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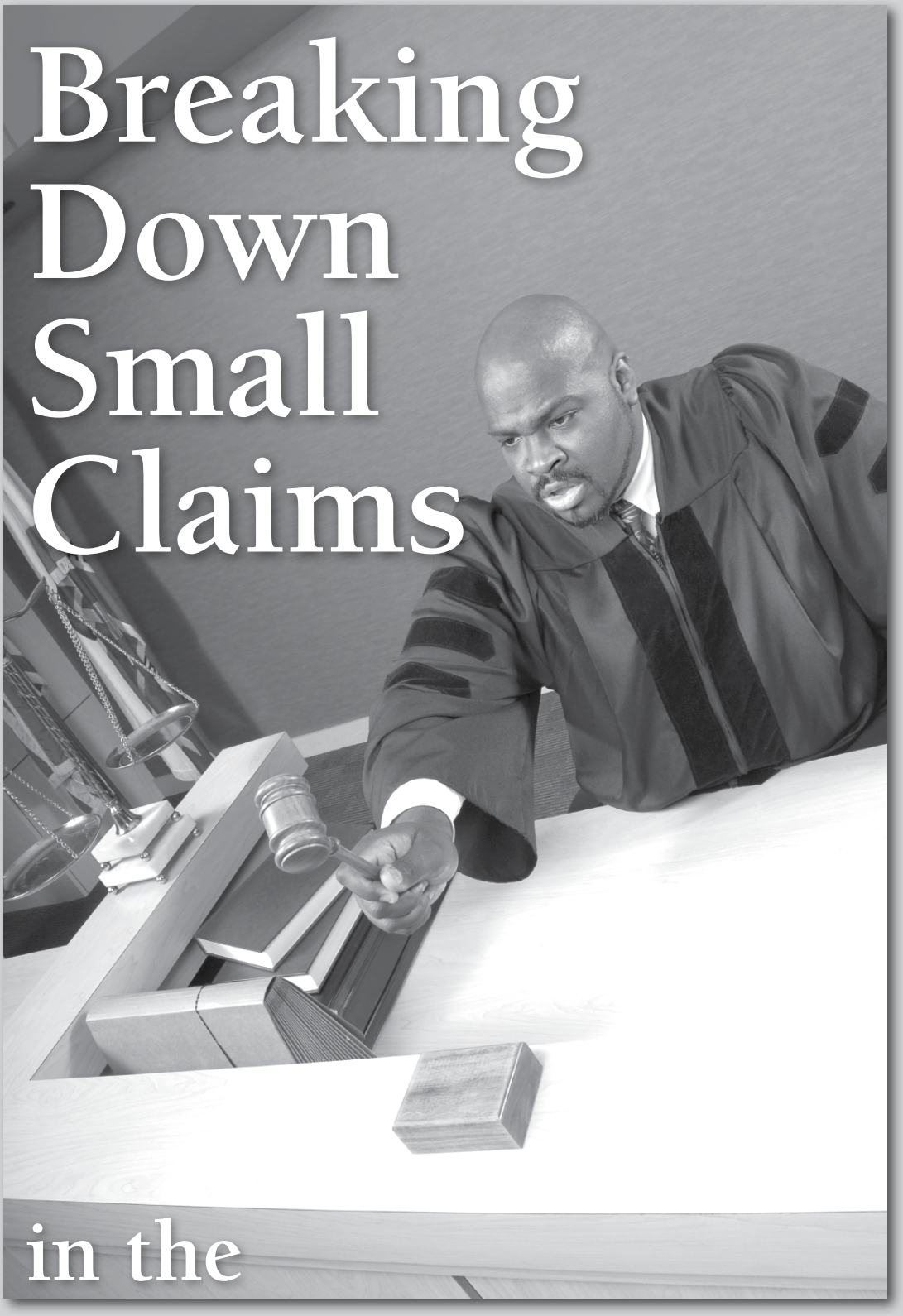

Breaking Down Small Claims in the New Justice Court

By Robert B. Johnson*

Today, Texas "small claims court" is a thing of the past.

I. Introduction

On June 29, 2011, the Texas legislature abolished small claims court with the passing of House Bill 79[1], and later House Bill 1263[2], which directed the Texas Supreme Court to include all cases within justice court, define small claims cases, and promulgate special rules of civil procedure applicable to such cases.[3] In accordance with the legislative directive, the Texas Supreme Court created new rules governing justice court, specifically defining four types of cases and establishing Texas Rules of Civil Procedure 500 to 510. Today, Texas "small claims court" is a thing of the past.[4] The former branch of justice court has been completely absorbed into the court's general jurisdiction. Justice court now hears all claims up to $10,000. Cases previously heard in small claims court are now one of four types of cases filed in justice court.[5]

The move to a unified justice court system isn't the only change effectuated by the legislature. All cases in justice court will now operate under a new, but uniform, set of rules that deviate substantially from the rules for small claims court formerly found in Texas Government Code Section 28 and the old justice court rules formerly found in Texas Rules of Civil Procedure 523 to 591. Although the new rules are designed to streamline practice within justice court, it is still especially important for practicing attorneys to be familiar with the intricate details of and dramatic changes to the rules.

Under the new law, justice court still has jurisdiction over all cases involving an amount in controversy of less than $10,000. However, justices of the peace will no longer take a bifurcated approach to handling cases. Although the rules have been modified to provide more uniformity, certain types of cases will be subject to additional rules unique to the type of case. Small claims cases, debt claim cases, repair and remedy cases, and eviction cases will now be governed by the same general set of rules, with debt claim cases, repair and remedy cases, and eviction cases also operating under an additional set of rules unique to the case type.[6] From the introduction of non-lawyer representation to new deadlines and due dates, this is a new look justice court that may please some but aggravate others.

This article discusses the current position of small claims cases within justice court. As necessary, it includes references to the old rules governing small claims court found in the Texas Government Code.[7] Additionally, the old rules governing justice court will be used as a point of reference. The comparisons to both sections are important for having a complete understanding of the new rules, which now govern all cases heard by justices of the peace.

II. Justice Court Overview

Historically, justices of the peace presided over both small claims and justice court but applied different rules to each.[8] Although differentiated by two unique sets of rules, both small claims court and justice court handled cases involving an amount in controversy of less than $10,000. Relief in small claims court was limited to the recovery of money damages.[9] Because the courtroom was treated as informal and the rules of evidence did not apply, small claims court was popular among both attorneys and pro se plaintiffs and defendants as an economical court.[10] The real "People's Court." On the other hand, justice court was functionally similar to district or county court. Justice court handled other civil matters, debt collection, and eviction cases and justices formally applied the rules of procedure and evidence.

Following the implementation of the new rules, justice court will now hear four types of cases: (1) small claims cases, (2) debt claim cases, (3) repair and remedy cases, and (4) eviction cases. A lawsuit for money damages, civil penalties, or property may be brought as a "small claims case." An action to recover money owed from the extension of credit may be brought as a "debt claim case." A tenant may enforce a landlord's duty as a "repair and remedy case." And, a landlord may bring a case to recover possession of real property as an "eviction case." The justice of the peace will hear all cases and apply the same general rules to each, except that particular rules apply to debt cases, repair and remedy, and eviction actions as prescribed by Texas Rules of Civil Procedure 508 to 510.[11]

A. Small Claims Case

Much like the old small claims court, a plaintiff may bring a cause of action to recover money damages and civil penalties in the new justice court.[12] Significantly, a plaintiff also may now bring an action to recover personal property, so long as the value of the property does not exceed $10,000, including attorneys' fees.[13] Texas Rules of Civil Procedure 500.3(a) states:

> A small claims case is a lawsuit brought for the recovery of money damages, civil penalties, personal property, or other relief allowed by law. The claim can be for no more than $10,000, excluding statutory interest and court costs but including attorneys fees, if any. Small claims cases are governed by Rules 500-507 of Part V of the Rules of Civil Procedure.[14]

Ultimately, the new rule encapsulates the spirit of the old small claims court, while also allowing a plaintiff to now also retrieve personal property. Further, note that while the new rule excludes interest and court costs, it includes attorney fees. It is unclear whether this provision looks to the amount of fees requested at the time of filing, or those awarded. For instance, the rule fails to detail the consequence of filing a case requesting a small amount for attorney fees that later escalates beyond the jurisdictional amount. Accordingly, to avoid jurisdictional problems, the amount in controversy should be determined at the date of filing and should not be affected by subsequent increases in attorney fees.

B. Debt Claim Case[15]

A financial institution, debt collector, or other person or entity primarily engaged in lending money may not bring a small claims case to collect on a debt. Instead, the person, entity, or institution must bring a debt claim case. The plaintiff must follow specific rules for proving up damages based on the type of debt. The rules distinguish credit accounts, personal and business loans, ongoing interest accounts, and assigned debt:

> A debt claim case is a lawsuit brought to recover a debt by an assignee of a claim, a debt collector or collection agency, a financial institution, or a person or entity primarily engaged in the business of lending money at interest. The claim can be for no more than $10,000, excluding statutory interest and court costs but including attorney fees, if any. Debt claim cases in justice court are governed by Rules 500-507 and 508 of Part V of the Rules of Civil Procedure. To the extent any conflict between Rule 508 and the rest of Part V, Rule 508 applies.[16]

It is important to note that a debt claim lawsuit can't be brought as a small claims case. Further, Texas Rules of Civil Procedure 508 has built in protections that require a plaintiff to prove up a case before a judgment is rendered, regardless of the defendant's presence in court.[17] Due to some ambiguity in the rule, there is a possibility that some consumers may mistakenly file

a debt claim case instead of a small claims case. The implications of such actions are unclear, as a liberal reading of the rule may actually allow such an action. Ultimately, debt collection actions will have a new look under Texas Rules of Civil Procedure 500 to 508, especially with the changes to discovery.

C. Repair and Remedy Case

Where a tenant wants to enforce the landlord's obligation to fix a condition that materially affects the health or safety of an ordinary tenant, the tenant may bring a repair and remedy case in justice court.[18] The law states:

> A repair and remedy case is a lawsuit filed by a residential tenant under Chapter 92, Subchapter B of the Texas Property Code to enforce the landlord's duty to repair or remedy a condition materially affecting the physical health or safety of an ordinary tenant. The relief sought can be for no more than $10,000, excluding statutory interest and court costs but including attorney fees, if any. Repair and remedy cases are governed by Rules 500-507 and 509 of Part V of the Rules of Civil Procedure. To the extent of any conflict between Rule 509 and the rest of Part V, Rule 509 applies.[19]

A repair and remedy case allows a residential tenant to enforce a landlord's duty to repair conditions that materially affect the health and safety of an ordinary tenant. The rules found in former Texas Rules of Civil Procedure 737 for representation and discovery have been replaced, and the rules governing citation and appeal are notably different.[20] Accordingly, Landlords, tenants, and attorneys representing both sides should carefully review the requirements set forth in Texas Rules of Civil Procedure 500 to 507 and 509.

D. Eviction Case

When a tenant has breached a lease and the landlord has followed proper notice guidelines, a landlord may bring an eviction case in justice court. The new rule states:

> An eviction case is a lawsuit brought to recover possession of real property under Chapter 24 of the Texas Property Code, often by a landlord against a tenant. A claim for rent may be joined with an eviction case if the amount of rent due and unpaid is not more than $10,000, excluding statutory interest and court costs but including attorney fees, if any. Eviction cases are governed by Rule 500-507 and 510 of Part V of the Rules of Civil Procedure. To the extent of any conflict between Rule 510 and the rest of Part V, Rule 510 applies.

The rules governing evictions are different in many significant ways. For instance, the contents of the petition, appearance date, and rules governing default judgments have all changed.[21] Although this article won't focus on the changes, landlords and tenants will face a new and unique set of challenges as they become acclimated with the new rules governing eviction proceedings.

III. Pre-Trial Procedure in Small Claims Cases

There are many significant changes to the rules governing small claims cases within justice court. The introduction of non-lawyer representation, an alteration to the due order of pleadings, a written pleading requirement, some changes to important dates, and a longer time to appeal are just some of the changes that arise out of the new rules.

Superficially, small claims cases may not seem substantially different when compared to the previous guidelines. However, a closer examination of the details reveals rule changes that could lead attorneys astray if not closely studied and followed.

One of the most interesting new rules allows for non-attorney assisted representation.

A. Non-Lawyer Representation

Problems have always existed with self-representation in small claims court. There are numerous reasons a person may have trouble representing him or herself. For example, public speaking tops the list of worst human fears.[22] There also may be barriers based on language or physical limitations. Against a more refined or sophisticated opponent, especially an attorney, effective communication could make or break a case.

One of the most interesting new rules allows for non-attorney assisted representation.[23] The rule states, "the court may, for good cause, allow an individual representing himself or herself to be assisted in court by a family member or other individual who is not being compensated."[24] Be it a family member, neighbor, friend, associate, or casual acquaintance, the new rules allow a layperson to use non-lawyer representation, provided the judge approves and that person is not compensated. Ultimately, this could be a great benefit for persons who may otherwise struggle with communication. However, the rule is not without its problems.

The new rule does not define "good cause" or "compensated." Because "good cause" is not clearly defined, approval of non-lawyer representation is left to the discretion of the court. With no case law on the issue, it is impossible to predict what courts might consider. Likely functioning on a case-by-case basis, with no specific legal standard for determining "good cause," application of the law is likely to be inconsistent across courts, and even throughout cases in a single court. Rationalizing arguments about what is "just" and "reasonable" is subjective by nature, and leaves the door open for very broad interpretation. As a result, what may satisfy "good cause" in one court, or even one case, may not in another.

The new rule may also discourage individuals from seeking out an attorney, when one could be very helpful. This is especially troubling in fee-shifting cases that allow attorney's fees to be awarded against the defendant. Additionally, while attorneys are held to a standard of care and answer to the state bar, non-lawyers representing in justice court have no governing body or standard of care. To expect a non-lawyer to represent with the same effectiveness is to set extraordinarily high expectations. Ideally, this rule will be used to simply provide assistance with communication and presentation, and not as a substitute for legal representation.[25]

B. Venue

According to Texas Rules of Civil Procedure 502.4(a), venue is defined pursuant to Texas Civil Practice and Remedies Code Rule 15.082. According to the rule, "a suit in justice court shall

be brought in the county and precinct in which one or more defendants reside."[26] The apparently mandatory language of this rule, however, is modified by more specific language of the next section, which provides for four possible venues.[27] The rule states:

> Generally, a defendant in a small claims case as described in Rule 500.3(a) or a debt claim case as described in Rule 500.3(b) is entitled to be sued in one of the following venues:
> (1) the county and precinct where the defendant resides;
> (2) the county and precinct where the incident, or the majority of incidents, that gave rise to the claim occurred;
> (3) the county and precinct where the contract or agreement, if any, that gave rise to the claim was to be performed; or
> (4) the county and precinct where the property is located, in a suit to recover personal property.

Thus, it appears that small claims and debt cases may be brought in a number of venues, while eviction and repair cases must be brought where the defendant resides.[28]

C. Motion to Transfer Venue

Contrary to the general due order of pleadings rule, a defendant may challenge venue up to 21 days after the answer is filed, if the plaintiff files a case in an improper venue.[29] This provision is an exception to the general rule, only available if a plaintiff files in an improper venue. The rule states:

> If a plaintiff files suit in an improper venue, a defendant may challenge the venue selected by filing a motion to transfer venue. The motion must be filed before trial, no later than 21 days after the day the defendant's answer is filed, and must contain a sworn statement that the venue chosen by the plaintiff is improper and a specific county and precinct of proper venue to which the transfer is sought. If the defendant fails to name a county and precinct, the court must instruct the defendant to do so and allow the defendant 7 days to cure the defect. If the defendant fails to correct the defect, the motion will be denied, and the case will proceed in the county and precinct where it was originally filed.[30]

While the rule is unique, it is limited to instances where a plaintiff has filed in an improper venue. Further, should more than 21 days pass after the answer is filed, the due order of pleadings remain, and the case will continue without regard for proper venue.

D. Pleadings

Of the changes to justice court, the requirement for pleadings illustrates the more formalized nature of new rules. Pursuant to former Rule 525 of the Texas Rules of Civil Procedure, all pleadings, with certain exceptions, were required to be oral.[31] The old Texas Government Code rules governing small claims court were largely silent on pleadings.[32] This rule has been changed to require written, signed, and filed documents for pleadings and motions.[33]

Rule 525 stated, "The pleadings shall be oral, except where otherwise specially provided; but a brief statement thereof may be noted on the docket; provided that after a case has been appealed and is docketed in the county (or district) court all pleadings shall be reduced to writing."[34] New Rule 502.1 of the Texas Rules of Civil Procedure replaces Rule 525 and dramatically alters the requirements for pleadings, calling for all pleadings, with certain exceptions, to be written. The new rule states:

> Except for oral motions made during trial or when all parties are present, every pleading, plea, motion, application to the court for an order, or other form of request must be written and signed by the party or its attorney and must be filed with the court. A document may be filed with the court by personal or commercial delivery, by mail, or electronically, if the court allows electronic filing.[35]

Ultimately, the written pleading requirement may be another change to the rules that could impact the accessibility of justice court for the layperson because it creates an additional hurdle that a layperson may be unable to overcome. However, although statistics aren't available, Rule 525 was a rule rarely used in practice. For practical purposes, this rule change may have very limited impact.

E. Citation

Unlike the changes noted above, the changes to the rules governing citation are dramatic, noteworthy, and particularly important for practicing attorneys. From changes to the format of citation to a new answer due date, the additions and alterations within this section are considerable. Attorneys practicing in justice court should make a diligent effort to understand and adjust their practice accordingly.[36]

Under the new rule:

> The citation must: (1) be styled "The State of Texas"; (2) be signed by the clerk under seal of court or by the judge; (3) contain the name, location, and address of the court; (4) show the date of filing of the petition; (5) show the date of issuance of the citation; (6) show the file number and names of parties; (7) be directed to the defendant; (8) show the name and address of attorney for plaintiff, or if the plaintiff does not have an attorney, the address of plaintiff; and (9) notify defendant that if the defendant fails to file an answer, judgment by default may be rendered for the relief demanded in the petition.[37]

Unlike in Texas Rules of Civil Procedure 534(b)(11), new Texas Rules of Civil Procedure 501.1(b)(8) calls for the inclusion of the "name and address of an attorney for plaintiff, or if the plaintiff does not have an attorney, the address of plaintiff." This replaces the Texas Rules of Civil Procedure 534(b)(11) requirement that the citation "contain the address of the clerk."

Other parts of Texas Rules of Civil Procedure 534(b) have been moved to the notice text requirement to create a more robust notice to the defendant. Furthermore, the new notice requirement includes the addition of the new answer due date. The citation must include the following notice to the defendant in boldface type:

> You have been sued. You may employ an attorney to help you in defending against this lawsuit. But you are not required to employ an attorney. You or your attorney must file an answer with the court. Your answer is due by the end of the 14th day after the day you were served with these papers. If the 14th day is a Saturday, Sunday, or legal holiday, your answer is due by the end of the first day following the 14th day that is not a Saturday, Sunday, or legal holiday. Do not ignore these papers. If you do not file an answer by the due date, a default judgment may be taken against you. For further information, consult Part V of the Texas Rules of Civil Procedure, which is available online and also at the court listed on this citation.[38]

Critical components of the new citation rules include the new answer due date, listing the attorney's address instead of the clerk's address, and the new notice text. With both subtle and significant changes to the rules governing citation, attorneys should take special care when filing suit to include the modified text, new format, and amended dates.

F. Answer

As briefly discussed above, there are some significant changes to the rules governing the defendant's answer. Attorneys should

take particular note of the new answer due date. While the old rule calculated the answer due date as the Monday next following 10 days, the new rule calls for the defendant to file an answer by the end of the 14th day after the defendant was served. As a result, half of the time the answer will be due sooner than under the previous rules, creating a situation in which a defendant could face default judgment. According to the new rule:

> A defendant must file with the court a written answer to a lawsuit as directed by the citation and must also serve a copy of the answer on the plaintiff. The answer must contain:
> (1) the name of the defendant;
> (2) the name, address, telephone number, and fax number, if any, of the defendant's attorney, if applicable, or the address, telephone number, and fax number, if any, of the defendant; and
> (3) if the defendant consents to email service, a statement consenting to email service and email contact information.[39]

The rule makes it clear the defendant may file a general denial. It states, "an answer that denies all of the plaintiff's allegations without specifying the reasons is sufficient to constitute an answer or appearance and does not bar the defendant from raising any defense at trial."[40]

As noted above, unlike the old rules, the answer is due by the end of the 14th day after the defendant was served.[41] The rule states:

> Unless the defendant is served by publication, the defendant's answer is due by the end of the 14th day after the day the defendant was served with the citation and petition, but
> (1) if the 14th day is a Saturday, Sunday, or legal holiday, the answer is due on the next day that is not a Saturday, Sunday, or legal holiday; and
> (2) if the 14th day falls on a day during which the court is closed before 5:00 p.m., the answer is due on the court's next business day.[42]

If an attorney remembers only one change to the Texas Rules of Civil Procedure for justice court, it should be the rules governing the defendant's answer. This change alone could leave an attorney facing default judgment for a procedural mistake. This change could open the door for more de novo appeals to county court, a result counterproductive to the intent of the law, and further burdening an already overworked court docket. Regardless, it is among the most important new rules.

G. Discovery

The new rules incorporate many of the discovery practices long used in district and county court, but with some significant differences specifically geared to justice court.[43] Although small claims court allowed for "reasonable discovery" as permitted by a judge, justice court cases fell under a level 1 discovery control plan.[44] Now, instead of defined parameters, the judge will make the ultimate decision on whether to allow discovery, and the extent to which it is reasonable. For pre-trial discovery, the new justice court rules state:

> Pretrial discovery is limited to that which the judge considers reasonable and necessary. Any requests for pretrial discovery must be presented to the court for approval by written motion. The motion must be served on the responding party. Unless a hearing is requested, the judge may rule on the motion without a hearing. The discovery request must not be served on the responding party unless the judge issues a signed order approving the request. Failure to comply with a discovery order can result in sanctions, including dismissal of the case or an order to pay the other party's discovery expenses.[45]

Instead of defined parameters, the judge will make the ultimate decision on whether to allow discovery.

Although justice court does not have specific guidelines for the amount of discovery that can be taken in a given case, the judge now has great leeway to allow discovery deemed "reasonable and necessary."[46] This should allow the judge the ability to move a case forward, especially when only one side has an attorney.

H. Summary Disposition

The summary disposition rule for justice court operates as a hybrid summary judgment, combining both fact and no evidence summary judgment.[47] Under the new rules, the time frame for a court's consideration of summary disposition has been shortened from at least 21 days to 14 days.[48] The new rule on summary disposition states:

> (a) Motion. A party may file a sworn motion for summary disposition of all or part of a claim or defense without a trial. The motion must set out all supporting facts. All documents on which the motion relies must be attached. The motion must be granted if it shows that:
> (1) there are no genuinely disputed facts that would prevent a judgment in favor of the party;
> (2) there is no evidence of one or more essential elements of a defense which the defendant must prove to defeat the plaintiff's claim; or
> (3) there is no evidence of one or more essential elements of the plaintiff's claim.
> (b) Response. The party opposing the motion may file a sworn written response to the motion.
> (c) Hearing. The court must not consider a motion for summary disposition until it has been on file for at least 14 days. The judge may consider evidence offered by the parties at the hearing. By agreement of the parties, the judge may decide the motion and response without a hearing.
> (d) Order. The judge may enter judgment as to the entire case or may specify the facts that are established and direct such further proceedings in the case as are just.[49]

The affect of the new rules for summary disposition should be the same as under the old rules, except that the name has changed and that the motion for summary disposition may be considered after only 14 days, rather than 21.

IV. Trial & Post-Trial

Following the changes to the Texas Rules of Civil Procedure and the implementation of the Rules of Evidence, plaintiffs and defendants face a much more formalized trial process. However, since the judge has the ability to develop a case, plaintiffs and

defendants conceivably have some guidance in presenting their cases without trampling the rules. Furthermore, the new rules call for a more practical approach to redress, allowing plaintiffs to not only recover monetary damages, but also retrieve personal property. Although plaintiffs and defendants face a more structured system when pursuing small claims cases at trial, they benefit from many pragmatic changes that give the court authority to more appropriately resolve disputes.

A. Judge to Develop Case

Under the new rules, "[i]n order to develop the facts of the case, a judge may question a witness or party and may summon any person or party to appear as a witness when the judge considers it necessary to ensure a correct judgment and a speedy disposition."[50] While this was already the case for small claims court, it is entirely new for the other types of cases.[51] While this can be helpful for pro se plaintiffs and defendants, it is also foreseeable that such activity may influence juries. For example, if a judge is asking a party questions in order to develop a case, it could be construed as the judge siding with, or disagreeing with the party. However, charging the judge with developing the case can speed up the process and allow for more effective docket management.

B. Judgment

Throughout its history, small claims court has traditionally been a court where litigants could only recover monetary damages.[52] That is, if a plaintiff wanted a judgment for specific property, the plaintiff would have to file in another court.[53]

One of the major changes in the new justice court rules governing small claims cases is the ability to recover a specific article.[54] For example, if a defendant has possession of the plaintiff's $5,000 piano, the plaintiff may now bring a small claims case against the defendant to recover the piano. Under Texas Rules of Civil Procedure 505.1(e), the plaintiff can obtain a judgment for the return of the piano.[55] However, if the piano can't be found, the plaintiff can recover the value as assessed by a judge or jury. Plaintiffs seeking the return of property, therefore, should also be prepared to prove the value of the property as part of their case.[56]

C. Motion to Set Aside / Motion for New Trial / Appeal

Following trial, a party may want to file a motion to set aside, a motion for new trial, or an appeal.[57] Under the old rules, a party to a lawsuit had to act quickly to receive a new trial or request an appeal. Compared to the rules previously governing cases before the justices of the peace, a party to a lawsuit now has more time to request a new trial or file an appeal.

Under the old rule, a party had five days after rendition of judgment to file a motion to set aside a default judgment or a motion for new trial.[58] Pursuant to new Texas Rules of Civil Procedure 505.3, motions must now be filed within fourteen days of judgment.[59] If the judge doesn't rule on the motion, it is automatically denied at 5:00 p.m. on the 21st day after judgment.[60]

Similarly, the rules governing appeal have also been extended. The former rules called for appeals to be filed within 10 days of judgment or order over-ruling a motion for new trial.[61] Now, a party may appeal by filing a bond, deposit, or statement of inability to pay within 21 days of judgment or denial of a motion to reinstate, motion to set aside, or motion for new trial.[62] As with the old rule, the case must be tried de novo in county court.[63]

V. Conclusion

From non-lawyer representation to dramatically different dates and deadlines, Texas Rules of Civil Procedure 500 to 510 mark a significant departure from the previous rules governing justice and small claims court. While justice court maintains jurisdiction over claims of $10,000 or less, small claims cases in justice court are now much more formal. The days of an informal small claims court are gone, replaced by a system that much more closely resembles county or district court, but with an entirely new set of deadlines and procedures.

A comparison reading of the rules governing small claims cases paints the picture of a more complex system. While a reader could examine the former rules governing small claims court in a matter of minutes, the new rules are quite expansive and require much more time to read and understand. It will take time for litigants to learn the new rules and judges to determine how to exercise the broad discretion provided by the new rules.

The true ramifications of the new rules governing justice court may not be known for quite some time. That is, the justice court system may achieve long-term efficiencies under the new rules, but still deal with significant short-term inefficiencies to reach that goal. It will take time for litigants to learn the new rules, courts will need to restructure an entire operation, attorneys may lose business to non-lawyer alternatives, and county courts will bear the burden of a swollen docket from de novo appeals. However, the hope is that by sacrificing some short-term inefficiency, the justice court system will ultimately provide the public with a better outlet to appropriately resolve disputes.

** Robert B. Johnson is associate director of the Center for Consumer Law and lecturer for the Consumer Dispute Resolution course at the University of Houston Law Center.* *Special thanks to Dean Richard M. Alderman, Rick McElvaney, Lauren Simpson, and Jim Hawkins for their invaluable guidance with this article.*

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1 Tex. H.B. 79, 82nd Leg, 1st C.S. (2011).

2 Tex. H.B. 1263, 83rd Leg., R.S. (2013).

3 Previously, justice courts operated under a combination of rules, some of which were specific to justice court and others taken from county and district court. *See* Tex. R. Civ. P. 523 (West 1985, repealed 2013); *see generally* Tex. R. Civ. P. 523-91 (West 1985, repealed 2013).

4 *See* Tex. Sup. Ct. Misc. Docket No. 13-9049, 76 Tex. B.J. 440, available at http://www.texasbar.com/AM/Template.cfm?Section=Texas_Bar_Journal&Template=/CM/ContentDisplay.cfm&ContentID=22244 (*repealing* Texas Rules of Civil Procedure 523-91).

5 Act of May 17, 1985, 69th Leg., R.S., Ch. 480, § 1, 1985 Tex. Gen. Laws 1720, 1815 [hereinafter "former Section 28.002"], *repealed by* Act of June 29, 2011, 1st C.S., Ch. 3, § 5.06, 2011 Tex. Gen. Laws 5206, 5225. Under former section 28.002 (repealed 2013), each justice of the peace also served as the judge of the small claims court of the same precinct and place.

6 All cases are governed by Texas Rules of Civil Procedure 500 to 507. *See* Tex. R. Civ. P. 500-07. Additional rules for debt claim cases, repair and remedy cases, and eviction cases are available in Texas Rules of Civil Procedure 508, 509, and 510, respectively. *See* Tex. R. Civ. P. 508-10.

7 *See* Act of May 17, 1985, 69th Leg., R.S., Ch. 480, § 1, 1985 Tex. Gen. Laws 1720, 1815, repealed by Act of June 29, 2011, 1st C.S., Ch. 3, § 5.06, 2011 Tex. Gen. Laws 5206, 5225, *et seq.*

8 *See* Tex. R. Civ. P. 523-91 (West 1985, repealed 2013); Act of May 17, 1985, 69th Leg., R.S., Ch. 480, § 1, 1985 Tex. Gen. Laws 1720, 1815, *repealed by* Act of June 29, 2011, 1st C.S., Ch. 3, § 5.06, 2011 Tex. Gen. Laws 5206, 5225, *et seq.*

9 Act of May 17, 1985, 69th Leg., R.S., Ch. 480, § 1, 1985 Tex. Gen. Laws 1720, 1816, *amended by* Act of May 15, 1989, 71st Leg., R.S., Ch. 802, § 10, 1989 Tex. Gen. Laws 3664, 3666 [hereinafter "former Section 28.033"], *repealed by* Act of June 29, 2011, R.S., Ch. 3, § 5.06, 2011 Tex. Gen. Laws 5206, 5225.

10 *Id.*

[11] *See generally* Tex. R. Civ. P. 500-10.

[12] Tex. R. Civ. P. 500.3(a).

[13] *Id.*

[14] *Id.*

[15] The discussion of small claims cases is the primary focus of this article. As such, discussion of debt cases, repair and remedy cases, and eviction cases will be limited throughout this article. However, they are mentioned to provide context.

[16] Tex. R. Civ. P. 500.3(b).

[17] *See generally* Tex. R. Civ. P. 508.

[18] Tex. Prop. Code Ann. § 92.056 (Vernon 2008).

[19] Tex. R. Civ. P. 500.3(c).

[20] *Compare* Tex. R. Civ. P. 737.5 (West 1985, repealed 2013) with Tex. R. Civ. P 500.4(c) (regarding representation); *Compare* Tex. R. Civ. P. 737.7 (West 1985, repealed 2013) with Tex. R. Civ. P. 500.9 (regarding discovery); *See* Tex. R. Civ. P. 509.4 (regarding citation); Tex. R. Civ. P. 509.8 (regarding appeal).

[21] Tex. R. Civ. P. 510.3(a); Tex. R. Civ. P. 510.4(a); Tex. R. Civ. P. 510.6(c).

[22] Conrad Teitell, *Fearless Public Speaking*, 74 A.B.A.J. 94 (1988).

[23] Tex. R. Civ. P. 500.4(c).

[24] *Id.* Note that prior to the new rules, non-lawyers could represent defendants in eviction cases under Texas Rules of Civil Procedure 747a. *See* Tex. R. Civ. P. 747a.

[25] There may even be an opportunity for an industry to arise that sells "non-attorney representation" without encroaching on the rule prohibiting compensation. For example, a business could hypothetically sell other goods or services, and offer "representation" for free. However, the compensation rule is undefined and inherently very broad. As such, judges' discretion and local rules may prevent such activities from occurring. *Compare* Ronald J. Mann & Jim Hawkins, *Just Until Payday*, 54 UCLA L. Rev. 855 (2007) ("For example, payday lenders in some cases have avoided fee ceilings by selling insurance with the credit product, enabling the lenders to comply with rate ceilings while generating revenue through products that most consumers probably do not want. Another similar practice is to force consumers to purchase advertising space (for sayings such as "Go Cowboys!") in the lender's newsletter or to purchase gift certificates for worthless products in catalogs.")

[26] Tex. Civ. Prac. & Rem. Code Ann. § 15.082 (West 1985). Note that this rule is substantially the same as the old venue rule for small claims court found in former rule 28.011 (repealed 2013). *See* Act of Apr. 30, 1987, 70th Leg., R.S., Ch. 148, § 2.31, 1987 Tex. Gen. Laws 534, 552 [hereinafter "former Section 28.011"], *repealed by* Act of June 29, 2011, 1st C.S., Ch. 3, § 5.06, 2011 Tex. Gen. Laws 5206, 5225.

[27] *Compare* Tex. Civ. Prac. & Rem. Code Ann. § 15.082 (West 1985) with Tex. R. Civ. P. 502.4(b).

[28] With no similar contradiction for eviction and repair and deduct cases, appropriate venue is only where the defendant resides. Note the potential problems that may arise if a defendant doesn't live in the same area as a rental property under a repair case.

[29] *Compare* Tex. R. Civ. P. 86(1) and Tex. R. Civ. P 120a with Tex. R. Civ. P. 502.4(d).

[30] Tex. R. Civ. P. 502.4(d).

[31] Tex. R. Civ. P. 525 (West 1985, repealed 2013).

[32] Act of May 17, 1985, 69th Leg., R.S., Ch. 480, § 1, 1985 Tex. Gen. Laws 1720, 1816, *amended by* Act of May 15, 1989 71st Leg., R.S., Ch. 802, §5, 1989 Tex. Gen. Laws 3664, 3665 [hereinafter "former Section 28.012"], *repealed by* Act of June 29, 2011, 1st C.S., Ch. 3, § 5.06, 2011 Tex. Gen. Laws 5206, 5225 (By providing the sworn statement, this arguably constitutes the only provision of former Section 28 that concerned pleadings).

[33] *Compare* Tex. R. Civ. P. 525 (West 1985, repealed 2013) with Tex. R. Civ. P. 502.1.

[34] Tex. R. Civ. P. 525 (West 1985, repealed 2013).

[35] Tex. R. Civ. P. 502.1.

[36] Act of May 17, 1985, 69th Leg., R.S., Ch. 480, § 1, 1985 Tex. Gen. Laws 1720, 1816, *amended by* Act of May 15, 1989 71st Leg., R.S., Ch. 802, §7, 1989 Tex. Gen. Laws 3664, 3665, [hereinafter "former Section 28.013"], *repealed by* Act of June 29, 2011, 1st C.S., Ch. 3, § 5.06, 2011 Tex. Gen. Laws 5206, 5225 (According to Section 28.013(a), citation rules for small claims court were governed by the guidelines set forth in Texas Rules of Civil Procedure 534. *See* Tex. R. Civ. P. 534 (West 1985, repealed 2013).

[37] Tex. R. Civ. P. 501.1(b).

[38] Tex. R. Civ. P. 501.1(c).

[39] Tex. R. Civ. P. 502.5(a).

[40] Tex. R. Civ. P. 502.5(b).

[41] Tex. R. Civ. P. 502.5(d).

[42] *Id.*

[43] Tex. R. Civ. P. 500.9. In county and district court, discovery limitations are defined by the discovery level, which give specific guidance on the amount of discovery that can be taken. *See* Tex. R. Civ. P. 190.

[44] Act of May 17, 1985, 69th Leg., R.S., Ch. 480, § 1, 1985 Tex. Gen. Laws 1720, 1816, *amended by* Act of May 15, 1989, 71st Leg., R.S., Ch. 802, § 10, 1989 Tex. Gen. Laws 3664, 3666 [hereinafter "former Section 28.033"], *repealed by* Act of June 29, 2011, 1st C.S., Ch. 3, § 5.06, 2011 Tex. Gen. Laws 5206, 5225. Note that the old justice court rules were silent as to discovery. As such, Texas Rules of Civil Procedure 523 referred to the rules governing county and district court. Since all cases in justice court fell under the required $50,000 threshold, discovery control plan 1 applied. See Tex. R. Civ. P. 523 (West 1985, repealed 2013); Tex. R. Civ. P. 190.

[45] Tex. R. Civ. P. 500.9(a).

[46] *Id.* Note that an attorney who serves discovery under the old rules could be subject to sanctions or other discipline.

[47] *Compare* Tex. R. Civ. P. 166a with Tex. R. Civ. P 503.2.

[48] Tex. R. Civ. P. 503.2(c). Under Texas Rules of Civil Procedure 166a(c), "the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing." *See* Tex. R. Civ. P. 166a(c).

[49] Tex. R. Civ. P. 503.2(a)-(d).

[50] Tex. R. Civ. P. 500.6.

[51] Act of May 17, 1985, 69th Leg., R.S., Ch. 480, § 1, 1985 Tex. Gen. Laws 1720, 1816 [hereinafter "former Section 28.034"], *repealed by* Act of June 29, 2011, 1st C.S., Ch. 3, § 5.06, 2011 Tex. Gen. Laws 5206, 5225.

[52] Act of May 22, 1991, 72nd Leg., R.S., Ch. 776, § 4, 1991 Tex. Gen. Laws 2767, 2768, *amended by* Act of May 16, 2007, 80th Leg., R.S., Ch. 383, § 3, 2007 Tex. Gen. Laws 685, 686, [hereinafter "former Section 28.003"], *repealed by* Act of June 29, 2011, 1st C.S., Ch. 3, § 5.06, 2011 Tex. Gen. Laws 5206, 5225.

[53] Old justice court rules allowed for the recovery of specific property, but small claims court rules did not. *See* Tex. R. Civ. P. 560 (West 1985, repealed 2013).

[54] Tex. R. Civ. P. 505.1(e).

[55] Tex. R. Civ. P. 505.1(e).

[56] Without evidence proving up the value of the article, a judge or jury could have difficulty assigning appropriate damages. As such, the plaintiff should go to court prepared to prove up the value of the specific article using receipts, a survey or market prices for the same, or similar article, or an affidavit from an expert.

[57] Tex. R. Civ. P. 505.3; Tex. R. Civ. P. 506.1.

[58] Tex. R. Civ. P. 569 (West 1985, repealed 2013).

[59] Tex. R. Civ. P. 505.3.

[60] Tex. R. Civ. P. 505.3(e).

[61] Tex. R. Civ. P. 571 (West 1985, repealed 2013).

[62] Tex. R. Civ. P. 506.1.

[63] *Compare* Tex. R. Civ. P. 574b (West 1985, repealed 2013) with Tex. R. Civ. P. 506.3.

Everything You Wanted to Know About Legal Writing But Were Afraid to Ask

By Chad Baruch*

I. INTRODUCTION**

"[T]he term 'legal writing' has become synonymous with poor writing: specifically, verbose and inflated prose that reads like – well, like it was written by a lawyer."[1] Legal writing suffers from "convoluted sentences, tortuous phrasing, and boring passages filled with passive verbs."[2] Despite recognition of this problem and concerted efforts by law schools to fight it, legal writing continues to deteriorate.[3]

No one who teaches at any level will be surprised by this deterioration in writing skills. Teachers bemoan it every day in high school, college, and law school faculty lounges. This paper presents a series of practical, easily implemented steps to improve legal writing.

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A. Legal Writing is Important!

Many lawyers roll their eyes at discussions of legal writing, and use legal writing presentations during seminars as coffee breaks. They regard legal writing as a topic for law professors, judges, and all-around eggheads, one that has little application to their practices. They are wrong. As Irving Younger explained:

> So prevalent is bad legal writing that we get used to it, shrugging it off as a kind of unavoidable occupational disability, like a cowboy's bowlegs. This is an unfortunate state of affairs. Bad writing goes with bad thinking, and since bad thinking is the source of many of the ills that beset us, lawyers should acknowledge a professional obligation to wage war against bad writing. If the author who produced it is you, correct it. If another, condemn it. [4]

There are many reasons for a lawyer to write well. Good writing helps attorneys by:

- Enhancing their credibility with other lawyers. Many lawyers *are* good writers, and most of them recognize and respect quality legal writing when they see it. When opposing these lawyers, your ability to write well commands respect and affects their evaluation of the likelihood of success. At my former firm, we were writing snobs. When facing attorneys from small firms, we routinely made assumptions about them based upon their legal writing. Quality legal writing gains you respect that may prove useful in litigation.

- Preventing malpractice and grievances. Inferior legal research and writing skills can give rise to malpractice liability, client grievances, and court sanctions.

- Enhancing their credibility with clients. Some clients read what you produce in their cases with a Javert-like obsession for pointing out even the tiniest errors. A superior legal writing product works like a salve on these clients' tortured psyches.

- Enhancing their credibility with judges. Judges are the most frequent victims of bad legal writing. They cannot escape a daily barrage of poorly written motions and briefs. No surprise, then, that judges take special note of well-written pleadings. Once, during a sanctions hearing, a district court judge permitted me to argue on behalf of my client for less than one minute, telling me that his reading of my brief already made clear that I was "the only lawyer in the room who knows what he is talking about" (that was not true, but it kept my client from being sanctioned and pleased my mother very much).

- Helping them win cases. Legal writing is critical to appellate success. Even at the trial court level, better legal writing – particularly at the summary judgment stage – will produce better results for your clients. Like it or not, many cases are won or lost on the briefing.

The importance of legal writing increases as the odds of reaching trial diminish. In this era of ever-rarer trials and hearings, legal writing takes on added significance. As courts expand the types of matters they will decide based solely on briefing, legal writing becomes ever more critical. [5]

B. Know Your Audience – Judges Matter!

An important part of legal writing is to know your audience. Lawyers write most often for judges. With increasing frequency, judges are making public their frustration with much of the legal writing that comes before them and are asking attorneys to do better. As Supreme Court Justice Ruth Bader Ginsburg noted: "The cardinal rule: it should play to the audience . . . The best way to lose that audience is to write the brief long and cluttered . . . ." [6] Judges do not have unlimited time to read briefs:

> Briefs usually must compete with a number of other demands on the judge's time and attention. The telephone rings. The daily mail arrives with motions and petitions clamoring for immediate review. The electronic mail spits out an urgent message . . . . The clerk's office sends a fax with an emergency motion. The air courier arrives with an overnight delivery. The law clerks buzz you on the intercom because they have hit a snag in a case. So the deathless prose that you have been reading . . . must await another moment. Or another hour. Or another day.[7]

The simple truth is that judges – and particularly state court judges – rarely have extended periods of time to focus on your legal writing. Judges want briefs that are interesting but also are organized and clear – in other words, briefs that are easy to read.

It is not uncommon for a state court judge to hear motions in twenty or thirty cases in a single morning. Most mornings, several of those are summary judgment motions involving lengthy briefs. Sometimes a hearing involves complex legal issues that necessitate lengthy briefs. Even in those cases, however, attorneys can take a number of steps to assist a busy judge reviewing their briefs. This paper describes some of those steps.

C. For Further Instruction

Attorneys interested in more detailed instruction on legal writing should take Bryan Garner's seminars. He is an outstanding teacher of legal writing and anyone attending his seminars will come away a better writer (I even recommend his seminars to my high school students in preparation for the AP examination). Mr. Garner's books on legal writing are helpful in any significant writing project. His most helpful for attorneys is *The Winning Brief*.

D. Maintain Credibility

Your brief only has as much value as your reputation and credibility. Be careful, then, to maintain your credibility with opposing counsel and the court. Don't misstate or overstate the facts or law. Cite-check your citations. Address all significant arguments raised or likely to be raised by your opponent. When the other side is right, don't be afraid to say so if it will not matter to the end result.

E. Use the Right Tone

Shrill briefs are not persuasive. Adopt a reasonable and respectful tone regardless of how opposing counsel behaves. An angry or defiant tone usually is unproductive. On very rare occasions, humor may be effective in conveying frustration. In helping defend an attorney from a specious sanctions motion several years ago, I wanted to point out to the court that the other party was blaming my client for a whole host of things that were not even arguably his fault. The opening line of our response read:

"Smith has accused Mr. X of everything but being the gunman on the grassy knoll." Upon receiving the response, opposing counsel called to tell me he enjoyed the line, so apparently it got our point across without offending anyone.

II. DRAFTING EFFECTIVE DOCUMENTS

A. Write in Something Resembling English

An important goal in drafting any document (presumably) is ensuring that the people who read it can understand it. Notwithstanding this rather obvious point, many contracts leave one with the unmistakable impression that the drafter's goal was to make certain that no one would ever comprehend the contract's terms.

Thought hardly difficult, drafting contracts in English requires a willingness to set aside entrenched writing habits and embrace the use of plain language. Here are some examples of traditional contract provision, and their plain English counterparts:

This Agreement constitutes the entire understanding between the parties with respect to the subject matter of this Agreement and supersedes any prior discussions, negotiations, agreements, and understandings between the Parties.

This Agreement contains the entire agreement between the parties.

The terms of this Agreement may not be varied or modified in any manner, except by a subsequent written agreement executed by all parties.

The parties can amend this Agreement only by signing a written document.

B. Prepare Documents in a Readable Typeface

To enhance readability, prepare documents in a serif typeface (serif refers to the lines or curves at the top and bottom of a letter) like Times New Roman or Garamond. Avoid using Courier and Arial. Whatever typeface you choose, use at least 12-point font.

A contract prepared in Garamond is readable.

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A contract prepared in Courier
is not.
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Neither is Arial.

C. Use Plenty of White Space

Magazine editors know that the intelligent use of white space pleases the human eye and enhances readability. Use enough white space in your contracts that the reader's eye gets a break from the text. Place this white space strategically throughout the contract to prevent the reader from being overwhelmed by text.

D. Give Your Contract a Title

A contract entitled *Contract* or *Agreement* does not help the reader very much. On the other hand, a contract entitled *Contract for Alarm Services* or *Agreement to Provide Computer Consulting Services* may help the reader understand the contract's purpose.

E. Include a Table of Contents

For contracts more than a few pages long, provide a table of contents.

F. Give Each Section a Clear and Specific Title

Regardless of the length of your contract, provide section titles that clearly and specifically state the subject matter of each section. Meaningful section titles are easy to draft and make the contract more understandable. In other types of legal writing, a well drafted topic sentence fulfills this function. Think of your contract's section headings as a series of topic sentences, or alternatively as a roadmap through the contract. Here are some examples of good section headings:

How to Provide Notice

The Law Governing This Agreement

How to Amend this Agreement

What We Can Do If You Default

G. Provide an Introduction That Explains the Contract

In addition to a good title and descriptive section headings, provide an introductory statement that helps the reader understand the purpose of the contract.

This contract specifies the terms on which CenterCorp will provide alarm monitoring services to Smith's Widgets.

H. The Strategic Use of Bullet Points

Bullet points are a remarkable tool both to enhance clarity and for persuasion. They are an excellent way to present any type of list, so long as the listed items have no rank order. To avoid adding more numbers to a contract, use bullet points when listing items that do not have a rank order.

I. Avoid Underlining and All-Capital Letters

The use of all capital letters is distracting and makes type very difficult to read. While lower case letters have distinctive shapes, most fonts do not include those individual characteristics for capital letters, meaning the capital letters have a uniform shape and appearance that renders them inherently difficult to read. Similarly, underlining – a holdover from the days of typewriters – fails to provide sufficient emphasis for critical contract terms and often looks unnatural. ***To add emphasis, use italics or boldface type.***

J. The Top Ten Things *Not* to Say in Contracts

Here are some other common words and phrases that should be excised from contracts:

Prior to. *Prior to* is a longwinded way of saying *before*. Just say *before*. *Prior to* leads to other clunky phrasing (as in *prior to commencement of the option period* – instead of *before the option period begins*).

Shall. Once upon a time, lawyers were taught that *shall* was a legal term of art imposing a mandatory duty. Whether that ever was true, it certainly isn't now. Lawyers routinely use *shall* to mean all sorts of different things, including *is* (*There shall be no right of appeal from the county court at law*) and *may* (*No floor supervisor shall investigate or resolve any complaint of harassment by a subordinate employee*). Where a contract calls for required action, use *must* instead of *shall*. It sounds more natural and leaves no doubt as to its mandatory effect.

Now, therefore, in consideration of the foregoing and the mutual covenants and promises herein, the receipt and sufficiency of which are hereby acknowledged. This commonly used phrase causes a ordinary reader's eyes to glaze over, and adds nothing to the contract. A good contract specifies each party's consideration, making

this clause redundant. If the contract fails to specify the consideration, this vague clause will not suffice to do so.

The parties agree. Isn't the whole point of a contract that the parties agree to all the terms?

The parties expressly agree. By specifying certain terms that the parties "expressly agree" about, this language implies the parties do not expressly agree about all the other terms.

Unless otherwise agreed. If this language refers to other potentially contradictory language in the contract, that other language should be specified. If it refers to contemplated amendments, it is unnecessary and probably confusing, so long as the contract specifies its amendment process.

Hereby. This word never serves any legitimate function, and clutters otherwise sound legal writing.

Wherefore. Let me introduce you to hereby's more annoying cousin.

Notwithstanding anything in this contract to the contrary. This provision serves only to confuse the reader. A well written contract should not have inconsistencies necessitating this language. If two provisions may be interpreted inconsistently and this cannot be avoided, the better practice is to explain the apparent inconsistency and how it should be resolved.

In witness hereof, the parties have caused this contract to be executed by their duly authorized representatives. This is another common phrase without any real meaning.

III. WRITING TO PERSUADE

A. Strong Introductions – Starting Well

Good writing includes a strong introduction. An introduction serves several purposes. First and foremost, it hooks the reader. An introduction piques the reader's interest and invites further reading. Mystery novelist Elmore Leonard is a master of the understated yet compelling introduction. Consider the opening paragraph from one of his recent novels:

> Late afternoon Chloe and Kelly were having cocktails at the Rattlesnake Club, the two seated on the far side of the dining room by themselves: Chloe talking, Kelly listening, Chloe trying to get Kelly to help her entertain Anthony Paradiso, an eighty-four-year-old guy who was paying her five thousand a week to be his girlfriend.[8]

This introduction hooks the reader, who wants to know more about Chloe's sordid arrangement with her sugar daddy. There is an important lesson here for lawyers. Most lawyers who use introductions focus on *issues*. The Leonard approach focuses on *people*; issues would be set forth only in the context of their impact on people. All of us – even judges – are more likely to be interested in people facing problems than in abstract legal issues. An introduction that presents the primary players in a compelling light is particularly effective:

> "Joseph Burke got it on Guadalcanal, at Bloody Ridge, five .25 slugs from a Jap light machine gun, stitched across him in a neatly punctuated line."[9]

Here is the introduction to a summary judgment brief filed on behalf of the American Civil Liberties Union in a First Amendment case involving the petition clause, in which we hoped to hook a rural Texas judge right away:

> On July 18, 1833, Stephen F. Austin arrived in Mexico City bearing a petition for reforms relating to grievances asserted by the residents of what is now Texas. For this audacity in petitioning his government, Austin spent more than a year in prison. Whoville City Council Member Cindy Simple apparently takes a similarly dim view of the petition right. While John Smith has not been imprisoned, he has - solely for exercising his constitutional right to petition his government - been haled into court and forced to defend this SLAPP (strategic lawsuit against public participation).
>
> Mr. Smith is entitled to summary judgment because the communications at issue sought redress of grievances from elected government officials and therefore are protected by the Petition Clauses of the United States and Texas Constitutions. Permitting this SLAPP to proceed would threaten fundamental constitutional liberties: "Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined."[10]

Sometimes, an introduction begins with a single line so interesting or compelling that it commands the reader's attention. Quintin Jardine, Scottish author of the Inspector Skinner series so popular in the United Kingdom, often begins his novels with single sentences so interesting the reader cannot help but continue:

> Panic was etched on the face of the clown on the unicycle.[11]
>
> As a city, Edinburgh is a two-faced bitch.[12]
>
> It was only a small scream.[13]

Here is an example of the eye-catching opening sentence from another of Spenser's cases:

> The office of the university president looked like the front parlor of a successful Victorian whorehouse. Bradford W. Forbes, the president . . . was telling me about the sensitive nature of a college president's job, and there was apparently a lot to say about it. I'd been there twenty minutes and my eyes were beginning to cross. I wondered if I should tell him his office looked like a whorehouse. I decided not to.[14]

In a recent case involving an attorney who sold real property to our clients under a contract for deed but failed to follow the new property code provisions governing executory contracts, we began our clients' summary judgment motion with the following line:

> "Stanley Jones is an attorney who refuses to follow the law."

Perhaps my all-time favorite introduction to a legal brief, cited by Bryan Garner, is this opening paragraph of the shareholders' brief in a complex takeover case: "NL Industries is owned by its shareholders. The board of directors works for them. The shareholders want to sell their stock to Harold Simmons. The board won't let them." [15] This introduction is wonderful. It focuses on people, explains their problem, and points the reader toward a conclusion.

A strong introduction to a legal motion or brief provides a glimpse of the most important legal issues in the case. These should be woven into your client's story. Good introductions frame the issues so their resolution is clear to the reader. This is

done by framing the issues so the reader is compelled to reach the result you seek without being asked to do so.

Sometimes, an attorney must be creative in crafting an introduction. Several years ago, I represented a retired couple being sued on an account. The couple retired after selling a successful fabrication business to their son, who promptly ran it into bankruptcy. One of the son's unpaid creditors, who also did business with the company prior to the sale, sued the couple. This creditor sued the couple because the son was bankrupt and the parents had money. The parents were entitled to summary judgment and this would be fairly evident to any judge willing to read a five-page brief. The goals of our introduction were to persuade the judge to read the remainder of the brief – in other words, to get the judge's attention – and to make clear that the wrong people were being sued. In preparing the brief, I remembered a motion hearing during which the judge questioned me about a murder case in Dallas that I worked on for a brief time. The judge was fascinated by the case. The introduction to our brief joined the judge's interest in true crime with our desire to show the creditor's motive for suing our clients:

> The murder of Marilyn Reese Sheppard, found beaten to death in her home on July 4, 1954, was the most reported and sensational crime of the 1950's. During his closing argument en route to winning an acquittal at the retrial of Dr. Sam Sheppard, criminal defense attorney F. Lee Bailey described the myopic police investigation that resulted in the conviction and imprisonment of an innocent man:
>
> In my closing argument, I compared the State of Ohio to a woman who was poking around in the gutter beneath a street light. When a passerby asked what she was doing, she said she was looking for a dollar bill she had dropped fifty feet away. "Then why aren't you looking over there? asked the passerby. "Because," she replied, "the light is better over here."
>
> ABC Services filed this breach of contract case to collect a commercial account. The services at issue were ordered and received by TinMan Fabricating, which failed to pay for them. Rather than suing TinMan –which is insolvent and bereft of assets – ABC sued Nick and Nora Nelson, a married couple whose business assets were sold to, and later reacquired through foreclosure from, the founders of TinMan. Instead of suing the company that ordered the services and is obliged to pay for them, ABC chose to sue the Nelsons – presumably because "the light is better over here" (meaning the Nelsons can satisfy a judgment).
>
> In a different era, ABC might have pursued the Nelsons under the de facto merger doctrine, enmeshing the court in a protracted and arduous analysis of the Nelsons' business relationship with TinMan. In 1979, however, the Texas Legislature precluded the types of claims alleged by ABC in this lawsuit when it amended the Business Corporation Act to preclude successor liability in the absence of express assumption. Because the Nelsons did not:
> order or authorize anyone to order the services, receive the services, have any involvement in TinMan,
> give any indication they would pay for the services, or
> expressly assume any of TinMan's liabilities upon acquiring that company's assets,
>
> they are not liable for payment of the account. ABC must look for its money where it was lost, not where "the light is better." The Nelsons are entitled to summary judgment.

This introduction worked better than we possibly could have imagined. Not only was it clear at the hearing that the judge read our entire brief, the judge actually referred to the better light analogy during argument! Opposing counsel began his argument by telling the judge that summary judgment was not appropriate "despite the excellent brief" we filed. The judge granted our clients' summary judgment motion.

Drafting an introduction is a good way to focus your briefing in a case. When there are several complex issues in a case, drafting the introduction first necessarily forces you to decide what facts and arguments really are important. Having to compress four pages of facts and ten or twenty pages of argument into four or five sentences usually shows you what matters!

Introductions are also effective in shorter motions. The next time you file a motion for continuance, consider replacing:

Plaintiff John Smith files this Motion for Continuance, and would respectfully show as follows . . . .

with:

John Smith seeks a continuance due to non-elective surgery he is scheduled to undergo on the day of trial.

By reading the first sentence of your motion, the court will know what you seek, and why.

B. Strong Conclusions – Finishing Well

A particularly puzzling aspect of legal writing is the tendency of some lawyers to write an outstanding motion or brief – complete with strong introduction, well-crafted paragraphs, and persuasive arguments – and then end it with a conclusion that says something like "Wherefore, premises considered, plaintiff prays that this motion be granted in its entirety." Talk about ending with a whimper! A strong conclusion is nearly as important as a strong introduction. It is your opportunity to provide a compelling summary of your argument and leave the reader thinking about your principal points. Stuart Woods did a great job ending his early novels. In ending a book about a middle-aged man recounting his youthful adventures with a married couple, and the tragic death of the wife, Annie, he concludes:

> "The years have passed, and all this has remained fresh with me. I think of Mark often. I cannot bear to think of Annie."[16]

This ending is perfect – poetic, appropriate, abrupt, and emotional without being sentimental. What is its focus? It does not refer to any of the thrilling events of the novel. Instead, it focuses solely on *people*. Again, *people* are compelling.

A conclusion should describe the specific relief you seek, tie it to the people you represent, set forth the most compelling reason it should be granted, and leave the reader thinking. Here is the conclusion from our summary judgment motion involving the parents being sued for their son's obligation:

> The Business Corporation Act precludes successor liability in the absence of express assumption. Because the Nelsons did not expressly assume any of TinMan's liabilities, and because they neither purchased nor received the services at issue, they are not obliged to pay for them or spend any more money defending this lawsuit. The Nelsons are entitled to summary judgment.

This conclusion is brief, but it sets forth the central argument, focuses on the people involved, and tells the court what relief is being sought.

C. Summarize Arguments and Issues

How important are summaries? Well, the Fifth Circuit and the Texas appellate courts require them. Summaries are helpful to appellate judges, and their usefulness probably is even greater to overworked and distracted trial court judges. A summary of the argument or issue should identify the relief requested, the legal principles at issue, and the specific arguments addressed in the brief. A good summary achieves the delicate balance between being thorough and reprinting your entire argument. A summary that states your arguments but does not provide any support for them has limited utility. A summary that essentially copies your entire argument serves little purpose. Useful summaries are short, yet set forth the critical arguments in support of your key points.

E. Use Tables for Lengthy Briefs

Tables of contents and authorities are useful tools for judges and should be provided in any motion or brief longer than ten pages. There is a reason these tables are required for appellate briefs – judges and their clerks use them.

F. Use Headers

Headers, particularly in the argument section of a brief, are powerful summaries and a useful roadmap of your position. The ideal header is a one sentence statement in the form of a positive assertion of the argument that follows it, rather than merely a signpost. This header is not very powerful: "The accident photographs." This header is better: "The accident photographs should be excluded because they are hearsay." Using headers throughout your motion or brief will make it more readable, understandable, and persuasive.

G. Literary References

Literary references are a potent persuasive tool and may be useful in calling to the reader's mind the theme of a literary work. For example, a judge's quotation of Shakespeare's *King Lear* ("How sharper than a serpent's tooth it is to have a thankless child") reveals his disdain for adult children who attempted to defraud their mother.[17]

Literary references may be useful in setting an overall theme for a legal brief. In seeking summary judgment on behalf of a SLAPP defendant in a case where the plaintiff's claims violated my client's First Amendment rights as well as any sense of decency, I cited on the cover page a line delivered by Wilford Brimley in the movie *Absence of Malice*: "It ain't legal and worse than that, by God it ain't right." [18] It summed up my feelings about the case and, as it turned out, the judge's opinion as well. A terrific literary reference in any case involving an attempt to distort the meaning of a statute is Humpty Dumpty's classic statement about the meaning of words: "When I use a word, it means just what I choose it to mean . . . ."[19] Could there be a better way to underscore a litigant's distortion of meaning?

Caution is the watchword when using literary references. Sad though it may be, don't assume that judges and lawyers will recognize even major literary references unless you provide a citation. Also, don't overuse literary references. It is easy to pass over the line from being clever and insightful to full-on Niles Crane insufferability.

H. Presenting the Issues

A good brief or motion immediately sets forth the critical issues in the case. In appellate cases, briefing rules often require immediate identification of the issues. Where no rule compels immediate identification of the critical issue, the good legal drafter nevertheless presents that issue through a well-crafted introduction. This simple paragraph introduces the issue in a motion to compel:

Joe Nelson accuses the Smiths of carrying out a complex scheme to defraud him of more than $250,000.00. Mr. Nelson served interrogatories and document requests on the Smiths more than four months ago. The Smiths objected to every interrogatory and have yet to produce a single document. Mr. Nelson seeks to compel responses.

Good issues are hard to find. Generally, good issues:

- are presented at the outset of the motion or brief;
- are presented in short and readable sentences (rather than the old-style single sentence that begins with the word *whether* and continues until rigor mortis sets in);
- include facts sufficient for the reader to understand the issue and how it arose (in other words, focus on the people rather than an abstract legal principle); and
- permit only one possible answer.

Here are examples of issues from appellate briefs that follow this format:

> The underlying lawsuits allege losses to three financial institutions by Smith's legal malpractice in failing to discover conflicts, implement procedures to assure compliance with ethical standards, train and educate lawyers working on financial institution matters in their ethical and professional duties, and assure that those lawyers were adequately supervised. Are these activities "professional services for others" within the meaning of the insuring agreement so that the insurance company has a duty to defend the underlying lawsuits against Smith?[20]
>
> ********
>
> A jury convicted Abel Munoz of illegal entry after deportation. At sentencing, Mr. Munoz objected to the assessment of criminal history points for a prior conviction, claiming his guilty plea in that prior case was entered without benefit of counsel or a valid waiver of rights. The record of the prior case is silent as to representation or waiver. Despite the testimony by Mr. Munoz establishing lack of waiver or counsel, and the absence of any record or other evidence to contradict it, the district court assessed the points. Did the district court violate the sentencing guidelines?[21]
>
> ********
>
> Jane Doe sued ABC Corporation under Title VII. The district court granted ABC's summary judgment motion solely on the basis of after-acquired evidence. May a Title VII claim be adjudicated on the basis of after-acquired evidence?[22]

These introductions to Supreme Court decisions present issues in the context of facts:

Petitioner is a boy who was beaten and permanently injured by his father, with whom he lived. Respondents are social workers and other local officials who received complaints that petitioner was being abused by his father and had reason to believe that was the case, but nonetheless did not act to remove petitioner from his father's custody. Petitioner sues respondents claiming that their failure to act deprived him of his liberty in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. We hold that it did not.[23]

After publicly burning an American flag as a means of

Spell check is a wonderful tool but is no substitute for thorough editing.

> political protest, Gregory Lee Johnson was convicted of desecrating a flag in violation of Texas law. This case presents the question whether his conviction is consistent with the First Amendment. We hold that it is not.[24]

IV. THE NUTS & BOLTS OF LEGAL WRITING

A. Relative Dating

Face it – dates are distracting, interrupting your prose with visual eyesores. Even worse, when someone goes to the trouble of inserting a date into a brief, most of us assume the date is relevant and slow down to try and absorb it. Judges are no different. As Fifth Circuit Judge Jacques Wiener Jr. observed:

"When we judges see a date or a series of dates, or time of day, or day of the week, . . . most of us assume that such information presages something of importance and we start looking for it. But if such detailed information is purely surplus fact and unnecessary minutiae, you do nothing by including it other than to divert our attention or anticipation from what we really should be looking for. In essence, you will have created your own red herring." [25]

Most of the time, the date is irrelevant to any issue in the case and serves only as a serious distraction to the reader. Take, for example, this paragraph in a DTPA case:

> On February 6, 2006, the Millers purchased a house from the Smiths. On February 13, 2006, the Millers discovered a water stain on the wall of their bedroom closet. On February 16, 2006, Foundation Repair Company inspected the home and informed the Millers that it required significant foundation repairs. On March 12, 2006, the Millers paid Foundation Repair the sum of $8,500.00 to perform the necessary repairs.

All the dates are distracting; none of the dates is relevant. A better approach is:

> A week after purchasing a house from the Smiths, Robert and Ann Miller discovered a water stain on the wall of their bedroom closet. Three days later, Foundation Repair Company inspected the home and informed the Millers that it required significant foundation repairs. The following month, the Millers paid Foundation Repair the sum of $8,500.00 to perform the necessary repairs.

An even better approach is:

> After purchasing a house from the Smiths, Robert and Ann Miller discovered a water stain on the wall of their bedroom closet. Foundation Repair Company inspected the home and informed the Millers that it required significant foundation repairs. The Millers paid Foundation Repair the sum of $8,500.00 to perform the necessary repairs.[26]

In most instances, chronology and relative dating are a better approach than actual dates. Of course, dates must be included when they are important, as in cases involving statutes of limitations or other legal issues dependent on actual dates. Even where actual dates are included, however, it is often best to frame them within the chronology. For example:

> The Texas Supreme Court rejected Ms. Smith's application for review on March 1, 2001, triggering the two-year statute of limitations. Ms. Smith filed this lawsuit two weeks prior to expiration of the limitations period, on February 16, 2003.

B. Spell Check (A Dangerous Tool!)

Spell check is a wonderful tool but is no substitute for thorough editing. The dangers of spell check are illustrated by a recent federal criminal pleading in which the government stated its intention to prosecute an alien for "Attempted Aggravated Sexual Assualt of a Chile."[27]

C. Don't Plagiarize

Legal writing culture is citation oriented, meaning it insists that sources of words and ideas be documented. In this environment, pagiarism is a very real issue. Plagiarism can have severe consequences, including a lawyer's loss of credibility and professional standing.

Most plagiarism in legal writing occurs when a lawyer uses the words, whether directly quoted or paraphrased, from a court decision or treatise. This is a tempting technique, since courts and legal scholars often set forth applicable principles clearly and concisely. The pride of a well written brief, however, will give way to humiliation if opposing counsel or the judge discovers that a source is quoted or paraphrased without attribution. In *Iowa Supreme Court Board of Professional Ethics v. Conduct & Lane*, Lane copied almost twenty pages of published work into a brief and then requested an award of $16,000.00 in legal fees for preparing it.[28] When a magistrate discovered that Lane had taken the pages verbatim from a treatise, the Iowa Supreme Court concluded that Lane plagiarized the brief and suspended him from the practice of law for six months.[29]

When borrowing from form books, other briefs, or court decisions, it is appropriate to borrow language so long as it is tailored and applied to the specific case. Treatises and articles, however, should not be used without attribution.

Like other writers, attorneys must take care for ethical and practical reasons not to plagiarize.

D. "A Few Too Many Words"

Salieri said it best in *Amadeus*: "A few too many notes."[30] Though probably an unfair criticism of Mozart, it remains an accurate assessment of most legal writing. Lawyers use too many words.

To improve your writing, review each draft with an eye toward cutting needless words. Be relentless in hacking unnecessary words from your writing. Shorten sentences. Simplify language. Cut, cut, cut. Spenser, Robert B. Parker's literate detective, speaks in simple yet descriptive sentences:

> It was a late May morning in Boston. I had coffee. I was sitting in my swivel chair, with my feet up, looking out my window at the Back Bay. The lights were on in my office. Outside, the temperature was 53. The sky was low and gray. There was no rain yet, but the air was swollen with it, and I know it would come.[31]

One source of clutter in legal writing is the overuse of certain customary phrases. If you find any of the following phrases in your writing, eliminate them:

- It is Smith's position that . . . .
- We respectfully suggest that . . . .

- It would be helpful to remember that . . . .
- It should be noted that . . . .
- It should not be forgotten that . . . .
- It is important to note that . . . .
- It is apparent that . . . .
- It would appear that . . . .
- It is interesting to note that . . . .
- It is beyond dispute . . . .
- It is clear that . . . .
- Be it remembered that . . . .
- Some additional phrases used by lawyers, and more efficient alternatives, are:
- during the time that/while
- for the period of /for
- as to/about
- the question as to whether/whether
- until such time as/until
- the particular individual/[Name]
- despite the fact that/although
- because of the fact that/because
- in some instances/sometimes
- by means of/by
- for the purpose of/to
- in accordance with/under
- in favor of/for
- in order to/to
- in relation to/about
- in the event that/if
- prior to/before
- subsequent to/after
- pursuant to/under[32]

Another way to pare your writing is to avoid using *provided that*. In addition to cluttering your writing, the phrase usually signals failure to think through what you want to say. Rather than weaving the additional matter into your original statement, you just added the words *provided that* to the end of the sentence. Consider the following sentence:

> "Any expert witness may testify, provided that the expert has been properly designated."

With better planning – or editing – it becomes:

> "Any properly designated expert witness may testify. "

E. Names, Not Party Designations

We know that people, rather than issues, are compelling. Why, then, would an attorney ever detract from the power of a brief by referring to the client as *plaintiff*, *defendant*, *petitioner*, or *respondent*? Novelists certainly don't do this. Consider the following passage from Spenser's case files:

> I drove the side of my right fist into his windpipe as hard as I could and brought my forearm around and hit Zachary along the jawline. He gasped. Then Hawk was behind Zachary and kicked him in the side of his back. He bent back, half turned, and Hawk hit him a rolling, lunging right hand on the jaw, and Zachary loosened his grip on me and his knees buckled and he fell forward on his face on the ground. I stepped out of the way as he fell.[33]

Now read the same passage written in the style of some lawyers:

> Petitioner drove the side of his right fist into respondent's windpipe as hard as petitioner could and brought his forearm around and hit respondent along the jawline. Respondent gasped. Then intervenor was behind respondent and kicked respondent in the side of respondent's back. Respondent bent back, half turned, and intervenor hit respondent a rolling, lunging right hand on the jaw, and respondent loosened his grip on petitioner and respondent's knees buckled and he fell forward on his face on the ground. Petitioner stepped out of the way as respondent fell.

Yuck. When the human element of the narrative is removed, it ceases to be compelling.

There are two significant exceptions to the rule against using party designations. First, use of party designations may be advisable where the opposing party is sympathetic in comparison to your client. For example, I used party designations in defending a recent child molestation case on behalf of a Dallas church. In that case, *plaintiff* seemed a lot better for my client than *Sally*. Second, party designations are helpful in cases involving multiple parties where confusion might otherwise result. Other than these situations, it is best to use names rather than designations.

F. To Cap or Not to Cap – Parties

Puzzling as it is, many attorneys engage in the maddening practice of capitalizing party designations like Plaintiff and Defendant. As noted in the preceding section, the better practice is to use the parties' names rather than their party designations. If you must use party designations, don't capitalize them. There is no compelling reason to do so, and it distracts those of us who know it. Among the authorities supporting this viewpoint are two of the leading guides to legal writing, and the Supreme Court:

> "Briefly, plaintiff seeks to recover for personal injuries . . . ."[34]
>
> "On January 15, 1979, appellant filed a charge with the Equal Employment Opportunity Commission . . . ."[35]
>
> "Louisiana infringed appellant's rights of free speech and free assembly by convicting him under this statute . . . ."[36]

During my first year as an associate, our partners assigned me the task of researching whether party designations should be capitalized and preparing a summary of my research. While they found my citation of legal writing authorities persuasive, the decisive factor in their decision was my discovery that Justice Cardozo did not capitalize those designations. For our partners, Justice Cardozo's word decided the matter.

G. Mr./Ms. or Last Names

This is one where Mr. Garner and I part ways. He advises legal writers to use last names alone:

> Legal writers seem to fear that, when referring to parties, they're being impolite if they don't consistently use *Mr.*, *Ms.*, or some other courtesy title. Actually, though, they're simply creating a brisker, more matter-of-fact style. Journalists aren't being rude when they do this, and neither are you.[37]

While recognizing Mr. Garner's superior expertise on writing, I disagree with his assessment of courtesy. Journalists face space limitations necessitating their use of only last names (in his excellent argument in favor of the serial comma, Mr. Garner points out that space limitations affect journalistic style). Lawyers do not have the same concern. Lawyers do, however, work in a profession losing even the pretense of civility. The use of *Mr.* or *Ms.* restores a small bit of this civility to the legal profession.

In debating the issue, I am reminded of George Washington.

The most towering figure in American history, and a man known throughout the world as a great gentleman, Washington refused during the Revolutionary War to accept letters from General Howe addressed to "Mr. George Washington" or "George Washington, Esq." because they did not contain his rank of general. One can only imagine his reaction to a letter addressed simply to "Washington."

Perhaps the Texan in me causes me to feel this way. This much I know: my grandfather, who came to Texas during the 1890's, would never have approved of referring to any person – and certainly never a woman – solely by last name. I am not sure that a different approach constitutes progress.

On the subject of names, please avoid the peculiar practice of many attorneys who feel the need to tell us that Smith is shorthand for Smith:

> "Plaintiff John Smith ("Smith") petitions the court for relief . . . ."

If the reader cannot figure out that Smith means Smith, good luck with the rest of your argument.

H. Avoid Be-Verbs

Verbs move the action. Consequently, good writers try to avoid using forms of *to be*, the so-called be-verbs, including is, am, was, were, will be, and have been. These verbs undermine the power of your writing and put readers to sleep.

Be-verbs destroy impact and sap strength from sentences. Infusing writing with stronger verbs improves language and increases the reader's interest. It also creates a more compelling story or argument. Simply put, verbs matter more to our writing than any other category of words. Using strong verbs amounts to injecting your writing with performance-enhancing words. Here is a sentence with the dreaded be-verb: *The petitioner will be granted certiorari by the Supreme Court.* Now, here is the same sentence without the be-verb: *The Supreme Court will grant certiorari in the case.* The first sentence is sluggish compared to the second. The more effective sentence makes the subject (in this case, the Supreme Court) perform the action – *The Supreme Court will grant*.

Employing "be-verbs" is not entirely off limits. If a subject does not need to be identified, for example, it is not necessary to use action verbs. To increase your writing efficiency, however, limit "be-verbs" to about a quarter of your sentences.

I. State a Rule, Give an Example

Legal writing is the process of presenting rules and explaining their application. Stating a rule without providing an example of its application to facts leaves the job half-done. When presenting and applying a rule, most lawyers first present the rule and then apply it to the facts of their case. Many times, an intermediate step – presenting an example of the rule in action –improves the argument. Consider an argument concerning assumption of risk in athletics:

> Students who participate in sports assume risks inherent to the activity.[38] Tommy Jones did not assume the risk of tripping over debris in the end zone because that debris is not inherent to football.

This argument improves when an example is inserted between the general rule and its application:

> Students who participate in sports assume risks inherent to the activity.[39] A student who is injured in an awkward fall while learning a jump roll in karate class has assumed an inherent risk, while a student who trips over a torn tennis court divider has not. Falling is inherent to karate jump rolls, while torn nets are not inherent to tennis. Tommy Jones did not assume the risk of tripping over debris left in the end zone of the football field because that debris – like the torn tennis net – is not inherent to the game.[40]

In presenting a rule – particularly a complex rule – provide an example of the rule before applying it to your case.

J. Provide Determinative Facts

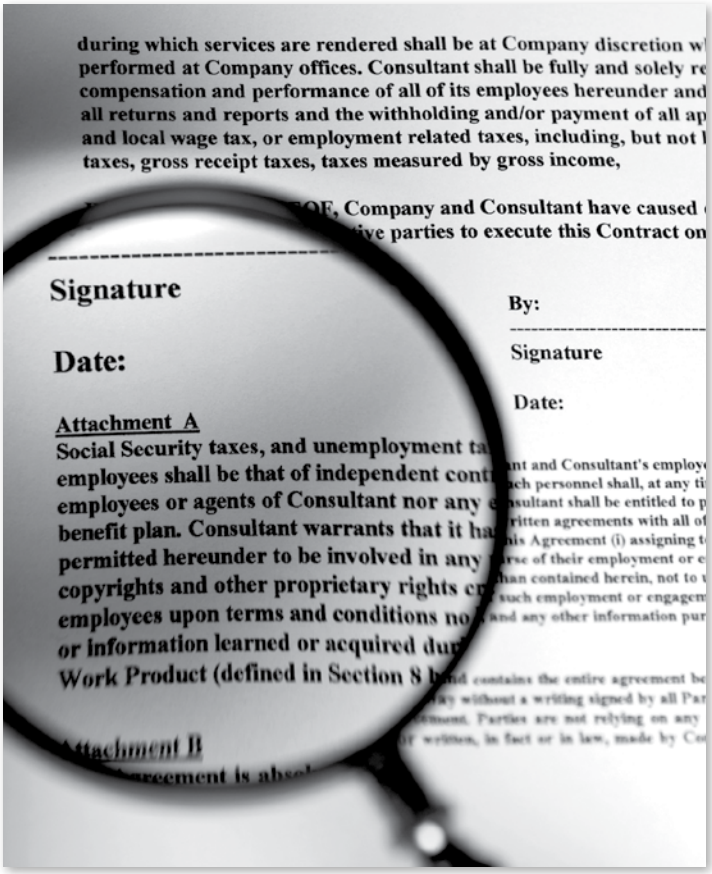
Provide the determinative facts when discussing important cases. Attorneys are so focused on the rules established by cases that they sometimes forget to describe the facts that led to those rules. Whether relying on a case or distinguishing it, providing the critical facts that led to the holding helps judges understand it. Provide those facts that related directly to the holding, with an eye toward providing only that level of detail necessary to secure a complete understanding of the holding.

K. Tell A Good Story, or Any Story

Much of the advice in this paper relates to storytelling. These techniques are designed to help the legal writer tell a better story. The statement of facts in a motion or brief should be a compelling story. The most compelling way to tell a story usually is in chronological order, by providing the facts in the order they happened.

There are rare exceptions when chronology is not the most persuasive way to tell a story. In a recent Supreme Court petition, my client argued that the Fifth Circuit resolved fact issues in affirming summary judgment for an employer in a discrimination case despite the Supreme Court's previous admonition in a similar case not to do so. To emphasize the critical fact issues in the case, we presented alternate versions of certain facts:

> D. *Toycom "Eliminates" the RTV Lead Position*
>
> Ms. Johnson's Version: Only two weeks after demoting Ms. Johnson, Toycom informed her it was eliminating the position of RTV Lead altogether and the company reduced the pay of both Ms. Johnson and Ms. Smith. The very next day, however, Ms. Smith received a pay raise from Toycom. Ms. Smith received another pay raise when she became the RTV Clerk/Trainer, a newly created position with the same duties as the previously "eliminated" RTV Lead position. Toycom managers could not agree about why the position was eliminated just weeks after the demotion of Ms. Johnson and promotion of Ms. Smith. Ms. Johnson remained a clerk until being terminated by Toycom on June 18, 2003. The demotion from RTV Lead to clerk substantially altered Ms. Johnson's job duties and authority, as well as her salary.
>
> Toycom's Version: Toycom made a business decision (based upon transfer of certain functions from the RTV Department to a different department) that it did not require any RTV Leads. Ms. Johnson and Ms. Smith were both demoted to clerk, with an attendant salary reduction. The day after her demotion, Ms. Smith was given a merit pay increase as a result of her regularly scheduled performance review. Between January of 2003 and mid-2004, Toycom did not have any RTV Leads.
>
> The Critical Fact Issue: The parties differ sharply over whether Toycom ever eliminated the RTV Lead position. Ms. Johnson believes that Toycom realized it could not demote her legally, hatched a plot to eliminate the position only in name, created an equivalent position



to award to Ms. Smith, and then lied about what its scheme.

This type of narrative is compelling when you want to highlight fact disputes. Most of the time, however, a chronological narrative is the best way to tell a story.

L. Creating Strong Paragraphs

Once upon a time, most of us had a high school teacher who instructed us to use topic sentences. Good advice. The first sentence of an effective paragraph expresses the focus of that paragraph. In legal writing, the topic sentence provides the reader with a summary of the argument contained in that paragraph. It also assists overworked judges trying to skim a brief before a hearing. Strong topic sentences permit judges to read only the beginning portion of each paragraph and still grasp the issues.

Backward though it may seem, many lawyers to do the exact opposite of what I am counseling – they fall into the habit of placing topic sentences at the end of paragraphs. This is most common in paragraphs discussing court decisions. Here is an example of this writing mistake:

> In *Smith v. Jones*, 000 S.W.0d 0 (Tex. 0000), the Texas Supreme Court held that "evidence of a prior sexual molestation conviction may not be admitted to show that molestation in the present case took place." *Id.* at 00. The court went on, however, to state that such evidence "may be admitted for the purpose of establishing other facts, such as absence of mistake, motive, plan, or preparation." *Id.* Thus, evidence of Johnson's prior conviction is admissible to disprove his defense of mistake.

Aargh. The reader must complete the paragraph before discovering its principal point. Even worse, the case is cited without any immediate clue about its importance. A judge reading this paragraph could better analyze the import of the case if the topic sentence was at the beginning – rather than the end – of the paragraph (like Mr. Bonikowske taught me in the tenth grade!). Here is the same paragraph, rewritten to help the reader:

> Evidence of Johnson's prior conviction is admissible to disprove his defense of mistake. In *Smith v. Jones*, 000 S.W.0d 0 (Tex. 0000), the Texas Supreme Court held that "evidence of a prior sexual molestation conviction may not be admitted to show that molestation in the present case took place." *Id.* at 00. The court went on, however, to state that such evidence "may be admitted for the purpose of establishing other facts, such as absence of mistake, motive, plan, or preparation." *Id.* Thus, Johnson's prior conviction is admissible under *Smith*.

Now the reader understands the point of the paragraph and case citation upon reading the first sentence. Good topic sentences make your writing more readable and persuasive.

M. Creating Strong Sentences

Short sentences transform prose. Lengthy sentences are a common element of most poorly written motions and briefs. Your goal should be an average sentence length of fewer than twenty words. Remember to vary your sentence length. Some sentences should be longer, others shorter, but twenty words or less is a good average.

Uncomplicated sentences are particularly important to express complicated ideas. The more complex the idea, the shorter and simpler the sentences presenting it should be.

N. Eliminate Legalese

One sure way to undermine the power of your writing is to use legalese. All of us know this rule, and all of us break it (or stand mute while others do). We obligate our clients to *agree and covenant* not to do certain things, as though agreeing without covenanting somehow is not enough. We seek *any and all* documents, *bind and obligate* parties, demand that others *cease and desist*, help our clients *give, devise, and bequeath* their belongings, and declare contracts *null and void*. Sometimes these outdated terms of art are actually necessary, but only rarely. Most of the time, a single word will perform the work of these phrases. Similarly, is there really any reason to use words like *aforementioned*, *herein, hereinabove, inter alia, arguendo, hereinafter*, or *wherefore*? These are grand words on the Scrabble board and at the Renaissance Faire, but not in your motions and briefs.

O. Write in English

Latin is legalese's insufferable cousin. Avoid writing in any foreign language (except of course, when practicing law in the jurisdictions where they are spoken). The principal benefits of writing in English are (1) being understood and (2) avoiding sounding like a pretentious jackass. A side benefit is avoiding the "marvelous capacity of a Latin phrase to serve as a substitute for reasoning."[41] Impress your friends at cocktail parties with your command of Latin. Write in English.

P. Active, Not Passive

Many lawyers use the passive voice without realizing the damage it does to their writing. With the passive voice, the subject of the clause does not perform the action of the verb. A classic example of a passive sentence is: *The deadline was missed by Mr. Jones.* The same sentence in active voice would read: *Mr. Jones missed the deadline.* The passive voice is weak and often

ambiguous. Instead of saying that an actor acted, you say that an action was taken, meaning the reader might not realize who acted.

Lawyers who write strong, persuasive, and effective sentences avoid the passive voice. The passive voice adds unnecessary words, muddles writing, and undermines clarity.

Examples of passive phrases include:
Is dismissed
Are docketed
Was vacated
Were reversed
Been filed
Being affirmed
Be sanctioned
Am honored
Got paid

The passive voice is acceptable in certain situations, such as when the actor cannot be identified or is unimportant. Use the passive voice when the active might alter what you want to say. On the whole, however, avoiding the passive voice saves words, promotes clarity, and animates your style. You will snatch and hold the reader's attention with clear, assertive sentences.

Q. Using However

You should not begin a sentence with however. You may, however, move it inside the sentence.

R. The Important Case of That v. Which

Confusion regarding the use of these words abounds. Much of the time when *which* is used, it should be *that* instead. The result of this confusion is misuse of both words, causing ambiguity. The best way to remember when to use these words is to understand that *that* is restrictive, while *which* is nonrestrictive. Remembering this simple rule will, at least most of the time, permit you to use *that* and *which* properly. The real mistake most writers make is to use *which* restrictively. So long as you remain vigilant in avoiding the restrictive *which*, you should be fine.

S. Not Sexist, But Not Awkward Either

Avoid sexist language. It offends some judges and lawyers and can be removed painlessly most of the time. The most effective way to remove sexist language is to reword your sentences to avoid it. Consider the following sentence: *The fiduciary duty an attorney owes to his client is one of the highest recognized by Texas law.* Some lawyers would rewrite the sentence to read as follows: *The fiduciary duty an attorney owes to his or her client is one of the highest recognized by Texas law.* How awkward! Rewrite the sentence to refer specifically to the litigants: *As the Wrays' attorney, Mr. Smith owed to them one of the highest fiduciary duties recognized by Texas law.* Alternatively, use an article instead of the pronoun: *An attorney's fiduciary duty to the client is one of the highest recognized by Texas law.*

You can rewrite most sentences easily to avoid sexist language. The sentence, "Communications between a physician and his patient are protected from discovery," becomes, "Physician-patient communications are protected from discovery."

While it may take some effort, rooting out sexist language is worth it.

T. Using the Dash – For Emphasis

Dashes highlight important phrases within your sentences. They are superior in this regard to commas and parentheses. Once you start using the dash this way, your use of commas will diminish and your use of parentheses will almost disappear. Dashes can be used both for interruptive phrases and for emphasis near the end of a sentence.

Here are some examples of dashes from actual briefs used this way:

> The Smiths paid the note–in full.
>
> The memorandum–which contained false information about Mayor Smith–was an attempt to obtain government action.
>
> Judge Benavide–in attempting to find some basis for Smith's decisions during voir dire–was being kind.

John Grisham, the best-selling legal writer of all time, uses the dash for interruptive phrases in his books:

> "Rabbits, squirrels, skunks, possums, raccoons, a million birds, a frightening assortment of green and black snakes–all nonpoisonous I was reassured–and dozens of cats. But no dogs."[42]

Spenser also uses the dash both for emphasis and interruptive phrases:

> "It is a matter of the utmost delicacy, Mr. Spenser"–he was looking at himself in the glass again–" requiring restraint, sensitivity, circumspection, and a high degree of professionalism."[43]
>
> "Her hair was loose and long. She wore a short-sleeved blouse, a skirt, no socks, and a pair of loafers. I looked at her arm–no tracks. One point for our side; she wasn't shooting."[44]

The most famous use of the dash for an interruptive phrase in American history – and perhaps the most compelling – is Abraham Lincoln's use in the Gettysburg Address:

> "Now we are engaged in a great civil war, testing whether than nation – or any nation, so conceived and so dedicated – can long endure."[45]

U. Quotation Marks

The misused quotation mark is inescapable in American society. My son and I pass a church sign each morning on the way to school that states:

ACADEMY NOW "ENROLLING"

Despite an entire year of trying, we have yet to figure out what it means. Our local driver's education school engages in the curious but common practice of using quotation marks to emphasize key words, along these lines:

> It is imperative that "any" student who wishes to take the driving test bring "all" forms of requested identification, and each student "must" pay the testing fee. There are "no" exceptions.

An entire page of this actually made my eyes hurt. The misused quotation mark is so common that there is an episode of *Friends* devoted in part to Joey's inability to understand how quotation marks are used!

Quotation marks should be used when you are quoting someone, when you are referring to a word (as in, *the Legislature's use in the statute of the word "the" denotes an intent to signal a particular class*), and when you are pointing out that a word or phrase is being misused (as in, *Smith's classification of a giraffe as a "farm animal" flies in the face of a century of caselaw, not to mention common sense*). Other than that, avoid the use of quotation marks. "Really."

V. Persuasion with a Bullet

Bullets are a remarkable persuasive tool. They are an excellent way to present any type of list, including the elements of a cause

Many lawyers make the critical mistake of avoiding counterarguments or relegating them to the very end of a brief.

of action. The elements of a claim for breach of contract, for example, are:

- the existence of a valid and enforceable contract,
- breach, and
- proximate cause of
- actual damages.

W. Confront Counter Arguments

Many lawyers make the critical mistake of avoiding counterarguments or relegating them to the very end of a brief. Good legal writers confront counterarguments directly and without hesitation. Sound argumentation requires not only the construction of your argument but also the refutation of opposing arguments.

The best way to overcome opposing arguments is to weave them into your argument. Begin your argument by joining the law and facts necessary to support it, and then build to your principal conclusion. Then, enunciate the strongest possible counterargument and refute it. Repeat this process for each credible or likely counterargument. Finally, return to your principal argument and conclude it. In refuting counterarguments, devote as little time as possible to presenting the counterargument (you do not, after all, wish to highlight your opponent's arguments) and focus your efforts on refuting it. By this process, you will both support your argument and deal directly with the opposing arguments.

X. Serial Commas/Using Commas

Could there be a more important issue facing this nation than the ongoing dispute over the serial comma, known abroad as the Oxford comma (those British have a different word for everything!)? Some, Mr. Garner chief among them, are adamant about its use. Others, including Lynne Truss of *Eats Shoots and Leaves* fame, counsel flexibility.

Ms. Truss, incidentally, is the author of the greatest rule ever written about commas: *Don't use commas like a stupid person*.[46] Well said and worth saying again in big scary letters:
DON'T USE COMMAS LIKE A STUPID PERSON

The comma is the most overused, misunderstood mark in the English language. Please don't:

- Substitute a comma for the word *and* ("Agent, principal both responsible for defamation);
- Misplace a comma (the classic gun-toting panda who feels compelled to fire into the air because of a dictionary's misplaced comma – he believes a panda actually eats, shoots and leaves);
- Delete a necessary comma ("The captain crawled out of the boat's cabin before it sank and swam to shore");
- Use the gratuitous comma (The plaintiffs, were required to sign sworn statements waiving their DTPA rights);
- Overuse commas, placing them, at every turn, throughout your writing, leaving the reader to navigate, in frustration, what, otherwise, might be compelling prose;
- Use a comma to separate a party designation and name (Plaintiff, John Smith files this motion . . . .).

Of course, some people can get away with breaking all the comma rules. In his farewell address before leaving Springfield after being elected president, Abraham Lincoln relied heavily on commas yet produced compelling prose still praised more than a century later:

> My friends – No one, not in my situation, can appreciate my feeling of sadness at this parting. To this place, and the kindness of these people, I owe every thing. Here I have lived a quarter of a century, and have passed from a young to an old man. Here my children have been born, and one is buried. I now leave, not knowing when, or whether ever, I may return, with a task before me greater than that which rested upon Washington. Without the assistance of the Divine Being, who ever attended him, I cannot succeed. With that assistance I cannot fail. Trusting in Him, who can go with me, and remain with you and be every where for good, let us confidently hope that all will yet be well. To His care commending you, as I hope in your prayers you will commend me, I bid you an affectionate farewell.[47]

Y. To Split or Not to Split

As a first-year associate, I was summoned to our firm's conference room for a meeting with one of the partners. The partner laid before me a lengthy memorandum of my creation and turned to a portion he had highlighted in the middle of my glorious work. He asked me: "Are you aware of the firm's policy toward the split infinitive?" Concealing my astonishment that the firm had a policy on split infinitives, I confessed ignorance. The partner handed me a copy of Fowler's *Modern English Usage*, opened it to the section entitled *Split Infinitive*, and walked out of the room. This is what I learned (other than that our firm took legal writing a bit too seriously):

> "The English-speaking world may be divided into (1) those who neither know nor care what a split infinitive is; (2) those who do not know, but care very much; (3) those who know and condemn; (4) those who know and approve; & (5) those who know and distinguish."[48]

Upon completing the entry, I longed for the time only minutes earlier when I was among what Fowler termed those "happy folk, to be envied by most of the minority classes," who neither know nor care.[49] Alas, from that moment forward, I would be haunted by misgivings and confusion about the dreaded split infinitive.

The preferred class of people – at least according to Fowler – is those who know and distinguish. To summarize, split infinitives should be avoided unless the cure is worse than the disease. In other words, avoid the split infinitive unless doing so renders a sentence horrifically awkward, ambiguous, or patently artificial. Thus, we still avoid the classic *to mortally wound*, preferring instead *to wound mortally*. Captain Kirk and his crew do not undertake *to boldly go*, but instead *to go boldly*. On the other hand, we will probably prefer *our object is to further cement trade relations*, to *our object is further to cement trade relations* (making it unclear whether an additional object or additional cementing is the goal).

The problem is that many readers do not possess breeding sufficient to permit their appreciation of the nuance and beauty of the properly split infinitive, falling instead into the class of those who know and condemn in all cases. Even worse, those

who know and condemn are on the constant lookout for the split infinitive, to point it out and thereby establish their intellectual superiority. At least of a few of these condemners are judges. My constant state of infinitive-paranoia therefore causes me to rephrase sentences at almost any cost to avoid split infinites. You will have to find your own way on this one.

Z. Numbers

Numbers greater than ten should be written as numbers (100), but only words should be used for one through ten. The most important exceptions to this rule are (1) when a passage contains numbers in both categories, in which case only numbers should be used, (2) references to discovery requests or other numbered items, (3) when referring to percentages, where only numbers should be used, and (4) when the number begins a sentence. Finally, don't engage in the puzzling practice of using words and numbers, as in ten (10). Few judges and lawyers will assume that by ten you mean 26.

AA. Referencing Filings

Most lawyers list the entire title of pleadings and discovery instruments when referring to them:

> "After filing Plaintiff's Original Petition, plaintiff served Plaintiff's First Set of Interrogatories, Plaintiff's First Requests for Production, and Plaintiff's Requests for Disclosure. When defendant failed to respond, plaintiff filed Plaintiff's Motion to Compel Discovery and for Sanctions. "

This is distracting because it requires the use of capital letters, confusing because it disrupts the narrative flow, and deflating because it interrupts your prose. To avoid these problems, describe a pleading rather than giving its title:

> "After filing this lawsuit, Mr. Smith served requests for production and disclosure, as well as interrogatories, on Good Times. When Good Times did not respond, Mr. Smith sought to compel responses."

If the title must be used, it is best simplified:

> "After filing his petition, Mr. Smith served interrogatories, document requests and disclosure requests on Good Times. When Good Times did not respond, Mr. Smith filed a motion to compel responses."

BB. Modifiers

Misplaced and dangling modifiers are not located properly in relation to the words they modify, leading to ambiguous sentences that sometimes do not mean what the writer intended them to mean. An example of a misplaced modifier would be: *The magazine sat on the bed that Jonathan had read.* Jonathan read the magazine, not the bed. This modifier is misplaced because it is not placed nearest the word it modifies. Another example: *The clerk posted the docket of cases for the lawyers heard that morning.* It should, of course, be: *The clerk posted the docket of cases heard that morning for the lawyers.* Dangling modifiers usually are –ing modifiers not logically connected to the principal part of the sentence: *Walking through the courthouse, the briefcase rubbed against my leg.* The briefcase was, in all likelihood, not walking through the courthouse. Instead, write: *The briefcase rubbed against my leg as I walked through the courthouse.*

Careful editing should resolve misplaced or dangling modifiers, which is important because they are to many readers the written equivalent of nails on a chalk board.

CC. Citing Cases – Joining Law & Fact

Case citations are more persuasive when joined with the facts of a particular case. Many lawyers insist on separating law and fact even though it undermines the power of their argument. Here is an example of legal writing undermined by its separation of law and fact:

A party may protect from discovery the work of an expert witness employed purely for consultation. A party may not, however, continue to protect that consulting expert's work from discovery once it is reviewed by a testifying expert witness.[50]

In this case, Smith's report as a consulting expert witness was later reviewed by Jones, an expert witness who will testify on behalf of Buy-Low at trial. As a result, Buy-Low must produce Smith's report.

These two paragraphs are combined, strengthened, and shortened by joining law and fact:

> Smith's report was not discoverable when Buy-Low was using him purely for consultation. Once Buy-Low showed Smith's report to Jones, however, it became discoverable because Jones is a testifying expert.[51]

While not always possible, joining law and fact in this manner often strengthens the argument and makes it easier for the judge to understand how a legal rule applies in a particular case.

DD. Instant Cases

Coffee is instant. Teenage gratification in American culture is instant. Cases are not instant. Enough said.

EE. Use Consistent Terms

Don't change the way you refer to people and things. Once it is a collision, don't make it an accident then an incident. Once it is an automobile, don't make it a car then a motor vehicle. Once it is Mr. Smith, don't make it Smith then Robert Smith. Be consistent.

FF. Use Transitions

Good writing contains transitions between paragraphs. Refer back to concepts in the previous paragraph to provide a bridge between your thoughts.

GG. Avoid Screaming Adjectives

Rarely will an over-the-top adjective enhance your argument. Consider the following sentence: *The school district's actions are outrageously insensitive and in blatant violation of the First Amendment*. Are regular violations of constitutional rights and normally insensitive actions not enough? These types of adjectives accomplish little other than to undermine your professional standing and credibility.

HH. Eliminate And/Or

Its inherent ambiguity and ugliness aside, the hatred many judges have for this phrase should be enough to persuade you to avoid it. Here is what the Wisconsin Supreme Court had to say about it (and this should convince you!):

> It is manifest that we are confronted with the task of first construing "and/or," that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of someone too lazy or too dull to express his precise meaning, or too dull to know what he did mean . . . .[52]

II. Avoid Repetition

Developing a consistent theme is one thing, but repeating the same sentence throughout a brief is quite another. Too many

lawyers use the same sentence in the introduction, statement of the case, and facts sections, or the summary of the argument, argument, and conclusion. If you feel the need to say the same thing repeatedly, at least vary the language.

V. ETHICAL CONSIDERATIONS

A. Competence – Research

Texas attorneys are required to provide their clients with competent representation.[53] In many – perhaps even most – cases, competent representation of the client requires adequate legal research.

An attorney is expected "to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques."[54] As one court stated: "We recognize that it is unreasonable to expect every attorney . . . to construct arguments as if they were authored by Learned Hand, but a line must be drawn separating adequate from inadequate briefs . . . ."[55]

The reporters are rife with cases in which attorneys failed to perform adequate research.[56] Violation of this rule may constitute an ethical violation.[57] It may also violate federal or state civil procedure rules.[58]

An important part of performing adequate legal research is insuring the cases you cite remain valid law. Several years ago, I represented an employment discrimination plaintiff in federal court. The head of employment litigation for one of the mammoth downtown firms represented the employer. The employer sought summary judgment. A young associate drafted the motion, and the supervising partner signed it. Our summary judgment response pointed out that the principal cases the employer relied upon had been overturned. The federal magistrate began the summary judgment hearing by giving a senior partner of one of the largest law firms in Dallas a stern lecture about cite-checking and supervising associates. There are a lot ways to be humiliated in the practice of law, but having your opponent point out that you are relying on invalid law has to be near the top of the list.

B. Competence – Writing Skill

Competent representation usually requires adequate writing skills. With increasing frequency, courts are recognizing this fact and punishing lawyers who fail to heed it. The Kentucky Supreme Court suspended an attorney from the practice of law for sixty days when he filed a brief that was "little more than fifteen unclear and ungrammatical sentences, slapped together as two pages of unedited text with an unintelligible message."[59] Similarly, the Minnesota Supreme Court publicly reprimanded an attorney and ordered him to attend ten hours of legal writing education programming based on pleadings that were "rendered unintelligible by numerous spelling, grammatical, and typographical errors . . . sufficiently serious that they amounted to incompetent representation."[60] The Vermont Supreme Court also ordered an attorney to obtain instruction to improve his writing as a condition of maintaining his license to practice law.[61]

Sometimes, the cruelest punishment for an attorney's bad writing is the judge's public wrath. Take, for example, Judge Samuel B. Kent of the United States District Court for the Southern District of Texas:

> [T]his case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston . . . .
>
> [A]ttorneys have obviously entered into a secret pact – complete with hats, handshakes and cryptic words – to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court will be so utterly charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed. [62]

In another case, a federal bankruptcy judge entered an "Order Denying Motion for Incomprehensibility," citing by footnote a statement from the movie "Billy Madison," in which a competition judge responds to Billy Madison's answer to a question:

> Mr. Madison, what you've just said is one of the most insanely idiotic things I've ever heard. At no point in your rambling, incoherent response was there anything that could even be considered a rational thought. Everyone in this room is now dumber for having listened to it. I award you no points, and may God have mercy on your soul.

The judge concluded that "[d]eciphering motions like the one presented here wastes valuable chamber staff time and invites this sort of footnote."[63] The Mississippi Supreme Court criticized an attorney for using "legalese instead of English" in an indictment that was "grammatically atrocious." The court used a literary reference when it paraphrased Shakespeare and stated: "It cannot be gainsaid that all the perfumes of Arabia would not eviscerate the grammatical stench emanating from this indictment."[64]

The tenor of legal writing also can give rise to sanctions. An attorney who referred in a pleading to the presiding judge as a "lying incompetent ass-hole," and then wrote that the special judge who replaced that judge would be superior if only he "graduated from the eighth grade" was suspended from the practice of law for sixth months (mercifully, it would seem, for his clients).[65] Similarly, an attorney who referred to opposing counsel as "Nazis" and a "redneck pecker-wood" was reprimanded and ordered to apologize.[66] The moral of these cases is that lawyers need to insure that their writing is competent and – if they believe it may not be – should get help to improve it.

C. Disclosure of Adverse Authority

Attorneys must disclose to the court any authority in the controlling jurisdiction known to the attorney to be directly adverse to the position of the client and not disclosed by opposing counsel. Tex. Disciplinary R. Prof. Conduct 3.03(a)(4) (2005). Legal authority is not limited to case law. It includes administrative rulings, codes, ordinances, regulations, rules, and statutes.[67]

D. Following Court Writing Rules

Following court rules becomes progressively more difficult with each passing year. In the federal system, local rules have proliferated to the point that one sometimes wonders why the federal rules even exist. I was admitted to practice in the Northern District of Texas just after a number of the new discovery rules were enacted. Judge Sanders told me, "Some of us follow all the rules, some of us follow some of the rules, and some of us follow none of the rules – so make sure you read each judge's rules!" Whew. Not to be outdone, many state court judges now have individual rules and standing orders concerning pretrial and trial practice in their courts.

Lawyers ignore court rules concerning writing at their peril. The Texas Supreme Court has dismissed appeals due to failure to follow briefing rules.[68] Attorneys who violate

Judges' top pet peeve is the practice by lawyers of filing briefs just prior to hearings.

briefing rules may also be ordered to pay sanctions.[69]

VI. THE LEGAL WRITING PROCESS

A. The Nike Rule: Just Write It!

As Eugene F. Ware noted: "All glory comes from daring to begin." The problem is how to begin. There is no shortage of advice, much of it contradictory, about the writing process. Some experts insist that the first step to any successful writing project is the old-fashioned outline. Some contend that you should write a rough draft before performing any research. Others counter that the more effective technique is to perform all the research, then prepare a rough draft. Still others advise lawyers to brainstorm and write down all their ideas before beginning the actual brief. There are probably as many effective ways to begin the writing process as there are writers. If a process works for you, use it. If it doesn't, find a new one. You can research, then outline, then write. You can brainstorm, then research, then write. Any combination of these tasks is acceptable so long as it works for you.

Writing ruts are a more persistent and universal problem. All writers get into ruts. There are things you can do to overcome these difficulties. Starting a brief in the middle is effective when you are having trouble beginning a project. Another useful tool is to change scenery. If you are having trouble writing in the office, try the neighborhood Starbucks or bookstore. A simple change of scenery may be enough to kick-start a project (and there is no better place for literary inspiration than the bookstore!).

B. Ruthless Editing

To call someone a great legal writer really is to say that person is a great legal editor. Great writing results from sustained and thorough editing.

The first and most important editor of your writing is you. Edit your work relentlessly and savagely, striking every unnecessary word. While editing your work, you should:

have the Blue Book close at hand and pay careful attention to citation forms;

proofread the final product – never assume that prior edits were made;

let the finished product sit for a day or two, then come back to it for a final read.

Once you are relatively satisfied with your work, seek editing input from others. These others may be lawyers, but need not be – my mother is my best editor (of course, it helps that she actually was an editor!).

Committed editing means numerous drafts. Good writers write, rewrite, and rewrite again almost the point of being unable to stand looking at the work. One of the very best ways to edit your writing is to read it aloud. If it sounds unnatural, it probably needs to be rewritten. An even better editing method is to read your work aloud to someone else. Whatever your method, careful editing is a requirement for quality legal writing.

VII. SURVEY SAYS . . . .!

In 2007, the State Bar College asked me to resurvey Texas judges about their writing preferences and pet peeves. /the first surprising result of the survey was that the judges took the time to complete and return it. Some of them even wrote notes expressing their gratitude that someone was at least trying to help improve the quality of briefs filed in their courts.

The surveys were sent to all civil and family district court judges, and all civil county court at law judges, in Dallas and Harris Counties. Virtually all of the judges completed and returned the surveys, which were anonymous.

A. What Judges Read

At least according to their own estimates, judges read almost all summary judgment briefs, almost no discover dispute briefs, and the majority of all other briefs filed in their courts. Well above 80 percent of the judges polled indicated that they read more than 75 percent of the summary judgment briefs filed in their courts. This compares with less than 50 percent of the judges who indicated they read at least 75 percent of the briefs pertaining to discovery disputes. In fact, about one-third of the judges admitted that they read fewer than 25 percent of the discovery dispute briefs filed in their courts. Finally, about 80 percent of the judges stated they read at least 75 percent of other briefs filed in their courts.

Of critical importance for lawyers is that almost 90 percent of the judges indicated that when they do "read" a brief, the usually skim it for what they believe to be important and read only the most important sections in their entirety.

B. What Judges Hate

In the survey, judges were asked to identify their #1 pet peeve in connection with briefs filed in their courts. ***Overwhelmingly*** (and, at least to me, surprisingly) judges' top pet peeve is the practice by lawyers of filing briefs just prior to hearings, rather than filing them well in advance of hearings to permit the judge to review them. In survey after survey, the judges pleaded "Please file the brief sufficiently prior to the hearing date that I can read it, and review the controlling cases if I choose to do so." The other pet peeve that garnered a substantial number of votes was wordiness. A great many judge cited their frustration with briefs that fail to get to the point. Among the other top pet peeves were the following:

Briefs that include numerous unnecessary case citations;

C. Pet Peeves

Here are things responding judges took the time to write when asked to list "things that bother me:"

- Not bringing an order to the hearing
- Detailing irrelevant facts
- Sloppiness
- Dishonest statements in briefs
- Verbosity; length
- Citing cases that are not directly relevant
- Filing briefs at the last minute
- Failing to put major arguments at the beginning
- Taking extreme positions not supported by cases or evidence
- Wasting time telling me black-letter law every first-year law student already knows
- Too many exhibits
- Not providing a copy directly to the court—the clerk may not recognize the time constraints involved
- Citing something called "The Law" without actually citing a single statute or case to support it
- Lack of organization

- Failure to clearly state issue and requested relief
- Case citations that do not actually support the proposition for which they are cited
- Misrepresenting the holding of a case
- Not clearly identifying the type and grounds for summary judgment
- Vituperative language
- Failure to let the court know what kind of case it is at the outset
- Lack of citation to legal authorities
- Failure to provide the cases they want me to review
- Hyperbole
- Long or unclear titles for motions and briefs— one judge actually included a photocopy of one for me, entitled (and the names have been changed to protect both the innocent and the guilty) "Defendant City of Smithtown's Motion for Reconsideration of October 27, 2008 Partial Summary Judgment Order and for Partial Summary Judgment Limiting the City's Cumulative Potential Liability on All Claims by John Smith, Stacy Jones, Ronald Lee, Michael Plunkett, and Lucy Lopez to $500,000"); to make matters worse, as the judge pointed out, the title was printed in all-capital letters and was underlined, so it actually looked like this: DEFENDANT CITY OF SMITHTOWN'S MOTION FOR RECONSIDERATION OF OCTOBER 27, 2008 PARTIAL SUMMARY JUDGMENT ORDER AND FOR PARTIAL SUMMARY JUDGMENT LIMITING THE CITY'S CUMULATIVE POTENTIAL LIABILITY ON ALL CLAIMS BY JOHN SMITH, STACY JONES, RONALD LEE, MICHAEL PLUNKETT, AND LUCY LOPEZ TO $500,000.

D. Most Common Mistakes

The most common writing mistakes the surveyed judges see are:

- Poorly-drafted affidavits
- Wordiness
- *Ad hominem* arguments
- Inaccurate case citations (misrepresenting the holding)
- Assuming court is as familiar with case as advocates
- Using case law that has been overturned or otherwise called into question
- Grammar mistakes
- Citation errors
- Filing briefs too late
- Long analysis of irrelevant issues
- Failure to address the other side's issues
- Failure to provide a proposed order
- Emotional arguments

E. Annoyances

The things that most annoy the surveyed judges, in descending order of annoyance (from "infuriating" to "mildly annoying") are:

1. Derogatory remarks about opposing counsel or parties.
2. Wordiness/length.
3. Spelling and grammar mistakes.
4. Repeated use of words like "clearly" and "obviously" as a substitute for reasoning and citations.
5. Legalese.
6. Obvious errors in citation form.
7. String cites.

F. Wish List

Judges listed a great many things helpful to them (my favorite response by far was "having a briefing attorney"). The judges are almost unanimous in five preferences. First, they appreciate briefs that have an introduction at the very beginning explaining the case, issues, and argument. Second, they ask that counsel provide courtesy copies—at least in connection with dispositive or lengthy motions—of cases cited in briefs. Third, as they do in every survey and in response to almost every question, they ask that briefs be just that—brief! Some of the judges noted the growing importance of this preference in light of the move by their courts to electronic filings. Fourth, they appreciate when lawyers are specific and succinct in stating (at the beginning of the motion or brief) the requested relief in plain and simple language. Finally, they appreciate when lawyers plainly state the requested relief at the outset of the motion or brief, and provide a proposed order granting it.

One judge included a "wish list" item that I found particularly interesting: working with opposing counsel to narrow the issues and move the focus of the case to the actual dispute.

VIII. CONCLUSION

This paper is so brief a collection of ideas about writing that it really constitutes little more than a random collection of personal pet peeves. In applying these suggestions, remember that rules – at least many of them – were made to be broken. So, to paraphrase Richard Bach's reluctant messiah:

Everything in this paper may be wrong.[70]

** Chad Baruch is an appellate attorney in Dallas, and the Men's Basketball Coach at Paul Quinn College. An earlier version of this aritlce was published in the* Texas Journal of Business Law*, Volume 43, No. 3, Winter 2009, page 593.*

*** At several points in this article, I use my own motions and briefs as examples (and sometimes those filed by opposing lawyers). I have gently edited many of these examples to better illustrate the points I am attempting to make; as a result, these examples are my creation and only based on source pleadings. To protect the identities of the parties involved in these cases and avoid any potential breach of client confidentiality, I have changed all the names and declined to provide any case citations.*

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1 Steven Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389, 13389 (1984).

2 *Id.*

3 *See* Lynne Agress, *Teaching Lawyers the Write Stuff*, Legal Times, Oct. 2, 1995, at 37.

4 Irving Younger, *Symptoms of Bad Wrting,* MICH. BAR J. 44 (March 2003).

5 *See* Edward D. Re, *Increased Importance of Legal Writing in the Era of the "Vanishing Trial*, 21 Touro L. Rev. 665 (2005).

6 Ruth Bader Ginsburg, *Appellate Advocacy: Remarks on Appellate Advocacy*, 50 S.C. L. Rev. 567, 568 (1999).

7 Ruggero J. Aldisert, Winning on Appeal: Better Briefs and Oral Argument 24-25 (1996).

8 Elmore Leonard, Mr. Paradise 1 (2004).

9 Robert B. Parker, Double Play 1 (2001).

10 *Gordon v. Marrone*, 590 N.Y.S.2d 649, 656 (Sup. Ct. 1992, *aff'd*, 616 N.Y.S.2d 98 (App. Div. 1994).

11 Quintin Jardine, Skinner's Festival 1 (1994).

12 Quintin Jardine, Skinner's Rules 1 (1993).

13 Quintin Jardine, Skinner's Trail 1 (1994).

14 Robert B. Parker, The Godwulf Manuscript5-6 (1973).

[15] Bryan Garner, The Winning Brief 99 (2004).
[16] Stuart Woods, Run Before the Wind 373 (1983).
[17] *Mileski v. Locker*, 178 N.Y.S.2d 911 (N.Y. Sup. Ct. 1958).
[18] ABSENCE OF MALICE (Columbia Pictures 1981).
[19] LEWIS CARROLL, THROUGH THE LOOKING GLASS 247 (Modern Library ed., Random House)
[20] *See* note ** at INTRODUCTION, p.103
[21] *Id.*
[22] *Id.*
[23] DeShaney v. Winnebago County Soc. Servcs. Dep't, 489 U.S. 189 (1989).
[24] *Texas v. Johnson*, 491 U.S. 397 (1989).
[25] Jacques L. Wiener Jr., *Ruminations from the Bench: Brief Writing and Oral Advocacy in the Fifth Circuit*, 70 Tul. L. Rev. 187, 192 (1995).
[26] *See* note ** at INTRODUCTION, p. 103.
[27] Jerry Buchmeyer, *Who Was That Masked Man?*, 69 Tex. Bar J. 491, 492 (2006) (and presumably giving whole new meaning to the term *hot sex*).
[28] *Iowa Supreme Court Board of Professional Ethics v. Conduct & Lane*, 642 N.W.2d 296 (Iowa 2002).
[29] *Id.* at 300-302.
[30] AMADEUS (The Saul Zaentz Company 1984).
[31] Robert B. Parker, Back Story 1 (G.P. Putnam's Sons 2003).
[32] *See* Bryan Garner, Legal Writing in Plain English 35(2001); Richard Wydick, Plain English for Lawyers 11(2d ed. 1985).
[33] Robert B. Parker, The Judas Goat 192 (1978).
[34] Henry Weihofen, Legal Writing Style 238 (1980).
[35] John Dernbach & Richard V. Singleton II, A Practical Guide to Legal Writing and Legal Method 174 (1981).
[36] *Cox v. Louisiana*, 379 U.S. 536 (1965).
[37] Bryan Garner, The Winning Brief 266 (2004).
[38] *Morgan v. State*, 685 N.E.2d 202, 207-08 (N.Y. 1977).
[39] *Id.*
[40] Michelle G. Falkow, *Pride and Prejudice: Lessons Legal Writers Can Learn from Literature*, 21 Touro L. Rev. 349, 358 (2005).
[41] Edmund M. Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 Yale L.J. 229, 229 (1922).
[42] John Grisham, The Last Juror 28 (2004).
[43] Robert B. Parker, The Godwulf Manuscript 6 (1973).
[44] Robert B. Parker, The Godwulf Manuscript 54 (1973).
[45] President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863) (transcript avvilable in the Illinois State Historical Library at Springfield).
[46] LYNNE TRUSS, EATS, SHOOTS, AND LEAVES 96 (2004).
[47] President Abraham Lincoln, Lincoln's Farewell Address in Springfield (Feb. 11, 1861).
[48] H.W. Fowler, A Dictionary of Modern English Usage 558 (1944).
[49] *Id.*
[50] Tex. R. Civ. P. 192.3(e) (West 2006).
[51] Tex. R. Civ. P. 192.3(e) (West 2006).
[52] *Employers' Mut. Liab. Ins. Co. v. Tollefsen*, 263 N.W. 376, 377 (Wis. 1935).
[53] Tex. Disciplinary R. Prof. Conduct 1.01 cmt. 6 (2005), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Vernon 2005)
[54] *Smith v. Lewis*, 530 P.2d 589, 595 (Cal. 1975).
[55] *Mortars v. Barr*, No. 01-2011, 2003 WL 115359, at *3-4 (Wis. App. Jan. 14, 2003).
[56] *See, e.g., Fletcher v. State*, 858 F. Supp. 169 (M.D. Fla. 1994) (party cited one case that had been overruled and another that was reversed).
[57] *Baldayaque v. United States*, 338 F.3d 145 (2d Cir. 2003) (attorney who advised client that deadline to file his habeas petition had passed, even though client still had fourteen months to file, violated ethical rule mandating competent representation).
[58] *See, e.g., Carlino v. Gloucester City High School*, No. 00-5262, 2002 WL 1877011, at *1 (3d Cir. 2002) ("flagrant failure to conduct any legal research" violated Rule 11(b) of the Federal Rules of Civil Procedure).
[59] *Kentucky Bar Ass'n v. Brown*, 14 S.W.3d 916 (Ky. 2000).
[60] *In re Hawkins*, 502 N.W.2d 770 (Minn. 1993).
[61] *In re Shepperson*, 674 A.2d 1273 (Vt. 1996).
[62] *Bradshaw v. Unity Marine Corp.*, 147 F. Supp. 2d 668, 670 (S.D. Tex. 2001).
[63] Jerry Buchmeyer, *Who Was That Masked Man?*, 69 Tex. Bar J. 491, 492 (2006).
[64] *Henderson v. State*, 445 So.2d 1364, 1367 (Miss. 1984).
[65] *Kentucky Bar Ass'n v. Waller*, 929 S.W.2d 181 (Ky. 1996).
[66] *See In re Wilkins*, 782 N.E.2d 985, 987 (Ind. 2003).
[67] *See, e.g., Dilallo v. Riding Safety, Inc.*, 687 So.2d 353, 355 (Fla. Dist. Ct. App. 1997).
[68] *See, e.g., White Budd Van Ness Partnership v. Major-Gladys Drive Joint Venture*, 811 S.W.2d 541 (Tex. 1991) (dismissing application for writ of error based upon improper type size and margins altered to comply with page limit).
[69] *See, e.g., Laitram Corp. v. Cambridge Wire Cloth Co.*, 919 F.2d 1579, 1584 (Fed. Cir. 1990).
[70] (Richard Bach, Illusions: The Adventures of a Reluctant Messiah 136 (1977).

Express Consent Under the TCPA…

Is it Safe?

By Steven Dunn*

In the 1976 movie *The Marathon Man*, Sir Laurence Olivier is torturing Dustin Hoffman in the attempt to discover if it is safe for Olivier to retrieve his cache of ill-gotten diamonds. Olivier believes Hoffman knows the location of the diamonds and whether the site is being watched. So as he drills into his teeth, Olivier continually asks Hoffman, "Is it safe?" At the time, Hoffman does not know.

In context, two, recent federal district court decisions show the evolving and yet contradictory landscape of TCPA compliance on the issue of "express consent" under the Telephone Consumer Protection Act, 47 U.S.C. § 227. As such, with regard to the safe harbor, "express consent," defense, third party debt collectors are left to wonder, "is it safe?"

The TCPA prohibits making a call to a cellular telephone using an automatic telephone dialing system (ATDS) without the prior express consent of the called party. A debt collection company sued for violating the TCPA (either individually or in a class context) can defeat these TCPA claims by demonstrating the debtor gave "express consent" to be called on his/her cellular telephone.

The Federal Communications Commission has issued two relevant orders regarding consent to call a cell phone. In 1992, the FCC issued an order, which stated that cellular carriers do not need consent from "their cellular subscribers prior to initiating autodialer … calls for which the cellular subscriber is not charged." Thereafter, in 2008, the FCC expanded the issue of "consent" by stating that if a party provides a cell phone number to a creditor, for example, as part of a credit application, they are deemed to have provided express consent to be autodialed by the creditor at that cell number. The latter FCC ruling also states that calls "placed by a third party collector on behalf of that creditor are treated as if the creditor itself placed the call."

For the sake of the debt collection industry, the preponderance of the caselaw and FCC ruling interpretation give a roadmap to a safe harbor and courts should be encouraged not to stray from that course.

These "express consent" provisions were tested in the case of Leckler v. Cash Call. The *Leckler* court held the FCC's declaratory ruling regarding express consent was "manifestly contrary to the statute and unreasonable." Thanks in great part to excellent work done by our colleague, David Kaminski, the Court vacated this order in November of 2008. The FCC rulings remained intact and could be relied upon by courts when considering the issue of consent.

Fast forward to May 8, 2013, when a federal district court in Florida rendered its opinion in *Mais v. Gold Coast Collection Bureau, Inc.* The *Mais* court held it had jurisdiction to review the FCC's 2008 Ruling. The court then determined that the provision in the 2008 FCC Ruling stating "the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent … to be contacted at that number…." constitutes **implied consent** not express consent, and impermissibly amended the TCPA to provide an exception that Congress did not write in the TCPA. The court stated it could ignore the FCC's ruling. The court continued on its path of holding Gold Coast liable when it held that even if applicable, the FCC ruling did not apply to medical debt, that the ruling only pertained to consumer retail credit transactions, and that even if applicable, a defendant had the burden of proof to prove "express consent." The *Mais* court completed its autopsy on Gold Coast by holding that the FCC's 2008 ruling, even if applicable, only applied to the creditor and in attempting to expand protection to the agent, the FCC impermissibly added a vicarious liability provision to the TCPA when Congress did not. [Since the underlying creditors in the *Mais* case did not make the alleged offensive calls, their motion for summary judgment was granted.] Mr. Kaminski broke down the *Mais* decision in a very thorough article on insideARM.com.

Less than three weeks after the *Mais* decision, a federal district court in Missouri issued its opinion in *O'Connor v. Diversified Consultants, Inc*. In *O'Connor*, the plaintiff sought certification of a nationwide class of persons who received on their cellular phone any telephone call from Diversified wherein Diversified utilized an ATDS and where the consumer failed to provide express consent. However, the *O'Connor* court gave deference to the FCC's rulings and specifically held, "Diversified argues that in collecting the debt from these cellular customers it stands in the shoes of U.S. Cellular and is entitled to the shelter that the FCC has provided to cellular companies. I agree with Diversified's position. I find that a debt collector for a cellular company may invoke the shelter given to the cellular company for calls to its subscribers." The *O'Connor* court then went one step further when it held, *"Because we find that autodialed and prerecorded message calls to wireless numbers provided by the called party in connection with an existing debt are made with the 'prior express consent' of the called party, we clarify that such calls are permissible.* [emphasis added]. We conclude that the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt."

Because of this language, the argument can be made that the FCC's rulings regarding express consent and the basis underlying the *O'Connor* decision are applicable to the collection of all consumer debts, and not just cellular telephone debt.

In addition, there are various ways a debtor can give "express consent." Express consent can be verbal (*Greene v. DirectTV, Inc.*: orally providing cell number to credit bureau is prior express consent to potential creditor who receives fraud alert from credit bureau). Express consent can be written (*Moore v. Firstsource Advantage*: consent is proper if the wireless number was provided by the subscriber in connection with the existing debt). Consent also can be provided by a spouse (*Gutierrez v. Barclays Group*).

With regard to the issue of "burden of proof" turned on its head by the *Mais* court, especially on class certification issues, a debt collector can rely not only on the *O'Connor* decision, but also on the case of *Forman v. Data Transfer, Inc.,* (164 F.R.D. 400 (E.D. Pa. 1995)). Although a fax case and not a cell phone case, in *Forman*, the plaintiff was seeking to certify a class of plaintiffs asserting claims under the TCPA. The court in *Forman* noted that the TCPA prohibits a person from sending an "unsolicited advertisement" to a fax machine, and that the TCPA defines an "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." On that basis, the court concluded that, by definition, "[T]he essential question of fact that each potential plaintiff must prove is whether a specific transmission to its [facsimile] machine was without express invitation or permission on its part."

Based on the requirement that each plaintiff must prove no express invitation or permission to establish a violation of the TCPA, *Forman* held that the individual issues of express invitation or permission predominated over common issues; thus, the court denied certifying a class alleging violations of the TCPA. The *Forman* court explained that "[p]laintiff's proposed `common' questions[, including whether or not express invitation or permission was given,] are inherently individualized, requiring inquiry into the particular circumstances of each transmission." The court further explained that the "gravamen of [a] plaintiff's complaint is not a common course of conduct by [a] defendant, but rather a series of individual transmissions under individual circumstances."

In "*The Marathon Man*," Olivier discovered that indeed, "it was not safe." For the sake of the debt collection industry, the preponderance of the caselaw and FCC ruling interpretation give a roadmap to a safe harbor and courts should be encouraged not to stray from that course.

**Steven R. Dunn graduated from the University of Houston Law Center in 1984 and has been a licensed attorney based in Dallas, Texas since that time. His practice primarily consists of representing third party debt collectors in all Texas state courts and federal courts not only in Texas, but also throughout the United States. His areas of expertise includes complex class related litigation, Fair Debt Collection Practices defense, Telephone Consumer Protection Act defense, premises liability, banking and U.C.C. law, business litigation, and employment law. His experience also includes overseeing compliance issues and corporate matters. An earlier version of this article was published at* InsideARM.com.

Massachusetts Supreme Judicial Court Reconsiders Opinion in Light of *American Express Co. v. Italian Colors Restaurant*

by Jeffrey Kirk*

I. Introduction

On June 12, 2013, the Supreme Judicial Court of Massachusetts issued its second opinion in *Feeney v. Dell Inc.*[1] *(Feeney II),* reassessing its 2009 holding in *Feeney v. Dell Inc.*[2] (*Feeney I*) that an arbitration agreement prohibiting class actions against Dell rendered consumers' claims against the computer manufacturer nonremediable, making the agreement invalid under state law.[3] While the *Feeney I* remand was still pending, the U.S. Supreme Court held in *AT&T Mobility LLC v. Concepcion*[4] (*Concepcion*) that collective-arbitration waivers in consumer contracts generally fall under the auspices of the Federal Arbitration Act ("FAA" or "the Act"), and that the Act supersedes most claims made against such waivers under state law.[5] In *Feeney II*, the Massachusetts court nevertheless found new footing for its original decision by distinguishing its facts from those in *Concepcion*, and ultimately concluded that it would be contrary to Congress's original intent in enacting the FAA to permit arbitration clauses that effectively deny consumers redress against wrongs committed under laws designed to protect them.[6] After its June ruling, however, the court was compelled to revisit the case for a third time (in *Feeney III*[7]) following the U.S. Supreme Court's holding in *American Exp. Co. v. Italian Colors Restaurant*,[8] where it reached well beyond its logic in *Concepcion* to conclude that the FAA does not permit state courts to invalidate class-arbitration waivers on grounds of individual arbitrations being either cost-prohibitive or likely to result in minimal levels of redress, regardless of Congressional intent. On August 1, 2013, the Massachusetts court consequently reversed and remanded *Feeney II*.[9]

II. The Case

Dell and its related subsidiaries and partners sold a variety of computer products to consumers and businesses, including optional hardware service contracts. The two plaintiffs, John A. Feeney and Dedham Health and Athletic Complex, were both Dell customers.[10] Dell collected sales tax on its optional service contracts, and while the facts of the matter remain in dispute, the plaintiffs claimed these taxes were collected in violation of Massachusetts law, because no such tax was actually required by the Commonwealth's taxing authorities.[11]

The terms of both plaintiffs' purchase agreements with Dell mandated that any financial claims against the company not only go through the arbitration process, but also that each be arbitrated on an individual basis, effectively prohibiting them from participating in any class action – either by arbitration or litigation – against Dell.[12] In 2003, the plaintiffs sued Dell on the basis that the contractual terms were unconscionable and in violation of the Massachusetts Consumer Protection Act, which provides for class actions. In response, Dell moved to stay the proceedings and

Although *Italian Colors* provides another hurdle for state courts, it is likely that they will continue to devise new paths around the holding.

compel arbitration pursuant to the contractual terms and conditions as well as the FAA; a Superior Court judge granted Dell's motion. After the plaintiffs' subsequent appeals failed, they each filed arbitration claims "under protest," and their requests for class certification were denied by the National Arbitration Forum on the basis of class actions being prohibited by the plain language of their Dell contracts.

In 2008, the plaintiffs moved the Superior Court to vacate the arbitration decision, and also to revisit its earlier decision allowing Dell's motion to compel arbitration.[13] While their lower-court action once again failed, the Massachusetts Supreme Judicial Court granted their application for direct appellate review, and in the subsequent *Feeney I* holding, the court reversed the mandatory arbitration order and invalidated the arbitration clause on the basis that a class-action prohibition "contravenes Massachusetts public policy."[14] While the case was on remand, the U.S. Supreme Court issued its decision in *Concepcion*. The Court's opinion negated much of the *Feeney I* decision's legal underpinnings by requiring that arbitration agreements be enforced as written, even if they directly exclude class actions.[15]

Confronted with the *Concepcion* hurdle, the *Feeney II* court still concluded that Dell's class-action prohibition could nevertheless be defeated because, unlike the *Concepcion* case, the *Feeney* appellants had no viable means of obtaining adequate relief through individual arbitration.[16] In *Concepcion*, the arbitration clause in the plaintiffs' contract with AT&T stated that the company, in the event that an arbitrator granted a customer an award greater than AT&T's final written settlement offer, would be required to pay the customer a minimum recovery of $7,500 plus twice the customer's total attorney fees. The Court further noted that this amount would almost certainly be more than the plaintiffs could recover in a class action.[17] In contrast, the *Feeney* contracts had no such stipulation, resulting in the plaintiffs' potential recovery amounts being limited to the $13.65 and $215.55 in sales taxes they had respectively paid under their Dell service contracts.[18]

Shortly after the Massachusetts court's decision in *Feeney II,* however, the U.S. Supreme Court created yet another hurdle with its decision in *American Exp. Co. v. Italian Colors Restaurant. Italian Colors* effectively abrogated the Massachusetts court's *Feeney II's* rationale by holding that an arbitration class action waiver is enforceable, even if the consequence is to deny the consumer an effective remedy. Based on *Italian Colors*, the Massachusetts court granted Dell's petition for rehearing.[19] In *Feeney III*, the court concluded its earlier holding was no longer viable in light of the Supreme Court's explicit holding that the matter of individual arbitration expenses being cost-prohibitive did not, in itself, eliminate the *right to pursue* such a remedy, whether under state or federal law.[20]

III. Existing Law/Legal Background

The FAA has been a tenet of American jurisprudence for nearly 90 years, with dozens of Supreme Court cases on the subject. The Court has made it clear that the Act is broadly applicable under both federal and state laws, and that there is a strong national policy favoring arbitration. Some courts nevertheless continue to attempt to circumvent the enforcement of arbitration clauses,, finding ways to avoid arbitration and allow the parties to use a class action and judicial recourse. The Supreme Court's decision in *Concepcion*, invalidating California's attempt to declare prohibitions on class actions unconscionable, failed to provide substantive elucidation on the matter of class-action arbitration, and spurred appellate- and state-level courts into devising myriad means of allowing class actions to proceed.

Feeney II is only one of many such rulings, and they will likely continue unless and until the Supreme Court elects to narrow the parameters of both *Concepcion* and *Italian Colors* vis-à-vis prohibitions on class-action waivers in consumer adhesion contracts. Although *Italian Colors* provides another hurdle for state courts, it is likely that they will continue to devise new paths around the holding; indeed, in *Feeney III* the Massachusetts court stated that "the plaintiffs raise[d] several alternative grounds for denying the defendants' renewed motion," and that the court "decide[d] … only that the class waiver may not be invalidated on the ground that it effectively denies the plaintiffs a remedy. We take no view on the other issues."[21] This statement appears to be an implicit invitation for an appeal on alternate grounds not abrogated by *Italian Colors.*

A number of courts have interpreted *Concepcion* in light of its explicit statement that certain arbitration agreements can still be invalidated by "generally applicable contract defenses" such as fraud, duress, and unconscionability,[22] and *Italian Colors* contains no language contrary to this view. For example, in *Noohi v. Toll Bros., Inc.*, the Fourth Circuit held that an arbitration agreement was unenforceable under Maryland law owing to a lack of consideration, and that the FAA – even after taking *Concepcion* into account – did not preempt the state-law requirement that arbitration provisions be supported by consideration discrete from the underlying contract.[23] In *Gandee v. LDL Freedom Enterprises, Inc.*, the Washington Supreme Court held that multiple provisions in a debt adjustment contract were substantively unconscionable, and that nothing in the *Concepcion* holding preempted this conclusion.[24] Similarly, in *Samaniego v. Empire Today LLC*, California's Second Court of Appeal held that a contractual provision mandating arbitration of claims asserting labor-law violations was both procedurally and substantively unconscionable, and that the FAA did not preempt the state's existing unconscionability doctrine regarding such claims.[25]

Other state courts have fully skirted *Concepcion* by asserting that it is inapplicable to cases at hand. In *Brown v. Ralphs Grocery Co.*, for example, California's Second Court of Appeal held that the FAA governs only private arbitrations, and thus the appellant's "public" action under the state's Private Attorney General Act – which allows actions to recover civil penalties for violations of California's labor code – was permissible because the Act creates a statutory right for penalties "that otherwise would be sought by state labor law enforcement agencies," and individuals suing under it stand as "proxies" for these agencies.[26]

Concepcion has also proven challenging in cases where adhering to the Court's interpretation of the FAA would require violating another federal law. In *In re American Express Merchants' Litigation*, for example, the Second Circuit held that adherence to a mandatory arbitration clause containing a class-action waiver would entirely preclude the appellants' ability to pursue their antitrust claims under the Sherman Act.[27] Also, in *Sutherland v. Ernst & Young LLP*, the U.S. District Court for the Southern District of New York held that the plaintiff could not vindicate her rights under the Fair Labor Standards Act (FLSA) absent collective action, and that the class-action waiver in her arbitration agreement with the defendant was thus unenforceable under both the FLSA and New York law.[28] Further, the National Labor Relations Board was confronted with the matter in a case against D.R. Horton, a home building company.[29] The Board concluded

that the company's blanket restriction on employee class actions, for arbitration and litigation, violated employees' rights under the National Labor Relations Act to engage in concerted action for mutual protection.[30]

Italian Colors, however, has called the future relevance of each of these holdings into question. Under its rationale, the FAA does not permit courts or administrative agencies to invalidate class-arbitration waivers on cost-prohibition grounds *even if* such a waiver would in practice wholly preclude a plaintiff's ability to pursue claims under federal laws such as the Sherman Act and Clayton Act.[31] In effect, the Court has stated that the arbitration mandates of the FAA trump both the language and Congressional intent of extant and/or subsequent federal law, an apparent paradox that may not be resolved absent Congressional intervention.

IV. Conclusion

Even though *Feeney II* has been reversed, numerous post-*Concepcion* holdings remain standing in which courts have concluded that plaintiffs merit relief on grounds not restricted by the *Concepcion* decision, most notably the well-established contractual defense of unconscionability. *Italian Colors* does not alter any of the earlier jurisprudential calculus in this regard. Many of the class-arbitration cases in which plaintiffs have won favorable rulings have transpired in traditionally pro-consumer areas of the country such as California and Massachusetts. As of yet, there is no consensus on the extent to which either *Concepcion* or *Italian Colors* can be circumvented, rationalized, or altogether ignored. Still, *Italian Colors* has upset earlier post-*Concepcion* rulings in which class-arbitration prohibitions were invalidated on grounds of individual arbitration costs precluding vindication of federal statutory rights, as clearly indicated in *Feeney III*, and it remains to be seen how other courts will reconcile *Italian Colors* with their previous decisions once they are challenged, a happenstance that at this point appears to be inevitable.

*Jeffrey Kirk is a third-year student at the University of Houston Law Center.

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1 *Feeney v. Dell Inc.*, 465 Mass. 470, 989 N.E.2d 439 (2013) (*Feeney II)*.

2 *Feeney v. Dell Inc.*, 454 Mass. 192, 908 N.E.2d 753 (2009) (*Feeney I)*.

3 *Feeney II,* 465 Mass. 470, 471, 989 N.E.2d 439, 440-41.

4 *AT&T Mobility LLC v. Concepcion*, 131 S.Ct 1740 (2011).

5 *Id.* at 1750-51.

6 *Feeney II,* 465 Mass. at 507, 989 N.E.2d at 464.

7 *Feeney v. Dell Inc.*, 466 Mass. 1001, 2013 WL 3929051 (Aug. 1, 2013) (*Feeney III)*.

8 *American Exp. Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2308-12 (2013).

9 *Feeney III*, 466 Mass. at 1001.

10 *Feeney I,* 454 Mass. at 194-95, 908 N.E.2d at 753.

11 *Id.* at 194-96, 908 N.E.2d 753.

12 *Id.* at 195, 908 N.E.2d 753.

13 *Id.* at 198, 908 N.E.2d 753.

14 *Id.* at 199-200, 908 N.E.2d 753.

15 *Concepcion*, 131 S.Ct at 1750-51.

16 *Feeney II*, 465 Mass. at 472, 989 N.E.2d at 441.

17 *Concepcion*, 131 S.Ct at 1745.

18 *Feeney II*, 465 Mass. at 503, 989 N.E.2d at 462.

19 *Feeney III*, 466 Mass. at 1001.

20 *Id*. at 1002.

21 *Id.* at 1003.

22 *Concepcion*, 131 S.Ct at 1746.

23 *Noohi v. Toll Bros., Inc.*, 708 F.3d 599, 602 (4th Cir. 2013).

24 *Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wash.2d 598, 601, 293 P.3d 1197 (2013).

25 *Samaniego v. Empire Today LLC*, 205 Cal.App.4th 1138, 1141, 140 Cal.Rptr.4d 492 (2012).

26 *Brown v. Ralphs Grocery Co.*, 197 Cal.App.4th 489, 500, 128 Cal. Rptr.3d 854 (2011) (citing *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court*, 46 Cal.4th 993, 1003, 95 Cal.Rptr.3d 605, 209 P.3d 937 (2009)).

27 *In re American Express Merchants' Litigation*, 667 F.3d 204, 206 (2d Cir. 2012).

28 *Sutherland v. Ernst & Young LLP*, 847 F.Supp.2d 528, 533 (S.D.N.Y. 2012).

29 *In re D.R. Horton, Inc.*, 357 NLRB No. 184, 192 L.R.R.M. (BNA) 1137, 2012 WL 36274 (2012).

30 *Id.*, 2012 WL 36274 at *1.

31 *Italian Colors*, 133 S.Ct. at 2308-12.

Trial Period Plan Creates Mortgage Modification

by Timothy Dyer*

The Ninth Circuit Court of Appeals held that banks participating in the Home Affordable Modification Program ("HAMP") can be contractually required to offer mortgagees permanent mortgage modifications when the mortgagees comply with the requirements indicated in their Trial Period Plans ("TPP"). In *Corvello v. Wells Fargo Bank, N.A.*, the Ninth Circuit Court of Appeals overturned the dismissal of the plaintiffs' breach of contract claims, finding that the language in the plaintiffs' TPP created a legally enforceable contract.[1] The language of the TTPs indicated if the borrower was in compliance with the TPP, "…the Lender will provide [borrower] with a Loan Modification Agreement."[2] The Ninth Circuit found that such language constituted a requirement by the lender to provide a loan modification agreement if the borrower complied.

The Case

Plaintiffs Phillip R. Corvello and Karen Lucia ("Plaintiffs") individually entered into mortgage agreements with Wells Fargo Bank, N.A. ("Wells Fargo").[3] Each of the Plaintiffs had defaulted on their mortgages. In 2009, the Plaintiffs applied with Wells Fargo for a loan modification. Wells Fargo, a bank participating in HAMP, following the steps of U.S. Department of the Treasury, Home Affordable Modification Program Supplemental Directive 09-01 (Apr. 6, 2009) ("SD 09-01"), began the process required for loan modification applications. The Plaintiffs appeared eligible for HAMP and Wells Fargo prepared TPPs for each plaintiff. A TPP requires borrowers to submit documentation to confirm the accuracy of their initial financial representations and to make trial payments to the lender.[4] The amount of the trial payments is determined by HAMP. The documentation is to be used to determine the eligibility of the borrowers for permanent modification. Under HAMP, if a borrower is determined not to be eligible, the lender is required to alert the borrower and consider alternatives.

The TPPs entered into by Wells Fargo and the Plaintiffs contained language that indicated the lender would offer the borrower a Modified Loan Agreement if the borrower complied with all parts of the TPP.[5] In the Plaintiffs complaints, they alleged that they had complied with their TTP and did not receive Modified Loan Agreements from Wells Fargo.[6] Plaintiffs claim, that having completed all their obligations under the TPPs and relying upon the language of the TPPs, Wells Fargo had an obligation to offer Modified Loan Agreements upon the end of the TPP period and that Wells Fargo did not alert them to any ineligibility.[7]

The lower court granted Wells Fargo's Rule 12(b)(6) Motions to dismiss both plaintiffs' complaints indicating that at the time of the lower court's finding, California law was that the language of the TPP could not modify a mortgage agreement.[8]

On appeal, the Ninth Circuit focused on the language of two areas of the TPP agreements to make the determination:

1. If borrower is in compliance with this Loan Trial Period and borrower's representations in Section 1 continue to be true in all material respects, then the Lender will provide the borrower with a Loan Modification Agreement.[9]
2. The Loan Documents will not be modified unless and until the borrower receives a fully executed copy of a Modification Agreement.[10]

Wells Fargo contended that there was no contract, and could be no agreement, unless the servicer sent the borrower a signed Modification Agreement.[11] Wells Fargo also contended there could be no contract without consideration, and that payment of debts was not consideration on which an enforceable agreement could be created.[12] Wells Fargo did not notify or alert either plaintiff that they were ineligible for a loan modification. At the time of trial, Wells Fargo indicated that the plaintiffs were ineligible for such modification, and upon internal review, reaffirmed that they had come to the correct decision.

The TPPs entered into by Wells Fargo and the Plaintiffs contained language that indicated the lender would offer the borrower a Modified Loan Agreement if the borrower complied with all parts of the TPP.

The court also held that that such deliberate misleading could be determined to be fraud or deceptive business practices in violation of state code.

The Law

In 2009, the Treasury Department started the HAMP program to incentivize banks to refinance mortgages of distressed borrowers. Since the inception of HAMP the Treasury Department has set forth directives of the process by which banks participating in HAMP must handle the modification of mortgages for eligible borrowers. SD 09-01 was the directive controlling at the time of the initial filing of *Corvello*. SD 09-01 indicated that if a borrower was possibly eligible, the bank and the borrower could begin a TPP before the eligibility of the borrower was certain.[13]

The Ninth Circuit considered the Seventh Circuit's finding in *Wigod v. Wells Faro Bank, N.A.*, to be the leading case on contractual obligations of banks under TPP agreements.[14] In *Wigod*, the plaintiff entered into a four month trial loan modification, which had an agreement contained within to permanently modify the loan if the plaintiff qualified under HAMP guidelines.[15] The plaintiff alleged that she qualified but Wells Fargo refused to grant a permanent modification.[16] The trial court dismissed the claim due the analysis that HAMP did not confer a private federal right of action upon which a borrower could enforce its requirements.[17]

The Seventh Circuit, however, determined that the plaintiff had a viable cause of action.[18] The court found that Wells Fargo had deliberately misled the plaintiff into believing that it would modify the loan and then refused to do so. Refusal to modify the loan gave rise to a breach of contract or promissory estoppel claim. The court also held that that such deliberate misleading could be determined to be fraud or deceptive business practices in violation of state code. Finally, the court held that such state law claims are not preempted or otherwise barred by federal law.

To sustain a breach of contract, the court in *Wigod* tested the requirements of contract formation against the trail loan modification.[19] The common law requirements of a breach of contract claim are: (1) offer and acceptance; (2) consideration; (3) definite and certain terms; (4) performance by the plaintiff of all required conditions; (5) breach; and (6) damages.[20] The Seventh Circuit found the language of the TPP and the surrounding circumstances sufficient to creat an offer.[21] By indicating the conditions precedent to permanent modification and having the opportunity to refuse to counter sign the TPP after the plaintiff had returned the document signed, Wells Fargo created an offer, accepted by the plaintiff. [22]

The Seventh Circuit also found the consideration requirement was satisfied by the TPP "contain[ing] sufficient consideration" by the promisee incurring "cognizable legal detriments."[23] The court noted this included: "the creation of new escrow accounts, the requirement of undergoing credit counseling (if asked), and to provide and vouch the truth of [plaintiff's] financial information."[24]

Finally, the court found the agreement contained clear and definite terms in the required process by which a borrower is determined for eligibility by HAMP.[25] Wells Fargo was obligated to use the standard set by the program, and while the terms were just an estimate of a permanent modification, the TPP implied that any change in the permanent offer would also be based upon HAMP guidelines.[26] Such guidelines followed by both parties in the TPP created terms which were clearly understood.[27]

The Ninth Circuit recognized that the Seventh Circuit followed Illinois law, but determined that in regards to the law in question, there were no material differences between the law of California and that of Illinois.[28] The court cited *West v. JPMorgan Chase Bank, N.A.*, where the California Court of Appeal expressly adopted the reasoning of *Wigod* and concluded that trial plan agreements only to authorize banks, before offering a modification, to evaluate whether borrowers had complied with the agreement's terms and if the borrowers representations were true.[29]

Conclusion

Corvello reflects a new trend in the courts to read natural language and understanding into mortgage documents. Specifically, with the rise of homeowners failing to maintain payments on mortgages due to the economic depression, courts have read the agreements as a homeowner might allowing actions to be brought using HAMP guidelines to establish contracts. The Ninth joins the current minority of jurisdictions enforcing the language of TPPs to the loan agreements.

Finally, it is important to note that while the TPP's language in *Corvello* could still exist in TPPs today, the question as to the eligibility of the borrower is no longer an issue, Treasury Supplemental Directives 10-01 now requires the borrower's eligibility to be fully determined before a TPP can be entered into.[30]

* Timothy Dyer is a third-year law student at the University of Houston Law Center.

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1 *Corvello v. Wells Fargo Bank, NA*, ___F.3d ___ (9th Cir. Aug. 8, 2013).

2 *Id*. at 2.

3 *Id.* Their situations differ factually in that Corvello's dealings with Wells Fargo were in writing, while the Lucias dealt with the bank by phone.

4 *Id*. at 1, citing *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012) (discussing the requirements of HAMP and SD 09-01).

5 *Id.* at 2-3.

6 *Id*. at 2.

7 *Id.* at 3.

8 *Lucia v. Wells Fargo Bank, N.A.*, 798 F.Supp.2d 1059 (N.D.Cal. 2011), *rev'd Corvello v. Wells Fargo Bank, NA*, ___ F.3d ___(9th Cir. Aug. 8, 2013).

9 *Corvello v. Wells Fargo Bank, NA*, --- F.3d --- (9th Cir. Aug. 8, 2013) at 2, quoting Page 1 of Corvello's TPP, "If I am in compliance with this Loan Trial Period and my representation in Section 1 continue to be true in all material respects, then the Lender will provide me with a Loan Modification Agreement, as set forth in Section 3, that would amend and supplement (1) the Mortgage on the Property, and (2) the Note secured by the Mortgage.

10 *Id*. at 3, quoting Paragraph 2G of Corvello's TPP Agreement, "I understand that the Plan is not a modification of the Loan Documents and that the Loan Documents will not be modified unless and until (i) I meet all of the conditions required for modification, (ii) I receive a fully executed copy of a Modification Agreement, and (iii) the Modification Effective Date has passed…"

11 *Id.* at 4.

12 *Lucia* at 1067.

13 U.S. Dep't of the Treasury, Home Affordable Modification Program Supplemental Directive 09-01 (Apr. 6, 2009).

14 *Corvello v. Wells Fargo Bank, NA*, ___ F.3d ___ (9th Cir. Aug. 8, 2013) at 4.

15 *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012).

16 *Id*. at 554-555.

17 *Id.* at 555.

[18] *Id*. at 547.
[19] *Id*. at 560.
[20] *Id.*
[21] *Id*. at 561-562.
[22] *Id*. at 562.
[23] *Id.* at 564.
[24] *Id*.
[25] *Id*. at 565.
[26] *Id*. at 565.
[27] *Id*.
[28] *Corvello v. Wells Fargo Bank, NA*, ___ F.3d ___(9th Cir. Aug. 8, 2013) at 5.
[29] *West v. JPMorgan Chase Bank, N.A.*, 214 Cal.App.4th 780, 798-799.
[30] U.S. Dep't of the Treasury, Home Affordable Modification Program Supplemental Directive 10-01 (Jan. 28, 2010).

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 view the full opinion, click on the link; or if that does not work, copy the link and paste it to your browser. 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

High cost no bar to waiver of class action. The U.S. Supreme Court held that plaintiffs cannot avoid a contractual waiver of class arbitration on the ground that the cost of individually arbitrating their claims exceeds their potential recovery. The justices ruled against a group of merchants seeking to bring a class action against a credit card company alleging antitrust violations. In response to American Express' motion to compel individual arbitration in accordance with a class action waiver between the parties, the plaintiffs submitted evidence that the cost of individually arbitrating each claim could exceed $1 million, while the maximum statutory recovery for each claimant was less than $13,000. The Court noted: "[T]he fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy," adding to the court's ruling in *AT&T Mobility v. Concepcion* that the Federal Arbitration Act trumps a state law requiring classwide arbitration proceedings "all but resolves this case." *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).
http://www.supremecourt.gov/opinions/12pdf/12-133_19m1.pdf

Supreme Court upholds arbitrator's decision allowing class arbitration. The U.S. Supreme Court upheld an arbitrator's decision that a particular arbitration clause authorized class arbitration. Justice Kagan wrote the main opinion, which was unanimous. The standard of review of arbitrators' decisions under the Federal Arbitration Act is highly deferential. So "the sole question for us," the Court stated, "is whether the arbitrator (even arguably) interpreted the parties contract, not whether he got its meaning right or wrong." The Court agreed that the arbitrator was interpreting the contract, and that was that. In a concurring opinion, Justice Alito and Justice Thomas suggested that any eventual class arbitration judgment in the case would be susceptible to collateral attack. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013).
http://www.supremecourt.gov/opinions/12pdf/12-135_e1p3.pdf

Consumer's claim against towing company not preempted by federal law. The Supreme Court held that the Federal Aviation Administration Authorization Act of 1994, which regulates motor carriers, does not preempt a claim arising out of the storage and disposal of a car. The Court noted: "Disposal of abandoned vehicles by a "storage company" is regulated by chapter 262 of the New Hampshire Revised Statutes Annotated. See N. H. Rev. Stat. Ann. §§262:31 to 262:40–c (West 2004 and 2012 West Cum. Supp.). Dan's City relied on those laws to dispose of Pelkey's vehicle for nonpayment of towing and storage fees. According to Pelkey, however, Dan's City failed to comply with New Hampshire's provisions governing the sale of stored vehicles and the application of sale proceeds…. We hold, in accord with the New Hampshire Supreme Court, that state-law claims stemming from the storage and disposal of a car, once towing has ended, are not sufficiently connected to a motor carrier's service with respect to the transportation of property to warrant pre-emption under §14501(c)(1). The New Hampshire law in point regulates no towing services, no carriage of property. Instead, it trains on custodians of stored vehicles seeking to sell them. Congress did not displace the State's

regulation of that activity by any federal prescription." *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769 (2013). http://www.supremecourt.gov/opinions/12pdf/12-52_l537.pdf

UNITED STATES COURTS OF APPEAL

Lender who repossessed car violated bankruptcy stay. The Second Circuit held that a car lender willfully violated the automatic stay in a Chapter 13 case by failing to return a repossessed vehicle to the debtor promptly after receiving notice of his bankruptcy petition. The court noted, "[The plaintiff] retained at least an equitable interest in the vehicle under New York law. Thus, under United States v. Whiting Pools, Inc., 462 U.S. 198 (1983), the filing of [the plaintiff's] bankruptcy petition transformed the equitable interest into a possessory interest held by [the plaintiff's] estate…." "We conclude that [the defendant] 'exercised control' over 'property' of [the plaintiff's] bankruptcy estate in contravention of §362 when it failed to relinquish the vehicle promptly after it learned that a Chapter 13 petition was filed." Weber v. SEFCU (*In re Weber)*, 719 F.3d 72 (2d Cir. 2013). http://docs.justia.com/cases/federal/appellate-courts/ca2/12-1632/12-1632-2013-05-08.pdf

Writing requirement violates Fair Debt Collection Act. The Second Circuit held that a debt collection notice violated federal law by stating that the debtors could only dispute the validity of their debts in writing*, Hooks v. Forman, Holt, Eliades & Ravin, LLC*, 717 F.3d 282 (2d Cir. 2013). http://www.ca2.uscourts.gov/decisions/isysquery/99051a01-2242-4d98-8c10-767c3382e472/1/doc/12-3639_errata_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/99051a01-2242-4d98-8c10-767c3382e472/1/hilite/

Court discusses when additional discovery must be allowed on arbitrability. The Third Circuit clarified when district courts must allow discovery about arbitrability. The court stated: "[W]hen it is apparent, based on 'the face of the complaint, and documents relied upon in the complaint,' that certain of a party's claims 'are subject to an enforceable arbitration clause, a motion to compel arbitration should be considered under a Rule 12(b)(6) standard without discovery's delay.' But if the complaint and its supporting documents are unclear regarding the agreement to arbitrate, or if the plaintiff has responded to a motion to compel arbitration with additional facts sufficient to place the agreement to arbitrate an issue, then 'the parties should be entitled to discovery on the question of arbitrability before a court entertains further briefing on [the] question.' After limited discovery, the court may entertain a renewed motion to compel arbitration, this time judging the motion under a summary judgment standard. In the event that summary judgment is not warranted because … there is 'a genuine dispute as to the enforceability of the arbitration clause,' the 'court may then proceed summarily to a trial regarding the 'making of the arbitration agreement.'" *Guidotti v. Legal Helpers Debt Resolution, LLC,* 716 F.3d 764 (3d Cir. 2013). http://www2.ca3.uscourts.gov/opinarch/121170p.pdf

Debt Collector can continue to call debtor's brother in-law. The Fourth Circuit held that a debt collector's repeated phone calls to the debtor's brother-in-law did not violate the Fair Debt Collection Practices Act because the collector reasonably believed he gave incomplete earlier responses. *Worsham v. Accounts Receivable Mgmt., Inc.*, 497 F. App'x 274 (4th Cir. 2012). http://www.ca4.uscourts.gov/Opinions/Unpublished/112390.U.pdf

Long-term unemployment justified student loan discharge. The Seventh Circuit held that a debtor who was out of work for ten years, filing 200 applications for employment during that time, could be discharged under the Bankruptcy Act's undue hardship standard. *Krieger v. Educ. Credit Mgmt. Corp.,* 713 F.3d 882 (7th Cir. 2013). http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D04-10/C:12-3592:J:Easterbrook:aut:T:fnOp:N:1116029:S:0

Third party may not enforce arbitration clause. The Ninth Circuit held that a debt processor could not enforce an arbitration provision contained in an agreement between a consumer and a debt-settlement program. *Rajagopalan v. NoteWorld, LLC*, 718 F.3d 844 (9th Cir. 2013). http://cdn.ca9.uscourts.gov/datastore/opinions/2013/05/20/12-35205.pdf

Montana state law pre-empted by Federal Arbitration Act. The Ninth Circuit considered whether a Montana state-law contract rule that says adhesive contracts that contain provisions that are "not in the reasonable expectations of both parties when contracting" are void as against public policy and can be used to void an arbitration provision. The question before the court was whether the Montana rule was overriden by section 2 of the Federal Arbitration Act (FAA). Relying on *AT&T Mobility v. Concepcion*, the court upheld the arbitration clause. The court noted: "We take *Concepcion* to mean what its plain language says: Any general state-law contract defense, based in unconscionability or otherwise, that has a disproportionate effect on arbitration is displaced by the FAA. We find support for this reading from the illustration in Concepcion involving a case "finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery."" *Mortensen v. Bresnan Communs., LLC*, 2013 U.S. App. LEXIS 14211 (9th Cir. 2013). http://cdn.ca9.uscourts.gov/datastore/opinions/2013/07/15/11-35823.pdf

The court held that when a settlement provides for coupon relief, either in whole or in part, any attorneys' fee that is "attributable to the award of coupons" must be calculated using the redemption value of the coupons.

Attorneys' fees must be tied to redemption value of coupons. The Ninth Circuit held that an attorneys' fee award to class counsel violated the Class Action Fairness Act ("CAFA"), and specifically 28 U.S.C. § 1712(a)-(c), which governs the calculation of attorneys' fees in class action cases containing a coupon component. The court held that when a settlement provides for coupon relief, either in whole or in part, any attorneys' fee that is "attributable to the award of coupons" must be calculated using the redemption value of the coupons. The court reversed the district court's award and remanded, because the district court awarded fees that were "attributable to" the coupon relief, but failed to first calculate the redemption value of those coupons. *Feder v. Frank (In Re HP Inkjet Printer Litig.)*, 716 F.3d 1173 (9th Cir. 2013). http://cdn.ca9.uscourts.gov/datastore/opinions/2013/05/15/11-16097.pdf

The 11th Circuit affirms an arbitrator's decision to allow a class action. The plaintiffs are mobile phone consumers who allege they were charged unlawful penalties for canceling phone service. Under the Wireless Industry Arbitration Rules of the AAA, an arbitrator found the arbitration clause allowed class actions and certified the class. The wireless provider then moved to vacate that determination in federal court, claiming the arbitrator exceeded his authority and refused to apply the law. The court, however, carefully applied the Supreme Court's language in *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013) and held that because the arbitrator engaged with the contract's language and the parties' intent, his construction of the contract must be upheld. *Southern Commc'ns Servs., Inc. v. Thomas*, 720 F.3d 1352 (11th Cir. 2013). http://www.ca11.uscourts.gov/opinions/ops/201115587.pdf

Court follows Sutter and affirms attorneys' fee award. The D.C. Court of Appeals relied on the Supreme Court's opinion in *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013) , and refused to vacate an arbitration attorneys' fee award. Co-counsel argued the arbitrator exceeded his powers by addressing an issue outside the scope of the arbitration and by basing his award on notions of ethics instead of the co-counsel agreement. In its analysis, the court summarized that the "'sole question' before the court in a challenge [that an arbitrator exceeded his power] is 'whether the arbitrator (even arguably) interpreted the parties' contract,'" citing *Sutter.* Given that limited question, and the fact that the court said there was "no doubt" the arbitrator reached his decisions after interpreting the parties' co-counsel agreement, the court affirmed the district court's denial of the motion to vacate. *Wolf v. Sprenger + Lang, PLLC*, 2013 D.C. App. LEXIS 393 (D.C. 2013). http://statecasefiles.justia.com/documents/district-of-columbia/court-of-appeals/and11-cv-0.pdf?ts=1373554924

STATE COURTS

Defendant that litigated for 21 months cannot compel arbitration. The New Jersey Supreme Court held that a medical provider who litigated a case in court for 21 months and then, only three days before the scheduled start of a jury trial, demand to shift the case over to arbitration, could not. Even the strong policy in favor of arbitration did not help the defendant in this case. *Cole v. New Jersey Medical Center*, 52 A.3d 176 (N.J. 2012). http://njlaw.rutgers.edu/collections/courts/supreme/a-6-12.opn.html

Class action prohibition in arbitration provision is unenforceable. The Massachusetts Supreme Court stated that, after *Concepcion*, a general public-policy-based prohibition on class-action bans could not be sustained. However, the court concluded that the principle that arbitration procedures must not effectively preclude plaintiffs from pursuing their claims survives *Concepcion*. In the instant case, the court found the ban effectively denied meaningful relief and, therefore, was unenforceable. *Feeney v. Dell Inc.,* 908 N.E.2d 753 (Mass. 2009).
http://masscases.com/cases/sjc/454/454mass192.html
Subsquently reversed, *Feeney v. Dell Inc.*, 466 Mass. 1001, ____N.E.2d____ (2013).
http://masscases.com/cases/sjc/466/466mass1001.html

DECEPTIVE TRADE PRACTICES AND WARRANTIES

CORPORATE AGENT INDIVIDUALLY LIABLE UNDER DTPA

DTPA DAMAGES MAY BE BASED ON COST OF REPAIRS OR DIMINUTION IN VALUE

DTPA MENTAL ANGUISH DAMAGE AWARD AFFIRMED

MBR & Assocs., Inc. v. Lile,____S.W.3d____(Tex. App.—Fort Worth 2012).

FACTS: Appellee, William Lile, hired Appellants, MBR Guaranteed Foundation Repair and Marion Brian Ramon, to repair the foundation of his home. MBR and Ramon represented that they: (1) employed master plumbers and engineers; (2) carried liability insurance to cover any potential property damage; and (3) would have a master plumber and engineer oversee the work.

During the repair work, MBR negligently lifted the foundation, causing severe damage to the property. At the time, no engineer or master plumber was supervising. A representative who falsely claimed to be a master plumber was sent to fix the damage. In his attempts to repair the damage, the representative further damaged the property and fixed nothing. Ramon informed Lile that the damage was not Ramon's fault and he would not use his insurance.

Lile sued for breach of contract, negligence, violations of the DTPA, fraud, and gross negligence. The trial court found for Lile on each cause of action and awarded damages against MBR and Ramon jointly and severally. MBR and Ramon appealed.

HOLDING: Affirmed.

REASONING: The court found a corporation did not insulate individuals operating it from personal liability when, *inter alia*, the individuals used the corporation as a mere tool, business conduit of another, for personal purposes, or undercapitalization. Ramon's testimony revealed that he considered himself and MBR to be "one and the same." The two entities shared the same phone number and office, MBR did not file separate tax returns, and Ramon's individual property was not kept separate from the corporation's. The court found ample evidence in the record indicating that Ramon was MBR's alter ego, and therefore affirmed the lower court's finding that Ramon was vicariously liable.

The court stated that for damages to property, if repair was feasible and did not cause economic waste, then a plaintiff could recover the cost of repair; otherwise a plaintiff would be entitled to the diminution in market value caused by the injury. The court stated, however, that a plaintiff does not have to prove both cost of repair and diminution in value; he is allowed to elect which damage model to plead or prove. The court explained that if a defendant disagreed with the application of a plaintiff's election for damages, the burden would be on the defendant to prove the other damage model was appropriate.

The court rejected MBR's argument that Lile could not recover mental anguish damages in a suit based solely on damage to real property. The court relied on *City of Tyler v Likes*, 962 S.W.2d 489 (Tex. 1997), which held "mental anguish based solely on negligent property damage is not compensable as a matter of law." *Likes* refused comment on whether mental anguish damages would have been permitted for gross negligent or intentional damages. This court found *Likes* allowed mental anguish damages for some knowing violations of statutes, like the DTPA. Likening mental anguish damages to emotional distress damages, the court held a claim of mental anguish, based solely on property damage, was contingent upon evidence of design to harm the plaintiff personally.

DTPA CLAIM IS HEALTHCARE LIABILITY CLAIM SUBJECT TO CHAPTER 74 OF THE CIVIL PRACTICE AND REMEDIES CODE

McAllen Hosps., L.P. v. Gomez,____S.W.3d____(Tex. App.—Corpus Christi 2013).

FACTS: Appellee, Arturo Gomez, was injured in an automobile collision and received treatment for his injuries at a nearby hospital. Over a year later Gomez received further treatment for his injuries at Appellant hospital, McAllen Medical Center. McAllen filed a hospital lien against Gomez for "reasonable and necessary" medical expenses incurred by McAllen in treating Gomez. Gomez brought a suit against McAllen alleging three causes of action: DTPA unconscionable action, declaratory judgment, and fraudulent-lien claim.

McAllen filed a motion to dismiss based upon Gomez's failure to file an expert report as required by Tex. Civ. P. Code §74.351. The court denied the motion and McAllen appealed.

HOLDING: Reversed in part.

REASONING: The standard of review for applicability of Chapter 74 of the Civil Practice and Remedies Code is *de novo* review. The court applied the requirements of a healthcare liability claim to each of the causes of action. Under Chapter 74, a healthcare liability claim requires three elements: (1) a physician or health care provider must have been a defendant; (2) the claim or claims at issue must have concerned treatment, lack of treatment, or a departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care; and (3) the defendant's act or omission complained of must have proximately caused the injury to the claimant.

The court held that the DTPA unconscionable action claim satisfied the first element because a hospital fit within the meaning of "healthcare provider." Next the court looked at the second element. Gomez's DTPA complaint was that the hospital billed an unreasonable amount. The court found billing to be part of administrative services; thus, satisfying the second element. The court also determined that the "injury" suffered by Gomez was within the scope of Chapter 74, because it included more than pure economic loss; the claim included damages for mental anguish. These injuries were all directly related to the hospital's billing that was in question and therefore, satisfying the third requirement. With all three requirements met, the court found that Chapter 74 applied and the lower court's denial of the motion to dismiss was in error.

CONSUMER CREDIT

CONSUMER'S CLAIM AGAINST TOWING COMPANY NOT PREEMPTED BY FEDERAL LAW

Dan's City Used Cars, Inc. v. Pelkey,____U.S.____(2013).

FACTS: Petitioner, Dan's City Used Cars, Inc., towed and stored the vehicle of Respondent, Robert Pelkey. Dan's wrote to Pelkey, notifying him of the tow and storage. In response, Pelkey notified Dan's of his intent to pay charges and reclaim his vehicle. However, Dan's disposed of the car by trading it to a third party. Pelkey was not notified in advance of the trade and received no proceeds from the sale.

Pelkey sued Dan's for violating the New Hampshire Consumer Protection Act's requirement for disposal of stored vehicles. The court granted summary judgment to Dan's on grounds that the Federal Aviation Administration Authorization Act (FAAAA) preempted Pelkey's claims. Pelkey appealed. The Supreme Court of New Hampshire reversed and remanded. The Supreme Court granted *certiorari*.

HOLDING: Affirmed.

REASONING: The Court found Pelkey's claims escaped preemption because they were not related to either the "transportation of property" or the "service" of a motor carrier. The Court reasoned that §601(c) of the FAAAA preempted state laws related to a "price, route, or service of any motor carrier…with respect to the transportation of property." Title 49 defined "transportation" as services related to the movement of property, including arranging for storage and handling. The Court held the FAAAA's preemption clause inapplicable to Pelkey's claims because he neither objected to how his car was transported, nor the price of the tow. Rather, he sought redress only for conduct occurring after the car stopped moving and was permanently stored.

The Court found the words "storage" and "handling" fit within the definition of "transportation" only when those services related to the movement of property.

The Court found the words "storage" and "handling" fit within the definition of "transportation" only when those services related to the movement of property. The Court explained that temporary storage of an item in transit en route to its final destination qualified as transportation. Thus, permanent storage did not qualify as transportation, and in this case, no storage occurred in the course of towing Pelkey's vehicle.

The Court also rejected Dan's argument that Pelkey's claims were related to its towing service because selling the car was how Dan's obtained payment for the tow. The Court reasoned that if such state laws were preempted, there would be no laws to govern either the resolution of a non-contract-based dispute arising from a towing company's disposal of a vehicle previously towed, or afford a remedy for wrongful disposal.

TRIAL PERIOD PLANS CAN CREATE MORTGAGE MODIFICATION

Corvello v. Wells Fargo Bank, N.A.,____F.3d____(9th Cir. 2013).

FACTS: Appellants, Philip Corvello and Karen and Jeffrey Lucia (Corvello), entered into separate mortgage agreements with Appellee, Wells Fargo Bank. Corvello defaulted on the mortgage and applied with Wells Fargo for loan modification. Wells Fargo, a bank participating in the Home Affordable Modification Program (HAMP), was required to follow U.S. Treasury guidelines in order to be entitled to the benefits of the program.

Wells Fargo sent Corvello a Trial Period Plan (TPP) while determining eligibility for loan modification. Corvello fulfilled the TPP requirements but Wells Fargo did not inform Corvello of eligibility and did not offer loan modification. Corvello filed suit against Wells Fargo and the district court granted Wells Fargo's motion to dismiss.

HOLDING: Reversed and remanded.

REASONING: Corvello argued that Wells Fargo was obligated to offer loan modification because he fulfilled the TPP. Wells Fargo argued that the TPP expressly stated that it was not a modification of the mortgage. Wells Fargo also argued that if the TPP were to constitute a contract, it must have all elements required for contracts, including consideration, and that payment of debts or the compliance with the HAMP program reporting requirements could not count as consideration.

The court focused on language in two sections of the TPPs. First, "if [borrower is] in compliance with this Loan Trial Period and [borrower's] representations… [are] true in all material respects, then the Lender will provide [the borrower] with a Loan Modification Agreement…" Second, "[…] the Loan Documents will not be modified unless and until… (ii) [borrower] receive[s] a fully executed copy of a Modification Agreement…" The court found that a natural understanding of the language in the TPP constituted an agreement by Wells Fargo to grant a Modification Agreement if the borrower complied with all requirements of the TPP. The court also found that compliance with HAMP and TPP requirements constituted consideration and therefore the creation of a binding contract.

DEBT COLLECTION

DEBT COLLECTOR CAN CONTINUE TO CALL DEBTOR'S BROTHER-IN-LAW WITHOUT VIOLATING FDCPA

Worsham v. Accounts Receivable Mgmt. Inc.,____F.3d____(4th Cir. 2012).

FACTS: Appellee, Accounts Receivable Management Inc. (ARM), called Appellant, Michael Worsham, attempting to locate Martha Bucheli, (the "Debtor"). Worsham was listed as a contact for Debtor. ARM called Worsham's phone approximately ten times, and Worsham answered two of these calls. Both times he heard a prerecorded message instructing the listener to press "one" if they were the Debtor and "two" if they were not. One time Worsham pressed two, and upon hearing additional prompts and options, he hung up the phone. The other time, Worsham hung up the phone without indicating that he was not the debtor.

Worsham filed suit in state court, alleging violations of the FDCPA. ARM removed the case to federal court. Following cross motions for summary judgment, the district court granted ARM's motion. Worsham appealed.

HOLDING: Affirmed.

REASONING: Worsham argued three FDCPA violations had occurred. First, debt collectors could not contact a third party multiple times. Second, debt collectors could not contact anyone other than debtors, creditors, or attorneys of either party. Third, debt collectors could not harass, oppress, or abuse any person in connection with the collection of a debt.

The court found that the FDCPA allows debt collectors to call third parties multiple times under certain circumstances. Per U.S.C. §1692b, debt collectors could communicate with any third party more than once if it was reasonably believed that the third party's earlier response was incomplete and the third party had information to the debtor's location. Though Worsham answered that he was not the debtor, he failed to completely answer the subsequent prompts. Also, Worsham's number appeared as a possible contact for the debtor, which would have had a reasonable person believe that Worsham had more information on the debtor's location.

The court noted that Worsham's second and third FDCPA claims explicitly exempted any calls permitted under §1692b from liability. Because the court held that ARM's calls were permitted under U.S.C. §1692b, ARM's calls were legal and permitted.

WRITING REQUIREMENT VIOLATES FAIR DEBT COLLECTION PRACTICES ACT

Hooks v. Forman, Holt, Eliades & Ravin, LLC, 717 F.3d 282 (2d Cir. 2013).

FACTS: Appellants, Karen Hooks and Geraldine Moore (Hooks), signed a mortgage and failed to make payments. Thereafter, Appellee, Forman, Holt, Eliades & Ravin, LLC (FHER), sent a collection notice to Hooks. The notice required that any objections to the debt be in writing within thirty days or the debt would be assumed valid.

Hooks filed suit, arguing that requiring their objection to be in writing violated the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §1692g(a)(3). FHER moved to dismiss the complaint for failure to state a claim, and the district court granted. Hooks appealed.

HOLDING: Vacated and remanded.

REASONING: The court looked to both Third and Ninth Circuit opinions on the issue. The Third Circuit held that a notice imposing a writing requirement does not violate §1692g(a)(3) because other parts of §1692g explicitly contained writing requirements. If one section allowed either written, or oral notices, there would be an "incoherent system."

In contrast, the Ninth Circuit held the consumer's objections were not required to be in writing for three reasons. First, Congress's inclusion of a writing requirement in certain sections but not in others was intentional. Second, the statute provided protections in case of a dispute that did not depend on a prior writing. Third, allowing oral objections furthered Congress's intent of protecting wrongfully alleged debtors.

The Ninth Circuit held the consumer's objections were not required to be in writing for three reasons.

The court agreed with the Ninth Circuit and held that requiring written notice of objection was a violation of §1692g (a)(3) of the FDCPA. The legislative exclusion of language requiring written notice was purposeful and should be given effect.

Further, the court found that the sections without a writing requirement provided rights that were fundamental to debt consumers. The right to dispute a debt was the most fundamental right set forth in §1692g(a) of the FDCPA and the intent of Congress was to ensure that people who disputed debt could benefit from these fundamental protections. Requiring a written objection would be an undue burden and prevent some people from enjoying fundamental protections of the FDCPA.

Lastly, the court observed some sections in §1692g were more burdensome than others to debt collectors. These burdensome sections required debt collectors take affirmative steps in order to comply with the FDCPA. The court found it was within reason to require debt consumers take additional steps, such as writing a notice, before invoking more burdensome sections. At the same time, it was within reason to not require debt consumers take additional steps, such as writing a notice, before invoking the less burdensome sections of the FDCPA.

FEE OWED TO COURT IS NOT DEBT UNDER FDCPA

Knight v. Superior Court of N.J. Law Div., 513 F. App'x. 122 (3d Cir. 2013).

FACTS: A default judgment was entered against Appellant, Brian Knight, in the Superior Court of New Jersey of Hudson County (Superior Court) for an unpaid debt to Capital One Bank. Knight then filed a *pro se* complaint in the District Court of New Jersey against the Superior Court and the law firm that had represented

Capital One Bank, Goldman & Warshaw. In the unpaid debt case, Goldman & Warshaw had sent a letter to Knight stating that if he wished to file a motion to vacate a court order, he must submit a restoration fee to the court. Knight alleged that the letter sent by Goldman & Warshaw violated the FDCPA because it was deceptive and threatened action that could not be legally taken.

The district court *sua sponte* screened the complaint and concluded that the complaint failed to allege factual allegations that would support any cause of action. Knight filed an amended complaint and the district court dismissed Knight's amended complaint as frivolous. Knight appealed, alleging a violation of his rights under the Due Process Clause of the Fifth and Fourteenth Amendments and the Fair Debt Collection Practices Act.
HOLDING: Affirmed.
REASONING: The court found that a restoration fee was not debt under the FDCPA and affirmed the district court's decision dismissing Knight's complaint because it failed to state a viable claim for relief under the FDCPA. Under 15 U.S.C. §1692a(5), a "debt" is an "alleged obligation of a consumer to pay money arising out of a transaction" for "money, property, insurance, or services." The court also noted that Goldman & Warshaw was required by law to inform Knight, a *pro se* defendant, of the court fee for filing a motion to vacate.

ARBITRATION

SUPREME COURT RULES HIGH COSTS NOT A BAR TO CLASS-ACTION WAIVER

Am. Exp. Co. v. Italian Colors Rest.,____U.S.____(2013).

FACTS: Respondent, Italian Colors Restaurant, was a merchant who accepted American Express cards. Italian Colors had an agreement with Petitioner, American Express, and a wholly owned subsidiary, that contained a clause requiring all disputes between parties be resolved by arbitration. The agreement contained a waiver to class arbitration.

Italian Colors brought class arbitration against American Express for violations of federal antitrust laws, the Sherman Act and Clayton Act. American Express moved to compel individual arbitration. In resisting the motion, an economist for Italian Colors estimated that the cost of an expert analysis necessary to prove the antitrust claims would possibly exceed $1 million, while the maximum recovery for an individual plaintiff would be $38,549. The district court granted the motion and dismissed the lawsuits. The appellate court reversed and remanded. The United States Supreme Court granted *certiorari.*

HOLDING: Reversed.

REASONING: The Court held that the excessive costs of requiring members of the class to litigate their claims individually would not conflict with the policies of antitrust laws. The Court reasoned that Congress had taken measures to facilitate litigation, but it did not guarantee an affordable path to the resolution of every claim. In support, the Court observed that the Sherman and Clayton acts were enacted decades before Federal Rule of Civil Procedure 23 (the Rule) allowed class actions; thus they did not speak on class actions and could not have intended to preclude waivers of class arbitration.

Likening class-certification requirements to class waiver, the Court found the Rule did not create an entitlement to class actions. The Court observed that class certifications have certain requirements, one being class notice. Though the class-notice requirement creates high costs, the Court held that the class-notice requirement could not be dispensed with, even if it prevented the class action.

Lastly, the Court rejected Italian Colors's argument that an exception allowed courts to invalidate agreements that prevented "effective vindication." The Court explained this exception applied when high costs prevented a party's ability to pursue statutory remedies. This would have included high administrative and filing fees that caused the forum to be impractical. In this case, however, the high costs were not due to the pursuit of statutory remedies, but due to proving a statutory remedy.

MONTANA STATE LAW PRE-EMPTED BY FEDERAL ARBITRATION ACT

Mortensen v. Bresnan Commc'ns, LLC,____F.3d____(9th Cir. 2013).

FACTS: Appellees, Dale Mortensen and Melissa Becker (Mortensen), entered into a contract with Appellant, Bresnan Communications, for Internet service. The service agreement contained a provision stating the Federal Arbitration Act (FAA) would govern whether disputes could be arbitrated or not. Thereafter, Bresnan entered into a temporary agreement with advertising company NebuAd, allowing NebuAd to temporarily gather information from Bresnan's subscribers to facilitate targeted-advertising.

The reasonable expectations/fundamental rights rule had a disproportionate impact on arbitration agreements and was preempted by the FAA.

Mortensen brought suit against Bresnan alleging that Bresnan failed to provide adequate notice about NebuAd gathering subscriber information. Bresnan responded and filed a motion to compel arbitration in accordance with the service agreement. The district court applied Montana state law, which required that an arbitration agreement in a contract of adhesion be within a party's "reasonable expectations." The district court decided that the arbitration agreement was not a reasonable expectation because it was an unknowing waiver of the constitutional right to a jury trial.

HOLDING: Vacated and remanded.

REASONING: First, the court reviewed the Supremacy Clause and how generally any law that stood as an obstacle to the laws of the United States was preempted. The court then discussed how the FAA, a law that mandates courts to direct parties to proceed to arbitration if they agreed to do so, generally preempted state laws. The appellate court then made clear that the FAA has an exception to its preemptive powers found in the FAA's saving clause. The FAA's savings clause did not require the enforcement of arbitration agreements that were formed under duress, fraud, and unconscionability.

The court found that even these general contract defenses are preempted if they are in opposition to ensuring that private arbitration agreements are enforced according to their terms. Even generally applicable state-law rules are preempted when they have a disproportionate impact on arbitration. The appellate court reasoned that the FAA would preempt any state-law contract defense that had a disproportionate effect on arbitration.

The Montana Supreme Court previously ruled that arbitration agreements constitute a waiver of a party's fundamental constitutional rights to trial by jury. Additionally, Montana state law treated contracts of adhesion as a violation of public policy; the state law voided arbitration agreements where the waiver was not made voluntarily or knowingly. Accordingly, waivers to arbitration agreements were valid only when they were explained to and initialed by consumers. The appellate court found that the reasonable expectations/fundamental rights rule had a disproportionate impact on arbitration agreements and was preempted by the FAA.

DEFENDANT THAT LITIGATED FOR 21 MONTHS CANNOT COMPEL ARBITRATION

Cole v. Jersey City Med. Ctr.,____A.3d____(N.J. 2013).

FACTS: Respondent, Karen Cole, worked for Appellant, Liberty Anesthesia Associates (Liberty), as a certified registered nurse anesthetist. Liberty provided Jersey City Medical Center (JCMC) with anesthesia services, including the services contracted by Cole. JCMC suspended Cole from its staff, which resulted in Liberty firing Cole subject to their employment agreement. Liberty and Cole's employment agreement included an arbitration clause for any actions that result in a controversy.

After filing an initial suit against JCMC, Cole amended her complaint to include Liberty as a direct defendant. Liberty's answer to Cole's amended complaint included thirty-five affirmative defenses; however, a defense based on the arbitration clause was not among them. After twenty-one months of litigation, the trial discovery was complete. Three days before the trial was to begin, Liberty filed a motion to compel arbitration. The Superior Court, Law Division, granted Liberty's motion to compel arbitration but the Superior Court, Appellate Division, reversed and remanded. Liberty appealed to the New Jersey Supreme Court.

HOLDING: Affirmed and remanded.

REASONING: The court stated that without a demand for arbitration or an assertion of a right to arbitrate, a party might waive the right to arbitrate in prolonged litigation. A party could have expressly or implicitly waived its right to arbitrate, depending on its actions. If it filed a suit, an answer, or counterclaim without mentioning the arbitration provision and engaged in extensive discovery, then a court is likely to recognize a waiver of the party's right to arbitrate.

Three days before the trial was to begin, Liberty filed a motion to compel arbitration.

The court's decision not to enforce the arbitration clause rested on certain facts: Liberty waited twenty-one months before requesting arbitration; Liberty filed its motion to compel arbitration three days before trial; and it had thirty-five other affirmative defenses besides arbitration. These actions demonstrated Liberty's intentions to try the case instead of arbitrate. A factor even more representative than others was that Liberty filed a motion for summary judgment, which the court partially granted in regards to some of the asserted claims. The court reasoned that if it had the authority to resolve those claims, then Liberty no longer had the right to force arbitration after twenty-one months of litigation.

THIRD PARTY MAY NOT ENFORCE ARBITRATION CLAUSE

Rajagopalan v. NoteWorld, LLC, 718 F.3d 844 (9th Cir. 2013).

FACTS: Appellee, Amrish Rajagopalan, accumulated approximately $15,000 in debt. He sought professional assistance from First Rate Debt Solutions (First Rate) to settle the debt. Rajagopalan signed up for a one-year program. First Rate explained the contract over the phone while Rajagopalan scrolled through the document on his computer and electronically signed. The contract contained an arbitration clause, indicating that all parties to the contract would resolve any disputes through binding arbitration. After paying about $8,000 to First Rate by way of Appellant, NoteWorld, the payment processing company utilized by First Rate, Rajagopalan canceled his subscription and sought a full refund from NoteWorld. NoteWorld refused.

Rajagopalan filed a class action complaint against NoteWorld. NoteWorld counter-filed a motion to compel arbitration or in the alternative, dismiss without prejudice. NoteWorld asserted that Rajagopalan's claims rely on and arise under that contract and NoteWorld could invoke the arbitration agreement as a third party beneficiary. The federal district court disagreed and held that the arbitration agreement was substantively unconscionable, and that NoteWorld could not invoke third party beneficiary status because no evidence was submitted that Rajagopalan intended for NoteWorld to become a third party beneficiary. Additionally, the court noted that an indirect reference to a third party in the contract doesn't make that third party a beneficiary of the contract. NoteWorld appealed.

HOLDING: Affirmed.

REASONING: The court agreed with the district court's assessment of third party beneficiaries to contractual arbitration agreements. The court held that when designating a third party beneficiary, both contracting parties must intend for the third party beneficiary to be included in the terms of the contract. The intention could be ascertained by whether the parties intended for the third party to necessarily and directly benefit from the performance of the contract, or whether the parties intended for the third party to assume any duties or obligations under the contract. The creation of a third party beneficiary contract requires that one of the original parties assumes a direct obligation to the third party beneficiary at the time of the signing of the contract.

The court explained that NoteWorld did not submit any evidence that Rajagopalan intended for them to be actively involved in the contract. Additionally, Rajagopalan barely even knew NoteWorld would be so involved in the actions of First Rate. As a result, the court concluded NoteWorld could not have invoked the arbitration clause as a third party beneficiary.

BANKRUPTCY

LENDER WHO REPOSSESSED CAR WILLFULLY VIOLATED BANKRUPTCY STAY

In re Weber,____F.3d____(2d Cir. 2012).

FACTS: Appellee, Christopher Weber, and Appellant, State Employees Federal Credit Union (SEFCU), entered into a loan agreement allowing SEFCU to repossess Weber's vehicle in the event that Weber defaulted on the loan. After Weber defaulted, SEFCU repossessed the vehicle. Weber subsequently filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code (the Code). Weber's attorney contacted SEFCU to return the vehicle pursuant to the stay imposed by the 11 U.S.C. §362(a). Two months later, SEFCU was still in possession of the vehicle, and Weber filed suit in bankruptcy court to recover damages for loss of use of the vehicle.

The bankruptcy court granted summary judgment in favor of SEFCU, reasoning that SEFCU's actions did not constitute a "willful" violation of the automatic stay proscribed by the Code. Weber appealed to the district court, which ruled in his favor. The district court concluded that SEFCU had violated the Code because it knew of the petition and still retained the vehicle, making the possession willful. SEFCU appealed.

HOLDING: Affirmed.

REASONING: The court examined three issues in deciding whether there was a willful violation of the stay created by Weber's petition under Chapter 13.

First, the court looked at whether SEFCU's refusal to relinquish the vehicle constituted an unlawful exercise of control in violation of the automatic stay. Under §541 of the Code, Weber retained an equitable interest in the vehicle. The court held that property under the control or in possession of the entity must be delivered to the trustee during bankruptcy proceedings. SEFCU failed to do so and therefore was in violation of the Code.

Second, the court rejected SEFCU's claim that they were excused from returning the vehicle because Weber had not provided "adequate protection" for SEFCU's security interest in the vehicle. Section 542(a) of the Code provided that anyone in possession of Chapter 13 property "shall deliver," without qualification, the property to the trustee. The Code further required a creditor first surrender the property in question and then request "adequate protection" from the bankruptcy court.

Third, the court found a creditor willfully violated the Code simply when it knew the existence of the petition and the automatic stay. Specific intent to violate the Bankruptcy Code was not needed; as long as the creditor had the general intent to take any action that would violate an automatic stay, the intent requirement was satisfied. The court found that good faith did not excuse SEFCU's actions, and therefore, SEFCU was liable for Weber's related damages, attorney's fees and costs.

LONG TERM UNEMPLOYMENT JUSTIFIED STUDENT LOAN DISCHARGE

Krieger v. Educ. Credit Mgmt. Corp., 713 F.3d 882 (7th Cir. 2013).

FACTS: Appellant, Susan Krieger, borrowed federal student loans from Appellee, Educational Credit Management Corporation (ECMC). After receiving her paralegal certification, Krieger filed 200 applications for employment; none were successful. Fifty-three-years-old, living with her mother in a rural town with limited jobs, and unable to find employment for ten years, Krieger filed for bankruptcy.

The court mentioned that Krieger's lack of employment and income were evidence she could not have maintained a minimal standard of living if forced to repay the loans.

Relying on 11 U.S.C. §523(a)(8), ECMC moved to have Krieger's federal student loans exempted from discharge. The bankruptcy court declined and entered judgment in favor of Krieger. ECMC appealed and the district court reversed. Krieger appealed.

HOLDING: Reversed and remanded.

REASONING: The court noted that 11 U.S.C. §523(a)(8) excluded educational loans from discharge, unless repayment of the loans caused undue hardship. The court held undue hardship required that: (1) the debtor could not maintain a minimal standard of living based on current income if forced to repay; (2) such a state of affairs was likely to persist for a significant portion of the repayment period; and (3) the debtor had made good faith efforts at repayment.

Though ECMC conceded the first prong was satisfied, the court mentioned that Krieger's lack of employment and income were evidence she could not have maintained a minimal standard of living if forced to repay the loans. Looking at the second prong, the court examined Krieger's employment status and history. Krieger was fifty-three-years-old, unemployed for twenty-five years, and had never made over $12,000 a year when she did work. The court noted unemployment was unappealing for employers; thus, it was likely Krieger's unemployment would persist indefinitely.

MISCELLANEOUS

ATTORNEYS' FEES MUST BE TIED TO REDEMPTION VALUE OF COUPONS

In re HP Inkjet Printer Litig.,____F.3d____(9th Cir. 2013).

FACTS: In three separate class action lawsuits, Appellants sued Appellee, Hewlett Packard (HP), alleging unfair business practices. The suits were consolidated for settlement upon the district court's approval. In part of the settlement agreement HP agreed to: (1) provide class members $5 million in "e-credits" to HP's website; (2) pay up to $950,000 for class notice and settlement administration costs; and (3) pay up to $2,900,000 in attorneys' fees and expenses. The term "e-credits" was used as a euphemism for coupons.

After reviewing the agreement, the district court held the lodestar method of determining attorneys' fees was applicable per §1721(b)(1) of the Class Action Fairness Act (CAFA). In addition, the "key consideration" in determining the appropriate fees was "reasonableness in light of the results actually achieved." The district court estimated the ultimate value of the class settlement to be roughly $1.5 million. Recognizing that it would be improper to award fees that outstrip the calculated class benefit, the court ordered HP pay a reduced lodestar amount of $1.5 million and reduced costs of approximately $600,000.

Appellants appealed the fee orders and the Center for Class Action Fairness intervened as an objector.

HOLDING: Reversed, vacated, and remanded.

REASONING: The court held the sum of the attorneys' fees violated the CAFA in regard to settlements involving a coupon component. The court observed that the CAFA aimed to put an end to the inequities that arose when class counsel received attorneys' fees in cash that were grossly disproportionate to the actual value of the coupon relief obtained for the class. Section 1712(a) stated, in relevant part, "the portion of any attorney's fee award to class counsel that is attributable to the award of coupons shall be based on the value to class members of the coupons that are redeemed." This required that any attorneys' fee awarded for obtaining coupon relief should be calculated using the redemption value of the coupons.

CAFA aimed to put an end to the inequities that arose when class counsel received attorneys' fees in cash that were grossly disproportionate to the actual value of the coupon relief.

If a settlement was comprised of both coupons and equitable relief, the court would have to: (1) determine a reasonable contingency fee based on the actual redemption value of the coupons awarded; (2) determine a reasonable lodestar amount to compensate class counsel for any non-coupon relief obtained; and (3) combine both amounts for the total attorneys' fee.

In this case, the settlement agreement specified that no coupons could be issued until after the entry of a final judgment. Therefore, it was impossible for the district court to calculate the redemption value required by §1712, which was necessary to determine reasonable attorneys' fees.

STATE LAW PLACING $50,000 CAP ON PLAINTIFF'S PUNITIVE DAMAGES FROM PERSONAL INJURY DOES NOT VIOLATE INDIANA'S CONSTITUTION

State v. Doe, 987 N.E.2d 1066 (Ind. 2013).

FACTS: Appellee, John Doe, was awarded $150,000 in punitive damages for childhood sexual abuse. The defendant moved to have the punitive damages reduced to the statutory maximum. Indiana law capped punitive damages to no more than the greater of either three times the amount of compensatory damages or $50,000. In addition, seventy-five percent of the punitive damages would be paid into the State's violent crime victims compensation fund, while the remaining twenty-five percent went to the plaintiff. The trial judge denied defendant's motion, ruling that the cap violated the state constitution in regards to the separation of powers and the right to jury trial in civil cases. Appellant, State of Indiana, intervened to protect its interest in punitive damage awards and appealed directly to the Indiana Supreme Court.

HOLDING: Reversed and remanded.

REASONING: First, Doe argued that the right to a jury trial applied to all common law causes of actions and damages; therefore, a plaintiff has the right to recover a jury's assessment of damages. The court rejected the argument and held that the cap and allocation scheme were not in violation of the Indiana Constitution because the Legislature had the authority to limit punitive damages. Furthermore, the court noted that the Indiana Constitution required no more than the right to have a jury assess damages. Though a cap existed, the right to a have a jury assess damages still existed. Therefore, a cap was constitutional.

Second, Doe argued that the judiciary had the sole power to modify verdicts through the procedural device remittitur, and that a cap was legislative interference and unconstitutional. The court also rejected this argument and looked to criminal law for support. In criminal law, the legislature defined crimes and set limits on punishments, while the judiciary enforced those punishments within the limits. The court found these roles also applied in civil trials. The legislature defined the causes of action and limits on remedies, while the judiciary had sole authority to apply the remedies within the limits. The court noted a cap on punitive damages for a civil trial was no different than an eight-year maximum prison sentence for a Class C felony.

RCLA LIMITS DAMAGES FOR CONSTRUCTION DELAY

Timmerman v. Dale, 397 S.W.3d 327 (Tex. App.—Dallas 2013).

FACTS: In May 2006, Appellee, Richard P. Dale, hired Appellant, Timmerman Custom Builders (Timmerman), to remodel his upscale condominium. Dale and Timmerman signed a contract where Timmerman agreed to begin construction "forthwith and to continue such construction with reasonable diligence in

substantial conformity with the Plans and Specifications." The contract also contained a provision in which both parties acknowledged that the Residential Construction Liability Act in the Texas Property Code (RCLA) applied "to construction defects and any disputes or claims regarding construction defects in connection with the improvements."

In January 2008, Dale filed suit, alleging unreasonable delay in completing the project. Dale sought the fair market rental value of his condominium that had existed when the remodeling should have been completed. The parties agreed that the trial court would decide by summary judgment two issues: (1) whether or not a claim for delay in the construction of a residence was governed by the RCLA; and (2) whether or not reasonable rental value can be recovered on an issue of delay under the RCLA. The trial court held Dale's claim for lost rental value was not governed by the RCLA. Timmerman appealed.

HOLDING: Reversed and remanded.

REASONING: To determine if the claim was governed by the RCLA, the court first looked to the plain meaning of the statute. The RCLA provides limitations on damages for causes of actions resulting from construction defects in residences. It applies to "any action to recover damages or other relief arising from a construction defect, except a claim for personal injury, survival, or wrongful death or for damage to goods." A construction defect means "a matter concerning the design, construction, or repair of a new residence, of an alteration of or repair or addition to an existing residence, or of an appurtenance to a residence, on which a person has a complaint against a contractor." The question then became, "Whether or not "unreasonable" delay could have been an action arising from a matter concerning the construction of the residence?"

RCLA provides limitations on damages for causes of actions resulting from construction defects in residences.

The court noted that the statute was written broadly, to encompass "any action" arising from a construction defect. The court also noted that the statute defined construction defect as meaning that the complaint against the contractor must merely have arisen from a matter that concerned the construction of a new or existing residence, and need not have involved defective construction or repair. The term "construction" was not defined in the statute, so the court gave the term its plain meaning of "the act of putting parts together to form a complete integrated object." The court found that Dale's complaint for unreasonable delay concerned the manner of Timmerman's performance of the construction, even though it did not address the quality of construction. Because Dale's complaint of delay concerned the construction, it was governed by the RCLA and damages were limited.

SOLICITED FAX WITHOUT OPT-OUT MAY VIOLATE TELEPHONE CONSUMER PROTECTION ACT

Nack v. Walburg, 715 F.3d 680 (8th Cir. 2013).

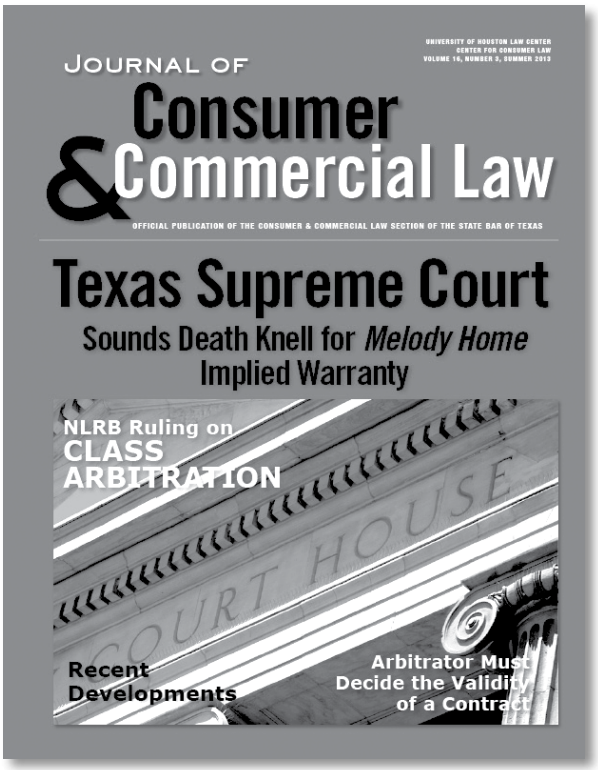
FACTS: Appellant, Michael Nack, consented to and received a fax advertisement from Appellee, Douglas Walburg. Nack sued Walburg alleging the fax did not contain opt-out language required by the Telephone Consumer Protection Act (TCPA).

On Walburg's motion, the district court granted motion summary judgment holding, the opt-out notice requirement only applied "unsolicited advertisements." Nack appealed.

HOLDING: Reversed and remanded.

REASONING: The court stated the TCPA prohibits the use of any device to transmit unsolicited advertisement without an opt-out notice for future unsolicited advertisements. Nothing in the TCPA expressly requires faxes to have opt-out notices. The court, however, turned to regulations and examined the conflicting language of §64.1200(a)(3)(iv) in Code of Federal Regulations. This regulation expressly requires solicited faxes contain an opt-out notice.

The court solicited the views of §64.1200's author, the FCC. The FCC explained in an amicus brief that the opt-out requirement also applied to solicited faxes. The reasoning was that one-time consent did not constitute permanent consent. The court explained that deference should be given to the agency charged with enforcing a statute and promulgating the regulations to implement that statute. FCC's interpretation was held to be correct because §64.1200 did not conflict with clear statutory language in the TCPA and the application of the §64.1200 was not arbitrary or capricious.



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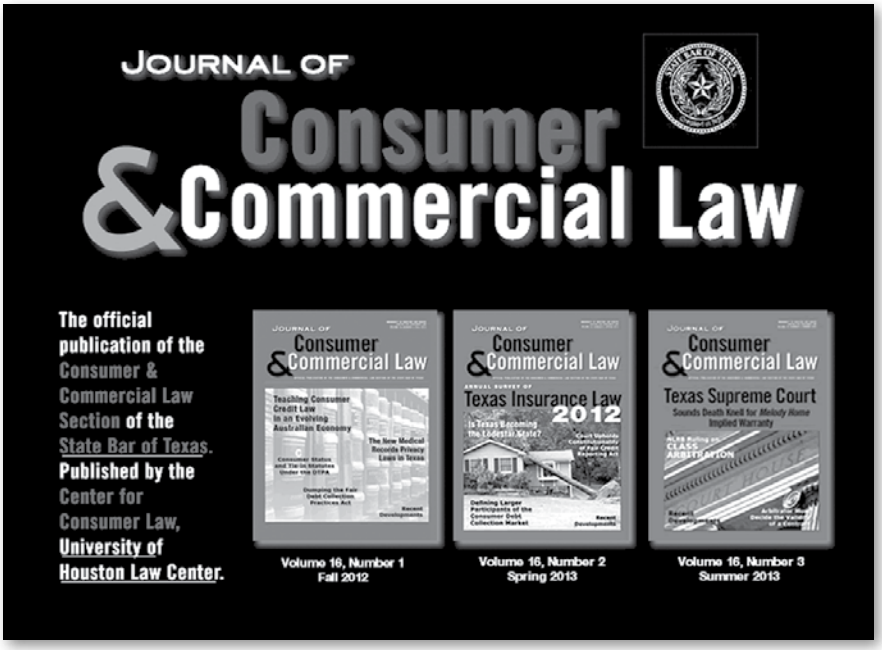

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THE LAST WORD

Each issue of the *Journal*, I write words to the effect that this issue contains "something for everyone." I admit, sometimes it is a little bit of a stretch. But not this time! I can't imagine a consumer or commercial attorney who won't find something of value in this issue. Whether you want to improve your writing, stay current about changes in the new Justice Court Rules, or just stay informed about the most current case law, you will find this issue informative.

As most of you know, Texas small claims court is gone, replaced by a new and improved justice court that now hears all "small claims cases." Robert Johnson's article explains the many changes to the court rules, and gives helpful hints for avoiding possible pitfalls. And who among us doesn't want to write better? Assuming you do, Chad Baruch's article discusses common mistakes, explains how to write clearer and more succinctly, and gives examples of good and bad writing. Unless you have found a way to practice law without ever writing anything, this article is a must read.

And finally, perhaps the most valuable part of the *Journal* is the many recent decisions discussed in the short student articles, the *News Alert*, and the *Recent Decisions* sections. This is one of the easiest ways to stay current with what's new in the fields of consumer and commercial law.

Hope you enjoy.

Richard M. Alderman
Editor-in-Chief