011.pdf (last visited Oct. 13, 2011).

9 The Texas Debt Collection Act: Hearings on Tex. S.B. 252 Before the Sen. Comm. on Jurisprudence, 63d Leg., R.S. 4 (Apr. 5, 1973) (comments of Sen. Gammage) (transcript available from the Legislative Reference Library of Texas).

10 House Comm. on Judiciary, Bill Analysis, Tex. S.B. 252, 63rd Leg., R.S. (1973).

11 Act of May 22, 1973. 63rd Leg., R.S., ch. 547., Gen & Sp. Laws of Tex. (now codified as TEX. FIN. CODE ANN. § 392 (West 2010)).

12 Kirsten N. Arnold, Note, *Getting Payment for a Clean Bill of Health: Reconciling the Health Insurance Portability and Accountability Act ("HIPPA") with the Fair Debt Collection Practices Act ("FDCPA") for Health Care Debt Collection*, 93 IOWA L. REV. 605, 614 (2008).

13 15 U.S.C. § 1692, sec. 802(a).

14 15 U.S.C. § 1692.

15 Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 718 (2006).

16 *EMC Mortg. Corp. v. Jones*, 252 S.W.3d 857, 870 (Tex. App.—Dallas 2008, no pet.).

17 Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes*

No ethical or professional business interest justifies the outrageous conduct so many consumers witness today.

- World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 725 (2006).
- 18 Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 725 (2006).
- 19 Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA is Failing America's Elderly Debtors*, 16 ELDER L. J. 135, 155 (2008).
- 20 See Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA is Failing America's Elderly Debtors*, 16 ELDER L. J. 135, 157 (2008).
- 21 FED. TRADE COMM'N, *Annual Report 2011: Fair Debt Collection Practices Act*, at 4 (2011), available at <http://www.ftc.gov/os/2011/03/110321fairdebtcollectreport.pdf> (last visited Oct. 12, 2011).
- 22 FED. TRADE COMM'N, *Annual Report 2011: Fair Debt Collection Practices Act*, at 5 (2011), available at <http://www.ftc.gov/os/2011/03/110321fairdebtcollectreport.pdf> (last visited Oct. 12, 2011).
- 23 FED. TRADE COMM'N, *Annual Report 2011: Fair Debt Collection Practices Act*, at 5 (2011), available at <http://www.ftc.gov/os/2011/03/110321fairdebtcollectreport.pdf> (last visited Oct. 12, 2011).
- 24 15 U.S.C. §1692a, sec. 803(5) (emphasis added).
- 25 ATTY. GEN. OF TEX., http://www.oag.state.tx.us/consumer/debt_collection.shtml (describing the differences between the FDCPA and the TDCA) (last visited Oct. 24, 2011).
- 26 TEX. FIN. CODE ANN. § 392.001(6) (defining the term "debt collector").
- 27 See TEX. FIN. CODE ANN. § 392.001(7) (defining the term "third party debt collector"); see also ATTY. GEN. OF TEX., http://www.oag.state.tx.us/consumer/debt_collection.shtml (describing the application of the) (last visited Oct. 24, 2011).
- 28 Heintz v. Jenkins, 514 U.S. 291, 292 (1995) (affirming the Seventh Circuits' application of the FDCPA to lawyers who regularly collect debts, including initiating litigation for the purposes of collection consumer debts).
- 29 TEX. FIN. CODE ANN. § 392.101
- 30 TEX. FIN. CODE ANN. § 392.102 (authorizing a plaintiff to sue both the third party debt collector and the surety).
- 31 Marauder Corp. v. Beall, 301 S.W.3d 817, 820-21 (Tex. App.—Dallas 2010, no pet.)
- 32 15 U.S.C. § 1692g, sec. 809(a)(4) and (5).
- 33 15 U.S.C. § 1692g, sec. 805(a).
- 34 Elwin Griffith, *Identifying Some Trouble Spots in the Fair Debt Collection Practices Act: A Framework for Improvement*, 83 NEB. L. REV. 762, 787 (2005).
- 35 Elwin Griffith, *Identifying Some Trouble Spots in the Fair Debt Collection Practices Act: A Framework for Improvement*, 83 NEB. L. REV. 762, 826 (2005).
- 36 TEX. FIN. CODE ANN. § 392.202(a).
- 37 TEX. FIN. CODE ANN. § 392.202(b).
- 38 See 15 U.S.C. § 1692l, sec. 814(a). In January 2012, the CFPB and the FTC entered into a Memorandum of Understanding ("MOU") to coordinate efforts to protect consumers and avoid duplication of federal law enforcement and regulatory efforts. Memorandum of Understanding Between the Consumer Financial Protection Bureau and the Federal Trade Commission (Jan. 2012). The MOU is available at, <http://ftc.gov/os/2012/01/120123ftc-cfpb-mou.pdf>.
- 39 Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 722 (2006).
- 40 15 U.S.C. § 1692l, sec. 814(d).
- 41 Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA is Failing America's Elderly Debtors*, 16 ELDER L. J. 135, 146 (2008).
- 42 See generally, CFBP ANNUAL REPORT 2012, FAIR DEBT COLLECTION PRACTICES ACT, (2012), available at http://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf; FTC, ANNUAL REPORT 2011: FAIR DEBT COLLECTION PRACTICES ACT, at 11 (2011), available at <http://www.ftc.gov/os/2011/03/110321fairdebtcollectreport.pdf> (also noting the FTC settled with West Asset Management in March 2011 for \$2.8 million – the largest penalty ever assessed in a debt collection case)
- 43 TEX. FIN. CODE ANN. § 392.403(d).
- 44 Email from Jordan Hale, Assistant Pub. Info. Coordinator, Office of the Attorney General of Texas, to Justin P. Nichols (Nov. 9, 2011) (responding to a request for public information, No. 11-32042, regarding debt collector complaints) (on file with author).
- 45 Email from Jordan Hale, Assistant Pub. Info. Coordinator, Office of the Attorney General of Texas, to Justin P. Nichols (Dec. 15, 2011) (responding to a request for public information, No. 11-32311, suits filed by the attorney general's office in 2010 based on TDCA violations) (on file with author).
- 46 TEX. ADMIN. CODE § 83.859 (West 2010).
- 47 Bruce N. Menkes and Anna-Katrina S. Christakis, *The FDCPA Take a New Direction: Federal Review of State Court Litigation Practices*, 63 BUS. LAW. 717, 717 (2008); see also *Marauder Corp. v. Beall*, 301 S.W.3d 817, 822 (Tex. App.—Dallas 2010, no pet.) (holding proof of actual damages is not a pre-requisite to recovery of statutory damages under the TDCA).
- 48 15 U.S.C. § 1692k, sec. 813(a)(2) (emphasis added).
- 49 FED. TRADE COMM'N., *Debt Collection FAQs: A Guide for Consumers*, at 4 (2009), available at <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre18.pdf> (last visited Oct. 12, 2011).
- 50 TEX. FIN. CODE ANN. § 392.403(e) (providing minimum damages which shall be awarded to a consumer who successfully maintains an cause of action against a debt collector for violating §§ 392.101 (bonding requirement), 392.202 (dispute procedures), or 392.301(a)(3) (representing or threatening to represent to a third party that the consumer is willfully refusing to pay a debt when the consumer has filed a written dispute regarding the debt)).
- 51 Marauder Corp. v. Beall, 301 S.W.3d 817, 822 (Tex. App.—Dallas 2010, no pet.)
- 52 Marauder Corp. v. Beall, 301 S.W.3d 817, 823 (Tex. App.—Dallas 2010, no pet.)
- 53 15 U.S.C. § 1692k, sec. 813(a)(1); and TEX. FIN. CODE ANN. § 392.403(a)(2).
- 54 See generally TEX. PROP. CODE ANN. §42 et. seq. (outlining the types of personal property exempt from seizure, execution, garnishment, or attachment).
- 55 William R. Crow, Jr., Comment, *The Texas Debt Collection Practices Act: Relief for the Harassed Consumer?*, 8 ST. MARY'S L. J. 773, 776 (1977).
- 56 See *Duty v. Gen. Fin. Co.*, 273 S.W.2d 64, 65 (Tex. 1954) (first recognizing the common law tort of wrongful debt collector); see also Boe W. Martin, *A Creditor's Liability for Unreasonable Collection Efforts: The Evolution of a Tort in Texas*, 9 S. TEX. L. J. 127, 135 (1967) (clarifying that it is more accurate to call the cause of action "unreasonable collection").
- 57 Boe W. Martin, *A Creditor's Liability for Unreasonable Collection Efforts: The Evolution of a Tort in Texas*, 9 S. TEX. L. J. 127, 132 (1967); see also *EMC Mortg. Corp. v. Jones*, 252 S.W.3d 857, 868 (Tex. App.—Dallas 2008, no pet.)
- 58 273 S.W.2d 64.
- 59 *Duty v. Gen. Fin. Co.*, 273 S.W.2d 64, 66 (Tex. 1954).
- 60 *Indus. Fin. Serv. Co. v. Riley*, 295 S.W.2d 498, 506 (Tex. Civ. App.—Dallas 1956, writ granted) (suggesting a finding of recklessness, combined with malice, will support a judgment against a debt collector for unreasonable collection efforts), *aff'd*

in part and rev'd in part on other grounds, 302 S.W.2d 652 (Tex. 1957).

61 359 S.W.2d 95.

62 Moore v. Savage, 359 S.W.2d 95, 96 (Tex. Civ. App.—Waco 1962, writ ref'd n.r.e.) (concluding a cause of action for unreasonable collection efforts does not require willfulness or maliciousness, but a showing of negligence causing physical injury is enough to sustain damages); *see also* Boe W. Martin, *A Creditor's Liability for Unreasonable Collection Efforts: The Evolution of a Tort in Texas*, 9 S. TEX. L. J. 127, 134 (1967).

63 EMC Mortg. Corp. v. Jones, 252 S.W.3d 857, 868–69 (Tex. App.—Dallas 2008, no pet.) (citing Montgomery Ward & Co. v. Brewer, 416 S.W.2d 837, 844 (Tex. App.—Waco 1967, writ ref'd n.r.e.)).

64 TEX. FIN. CODE ANN. § 392.403(a)(1).

65 Marauder Corp. v. Beall, 301 S.W.3d 817, 820 (Tex. App.—Dallas 2010, no pet.).

66 Marauder Corp. v. Beall, 301 S.W.3d 817, 821 (Tex. App.—Dallas 2010, no pet.) (reversing the trial court's issuance of a statewide injunction against a debt collector when the plaintiff only plead for individual relief, but suggesting had the plaintiff sought statewide relief in her pleadings the court would have upheld the broad injunction).

67 Pullins v. Credit Exchange of Dallas, Inc., 538 S.W.2d 681, 683 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.).

68 EMC Mortg. Corp. v. Jones, 252 S.W.3d 857, 873 (Tex. App.—Dallas 2008, no pet.).

69 Alamo Nat'l Bank v. Kraus, 616 S.W.2d 908, 910 (Tex. 1981).

70 EMC Mortg. Corp. v. Jones, 252 S.W.3d 857, 871 (Tex. App.—Dallas 2008, no pet.) (citing Grogan v. Santos, 617 S.W.2d 312, 315–16 (Tex. Civ. App.—Tyler 1981, no writ).

71 Boe W. Martin, *A Creditor's Liability for Unreasonable Collection Efforts: The Evolution of a Tort in Texas*, 9 S. TEX. L. J. 127, 132 (1967). (citing *Indus. Fin. Serv. Co. v. Riley*, 295 S.W.2d 498, 506 (Tex. Civ. App.—Dallas 1956, writ granted) as the first case to hold liability could be imposed for unreasonable collection under some theory other than intentional conduct); *Cf.* Harned v. E-Z Finance Co., 254 S.W.2d 81 (Tex. 1953) (rejecting an award for mental anguish absent proof of accompanying physical injury); *but see* William R. Crow, Jr., Comment, *The Texas Debt Collection Practices Act: Relief for the Harassed Consumer?*, 8 ST. MARY'S L. J. 773, 779 (1977) (explaining Texas courts generally construe physical injury to include infliction of emotional distress).

72 TEX. FIN. CODE ANN. § 392.404(a) (making a violation of the TDCA a deceptive trade practice actionable under the Texas Deceptive Trade Practices Act).

73 TEX. BUS. & COMM. CODE § 17.50(b)(1).

74 Blanche v. First Nationwide Mortg. Corp., 74 S.W.3d 444, 445–46 (Tex. App.—Dallas 2002, no pet.) (concluding a consumer's informal notice of bankruptcy to mortgagee raised a fact issue as to the mortgagee's degree of culpability which needed to be resolved by the fact finder at trial in order to determine the amount of possible damages which could be awarded); *see also* EMC Mortg. Corp. v. Jones, 252 S.W.3d 857 (Tex. App.—Dallas 2008, no pet.) (requiring a showing that the plaintiff was actually denied credit or was offered a higher interest rate in order to support an award for loss of credit reputation).

75 989 S.W.2d 72.

76 Household Credit Servs., Inc. v. Driscoll, 989 S.W.2d 72, 88–89 (Tex. App.—El Paso 1998, pet. denied)

77 EMC Mortg. Corp. v. Jones, 252 S.W.3d 857, 870 (Tex. App.—Dallas 2008, no pet.).

78 *See generally* Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp., 439 U.S. 297, 313 (1978) (holding a bank may charge customers any rate allowed by the home state of the bank, even when the maximum allowable interest rate in the bank's home state exceeds that of the consumer's home state), and Smiley v. Citibank, 517 U.S. 735, 745 (1996) (declaring fines, charges, dues, and fees are all considered "interest," and banks are bound by the maximum interest allowed in the bank's home state, not the state of the consumer).

79 Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA is Failing America's Elderly Debtors*, 16 ELDER L. J. 135, 138 (2008).

80 Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA is Failing America's Elderly Debtors*, 16 ELDER L. J. 135, 137–38 (2008).

81 Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 734 (2006).

82 Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 724 (2006).

83 Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 729 (2006).

84 ACA INT'L Code of Ethics and Code of Operations of ACA International, as amended on Nov. 23, 2010, at 4 (*available at* http://www.acainternational.org/files.aspx?p=/images/12909/codeofethics-ops_2010.pdf) (last visited Dec. 27, 2011).

85 ACA INT'L. <http://www.acainternational.org/about-file-an-ethics-complaint-209.aspx> (informing consumers effective Sept. 19, 2011, ACA International will no longer directly mediate consumer complaints against debt collectors) (last visited Dec. 27, 2011).

86 Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 740 (2006) (proposing incorporation of the ACA's Code of Ethics into the FDCPA).

87 Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 741–42 (2006).

88 Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 746 (2006).

89 15 U.S.C. §1692g, sec. 809(d).

90 Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA is Failing America's Elderly Debtors*, 16 ELDER L. J. 135, 157 (2008).

91 Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 732–34 (2006).

92 TEX. FIN. CODE ANN. § 392.306.

93 15 U.S.C. § 1692k, sec. 813(a)(3); and TEX. FIN. CODE ANN. § 392.403(b).

94 McKinley v. Drozd, 685 S.W.2d 7, 9 (Tex. 1985).

95 John Tavormina, Comment, *The Fair Debt Collection Practices Act: The Consumer's Answer to Abusive Collection Practices*, 52 TUL. L. REV. 584, 599 (1978).

96 FED. TRADE COMM'N, *Annual Report 2011: Fair Debt Collection Practices Act*, at 14 (2011), *available at* <http://www.ftc.gov/os/2011/03/110321fairdebtcollectreport.pdf> (last visited Oct. 12, 2011).

97 FED. TRADE COMM'N, *Annual Report 2011: Fair Debt Collection Practices Act* (2011), *available at* <http://www.ftc.gov/os/2011/03/110321fairdebtcollectreport.pdf> (last visited Oct. 12, 2011).

- 98 FED. TRADE COMM'N., *Debt Collection FAQs: A Guide for Consumers* (2009), available at <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre18.pdf> (last visited Oct. 12, 2011).
- 99 Email from Jordan Hale, Assistant Pub. Info. Coordinator, Office of the Attorney General of Texas, to Justin P. Nichols (Nov. 9, 2011) (responding to public information request no. 11-32042, regarding debt collector complaints) (on file with author).
- 100 Email from Jordan Hale, Assistant Pub. Info. Coordinator, Office of the Attorney General of Texas, to Justin P. Nichols (Dec. 15, 2011) (responding to public info. request no.: 11-32311, estimating the number of TDCA-related lawsuits filed by the attorney general in 2010) (on file with author).
- 101 ATTY. GEN. OF TEX., http://www.oag.state.tx.us/consumer/debt_collection.shtml (last visited Oct. 24, 2011).
- 102 Roy K. Schneider, Comment, *Illiberal Construction of Pro Se Pleadings*, 159 U. PA. L. REV. 585, 617-18 (2011).
- 103 Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 723 (2006).
- 104 Roy K. Schneider, Comment, *Illiberal Construction of Pro Se Pleadings*, 159 U. PA. L. REV. 585, 594 (2011).
- 105 Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam).
- 106 Jessica Case, Note, *Pro Se Litigants at the Summary Judgment Stage: Is Ignorance of the Law and Excuse?*, 90 KY. L. J. 701, 708 (2002).
- 107 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (holding a plaintiff must allege more than mere conclusions and speculation in order to survive summary judgment, and must allege facts which, if true, would be grounds for relief).
- 108 Roy K. Schneider, Comment, *Illiberal Construction of Pro Se Pleadings*, 159 U. PA. L. REV. 585, 610 (2011).
- 109 *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009) (holding the allegations of facts which create the possibility of misconduct is not enough, but rather the pleadings must allege facts which are plausible).
- 110 See generally Haines v. Kerner, 404 U.S. 519 (1972).
- 111 FED. R. CIV. P. 12(b)(6) (creating a defense against a plaintiff's claims if the pleadings fail to state a claim upon which relief can be granted).
- 112 Roy K. Schneider, Comment, *Illiberal Construction of Pro Se Pleadings*, 159 U. PA. L. REV. 585, 617-18 (2011).
- 113 Jessica Case, Note, *Pro Se Litigants at the Summary Judgment Stage: Is Ignorance of the Law an Excuse?*, 90 KY. L. J. 701, 708 (2002).
- 114 Roy K. Schneider, Comment, *Illiberal Construction of Pro Se Pleadings*, 159 U. PA. L. REV. 585, 613 (2011).
- 115 Jessica Case, Note, *Pro Se Litigants at the Summary Judgment Stage: Is Ignorance of the Law an Excuse?*, 90 KY. L. J. 701, 702 (2002).
- 116 Roy K. Schneider, Comment, *Illiberal Construction of Pro Se Pleadings*, 159 U. PA. L. REV. 585, 592 (2011).
- 117 *In-Depth: Leveling the Playing Field: Help for Self-Filers*, THE THIRD BRANCH (Admin. Off. U.S. Cts., D.C.), Jul. 2011, at 1, available at http://www.uscourts.gov/news/TheThirdBranch/11-07-01/IN-DEPTH_Leveling_the_Playing_Field_Help_for_Self-Filers.aspx (last visited Oct. 24, 2011).
- 118 FED. TRADE COMM'N., *Debt Collection FAQs: A Guide for Consumers*, at 4 (2009), available at <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre18.pdf> (last visited Oct. 12, 2011).
- 119 Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA is Failing America's Elderly Debtors*, 16 ELDER L. J. 135, 162 (2008).
- 120 Steven Plitt and Joshua D. Rogers, *Charting a Course for Federal Removal Through the Abstention Doctrine: A Titanic Experience in the Sargasso Sea of Jurisdictional Manipulation*, 56 DEPAUL L. REV. 107, 107 (2006).
- 121 Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA is Failing America's Elderly Debtors*, 16 ELDER L. J. 135, 162 (2008).
- 122 28 U.S.C. § 1331 (2010) (creating federal question jurisdiction for federal courts).
- 123 Steven Plitt and Joshua D. Rogers, *Charting a Course for Federal Removal Through the Abstention Doctrine: A Titanic Experience in the Sargasso Sea of Jurisdictional Manipulation*, 56 DEPAUL L. REV. 107, 107-8 (2006).
- 124 Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 723 (2006).
- 125 Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 724 (2006).
- 126 28 U.S.C. §1332(a) (creating diversity jurisdiction for federal courts).
- 127 Steven Plitt and Joshua D. Rogers, *Charting a Course for Federal Removal Through the Abstention Doctrine: A Titanic Experience in the Sargasso Sea of Jurisdictional Manipulation*, 56 DEPAUL L. REV. 107, 108 (2006).
- 128 TEX. FIN. CODE ANN. § 392.102 (authorizing a plaintiff to sue both the third party debt collector and the surety).
- 129 Tex. Fin. Code Ann. § 392.306 (imposing liability on a creditor who has actual knowledge that the debt collector it hires regularly violates the TDCA).
- 130 John Tavormina, Comment, *The Fair Debt Collection Practices Act: The Consumer's Answer to Abusive Collection Practices*, 52 TUL. L. REV. 584, 587(1978).
- 131 Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA is Failing America's Elderly Debtors*, 16 ELDER L. J. 135, 137 (2008).
- 132 See Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA is Failing America's Elderly Debtors*, 16 ELDER L. J. 135, 147-48 (2008) (noting credit card debt increased by 89% from 1992 to 2011).
- 133 Boe W. Martin, *A Creditor's Liability for Unreasonable Collection Efforts: The Evolution of a Tort in Texas*, 9 S. TEX. L. J. 127, 129 (1967).
- 134 Duty v. Gen. Fin. Co., 273 S.W.2d 64, 66 (Tex. 1954).



Consumer News Alert Recent Decisions

Since October 2006, the Center for Consumer Law has published the “Consumer News Alert.” This short newsletter contains everything from consumer tips and scam alerts, to shopping hints and financial calculators. It also has a section just for attorneys, highlighting recent decisions. The alert is delivered by email three times a week. Below is a listing of some of the cases highlighted during the past few months. To subscribe and begin receiving your free copy of the Consumer News Alert in your mailbox, visit the Center for Consumer Law, www.uhcl.org.

UNITED STATES COURTS OF APPEAL

Rewards program promises made in advertisements may be enforced. The Ninth Circuit held that a cigarette company may have made promises in advertising for a rewards program that customers could enforce in a breach of contract suit. The court found the promises enforceable, despite the fact that they were made in an advertisement. “[W]e find no reason to presume that RJR’s communications did not constitute an offer merely because they were addressed to the general public in the form of advertisements. The operative question under California law . . . is simply ‘whether the advertiser, in clear and positive terms, promised to render performance in exchange for something requested by the advertiser, and whether the recipient of the advertisement reasonably might have concluded that by acting in accordance with the request a contract would be formed.’” *Sateriale v. R. J. Reynolds Tobacco Co.*, No. 11-55057, 2012 U.S. App. LEXIS 14394 (9th Cir. July 13, 2012).

Collection letter cannot be sent “c/o debtor’s employer.” The Ninth Circuit held that a law firm violated federal debt collection law by sending a collection notice addressed to the debtor in “care of” her employer. *Evon v. Law Offices of Sidney Mickell*, Nos. 10-

16615, 10-17836, 2012 U.S. App. LEXIS 15861 (9th Cir. Aug. 1, 2012).

Collection letter did not violate Fair Debt Collection Practices Act. The Fifth Circuit held that a debt collection letter’s threat did not violate federal law by including language that purportedly contradicted and overshadowed statutorily required notices. “The supposed threat falls in the category of ‘letters [that] encourage debtors to pay their debts by informing them of the possible negative consequences of failing to pay,’ words that do not overshadow the required notice language. This is because ‘one way to encourage someone with a true dispute to come forward and resolve that dispute is to inform him of the possible negative consequences of his continued inaction.’ . . . The letter in this case essentially provided such warnings and nothing more. Thus, the notice language in [the defendant’s] letter is not overshadowed by the letter’s bad-credit warnings.” *McMurray v. ProCollect, Inc.*, No. 11-10291, 2012 U.S. App. LEXIS 14866 (5th Cir. July 16, 2012).

Arbitration clause doesn’t cover job applicant. The First Circuit held that a mandatory arbitration clause in an employment application was unenforceable against a pregnant woman who brought suit after being denied a job. The employer argued that the arbitration clause unambiguously covered all disputes with job applicants. The court disagreed, holding that because the clause was ambiguous, and because the party that drafted it had all the bargaining power, it should be construed against the employer. “[N]othing in the arbitration clause refers to ‘applicants’ . . . Instead every reference is to ‘your employment,’ ‘the employment process,’ or ‘pre-employment disputes.’ Accordingly, there is a reasonable basis for [the applicant’s] belief that she would only be bound by the arbitration clause if ultimately hired.” *Gove v. Career Sys. Dev. Corp.*, No. 11-2468, 2012 U.S. App. LEXIS 14653 (1st Cir. July 17, 2012).

Express warranty requires privity. The Fifth Circuit held that a claim against a manufacturer for breach of express warranty requires that the affirmation or promise be made to the plaintiff. Scott v. Dorel Juvenile Grp. Inc., No. 11-10349, 2012 U.S. App. LEXIS 155 (5th Cir. Jan. 4, 2012).

Class-wide arbitration claim may proceed even without express agreement. The First Circuit held that an arbitrator, and not a judge, must decide if an arbitration agreement allows for a dispute to move forward individually or on a class-wide basis. The plaintiff franchisor argued that the U.S. Supreme Court's 2010 ruling in Stolt-Nielsen S.A. v. AnimalFeeds International Corporation required the express consent of the parties before arbitration could proceed as a class action. But the First Circuit disagreed, holding not only that an agreement silent on the class-action question did not control, but also that the arbitrator was properly in a position to decide the intent of the parties. "We . . . reject the . . . precept, on which [the franchisor's] argument depends, that there must be express contractual language evincing the parties' intent to permit class or collective arbitration," the court held. "Stolt-Nielsen imposes no such constraint on arbitration agreements." Fantastic Sams Franchise Corp. v. FSRO Ass'n Ltd., 683 F.3d 18 (1st Cir. 2012).

Defendant has right to show amount in controversy. The Tenth Circuit held that a defendant in a consumer lawsuit should have had the opportunity to show that the amount in controversy was sufficient for removal under the Class Action Fairness Act. The district court remanded the consumer's class action lawsuit to state court, concluding from the face of the complaint that the damages at issue did not meet the Act's \$5 million jurisdictional threshold. The court held that defendant should have had the opportunity to show by the preponderance of the evidence that the amount at stake satisfied the Act's requirements. It noted that the circuits are divided over the proper standard in this context. Frederick v. Hartford Underwriters Ins. Co., 683 F.3d 1242 (10th Cir. 2012).

Law firm bringing replevin action is subject to Fair Debt Collection Practices Act. The Fourth Circuit held that the aunt of the debtor could maintain an action against a law firm based on an alleged violation that occurred in connection with a replevin proceeding. Rawlinson v. Law Office of William M. Rudow, No. 10-2148, 2012 U.S. App. LEXIS 173 (4th Cir. Jan. 5, 2012) (per curiam).

Law firm cannot sue bank to recover loss from fake check. The First Circuit held that a law firm could not sue Citibank to recover lost funds from a fraudulent check deposited into the firm's IOLTA account. Aresty Int'l Law Firm v. Citibank, 677 F.3d 54 (1st Cir. 2012).

Parties can waive arbitration notwithstanding a no waiver clause. The Sixth Circuit affirmed a district court's finding that the defendant had waived its right to arbitration by participating in litigation for eight months. Johnson Assocs. Corp. v. HL Operating Corp., 680 F.3d 713 (6th Cir. 2012).

Debt collector may have violated Telephone Consumer Protection Act. The Seventh Circuit held that a debt collector may have violated the TCPA when its automated dialing system contacted cell phone users with reassigned numbers. The debt collector argued that it had the consent of the prior owner and therefore didn't violate the Act. The court disagreed, noting "there can't be any long-term consent to call a given cell number, because no one . . . has a property right in a phone number. Consent to call a given num-

ber must come from its current subscriber." Soppet v. Enhanced Recovery Co., 679 F.3d 637 (7th Cir. 2012).

Purchaser of mortgage may be a debt collector under the Fair Debt Collection Practices Act. The Sixth Circuit held that a mortgage purchaser may be a "debt collector" liable for violations of the federal Fair Debt Collection Practices Act. The court also noted that although the debt was not actually in default, the FDCPA still applies. "A FDCPA defendant cannot escape coverage under the Act by asserting to the court that the debt was not actually in default, despite having dunned plaintiffs for months or years in the face of plaintiffs' pleas or proof that the collector has made some error." Bridge v. Ocwen Fed. Bank, 681 F.3d 355 (6th Cir. 2012).

The Sixth Circuit held that a mortgage purchaser may be a "debt collector" liable for violations of the federal Fair Debt Collection Practices Act.

Purchaser has three years to rescind under Land Sales Act. [Interstate Land Sales Full Disclosure Act ("ILSFDA"), 15 U.S.C. § 1701] The Fourth Circuit held that purchasers of a lot in an upscale real estate development had three years to exercise their rescission rights under federal law imposing disclosure requirements in interstate land sales. Nahigian v. Juno-Loudoun, LLC, 677 F.3d 579 (4th Cir. 2012).

Law firm's validation notice does not violate Fair Debt Collection Practices Act. The Ninth Circuit held that a validation notice sent by a law firm that implied notice had to be in writing did not violate the FDCPA. The court concluded that a validation notice violates § 1692g(a)(3) only by expressly requiring a consumer to dispute a debt in writing. "We hold that [the firm's] notice does not violate § 1692g(a)(3) of the FDCPA by impermissibly requiring [the plaintiff] to dispute her debt in writing. The notice does not expressly state such a requirement. Assuming without deciding that the notice could be understood to imply a writing requirement, that implication is part of the statute itself. Such an implicit requirement does not violate § 1692g(a)(3)." Riggs v. Prober & Raphael, 681 F.3d 1097 (9th Cir. 2012).

TILA plaintiffs do not need to plead ability to repay. The Tenth Circuit held that home borrowers were not required to plead that they had the ability to repay their loan in order to invoke their rescission rights under the Federal Truth in Lending Act. Sanders v. Mountain Am. Fed. Credit Union, No. 11-4008, 2012 U.S. App. LEXIS 15714 (10th Cir. July 30, 2012).

Nursing home can enforce arbitration clause. The Eleventh Circuit held that a nursing home could enforce an arbitration clause signed by a patient upon admission when her estate later sued for wrongful death. Entrekin v. Internal Med. Assocs., No. 11-10730, 2012 U.S. App. LEXIS 16655 (11th Cir. Aug. 9, 2012).

STATE COURTS

Texas Supreme Court discusses calculation under Lodestar Method. Under Texas law, a claim for attorney's fees under the Texas Commission on Human Rights Act is subject to the Lodestar method employed by federal courts. In a recent decision, the Texas Supreme Court reversed the standard of proof to recover such fees, noting, "[w]hile Texas courts have not routinely required billing records or other documentary evidence to substantiate a claim for attorney's fees, the requirement has merit in contested cases under the lodestar approach." The court continued, "[w]hen applying for a fee under the lodestar method, the applicant must provide sufficient details of the work performed before the court can make a meaningful review of the fee request. For the purposes of lodestar calculations, this evidence includes, at a minimum, documentation of the services performed, who performed them and at what hourly rate, when they were performed, and how much time the work required." *El Apple I, Ltd. v Olivas*, 55 Tex. Sup. J. 954 (2012).

Federal banking law preempts a state law regulating convenience checks. The California Supreme Court held that a state law requiring credit card companies to make certain disclosures regarding the use of convenience checks is preempted by the federal National Bank Act. The court noted, "[i]f disclosure requirements such as those in [the state law] were allowed to stand, national banks operating in multiple states would face the prospect of 'limitations and restrictions as various and as numerous as the states.' National banks would have to monitor requirements as to the content, language, manner, and format of disclosures for each of the 50 states (and possibly municipalities as well), and continually adjust their convenience check offers to comply with the prescriptions of each local jurisdiction. Such '[d]iverse and duplicative [regulation] of national banks' engagement in the business of banking ... is precisely what the NBA was designed to prevent.'" *Parks v. MBNA Am. Bank, N.A.*, 278 P.3d 1193 (Cal. 2012).

President of corporation cannot represent business in arbitration proceeding. The Supreme of Arkansas joined other states in holding that a corporate officer, director, or employee, who is not a licensed attorney, engages in the unauthorized practice of law by representing the corporation in arbitration proceedings. The court also held that a court, not the arbitrator, should determine issues regarding legal representation during arbitration proceedings. *NLSHA, LLC v. TriBuilt Constr. Grp., LLC*, No. 11-927, 2012 Ark. LEXIS 157 (Ark. Mar. 29, 2012).

The Court held that not every named plaintiff must have standing at the time of suit as to every claim. As long as the plaintiffs, taken together, have standing as to each claim, the case can proceed.

Texas Supreme Court discusses standing and mootness in class actions. The Court held that not every named plaintiff must have standing at the time of suit as to every claim. As long as the plaintiffs, taken together, have standing as to each claim, the case can proceed. The Court also rejected the county's argument that the suit was moot because all the named plaintiffs eventually obtained counsel and

their criminal proceedings are complete. The Court reasoned that the claims were inherently transitory, and, thus, even though the named plaintiffs' claims were now moot, that did not make the class action moot. *Heckman v. Williamson Cnty.*, 55 Tex. Sup. J. 803 (2012).

Lawyer cannot enforce arbitration agreement in retainer contract. The Supreme Court of Louisiana held that an attorney could not enforce an arbitration clause when a former client sued him for malpractice. The plaintiff argued that the arbitration clause could not be enforced because the state's rules of professional conduct prohibit lawyers from limiting liability to a client unless the client is independently represented by counsel when the retainer agreement is negotiated. The state supreme court rejected a *per se* rule against arbitration clauses in attorney-client retainer agreements. However, the court emphasized that such provisions must be "fair and reasonable" to the client. In this case, the court decided that the defendant's arbitration clause was unenforceable because he failed to make the necessary disclosures to the plaintiff. *Hodges v. Reasonover*, No. 2012-CC-0043, 2012 La. LEXIS 1962 (La. July 2, 2012).

Is Sending Notice Within Three Years Sufficient to Preserve Rescission Rights Under Truth-in Lending?

Why Not?

By Steven Herrera*



Procedure and Relevant Statutes

As the law stands today, courts are split on whether the filing of a lawsuit is the only way to preserve the right of rescission before the expiration of the three-year limitation of section 1635(f) of the Truth in Lending Act (TILA). Currently, the majority of courts have ruled that a lawsuit must be filed within the statutory limitations period. A minority, however, have taken the position is that mere notice to rescind is sufficient to satisfy the statute, and preserve the right to subsequently file suit.

Under the TILA, a debtor generally has right to rescind on a transaction up to three days after the consummation of the transaction.¹ This three-day “cooling off” period, allows a debtor to rescind for any reason or for no reason.² However, pursuant to 15 U.S.C. §1635(a) and (f), if the creditor fails to deliver “the information and rescission forms required under [§1635] together with a statement containing the material disclosures required under TILA, then the borrower may rescind until the earlier of (i) that delivery or (ii) ‘three years after the date of consummation of the transaction[.]’”³ Specifically, section 1635(f) provides, in relevant part, the following:

An obligor’s right of rescission shall expire *three years after the date of consummation of the transaction* or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor.⁴

But section 1635 is not the only section of the TILA that deals with limitations. Section 1640(e) sets out a one-year statute of limitations, stating, “Any action under this section may be brought...in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.”⁵ The relationship between sections 1635 and 1640 is clouded by the language of Regulation Z, the implementing regulation of 1635(f), which states:

To exercise the right to rescind, the consumer shall

notify the creditor of the rescission by mail, telegram or other means of written communication. Notice is considered given when mailed, when filed for telegraphic transmission or, if sent by other means, when delivered to the creditor’s designated place of business.⁶

The issue is whether the TILA, as supplemented by Reg. Z, declares that mere notice is sufficient to exercise the right of rescission, after which the consumer would have one-year to file suit, or if section 1635 requires the filing of a lawsuit within the three-year period. Both interpretations of the timing of the right of rescission rely on an interpretation §1635(f), as discussed by the Supreme Court in *Beach v. Owen Fed. Bank*, 523 U.S. 410 (1998). In *Beach*, the Court stated:

Section 1635(f)...takes us beyond any question whether it limits more than the time for bringing a suit, by governing the life of the underlying right as well. The subsection says nothing in terms of bringing an action but instead provides that the “right of rescission [under the Act] shall expire” at the end of the time period. It talks not of a suit’s commencement but of a right’s duration, which it addresses in terms so straightforward as to render any limitation on the time for seeking a remedy superfluous.⁷

In light of the Court’s ruling, §1635(f) has continuously been labeled as a statute of repose, thus, a firm bar, rather than a statute of limitations.⁸ The conflict between the finality of §1635(f)’s three-year limitation and the simple requirements to exercise a right to rescission under Regulation Z is the reason for

The issue is whether the TILA, as supplemented by Reg. Z, declares that mere notice is sufficient to exercise the right of rescission.

the disparity in interpreting how rescission may be exercised.

The Right of Rescission May Only be Exercised by Filing an Action for Enforcement

The majority view insists the holding in *Beach* is dispositive as to when and how a debtor must exercise his right to rescission. As explained by the Third Circuit in *Williams v. Wells Fargo Home Mortg., Inc.*, the Court's analysis of §1635(f) in *Beach* implicitly holds that "any claim for rescission under §1635 must be filed within the three-year period."⁹ Thus, while a debtor can invoke the right to rescission by notice, that invocation alone will not preserve the right beyond the three-year period, even if suit is commenced within one year following a notice of rescission.¹⁰

Some decisions have relied solely on Regulation Z as authority for the position that mere notice is sufficient to exercise a debtor's right to rescission.

The Ninth Circuit concluded generally the same in *McOmie—Gray v. Bank of Am. Home Loans*, by stating, "rescission suits must be brought within three years from the consummation of the loan, regardless [of] whether notice of rescission is delivered within that three-year period."¹¹ However, *McOmie* went a step further and expressly found the one-year pe-

riod of §1640(e) did not extend the right of rescission past the three-year limitation of §1635(f).¹²

While asserting that *Beach* was dispositive to this issue, the Tenth Circuit also considered a policy argument in rejecting a debtor's claim that she was entitled to exercise her right to rescission by mere notice. In *Rosenfield v. HSBC Bank, USA*¹³, the court noted the purpose of the TILA is, "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare... various credit terms[,] avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices."¹⁴ The court weighed this purpose with the practical effects of allowing debtors to easily exercise their right to rescission, for example, clouding a "bank's title on foreclosure."¹⁵ The court held that without requiring the filing of a lawsuit, the "time period for solidifying the legal relationship between lenders and borrowers [would] effectively [be] enlarged, thus upset[ting] the economic best interests of the public as a whole."¹⁶

The Virginia district courts have reached the same conclusion, but with different reasoning.¹⁷ For example, in *Bradford v. HSBC Mortg. Corp.*, the court reviewed the statutory process of debtor rescission under the TILA and concluded that mere notice was insufficient to rescind after the three-day "cooling off" period.¹⁸ First, the court noted the process begins with debtors sending a notice to rescind to the creditor.¹⁹ At this point, "the lender has twenty days to decide whether it will (i) recognize the existence of a rescission right and privately arrange rescission with the borrower and any other interested parties, or instead (ii) dispute the existence of a rescission right and await the borrower's initiation of suit."²⁰ Therefore, notice only *advances* a claim of rescission and a court order is required to determine whether to order rescission, the effect of rescission, and the obligations of the debtor or creditor.²¹ It follows, the court continued, that because a lender cannot be obligated under §1635(b) to rescind upon receiving notice, the borrower has not yet fully "exercise[d] his right to rescind" and more is needed.²² The court held that until the right to rescind was fully exercised, the debtor's claim

to rescission was not fully advanced, notwithstanding the fact that the notice was sent before the §1635(f) three-year limitation.²³

The Right of Rescission May be Exercised by Notice to the Creditor

Contrary to the majority of courts, some decisions have relied solely on Regulation Z as authority for the position that mere notice is sufficient to exercise a debtor's right to rescission.²⁴ Most of these courts, however, narrow the Court's ruling in *Beach* to answer only the question of when the right to rescission expires, not how it must be exercised.²⁵ For example, in *Gilbert v. Residential Funding LLC*, the Fourth Circuit found mere notice enough to exercise the right to rescind, while narrowing the holding of *Beach*.²⁶ In *Gilbert*, the debtors executed an adjustable rate note with their creditors on May 5, 2006, sent a letter attempting to exercise their right to rescind on April 5, 2009, and filed suit to enforce that right on September 14, 2009.²⁷ The circuit court construed the holding in *Beach* as dispositive only in answering "whether §1635(f) is a statute of limitation, that is, 'whether [it] operates, with the lapse of time, to extinguish the right which is the foundation for the claim' or 'merely to bar the remedy for its enforcement.'"²⁸ Further, relying heavily on a plain language interpretation the court stated "neither 15 U.S.C. §1635(f) nor Regulation Z says anything about the filing of a lawsuit, and we refuse to graft such a requirement upon them."²⁹ Thus, the court in *Gilbert* held that the debtors exercised their right to rescind with their April 5 notice of intent to rescind.³⁰ Other courts have agreed with the analysis of *Gilbert*, and have held that the one-year limitation imposed by 15 U.S.C. §1640(e) limits the length of time a debtor has to file a claim after rescission is denied or unanswered.³¹

Conclusion

While it may be that the Supreme Court intended to impose a final bar to rescission claims in *Beach*, the plain language of Regulation Z and §1635(f) clearly indicate the proper way to exercise the right of rescission and lack any language requiring debtors to file suit. As stated in §1635(f), "an obligor's right of rescission shall expire *three years after the date of consummation of the transaction*." Regarding the same "right," Regulation Z allows debtors to "exercise the right to rescind, the consumer shall *notify* the creditor of the rescission by mail." As the court noted in *Gilbert*, "the Supreme Court has repeatedly emphasized the importance of the plain meaning rule, stating that if the language of a statute or regulation has a plain and ordinary meaning, courts need look no further and should apply the regulation as it is written."³² Thus, clearly Regulation Z must have some effect, because any other interpretation would render the right in Regulation Z's "right to rescind," and the right in §1635(f)'s "right of rescission," distinct.

Understandably, however, courts have noted potential title hindrances for restricting the exercise of the right of rescission.³³ However, this is not sufficient to curtail the potency of Regulation Z.³⁴ Even if the exercise of the right to rescind under Regulation Z were admissible, title would not be "clouded" for a significant period of time. For example, if a debtor attempted to exercise her right to rescission the day before the three-year expiration, a claim regarding her denial would arise after the 20-day mark of §1635(b). Moreover, due to the statute of limitations under §1640(e), a denial of a valid right to rescission would only last one year. At most, one year plus 20 days would be the maximum amount of time allowed past the three-year limitation.³⁵ Accordingly, if Regulation Z is given effect and the exercise of the right of rescission begins with notice, there is no rational fear of continuous, unrestricted "clouding" of title. Additionally, it seems Massachusetts finds four years suitable to effectuate the purpose

of the TILA and give debtors ample time to file their rescission claims.³⁶

The reasoning of the Fourth Circuit in *Gilbert* is the most compelling view of the relationship between section 1635 and 1640 of the TILA. While *Beach* set a strict bar for rescission claims, it did not answer the question of *how* rescission must be exercised. Regulation Z must be given credence—debtors should be able to exercise their right to rescission and begin the process by notice. While the reasoning of the cases that hold otherwise is persuasive, none are compelling enough to negate the effect of Regulation Z.

* Third year student, University of Houston Law Center.

1 15 U.S.C. §1635(a).

2 See *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418, 421 (1st Cir. 2007).

3 *Bradford v. HSBC Mortg. Corp.*, 838 F. Supp. 2d 424, 429 (E.D. Va. 2012) (quoting 15 U.S.C. §635(f)). See also *Geraghty v. BAC Home Loans Servicing LP*, CIV. 11-336 JNE/TNL, 2011 WL 3920248 (D. Minn. Sept. 7, 2011).

4 15 U.S.C. §1635(f) (emphasis added).

5 15 U.S.C.A. §1640.

6 12 C.F.R. §1026.23(a)(2) (emphasis added).

7 *Id.* at 417.

8 See *In re Cmty. Bank of N. Virginia*, 622 F.3d 275, 301 n.18 (3d Cir. 2010), *as amended* (Oct. 20, 2010) (§1635(f) is not a statute of limitations, but a statute of repose); *Jones v. Saxon Mortg., Inc.*, 537 F.3d 320, 327 (4th Cir. 1998) (“by its terms, §1635(f) mirrors a typical statute of repose in that it ‘precludes a right of action after a specified period of time rather than’ providing that a cause of action must be brought within a certain period of time after the cause of action accrued.”) (quoting *Beach v. Great Western Bank*, 692 So.2d 146, 152 (Fla.1997), *aff’d*, 523 U.S. 410 (1998)); *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1164 (9th Cir. 2002) (§1635(f) is a statute of repose).

9 *Williams*, 410 F. Appx. 495, 499 (3d Cir. 2011); See also *DeCosta v. U.S. Bancorp*, 2010 WL 3824224 (D. Md. Sept. 27, 2010); *Sam v. Am. Home Mortg. Servicing*, 2010 WL 761228 (E.D. Cal. Mar. 3, 2010); *Falocchia v. Saxon Mortg., Inc.*, 709 F.Supp.2d 860 (E.D.Cal. Feb.12, 2010).

10 *Id.*; See *Sherzer v. Homestar Mortg. Services*, 2011 WL 5075086 (E.D. Pa. Oct. 24, 2011) (suit must be filed within three years, despite filing within one year following notice of rescission); *Chevy Chase Bank, F.S.B. v. Carrington*, 2010 WL 745771 (M.D. Fla. Mar. 1, 2010) (no matter what actions [debtor] took or failed to take, her right to rescind was extinguished [three years after consummation of the transaction]—well before filing the instant suit); *Sobieniak v. BAC Home Loans Servicing, LP*, 835 F. Supp. 2d 705, 710 (D. Minn. 2011) (language of the TILA, the holding in *Beach* and the strong public policy favoring certainty of title all support the majority view that Congress intended that any lawsuit to enforce the right of rescission be brought within the three-year repose period); *In re Dawson*, 437 B.R. 15, 19 (Bankr. D.D.C. 2010) (“if a borrower has given timely notice of rescission *and* sued to enforce that right prior to the expiration of three years without having sold the property, the right of rescission has been exercised”) (emphasis added); *Beaukes v. GMAC Mortgage, LLC*, 2012 WL 1204635 (D. Minn. Apr. 11, 2012); *Dietz v. Beneficial Loan and Thrift Co.*, 2011 WL 6739504, at *3–4 (D.Minn. Dec. 22, 2011).

11 667 F.3d 1325, 1328 (9th Cir. 2012).

12 *Id.* at 1329; See 15 U.S.C. §1640(e) (“any action...may be brought in...within one year from the date of the occurrence of the violation”).

13 *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172 (10th Cir. 2012).

14 *Rosenfield*, 681 F.3d at 1179 (quoting 15 U.S.C.A. §1601(a) (West)).

15 *Id.* at 1186; See *Sobieniak*, 835 F.Supp.2d at 710 (“strong public policy favoring certainty of title” supports a firm bar on rescission claims after three year limitation).

16 *Id.* (quoting *Saxon Mortg.*, 537 F.3d at 327).

17 See *Wolf v. Fed. Nat. Mortg. Ass’n*, 830 F. Supp. 2d 153, 160 (W.D. Va. 2011) (three-year limitation of §1635(f) “extinguishes the borrower’s rescission right regardless of whether any notice of rescission was filed within three years of closing”) (quoting *Yowell v. Residential Mortg. Solution, LLC*, 2011 WL 3654388, *9 (W.D.Va. Aug. 17, 2011), *appeal docketed*, No. 11–1994 (4th Cir. Sept. 20, 2011)).

18 *Bradford*, 838 F.Supp.2d at 429.

19 *Id.*

20 *Id.*

21 *Id.* (emphasis added) (quoting *Am. Mortg. Network, Inc. v. Shelton*, 486 F.3d 815, 821 (4th Cir.2007)).

22 *Id.* at 434-35.

23 *Id.* at 436.

24 See *Siver v. CitiMortgage, Inc.*, 830 F.Supp.2d 1194, 1196 (W.D. Wash. 2011) (notice of rescission, without the filing of suit, within the three years of §1635(f) is timely); *Carson v. Wells Fargo Bank, N.A.*, 2011 WL 2470099 (M.D. Fla. June 20, 2011) (because notifying the creditor automatically triggers rescission, it is this notification, not the filing of the suit, that must be within the three-year period).

25 See *Cocroft v. HSBC Bank USA, N.A.*, 2012 WL 1378645 (N.D. Ill. Apr. 20, 2012) (“*Beach* addresses *when* the right to rescind expires and whether it can be tolled. It leaves unresolved the question of *how* a consumer must exercise that right to rescind—suit, or notice via letter”) (quoting *Stewart v. BAC Home Loans Servicing, LP*, 2011 WL 862938, at *6) (N.D.Ill. May 10, 2011) (emphasis in original); *Barnes v. Chase Home Fin., LLC*, 825 F. Supp. 2d 1057, 1064 (D. Or. 2011) (limitation in §1635(f) applies to the borrower’s exercise of his right of rescission rather than to the timing of a lawsuit to enforce that right); *In re Hunter*, 400 B.R. 651, 658 (Bankr. N.D. Ill. 2009) (the *Beach* decision did not discuss the method for exercising this right to rescind under TILA); *Seneca v. First Franklin Fin. Corp.*, 2011 WL 3235647 (S.D. Cal. July 28, 2011) (cited *Beach*, but found exercise of rescission timely, notwithstanding the fact that suit was after three-year limitation); *Calvin v. Am. Fid. Mortg. Services, Inc.*, 2011 WL 1672064 (N.D. Ill. May 3, 2011) (*Beach* did not discuss how the right must be asserted within the three-year period).

26 678 F.3d 271, 278 (4th Cir. 2012).

27 *Id.* at 275.

28 *Id.* at 278.

29 *Id.* at 277.

30 *Id.* at 277-78.

31 See *Sultan v. BAC Home Loans Servicing L.P.*, 2011 WL 1557933 (W.D. Mo. Apr. 25, 2011) (because debtors filed a notice of rescission within three years of closing, they have one year from creditor’s refusal to rescind to file a claim); *Ibrahim v. MortgageIT, Inc.*, 2011 WL 2560233 (N.D. Cal. June 28, 2011); *Santos v. Countrywide Home Loans*, 2009 WL 2500710 (E.D. Cal. Aug. 14, 2009) (“Plaintiff could file suit after the end of the three year period of repose but within the one year limitations period borrowed from Section 1640”); *Pearce v. Bank of Am. Home Loans*, 2010 WL 2348637 (N.D. Cal. June 8, 2010) (notice of intent to

rescind within three years is sufficient, but plaintiff must bring the claim within one year of the creditor's denial or failure to respond); *Sherzer v. Homestar Mortg. Services*, 2010 WL 1947042 (E.D. Pa. May 7, 2010) *report and recommendation adopted as modified*, 2010 WL 2649852 (E.D. Pa. July 1, 2010); *Lee v. U.S. Bank*, 2010 WL 2635777 (N.D. Cal. June 30, 2010); *Briosos v. Wells Fargo Bank*, 737 F.Supp.2d 1018, 1026-27 (N.D. Cal. 2010) (because debtor exercised his right to rescission before the right expired by operation of §1635(f)'s three-year limitations period and filed suit less than one year after creditor rejected his request for rescission, claim is not barred); *Cf. Palmer v. Champion Mortg.*, 465 F.3d 24, 27 (1st Cir. 2006) (if a creditor does not respond to a rescission request within 20 days, the debtor may file suit in federal court to enforce the rescission right).

32 *Gilbert v. Residential Funding LLC*, 678 F.3d 271, 276 (4th Cir. 2012) (citing *Textron, Inc. v. Comm'r*, 336 F.3d 26, 31 (1st Cir.2003)).

33 *See Beach*, 523 U.S. at 411 (since a statutory rescission right could cloud a bank's title on foreclosure, Congress may well have chosen to circumscribe that risk).

34 *See Leonard v. Bank of Am. NA*, 2012 WL 3001266 (E.D. Wis. July 23, 2012) ("concerns regarding the potential threat to a clear title in cases where it is difficult to discover that a rescission demand has been made, it cannot ignore the plain language of §1635(f) and Regulation Z").

35 *See* §§1635(f), (b), 1640(e); *Abubo v. Bank of New York Mellon*, 2012 WL 2022327 (D. Haw. June 5, 2012) (the date of occurrence of a TILA violation for failure to honor a borrower's rescission "is the earlier of when the creditor refuses to effectuate rescission, or twenty days after it receives the notice of rescission") (citing *Kruse v. U.S. Bank, N.A.*, 2010 WL 331354, at *3 (D.Colo. Jan.20, 2010)).

36 *See* Mass. Gen. Laws Ann. ch. 140D, §10(f) (West) ("An obligor's right of rescission shall expire *four years* after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding that the information and forms required under this section or any other disclosures required under this chapter have not been delivered to the obligor") (emphasis added).

DECEPTIVE TRADE PRACTICES AND WARRANTIES

DTPA FAILURE TO DISCLOSE REQUIRES DIRECT EVIDENCE OF INTENT

Arlington Home, Inc. v. Peak Env'tl. Consultants, Inc., 361 S.W.3d 773 (Tex. App.—Houston [14th Dist.] 2012).

FACTS: Naela Kaki assigned her rights under an earnest money contract to Arlington Home. Arlington requested that Coldwell Banker arrange a mold inspection for the home prior to closing. Coldwell arranged the inspection with Peak Environmental Consultants, which does business as Live Oak. Live Oak set forth a proposal to Arlington that presented the costs and procedures that would be followed before and after the inspection. At first, Live Oak was unaware of the previous mold issues and water damage but later identified the problem. Live Oak executed the inspection as stated in the proposal, but collected one fewer interior air sample.

Live Oak emailed Coldwell the results, which indicated there was no significant mold amplification expected to pose a threat to the property or its occupants. Coldwell relayed this information to Arlington. Arlington subsequently closed on the home after Hurricane Rita had struck. While remodeling the home, significant mold problems were discovered. Arlington sued Coldwell Banker and Live Oak collectively. Arlington sued for violations of the Deceptive Trade Practices Act, alleging that Defendants failed to disclose and made misrepresentations of

facts that induced Arlington to buy the home. The jury found that Live Oak had engaged in false, misleading, or deceptive acts; that Arlington had relied on these acts; and that these acts were a producing cause of Arlington's damages. Live Oak

Because the complainant failed to direct the court to any evidence that the alleged violator intended to induce the complainant to purchase, the trial court did not err in granting the JNOV.

filed for a judgment notwithstanding the verdict, which the trial court granted. The jury's award for Arlington was rescinded. Arlington challenges the trial court's entry of the JNOV in favor of Live Oak.

HOLDING: Affirmed.

REASONING: The court reasoned that to prevail on a claim for failure to disclose under the DTPA, a complainant must have presented evidence of 1) a failure to disclose material information concerning goods or services, 2) which was known at the time of the transaction, 3) if such failure was intended to induce the consumer into a transaction, 4) which the consumer would not have entered had the information been disclosed. See Tex. Bus. Comm. Code Ann. § 17.46(b)(24). During trial, Arlington put forth an email that outlined a conversation between Coldwell Banker and Arlington. The court explained that the conversation and the surrounding circumstances gave Arlington an opportunity to cancel its purchase of the home and

have its earnest money returned at the time that Arlington read Coldwell's email. All parties claimed that they were not aware of any defects or threats of mold at the home and Arlington failed to demonstrate evidence to the contrary. The court rejected Arlington's claim that the email was evidence of Live Oak or Coldwell Banker inducing them to purchase the home. The email only consisted of the results of the mold inspection and was written in good faith.

The court held that there must be direct evidence of the intent to induce under the relevant subsection of the DTPA. The court went on to conclude that because the complainant failed to direct the court to any evidence that the alleged violator intended to induce the complainant to purchase, the trial court did not err in granting the JNOV on the DTPA claim.

BUYER OF USED GOODS CAN SUE MANUFACTURER FOR BREACH OF IMPLIED WARRANTY

Shows v. Man Engines, 364 S.W.3d 348 (Tex. App.—Houston [14th Dist.] 2012).

FACTS: Defendant Man Germany manufactured engines that were installed in a yacht in 2000. In 2002, Plaintiff Doug Shows purchased the yacht knowing that it and its engines were used. In 2004, the yacht suffered major engine failure due to a defective valve. In 2005, the same defects caused engine failure and the engine had to be replaced.

In 2006, Plaintiff filed suit, asserting various claims including breach of the implied warranty of merchantability. At trial, the jury found Defendant liable for breach of the implied warranty of merchantability. Defendant filed a motion for judgment notwithstanding the verdict arguing that there was no implied warranty because Plaintiff bought the yacht knowing it and its engines were used. The trial court granted the motion and Plaintiff appealed.

HOLDING: Reversed and remanded.

REASONING: Defendant relied on the "Chaq Oil Rule" that states implied warranties do not arise when a buyer knowingly purchases used goods. *Chaq Oil v. Gardner Machine Corp.*, 500 S.W.2d 877, 878 (Tex. App.—Houston [14th Dist.] 2000). The court refused follow the line of cases supporting the "Chaq Oil Rule" because they address whether an implied warranty arises between a subsequent seller and a subsequent buyer in the subsequent sale. The court noted that these cases do not address whether the subsequent buyer may sue the original manufacturer of the goods for a breach of the implied warranty that occurred when the goods left the manufacturer's possession as part of the first sale of the goods. Because Plaintiff brought suit against the manufacturer of the engines, the "Chaq Oil Rule" does not apply.

The court recognized that a warranty of merchantability may be implied in a contract for the sale of new goods by the manufacturer. *Nobility Homes of Texas v. Shivers*, 557 S.W.2d 77, 81 (Tex. 1977). The Supreme Court of Texas held in *Nobility Homes* that there is no "privity" required for implied warranties, and a downstream buyer of a mobile home may bring a claim for breach against a remote manufacturer. The court in

RECENT DEVELOPMENTS

Nobility Homes did not expressly state whether a consumer who knowingly purchased used goods could bring suit against the manufacturer for breach of the implied warranty, but did not exclude that possibility.

The court in the instant case extends *Nobility Homes*, and holds a subsequent buyer who knew the goods were used could sue the manufacturer of the goods for a breach of the implied warranty, provided the breach occurred when the goods left the manufacturer's possession as part of the first sale of the goods.

UCC REQUIRES NOTICE OF BREACH OF WARRANTY

FAILURE TO NOTIFY SELLER OF BREACH OF WARRANTY BARS RECOVERY OF ONLY WARRANTY CLAIMS

Hull v. South Coast Catamarans, L.P., 365 S.W.3d 35 (Tex. App.—Houston [1st Dist.] 2011).

FACTS: Plaintiff Edgar Hull, Jr. purchased a new boat from Defendant South Coast Catamarans, L.P., a boat dealer. About five months later, Aksano Catamarans, LLC, the boat manufacturer, delivered the boat to a third party facility. Hull hired a truck driver to transport the boat to him, and the driver notified Hull that the boat had cracks, small holes, and dents in its fiberglass. Hull notified Aksano about the boat, and was told to have the boat inspected. The technician estimated that it would cost \$3,000 to \$5,000 to determine the extent of the fiberglass problem. Hull notified Aksano that he would not accept the boat based on its condition. Aksano informed Hull that it would fix any problem with the boat if it was determined to have been caused by them. The surveyor hired to inspect the boat concluded that the boat's poor structural integrity precluded its safe use. Hull demanded a full refund and other costs he had incurred in relation to the boat. Hull refused to accept repair of the boat or a replacement. Hull made phone calls to South Coast, but with no answers. Aksano refused to examine the boat but offered to help Hull resell it.

Hull sued Aksano and South Coast for violations of the Texas Deceptive Trade Practices Act, fraud, negligent misrepresentation, breach of contract, negligence, and breach of warranty. The jury returned a unanimous verdict in favor of Hull on all of his claims, but before entry of judgment, Aksano and South Coast moved for a new trial. The district judge ordered a new trial for violation of the court's discovery and docket control order and a juror error. Subsequently, Aksano and South Coast filed a traditional motion for summary judgment. The district judge granted the motions and entered final judgment. Hull appealed.

HOLDING: Reversed.

REASONING: Hull argued that the trial court erred in granting summary judgment to Aksano and South Coast regarding Hull's breach of warranty claim related to the defective condition of the boat. Aksano and South Coast claimed that Hull did not provide them with an opportunity to cure the boat's defects because Hull asked for a refund and stated that he would not accept repair or replacement of the boat. The court disagreed. It noted the general rule that a buyer must notify the seller of a breach of warranty within a reasonable time after he discovers

or should have discovered any breach in order to maintain an action for breach of warranty. See Tex. Bus. & Com. Code Ann. § 2.607(c)(1) (West 2009). The court explained that notification is intended to give the seller an opportunity to cure any defects in the product. Additionally, the court recognized that the notice does not need to be formal; a general expression of dissatisfaction may be sufficient to meet the notice requirement under section 2.607. *U.S. Tire-Tech, Inc. v. Boeran, B.V.*, 110 S.W.3d 194, 200 (Tex. App. — Houston [1st Dist.] 2003). The court explained that ordinarily the question of notice is a question of fact to be determined by the trier of fact — thus inappropriate for summary judgment unless “no room for ordinary minds to differ exists.”

The court, after reviewing the record, determined that Aksano and South Coast received appropriate notice under section 2.607(c)(1) when Hull notified them

of problems with the fiberglass. Also, because the record showed that Aksano refused to examine the boat, disputed the damage reports sent by Hull, and made no attempt to repair the boat or to pay for repairs or replacement, the court found there were issues of material fact as to whether Aksano and South Coast were given an opportunity to cure, and thus summary judgment was improperly granted to the breach of warranty claims.

Finally, the court addressed the applicability of section 2.607(c)'s notice requirement on Hull's DTPA non-breach of warranty claims. Citing *Mobil Min. & Minerals Co. v. Texas Auto Pool, Inc.*, 01-09-00093-CV, 1992 WL 211503 (Tex. App. — Houston [1st Dist.] 1992), the court found that section 2.607(c) does not bar DTPA non-breach of warranty claims even if the notice requirement had not been met. The court concluded that the trial court erred in granting the summary judgment motion in favor of Aksano and South Coast.

DTPA LAUNDRY LIST REQUIRES PROOF OF RELIANCE

DTPA RESCISSION AWARD NOT AVAILABLE WITHOUT PROOF OF ACTUAL DAMAGES

DTPA RESCISSION REQUIRES CONSUMER RETURN VALUE RECEIVED

Cruz v. Andrews Restoration, Inc., 364 S.W.3d 817 (Tex. 2012).

FACTS: Erwin Cruz insured his home property with Chubb Lloyd's Insurance Company of Texas. After a big storm, Cruz discovered several roof leaks that caused significant water damage throughout the house and called to file a claim with Chubb. Andrews Restoration, doing business as Protech, was called to the home to evaluate the damage of the storm. Chubb authorized Protech to perform mold remediation services and verbally agreed to pay for them. Cruz formally demanded policy limits, but Chubb suggested hiring a contractor to evaluate and estimate the reconstruction cost of the projected damages resulting from remediation activities. After a foray into

Notification is intended to give the seller an opportunity to cure any defects in the product.

RECENT DEVELOPMENTS

dehumidification by Protech to fix the mold issue, Cruz's claim was still unresolved more than two years after the storm. At that time, the outstanding invoices totaled over \$700,000, which Chubb had verbally agreed to pay earlier. Chubb ultimately tendered policy limits about two and a half years after the storm, and the house was demolished two years later.

Protech brought suit against Chubb and Cruz to recover the outstanding balance. Chubb counterclaimed for fraud, and Cruz counterclaimed for fraud, fraudulent inducement, negligent misrepresentation, and violation of the Texas Deceptive Trade Practice Act. The jury found that Chubb breached his agreement with Protech, and awarded damages to Protech in the amount of its unpaid invoices. The jury also found that Cruz breached its contract with Protech, and awarded the same damages of the unpaid invoices. The jury did not, however, find that Protech committed fraud against Chubb or Cruz, or that Protech was at fault for the DTPA claims brought by Cruz.

All parties appealed and the appellate court held that Cruz was not entitled to restoration of consideration because Cruz had failed to prove entitlement to rescission. Protech and Cruz filed petitions for review.

HOLDING: Affirmed.

REASONING: The court noted that the DTPA authorizes consumer suits when deceptive acts are the producing cause of "[actual damages] or damages for mental anguish." TEX. BUS. & COM. CODE ANN. § 17.50(a)(1). Cruz claimed that he was entitled to the money he paid to Protech because one of his remedies under the DTPA is to restore illegally acquired money or property. Maintaining its holding that a party who failed to recover actual damages or damages for mental anguish was not entitled to attorney's fees under the DTPA, the court held even a rescission award requires a showing of actual damages. See *Russell v. Indus. Transp. Co.*, 258 D.E. 462, 465 (1924). The court found that Cruz could not satisfy section 17.50(a)(1) because the statute clearly provides a cause of action only to consumers who have sustained damages, and the jury found none.

Additionally, the court noted that, under TEX. BUS. & COM. CODE ANN. §17.50(a)(1), a consumer loses his claim without proof of reliance to his detriment on the deceptive act. The court pointed out that the trial court jury found no reliance in the DTPA claim submitted by Cruz, and Cruz's subsequent filings did not mention reliance. Although Cruz presented facts that Protech engaged in a false, misleading or deceptive act, the court found he did not meet all the statutory requirements to recover on his DTPA claim because reliance is a necessary element.

Finally, the court applied TEX. BUS. & COM. CODE ANN. §17.50(b)(3) to evaluate Cruz's claim of entitlement to all amounts paid under contract without deducting value received under the agreement. Cruz argued that he is entitled to all the money paid by him under the agreement, without surrendering the benefits he received. However, the court noted that rescission is not a one-way street. The court reasoned that it requires a mutual restoration and accounting, in which each party restores property received from the other. However, Cruz argued that the term "restore" was a broader remedy than "restitution" and did not require him to account for the benefits he was afforded. The court looked to the definitions of the terms and determined that restitution was merely the "act of restoring" and the

terms were essentially the same. Cruz claimed that the DTPA authorizes restoration only to the consumer, without requiring that he disgorge any benefit received. The court held that section 17.50(b)(3)'s restoration remedy contemplates mutual restitution.

The court held that the trial court was correct in deciding not to award Cruz any remedy on his DTPA claims, and that the DTPA does not authorize an order restoring to Cruz amounts paid by him under the contract.

CIGARETTE REWARDS PROGRAM PROMISES MADE IN ADVERTISEMENTS MAY BE ENFORCED

Sateriale v. R.J. Reynolds Tobacco Co., ___ F.3d___ (9th Cir. 2012).

FACTS: Defendant R.J. Reynolds Tobacco Co. (RJR) operated a rewards program for consumers called Camel Cash until 2007. Under the program, consumers could purchase packages of Camel cigarettes containing certificates called C-Notes, which could then be exchanged for merchandise advertised in a catalog provided by Defendant. Certain (but not all) catalogs stated that the program could be terminated without notice, and in October 2006, Defendant mailed a notice to program members announcing that the program would terminate as of March 31, 2007.

Plaintiffs complained that in October 2006, Defendant no longer allowed for redemption of C-Notes for merchandise despite its promise to continue the program through March of 2007, and because it so abruptly ceased accepting C-Notes for redemption the C-Notes were rendered worthless. Plaintiffs brought their action for breach of contract, promissory estoppel, and violation of two California consumer protection laws. The district court granted Defendant's motion to dismiss for failure to state a claim upon which relief could be granted.

HOLDING: Affirmed in part and reversed in part.

REASONING: The court examined the claims in turn beginning with the breach of contract claim. Defendant contended that there was no contract because there was no offer, but merely invitations to make an offer under common law's general rule that advertisements of goods are not ordinarily intended or understood as offers to sell. The court rejected that argument because that rule includes an exception for offers of a reward, including offers of a reward for the redemption of coupons. Defendant also argued that if there were an offer, any contract arising from it would be too indefinite to be enforced. The court explained that terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy. It held that the existence of a breach could be readily discernible; and though an appropriate remedy would be more difficult to ascertain, public policy dictates that the court should go to great lengths to find a construction of the agreement to salvage the contract. The court found that there was enough in the agreement to show the existence of a unilateral contract, and the question of whether there was a breach should have survived the motion to dismiss. The court next examined the promissory estoppel claim and determined that although it should have survived the motion to dismiss, the claim rises and falls with the existence of a contract. The court upheld the dismissal of the California consumer law complaints.

RECENT DEVELOPMENTS

COMMON LAW, NOT DTPA, APPLIES TO UNCONSCIONABILITY ASSERTED AS AN AFFIRMATIVE DEFENSE

Philadelphia Indem. v. SSR Hospitality, 459 Fed. App. 308 (2012).

FACTS: Plaintiff, SSR Hospitality, was a corporation formed to purchase the Hawthorn Suites Hotel in Austin, Texas. SSR purchased an insurance policy, which included coverage for property damage, contents, and income, from Defendant, Philadelphia Indemnity Insurance Company (PIIC). During the covered period, the floor in a conference room in the hotel collapsed. After SSR submitted an insurance claim, PIIC investigated and discovered property damage to the hotel that predated the policy's inception. PIIC determined that the costs of repairs could exceed \$450,000. It issued a letter partially denying SSR's claim. SSR then executed a release of liability in exchange for \$13,984.39, which was the cost of the floor repairs minus the deductible. After receiving payment, SSR filed additional claims for the cost of the remainder of the repairs. In response to these claims, PIIC filed a declaratory judgment action seeking a

declaration of its obligations under the policy with respect to the cost of the damages. PIIC then moved for summary judgment, insisting that the release barred all of SSR's claims. SSR filed a response and countermotion for summary judgment arguing that the release was unconscionable. The district court granted PIIC's motion.

HOLDING: Affirmed.

REASONING: The parties disagreed about whether the Texas Deceptive Trade Practices Act (DTPA) applied to SSR's affirmative defense of unconscionability. SSR argued that the DTPA, which includes unconscionability as a cause of action and allows consumers to collect damages for unconscionable conduct by sellers, should apply. PIIC urged the court to apply common law, which conceives of unconscionability strictly as an affirmative defense to contractual performance. The Fifth Circuit agreed with PIIC that common law should apply, citing the TEXAS PRACTICE CODE OF CONSUMER RIGHTS AND REMEDIES § 4.8 (3d ed. 2009) (explaining the traditional common law view of unconscionability and the concept under the DTPA). The court then considered the facts of the case and determined that the release was neither substantively nor procedurally unconscionable.

INSURANCE

BENEFICIARY OF INSURANCE POLICY IS NOT DTPA CONSUMER

Kocurek v. CUNA Mut. Ins. Soc'y, 459 Fed. App'x. 371 (5th Cir. 2012).

FACTS: Louis Kocurek purchased an accidental death and dismemberment insurance policy naming Plaintiff as the primary beneficiary and Mr. Kocurek's children from a previous marriage as contingent beneficiaries. Defendant issued the policy, valued at \$200,000, on November 1, 2004. Approximately four months after purchasing the policy, Defendant sent Mr. Kocurek a mailing, offering him additional coverage. The second policy, which was issued April 1, 2005 in the amount of \$300,000, named Mr. Kocurek's children as primary beneficiaries and Plaintiff as the contingent beneficiary. Mr. Kocurek paid the premiums on both of these policies until his accidental death on July 27, 2006.

After Mr. Kocurek's death, Plaintiff attempted to collect benefits under the 2004 policy and his children attempted to collect benefits under the 2005 policy. Defendant refused to pay benefits on the earlier policy, pointing to a "one policy only" provision found in both policies. Plaintiff claimed the provision was unfair and misleading, as Defendant often solicited customers with mailings offering additional coverage without mentioning the "one policy" provision. The Plaintiff also contended that the "one policy only" clause was misleading because it was placed at the end of the list of policies under a "General Provisions" heading instead of elsewhere in a more appropriate place among other policies.

Plaintiff alleged three causes of action: false, misleading or deceptive acts or practices; fraud/misrepresentation; and neg-

ligence/gross negligence. Defendant filed a motion to dismiss the claim arguing, among other things, that the Plaintiff was not a consumer under the Texas Deceptive Trade Practices Act (DTPA). The district court granted the motion and Plaintiff appealed.

HOLDING: Affirmed in part, reversed in part, and remanded.

REASONING: The court found that as far as Plaintiff's claims under the DTPA were concerned, the motion to dismiss was properly granted. According to Tex. Bus. & Com. Code § 17.50, only a consumer may maintain a cause of action directly under the DTPA. In this case, the court found that Plaintiff's husband actually purchased the policies; therefore he was the customer for DTPA purposes, not the Plaintiff. To that point, Plaintiff argued that she was a consumer by virtue of her community property interest in the policies, which were paid for with community funds. The court declined to consider this argument on appeal however, as it was not timely raised in the district court.

Plaintiff alleged three causes of action: false, misleading or deceptive acts or practices; fraud/misrepresentation; and negligence/gross negligence.

RECENT DEVELOPMENTS

CONSUMER CREDIT

FEDERAL BANKING LAW PREEMPTS STATE LAW REGULATING CONVENIENCE CHECKS

Parks v. MBNA America Bank, N.A., 278 P.3d 1193 (Cal. 2012).

FACTS: In 2003, Defendant MBNA American Bank issued a credit card to Plaintiff Allan Parks. Later that year, Defendant sent Plaintiff convenience checks. Plaintiff used some of the checks and incurred finance charges in excess of the amount he would have been charged had he used the credit card for the transactions. The convenience checks did not include disclosures required by California law.

In 2004, Plaintiff brought a class action suit against Defendant alleging Defendant violated the California disclosure law. Defendant claimed the California law was preempted by federal banking law, but was denied judgment on that ground. After several years of litigation, Defendant again moved for judgment on the ground that the California law was preempted by federal banking law, arguing that recent federal case law supported preemption. The trial court granted Defendant's motion for summary judgment. The court of appeals reversed, reasoning the state law was not preempted because it did not significantly impair the power of national banks. Defendant appealed.

HOLDING: Reversed.

REASONING: The California Supreme Court began by noting that the National Bank Act of 1864 (NBA) broadly authorizes national banks to exercise all incidental power as shall be necessary to carry on the business of banking, and that this power expressly includes loaning money based on personal security. The court noted that allowing MBNA to offer convenience checks only if it complies with California Civil Code §1748.9 is tantamount to saying that MBNA may not offer the convenience checks *unless* it complies with §1748.9. The court concluded that the disclosure requirements of §1748.9 placed a condition on the federal powers to loan money on personal security, and was inconsistent with the NBA. Therefore, §1748.9 fails the significant impairment test, which provides that the legal standard for preemption is when the state consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers. This standard is now codified by the Dodd-Frank Act. *See* 12 U.S.C. §25b(b)(1)(B).

Finally, the court noted national banks must operate "subject to law" and state laws of general applicability are not preempted. Although national banks are subjected to state laws governing all businesses, laws that apply only to banks are preempted. The court found that the California law at issue was not generally applicable and placed conditions on the ability of national banks to engage in lending because banks that did not comply with the law would not be allowed to loan money in the state. Therefore, the state law regulating convenience checks was preempted.

TRUTH IN LENDING ACT REQUIRES ONLY NOTICE OF RESCISSION WITHIN THREE-YEAR DEADLINE

Gilbert v. Residential Funding LLC, 678 F.3d 271 (4th Cir. 2012).

FACTS: The Plaintiffs executed an adjustable rate note to refinance their property and a deed of trust to secure the note. Deutsche Bank Trust Company Americas (Deutsche) became the trustee for the note, and GMAC Mortgage, LLC (GMAC) became the sub-servicer. Two years later, the Plaintiffs defaulted on their loan, resulting in a foreclosure action. After a June 2009 hearing, the county superior court allowed the foreclosure to proceed.

In April 2009, however, Plaintiffs sent a letter to GMAC, notifying them that Plaintiffs were exercising their right to rescind the loan due to alleged violations of the Truth in Lending Act (TILA). GMAC found no basis to allow the Plaintiffs to rescind their transaction, and denied the attempted rescission. Plaintiffs then requested that GMAC cancel its security interest and return all consideration paid. After GMAC refused, Plaintiffs filed suit in county superior court to enjoin the mortgage foreclosure sale and rescind the loan. GMAC removed to federal district court and filed a motion to dismiss, arguing Plaintiffs did not sue within TILA's three-year window for rescission. The Plaintiffs appealed.

HOLDING: Reversed.

REASONING: The court recognized a split of authority as to whether a borrower must file or provide written notice within the statutory three-year period to assert his or her right to rescind under TILA. For example, the Ninth Circuit has held that rescission suits must be brought within three years, regardless of whether notice is delivered within that time, while a Bankruptcy Court in the Northern District of Illinois found TILA gives a consumer the right to rescind a credit transaction provided notice is provided within the statutory window. The court distinguished a prior Fourth Circuit decision, *American Mortgage Network, Inc. v. Shelton*, 486 F.3d 815 (4th Cir. 2007). In *Shelton*, the borrowers sought rescission *and* a declaration that the bank had forfeited the loan principal pursuant to violations of TILA. In the instant case, Plaintiffs only sought to show they had given proper notice to exercise their right to rescind. Based on this difference, the court found *Shelton* was not sufficient authority.

The court then looked at the statute and its plain meaning. Section 1635(f) of TILA provides, "An obligor's right of rescission shall expire three years after the date of consummation of the transaction . . . To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication. Notice is considered given when mailed." Neither §1635(f) nor Regulation Z (12

Neither §1635(f) nor Regulation Z (12 CFR Part 226), which implements the regulation, mention filing suit.

RECENT DEVELOPMENTS

CFR Part 226), which implements the regulation, mention filing suit. Finding no statutory basis, the court refused to impose the requirement that borrowers must file suit to comply with TILA's rescission requirements.

The court noted, however, that notice of cancellation does

not automatically void the loan agreement. Either the creditor must acknowledge that the right of rescission is available, and the parties must unwind the transaction, or the borrower must file a lawsuit so the court may enforce the right to rescind.

DEBT COLLECTION

DEBT COLLECTOR MAY HAVE VIOLATED TELEPHONE CONSUMER PROTECTION ACT

Soppet v. Enhanced Recovery Co., LLC, 679 F.3d 637 (7th Cir. 2012).

FACTS: Plaintiffs Soppet and Tang each received numerous calls on their respective cellular phones from an automated dialing system used by the defendant to collect debts for the cellular service provider—AT&T. It was clear from the messages that the calls were intended for the previous subscribers to the plaintiffs' phone numbers. In both cases, the original subscriber had given consent to receiving collection calls on their cell phones, but the collection activity occurred several years later, after the phone numbers had been recycled for use by the Plaintiffs.

The Plaintiffs, on behalf of a class, sued the debt collector under the Telephone Consumer Protection Act (TCPA). Section 227(b)(1) of the TCPA states: "It shall be unlawful for any

Only the consent of the subscriber assigned to a cell number at the time of the call justifies an automated or recorded call.

person within the United States . . . if the intended recipient is within the United States . . . to make any call . . . using any automatic dialing system . . . to any telephone number

assigned to a . . . cellular phone service . . . or any service for which the called party is charged for the call." Defendant Enhanced Recovery contended that the phrase "called party" in the TCPA referred to the actual debtors, and that their consent to be called on the numbers remained in force after the numbers' reassignment to Plaintiffs. The district court judge held that only the consent of the subscriber assigned to a cell number at the time of the call justifies an automated or recorded call. Enhanced Recovery appealed, and the issue on appeal was whether a "called party" under the TCPA refers to the person receiving the call or the intended recipient of the call.

HOLDING: Affirmed.

REASONING: The TCPA curtails the use of automated dialers to cell phones because cell phone users are often billed by the minute as soon as the call is answered or if the call goes to voicemail. This makes calling cell phones to collect on a debt different from, and potentially more expensive, than landlines for the recipients of these calls.

The court analyzed the language of the statute and found that there was consistent use of "called party" in referring to the current subscriber on the cell number or the person who actually

answered the call. The phrase was used seven times in the TCPA. Four times, the language unmistakably denoted the "called party" as the current subscriber, one of the times, the "called party" was denoted as the one who answers the phone, and two times the meaning of called party could not be determined. The court ruled, however, that there was no evidence that "called party" means "intended recipient," as Defendant urged.

The Defendant also argued that consent to call should be effective until revoked. The court rejected this argument as well, explaining that nobody, including the phone company, has property rights to a phone number and consent to call a number must come from the current subscriber.

Finally, the court rejected the defendant's argument that, if the court held for the plaintiffs, debt collectors' costs would rise because they would be effectively barred from ever using automated collection systems. The court stated that it was not the power of the court to write better laws but only to interpret them.

LAW FIRM BRINGING REPLEVIN ACTION IS SUBJECT TO FAIR DEBT COLLECTION PRACTICES ACT

Rawlinson v. Law Office of William M. Rudow, LLC, 460 F. App'x 254 (4th Cir. 2012).

FACTS: Plaintiff's nephew defaulted on a loan from WFS Financial ("WFS") for the purchase of a motor vehicle. Defendant Rudow then filed a replevin complaint in Maryland district court on behalf of WFS against both Plaintiff and her nephew, alleging that both parties had possession of the vehicle. The complaint demanded return of the vehicle, pursuant to the terms of the loan agreement, as well as recovery of the loan principal, interest, late charges, and attorney's fees. The state court dismissed the replevin action against Plaintiff because Defendant failed to present evidence that Plaintiff had possession of the vehicle or had any liability to WFS.

Plaintiff then filed suit against Defendant in Maryland circuit court alleging that the replevin action violated various provisions of the Fair Debt Collection Practices Act (FDCPA). Defendant removed the case to federal district court. The federal district court dismissed Plaintiff's action, and held that Plaintiff could not recover because she neither owed the debt nor had any financial interest in the vehicle. Plaintiff appealed.

HOLDING: Reversed and remanded.

REASONING: The court first examined the FDCPA's definition of "debt," defined as an "obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the

RECENT DEVELOPMENTS

subject of the transaction are primarily for personal, family or household purposes . . .” 15 U.S.C §1692a (5). The court held that based on *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 375-76 (4th Cir. 2006), Defendant’s replevin action was subject to the FDCPA requirements. In *Wilson*, the court held that a proceeding to foreclose on real property constituted the collection of a debt within the meaning of the FDCPA and further, that the method by which a debt collector seeks to satisfy a debt does not determine whether a debt exists under the statute. The court reasoned that under *Wilson*, Defendant’s replevin action, which sought possession of the vehicle and monetary damages, rather than only seeking direct payment of the loan, constituted the collection of a debt within the meaning of the FDCPA. The court stated that to hold otherwise would create a loophole in FDCPA protections for debt secured by personal property that the *Wilson* court expressly avoided.

The court then rejected Defendant’s argument that a replevin action is not within the scope of the FDCPA because replevin sounds in tort, and tort claims are not debts under the FDCPA. The court noted that *Wilson* made clear that a court should look beyond the label of the debt collection practice to determine whether a debt is being collected. The court found that the cases Defendant relied upon involved conventional tort claims in which liability arose from tortious activity, not from a consensual transaction.

The court concluded that Plaintiff’s nephew and WFS entered into a consensual loan agreement of exactly the kind covered by the FDCPA – “a transaction in which a consumer is offered or extended the right to acquire ‘money, property, insurance, or services’ which are ‘primarily for household purposes’ and to defer payment.” *Zimmerman v. HBO Affiliate Grp.*, 834 F.2d 1163, 1168-69 (3d Cir. 1987).

LAW FIRM’S VALIDATION NOTICE THAT IMPLIED NOTICE MUST BE IN WRITING DOES NOT VIOLATE FAIR DEBT COLLECTION PRACTICES ACT

Riggs v. Prober & Raphael, 681 F.3d 1097 (9th Cir. 2012).

FACTS: After defaulting on her car loan, Plaintiff Joann Riggs’ car was repossessed by the bank and sold, with the proceeds applied to Riggs’ debt. Defendant Dean Prober, an attorney at Prober & Raphael, then sent a validation notice to Plaintiff on behalf of the bank requesting repayment of the remaining debt. The notice stated that if Plaintiff notified Defendant in writing within 30 days that she was disputing the debt, Defendant would provide verification of the obligation or judgment, the amounts owed, and the original creditor’s name and address. Plaintiff failed to contact Defendant and made no payment towards her debt.

Defendant filed suit on behalf of the bank in California Superior Court. Plaintiff then filed a cross-claim for violation of the Fair Debt Collection Practices Act (FDCPA). The parties settled by dismissing both claims. In March 2010, Plaintiff sued Defendant in federal district court, alleging that Defendant’s validation notice violated the FDCPA because it (1) implicitly required her to dispute her debt in writing and (2) misrepresented her rights to dispute the debt in another manner. The district court granted partial summary judgment for Defendant.

Plaintiff appealed.

HOLDING: Affirmed.

REASONING: The court first cited to *Camacho v. Bridgeport Fin. Inc.*, 430 F.3d 1078, 1081-82 (9th Cir. 2005), which held that a validation notice violates §692g(a)(3) of the FDCPA insofar as it states that the debtor’s disputes must be made in writing. The court noted that whether an initial communication violates the FDCPA depends on if it is likely to deceive or mislead a hypothetical least sophisticated debtor. The court explained that the FDCPA has a dual purpose – to protect both consumers against deceptive debt collection practices, as well as debt collectors from unreasonable constructions of their communications. See *Jacobson v. Healthcare Fin. Servs. Inc.*, 516 F.3d 85, 90 (2d Cir. 2008). The court reasoned that although *Camacho* did not decide whether the FDCPA also prohibits debt collectors from implicitly requiring that disputes be in writing, the court did not believe the FDCPA could support such a prohibition.

The court explained that subsections (a)(4) and (a)(5) of §1692g prominently require a consumer to do certain things in writing, including notifying the debt collector that the debt is disputed in order to obtain verification. However, subsection (a)(3) does not mention what form a general dispute of an alleged debt must take. When read together, the court found subsections (a)(4) and (a)(5) of §1692g of the FDCPA could imply that a debtor must dispute her debt in writing. However, the court further held that although Defendant’s notice could be understood to implicitly require written disputes, the validation notice did not expressly state that Plaintiff must dispute her debt in writing.

NO VIOLATION OF FDCPA UNDER THE “UNSOPHISTICATED CONSUMER” TEST

Zemeckis v. Global Credit & Collection Corp., 679 F.3d 632 (7th Cir. 2012).

FACTS: Plaintiff Misty Zemeckis owed money to Capital One Bank. Capital One retained Defendant Global Credit & Collection Corp. to collect the debt from Plaintiff. Defendant sent a letter to Plaintiff about the debt containing threats of legal action and requested that Plaintiff call Defendant about the debt “today.” Notice of the 30-day debt validation period required by the Fair Debt Collection Practices Act [FDCPA] was placed on the back of the letter and instructions directing Plaintiff to the back of the letter were in all capital letters on the front. Plaintiff filed a class action lawsuit against Global Credit maintaining that the letter’s content violated §1692(g) of (FDCPA). She alleged that because the letter threatened legal action, “urged her to take action now,” and instructed her “to call Global Credit’s office today,” the statutorily mandated language informing her that she had 30 days to contest the validity of her debt had been overshadowed.

The district court granted Defendant’s motion to dismiss Plaintiff’s claim. Plaintiff appealed.

HOLDING: Affirmed.

REASONING: The court evaluated the collection letter under the “unsophisticated consumer” standard to determine whether the validation notice was overshadowed by the rest of the letter,

RECENT DEVELOPMENTS

in violation of §1692(g) of the FDCPA. *Avila v. Rubin*, 84 F.3d 222, 226-27 (7th Cir. 1996). Under the unsophisticated consumer test, a debt collection letter must be clear and comprehensible to a person who is uninformed, naïve, and trusting, but not without a rudimentary knowledge about the financial world or incapable of making basic deductions and inferences. The standard also requires that a significant fraction of the population must find the letter confusing in order for the letter to be in violation of the law.

The court found that generally whether a debt collection letter is confusing is a question of fact, but that a letter can be found not confusing as a matter of law if it is apparent from reading the letter that a significant fraction of the population would be misled by it. *Taylor v. Cavalry Inv., L.L.C.*, 365 F.3d 572, 574 (7th Cir. 2004). The court stated that it had already ruled that language that rushes the debtor to “act now” is merely “puffery” designed to create a mood rather than to convey concrete information or misinformation. The court held that the language in the instant case did not violate §1692(g)(b), and was only meant to expedite action by the debtor. It did not specifically require immediate *payment*. Therefore, the language of the letter did not contradict or overshadow Zemeckis’ right to a thirty-day validation period.

COLLECTION LETTER DOES NOT VIOLATE FAIR DEBT COLLECTION PRACTICES ACT

McMurray v. ProCollect, Inc., 687 F.3d 665 (5th Cir. 2012).

FACTS: Defendant ProCollect, a debt collector, mailed a letter to Plaintiff Janet McMurray, attempting to collect a debt she allegedly owed to Highland Oaks Apartments. The letter explained that her debt was referred to the collection agency and “failure to timely validate the referenced amount due [would] cause” the debt collector to report the account to the credit reporting agencies. This particular section also explained, in all-caps, the negative ramifications that may result from failing to settle the debt. Below this information, the letter contained a statement in bold typeface that informed the consumer that unless the consumer disputed the validity of the debt within 30 days, the debt collector would assume the debt was valid. The statement also stated that if the consumer were to dispute the

debt, the collector would obtain verification of the debt from the creditor and send a copy of that verification along with other pertinent information informing the consumer of the debt.

Plaintiff filed an action in federal court, claiming Defendant’s letter violated the Fair Debt Collection Practices Act (FDCPA) because the letter contradicted and overshadowed the statutorily-required notice, which provided Plaintiff notice of her rights under the statute. Plaintiff and Defendant both moved for summary judgment. The district court granted Defendant’s motion for summary judgment. Plaintiff challenged the ruling.

HOLDING: Affirmed.

REASONING: The court held that ProCollect’s collection letter was not inconsistent or overshadowing of the notice that is required by §1692g(a) of the FDCPA. Debt collectors are required to provide consumers, among other things, (1) a statement that unless the consumer disputes the validity of the debt within 30 days, the debt collector will assume the debt is valid, and (2) a statement that if the consumer notifies the collector that the consumer is disputing the debt, the debt collector will obtain verification of debt and present a copy of that information to consumer along with all other pertinent information. 15 U.S.C. §1692g(a). A debt collector may violate the FDCPA if other language in the same communication “overshadows or is inconsistent with the statutorily-mandated notice.”

The court found that the letter did not contradict the notice because it did not demand payment within the 30-day statutory period and the language of the letter was plain and understandable from the perspective of the least sophisticated consumer. The court disagreed with Plaintiff’s contention that the notice was overshadowed by the capitalized “threat” of bad credit being placed prominently, while the statutory notice was below. The court concluded that the supposed threat falls in the category of letters that encourage debtors to pay their debts by informing them of the harmful penalties of failing to pay off the balance.

The language of the letter was plain and understandable from the perspective of the least sophisticated consumer.

RECENT DEVELOPMENTS

ARBITRATION

PRESIDENT CANNOT REPRESENT BUSINESS IN ARBITRATION PROCEEDING

NISHA, LLC v. Tribuilt Const. Group, LLC, ___ S.W.3d ___ (Ark. 2012).

FACTS: Defendant NISHA, a general contractor, hired Plaintiff TriBuilt to build a hotel. After the project was completed, Plaintiff filed suit against Defendant alleging that Defendant refused to pay Plaintiff \$664,462.12, defamed Plaintiff, and intentionally interfered with Plaintiff's ability to get bonding for the project.

Defendant moved to compel arbitration, which was granted in part. In January 2011, the court below entered an order permitting Plaintiff's counsel to withdraw, and the attorney withdrew from the arbitration as well. Rather than obtaining new counsel, Plaintiff's president notified Defendant that he would represent Plaintiff in the arbitration proceedings. Defendant filed an injunction seeking to prevent Plaintiff's president from representing Plaintiff in either the court or arbitration proceedings, contending that a corporate entity cannot represent itself in litigation through agents who are not attorneys. The district court granted Defendant's petition to enjoin Plaintiff's president from representing Plaintiff in the court proceedings but denied the injunction with respect to the arbitration, permitting the Plaintiff's president to represent Plaintiff in the arbitration proceedings. Defendant appealed.

HOLDING: Reversed.

REASONING: The court first found it had exclusive authority to regulate the practice of law in Arkansas, and an arbitration body could not decide what constituted the unauthorized practice of law. The court then held that neither a corporation nor a non-lawyer could practice law. *Arkansas Bar Association v. Union National Bank*, 273 S.W.2d 408 (Ark. 1954). While an individual could represent himself in court, a corporation can only represent itself through a licensed attorney. Further, one who appears before a court for the purpose of business in connection to pending litigation or who seeks to invoke the processes of a court is engaging in the practice of law. The court, however, determined that the *Union National Bank* case did not directly address whether a corporation's officer could represent a corporation in an arbitration proceeding.

The court noted that although arbitration proceedings can be initiated without court action, a court is often involved in an arbitration proceeding. Courts sometimes appoint arbitrators and must generally enter orders confirming arbitration awards. Except in limited circumstances, arbitration awards are valid, final, and have the same res judicata effects as a judgment of a court. The court also noted that other jurisdictions such as Florida, Ohio, and Arizona have held that a non-lawyer's representation of a corporation in arbitration proceedings is the unauthorized practice of law.

The court held that because arbitration proceedings are often similar to those in litigation and involve similar activities like discovery, and because arbitration proceedings bear significant indicia of legal proceedings, a non-lawyer's

representation of a corporation in an arbitration proceeding constitutes the unlicensed practice of law.

PARTIES CAN WAIVE ARBITRATION NOTWITHSTANDING A NO-WAIVER CLAUSE

Johnson Assoc. Corp. v. HL Operating Corp., 680 F.3d 713 (6th Cir. 2012).

FACTS: The case arose out of a contract between Defendant Hartmann Corp. and Johnson Associations Corp. for the manufacture of luggage. Plaintiffs alleged Defendant was unjustly enriched and filed for breach of contract damages. Hartmann responded by counterclaiming for breach of contract. Settlement conferences and discussions commenced and continued for two months.

When settlement negotiations stalled, Defendant filed a motion to continue the trial and served Plaintiffs with interrogatories, requests for production of documents and admissions, and noticed eight depositions. The final due date for responses to the discovery requests was set for August 26, 2010. Three days before that deadline, Defendant notified Plaintiffs it intended to seek arbitration, per the sourcing agreement between the two parties. When Plaintiffs failed to respond to the Defendant's request for arbitration, Defendant filed a motion to compel arbitration on August 25, 2010. The district court denied Defendant's motion, and Defendant appealed.

HOLDING: Affirmed.

REASONING: The court held that even with the presence of a no-waiver clause in a contract, an analysis of whether the actions taken by the parties served to waive arbitration must still be undertaken. To hold otherwise allows parties an opportunity to "test the waters" of the claims through discovery.

Defendant cited *Manasher v. NECC Telecom*, 310 Fed. Appx. 804 (6th Cir. 2009) where the 6th Circuit held that a party who had both failed to plead arbitration as an affirmative defense and participated in the litigation process for nearly a year before asserting arbitration, was found to have taken actions "completely inconsistent with any reliance on arbitration." The court in the instant case noted that although the litigation in *Manasher* was more significant and complex, the principles it discusses are applicable—a party who actively participates in litigation inconsistent with the right to arbitrate cannot subsequently demand arbitration.

The court then addressed Defendant's argument that the actions he took—namely, failing to assert arbitration as an affirmative defense; participating in a minimal amount of litigation while trying to settle the case; and filing an answer

Even with the presence of a no-waiver clause in a contract, an analysis of whether the actions taken by the parties served to waive arbitration must still be undertaken.

RECENT DEVELOPMENTS

and counterclaim—did not amount to actions “completely inconsistent with any reliance on arbitration.” Defendant asserted that none of those actions individually could be considered completely inconsistent with reliance on arbitration. The court found that even if any one of those actions would not have been sufficient by itself, the presence of all three of those actions by Hartmann *was* sufficient, when taken together, to manifest a complete lack of reliance on arbitration.

Addressing Defendant’s argument that his failure to assert arbitration did not prejudice the Plaintiffs due to unnecessary delay and expense, the court noted that the case at bar involved not only an eight-month delay, but also various scheduling motions and settlement discussions, as well as considerable discovery. Taken together, the court held that these factors resulted in “actual prejudice” for the plaintiffs.

The court held the Defendant’s actions were completely inconsistent with any reliance on arbitration, and the belated assertion of Defendant’s right to arbitration caused the plaintiffs actual prejudice. Notwithstanding the no-waiver clause in the sourcing agreement, Defendant waived his right to arbitration.

CLASS-WIDE ARBITRATION CLAIM MAY PROCEED TO ARBITRATOR EVEN WITHOUT EXPRESS AGREEMENT

Fantastic Sams Franchise Corp. v. FSRO Assoc. Ltd., ___ F.3d ___, 2012.

FACTS: In 2011, Plaintiff Fantastic Sams Regional Owners Association filed a demand for arbitration with the American Arbitration Association (AAA) against Defendant Fantastic Sams Franchise Corporation. Plaintiff’s demand, made on behalf of its members, who are franchisees of Fantastic Sams with individual franchise license agreements with Defendant, alleged that it had breached the franchise license agreements. Defendant then filed a petition in federal district court pursuant to Section 4 of the Federal Arbitration Act (FAA) to stay Plaintiff’s arbitration and to compel them to arbitrate their claims with Defendant on an individual basis.

Twenty-five franchise agreements contained express prohibitions against “class-wide” arbitration, executed at various dates after 1988, which are not at issue. However, ten agreements, executed at various dates before 1988, did not contain any express prohibitions on class or collective arbitration. These ten set out in broad terms the matters as to which arbitration is required: “Any controversy or claim arising out of or relating in any way to this Agreement or with regard to its formation, interpretation or breach shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association.”

Although the ten agreements were devoid of class-wide arbitration prohibitions, Defendant argued that Plaintiff’s arbitration as to these ten was foreclosed as a matter of law under the Supreme Court’s decision in *Stolt-Nielsen S.A. v. Animal Feeds International Corp.*, 176 L.Ed.2d 605 (2010). Because the ten agreements did not contain express consent to arbitration by an association, Plaintiff’s representative action must be barred.

In its response, Plaintiff argued that Defendant had misread *Stolt-Nielsen*, and that the decision did not require the

express consent posited by Defendant. Further, neither *Stolt-Nielsen* nor the prohibition on “class-wide” arbitration contained in some of the agreements applies to bar associational arbitration.

The court denied Defendant’s petition as to the remaining agreements, on the grounds that “[t]he arbitration clause in those contracts is very broad and applies, without qualification, to all controversies or claims arising from or related to the contract, including issues of interpretation and breach.” The district court concluded that whether the agreements preclude FSRO’s action “is a matter of contract interpretation which the parties have agreed to submit to arbitration.”

HOLDING: Affirmed.

REASONING: The court found that Defendant’s reading of *Stolt-Nielsen* was too broad, and reasoned that the Supreme Court held only that class arbitration may not be imposed on a party to an arbitration agreement “unless there is a contractual basis for concluding that the party agreed to” submit to class arbitration. In *Stolt-Nielsen*, the parties were in agreement that they lacked intent one way or the other on class arbitration.

The court then determined that the Supreme Court did not have occasion to consider what constituted a “contractual basis” for class arbitration. The Supreme Court acknowledged that “[i]n certain contexts, it is appropriate to presume” that the parties “implicitly authorize[d]” class arbitration. However, this implicit authorization may not be inferred from the mere “fact of the parties’ agreement to arbitrate.” The court noted that a finding that an agreement did not preclude class arbitration was not enough to conclude that the agreement authorized it when the parties said that they reached no agreement on the subject. The court further found that *Stolt-Nielsen* imposed no such constraint on arbitration agreements, which is consistent with Second Circuit and Third Circuit Court decisions.

The court found that it is conceivable an arbitrator could find more than silence in the arbitration agreements regarding whether the “parties agreed to authorize” the type of associational action brought by Plaintiff, because the relevant language in the arbitration agreements was quite broad and the parties vigorously disputed both its meaning and the intentions underlying it. Additional evidence could reveal that the later change in language of subsequent agreements reflected a conscious choice by the parties to exclude some forms of arbitration, available prior to 1988, after that date.

There was no dispute that the district court first looked to whether there was a valid, contractual agreement to arbitration. Neither party disputed that there was such an agreement. Defendant conceded that “the parties agree that Plaintiff’s claims are subject to the franchise agreements’ arbitration requirement.” The question was what type of arbitration an arbitrator would typically impose, and did not raise an issue of “arbitrability.” Under the Arbitration Rules of the AAA, arbitrators decide questions concerning the scope of their jurisdiction. Defendant conceded that Plaintiff’s underlying claims fall within the arbitration agreements.

The court concluded that because neither party disputed that the Plaintiff’s claims were subject to the franchise agreements arbitration requirement, the parties’ associational dispute should be decided by the arbitrators.

RECENT DEVELOPMENTS

LAWYER CANNOT ENFORCE ARBITRATION AGREEMENT IN RETAINER CONTRACT

Hodges v. Reasonover, ___ So.3d ___ (La. 2012).

FACTS: In 2007, Plaintiff Hodges sued a company in federal court in Atlanta regarding a contractual dispute and retained Defendant Reasonover, an attorney with whom Plaintiff had an ongoing business relationship since 1998. Plaintiff signed a retainer agreement in 2007, which contained an arbitration clause. In 2009, Plaintiff and Defendant renegotiated the retainer agreement. The revised agreement contained an arbitration clause identical to the one in the original agreement and stated “[b]ecause this agreement involves the acquisition of an additional interest in your case, and your interests in this transaction are adverse to ours, you should review this agreement with independent counsel.” Plaintiff chose not to retain independent counsel and signed the revised agreement.

Plaintiff’s claims ultimately failed to survive a motion for summary judgment. She then sued Defendant for malpractice, and Defendant filed exceptions based on the arbitration clause. The district court denied the exceptions based on the Louisiana Rule of Professional Conduct 1.8(h)(1), which prohibits any agreement made between an attorney and client that limits the liability of the attorney. It found that the mandatory arbitration clause was a prospective limitation of liability and, because Plaintiff had not been represented by independent counsel, the arbitration clause was invalid. Defendant appealed.

HOLDING: Affirmed on other grounds.

REASONING: The court disagreed that the arbitration clause was a *per se* limitation on liability, citing the Federal Arbitration Act, as well as public policy reasons for enforcing arbitration clauses. The court then analogized for the decision in *Ginter ex rel. Ballard v. Belcher, Prendergast & Laporte*, 536 F.3d 439 (5th Cir. 2008), which held that including a forum-selection clause into an attorney-client agreement is usually not a limitation on malpractice liability. The court held that provided a binding arbitration clause (1) provides

for a neutral decision maker, (2) is otherwise fair and reasonable to the client, and (3) does not limit the attorney’s substantive liability, it does not violate the Louisiana Rule.

The court found, however, that in the instant case, Defendant did not adequately disclose the full scope of the arbitration clause and

Defendant did not adequately disclose the full scope of the arbitration clause and the potential consequences of agreeing to binding arbitration.

the potential consequences of agreeing to binding arbitration, and affirmed the lower court. The court held that attorneys, by virtue of their legal education and training, have an advantage over clients, who may not understand the arbitration process and the full effects of an arbitration clause. The court then laid out the necessary disclosures that attorneys must give to their clients, including waiver of the right to a jury trial, waiver of the right to an appeal, waiver of the right to broad discovery, and the possibility of substantial upfront costs compared to litigation.

ARBITRATION CLAUSE DOES NOT COVER JOB APPLICANT

Gove v. Career Sys. Dev. Corp., 824 F. Supp. 2d 205 (2011).

FACTS: Plaintiff applied for a position as a medical clerk with Defendant company. Plaintiff’s employment application included a reference to Defendant’s dispute resolution and arbitration policy, which stated that submission of the application constituted an agreement to arbitrate any pre-employment disputes. While the policy was not directly attached to Plaintiff’s application for employment, the application stated that it was on display in Defendant’s employment office and would be provided to Plaintiff. Plaintiff, a visibly pregnant woman, interviewed for a position with Defendant. Defendant commented on her pregnancy and asked how much longer until she was due. Plaintiff was not selected for employment, and Defendant continued to advertise the position after informing her she had not been selected. Plaintiff filed suit alleging Defendant’s failure to hire her was due to her gender and pregnancy in violation of the Maine Human Rights Act and Title VII of the Civil Rights Act. Defendant filed a motion to compel arbitration along with a copy of Plaintiff’s employment application and the arbitration policy.

HOLDING: Motion denied.

REASONING: In its consideration of Defendant’s motion to compel arbitration, the court followed Section 3 of the Federal Arbitration Act (FAA) which requires a determination of (1) whether there is an agreement to arbitrate, (2) whether the dispute in question falls within the scope of that arbitration agreement, and (3) whether the party seeking arbitration has waived the right to compel arbitration. “Whether a party agreed to arbitrate a particular dispute is . . . a matter of contract.” *Johnson v. Circuit City Stores, Inc.*, 148 F.3d 373 (4th Cir. 1998). Under ordinary Maine contract law the court must interpret the effect of the parties’ intentions in the document; however, the FAA requires a presumption in favor of arbitration.

The court determined that Plaintiff had little to no bargaining power when she entered into the agreement and construed any ambiguities against the Defendant drafter. Within the arbitration policy, Defendant referred to “employment”, “employment process,” and “its employees” which the court found to suggest that the arbitration agreement applies if the applicant is hired and becomes an employee. The court found ambiguities as to whether the arbitration policy applied to job applicants who did not receive an employment offer, because it also referred to pre-employment disputes. The court determined that the clause was drafted to apply only to job applicants who later become employees, because to incorporate applicants who were not eventually hired would require specific language. Further, the fact that the Plaintiff was delivered a standard-form employment application gave Defendant all of the drafting and bargaining power. Due to such an imbalance, the court was required under Maine law to construe the ambiguities in favor of Plaintiff, holding that, as an applicant who was not hired, the arbitration policy did not incorporate her and require her to arbitrate her pre-employment dispute.

RECENT DEVELOPMENTS

ARBITRATION CLAUSE CAN'T BE ENFORCED IN BANKRUPTCY

In re Eber, 56 Bankr. Ct. Dec. 190 (9th Cir. 2012).

FACTS: On May 21, 2009, Plaintiffs Michael Ackerman and Floyd Kuriloff commenced an arbitration proceeding against Defendant, Jose Eber, for breach of contract, fraud, and breach of fiduciary duty in connection with the construction and operation of Defendant's hair salon. Defendant filed for Chapter 7 bankruptcy protection on June 16, 2009, and the arbitration proceeding was automatically stayed.

Plaintiffs filed a complaint for determination that the debts were non-dischargeable in the bankruptcy court's adversary proceeding. Plaintiffs also filed a motion for relief from the automatic stay, requesting that the bankruptcy court allow arbitration of their claims. The motion requesting relief from the stay was denied. Plaintiffs filed both a motion to vacate the court's decision on their automatic stay and a motion to compel arbitration. Both motions were denied. Plaintiffs next filed a request to stay the adversary proceeding pending appeal of the denial of their motions by the district court. The bankruptcy court denied the request. Plaintiffs filed appeals to the district court for the denial of Plaintiffs' motion to compel arbitration, motion for relief from automatic stay, and motion to vacate. All three motions were subsequently denied

on appeal to the district court.

Trial was held on March 9, 2011, and the bankruptcy court found that Plaintiffs failed to prove the elements necessary to prevail under §§ 523(a)(2), (4), and (6) of the Bankruptcy Code, and, therefore, discharged Plaintiffs' claims. Plaintiffs appealed. **HOLDING:** Affirmed.

REASONING: The court focused its analysis upon the reconciliation of the Federal Arbitration Act (FAA) and the Bankruptcy Code. Although the FAA establishes a mandate in favor of arbitration, the United States Supreme Court has held that the FAA "mandate may be overridden by a contrary congressional command." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). The court noted, however, that a bankruptcy court has discretion to decline to enforce an otherwise applicable arbitration provision only if arbitration would conflict with the underlying purposes of the Bankruptcy Code with regard to core bankruptcy proceedings.

The court disagreed with Plaintiffs' contention that the underlying dispute between the parties involved three separate and distinct claims: liability, damages, and dischargeability. These claims were rejected by the bankruptcy court's factual finding that by seeking to compel arbitration, Plaintiffs were attempting to have an arbitrator determine the dischargeability of their §§ 523(a)(2), (4), and (6) claims. The court found this was a core bankruptcy proceeding, not subject to arbitration.

MISCELLANEOUS

EMPLOYEE WHO WAS FIRED FOR REFUSING TO COMMIT AN ILLEGAL ACT MAY RECOVER PUNITIVE DAMAGES

Safeshred, Inc. v. Martinez, 365 S.W.3d 655 (Tex. 2012).

FACTS: Plaintiff Martinez was an at-will employee working as a commercial truck driver for Defendant Safeshred. Prior to each hauling trip, Plaintiff was required to inspect Defendant's truck to ensure its compliance with safety regulations. Plaintiff continually discovered illegal safety violations in the truck, but was ordered to drive it anyway. Plaintiff attempted numerous times to raise concerns about the truck to Defendant, and was even pulled over and cited by Department of Public Safety officer for violations. Defendant failed to correct all the violations. When Plaintiff refused to drive the truck for fear of his own safety, Defendant told Plaintiff to drive the truck or go home. Plaintiff went home and was fired.

Plaintiff brought a wrongful termination suit, and a jury awarded him lost wages, mental anguish damages and exemplary damages. The appellate court found that the evidence was factually insufficient to render mental anguish damages, but found the lost wages and exemplary damage awards were proper.

HOLDING: Affirmed in part and reversed in part.

REASONING: The court first discussed *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985), which recognized a narrow exception to the at-will employment doctrine allowing

an employee to sue his employer if discharged solely for refusing to perform an illegal act. The court rejected Safeshred's argument that *Sabine Pilot* stood for contractual claims, and held that such a claim sounds in tort, not contract, allowing the possibility to collect punitive or exemplary damages. The court reasoned that to hold otherwise would presume that there is a contract between an at-will employee and his employer. However, it held that punitive or exemplary damages under a *Sabine Pilot* claim are available only when there is malice in connection with the firing. The court stated that malice could only be shown by evidence that the Defendant, in firing the Plaintiff, intended or ignored an extreme risk of some additional harm, such as interference with future employment, harassment, or termination of an employee with the knowledge that it is unlawful to do so. The court determined that the malice shown in this case was not sufficiently related to Martinez's firing, and was, therefore, not enough to justify an award for punitive damages.

LAW FIRM CANNOT SUE TO RECOVER LOSS FROM FAKE CHECK

Aresty Int'l Law Firm, P.C. v. Citibank, N.A., 677 F.3d 54 (1st Cir. 2012).

FACTS: In 2007, Plaintiff received a check purportedly from a customer of one of its clients in the amount of \$197,750, drawn on Defendant Bank. Plaintiff deposited the check in its account with Citizens Bank, and instructed Citizens to wire the funds from

RECENT DEVELOPMENTS

that account to another party, which it did. The check, however, was fraudulent and Defendant refused to pay the check, instead returning it to Citizens. Citizens subsequently sued Plaintiff in January 2009 for the missing funds it had wired, and recovered most of the withdrawal amount.

In October 2010, Plaintiff sued Defendant Citibank, claiming it violated federal banking regulation 12 C.F.R. §229.33, and that Defendant breached a duty owed under the regulation. Defendant moved to dismiss arguing that Plaintiff's claims were time-barred and preempted by federal law.

The district court granted Defendant's motion to dismiss. Plaintiff appealed, arguing that the limitations period should be equitably tolled, and that its UCC negligence claim survived Defendant's arguments.

HOLDING: Affirmed.

REASONING: The court first addressed whether the Plaintiff's claims were barred by the statute of limitations and determined they were. Equitable tolling of the statute of limitations applies only when the Plaintiff shows it could not have discovered information essential to its claim earlier, even with the exercise of due diligence. The court held that Plaintiff's claims would be time-barred even if they were tolled because Plaintiff should have discovered that it could sue Defendant after being sued by Citizens in January 2009.

The court further held that Plaintiff's state law claims were preempted by federal law. The federal statutory authority for the banking regulation cited by Plaintiff expressly preempted conflicting state laws and state law claims. 12 U.S.C. §4007(b). The court found that the Plaintiff was attempting to bypass the one year limitations period of the federal law by creating state law claims with three and five-year limitations periods based on the purported federal banking regulation claim. The court held that the trial court did not abuse its discretion in declining to find that Plaintiff's claims were equitably tolled and were expressly preempted by federal law.

TEXAS SUPREME COURT DISCUSSES STANDING AND MOOTNESS IN CLASS ACTIONS

Heckman v. Williamson Cnty, ___ S.W.3d ___(Tex. 2012).

FACTS: Plaintiffs Heckman, Maisenbacher, Peterson, Stempko, and Newberry faced misdemeanor charges in Williamson County. Each Plaintiff claimed to be unable to afford legal representation, and that they had been, or soon would be, denied their right to court appointed counsel. Plaintiffs filed a lawsuit against Defendant Williamson County and local judges, under section 1983 of the Civil Rights Act of 1871, claiming that the public officials had deprived them of their constitutional rights which involved right to counsel and self-representation. They sought injunctive and declaratory relief to stop Defendants' alleged unconstitutional practices. The claims were brought as a class action lawsuit for similarly injured individuals.

Defendants argued that Plaintiffs all lacked standing on all the claims and the suit had become moot since they all had been appointed counsel. The trial court did not rule on Plaintiffs' petition for class-certification; however, the court of appeals held that none of the named plaintiffs ever had standing on all the purported claims and the case had become moot. Plaintiffs

appealed.

HOLDING: Reversed and remanded.

REASONING: The court first decided whether a named plaintiff must have standing on all of the class's claims, in order to pursue any of the claims. It stated that standing requirements extend to class actions, and that the individual who brought the class action must prove that he individually had standing to sue. However, that same plaintiff does not need to have standing for every purported claim. The court held that the appellate court erred in dismissing the suit on standing grounds because the named plaintiff had standing to at least one claim.

The court then addressed the second issue in which Defendants argued that Plaintiffs' individual claims became moot once they were appointed counsel and their criminal cases ended. Defendants argued that none of the mootness exceptions would apply in the present case. The court disagreed and held that, though the Plaintiffs' interest may be moot, the present case involved claims that are inherently transitory and may apply the relation-back exception, which saves the entire lawsuit from being moot. The court then set two requirements to qualify for inherently transitory claims. First, the claim must be one of short duration. Second, there must likely be a continuing class of persons suffering from the same alleged harm.

The individual who brought the class action must prove that he individually had standing to sue.

TEXAS SUPREME COURT DISCUSSES CALCULATION UNDER LODESTAR METHOD

El Apple I, Ltd. v. Olivas, ___ S.W.3d ___(Tex. 2012).

FACTS: Myriam Olivas filed suit against her employer El Apple I, Ltd. for sex discrimination and retaliation under the Texas Commission on Human Rights Act (TCHRA). Olivas prevailed on only the retaliation claim. The jury awarded Olivas compensatory damages of \$1,700 for back pay and \$103,000 for past and future compensatory pay.

As the prevailing party, Olivas filed an application for attorney's fees under TCHRA. The trial court used the lodestar method and determined that the lead counsel should be compensated at a rate of \$250 per hour for 700 hours and the other attorney \$300 per hour for 190 hours. The court then enhanced the lodestar by applying a 2.0 multiplier, resulting in \$464,000 for attorney's fees. Legal assistant fees for 100 hours at a rate of \$65 per hour and \$99,000 in conditional attorney's fees for defending post-judgment motions and appeals were also added.

El Apple appealed, arguing that the court abused its discretion because there was neither sufficient evidence to make a reasonable assessment of attorney's fees, nor a basis to enhance the lodestar with a multiplier. The appellate court affirmed the attorney's fee award. El Apple appealed to the Texas Supreme Court.

HOLDING: Reversed and remanded.

REASONING: The determination of attorney's fees in a suit brought under state law is usually governed by state procedural

RECENT DEVELOPMENTS

rules. Texas courts, however, have looked to federal law in applying the lodestar method of calculating attorney's fees, including the TCHRA, which provides for an award of attorney's fees to the prevailing party as part of the costs.

The lodestar method involves two steps. First, the court must determine the reasonable hours spent by counsel in the case and a reasonable hourly rate for such work. Second, the court multiplies the number of such hours by the applicable rate to adjust the base lodestar up or down. The method aims to provide a relatively objective measure of attorney's fees. A trial court should obtain sufficient information to make a meaningful evaluation of the application for attorney's fees. Charges for duplicative, excessive, or inadequately documented work should be excluded.

The party applying for an award of attorney's fees under the lodestar method bears the burden to prove the hours expended were reasonable by evidencing, at a minimum, (1) the nature of the work, (2) who performed the services and their rate, (3) approximately when the services were performed, and (4) the number of hours worked. A simple way to meet these requirements is to record or document the hours. Documentation should occur reasonably close to the time when the work is performed. In instances where there are multiple attorneys working on the same case, the evidence for fee application needs to have stated which attorney performed what tasks at what hourly rate.

Olivas' attorneys did not indicate how the 890 hours they spent in the aggregate were devoted to any particular task or category of tasks. The attorneys based their time estimate on generalities such as the amount of discovery, the number of pleadings filed, the number of witness questioned, and the length of the trial. The court held that the evidence failed to show how many hours each of the tasks required and whether that time was rea-

sonable. Overall, the evidence was insufficient for a lodestar calculation, and the court reversed the fee calculation established by the trial court.

In the second step of lodestar method, a trial court may use a multiplier to increase or decrease the lodestar

to approximate a reasonable fee if relevant factors indicate an adjustment is necessary to reach a reasonable fee in the case. A list of non-exclusive of factors includes: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

The court first needs a base fee to determine whether or not a multiplier would be necessary. The lodestar presumptively produces a reasonable fee, but exceptional circumstances, such as any of the factors listed above, may justify an increase or decrease in the base fee. Because the court rejected the base fee established by the trial court, it declined to determine if a multiplier was necessary.

The evidence failed to show how many hours each of the tasks required and whether that time was reasonable.

THE LAST WORD

As Editor of the *Journal*, I always try to include a little something for everyone. I think you will agree that with this issue, I was successful. No matter what your interest is in consumer law, I am pretty confident that this issue has something you will enjoy, and find informative. The articles deal with topics as diverse as teaching consumer law in Australia, health law privacy, debt collection and DTPA tie-in statutes. The News Alert and Recent Development sections discuss dozens of cases decided during the past few months, Theoretical/practical, short/long, reportorial/analytical—whatever is your cup of tea, you will find it in this issue.

And one comment on recent developments in the United States Supreme Court. The last week of the Supreme Court term was closely watched, as the court issued major opinions dealing with health care and immigration. But for consumer attorneys, what the Court did not do may have been more significant. The court did not issue an opinion in *Edwards v. First American Corp.*, 610 F.3d 514 (9th Cir. 2010), cert granted in part, 131 S. Ct. 3022 (2011), instead dismissing its grant of certiorari as improvidently granted. The Court's dismissal is significant because *Edwards* raised the question of whether Congress may give consumers the right to enforce consumer protection statutes without showing actual damages. In *Edwards*, the Ninth Circuit, similar to all other circuits that have considered the issue, held that proof of economic injury was not required. A contrary ruling by the Supreme Court would have substantially weakened consumers' ability to enforce consumer protection statutes on both an individual and class basis.

Richard M. Alderman
Editor-in-Chief