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Sounds Death Knell for *Melody Home* Implied Warranty

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Richard M. Alderman
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100 Law Center
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www.alderman@uh.edu

Articles

Recent Developments

Texas Supreme Court Sounds Death Knell for *Melody Home* Implied Warranty

By Mark Feller*

In *Olshan Found. Repair Co., LLC v. Gonzales*, the Supreme Court of Texas held that the implied warranty of good and workmanlike repair, "the *Melody Home* warranty," may be superseded by an express warranty. The court also held that once a consumer has some knowledge that a service provider is performing poorly, the consumer's Deceptive Trade Practices Act (DTPA) claim accrues and must be filed within two years of that date to avoid being barred by the statute of limitations. These holdings have broad implications in the consumer litigation field.

Foundation of the Case

Nelda Gonzales and her former husband purchased a home in 1996.[1] In June 2001, she noticed cracking on the interior and exterior of her home.[2] A month later, she hired Southwest Olshan Foundation Repair, who installed 45 cable-locked pilings to remedy the problem.[3]

In April 2002, Gonzales noticed doors and windows sticking, Olshan returned and determined that this was caused by leaking plumbing.[4] In March 2003, Olshan dug tunnels, while a plumbing company repaired the leaks.[5] In October, Gonzales refused to let Olshan fill in the tunnels and re-level the home because one of their employees told her that "Olshan was not doing a good job," it was "the worse job I ever seen," and her home "had not been fixed."[6] Olshan sent engineers on November 2003 and July 2005 to investigate the foundation.[7] On both occasions the engineers told her that the foundation was functioning properly.[8] Nearly a year after the second inspection, Gonzales's attorney hired an engineering firm to inspect the foundation, the firm determined the foundation's pilings were not working.[9]

The *Melody Home* warranty is also a "gap-filler" and, therefore, may be superseded if "the parties' agreement sufficiently describes the manner, performance or quality" of the services.

In June 2006, Gonzales sued Olshan for fraud, breach of express warranty, breach of implied warranty of good and workmanlike repair, and DTPA laundry list violations.[10] A jury failed to find there was a breach of express warranty, but found in favor for Gonzales on the implied warranty, fraud, and DTPA claims.[11] The trial court ordered Olshan to pay Gonzales $101,000 in damages, $10,127 in engineering fees, and $80,000 in attorneys' fees.[12]

The Decision Below: The Statute of Limitations Bars Gonzales's Claim

The San Antonio Court of Appeals, sitting *en banc*, reversed the trial court's findings and rendered a take-nothing judgment in favor of Olshan.[13] In arriving at their decision, the appellate court first addressed Olshan's argument that the statute of limitations barred her DTPA and implied warranty claims.[14] At appeal Olshan argued that the DTPA two-year statute of limitations applied to Gonzales's implied repair warranty claim. Gonzales argued that because she did not bring the warranty claim under the DTPA, therefore the common law four-year statute of limitations applied because it was a construction claim.[15] The appellate court applied the two-year limitations period, concluding that the *Melody Home* warranty arises only under the DTPA.[16] The court did not affirmatively state that there is no common law implied warranty for repair services, but did cite approvingly to case law that supports the contention.[17]

After determining the two-year limitations period applied, the court decided when the period began to run, analyzed the discovery rule, and discussed the fraudulent concealment doctrine, which suspends the statute of limitations.[18] The court concluded that Gonzales admitted in her testimony that she had knowledge of facts, conditions, or circumstances that put her on notice of her injury resulting from Olshan's work prior to receiving her expert's report in 2006.[19]

The court found she was put on notice of the injury, and that the evidence conclusively established that in exercising reasonable diligence she should have discovered Olshan's acts or omissions in October 2003, once an Olshan employee told her the work was not being done properly.[20] The court noted that although she did not know the specific cause or extent of her injury at that time, the injury was "the type that is generally discoverable in the exercise of reasonable diligence."[21] The court held that neither the discovery rule, nor the common law doctrine of fraudulent concealment, nor the 180-day tolling provisions in section 17.565 of the DTPA applied to toll the limitations period.[22] The court of appeals did not address Olshan's remaining issues raised on appeal, including its argument that there was no implied warranty because Olshan provided an express warranty.[23]

The Texas Supreme Court Weighs In: Express Warranty Supersedes Implied

The Supreme Court of Texas granted Gonzales's petition for review and upheld the judgment, albeit on different grounds.[24] The court determined that Olshan's no-evidence objection to submitting the implied warranty claim to the jury preserved the argument that no implied warranty exists.[25] The court held Olshan's express warranty superseded the *Melody Home* warranty; and because the jury found that Olshan did not breach the express warranty, Gonzales's claim was precluded.[26] The court affirmed the appellate court's ruling with regards to the DTPA violations, holding that the statute of limitations period began to run once the employee told Gonzales that Olshan was doing a poor job.[27]

In holding that the express warranty superseded the implied warranty, the court first discussed case law regarding implied warranties.[28] It noted that since its creation, the *Melody Home* implied warranty of good and workmanlike performance could not be disclaimed or waived.[29] But the court noted that a similar warranty, the implied warranty of good and workmanlike construction in the sale of a new home, could be superseded by an express agreement between the parties that sufficiently describes the "manner, performance or quality of construction," because it was a "gap-filler," default warranty.[30] The court concluded that the *Melody Home* warranty is also a "gap-filler" and, therefore, may be superseded if "the parties' agreement sufficiently describes the manner, performance or quality" of the services.[31]

The agreement between Olshan and Gonzales provided two warranties: (1) that Olshan would use a certain system of foundation repair and adjust the foundation for the life of the home and (2) that Olshan would perform the repair in a good and workmanlike manner.[32] Although Gonzales did not sign the warranty, the court looked to it to determine whether Olshan's obligations under the express warranty superseded the implied warranty.[33] The court held that it had superseded the implied warranty because the express warranty language was sufficiently descriptive of the work (foundation repair with a Cable Lock system), the manner (good and workmanlike), and how it would perform (that Olshan would make adjustments for the life of the home).[34] Because the agreement superseded the implied warranty, the implied warranty could not be a basis for the judgment.[35]

The court also affirmed the lower court's finding that Gonzales's DTPA claim was barred by the statute of limitations.[36] The court agreed with the lower court's analysis that Gonzalez knew of the injury in October 2003 when an employee informed her of Olshan's shoddy workmanship.[37] The court further found that the common law doctrine of fraudulent concealment does not toll limitations for DTPA claims, because the legislature did not incorporate it as an exception to the DTPA's limitations period.[38]

The Aftermath: What *Gonzales* Means for Consumer Law

Gonzales is a major turn in Texas consumer law and has broad implications for consumers, service providers, and legal practitioners. Although the decision does not invalidate the *Melody Home* warranty, it does seriously limit its application. Furthermore, the decision exemplifies how expansively the DTPA statute of limitation defense can be interpreted.

The court does not address whether any of the policy reasons for the creation of the implied warranty and how they would be effected as a result of being able to supersede it with an express warranty. The *Melody Home* court gave several policy reasons for why the creation of the repair warranty was necessary.[39] The policies discussed by the *Melody Home* court are especially prescient in *Gonzales* because the homeowner seems to have relied on Olshan's expertise and its assurances that her foundation was functioning properly. The court does not discuss these reasons and analogizes the *Melody Home* warranty to the good and workmanlike construction warranty, declared a "gap-filler" in *Beucher*.[40] However the implied construction warranty was not created based on the same policy reasons.[41] Considering the strong public policy reasons and how they were present in this case, it is surprising the court did not offer a more concrete explanation for why the *Melody Home* warranty is just a "gap-filler."

When the court created the implied warranty in *Melody Home*, it extensively discussed why it could not be waived nor disclaimed.[42] The court noted that if it were to allow such waivers, they would become commonplace in adhesion contracts, yet consumers would continue to expect repair providers to perform adequately regardless of the fine print disclaimer.[43] This would allow repair providers to circumvent this expectation and encourage shoddy workmanship.[44] The court in *Gonzales* does not discuss this worry, and in fact created a rule that will likely result in precisely the situation feared by the court in *Melody Home.* Following the decision in *Gonzales,* service providers must simply include a few lines of "express warranty" language in their adhesion contracts to supersede the implied warranty of good and workmanlike performance.

The supreme court's discussion of the statute of limitations is also worrisome for consumers. After *Gonzales*, once a consumer has minimal knowledge of a potential injury her DTPA claim accrues, despite what they are told by professionals. The court found accrual began when Gonzales knew of her injury and Gonzales receipt of information that Olshan was performing poorly was equivalent to knowledge that her foundation was damaged.[45] Yet, the court does not discuss why Gonzales should have known of the injury to her foundation in October 2003, when Olshan engineers inspected the foundation in early 2004 and mid-2005 and told her both times that it was functioning properly.[46] Apparently Gonzales, an ordinary homeowner, should have been able to discover a complex foundation problem before competent engineering professionals were able to, assuming Olshan's engineers were competent and not misleading her. The court's broad definition of knowledge, for statute of limitations purposes, seems to defeat the legislature's intent for the DTPA to be liberally interpreted and applied to protect consumers and provide efficient, economical procedures to secure such protection.[47] Rather this decision encourages consumers to prematurely rush to the courthouse once they have an inkling their service provider is performing poorly or has injured their property to avoid being barred by the statute of limitations, rather than urging them to resolve problems outside the court room.

Whether *Gonzales* is a reasonable limitation on *Melody Home*, good public policy, or congruent with legislative intent, it is now the law and it is important for consumers, service providers, and consumer law practitioners. This decision should act as a motivating factor to encourage consumers to fully inform themselves on whether they are entering into or currently under a contract that includes an express warranty that covers repair services. Consumers should also contact an attorney as soon as they think their service provider is not performing adequately or that they may be otherwise injured and begin pre-suit discovery as soon as possible to avoid being barred by the two-year statute of limitations. Repair service providers may now limit their potential liability from implied warranty claims by providing an express warranty that specifies the manner, performance, and quality of the repair work to be done. Most importantly, attorneys who represent service providers or consumers in DTPA litigation should be aware of statute of limitation problems and plan accordingly.

Unanswered Questions

Several questions remain in the wake of the *Gonzales*. For one, the court does not discuss whether there is a minimal level of quality that must be included in the express warranty, nor does it give a hint as to when an express warranty need is sufficiently descriptive. Lower courts will deal with these questions, but in the words of the court, as long as the express warranty "sufficiently describes the manner, performance, and quality of the work to be performed," it will supersede the *Melody Home* warranty.[48]

Another unanswered question that remains after *Gonzales* is whether a *Melody Home* warranty claim may be brought outside the DTPA. Because the court concluded the implied warranty claim failed without relying on the limitations defense as the appellate court did, they did not need reach the issue.[49] Although some appellate courts have found that no implied repair warranty claim exists at common law, while one appellate court and the Fifth Circuit Court of Appeals has found inapposite; the court left the question for another day.[50] Because the DTPA does not create warranties and warranties actionable under the DTPA "must be recognized by the common law or created by statute;"[51] it would follow that the *Melody Home* warranty does still exist at common law.

Finally, the *Gonzales* court fails to note or discuss the conflicting jury findings. Although the jury did not find a breach of express warranty, which in part warranted that the repairs would be done in a good and workmanlike manner; they did find a breach of implied warranty of good and workmanlike repair.[52] This inconsistency may result from the fact that the express warranty contained other specifications, including the free lifetime repair. The court fails to address Gonzales's ability to make a future breach of express warranty claim.[53] This leads to the conclusion that a consumer cannot bring a breach of express warranty claim against a repair provider who gives a lifetime express warranty, regardless of how poorly the repair is performed, as long as they don't refuse to perform further repairs. This may result into consumers being stuck with a poorly performing repair company without recourse.

Conclusion

Gonzales demonstrates the Texas Supreme Court's reluctance to entertain implied warranty claims, and its readiness to allow parties to structure their legal relationship. It also shows that consumers and their attorneys must be diligent in prosecuting DTPA claims, lest they lose the opportunity because of they waited over two years after they had "learned" of their injury. The decision leaves some questions unanswered that will ultimately be worked out by the lower courts. One thing is certain, if service providers take advantage of the language in *Gonzales,* the *Melody Homes* warranty will become a shell of its former self.

* University of Texas School of Law, Class of 2014.

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1 *Sw. Olshan Found. Repair Co., LLC v. Gonzales*, 345 S.W.3d 431, 434 (Tex. App.—San Antonio 2011) *aff'd*, 11-0311, 2013 WL 1276033 (Tex. Mar. 29, 2013).
2 *Id.*
3 *Id.* at 435.
4 *Id.*
5 *Id.*
6 *Id.*
7 *Olshan*, 345 S.W.3d 435-36.
8 *Id.* at 435-36.
9 *Id.* at 436.
10 *Id.*
11 *Gonzales v. Sw. Olshan Foundation Repair, LLC*, No. 11–0311, 2013 WL 1276033 at *2 (Tex. Mar. 29, 2013).
12 *Id.*
13 *Id.* at 442.
14 *Id.* at 436.
15 *Id.*
16 *Id.* at 437.
17 *See id.* (citing cases). The court did not address this issue, noting in footnote 12, "In light of our determination that the express warranty superseded the implied warranty here and bars Gonzales's implied warranty claim, we need not reach Gonzales's argument that the implied warranty is actionable at the common law, in addition to the DTPA."
18 *Id.*
19 *Id.* at 438.
20 *Id.*
21 *Id.* at 439.
22 *Id.* at 439-40.
23 *Id.* at 442, n. 3.
24 *Gonzales*, 2013 WL 1276033 at *1.
25 *Id.*
26 *Id.* at *2.
27 *Id.* at *4.
28 *Id.* at *3.
29 *Id.* (citing *Melody Home Mfg. Co. v. Barnes*, 741 S.W. 2d 349, 354 (Tex. 1987)).
30 *Id.* (citing *Centex Homes v. Buecher*, 95 S.W.3d 266, 273-74 (Tex. 2002)).
31 *Gonzales*, 2013 WL 1276033 at *3.
32 *Id.*
33 *Id.*
34 *Id.* at *4.
35 *Id.*
36 *Id.*
37 *Id.* at *5.
38 *Id.*
39 *Melody Home*, 741 at S.W.2d at 353-54 (the four major policy reasons were: (1) the public interest in protecting consumers from inferior services, (2) service providers are in a better position to prevent loss than consumers, (3) consumers should be able to rely upon the expertise of the service provider; and (4) a service providers are better able to absorb the cost of damages associated with inferior services, through insurance and price manipulation).
40 *Gonzales*, 2013 WL 1276033 at *3.
41 *Compare id.*, *with Humber v. Morton*, 426 S.W.2d 554, 561 (Tex. 1968) (abandoning the rule of caveat emptor because it did not meet the demands of justice and home purchases are important, once-in-a-lifetime transactions for families).
42 *Melody Home*, 741 S.W.2d at 355.
43 *Id.*
44 *Id.*
45 *Gonzales*, 2013 WL 1276033 at *5.
46 *Id.* at *2.
47 Tex. Bus. & Com. Code Ann. § 17.44 (West 2011)
48 *Gonzales*, 2013 WL 1276033 at *4. Interestingly, in the instant case, the express warranty was to perform in a "good and workmanlike manner." The court fails to discuss how a jury could find a breach of the implied warranty of good and workmanlike performance, and not a breach of the express warranty to perform in a good and workmanlike manner.
49 *Id.* at *6, n. 9.
50 *Id.*
51 *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 438 (Tex. 1995)
52 *Gonzales*, 2013 WL 1276033 at *2.
53 *See id.* at *6, n. 3 (citing *PPG Indus., Inc. v. JMB/Houston Centers Partners Ltd. P'ship*, 146 S.W.3d 79, 96 (Tex. 2004)).

Circuit Court Owes "No Deference" to NLRB Ruling on

Class Arbitration

By Albrecht Riepen*

As and more businesses are turning to arbitration as a means of settling their legal issues, various courts throughout the country, including the United States Supreme Court, have been handing down decisions that are changing the face of modern arbitration jurisprudence. These decisions are helping practitioners in the field of alternative dispute resolution understand the contours of the new legal landscape in which they find themselves practicing.

One such case, handed down by the 8th Circuit Court of Appeals, was *Owen v. Bristol Care, Inc.*[1] Sharon Owen worked as an administrator for Bristol Care, Inc., a nursing home operator. Upon being hired, Owen signed a Mandatory Arbitration Agreement (MAA), providing that the employer and employee "agree to the resolution by binding arbitration of all claims or controversies for which a federal or state court or other dispute-resolving body otherwise would be authorized to grant relief" and prohibiting the parties "from arbitrating claims… as, or on behalf of, a class."[2] This agreement applied to "claims for wages and other compensation" as well as "claims for violations of federal statute, including the Fair Labor Standards Act (FLSA)."[3] The MAA did not, however, "waive the right to file a complaint with… any… federal, state or local agency designated to investigate complaints of harassment, discrimination, other statutory violations, or similar claims."[4]

Arbitration agreements containing class waivers are enforceable in claims brought under FLSA in the absence of any contrary congressional command.

Owen filed an action on behalf of herself and other similarly situated employees alleging that Bristol Care misclassified employees as administrators to avoid paying overtime for hours worked in excess of 40 hours per week. In response, Bristol Care attempted to stay the district court proceedings and compel arbitration, in accordance with the MAA.[5] The district court denied Bristol Care's motion to compel arbitration on the grounds that while the MAA did cover Owen's allegations, it was invalid because of the class waiver. The district court reasoned that the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*,[6] which upheld the enforceability of a class waiver in a consumer contract, was not controlling in the employment context.[7] Instead, the district court relied on a National Labor Relations Board (NLRB) decision, *In re D.R. Horton, Inc.*,[8] and the case of *Chen-Oster v. Goldman, Sachs & Co.*[9] in concluding that class waivers are invalid in FLSA cases because the FLSA provides for the right to bring a class action.

Owen on Appeal

The Eighth Circuit reversed the district court's denial of Bristol Care's motion to compel arbitration because arbitration agreements containing class waivers are enforceable in claims brought under FLSA in the absence of any contrary congressional command. Section 2 of the Federal Arbitration Act (FAA) provides that a written provision in any contract to settle by arbitration any controversy arising out of said contract shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of the contract.[10] Courts must enforce arbitration agreements according to their terms, and there must be a contrary congressional command for another statute to override the FAA's mandate. Such a command can be found in the text of a statute, its legislative history, or an inherent conflict between arbitration and the statute's underlying purposes. The Supreme Court has previously stated that this provision of the FAA establishes "a liberal federal policy favoring arbitration agreements" and that when Congress restricts the use of arbitration, it does so with clarity.[11]

The Eighth Circuit found that Owen identified nothing in either the text or the legislative history of the FLSA that indicated congressional intent to bar employees from agreeing to arbitrate FLSA claims individually. Moreover, the court found no inherent conflict between the FLSA and the FAA. The court reasoned that if an employee must affirmatively opt-in to a class action, then the employee has the power to waive participation in a class action as well. The court examined the legislative history and context of the FAA, which showed that although the FAA was originally enacted in 1925, it was *reenacted* in 1947, years after the FLSA, the National Labor Relations Act, and the Norris-LaGuardia Act. This suggests that, contrary to Owen's assertion, Congress intended the arbitration protections in the FAA to remain intact even in light of the FAA's subsequent revisions.[12] Lastly, the court found the NLRB's decision in *D.R. Horton* relied upon by Owen to be unpersuasive and remarked that the court was not obligated to defer to the NLRB's interpretation of Supreme Court precedent under *Chevron* or any other principle.[13]

While the issue in this case was novel for the Eighth Circuit, the court was able to look to numerous other circuit courts for guidance from similar cases. The court noted that its decision upholding the enforceability of class waiver arbitration clauses in the context of the FLSA was consistent with all of the other circuit courts of appeal that have considered the issue.

- In *Vilches v. Travelers Cos.*,[14] the Third Circuit dealt with FLSA claims by insurance adjustors alleging improper compensation of overtime work. The Third Circuit held that class waivers were neither procedurally nor substantively unconscionable.[15]
- In *Horenstein v. Mortg. Mkt., Inc.*,[16] the Ninth Circuit held that an agreement requiring employees to arbitrate FLSA claims against the employer was valid even though the arbitration clause eliminated employees' statutory right to collective action.[17]
- In *Caley v. Gulfstream Aerospace Corp.*,[18] two groups of employees filed claims against their employer under the FLSA, the Age Discrimination in Employment Act (ADEA), and the Employee Retirement Income Security Act (ERISA). The employer added an employment condition to the employment contract and gave notice of such to the employees. By continuing employment, the employees accepted the modified employment contract. The Eleventh Circuit upheld the district court's granting of employer's motion to compel arbitration.[19]
- In *Carter v. Countrywide Credit Indus. Inc.*,[20] current and former employees sued to recover overtime wages under the FLSA. The Fifth Circuit upheld the district court's granting of employer's motion to compel arbitration.[21]
- In *Adkins v. Labor Ready, Inc.*,[22] temporary employees filed suit against their temporary employment agency claiming violations of the FLSA in regard to unpaid wages. The Fourth Circuit upheld the district court's granting of employer's motion to compel arbitration and subsequent dismissal of the suit.[23]

The above decisions are also consistent with more than two decades of pro-arbitration Supreme Court precedent, which, al though primarily relating to class waivers in a consumer context, does uphold the enforceability of class waivers in employment disputes.

- In *CompuCredit Corp. v. Greenwood*,[24] consumers filed suit against their credit card issuer even though they had signed an agreement containing an arbitration clause. Because the Credit Repair Organizations Act does not preclude arbitration agreements, the FAA requires that parties arbitrate the dispute according to the arbitration clause.[25]
- In *AT&T Mobility, LLC v. Concepcion*,[26] the FAA preempted California state law regarding the unconscionability of class waivers in arbitration clauses. Plaintiffs' class action suit could not continue and claims would have to be adjudicated individually.[27]
- In *Gilmer v. Interstate/Johnson Lane Corp.*,[28] an employee brought suit alleging discriminatory termination based of age under the ADEA against employer. The employer moved to compel arbitration based on employment contract and the FAA. The Supreme Court held that age discrimination claims are subject to mandatory arbitration clauses.[29]

CONCLUSION

The result in *Owen* reflects the trend over the past few decades of courts favoring arbitration over litigation. Even though this trend is nothing new, many plaintiffs are unpleasantly surprised when they notice that they have (inadvertently and unknowingly, perhaps) signed away the right to sue their employer, cellphone provider, credit card company, or any of the host of consumer-oriented businesses now using arbitration clauses as boilerplate language in their forms and contracts. This leaves an aggrieved party with no option but to arbitrate according to the terms dictated by contract. Federal court decisions, especially at the circuit court level and the Supreme Court, have upheld the validity of these agreements favored by companies and the defense bar and, consequently, have helped establish arbitration clauses as a new standard operating procedure.

*Second-year law student at the University of Houston Law Center

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1 702 F.3d 1050 (8th Cir. 2013).
2 *Id.* at 1051.
3 *Id.*
4 *Id.*
5 9 U.S.C.A. §2 (West) ("A written provision in … a contract … to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").
6 131 S.Ct. 1740 (2011).
7 *Owen*, 702 F.3d 1050 at 1052.
8 357 NLRB No. 184, 2012 WL 36274.
9 785 F.Supp.2d 394 (S.D.N.Y. 2011).
10 9 U.S.C.A. § 2 (West).
11 *Owen*, 702 F.3d 1050 at 1052 (Quoting *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012)).
12 *Id.* at 1053.
13 *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
14 413 Fed.Appx. 487 (3rd Cir. 2011).
15 *Id.* at 494.
16 9 Fed.Appx. 618 (9th Cir. 2001).
17 *Id.*
18 428 F.3d 1359 (11th Cir. 2005).
19 *Id.* at 1379.
20 362 F.3d 294 (5th Cir. 2004).
21 *Id.* at 302.
22 303 F.3d 496 (4th Cir. 2002).
23 *Id.* at 507.
24 132 S.Ct. 665 (2012).
25 *Id.* at 673.
26 131 S.Ct. 1740 (2010).
27 *Id.* at 1753.
28 500 U.S. 20 (1991).
29 *Id.* at 1657.

Arbitrator, Not State or Federal Courts, Must Decide the Validity of a Contract Containing an Arbitration Clause

By Lesley O'Connor*

I. Introduction

On November 26, 2012, in a unanimous *per curiam* decision, the United States Supreme Court reaffirmed that under the Federal Arbitration Act (FAA), an arbitrator, and not state or federal courts, must decide the validity of a contract containing an arbitration clause.[1] The decision in *Nitro-Lift Technologies, L.L.C. v. Howard*, vacated the Oklahoma Supreme Court's ruling that a non-compete agreement in an employment contract was void and unenforceable based on state public policy.[2] By summarily vacating a state court decision that did not enforce an arbitration clause, the Supreme Court again recognized the strong federal policy favoring arbitration. Employees who sign employment contracts agreeing to arbitrate disputes will have difficulty in avoiding such contracts.

The U.S. Supreme Court has made it clear that it is a staunch advocate of the FAA, and any state court that attempts to circumvent or weaken the FAA's provisions faces the possibility of a swift rebuke.

II. The Case

Nitro-Lift Technologies, L.L.C. (Nitro-Lift) is a company that works with oil and gas well operators to provide services that enhance production.[3] Nitro-Lift entered into a confidentiality and non-compete agreement with two of its employees, Eddie Lee Howard and Shane D. Schneider.[4] The agreement contained an arbitration provision requiring any dispute, difference, or unresolved question between Nitro-Lift and its employees to be settled by a single arbitrator.[5]

Howard and Schneider quit Nitro-Lift and began working for a competitor.[6] When it learned of Howard and Schneider's switch to a competitor, Nitro-Lift served the employees with a demand for arbitration, claiming that they had breached their non-compete agreements.[7] The employees responded by filing suit in Oklahoma district court, arguing that the non-compete agreements were null and void.[8] The court dismissed the complaint, finding that the arbitration clauses were valid, and an arbitrator, not the courts, must settle the parties' dispute.[9]

Howard and Schneider appealed to the Oklahoma Supreme Court, which reversed the lower court's decision, holding that the "existence of an arbitration agreement in an employment contract does not prohibit judicial review of the underlying agreement" and the non-compete agreements were "void and unenforceable as against Oklahoma's public policy" expressed by the state legislature's enactment of Okla. Stat., Tit. 15 § 219A (West 2011).[10]

In reaching its decision, the Oklahoma Supreme Court did not disturb the district court's finding that the arbitration clause was valid.[11] Rather, the Oklahoma Supreme Court stated that although it had considered federal and state precedent, its decision rested "squarely within Oklahoma law which provid[ed] bona fide, separate, adequate, and independent grounds" for its decision. [12]

The U.S. Supreme Court unanimously disagreed with the Oklahoma Supreme Court, and held that it was for the arbitrator to decide in the first instance whether the covenants not to compete are valid as a matter of applicable state law.[13] The Court stated that by "declaring the noncompetition agreements in two employment contracts null and void, rather than leaving that determination to the arbitrator in the first instance, the state court ignored a basic tenant" of the FAA's substantive arbitration law.[14]

Apparently displeased with the fact that the Oklahoma Supreme Court had ignored federal precedent, the Court stated that the Oklahoma Supreme Court must not only abide by the FAA, which is the "supreme Law of the Land," but also the Court's own opinions interpreting the FAA.[15]

III. Existing Law/Legal Background

Since the adoption of the Federal Arbitration Act by Congress in 1925, the U.S. Supreme Court has consistently rebuffed attempts by lower courts to weaken or circumvent the FAA. As seen in *Nitro-Lift*, the Court has little patience when state courts attempt to enforce their own state laws and policies in place of the FAA. Many of these cases framed the discussion in *Nitro-lift.*

For example, in *AT&T Mobility LLC v. Concepcion*, the Supreme Court reversed a Ninth Circuit decision that found class-action waivers in arbitration agreements to be unenforceable under state law.[16] The Court held that under the FAA, arbitration agreements must be enforced, even if the agreement requires the consumer to arbitrate individually. In *Nitro-Lift*, the Court also rejected attempts to avoid arbitration under state law principles. Similarily, in *Marmet Health Care Center, Inc. v. Brown*, the Court reiterated that where state law conflicts with the FAA, the FAA controls.[17] "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."[18]

In addition to its recent decisions regarding the FAA, the Court also looked to its 1984 holding in *Southland Corp. v. Keating*. In *Southland Corp.,* the Court held that the FAA applies in both state and federal courts.[19] The Court in *Nitro-Lift*, citing *Southland Corp.*, classified the FAA as an Act that "declares a national policy favoring arbitration."[20] The policy is supported by the language of the FAA which states that a "written provision in…a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction… shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." [21] The Court held it is a "mainstay of the Act's substantive law that attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved by the arbitrator in the first instance, not by a state or federal court."[22]

Finally, the Court referenced *Buckeye Check Cashing, Inc. v. Cardegna*, wherein it held that an "arbitration provision is severable from the remainder of the contract," and while its validity is subject to initial court determination, the validity of the remainder of the contract is for an arbitrator to decide.[23] Based on this principle, the Court in *Nitro-Lift* stated that the Oklahoma Supreme Court's ruling should be vacated, as the trial court had found the contract contained a valid arbitration clause, and the Oklahoma Supreme Court did not hold otherwise.[24]

IV. Conclusion

The Court's decision in *Nitro-Lift* represents another ruling by the U.S. Supreme Court in a long line of cases favoring arbitration under the FAA. *Nitro-Lift* and other recent Supreme Court cases make clear that arbitration agreements will be enforced according to their terms, and it is the arbitrator who makes the decision of whether the underlying contract is enforceable. Employers and businesses who want their arbitration clauses enforced will be satisfied with the Court's ruling. Properly drafted employment agreements and sales contracts with arbitration clauses avoid handling disputes through the court system. The clauses can also can create a ban on class actions, often the tail that wags the arbitration dog. The U.S. Supreme Court has made it clear that it is a staunch advocate of the FAA, and any state court that attempts to circumvent or weaken the FAA's provisions faces the possibility of a swift rebuke.

* Third year student, University of Houston Law Center.

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1 Federal Arbitration Act (FAA). 9 U.S.C.A. § 1 et. seq (West 2013).
2 *Howard v. Nitro-Lift Techs.*, *L.L.C.*, 273 P.3d 20, ¶ 3, n. 21 (Okla. 2011).
3 *Nitro-Lift Techs.*, *L.L.C.*, 133 S.Ct. 500, 501 (2012).
4 *Id*. at 501-02.
5 *Id*. at 502.
6 *Id*.
7 *Id*.
8 *Id*.
9 *Id*.
10 *Howard v. Nitro-Lift Techs.*, *L.L.C.*, 273 P.3d 20, 23 (Okla. 2011).
11 *Nitro-Lift Techs.*, *L.L.C.*, 133 S.Ct. 500, 503 (2012).
12 *Id.* at 23, n. 5.
13 *Nitro-Lift Techs.*, *L.L.C.*, 133 S.Ct. at 504.
14 *Id*. at 501.
15 *Id*. at 503.
16 563 U.S. __, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011).
17 565 U.S.__132 S.Ct. 1201, 1203, 182 L.Ed.2d 42 (2012) (*per curiam)*.
18 *Marmet Health Care Center, Inc. v. Brown*, 132 S.Ct. 1201, 1203 (2012)(*per curiam)* (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. __, 131 S.Ct. 1740, 1747, 179 L.Ed.2d 742 (2011)).
19 465 U.S. 1, 10, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984).
20 *Nitro-Lift Techs.*, *L.L.C.*, 133 S.Ct. at 503.
21 9 U.S.C.A. § 2 (West 2013).
22 *Nitro-Lift Techs., L.L.C.*, 133 S.Ct. at 503 (citing *Preston v. Ferrer,* 552 U.S. 346, 349, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008) and *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967))
23 *Buckeye Check Cashing, Inc*., 546 U.S. 440, 445 (2006).
24 *Nitro-Lift Techs.*, *L.L.C.*, 133 S.Ct. 500, 503 (2012).

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.uhccl.org.

UNITED STATES SUPREME COURT

Class action plaintiff cannot avoid removal to federal court by stipulating total damages would be less than the $5 million jurisdictional threshold for application of the Class Action Fairness Act. Plaintiff filed a purported class action in Arkansas state court seeking reimbursement from a homeowners' insurance company for the cost of repairing storm damage. The plaintiff stipulated that recovery would be limited to less than $5 million, the minimum for federal court jurisdiction under the Act. The Supreme Court held that a stipulation as to damages could not overcome a judicial finding that the Act's jurisdictional threshold had been met. "We do not agree that CAFA forbids the federal court to consider, for purposes of determining the amount in controversy, the very real possibility that a nonbinding, amount-limiting, stipulation may not survive the class certification process. This potential outcome does not result in the creation of a new case not now before the federal court. To hold otherwise would, for CAFA jurisdictional purposes, treat a nonbinding stipulation as if it were binding, exalt form over substance, and run directly counter to CAFA's primary objective: ensuring 'Federal court consideration of interstate cases of national importance.'" *Standard Fire Ins. v. Knowles*, 133 S. Ct. 1345 (2013).

Defendant in FDCPA case does not have to show bad faith to recover attorney's fees. The United States Supreme Court held that successful defendants in civil unfair debt collection claims can be awarded attorney fees and costs without a showing that the plaintiff brought the claim in bad faith. The case involved a debtor who sued to recover from a debt collector that sent a fax to her workplace. The action, she argued, violated the law's provision barring debt collectors from contacting debtors' employers. After the debt collector was found not to have violated the Act, it sought and was awarded $4,500 in costs pursuant to Federal Rule of Civil Procedure 54(d)(1), which provides that "[u]nless a federal statute, these rules, or a court order provides otherwise, costs — other than attorney's fees — should be allowed to the prevailing party." The debtor appealed, arguing that under the FDCPA, costs can only be awarded "[o]n a finding by the court that an action [was] brought in bad faith and for the purpose of harassment." But in a an opinion authored by Justice Clarence Thomas, the Supreme Court disagreed, holding that the language of the FDCPA does not conflict with, and therefore does not displace, a district court's discretion to award costs under Rule 54(d)(1). *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166 (2013).

UNITED STATES COURTS OF APPEAL

Debt collectors statement that student loan is "not eligible" for discharge in bankruptcy is misleading. The Second Circuit held that it is misleading for a debt collector to tell a consumer categorically that her student loan debt is "NOT eligible" for discharge in bankruptcy. The court noted that although the debtor may face "several steep procedural and substantive hurdles" to such a discharge, she has the right to seek it and may in fact obtain it. "We think that, upon reading the Collection Letter, the least sophisticated consumer might very well refrain from seeking the advice of counsel, who could then assist her in pursuing all available means of discharging her debt through bankruptcy. The Collection Letter's capacity to discourage debtors from fully availing themselves of their legal rights renders its misrepresentation exactly the kind of 'abusive debt collection practice' that the FDCPA was designed to target." *Easterling v. Collecto, Inc.*, 692 F.3d 229 (2d Cir. 2012).

Online shoppers not bound by arbitration clause. The Second Circuit held that an arbitration provision contained in a confirmation email did not provide customers with sufficient notice to be contractually binding. *Schnable v. Trilegiant Corp.*, 697 F.3d 110 (2d Cir. 2012).

Truth in Lending Act plaintiff does not have to sue to protect rescission right. The Third Circuit held that home borrowers were not required to formally file suit before the Truth in Lending Act's three-year limitation period expired in order to preserve their right of rescission. Under TILA, consumers have an absolute right to rescind for three business days after closing on a home loan. The right to rescind is extended to three years if the lender fails to make requisite disclosures at the time the loan is made. Within three years of closing, the plaintiffs wrote a letter informing their lenders that they intended to rescind the loan based on their failure to receive the required TILA disclosures. When the lenders objected, the plaintiffs sued for rescission in federal court. The lenders argued that the plaintiffs had failed to preserve their rescission rights because their lawsuit was actually filed more than three years after closing. But the court concluded that the plaintiffs preserved their rescission rights when they sent the lenders the letter. *Sherzer v. Homestar Mortg. Servs.*, 707 F.3d 255 (3d Cir. 2013).

Significant motion practice without any discovery waives arbitration. The Third Circuit held that if the party seeking arbitration has engaged in significant motion practice, regardless of whether any discovery was exchanged, the right to compel arbitration has been waived. *In re Pharmacy Benefit Managers Antitrust Litig.*, 700 F.3d 109 (3d Cir. 2012).

Court follows Concepcion and requires individual arbitration. Plaintiff sought to represent a class of AmEx cardholders alleging false marketing. However, the arbitration clause in his credit card agreement explicitly waived any right to class arbitration. Notwithstanding plaintiff's argument that enforcing the arbitration clause would make it impossible for any person to effectively vindicate his substantive rights, the Third Circuit compelled individual arbitration. The court was apologetic, but firm: "Even if [plaintiff] cannot effectively prosecute his claim in an individual arbitration that procedure is his only remedy, illusory or not." *Homa v. Am. Express Co.*, 494 Fed. App'x 191 (3d Cir. 2012).

HOLA doesn't preempt fraud claim against lender. The Fourth Circuit held that federal consumer protection law does not completely preempt state-law claims brought by a plaintiff who alleged she was fraudulently induced into accepting a home loan. The plaintiff sued, arguing that her mortgage contract was unconscionable and that her lender fraudulently induced her into accepting the loan by misrepresenting the market value of her property. The lender argued that the plaintiff's state-law unconscionability claims were completely preempted by the federal Home Owners' Loan Act. The court found that the plaintiff's fraud claim was not preempted because it fell within the scope of the Act's exception for tort claims that only incidentally affect lending operations. *McCauley v. Home Loan Investment Bank*, 710 F.3d 551 (4th Cir. 2013).

Six months of litigation did not waive arbitration. The Fourth Circuit held that a defendant did not waive his right to arbitrate, despite litigating for more than 6 months and conducting discovery. *Rota-McLarty v. Santander Consumer USA, Inc.*, 700 F.3d 690 (4th Cir. 2012).

Home insurance doesn't cover Chinese drywall damage. The Virginia Supreme Court, in response to a certified question submitted by the Fourth Circuit, held that an "all risk" homeowners' insurance policy excluded coverage for damage allegedly caused by Chinese drywall. *Travco Ins. v. Ward*, 2013 U.S. App. LEXIS 1066 (4th Cir. Jan. 15, 2013).

F*air Credit Reporting Act damages for impairment of credit affirmed*. The Fifth Circuit affirmed an award of $20,000 in damages for impairment of credit based on the defendant's failure to properly investigate a credit dispute. *Smith v. Santander Consumer USA, Inc.*, 703 F.3d 316 (5th Cir. 2013).

Non-signatory cannot enforce arbitration agreement. The Fifth Circuit held that an accounting firm could not compel its clients to arbitrate their claims that the accountants had fraudulently convinced them to invest in particular securities. The accounting firm held up an arbitration agreement between its clients and a third party, a securities broker, which said that any dispute between the clients and the broker were arbitrable, including those between the clients and the broker's "officers, directors, employees or agents." The accounting firm argued that although it was not a party to that agreement, it was an agent of the broker, and could therefore enforce the arbitration agreement. The court concluded that the accountants could not compel arbitration because the actions of which their clients complained were not performed as agents of the securities broker. The court also concluded that the accountants could not rely on equitable estoppel principles to compel arbitration, primarily because the clients' claims did not rely on the agreement between the clients and the broker. *Baldwin v. Cavett*, 2012 U.S. App. LEXIS 22777 (5th Cir. Nov. 6, 2012).

The Fifth Circuit held that an accounting firm could not compel its clients to arbitrate their claims that the accountants had fraudulently convinced them to invest in particular securities.

Debt collection letter does not overshadow or contradict FDCPA's notice under least sophisticated consumer standard. The Fifth Circuit affirmed the district court's opinion finding that the collector's letter that urged "timely action" and warned of "bad consequences," did not violate the Act. *McMurray v. ProCollect, Inc.*, 687 F.3d 665 (5th Cir. 2012).

Mortgage foreclosure is debt collection under FDCPA. The Sixth Circuit held that a law firm that filed an action to foreclose on a mortgage engaged in "debt collection" subject to the requirements of the Fair Debt Collection Practices Act. The court noted that "*every* mortgage foreclosure, judicial or otherwise, is undertaken for the very purpose of obtaining payment on the underlying debt, either by persuasion (*i.e.*, forcing a settlement) or compulsion (*i.e.*, obtaining a judgment of foreclosure, selling the home at auction, and applying the proceeds from the sale to pay down the outstanding debt) . . . . Accordingly, mortgage foreclosure is debt collection under the FDCPA." The court also held that an attorney who meets the general definition of a debt collector "must comply with the FDCPA when engaged in mortgage foreclosure. And a lawyer can satisfy that definition if his principal business purpose is mortgage foreclosure or if he 'regularly' performs this function." *Glazer v. Chase Home Fin., LLC*, 704 F.3d 453 (6th Cir. 2013).

Rented condominium fees qualify as "debt" under FDCPA. The Sixth Circuit held that an assessment owed to a condominium association qualifies as a "debt" under the Fair Debt Collection Practices Act where the owner bought the property for his personal use and now leases it. *Haddad v. Alexander, Zelmanski, Danner & Fioritto, PLLC*, 698 F.3d 290 (6th Cir. 2012).

Radio stations telemarketing calls did not violate TCPA. The Sixth Circuit held that a radio station's prerecorded telemarketing call did not violate the Telephone Consumer Protection Act because the calls were exempt from the Act's provisions. The court found the calls were "hybrid" that both announced a contest and promoted the station. *Leyse v. Clear Channel Broad., Inc.*, 697 F.3d 360 (6th Cir. 2012).

Lender may be liable under Fair Credit Reporting Act. The Sixth Circuit held that an auto lender may be liable under the federal Fair Credit Reporting Act for failing to reasonably investigate a divorced man's claim that he was mistakenly listed as a co-obligor on his ex-wife's vehicle. *Boggio v. USAA Fed. Sav. Bank*, 696 F.3d 611 (6th Cir. 2012).

FCRA plaintiff must show actual damages. The Eighth Circuit held that a plaintiff could not pursue a claim under the Fair Credit Reporting Act in the absence of evidence that she suffered actual damages from an allegedly inaccurate criminal background check. Alleging that she suffered emotional distress from an inaccurate report, the plaintiff sued the defendant for violating the FCRA by failing to adopt reasonable procedures to ensure the maximum possible accuracy of its credit reporting. The court held that a consumer must present "competent evidence of actual injury" to state a claim under the FCRA. "[The plaintiff] suffered no physical injury and was not medically treated for any psychological or emotional injury. [The plaintiff] offered no reasonable detail about the nature and extent of her alleged emotional distress. Although [the caseworker] witnessed [the plaintiff] crying during the meeting, corroboration of a brief episode of frustration and unhappiness does not establish the sort of concrete emotional distress that is required to constitute a genuine injury and actual damages," the court said. *Taylor v. Tenant Tracker*, 710 F.3d 824 (8th Cir. 2013).

Circuit court owes "no deference" to NLRB ruling on class arbitration. One year ago, the NLRB ruled in *D.R. Horton, Inc.* that it is a violation of federal labor law for employers to require their employees to sign arbitration agreements waiving class actions, and that any arbitration agreements waiving class arbitration would be void. This week, the Eighth Circuit became the first federal circuit court to refuse to enforce the NLRB's ruling. *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).

Toyota can't compel arbitration of anti-lock brake system claims. The Ninth Circuit affirmed a district court decision that Toyota Motor Sales, U.S.A., a nonsignatory to several agreements with arbitration provisions, could not compel plaintiffs to arbitrate. *Kramer v. Toyota Motor Sales, U.S.A., Inc.*, 705 F.3d 1122 (9th Cir. 2013).

Store's calls to customer violated TCPA. The Ninth Circuit held that Best Buy violated federal consumer protection law by placing automated, prerecorded calls notifying a customer of the status of his membership in a store "rewards" program. The plaintiff alleged that, after buying a computer from Best Buy, he began to receive prerecorded calls from the retailer, even though he was registered on the national do-not-call list and later added to the retailer's do-not-call list. The plaintiff filed a class action under the Telephone Consumer Protection Act after he received an automated call notifying him of changes in the terms of his membership in a store rewards program. Best Buy argued that its calls were purely informational courtesy calls permitted under the Act. The court disagreed. *Chesbro v. Best Buy Stores, L.P.*, 705 F.3d 913 (9th Cir. 2012).

Consumer can recover damages for emotional distress under FCRA. The Tenth Circuit held that a consumer produced sufficient evidence of emotional injury to proceed with a claim under the Fair Credit Reporting Act. The plaintiff sued under the Fair Credit Reporting Act, alleging that the defendant breached duties imposed on furnishers of credit information when provided with notice of a credit dispute. The court held that the plaintiff's evidence failed to establish that he sustained economic damage in the form of a ruined credit rating or the denial of further financing. However, the court found that the plaintiff could proceed based on his contention that he suffered emotional distress that caused his health to deteriorate as a result of the defendant's negative credit reports. "Plaintiff described the circumstances surrounding his injury in reasonable and sufficient detail that he was not required to produce further evidence of his emotional distress. We conclude that his affidavit alone created a genuine dispute as to whether the [defendant's] actions caused him to suffer emotional damages," the court said. *Llewellyn v. Allstate Home Loans*, No. 11-1340, 2013 U.S. App. LEXIS (10th Cir. March 28, 2013).

Debtor not required to use Social Security Income in Repayment Plan. The Tenth Circuit held that a Chapter 13 debtor is not required to include Social Security income in the calculation of his projected disposable income. *Anderson v. Cranmer (In re Cramer)*, 697 F.3d 1314 (10th Cir. 2012).

Property manager is not subject to Fair Debt Collection Practices Act. The Eleventh Circuit held that a property management company that collected unpaid assessments on behalf of a homeowners association was not subject to the requirements of the Fair Debt Collections Practices Act. The court held that the defendant fell within the scope of an exemption in the FDCPA for entities "collecting or attempting to collect any debt owed … another to the extent such activity is incidental to a bona fide fiduciary obligation." *Harris v. Liberty Cmty. Mgmt., Inc.*, 702 F.3d 1298 (11th Cir. 2013).

Debt collector cannot moot lawsuit. The Eleventh Circuit held that debt collectors could not moot consumer lawsuits against them merely by offering the full amount of statutory damages the plaintiffs were entitled to under federal law. *Zinni v. ER Solutions, Inc.*, 692 F.3d 1162 (11th Cir. 2012).

UNITED STATES DISTRICT COURTS

Debt collector must disclose his company name. The district court in Colorado held that the Fair Debt Collection Practices Act requires a debt collector to disclose its company name in a voicemail left for the consumer. The court noted that the Act required meaningful disclosure of the caller's identity. The only way for an identity disclosure to be meaningful to a consumer is if it disclosed the name of the collection agency, rather than the personal name of the caller. Torres v. ProCollect, 865 F. Supp. 2d 1103 (D. Colo. 2012).

STATE COURTS

School student must arbitrate tort claims. A California Court of Appeal held that a prep school student must arbitrate her personal injury claims against the school and one of its teachers. The plaintiff attended a private college preparatory school and withdrew after an incident with a teacher. After withdrawing from the school, the plaintiff sued the school for defamation, negligent infliction of emotional distress, and negligent hiring and supervision. She also sued the teacher for battery, defamation and negligent infliction of emotional distress. The court agreed that the plaintiff's tort claims were subject to arbitration in accordance with the enrollment contract her parents signed. *Bigler v. Harker Sch.*, 213 Cal. App. 4th 727 (2013).

Fees charged for tax refund checks violated Truth in Lending Act. A California Court of Appeal held that a "handling fee" charged by a bank in connection with tax refund checks constituted an undisclosed finance charge that violated the federal Truth In Lending Act. The defendant provides certain tax preparation services, including arranging refund anticipation loans and electronic refund checks through certain banks. The state of California sued, alleging violations of various federal and state consumer protection laws. In particular, the state argued that certain "handling fees" that affiliated banks charged for electronic refund checks constituted undisclosed finance charges under TILA. The court agreed, finding that "in the present case, the handling fee was a condition to customers receiving [the defendant's] tax services on credit. [The defendant] does not establish why the fee's application to administrative aspects related to the extension of this credit matters, and we are not aware of any reason why it should." *People v. JTH Tax, Inc.*, 212 Cal. App. 4th 1219 (2013).

State prohibition against class action waiver is preempted by Federal Arbitration Act. A California Court of Appeal held that a "poison pill" in an automobile purchase contract did not render an arbitration clause in the agreement unenforceable. When plaintiff sued, the dealership moved to compel arbitration pursuant to a clause in its standard sales contract that included a class action waiver. The arbitration clause included a "poison pill" provision that purported to render the entire clause unenforceable in the event that the class action waiver was deemed unenforceable. The plaintiff contended that, because a state consumer protection law expressly barred class action waivers, the poison pill clause was triggered to preclude arbitration. The court disagreed and found the state law prohibition preempted by the FAA. *Flores v. West Covina Auto Grp.*, 212 Cal. App. 4th 895 (2013).

Landlord may be liable for attack by tenant's dog. The Connecticut Supreme Court held that a landlord may be liable for injuries suffered by a tenant who was bitten by another tenant's dog. *Giacalone v. Wallingford Hous. Auth.*, 51 A.3d 352 (Conn. 2012).

Fraud claim is subject to arbitration provision. The Florida Supreme Court held that an action for fraud was within the scope of an arbitration provision in a contract for the purchase of real property. "We hold that the action here based on fraud is within the scope of the arbitration provision because it has a clear contractual nexus with, and thus a significant relationship to, the contract. This relationship exists because: (1) the fraud claim is inextricably intertwined with both the circumstances that surrounded the transaction from which the contract emanated and the contract itself; and (2) resolution of the fraud claim requires the construction and consideration of duties arising under the contract." Jackson v. Shakespeare Found., Inc., 108 So. 3d 587 (Fla. 2013).

T*CPA suit is governed by federal not state limitations*. The Illinois Appellate Court held a private action under the Telephone Consumer Protection Act was not barred by the state's two-year statute of limitations for claims seeking statutory penalties. The court decided that TCPA claims brought in state court are subject to the four-year federal catchall statute of limitations rather than the state two-year limitations period, citing *Mims v. Arrow Financial Services*, 132 S. Ct. 740 (2012). *Wellington Homes v. W. Dundee China Palace Rest., Inc.*, 2013 Ill. App. LEXIS 44 (Ill. Ct. App. Feb. 4, 2013).

Estate isn't bound by nursing home arbitration clause. The Illinois Supreme Court held that the estate of a nursing home patient was not required to arbitrate a wrongful death claim pursuant to a clause in the defendant's admissions contract. The court decided that, under state law, a wrongful death action is not a true asset of a decedent's estate that a decedent may limit via an arbitration agreement. "[A] wrongful death action does not accrue until death and is not brought for the benefit of the decedent's estate, but for the next of kin who are the true parties in interest. [The plaintiff in this case], as [the patient's] personal representative in the wrongful death action, is merely a nominal party, effectively filing suit as a statutory trustee on behalf of the next of kin. [The plaintiff] is not prosecuting the wrongful death claim on behalf of [the patient], and thus the plaintiff is not bound by [the patient's] agreement to arbitrate for purposes of this cause of action," the court said. *Carter v. SSC Odin Operating Co., LLC*, 976 N.E.2d 344 (Ill. 2012).

Mortgage holder and homeowner's association not responsible for injury on abandoned property. An Indiana trial court found that the defendants had not breached a duty of care owed to the injured child. The Indiana Court of Appeals affirmed the trial court's grant of summary judgment. The court found it came down to basic premises liability law. Neither the mortgage company nor the association were "possessors" of the property, so they owed no duty to those coming onto the premises. *Erwin v. HSBC Mortg. Servs., Inc.*, 983 N.E. 2d 174 (Ind. Ct. App. 2013).

Legal malpractice plaintiff cannot recover "lost" punitive damages. The Kentucky Supreme Court held that a legal malpractice plaintiff could not recover lost punitive damages when suing an attorney who allegedly mishandled her personal injury case. The court held that lost punitive damages are not recoverable in a legal malpractice suit, explaining that "the nexus between the attorney accused of malpractice and the actual wrongdoer is far too attenuated. As such, a client's general right to be made whole should yield in light of the nature and purpose of punitive damages." *Osborne v. Keeney*, No. 2010-SC-000397-DG, 2012 Ky. LEXIS 203 (Ky. Dec. 20, 2012).

Defendant can't moot consumer class action. Maryland's highest court held that a consumer fraud defendant could not moot a putative class action by tendering full individual relief to the lead plaintiff. The court noted: "[A] tender of individual relief to the putative class representative does not moot a class action if the individual plaintiff has not had a reasonable opportunity to seek class certification, including any necessary discovery." *Frazier v. Castle Ford, Ltd.*, 59 A.3d 1016 (Md. Ct. App. 2013).

Lodestar attorney's fees should consider amount of recovery. The Minnesota Supreme Court held that the amount at stake in a lemon law case should have been considered in determining the reasonableness of attorney fees to be awarded under the lodestar method. The plaintiff recovered $230,000 in attorney fees and costs, based largely on over 600 hours billed by the plaintiff's attorneys at $350 to $375 per hour. The state supreme court first concluded that the lodestar method is the proper approach for determining reasonable attorney fees under state lemon law. The court agreed with the defendant that the amount involved in the litigation and the results obtained must be considered when determining fees under the lodestar method. "It is true that a cap on fees or an examination of the proportionality between the amount of recovery and the fees expended could hamper the ability of consumers to vindicate their rights relative to inexpensive products. But ignoring, as the [trial] court did, the amount involved in the litigation contravenes the principles that underlie statutory attorney fees provisions . . . ." "[Trial] courts, therefore, are directed to exclude from fee awards 'hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.' Because billing judgment is necessarily related to the merits of the case and the amount at issue in a consumer protection case, divorcing an award of attorney fees entirely from the amount at stake in the litigation would relieve attorneys from the need to exercise such judgment." *Green v. BMW of N. Am.*, 826 N.W.2d 530 (Minn. Feb. 2013).

The court agreed with the defendant that the amount involved in the litigation and the results obtained must be considered when determining fees under the lodestar method.

Payday lender can't enforce online arbitration clause. The Montana Supreme Court held that a payday lender could not enforce an arbitration clause included in its online loan application form. The court noted: "[The defendant] has presented no evidence to suggest that [the plaintiff] qualifies as a sophisticated party with significant business experience. Further, it appears that economic duress compelled [the plaintiff] to enter into this contract for a $600 payday loan with a 780 percent APR . . . ." It continued: "The arbitration clause qualifies as a contract of adhesion and falls outside [the plaintiff's] reasonable expectations, and, therefore, the arbitration clause is unconscionable." *Kelker v. Geneva-Roth Ventures*, No. 12-0313, 2013 Mont. LEXIS 68 (Mont. March 12, 2013).

"Open and obvious" rule does not bar shopper's negligence suit. The Nevada Supreme Court held a store could be liable for failing to protect a customer from tripping over an "open and obvious" hazard. The plaintiff sued Costco for negligence for injuries sustained when he tripped and fell over a wooden pallet that an employee had left in a store aisle. Costco argued that it did not breach a duty of care because the hazard created by the pallet was open and obvious. The state supreme court, recognizing the "evolution" of state premises liability law, held that the open and obvious nature of a dangerous condition no longer automatically relieves a property owner from the general duty of reasonable care. The court noted: "The fact that a dangerous condition may be open and obvious bears on the assessment of whether reasonable care was exercised by the landowner," but held it is not a complete bar. *Foster v. Costco Wholesale Corp.*, 291 P.3d 150 (Nev. 2013).

Home seller does not have to disclose property was scene of a grisly murder/suicide. A Pennsylvania appellate court held that neither the seller nor the real estate agent had a duty to disclose psychological defects because they are not "material." *Milliken v. Jacono*, 60 A.3d 133 (Pa. Super. Ct. 2013).

Nursing home cannot force arbitration of wrongful death suit. A Pennsylvania appellate court has ruled that an arbitration clause in a nursing home admission contract was not broad enough to encompass a claim for wrongful death. *Setlock v. Pinebrook Pers. Care & Ret. Ctr.*, 56 A.3d 904 (Pa. Super. Ct. 2012).

Arbitration clause in debt adjuster's agreement is unenforceable. The Washington Supreme Court held that a debt adjuster could not enforce a binding arbitration clause in its service contract when sued by a customer for violating state consumer protection law. The court concluded that the clause was unconscionable based on its "loser pays" provision, a 30-day time limit for requesting arbitration, and a provision designating Orange County, California as the sole venue for arbitration. The court also found that its decision was consistent with the decision in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), and not preempted by the FAA. In discussing why there was no preemption, the court explained that the defendant's arbitration clause "contained numerous unconscionable provisions based on the specific facts at issue in the current case. *Concepcion* provides no basis for preempting our relevant case law nor does it require the enforcement of [the defendant's] arbitration clause." *Gandee v. LDL Freedom Enters.*, 293 P.3d 1197 (Wash. 2013).

Arbitration clause unenforceable due to loss of forum. The Wisconsin Court of Appeals held that a nursing home could not demand arbitration of a wrongful death claim when the service designated in its admissions contract had exited the consumer-arbitration. Defendant sought to compel arbitration pursuant to an alternative dispute resolution agreement executed at the time of the husband's admission. The agreement designated the National Arbitration Forum (NAF) as the parties' exclusive forum for the arbitration of disputes. The plaintiff argued that the clause was unenforceable because the NAF had ceased providing consumer arbitration services. The court agreed that the loss of NAF as a forum for the parties' dispute rendered the defendant's arbitration clause unenforceable. The court found the forum to be an integral part of the ADR Agreement. *Riley v. Extendicare Health Facilities, Inc.*, 826 N.W.2d 398 (Wisc. Ct. App. 2013).

DECEPTIVE TRADE PRACTICES AND WARRANTIES

MISREPRESENATIONS ARE ACTIONABLE UNDER THE DTPA SO LONG AS THEY ARE OF MATERIAL FACT AND NOT MERELY "PUFFING" OR OPINION

A STATEMENT FALSELY INDICATING THAT REPAIRS WERE SUCCESSFUL IS ACTIONABLE UNDER THE DTPA

Kramer v. Hollmann, ____ S.W.3d ____(Tex. App. Nov. 21, 2012).

FACTS: Plaintiffs, Melissa and Scot Hollmann, entered into a contract with the Defendants, Paul Kramer and PK Industries d/b/a Castlegate Homes, to design and build a home. Sometime into construction of the home, a moisture leak developed. Defendants sent Plaintiffs an email claiming the leak had been fixed. After moving into the home, Plaintiffs noticed additional moisture problems involving the windows, the HVAC system, and the roof. Defendants continued to assure Plaintiffs that they would "make everything right" but the house eventually developed mold and Plaintiffs moved out.

The court defined puffery as "an expression of opinion by a seller not made as a representation of fact."

Plaintiffs sued Defendants for: (1) DTPA violations; (2) breach of contract; (3) breach of warranty; and (4) negligence. A jury awarded damages after finding Defendants liable for breach of contract, breach of warranty, and DTPA violations. Defendants appealed, claiming the evidence was legally and factually insufficient to support the finding of DTPA violations.

HOLDING: Affirmed.

REASONING: The court held that misrepresentations were actionable under the DTPA as long as they were of a material fact and not puffery. The court defined puffery as "an expression of opinion by a seller not made as a representation of fact." The court then explained a three-part test used to determine whether a statement was puffery. The first part of the test examined a statement's specificity, as imprecise or vague representations were only opinion. The second part of the test was a comparison between the subject matter knowledge of the buyer and seller to determine whether either party could judge the correctness of the matter as well as the other. Finally, a determination must have been made as to whether the representation refered to a past, present, or future condition, as representations concerning past or present conditions were given greater scrutiny, because future conditions necessitated opinion by nature.

The court held that several of Defendants' statements to Plaintiffs were mere puffery and not material fact, noting that phrases with indefinite meanings, such as "magnificent home with a quality level rarely seen" and "one of the finest homes" in the city, are not actionable misrepresentations. The court also explained the statements could be judged equally by either party, and that the statements related to future circumstances, and thus were mere puffery.

The court then addressed Defendants' statements falsely indicating that repairs were successful. It held such statements were actionable under the DTPA, specifically the implied warranty to repair in good and workmanlike manner. The court found that Defendants represented the repairs to have characteristics that they did not have, and therefore, violated the DTPA.

ARTFULLY PLEADING A DTPA CLAIM DOES NOT ENABLE PLAINTIFFS TO CIRCUMVENT THE STATUTE OF LIMITATIONS FOR HEALTH CARE LIABILITY CLAIMS

Perkins v. Apria Healthcare, Inc. ___ F. Supp. 2d ___ (N.D. Tex. 2012).

FACTS: Plaintiffs, Perkins, sued Defendant, oxygen tank manufacturer Apria Healthcare, in Texas state court, on behalf of a deceased user of medical oxygen tanks, asserting DTPA, negligence, misrepresentation, and other claims. Plaintiffs alleged that Defendant provided defective tanks, failed to fill the tanks as prescribed, or failed to assure that the tanks were in proper working order. Defendant removed the case to federal court and moved for summary judgment based on the affirmative defense of limitations, contending that the two-year statute of limitations period that applies to health care liability claims expired before Plaintiffs filed suit.

HOLDING: Motion granted.

REASONING: The court recognized that a two-year statute of limitations governed health care liability claims. Tex. Civ. Prac. & Rem. Code Ann. § 74.251(a) (West 2011). The court concluded that Defendant was a health care provider that provided a prescribed drug, and Plaintiffs' claims arose from the "treatment, lack of treatment, or other claimed departure from accepted standards of medical care." For these reasons, it was established that Plaintiffs' claim was a health care liability claim. The court reasoned that artfully pleading a DTPA claim did not enable plaintiffs to circumvent the statute of limitations for health care liability claims. The court noted that the Supreme Court of Texas has held that health care liability claim procedural rules apply despite plaintiffs having alleged something nominally different from a medical malpractice claim. Lastly, the court reasoned that the final delivery of oxygen was the only act that Defendant committed within the two-year limitations period and was insufficient of itself to constitute a breach or tort. The court found that a reasonable trier of fact could only find that Plaintiffs' claims were based on conduct that preceded the two-year limitations period and were, therefore, time-barred. The court concluded that Defendant established the Plaintiffs' claim was a health care liability claim, and was barred by the statute of limitations. Defendant's motion for summary judgment was granted.

DTPA LIMITATIONS ACCRUAL DATE DEPENDS ON THE DATE A PLAINTIFF BECAME AWARE OF THE DECEPTIVE ACT ITSELF RATHER THAN THE ACTOR'S IDENTITY

Lauzon v. Pulte Homes, Inc., ___ F. Supp. 2d ___ (W.D. Tex. 2012).

FACTS: Plaintiffs, Lauzon, were homeowners in the Hills of Rivermist residential subdivision in Bexar County, Texas. Plaintiffs filed suit against Defendant, Pulte Homes of Texas, L.P. and Centex Homes, Inc., alleging violations of the Texas DTPA. On January 24, 2010, a retaining wall in the subdivision collapsed and a landslide ensued. On January 23, 2012, Plaintiffs filed suit, alleging that the failure of the retaining wall put their homes in danger of physical damage and diminished the value of their properties. Centex filed a separate lawsuit against Arias & Associates, Inc. and Gravity Walls, Ltd. for negligently constructing the wall that collapsed. Plaintiffs alleged that they had no knowledge, nor should they have known through the exercise of reasonable diligence, that Arias and Gravity Walls were negligent in the design and construction of the wall until after Centex filed its lawsuit on January 19, 2012. On July 11, 2012, Plaintiffs filed a motion for leave to amend their complaint and add Arias and Gravity Walls as defendants in the lawsuit.

A claim under the DTPA is subject to a two-year limitations period.

HOLDING: Motion denied.

REASONING: The court first acknowledged that a claim under the DTPA was subject to a two-year limitations period. A DTPA claim "must be commenced within two years after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered the occurrence of the false, misleading, or deceptive act or practice." Tex. Bus. & Com. Code §17.565. The court reasoned that the accrual date depended on the date a plaintiff became aware of the deceptive act, rather than the actor's identity. The court concluded that because the wall collapse put Plaintiffs on notice that a deceptive act might have occurred, the statute of limitations began to run on January 24, 2010. Therefore, the two-year limitations period expired on January 24, 2012. The court denied Plaintiffs motion for leave to amend, which would have added Arias and Gravity Walls to the lawsuit.

DTPA DEFENDANT MAY WAIVE RIGHT TO ABATEMENT FOR FAILURE TO GIVE NOTICE

K.J. v. USA Water Polo, Inc., 383 S.W.3d 593 (Tex. App.—Houston [14th Dist.] 2012).

FACTS: Plaintiffs, K.J. and V.J., sued Defendant, USA Water Polo, on behalf of E.J., their minor child. Plaintiffs alleged that while on a school trip to Utah, E.J.'s team members sexually assaulted him. Plaintiffs sued for assault and battery, negligence, and fraud. E.J. claimed that he was blindfolded, spanked with a belt, given a "wedgie," and had fingers placed up his anus. Plaintiffs amended their complaint to include DPTA violations, but failed to give proper notice required by the DPTA prior to suing a defendant for violations of the act.

Defendant timely filed its plea in abatement. Two weeks later, the court granted the abatement and ordered Plaintiffs to provide the mandated written notice. Per that order, Defendant agreed to waive abatement if proper notice was given. The next month, Plaintiffs gave the required notice, but then filed a motion to set aside the order granting abatement, alleging that the case had been abated automatically by the statute on the eleventh day after the plea in abatement was filed. The court denied the motion and allowed the case to proceed. A jury found for Defendant on all claims. Plaintiffs appealed.

HOLDING: Affirmed.

REASONING: Plaintiffs argued on appeal that the two depositions taken during the automatic abatement period were "legal nullities" and could not support a verdict because the case was automatically abated for 60 days pursuant to DPTA §17.505(a). Plaintiffs relied on *Kimball Hill Homes*, where the trial court was found to have erred when it failed to abate the case for lack of presuit notice. *In re Kimball Hill Homes Tex., Inc*, 969 S.W. 2d 522 (Tex. App.—Houston [14th Dist.] 1998).

The court distinguished Plaintiffs' situation from *Kimball* because in *Kimball* "the complaining party was a defendant seeking a statutory abatement right it had been denied," whereas here the "plaintiff [was] seeking to benefit from an abatement period triggered by the plaintiff's own failure to comply with the notice requirements." Moreover, the defendant in *Kimball*, unlike Defendant here, did not waive his abatement right. Noting that a court has power to control its own docket, even in abatement, the appeals court concluded that the trial court properly acknowledged Defendant's right to waive abatement and, therefore, the depositions were valid. The court further opined that even if the trial court had erred, there was no evidence that the error caused an improper judgment because Defendant failed to preserve error on its claim of legal sufficiency.

CONSUMER CREDIT

FAIR CREDIT REPORTING ACT DAMAGES FOR IMPAIRMENT OF CREDIT AFFIRMED

Smith v. Santander Consumer USA, Inc., 703 F.3d 316 (5th Cir. 2012).

FACTS: Plaintiff, Jeffrey Smith, brought action against Defendant, Santander Consumer USA, Inc., for violations of the Fair Credit Reporting Act (FCRA) by failing to promptly investigate Plaintiff's credit dispute and not correcting the information misreported to a credit agency. Plaintiff suffered damages including a higher interest rate after refinancing his home, postponed expenses as a cautionary measure, and embarrassment resulting in damaged professional and family relationships. The jury found that the Defendant violated the FCRA. Defendant appealed, arguing: (1) Plaintiff did not offer sufficient evidence for his claim of damages; (2) Plaintiff failed to mitigate his damages; and (3) the district court improperly admitted letters from third parties to Plaintiff.
HOLDING: Affirmed.
REASONING: The court agreed with Defendant's assertion that Plaintiff's diminution of available credit alone does not constitute a measurable damage under FCRA. The court reasoned that the consumer is unaffected unless steps are taken to use the available credit or there is a showing of need for a higher credit amount.

The court further reasoned that the jury verdict, which was general and not itemized, reflected considerably less than Plaintiff sought. Because the evidence was sufficient for "reasonable and fair-minded men in the exercise of impartial judgment" to support the ultimate award, whether or not this court would have reached the same result, the *Boeing* standard required this court to affirm the jury verdict. The issue of mitigation of damage was a jury question. The court refused to speculate on the makeup of the general verdict because the total award to Plaintiff was less than the full amount of his claimed damages. Therefore, the failure to mitigate damages was no basis for reversing the district court's judgment.

The court also determined that the trial court's admission of letters to reflect the impact of the erroneous credit score on Plaintiff's line of credit was harmless error, if error at all, regardless of whether viewed for their relevance to Defendant's liability or compensable damages.

FEES CHARGED FOR TAX REFUND CHECKS VIOLATED TRUTH IN LENDING ACT

People v. JTH Tax Inc., ___ Cal. App. 4th ___ (2013).

FACTS: Defendant, JTH Tax Inc., doing business as Liberty Tax Service, provided tax preparation and loan services throughout the U.S., including 195 stores in California. Among the services offered by Defendant were e-filing, refund anticipation loans (RAL), and electronic refund checks (ERC). RAL were short term loans provided by third-party banks that had a relationship with Defendant. Defendant advertised and promoted the loans, offered them to its customers, and filled out all of the paperwork for its customers. Defendant delivered the application to the lender bank and then disbursed the loan proceeds to the customer; secured by the customer's anticipated refund. These services came with several charges and fees deducted by the lending bank, including a "handling fee" to establish a temporary special account where the customer's refund was deposited. The ERC application also required the establishment of this special account in order to receive the customer's refund directly from the IRS.

The California Attorney General filed a complaint against Liberty for violation of California's Unfair Competition Law and False Advertising Law. The complaint stated that there were inadequate disclosures to customers in RAL and ERC applications regarding the cost for the extension of credit. The AG sought injunctive relief, civil penalties, and an order of restitution. The court concluded that the handling fee was an undisclosed finance charge in violation of the Truth in Lending Act (TILA). Defendant appealed judgment
HOLDING: Affirmed.
REASONING: The TILA states that a finance charge is "any charge payable directly or indirectly by the creditor as an incident to or a condition of the extension of credit, which does not include any charge of a type payable in a comparable cash transaction." Defendant argued that the handling fee was not a finance charge because it was paid to the lender bank for setting up the special account and that the fee was not paid in cash transactions.

The appeals court agreed with the trial court that details, such as to whom the fee was paid, were inconsequential. Regarding comparable cash transactions, the trial court found that only 4 out of 60,000 transactions were cash transactions. The court ruled that these four were "insignificant exceptions" to an otherwise credit-based business, and therefore, the "comparable cash transaction defense" was unavailable. Defendant also argued that the handling fee was not a finance charge because it was not "interest." Defendant relied upon *Hahn v. Hank's Ambulance Service, Inc.*, arguing that the handling fee was a fee that was exempt from TILA disclosure. 787 F.2d 543 (11th Cir. 1986). The court distinguished JTH's fee from the fee in *Hahn*, reasoning that JTH's fee "gave the customer the *right* to defer payment of a debt."

TRUTH IN LENDING ACT PLAINTIFF DOES NOT HAVE TO SUE TO PROTECT RESCISSION RIGHT

Sherzer v. Homestar Mortgage Services, 707 F.3d 255 (3d Cir. 2013).

FACTS: Plaintiffs, the Sherzers, obtained two loans on their principal dwelling from Homestar Mortgage Services, one significantly larger than the other. The loans closed and Homestar assigned them both to HSBC Bank. Less than three years after the closing date, Plaintiffs' counsel wrote to Homestar and HSBC asserting that Homestar had failed to provide the disclosures required by TILA and that these omissions were material violations. The letter stated that the Plaintiffs were exercising their right to rescind the loan agreements under 15 U.S.C. §1635. HSBC agreed to rescind the smaller of the two loans but denied rescission of the larger one, claiming that Homestar had not materially violated the TILA. More than three years after the initial notice of rescission, the Plaintiffs filed suit in the Eastern District of Pennsylvania seeking a declaration of rescission, remedies for rescission, and damages.

Homestar and HSBC (Lenders) filed a motion for judgment on the pleadings, which argued that suits for rescission filed more than three years after a loan's closing date were time-barred under 15 U.S.C. §1635(f), even when the obligor mailed a notice of rescission within the three-year period. The Plaintiffs argued that providing a written notice of rescission was sufficient to reserve their right and that they were not also required to file suit within three years. The district court granted Lenders' motion and dismissed the case. The Plaintiffs appealed.

HOLDING: Reversed.

REASONING: The court first explained that the TILA allowed the obligor an absolute right to rescind within three days following closing, with or without the disclosures. If the lender failed to make the required disclosures, the obligor was also allowed a right to rescind extending three years from consummation of the transaction or sale of the property, whichever occurred first.

The court relied primarily on the explicit statutory language of §1635(a), (b), and (f), and its implementing regulation, Regulation Z, in concluding that only written notice was required. The statutory language provided that an obligor exercised his right to rescission upon sending notice to the creditor; no language alluded either explicitly or implicitly to a court filing. Regulation Z similarly specified that the obligor was to provide notice either by mail, telegram, or other means of written communication. The court concluded that the absence of any reference to causes of action or the commencement of suits in §1635 suggested that an obligor could accomplish rescission without a formal court filing. Because TILA is a remedial statute, the court read the statute liberally.

The statutory language provides that an obligor exercises his right to rescission upon sending notice to the creditor.

The Lenders cited *Beach v. Ocwen Federal Bank* in arguing that an obligor must bring suit within three years to exercise his right to rescission. Beach v. Ocwen Federal Bank, 523 U.S. 410 (1998). The court distinguished *Beach* by stating that the court in that case merely decided that obligors who had not exercised their right within the three-year period were barred from later asserting rescission as an affirmative defense. It made no mention of how the obligor should exercise this right. The court also found unconvincing Lenders' argument that it would be problematic for a court to recognize that rescission occurred after the three-year period had passed because the obligor no longer had any right of rescission to enforce. Instead, the court found that although after the three-year period the obligor no longer had a right to rescission, he had a statutory right to his property (down payments and the like) and to a clear title. Thus, borrowers who exercised their right by providing notice within the three-year period had standing to bring suit after the period expires.

The court then addressed Lenders' argument that a lender's security interest would become instantly void by law even if the obligor were to send an invalid notice, such as when the mandated disclosures had in fact been made. The court reasoned that if an obligor were to bring a fraudulent or ineffective TILA claim, the lender could choose to file suit to resolve any uncertainty. In such a case, a court might condition the release of a security interest on the return of loan proceeds to protect the lender, rather than treat it as an unsecured creditor. Regarding Lenders' argument that the high cost of litigation would burden enforcement of their rights, the court simply stated that the fact that a particular approach was costly was no reason to disregard the explicit language of the statute, and that this was a matter best left to the legislative process.

CONSUMER CAN RECOVER DAMAGES FOR EMOTIONAL DISTRESS UNDER FAIR CREDIT REPORTING AACT

Llewellyn v. Allstate Home Loans, Inc., 713 F.3d 1173 (10th Cir. 2013).

FACTS: Plaintiff, Glen Llewellyn, purchased property and executed a note with Defendant, Allstate Home Loans, to finance the purchase. The note was secured by a deed of trust on Plaintiff's new property. After the Plaintiff's first successful monthly payment, the loan was sold to NCCI and the servicing rights were transferred to Ocwen Loan Servicing, LLC. Plaintiff refinanced the loan prior to the service transfer, and he did not advise the refinance closing agent that the servicing rights had been transferred when he signed the refinance documents. Plaintiff incorrectly informed Ocwen that his loan had been refinanced. Later Plaintiff delivered the funds to the refinance closing agent but still did not mention the transfer of servicing.

The closing agent wired the funds to the bank, and the funds were eventually wired to Allstate. Neither Ocwen nor NCCI received the funds as a result of the refinancing. Ocwen sent Plaintiff a past-due notice on the loan and a letter discussing foreclosure. In a few days, Ocwen provided a negative credit report regarding Plaintiff to a credit reporting agency. Plaintiff informed Ocwen that his loans had been refinanced and serviced elsewhere, but Ocwen sent another past due notice and issued a foreclosure referral. Additional movement of the mortgage caused it to be finally serviced by NCC Servicing, LLC.

Several months later, Plaintiff filed suit against Ocwen for violation of Fair Debt Collection Practices Act and Fair Credit Reporting Act (FCRA). The district court granted summary judgment for Defendant on all claims, concluding that Plaintiff failed to bring evidence of actual damages. Plaintiff appealed.

HOLDING: Reversed.

REASONING: Plaintiff alleged both economic and emotional damages as a result of Ocwen's violation of the FCRA. In analyzing whether damages could be recovered for emotional distress, the court explored the physical manifestation of the emotional distress asserted by Plaintiff in his affidavit and medical records.

Plaintiff stated that before Ocwen issued the negative credit reports against him, his preexisting symptoms related to Chron's disease and depression were under control without medication. But once he discovered the issuance of a negative credit report in connection with his missing loan payment, his health condition deteriorated rapidly. He showed symptoms of Crohn's disease, including severe abdominal pain, cramping, bloating, constipation, diarrhea, and reoccurring nausea. He also experienced drenching night sweats, anxiety, severe kidney pains, and low-grade fevers and chills. These health problems led to a return of his depression.

Ocwen contended that without more, Plaintiff's affidavit was insufficient to create a genuine dispute as to whether Ocwen's actions caused Plaintiff to suffer emotional damages. The court rejected that argument, noting that Plaintiff explained his injury in reasonable detail and did not rely on conclusory statements. It was reasonable for the court to infer from the aggravation of Plaintiff's previously managed conditions and the development of several new symptoms at the time he discovered the negative credit report that Ocwen caused the emotional distress. The court concluded that an injured person's testimony alone may suffice to establish damages for emotional distress provided that the injured person reasonably and sufficiently explained the circumstances surrounding the injury and did not rely on conclusory statements. Plaintiff's affidavits created a genuine dispute as to whether Ocwen's action caused him emotional damages.

DEBT COLLECTION

DEFENDANTS IN FAIR DEBT COLLECTION PRACTICES ACT CASES MAY RECOVER COSTS WITHOUT A SHOWING OF BAD FAITH

Marx v. General Revenue Corp., ____U.S.____ (2013).

FACTS: Defendant, General Revenue Corporation, was hired to collect debt from Plaintiff, Olivea Marx, for defaulting on a student loan. Plaintiff sued Defendant for violating the FDCPA by harassing her with phone calls and falsely threatening to garnish up to 50% of her wages.

The district court found Plaintiff had failed to prove any violation of the FDCPA. Pursuant to Federal Rule of Civil Procedure 54(d)(1), the court awarded Defendant costs. Plaintiff filed a motion to vacate costs, arguing 15 U.S.C. §1692k(a)(3) sets the exclusive basis in awarding costs in FDCPA cases, which allows a court to award a defendant attorney's fees for bad faith. The motion was denied and Plaintiff appealed. The appeals court affirmed.

HOLDING: Affirmed

REASONING: The Court noted in comparing the relationship between Rule 54(d)(1) and §1692k(a)(3), it would "assume that the ordinary meaning of the statutory language accurately expresses the legislative purpose."

Turning to Rule 54(d)(1), the Court interpreted the word "should" in the Rule to mean a district court had discretion on whether or not to award costs. Rule 54(d)(1) states, however, that a federal statute or Federal Rule of Civil Procedure that is contrary can displace this discretion. A statute is contrary to Rule 54(d)(1) when it limits a Court's discretion by either (1) precluding awards of cost or (2) creating conditions necessary to receive awards of cost. Not all statutes that provide for costs are contrary.

The Court then looked to §1692k(a)(3) to determine whether it was contrary to Rule 54(d)(1). The second sentence of §1692k(a)(3) reads, "An action under this section brought in bad faith and for the purpose of harassment, the Court may award to the defendant attorney's fees...and costs." The Court held §1692k(a)(3) was not contrary to Rule 54(d)(1) for two reasons. First, the language does not limit a Court's discretion in awarding either attorney's fees or costs. Rather, §1692k(a)(3) codifies a court's pre-existing authority to award costs and the background rule that courts may award attorney's fees for bad faith claims. Second, the language did not place conditions necessary for awarding costs. Section 1692k(a)(3) contained language that was in sharp contrast to other statutes found to create those conditions. The Court focused on statutes with language such as, "No costs...*unless*" and "...not held liable...*unless*."

Lastly, the Court rejected the argument that §1692k(a)(3) establishes explicit cost-shifting standards that displace Rule 54(d)(1)'s more general default standard. The Court held §1692k(a)(3) applies only to those cases brought in bad faith and for harassment. Plaintiff did not bring her case in bad faith and for harassment, thus §1692k(a)(3) does not apply.

For these reasons the Court affirmed defendants in FDCPA cases may recover costs without a showing of bad faith.

PROPERTY MANAGER IS NOT SUBJECT TO FAIR DEBT COLLECTION PRACTICES ACT

Harris v. Liberty Community Management, Inc., 702 F.3d 1298 (11th Cir. 2012).

FACTS: Plaintiffs, seven homeowners in the Little Suwanee Point townhouse community, failed to pay over $750 in water bills and community maintenance fees to the community's HOA. In 2009, when the HOA contracted with Defendant, Liberty Management, to handle maintenance and community management matters on its behalf, the HOA was due $140,000 in fees from its residents. Among its duties, Defendant contracted to act as the sole and exclusive agent of the HOA to request, demand, collect, receive, and invoice for any and all future and outstanding charges and assessments. In order to execute collection of fees, the community ratified an amendment to allow Defendant to suspend water service to residents overdue by $750 or more after a series of notices.

Section 1692a(6)(F)(i) exempts persons or entities that collect or attempt to collect any debt owed or due or to the extent such activity is incidental to a bona fide fiduciary obligation.

Plaintiffs' water services were ultimately suspended and they sued under the Federal Debt Collection Practices Act (FDCPA). The district court granted summary judgment in favor of Defendant, concluding it came within an exemption to the FDCPA because its collection of overdue assessments was incidental to a bona fide fiduciary obligation to the HOA Association.

HOLDING: Affirmed.

REASONING: The FDCPA applies in general to debt collectors, but not all entities that collect debts are "debt collectors" under the Act. Section 1692a(6)(F)(i) exempts persons or entities that collect or attempt to collect any debt owed or due or to the extent such activity is incidental to a bona fide fiduciary obligation. The court found Defendant owed a fiduciary obligation to the HOA, acting as its sole and exclusive agent under the contract. Defendant was primarily engaged in management activities on behalf of the HOA and collection of outstanding assessments was not central to Defendant's wide-ranging duties. The court rejected Plaintiffs' argument that the FDCPA should be broadly construed in favor of coverage. Given that the court had already held debt collection as incidental to Defendant's primary activities for the HOA, Defendant was held exempt from the FDCPA regardless of interpretation.

MORTGAGE FORECLOSURE IS DEBT COLLECTION UNDER FDCPA

Glazer v. Chase Home Finance LLC, 704 F.3d 453 (6th Cir. 2013).

FACTS: Plaintiff, Lawrence Glazer, inherited property upon the death of Charles Klie, who had purchased the property in 2003. When purchasing the property, Klie took out a mortgage with Coldwell Banker, who later assigned its ownership rights in Klie's note and mortgage to the Federal National Mortgage Corporation ("Fannie Mae"). The assignment was never publicly recorded. Four years later, Coldwell Banker transferred its servicing rights to J.P. Morgan Chase Bank, but this transaction did not transfer any ownership rights in the note and mortgage. Then, Chase Home Finance, an arm of J.P. Morgan, obtained servicing rights to the Klie loan, which was current at the time.

Chase began to service the loan and accepted payments from Klie until the loan was in default. Chase hired Defendant, Reimer, Arnovits, Cherneck & Jeffrey Co., LPA and two of its attorneys, to foreclose on the Klie property. Defendant filed a foreclosure action on Chase's behalf, alleging that Chase held and owned the Klie promissory note and that the original note had been lost or destroyed, when Fannie Mae in fact owned the loan. The complaint named Plaintiff as someone with an interest in the Klie property, and Defendant served him with process. During the foreclosure proceedings, Plaintiff filed a lawsuit, alleging that Defendant violated the Fair Debt Collection Practice Act (FDCPA) when it falsely stated in the foreclosure complaint that Chase owned the note and mortgage, improperly scheduled a foreclosure sale, and refused to verify the debt upon request. Defendant moved to dismiss. A magistrate judge recommended dismissing the federal claims. Plaintiff filed objections and sought leave to amend the complaint to add new allegations. The judge granted Defendant's motion and denied Plaintiff's leave to amend. Plaintiff appealed.

The court declined to follow the majority view of district courts that a mortgage foreclosure is not debt collection.

HOLDING: Reversed.
REASONING: Plaintiff argued that the district court erred in dismissing his FDCPA claims against Defendant because its activities in bringing a mortgage foreclosure action were debt collection under the FDCPA. The court agreed.

The court declined to follow the majority view of district courts that a mortgage foreclosure is not debt collection. It found that the enforcement of a security interest, including a mortgage foreclosure, was an attempt to collect money. The court noted that whether an obligation was a "debt" depended not on whether the obligation was secured, but rather on the purpose for which it was incurred. Accordingly, the court found that a home loan was a "debt" even if it was secured.

The court explained that if a purpose of an activity was to obtain payment of a debt, the activity is considered debt collection. Because foreclosure was undertaken for the purpose of obtaining payment, mortgage foreclosure was debt collection under the FDCPA. Also, the court found that the legal nature of foreclosure did not prevent it from being debt collection.

Additionally, the court observed that the language of the FDCPA at §1692(a)(6) defined "debt collector" as "one who enforce[d] an interest in real property securing the consumer's obligation," e.g. mortgage foreclosures. The court added that lawyers who met the general definition of a "debt collector" must comply with the FDCPA when engaged in mortgage foreclosure.

SECURED CREDITOR MUST SHOW SALE WAS COMMERCIALLY REASONABLE TO RECOVER DEFICIENCY

Foley v. Capital One Bank, N.A., 383 S.W.3d 644 (Tex. App.—Houston [14th Dist.] 2012).

FACTS: Defendant, Ellen Foley, purchased a vehicle with a loan from Plaintiff, Capital One. Defendant fell behind on loan payments and Plaintiff, repossessed the vehicle. Plaintiff then sued Defendant for the remaining balance on the loan, pleading all conditions precedent to Plaintiff's right of recovery were fulfilled. Plaintiff then filed a business records affidavit indicating the vehicle was sold.

Defendant alleged Plaintiff failed to dispose of the collateral in a commercially reasonable manner and was not entitled to recover a deficiency judgment. At trial, no testimony was presented regarding the commercial reasonableness of the sale. Defendant moved for a take-nothing judgment, stating Plaintiff had the burden of proof on showing the reasonableness of the sale and failed to offer any evidence to meet its burden. At trial, the judge relied on the business record affidavit and awarded a judgment for the loan deficiency. Defendant appealed.
HOLDING: Reversed.
REASONING: Defendant presented two issues on appeal: (1) whether Plaintiff had the burden to prove commercial reasonableness; and (2) whether the trial judge erred by rendering judgment for Plaintiff absent legally sufficient evidence of commercial reasonableness. The court found that the evidence presented was legally insufficient to establish the essential element that Plaintiff disposed of the vehicle in a commercially reasonable manner. Article 9 of the Texas Uniform Commercial Code provided that when a debtor defaulted on an obligation, a secured party could take possession of collateral, disposed of it, and apply the proceeds to help satisfy the obligation. If the proceeds were insufficient to satisfy the obligation, and the secured party wished to obtain a deficiency judgment for the amount still owed on the obligation, every aspect of the disposition of collateral, including

the method, manner, time, place and other terms, must have been commercially reasonable.

Under the common law, a creditor seeking a deficiency judgment had the burden of pleading that disposition of the collateral was commercially reasonable and could meet this burden by pleading that disposition was reasonable, or that all conditions precedent had been performed or occurred. If the debtor responded to a general pleading with a specific denial, the burden shifted back to the creditor to prove reasonableness at trial.

The parties did not dispute that the purchase was a consumer transaction, and the evidence supported consumer use of the vehicle. The court applied the common-law rule, which placed the burden of pleading commercial reasonableness on the creditor. Plaintiff met its initial burden by stating all conditions precedent to right of recovery were fulfilled. Defendant specifically denied that Plaintiff disposed of the vehicle in a commercially reasonable manner, which shifted the burden of proof to Plaintiff to prove its claim. The court sustained Defendant's first issue.

At trial, the only evidence offered regarding the sale of the truck consisted of business records that only indicated it was sold for $4,700. Plaintiff neither offered evidence that the method and terms of the sale were commercially reasonable, nor offered evidence of safe harbors that Article 9 provided. Plaintiff failed to offer legally sufficient evidence of commercial reasonableness, relating to the disposition of the vehicle, other than business records stating that it was sold, thereby defeating its own claim.

ARBITRATION

SIX MONTHS OF LITIGATION DID NOT WAIVE ARBITRATION

Rota-McLarty v. Santander Consumer USA, Inc., 700 F.3d 690 (4th Cir. 2012).

FACTS: On July 5, 2007, Plaintiff, Antonia Rota-McLarty, purchased a used car from Easterns Automotive Group in Rockville, Maryland. To complete the transaction, Plaintiff executed two contracts with Easterns. The first was a Buyer's Order, which provided the terms of the sale and contained an agreement to arbitrate disputes. The second was a Retail Installment Sale Contract (RISC), which did not contain an arbitration provision. Easterns immediately assigned the RISC to Defendant, Santander Consumer USA, following the sale. Plaintiff returned the car as defective without making any payments on the RSIC. Defendant repossessed the vehicle, sold it at a loss and attempted to collect the outstanding debt. Three years later, Plaintiff filed a putative class action lawsuit in state court against Defendant, citing violations of Maryland consumer protection and unfair business practices. Over the next six months, the Defendant: (1) removed to federal district court for diversity jurisdiction, (2) filed an answer, and (3) began discovery under a bifurcated schedule. At the end of six months, and after a Maryland district court had applied *Stolt-Nielsen S.A. v. AnimalFeeds In't Corp.*, 559 U.S. 662 (2010), Defendant moved to stay the federal court proceedings and compel non-class arbitration.

The district court denied Defendant's motion, holding that the underlying transaction was purely intrastate, invoking the Maryland Uniform Arbitration Act (the "MUAA"), and that Defendant had waived its right to compel arbitration through unjustified delay causing prejudice.

HOLDING: Reversed.

REASONING: The dispositive determination of whether a litigant had waived its right to invoke the Federal Arbitration Act (FAA) was whether the opposing party had suffered actual prejudice. Two factors specifically informed the court's inquiry into actual prejudice: (1) the amount of the delay, and (2) the extent of the moving party's preparation for trial. The moving party's reason for the delay was irrelevant.

Discussing delay, the court found the six and a half month period from the date Plaintiff filed her complaint to the date Defendant filed its motion to compel arbitration was generally not sufficient for a finding of actual prejudice. Furthermore, the court found no evidence in the record of prejudice due to the delay. Plaintiff's expense of preparing for trial was unavailing. Significant expense as a result of extended litigation may have evidenced actual prejudice, but such cases usually involved resources expended specifically in response to pretrial motions.

Mere participation in discovery, the court concluded, is insufficient to find default.

Discussing the extent of Defendant's preparation for trial, the court determined Defendant's preparation was minimal. Moreover, Plaintiff failed to tie Defendant's actions to remove, answer, and bifurcate the discovery schedule to any actual prejudice. Plaintiff was unable to reference any evidence in the record to establish that her litigation strategy was revealed or that Defendant gained any adverse benefit during the six-month period of preparation. Mere participation in discovery, the court concluded, was insufficient to find default.

ARBITRATION CLAUSE UNENFORCEABLE DUE TO LOSS OF FORUM

Riley v. Extendicare Health Facilities, Inc., 826 N.W.2d 398 (Wis. Ct. App. 2012).

FACTS: In 2009, a complaint was filed against the National Arbitration Forum (NAF), a third party arbitration service, alleging fraud and problematic ties to the consumer loan and debt collection industry. As a result, NAF subsequently exited the arbitration business, which led to nationwide ambiguity concerning the interpretations of contracts involving the NAF and its rules and procedures. In 2010, Plaintiff, Judy Riley, entrusted her husband into Defendant'sß Extendicare Health Facility care. Plaintiff contracted with Defendant by signing an ADR agreement (Agreement), which designated the NAF as the arbitrator. The Agreement provided that if the NAF was unable or unwilling to arbitrate, a substitute arbitrator would be chosen, but NAF rules would still apply.

Plaintiff's husband died and Plaintiff brought suit against Defendant, who in turn moved for arbitration in accordance with the Agreement. Plaintiff asserted that the Agreement was invalid because the NAF no longer provided arbitration services. Defendant responded that pursuant to the Agreement, a substitute arbitrator could be used. Further, Defendant argued that the contract's severability clause allowed for enforceability of other non-essential terms of the contract. The circuit court denied Defendant's motion, ruling that it could not compel a substitute arbitrator to apply the NAF's rules and procedure. Further, the court concluded that the arbitration clause was central to the Agreement, precluding severance. Defendant appealed.

HOLDING: Affirmed.

REASONING: The court first noted that general contract law principles mandate the court to ascertain the parties' true intent in enforcing the contract. In interpreting the contract, the court analyzed whether forum selection clauses were integral or merely an ancillary concern. The court reasoned that Plaintiff's Agreement with Defendant contained a non-exclusive arbitrator designation clause and a separate clause mandating use of the NAF's rules and procedure. These two clauses together indicated that the parties intended to arbitrate exclusively under the NAF rules. The court then examined the clauses to determine if the use of an NAF arbitrator was necessary or ancillary.

In interpreting the contract, the court analyzed whether forum selection clauses were integral or merely an ancillary concern.

First, the court discussed how the Agreement was unique in that it not only introduced the arbitrator as NAF, but also mandated NAF rules apply in the case of a substitute arbitrator. This incorporation of NAF rules showed the parties commitment to the NAF forum. Second, the court noted the Agreement's repeated use of the word "shall." This repeated use of mandatory language, not permissive language, demonstrated the parties' specific intent to use NAF rules, as well as their intent that the NAF should be integral to the arbitration.

Finallly, the court rejected Defendant's severance argument, ruling that where a failed forum selection provision was as important a consideration as the agreement to arbitrate itself, a court would not sever the failed term from the rest of the agreement and the entire arbitration provision would fail. The court, therefore, held that the loss of the contracted forum made the arbitration clause unenforceable.

STATE PROHIBITION AGAINST CLASS ACTION WAIVER IS PREEMPTED BY FEDERAL ARBITRATION ACT

Flores v. West Covina Auto Group, LLC, 151 Cal. Rptr. 3d 481 (Cal. Ct. App. 2013). (Petition for review granted. Flores v. West Covina Auto Group, 297 P.3d 884).

FACTS: Plaintiffs, Israel Flores and Andrea Naasz, cosigned and purchased a used vehicle from Defendant, West Covina Toyota. A month later, Defendant called Plaintiffs and informed them that Defendant had lowered the price of the vehicle and Plaintiffs needed to sign a new contract. The new contract contained an arbitration clause with a waiver of the right to class-wide arbitration.

After experiencing numerous problems with the vehicle, Plaintiffs filed a complaint against Defendant alleging both individual and class claims. The class claims included violations of the Consumer Legal Remedies Act (CLRA), the Automobile Sales Finance Act, and the unfair competition law.

Defendant filed a motion to compel arbitration based on the contract. Defendant argued that the Federal Arbitration Act (FAA) preempted California law and that courts must uphold the arbitration clause even when it contained a class action waiver. The trial court granted the motion to compel arbitration. Plaintiffs appealed.

HOLDING: Affirmed.

REASONING: The court stated that because the sales contract allowed for both Federal and California law to apply, federal law would preempt state law in case of a conflict. The court discussed the CLRA and *Fisher v. DCH Temecula Imports LLC*, which held that the right to a class action lawsuit or classwide arbitration was an unwaivable statutory right under the CLRA. Fisher v. DCH Temecula, 187 Cal. App. 4th 601 (2010). The trial court, however, noted the subsequent Supreme Court decision in AT&T Mobility LLC v. Concepcion, 563 U.S. ___ , 179 L. Ed. 2d 742, 131 S.Ct. 1740 (2011), which held that the arbitration provision must be upheld despite the class action waiver.

The court noted that the overarching purpose of the FAA was to ensure the enforcement of arbitration agreements according to their terms, in order to facilitate streamlined proceedings. The savings clauses of the FAA allowed invalidation of an arbitration clause for generally applicable contract defenses such as fraud, duress, or unconscionability, but did not pertain to defenses that applied only to arbitration or disputes over agreements to arbitrate. The court then focused on *Concepcion* and the issue of consumers' waiver of class arbitration rights and the "Discover Bank rule" created by the California Supreme Court. The rule stated that arbitration provisions in some consumer contracts of adhesion were unconscionable because they waived the consumers' right to arbitration. *Concepcion* found that the FAA preempted the "Discover Bank rule" because the rule was inconsistent with the FAA and served as an obstacle to the objectives and purpose of the FAA by allowing parties to demand arbitration ex-post when the parties never agreed to it. The *Concepcion* court further explained that the "Discover Bank rule" did not fall within the savings clauses of FAA and even generally applicable contract defenses may be preempted by the FAA when applied in such a manner as to disfavor arbitration.

This court found no distinction between the CLRA's anti-waiver provision and the "Discover Bank rule." CLRA's provision stood as an obstacle to the purpose and objectives of FAA and was deemed preempted.

NON-SIGNATORY CANNOT ENFORCE ARBITRATION AGREEMENT

Baldwin v. Cavett, ___ F.3d ___ (5th Cir. 2012).

FACTS: Clifford W. Cavett, a partner in the accounting firm

Cavett, Turner & Wyble, LLP ("CTW"), provided accounting services to Plaintiff, Scott Baldwin, and several Baldwin family entities in the mid-1990s. In 2001, Cavett encouraged Plaintiff to transfer his investment accounts over to a registered securities broker, Ronald J. Legnion, with Raymond James Financial Services ("RJFS"). In December 2004, Plaintiff opened his account with RJFS and he and Legnion signed an RJFS new account form. The form was signed to acknowledge that the parties would abide by the terms and conditions set forth in the client agreement, which contained an arbitration clause. Cavett did not sign, but was listed as the "CPA" designated to receive duplicate copies of RJFS statements. After the financial markets plummeted in 2008, Plaintiff informed Cavett that he wanted to remove his investments from the market, but Cavett advised him against this, citing tax reasons. By 2009, Plaintiff had lost a large sum of money and subsequently brought an action against Cavett and CTW on violations of the Racketeer Influenced and Corrupt Organizations (RICO) statute and other state law claims.

Cavett and CTW moved to compel arbitration based on the arbitration clause in the Client Agreement signed between Plaintiff and RJFS. The district court denied Cavett and CTW's motion to compel arbitration. Cavett and CTW appealed.

HOLDING: Affirmed.

REASONING: The court applied a two-step analysis to determine whether a person may be compelled to arbitrate. The court explained that in the first step it must examine whether the parties agreed to arbitrate the dispute by asking two questions: (1) was there a valid agreement to arbitrate the claims, and (2) did the dispute in question fall within the scope of that arbitration agreement. If both were answered in the affirmative, the court, in the second step, considerd whether any federal statute or policy rendered the dispute non-arbitrable.

The court found in this case that the inquiry stopped at the first step. The court explained that there was an important distinction between a signatory and a nonsignatory to an arbitration agreement, and Cavett did not sign the new account forms or client agreements that contained the arbitration clause. The court rejected Cavett's claim that he and CTW were acting as agents of RJFS. The court explained that in order to enforce arbitration, the nonsignatory must have acted on behalf of the signatory, and in this case, when Cavett provided services to the Plaintiff, he was acting in his individual capacity. Further, under the rules of contract interpretation and enforcement governing arbitration clauses, contract formation required offer, acceptance, and a meeting of the minds. The court found that Cavett made no offers to the Plaintiff, nor accepted an offer from him. The court held that, because Cavett and CTW were not parties to the arbitration agreement and they did not act as agents of RJFS, they could not enforce the arbitration agreement against the Plaintiff.

TOYOTA CAN'T COMPEL ARBITRATION OF ANTI-LOCK BRAKE SYSTEM CLAIMS

Kramer v. Toyota Motor Corp., 705 F.3d. 1122 (9th Cir. 2013).

FACTS: Plaintiffs financed new Toyota vehicles in California, Texas, and Maryland by entering into "Retail Installment Sale Contracts" with their dealerships. The agreements included arbitration provisions, but Defendant, Toyota Motor Corp., was not a signatory to any of these agreements. Plaintiffs filed a putative class action lawsuit alleging vehicle defects in their anti-lock brake systems. They also claimed that Defendant had notice of the defects but failed to disclose them and continued to manufacture and sell defective vehicles. Plaintiffs alleged violations of California's Consumers Legal Remedies Act, breach of implied warranty, and common law breach of contract, among other claims. The Defendant moved to dismiss and the district court denied the motion. The Defendant then attempted to compel arbitration.

The district court denied the motion to compel arbitration, finding that the Defendant waived the right to arbitrate by litigating the action, participating in discovery, and negotiating protective orders for about two years. Defendant appealed.

HOLDING: Affirmed.

REASONING: The court first decided whether the district court had authority to decide whether Defendant could compel arbitration. The court cited to *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 177 L.Ed.2d. 567 (2010), wherein the U.S. Supreme Court determined that whether parties have agreed to submit a particular dispute to arbitration is typically for judicial determination. The court stated that without "clear and unmistakable evidence" in the arbitration agreements, the district court had the authority to determine arbitrability. The court then concluded that the terms of the arbitration clauses were expressly limited to Plaintiffs and the dealerships.

The court stated that without "clear and unmistakable evidence" in the arbitration agreements, the district court had the authority to determine arbitrability.

The court found that Defendant failed to argue successfully that Plaintiffs were equitably estopped from avoiding arbitration. Under California contract law, if a nonsignatory seeks to enforce an arbitration clause, equitable estoppel applies when: (1) the signatory relied on the terms of the written agreement in asserting its claims against the nonsignatory; and (2) when the signatory alleged substantially interrelated and concerted misconduct by the signatory and a nonsignatory and the allegations were intimately connected with the obligations of the underlying contract. The court rejected Defendant's argument that the Plaintiffs' allegations were intertwined with the purchase agreements because they relied upon the existence of Plaintiffs' vehicle purchase transactions. For Defendant's equitable estoppel argument to succeed, Plaintiffs' claims would have had to intimately relied on the existence of the purchase agreements, not merely referenced them, as the Plaintiffs did in this case. Similarly, the court disagreed with the Defendant that Plaintiffs' reliance on the "price term" of the purchase agreements made their claims intertwined.

As to allegations of collusion and interdependent misconduct between Defendant and the dealerships, the court found that California state contract law did not allow a signatory to enforce an arbitration agreement based upon a mere allegation of collusion or interdependent misconduct between a signatory and a nonsignatory.

AGREEMENT TO SUBMIT A DISPUTE TO A THIRD PARTY IS AN "ARBITRATION AGREEMENT," SUBJECT TO THE FAA, EVEN IF THE WORD ARBITRATION IS NOT USED

Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135, 707 F.3d 140 (2d Cir. 2013).

FACTS: Plaintiff, Bakoss, and Defendant, Certain Underwriters at Lloyds of London, entered into a Certificate of Insurance (Certificate) for payment to Plaintiff in the event he became "permanently totally disabled." Both parties reserved a right to have Plaintiff examined by a physician of their choice to determine if Plaintiff was totally disabled. If both physicians disagreed, the Certificate provided that the two appointed physicians would appoint a third physician to make a final and binding decision.

Plaintiff filed suit in state court for breach of disability insurance. Defendant removed the suit to federal court, claiming the third-physician clause was an arbitration agreement, governed by the Federal Arbitration Act (FAA). Plaintiff appealed the district court's judgment that the Certificate was governed by the FAA because the third physician provision was essentially an arbitration clause.
HOLDING: Affirmed.
REASONING: Plaintiff argued that because the FAA does not define "arbitration" the district court should have applied the state law definition. The court denied this argument and reasoned that unless there was a clear indication to the contrary, the court would presume the application of a federal act was not dependent upon state law. Congress intended for a uniform application of the act across the country, intending to enforce federal standards without reference to state law.

Looking to federal interpretations of "arbitration" under the FAA, the court determined that when the language of a contract clearly demonstrates an intention that disputes be submitted to a specified third party for final binding resolution, arbitration is appropriate even if the word is not explicitly used. Furthermore, because courts that applied state law articulated few reasons for doing so, the federal interpretations of "arbitration" prevailed in the interest of the uniform application of the FAA.

FRAUD CLAIM IS SUBJECT TO ARBITRATION PROVISION

Jackson v. Shakespeare Foundation Inc., 108 So. 3d 587 (Fla. 2013).

FACTS: Defendants, Jackson Realty Team, Inc., placed an advertisement for the sale of real property stating that a study verified that the property had no wetlands. In fact, when Defendants posted the advertisement, the study had actually established that 25 percent of the property constituted wetlands. Plaintiffs, the Shakespeare Foundation, Inc. and the Herd Community Development Corp., relied on Defendants' representations and contracted to purchase the property. In July 2007, after making full payment to the Defendants, Plaintiffs hired an engineering firm that discovered the existence of wetlands. Plaintiffs then filed an action against the Defendants for fraudulent misrepresentation. The trial court granted the Defendants' motion to dismiss based on contractual provisions that stipulated that all claims or controversies "arising out of or relating to this transaction or the contract are subject to binding arbitration."

The First District Court of Appeals of Florida reversed, finding that the arbitration clause did not encompass Plaintiffs' fraud claim, which arose from a general duty established by common law. Defendants appealed.
HOLDING: Reversed.
REASONING: The court first noted the three fundamental elements considered when determining whether a dispute was required to proceed to arbitration: (1) whether a valid arbitration agreement to arbitrate existed; (2) whether an arbitrable issue existed; and (3) whether the right to arbitration was waived. The court then explained that two basic types of arbitration provisions have emerged: (1) narrow provisions, which required arbitration for claims or controversies "arising out of" the subject contract, and (2) broad provisions, which required arbitration for claims or controversies "arising out of or *relating to*" the subject contract. The latter type broadened the scope of an arbitration provision to include claims that had a "significant relationship" to the contract, regardless of whether the claim was founded in tort or contract law.

A significant relationship exists between an arbitration provision and a claim if there is a "contractual nexus" between the claim and the contract.

According to the court, a significant relationship existed between an arbitration provision and a claim if there was a "contractual nexus" between the claim and the contract.

A contractual nexus was found if the claim presented "circumstances in which the resolution of the disputed issue required either reference to, or construction of, a portion of the contract." The court stated that, more specifically, a claim had a nexus to a contract if it emanated from an inimitable duty created by the parties' unique contractual relationship. The court found that the action had a clear nexus with the contract in this case because: (1) the fraud claim was "inextricably intertwined with both the circumstances that surrounded the transaction from which the contract emanated and the contract itself;" and (2) resolving the fraud claim required the construction and consideration of duties that arose under the contract. Plaintiffs' alleged damages arose from the contract itself because if they had not entered into the contract, they would not have bought real property unsuitable for development or sale. The court explained that the remedies in the contract were limited to the parties' rights in the event of default and did not mention remedial rights in the event of a fraud or tort action. The court concluded that the fraud action was within the scope of the contract's broad arbitration provision.

PRIVATE SCHOOL STUDENT MUST ARBITRATE TORT CLAIMS AGAINST TEACHER AND SCHOOL

Bigler v. Harker School, 153 Cal. Rptr. 3d 78 (Cal. Ct. App. 2013).

FACTS: Plaintiff, student Shivani Bigler, brought an action against Harker School and a teacher, Peter Itokazu. Plaintiff alleged breach of contract, breach of covenant of good faith and fair dealing, and negligent hiring. Each year Plaintiff was enrolled at Harker, her parents were required to sign an enrollment contract for the following school year, including a contract for the 2010-2011 year. Plaintiff, represented by her parents as guardians ad litem, filed a complaint in 2011 against Harker and Itokazu, alleging that she was "mistakenly or wrongfully accused of honor code violations," which were "not investigated and resolved pursuant to fundamentally fair policies and procedures and in good faith." On the same day that Plaintiff's parents filed the complaint on her behalf, the parents demanded commercial arbitration in their own names.

Harker and Itokazu moved to dismiss the suit and compel arbitration based on a mandatory arbitration clause in the enrollment contract the parents signed for the 2010-2011 school year. Plaintiff opposed the petition, saying that enforcement of the arbitration provision against Plaintiff would be procedurally and substantively unconscionable. The superior court denied the petition to compel arbitration because the enrollment contract was unconscionable; the objection to arbitration of Plaintiff's claims was not waived by her parents' own demand for arbitration; and that it was unlikely the Biglers had agreed to the arbitration provision expecting tort claims would be included. Harker and Itokazu appealed.

HOLDING: Reversed.

REASONING: The court first explained that arbitration agreements were valid except when there were grounds to revoke the contract, such as unconscionability of the contract. The court noted, however, that both procedural and substantive unconscionability must be present, though not in the same degree.

The court held that the arbitration provision in the enrollment contract was not procedurally unconscionable because the provision was on the top of the second page of the enrollment contract in boldfaced font, and the Biglers had never complained about the provision in previous years. The court found no indication of substantive unconscionability, such as overly harsh or one-sided results as to "shock the conscience." The court also believed the arbitration provision bound both parents and students.

The court then held Plaintiff's tort claims were subject to arbitration. Plaintiff had to prove "that [the] arbitration clause *cannot* be interpreted to require arbitration of [her tort claims]." The court stated that many cases have held that tort claims are subject to contractual arbitration provisions when the claims "arise out of the contractual relationship between the parties." Applying this rule, the court explained that all of the alleged tortious conduct took place on the school campus. Further, all of the conduct regarding the accusation related sufficiently to the relationship between Harker and its students and was encompassed in the agreed upon broad provision for arbitration.

Finally, the court rejected Plaintiff's argument that the teacher-student battery did not bear a reasonable relationship to the enrollment contract for the arbitration clause to apply, because the conduct occurred within the course and scope of Itokazu's role as her teacher.

PAYDAY LENDER CANNOT ENFORCE ONLINE ARBITRATION CLAUSE

Kelker v. Geneva-Roth Ventures, Inc., ____ P.3d ____ (Mont. 2013).

FACTS: Plaintiff, Kelker, submitted an online application at Defendant's, Geneva-Roth Ventures, Inc, website for a payday loan. Defendant charged Plaintiff an interest rate of 780% APR. When completing the application, Plaintiff clicked on a box to signify that she agreed to the terms of the Loan Agreement. Plaintiff electronically signed the eight-page Loan Agreement that contained an arbitration clause compelling arbitration for "any claim, dispute, or controversy" that arose out of the agreement. Defendant did not highlight the arbitration clause with bold font and all capital letters like it did with other provisions of the Loan Agreement.

Plaintiff brought a punitive class action alleging the interest rate violated the Montana Consumer Loan Act and the loan itself was unconscionable. Plaintiff claimed that Defendant had engaged in unfair, deceptive, or fraudulent practices in making and collecting loans and failed to provide necessary disclosures. Defendant sought to compel arbitration pursuant to the arbitration clause in the Loan Agreement. The district court denied Defendant's motion and held the arbitration clause unenforceable. Defendant appealed.

HOLDING: Affirmed.

REASONING: The court applied Montana contract law to determine whether the district court should have compelled arbitration pursuant to the arbitration clause. Arbitration agreements generally represented valid and enforceable contracts under Montana law, but unconscionable arbitration provisions were unenforceable. A contract was unconscionable if it was a contract of adhesion and the contractual terms unreasonably favor the drafter. A contract of adhesion arises when the stronger party gives the weaker party a choice either to accept or to reject the contract without the opportunity to negotiate its terms. The court found that the arbitration clause signed by Plaintiff was a contract of adhesion because Defendant afforded Plaintiff no meaningful choice over whether to accept or to reject any particular terms. Plaintiff could only accept or reject the standardized agreement.

A contract of adhesion arises when the stronger party gives the weaker party a choice either to accept or to reject the contract without the opportunity to negotiate its terms.

The court then assessed whether the arbitration clause unreasonably favored Defendant and fell outside Plaintiff's reasonable expectation. The court considered the totality of the *Kortum-Managhan* factors to determine whether the arbitration clause fell within Plaintiff's reasonable expectations. *Kortum Managhan v. Herbergers NBGL*, 204 P.3d 693 (Mont. 2009). Some *Kortum-Managhan* factors include: (1) whether the clause was conspicuous; (2) whether the legal effect of the clause was explained; (3) whether disparity in bargaining power existed between the contracting parties; (4) whether a difference in business experience and sophistication of the parties existed; and (5) whether the clause was ambiguous or misleading. The court found nearly all of these factors weighed against enforcement of this arbitration clause. Defendant was more experienced and sophisticated in business than Plaintiff. Plaintiff entered the agreement on the internet and no one explained the arbitration clause to her. The agreement was not conspicuous and Plaintiff had no contact with any employees or representatives of Defendant. Plaintiff did not sign separately or initial the arbitration clause and was not represented by counsel when she signed the arbitration clause. Additionally, economic duress compelled Plaintiff to enter into the contract. The court analyzed the language of the arbitration clause and found it ambiguous. When there is ambiguity in a contract, courts usually construe the contract terms against the drafters. The arbitration clause by Defendant was a contract of adhesion and fell outside Plaintiff's reasonable expectations, and therefore it was unconscionable and unenforceable.

MISCELLANEOUS

MANUFACTURED HOUSING STANDARDS ACT DOES NOT CONFER EXCLUSIVE OR PRIMARY JURISDICTION TO MANUFACTURED HOUSING BOARD

United Residential Prop. v. Theis, 378 S.W.3d 552 (Tex. App.—Houston [14th] 2012).

FACTS: Plaintiff, Tom and Dwana Theis, sued Defendant, United Residential Properties, L.P., for breach of contract, fraud, and false representations and unconscionable conduct under the Deceptive Trade Practices-Consumer Protection Act, Tex. Bus. & Com. Code Ann. §§17.41-17.63 (DTPA), after purchasing a mold-infested manufactured home from Defendant in July 2005.

The trial court found Defendant liable for all claims except breach of contract. Defendant appealed, arguing Plaintiff was required to exhaust administrative remedies under the Texas Manufactured Housing Standards Act (TMHSA) before bringing suit because the Texas Manufactured Housing Board (Board) had either primary or exclusive jurisdiction. Plaintiff claimed the statute did not confer primary or exclusive jurisdiction upon the Board to address claims of fraud or DTPA claims.

HOLDING: Reversed.

REASONING: The court explained exclusive jurisdiction was a legislative creation that grants an agency sole authority to make initial determinations in a dispute. In contrast, primary jurisdiction was a judicial creation that allocates power between courts and agencies when *both* have authority to make initial determinations in a dispute. Trial courts with primary jurisdiction should allow an agency to decide an issue initially when, "(1) an agency is typically staffed with experts trained in handling the complex problems in the agency's purview; and (2) great benefit is derived from an agency's uniform interpretation of its laws, rules, and regulations, whereas courts and juries may reach different results under similar fact situations."

The court explained agencies may only exercise those powers that the law, in clear and express statutory language, confered upon them. Having read TMHSA and relied on Defendant's supporting cases, the court held TMHSA did not include clear and express statutory language that conferred exclusive jurisdiction to the Board for either common law fraud or non-warranty DTPA claims.

The court then found that the Defendant had also failed to establish that the Board had primary jurisdiction over common law fraud and DTPA claims. Applying the above-mentioned factors for when a trial court should allow initial agency determination, the court found Defendant failed to argue the Board's specialized expertise and failed to show the benefit that would be derived from uniformity in judicial resolution of fraud and non-warranty DTPA claims involving manufactured homes. For these reasons the court ruled TMHSA did not confer either exclusive or primary jurisdiction to the Board.

DEFENDANT CAN'T MOOT CONSUMER CLASS ACTION

Frazier v. Castle Ford, Ltd., 59 A.3d 1016 (Md. 2013).

FACTS: Defendant, Crystal Ford Isuzu, Ltd., sold Plaintiff, Anthony Frazier, an extended warranty for his 2003 Ford Explorer, telling him that it would last for 48 months from the purchase date or 100,000 miles, whichever occurred first. Instead, the duration of the warranty was calculated from the build date of the car and, as a result, expired more than two years earlier than Plaintiff was led to believe. Plaintiff filed a complaint against Defendant in the Circuit Court of Montgomery County, Md. in July 2007, alleging that, despite his communication with Defendant regarding repair expenses he incurred due to the lack of warranty, the salesperson stated that there was nothing she could do. She also indicated that she had sold other extended warranties with the same discrepancy.

The action was purportedly brought on behalf of the entire class of Maryland citizens who had purchased extended warranties from Defendant during the previous four years, and also requested class certification.

Upon learning of the class certification request, Defendant paid to extend Plaintiff's warranty for approximately four years from the date it had sold him the extended warranty. Ford ESP North America sent him a check for the amount he spent on repairs during the period his car would have been covered by the warranty he had intended to purchase. Plaintiff never cashed the check.

The Circuit Court granted Defendant's motion to deny class certification, and granted in part its motion for summary judgment, leaving open the issue of attorney's fees for a later hearing. The court explained that because Plaintiff had been made whole with compensatory damages, the issue of class representation was mooted. The court eventually granted Plaintiff's attorney's fees at a later hearing. Both parties appealed to the Court of Special Appeals, which affirmed the Circuit Court rulings. Both parties appealed.

HOLDING: Reversed.
REASONING: The court stated that Defendant made no effort to rectify the situation until the class action complaint was filed, but then immediately took action to moot it by tendering individual damages to Plaintiff before he had any reasonable opportunity to seek class certification or conduct discovery. The court noted that if a defendant may simply "pick off" the class representative's claim immediately after suit is filed many meritorious class actions would never be litigated.

The court held that a tender of individual relief to the putative class representative does not moot a class action if the individual plaintiff has not had a reasonable opportunity to seek class certification, including any necessary discovery.

HOME SELLER DOES NOT HAVE TO DISCLOSE PROPERTY WAS SCENE OF GRISLY MURDER-SUICIDE

Milliken v. Jacono, 60 A.3d 133 (Pa. Super. Ct. 2012).

FACTS: In 2007, Plaintiff, Janet Milliken, purchased a house from Defendants, Kathleen and Joseph Jacono. Defendants had purchased the property in 2006 at an estate auction. The previous owner murdered his wife and committed suicide in the home. Defendants did not disclose the murder-suicide to Plaintiff when selling the home.

Plaintiff filed suit alleging fraud and misrepresentation when Defendants failed to make the disclosure. Plaintiff's suit was based on four claims: (1) violations of the Real Estate Disclosure Law; (2) fraud; (3) negligent misrepresentation; and (4) violations of the Unfair Trade Practices and Consumer Protections Law. The trial court granted Defendant's summary judgment for all claims. Plaintiff appealed.
HOLDING: Affirmed.
REASONING: The court noted that all of Plaintiff's claims relied upon the existence of a material defect in the property, including a psychological defect caused by the murder-suicide. The court explained that the events that took place at the property must have been legal defect for Defendants to incur a legal obligation to disclose.

First, the court looked to the Real Estate Seller Disclosure Law (RESDL), which enumerated sixteen defects a seller must disclose, and grouped them into two themes: physical and legal defects. The court held that psychological defects claimed by Plaintiff were so different from physical and legal defects that the lack of psychological defects in the RESDL evidenced the legislature's intent to not require their disclosure. The court reasoned that under RESDL, the home seller did not have to disclose a murder-suicide.

Next, the court addressed Plaintiff's claim of fraud, which required a material misrepresentation. Materiality must be measured objectively, not subjectively. The court determined that a murder-suicide was subjective, because the effect would vary from buyer to buyer. Thus, murder-suicide was not a material defect.

Finally, the court held that Plaintiff's negligent misrepresentation claim failed. Although the claim imposed a duty to inform on the seller, under the RESDL Defendant owed no duty to inform Plaintiff of the murder-suicide. For these reasons, the court held Defendants did not have to disclose the murder-suicide.

CLASS ACTION PLAINTIFF CANNOT AVOID REMOVAL TO FEDERAL COURT BY STIPULATING THAT TOTAL DAMAGES WOULD BE LESS THAN $5 MILLION JURISDICTIONAL THRESHOLD FOR APPLICATION OF THE CLASS ACTION FAIRNESS ACT

Standard Fire Insurance v. Knowles, ____ U. S. ____ (2013).

FACTS: In 2011, Plaintiff, Greg Knowles, filed a proposed class action in Arkansas state court against Defendant, Standard Fire Insurance. Plaintiff claimed that when the company had made certain homeowner's insurance loss payments, it had unlawfully failed to include a general contractor fee. Knowles sought to certify a class of hundreds, or perhaps thousands, of similarly situated Arkansas policy holders. The relief sought in the complaint stated that the Plaintiff and class stipulated that they would seek aggregate damages of less than $5 million. Defendant then sought to remove the case to federal district court, pointing to the Class Action Fairness Act's (CAFA) jurisdictional provisions. CAFA provided that federal district courts could exercise original jurisdiction to hear a class action if the matter in controversy exceeded $5 million. In determining the matter in controversy, the district court was to aggregate the claims of the class, including the claims of both proposed and certified class members. On aggregating class claims, the district court found that the resulting sum would have just exceeded the CAFA threshold but for Plaintiff's stipulation. In light of his stipulation, the court concluded that the amount in controversy was below the threshold and remanded the case to state court. Defendant appealed the order but the 8th Circuit declined to hear the appeal. The Supreme Court granted certiorari due to differences in treatment by the lower courts.

A court could potentially find that Plaintiff was an inadequate representative for the class because his stipulation on damages breached the fiduciary duty a representative owes to the class to recover as much as possible for the class members.

HOLDING: Vacated and remanded.
REASONING: To be effective, stipulations must be binding, but Plaintiff could not bind class members he purported to represent because the class had not yet been certified. A court could potentially find that Plaintiff was an inadequate representative for the class because his stipulation on damages breached the fiduciary duty a representative owes to the class to recover as much as possible for the class members. Alternatively, another class member could have intervened and been appointed representative for the class. The precertification stipulation would have been impermissibly based on the future contingency that Plaintiff would be certified as class representative. To treat the stipulation as binding would "exalt form over substance."

For purposes of jurisdiction, the Court limited its finding to examining the case as it appeared when filed in state court. It discounted what it considered the strongest counterargument to its reasoning. Using syllogistic form, Plaintiff might have argued that this complaint asks for less than $5 million in relief; that if the state court were to certify the class, the stipulation would bind all class members; that if the state court were to insist on modifying the stipulation by allowing class members to recover more than $5 million, it would have created a different case; and that CAFA permitted the district court to consider only this case (over which the court would have no jurisdiction). The Court argued that there was a real possibility that a nonbinding, amount-limiting stipulation would not survive the class certification process, and that therefore, this outcome would not result in the creation of a different case. Allowing a precertification stipulation to defeat federal jurisdiction would also allow the subdivision of a $100 million action into 21 just-below-$5 million actions, flying in the face of statute's objective of allowing federal court to consider interstate cases of national importance.


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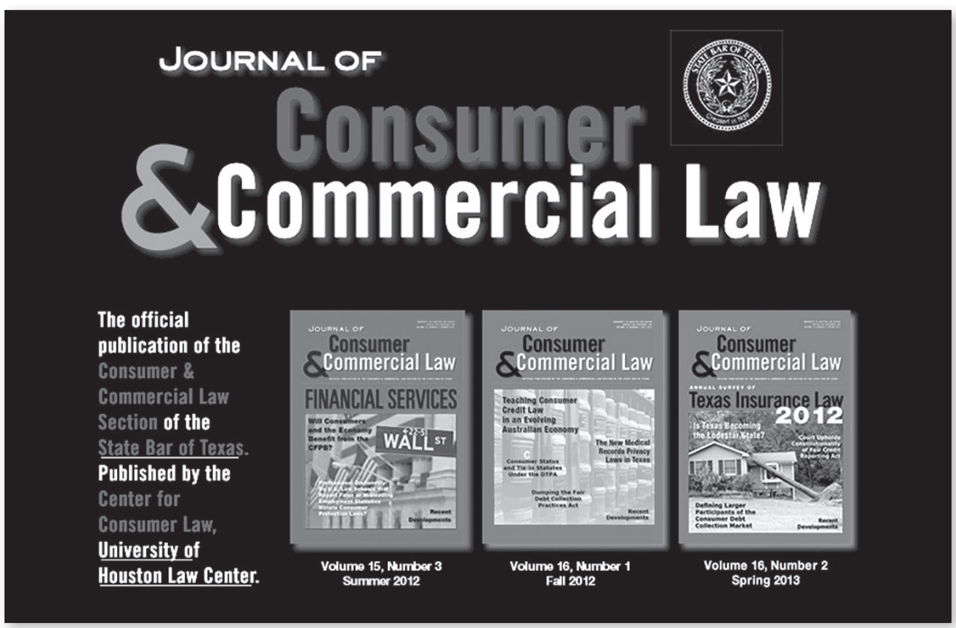
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THE LAST WORD

This issue marks the changing of the guard for the current student editorial board of the *Journal*. David Gantz, the Student Editor-in-Chief, and his staff have done a great job. I look forward to working with the new board, headed by Student Editor-in Chief Adam Robertson.

One thing you may notice about this issue is that it is a little shorter than prior issues. I apologize for the brief nature of this issue, but editing problems have delayed the lead article. The remaining content, however, should prove to be valuable to anyone practicing consumer or commercial law. For example, this issue contains case digests for 25 recent decisions and a longer discussion of the Texas Supreme Court's recent decision dealing with the warranty of good and workmanlike performance in service contracts.

And, as usual, I want to encourage all of you to consider submitting an article to the *Journal* for publication in a subsequent issue. We welcome articles of any length, and encourage opinion pieces as well as substantive discussions of the law. If you have something you would like us to consider, email it to me at alderman@uh.edu

Richard M. Alderman
Editor-in-Chief