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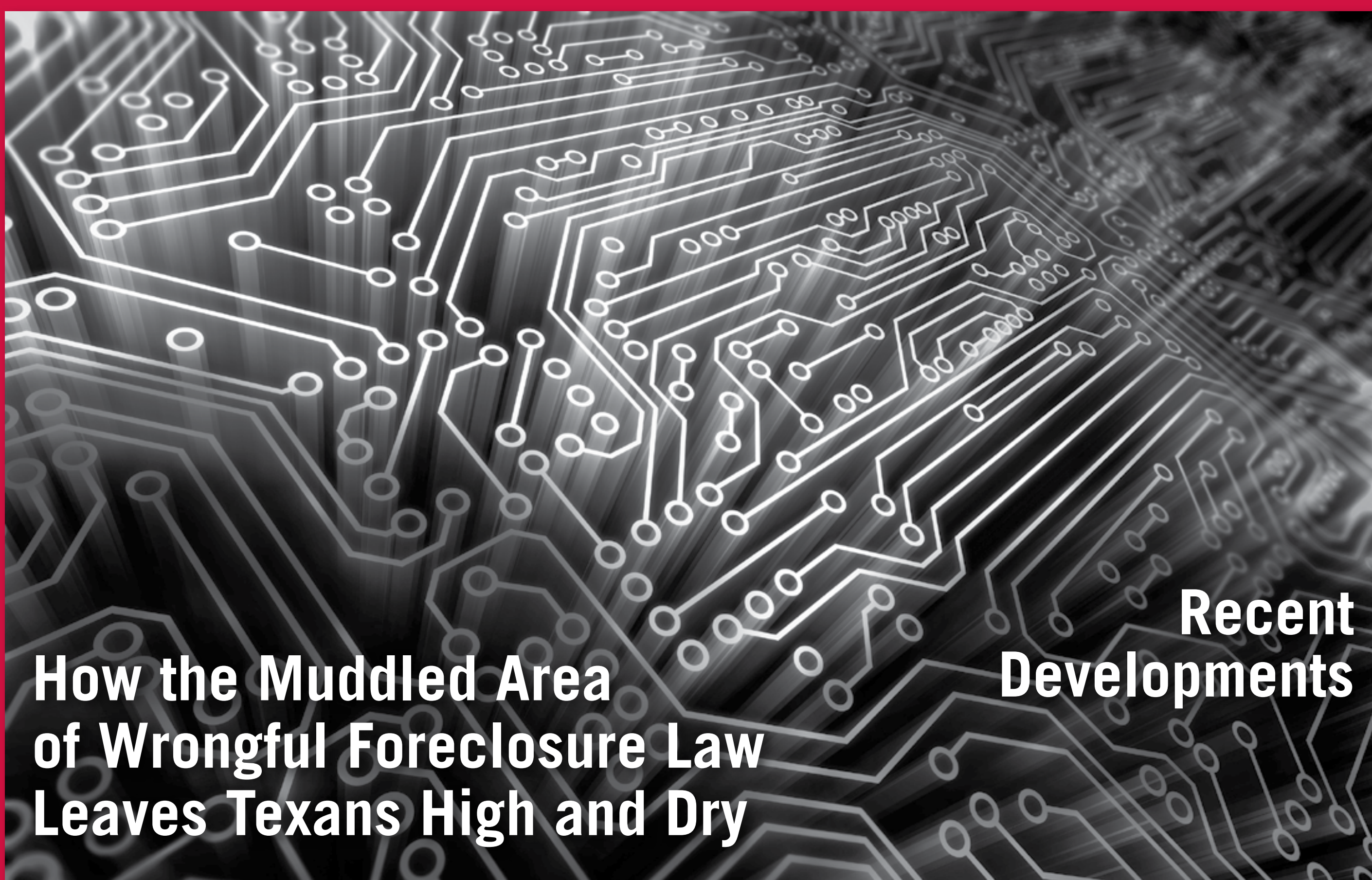
2015 Data Breach Litigation REPORT



Recent Developments

How the Muddled Area of Wrongful Foreclosure Law Leaves Texans High and Dry

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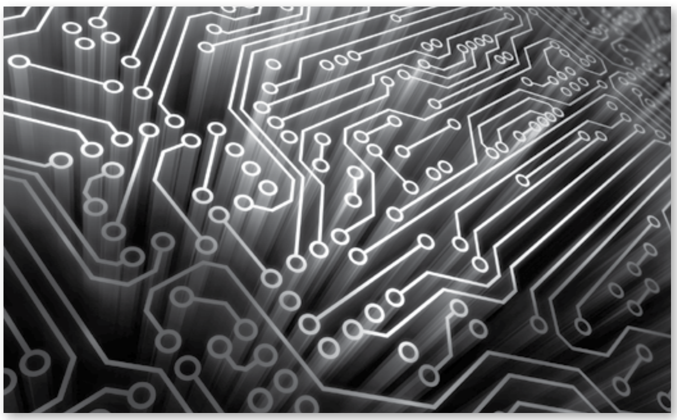

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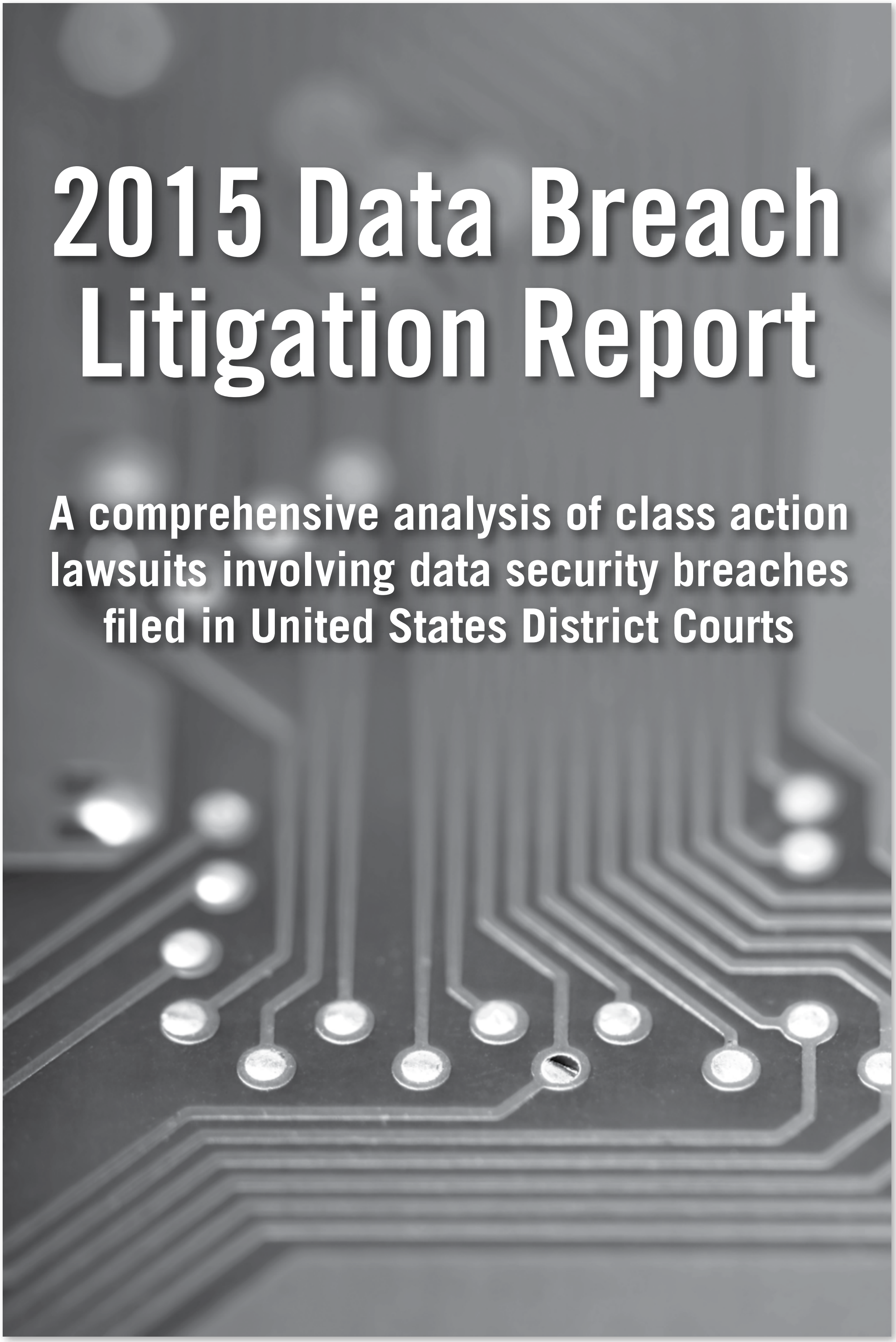
Articles

Recent Developments



2015 Data Breach Litigation Report

A comprehensive analysis of class action lawsuits involving data security breaches filed in United States District Courts

By David Zetoony,* Josh James, Leila Knox, ***
Tracy Talbot, **** and Amber Williams*****

Executive Summary

Data security breaches – and data security breach litigation – dominated the headlines in 2014 and continue to do so in 2015. Indeed, over 31,000 articles now reference data breach litigation.[1]

While General Counsel cite class action fears as one of their top concerns following a data breach, there is a great deal of misunderstanding concerning the nature of data security breach class action litigation. A main cause of that misunderstanding has been a lack of reliable statistics. Two years ago Bryan Cave's Data Privacy and Security Team set out to rectify the information gap by publishing what has become the most comprehensive survey and analysis of consumer class action complaints relating to data security breaches.

Our 2015 report covers litigation initiated over a 15 month period from the third quarter of 2013 through the third quarter of 2014 (the "Period"). Our key findings are:

- The overall volume of class action filings was significantly less than what was implied in the media. Approximately 110 cases were filed during the Period.
- When multiple filings against single defendants are removed, there were only 25 unique defendants during the Period. This evidences a "lightening rod" effect by plaintiff's attorneys to file multiple cases against companies connected to the largest and most publicized breaches; the vast majority of other companies that experienced a data breach were ignored by the plaintiffs' bar.
- Approximately 4% of publicly reported data breaches led to class action litigation.
- The Northern District of Illinois and the Northern District of California emerged as preferred forums for plaintiffs. The District of Minnesota and the Northern District of Georgia were also popular courts during the Period, this popularity was primarily due to their status as the home forums for two companies involved with the largest breaches during the Period.
- The retail industry has been disproportionately targeted by the plaintiff's bar. While only 14.5% of publicly reported breaches related to the retail industry, nearly 80% of class actions targeted retailers.[2]
- While plaintiff's attorneys alleged 24 different legal theories, there is a growing bias toward negligence and contract oriented theories.
- Plaintiff's attorneys have overwhelmingly focused on credit card breaches to the exclusion of breaches involving arguably more sensitive consumer information (*e.g.,* Social Security Numbers).

Part 1: Volume of Litigation

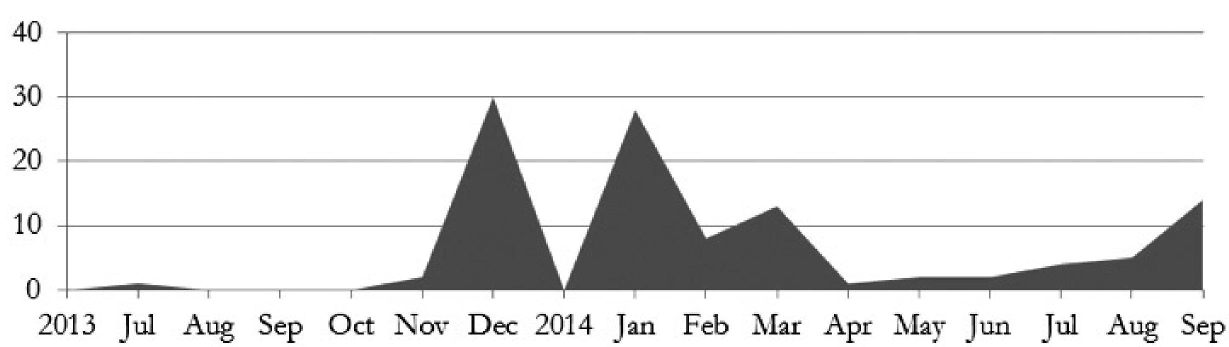
While a total of 110 complaints were filed during the Period, there was significant variation on a month-to-month basis. In addition, the quantity of litigation does not correlate with the number of publicly reported breaches in a month. For example, according to one interest group that tracks publicly reported breaches, nearly the same quantity of breaches were reported in January of 2014 as in April of 2014. However, twenty times more class action complaints were filed in January as compared to April.[3]

The volume discrepancy is due primarily to multiple class action complaints filed in connection with two large-scale credit card breaches that received significant media attention. Specifically, the vast majority of complaints filed in December of 2013 and January of 2014 related to the widely publicized Target data breach. Similarly, the majority of complaints filed in September of 2014 related to the highly publicized data breach of Home Depot.

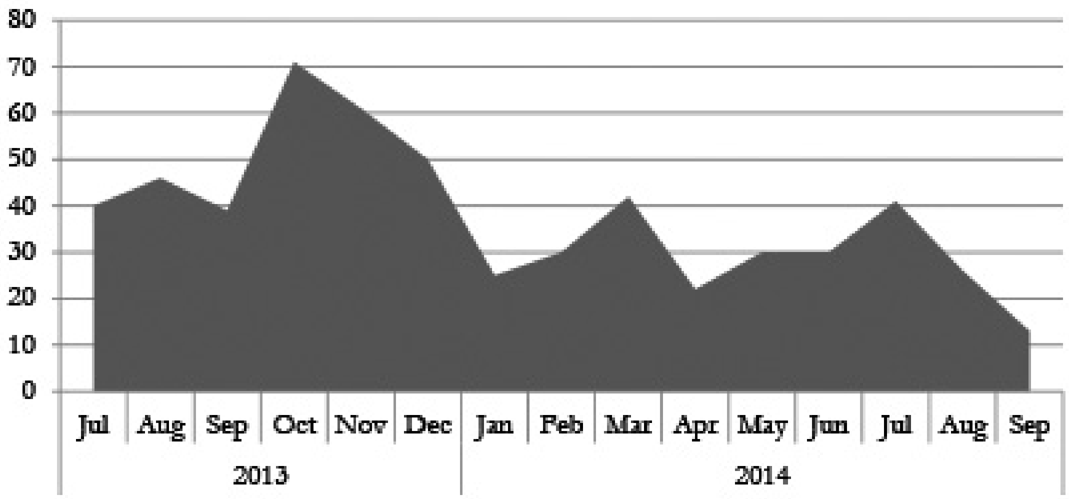
According to the Privacy Rights Clearinghouse Chronology of Data Breaches, 566 breaches were publicly reported during the Period.[4] However, only 110 federal class action complaints were filed during the same time frame and these filings related to only 25 unique defendants. As a result, slightly over 4% of publicly reported breaches ultimately led to class action litigation. This is consistent with the conclusion of other studies that found a similar rate of data security breach litigation between 2006 and 2010, and suggests that there has not been an increase in the rate of complaint filings when total complaints are normalized by the quantity of breaches.[5] This is also consistent with the estimated rate of complaint filings observed in other legal areas, including personal injury or loss.[6]

The following charts provide a breakdown of class action complaints filed with the quantity of publicly reported breaches disclosed during the Period: (See chart below and on page 92)

Class Action Complaint Filings



Publicly Reported Data Breaches

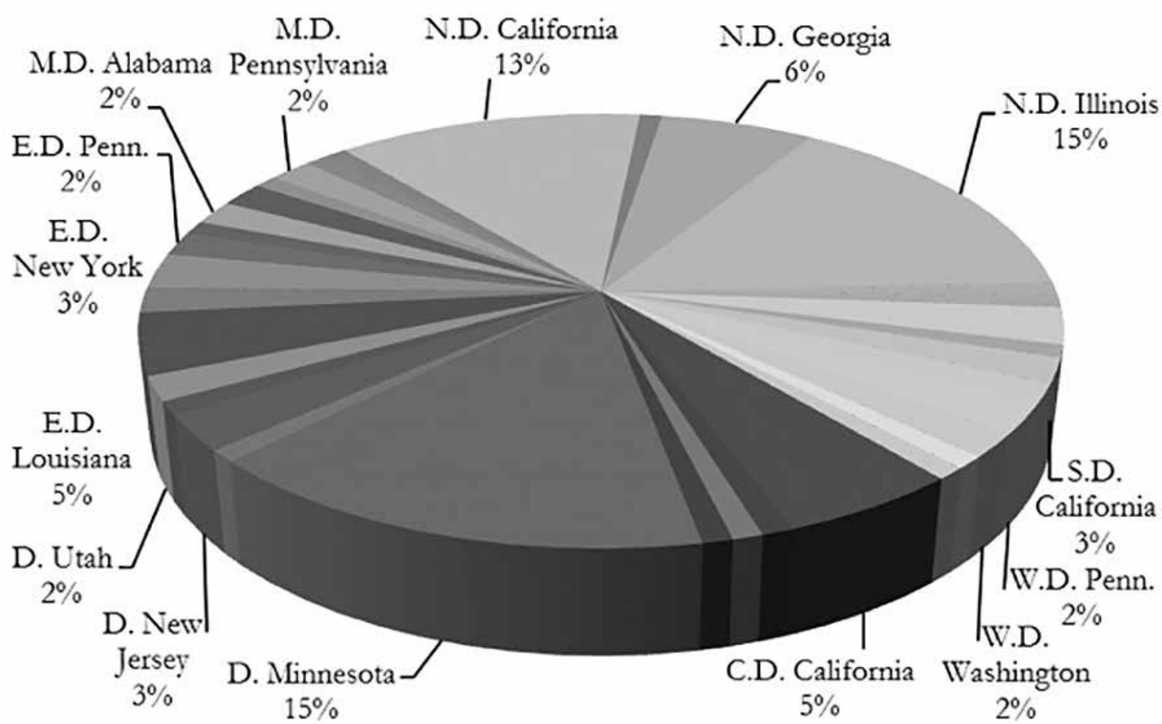


Part 2: Favored Courts[7]

Plaintiffs have demonstrated a clear preference for bringing data breach litigation in certain forums – specifically, the Northern District of Illinois and the Northern District of California. The preference may be due, in part, to a perception of those forums as being plaintiff friendly.

An equally popular, but perhaps less expected, forum was the District of Minnesota and, to a lesser extent, the Northern District of Georgia. The high rate of filing in both of these forums, however, was directly related to multiple class action filings against Target, which is located in Minnesota, and Home Depot, which is located in Georgia. If litigation relating to these two breaches is removed from the dataset, there does not appear to be any plaintiff preference for either forum.

The following chart provides a detailed breakdown by district of federal class action filings:[8]

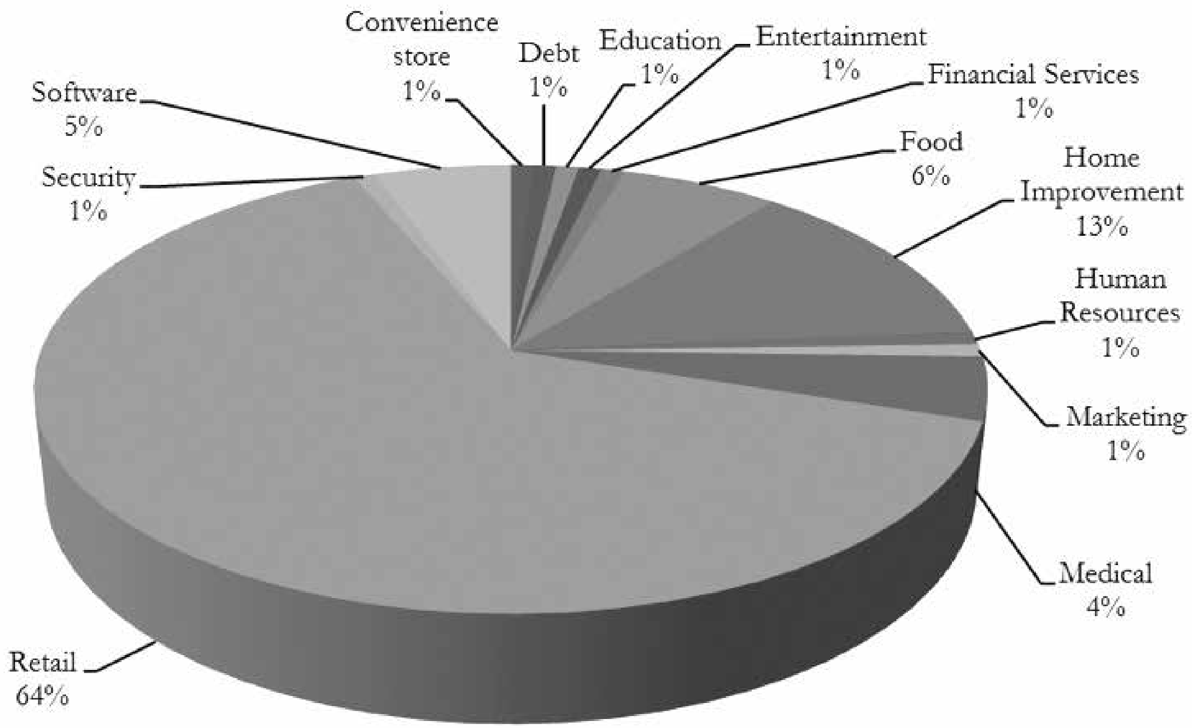


Part 3: Litigation by Industry

The retail industry was the target of the vast majority of class action complaints (64%), with 70 complaints filed against retailers during the Period. Note that for the purpose of this study we have treated the home improvement industry – which would include companies such as Home Depot – and the convenience store category as separate from retail. If complaints filed against home improvement and convenience stores that sell primarily to end-use consumers are included in the general retail category, nearly 80% of all class action complaints target the retail sector.

Although the data analyzed in this report was taken prior to the widely publicized breach of Anthem, Inc., the medical industry still received a significant, albeit minority, of class action complaints. The food sector and the software sector also received a significant, albeit minority, of class action complaints. Other industry sectors were largely ignored by plaintiff's attorneys.

The following chart provides a detailed breakdown of class action complaint filings by industry sector:

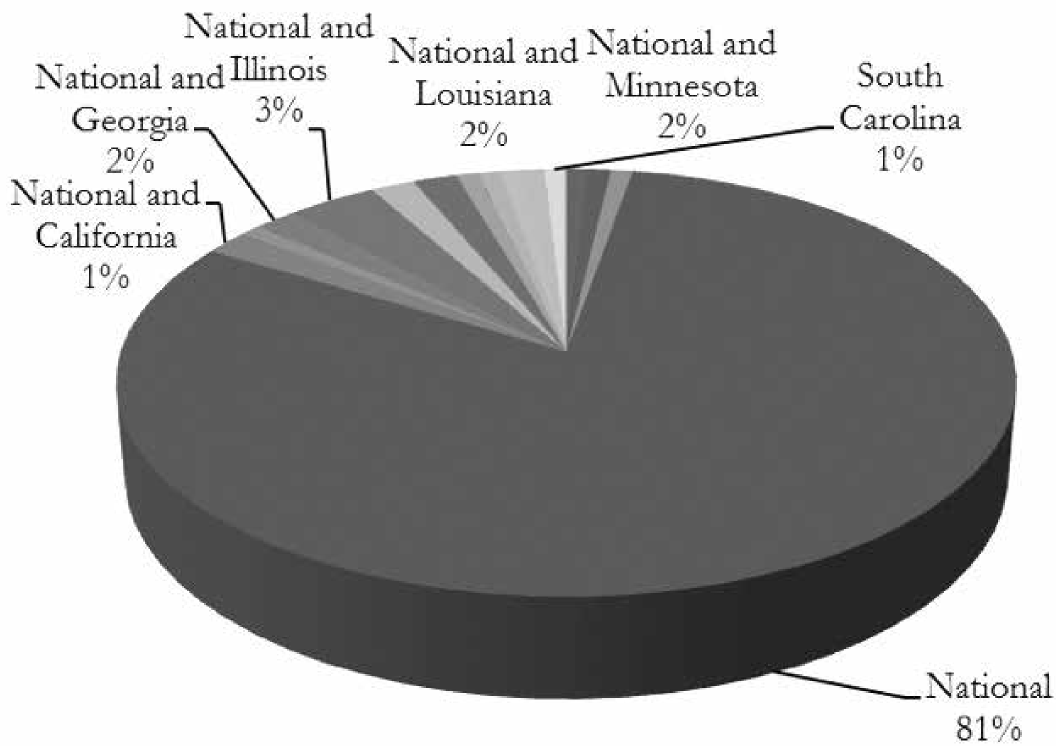


Part 4: Scope of Alleged Class (National v. State)

Access to class action complaints filed in state court differ among states and, sometimes, among courts within the same state. As a result, it is difficult, if not impossible, to identify the total quantity of class action filings in state court, and any analysis that includes state court filings would include a significant and misleading skew toward states that permit easy access to filed complaints. As a result, we purposefully do not include state court filings in our analysis and instead focus only on complaints filed in federal court and complaints originally filed in state court but subsequently removed to federal court under the Class Action Fairness Act ("CAFA").

We find in our dataset a strong preference for class actions that are national in scope. This may mean that plaintiff's attorneys prefer to allege putative national classes in an attempt to obtain potentially greater recovery. It could also mean, however, that additional complaints that have not been included in our analysis were filed in state court alleging putative classes comprised of single state groups.

Despite the preference for national classes, we continue to see a minority of cases (19%) allege sub-classes tied to residents in specific states. The following provides a detailed breakdown of the scope of putative classes:

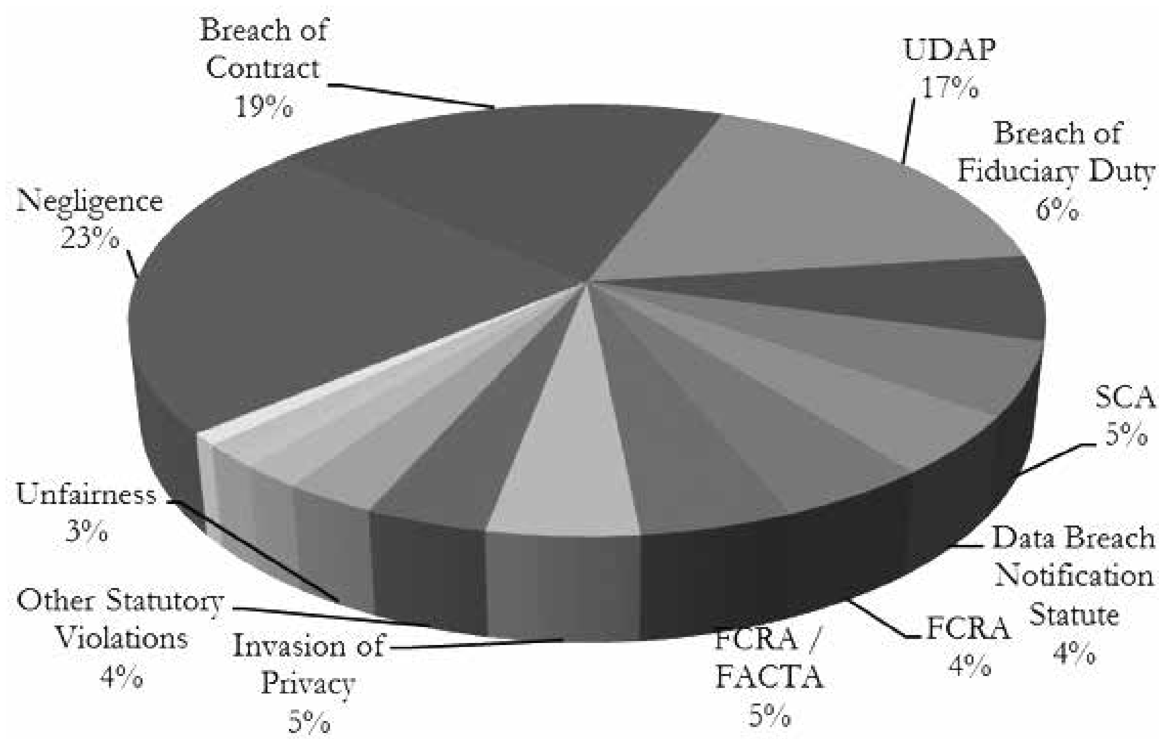


Part 5: Primary Legal Theories

The media, regulators, and Congress continue to focus their attention on state enacted "data breach notification laws." Though these statutes were not a popular primary legal theory, 40% of plaintiffs alleged a data breach notification law as a secondary theory in their complaint.[9] In addition, while plaintiffs continue to allege that companies failed to timely notify impacted consumers of a data breach, as a factual matter, most cases relate to breaches that were, in fact, announced by a company shortly after discovery.

There is no shortage of alternative theories upon which plaintiffs have brought suit. While the predominant theory is negligence, it does not yet dominate the landscape, and the predominant theory in nearly as many suits is breach of contract. Following negligence and breach of contract, the most common statutory allegation is that alleged poor data security violated general state consumer protection or unfair or deceptive trade practice laws.

The following chart provides a detailed breakdown of the primary theory alleged in data breach litigation complaints:[10]

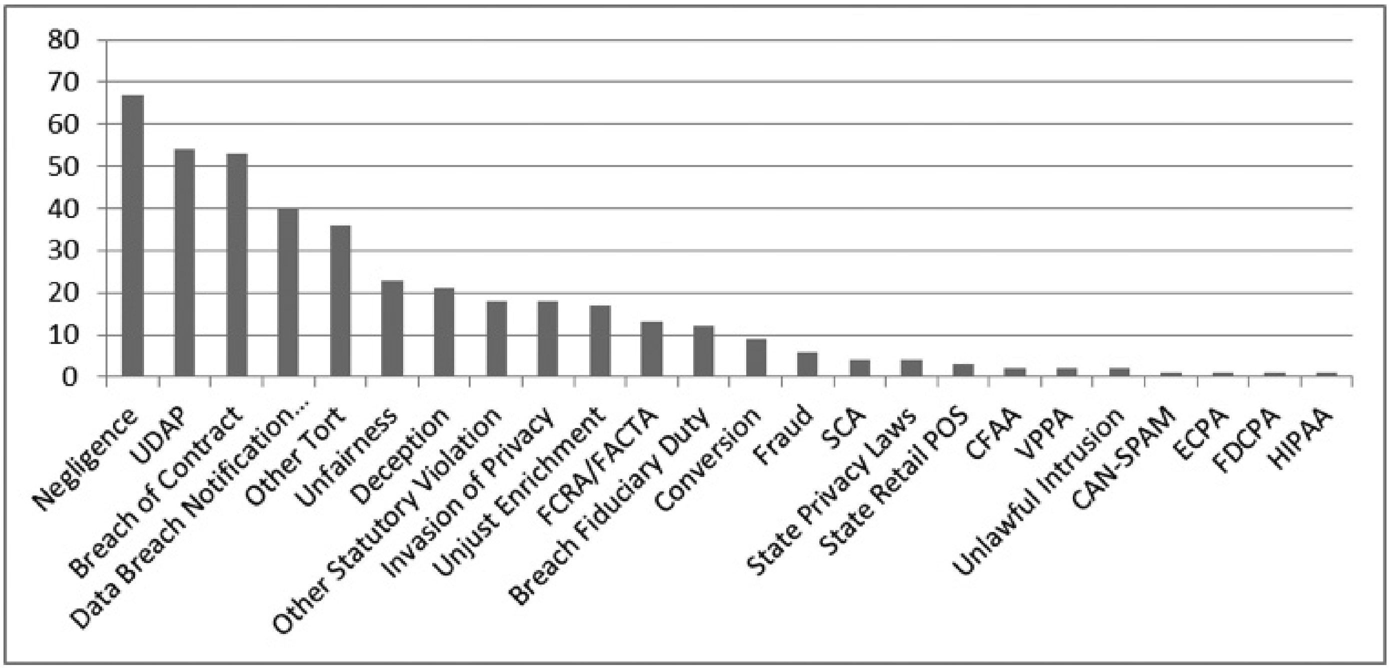


Part 6: Variety of Legal Theories Alleged

As discussed in Part 5, negligence and breach of contract were the leading "primary" legal theories used by plaintiff's attorneys. Although negligence and breach of contract may be the most common theories first put forward by a plaintiff's attorney, most plaintiffs choose to allege more than one theory of recovery, and some plaintiff's attorneys choose to include theories sounding in contract, tort, and statute.

As indicated in the table below, although plaintiff's attorneys show a clear preference for some legal theories – *e.g.,* breach of contract, negligence, and state statutes prohibiting unfair or deceptive acts and practices – in total they have pursued 24 different legal theories of recovery.

The following chart provides a detailed breakdown of all of the theories utilized by plaintiff's attorneys in date breach litigation complaints:



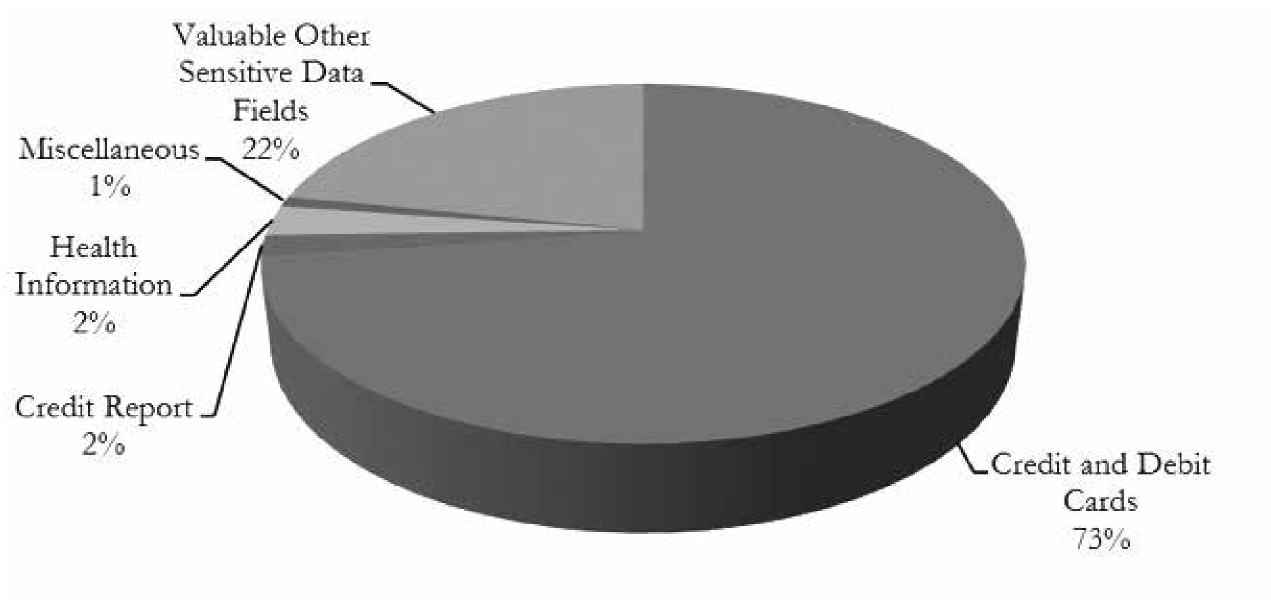
Part 7: Primary Type of Data at Issue

Privacy advocates have advanced different theories concerning what types of data are, and are not, more important to consumers if lost or stolen. While some advocates contend that the loss of a Social Security Number is the most harmful to consumers' privacy, as it can directly lead to identity theft which can cause economic injury, other privacy advocates argue that consumers care as much, if not more, about the loss of medical or salary information, as that data may result in shame or embarrassment.

Unlike other types of sensitive personal information, credit card account numbers can neither be used for identity theft (at least to the extent that the term refers to the opening of new accounts in the name of a consumer) or to embarrass or shame a consumer. While criminals that obtain a consumer's credit card may make fraudulent charges on the consumer's account, the Fair Credit Billing Act ("FCBA") and the Electronic Fund Transfer Act ("EFTA") dictate that the consumer cannot be held responsible for more than $50 in charges so long as the consumer reports the loss or theft of their card (or the unauthorized activity) within two business days of learning about it.[11] As a result of many banks and payment card networks now voluntarily waiving even the $50 that the consumer may be liable for under federal law, in most instances consumers suffer no financial harm as a result of a breach that involves their credit card.

Despite a lack of concrete financial harm connected with the loss of a credit card, plaintiff's attorneys continue to focus their resources overwhelmingly on breaches that involve credit card numbers.

The following chart provides a detailed breakdown of the type of data involved in data breach litigation:



Part 8: Plaintiff's Firms

Over 70 plaintiff's firms participated in filing class action complaints related to data security breaches. Although one plaintiff's firm filed seven class action lawsuits, the majority filed only one or two complaints.

Part 9: Methodology

The data analyzed in this report includes consumer class action complaints that were filed against private entities. Complaints filed against government agencies, or complaints that were filed on behalf of individual plaintiffs were excluded.

Data was obtained from the Westlaw Pleadings and the Westlaw Dockets databases. The sample Period covered the beginning of the third quarter of 2013 through the end of the third quarter of 2014 (*i.e.*, July 1, 2013-September 30, 2014). Multiple searches were run in order to find complaints that included – together with "class action" the following search terms:

- "security," or "breach" and phrases containing "personal," "consumer," or "customer" at a reasonable distance from the words "data," "information" or it derivations, "record," "report," "email," "number," or "code,"
- "data" at a reasonable distance from "breach," or
- "target" and "home depot" at a reasonable distance from "breach."

Although searches were conducted using "target" and "home depot," not all of the complaints filed as a result of these data breaches were found using Westlaw (*i.e.*, our search results produced around 56 complaints, while it is general knowledge that more than 140 lawsuits were filed against Target).[12] The discrepancy may be due in part to the speed at which the multiple filings were consolidated.

Additional searches were used to identify complaints that specifically referenced the Health Insurance Portability and Accountability Act ("HIPAA"), the Video Privacy Protection Act ("VPPA"), the Fair Credit Reporting Act ("FCRA"), the Fair and Accurate Credit Transactions Act ("FACTA"), the Fair Debt Collection Practices Act ("FDCPA"), and the Electronic Communications Privacy Act ("ECPA").

All the complaints identified by these searches were read and, after the exclusion of the non-relevant cases, categorized in order to identify and analyze the trends presented in this report.

As was the case in Bryan Cave's prior whitepapers, state complaints have been excluded so as not to inadvertently over-represent or under-represent the quantity of filings in any state. Complaints which are removed from state court to federal court were included within the analysis.

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1 Google News Search for "Data Breach Litigation" conducted on April 9, 2015.

2 Privacy Rights Clearinghouse estimates that in 2014, 43 of the 295 publicly reported breaches involved retailers. *See* http://www.PrivacyRights.org (last viewed April 9, 2015).

3 According to Privacy Rights Clearinghouse Chronology of Data Breaches, 25 breaches were publicly reported in January of 2014, compared to 23 in April of 2014. *See* Privacy Rights Clearinghouse Chronology of Breaches *available at* http://www.privacyrights.org (last viewed April 9, 2015).

4 *See* Privacy Rights Clearinghouse Chronology of Breaches *available at* http://www.privacyrights.org (last viewed April 9, 2015).

5 *See* Sasha Romanosky, *et al.,* Empirical Analysis of Data Breach Litigation, (April 6, 2013) at 10-11 *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1986461&download=yes (last viewed May 7, 2015).

6 *Id.*

7 This report does not include complaints filed in state courts. For more information, please see Part 9: Methodology below.

8 The following courts are not labeled in the chart and each represent 1% of the total filings for the Period: Middle District of Alabama; Northern District of Alabama; District of Colorado; Northern District of Florida; Southern District of Florida; District of Kansas; District of Massachusetts; District of New Hampshire; Northern District of New Jersey; Southern District of New York; Middle District of North Carolina; Northern District of Ohio; District of Rhode Island; Middle District of Tennessee; and the Western District of Wisconsin. In addition, the following courts are not labeled in the chart and each represent 2% of the total filings during the Period: Eastern District of Missouri; Middle District of Florida; and the Southern District of Illinois.

9 Please see Part 6 for additional information.

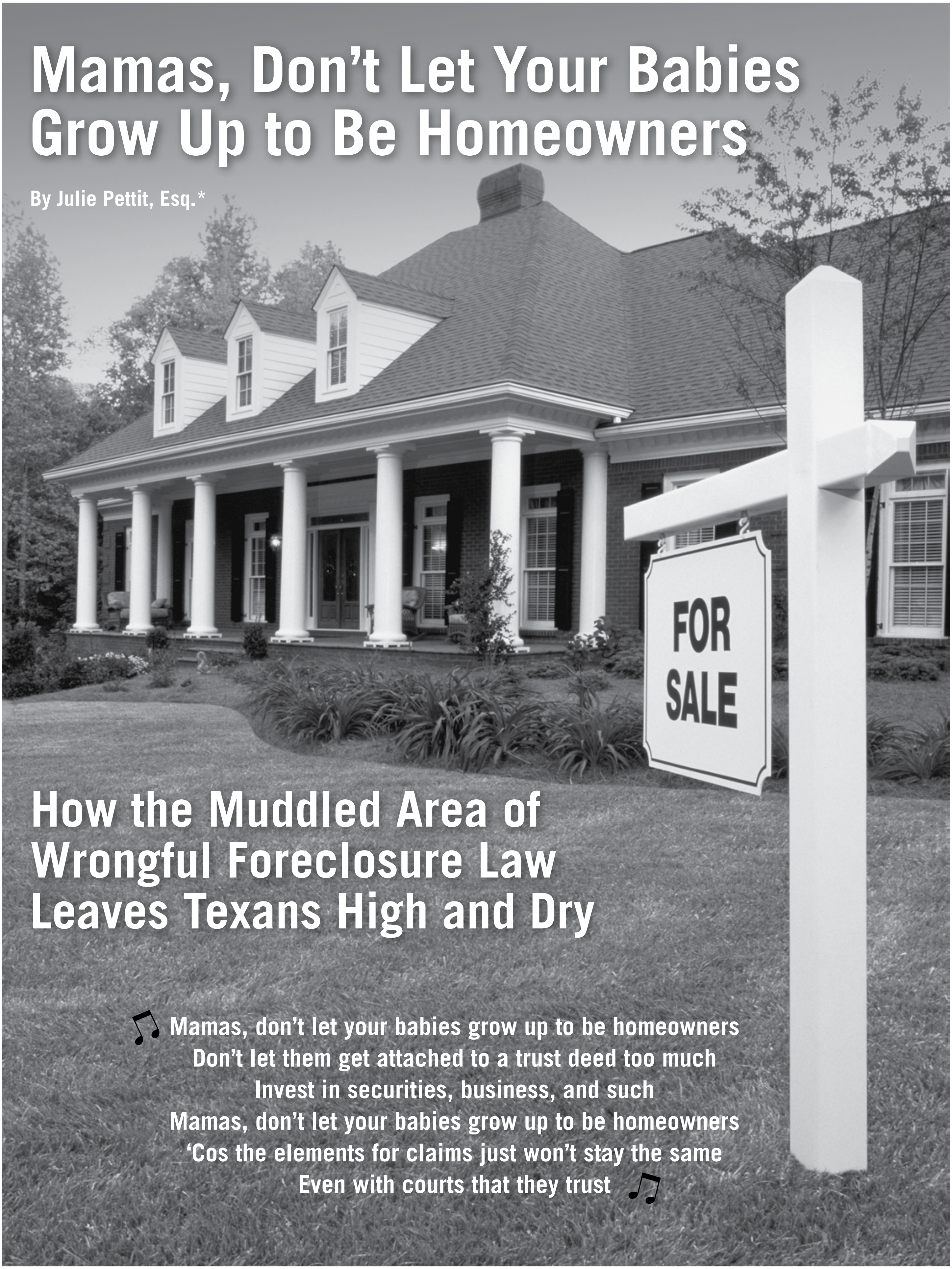
10 Additionally, 2% of plaintiffs claimed the VPPA as their primary legal theory. Fraud, HIPAA, and Unjust Enrichment each represented 1% of plaintiffs' primary legal theories during the Period.

11 *See* FTC Information Sheet, Lost or Stolen Credit, ATM, and Debit Cards *available at* http://www.consumer.ftc.gov (last viewed April 9, 2015).

12 *See* Target Breach Lawsuits Consolidated: Banking Suits Seek Recovery of Expenses *available at* http://www.bankinfosecurity.com/target-breach-lawsuits-consolidated-a-6845/op-1 (last viewed April 14, 2015).

Mamas, Don't Let Your Babies Grow Up to Be Homeowners

By Julie Pettit, Esq.*



How the Muddled Area of Wrongful Foreclosure Law Leaves Texans High and Dry

♫ Mamas, don't let your babies grow up to be homeowners
Don't let them get attached to a trust deed too much
Invest in securities, business, and such
Mamas, don't let your babies grow up to be homeowners
'Cos the elements for claims just won't stay the same
Even with courts that they trust ♫

Introduction

Imagine for just a moment that you have been accused of a relatively minor crime such as shoplifting. And, surprisingly, you are not made aware of this accusation until months after your shopping trip when the sheriff arrives on your doorstep, bustles you out the door, and takes you to into custody. Wait, what is that you say? Where are my rights? Where is my due process? Am I not entitled to receive timely, actual notice of the accusation, to present my case in court, and to reap from the procedural protections of the law before my freedom is taken from me? If you shoplift, rest assured you are indeed entitled to all those things. Strangely, however, if you are a Texan losing your home in foreclosure proceedings, you can expect to receive from the legal system much less protection than someone facing petty theft charges.

Unless a homeowner is able to cure the default between the time that the lender gives notice and the time that foreclosure auction occurs. . . there is no redemption period for the homeowner, except in specific circumstances, such as tax liens and Home Owners Associations liens.

This is the brutal truth: homeowners in Texas face a situation analogous to that described above, and they continue to face it every day. Our legal system is failing miserably at providing the most basic of procedural protections to vulnerable Texans facing the loss of their homes. This article will show that it is entirely possible for Texas homeowners to be foreclosed upon and lose their home, despite having received no actual notice of the impending foreclosure, judicial oversight, or chance to protest against unfair business practices by their mortgagee.

Part I of this article explains the foreclosure process in Texas, including the most common route of non-judicial foreclosure, as well as the structure and remedies relating to a claim for wrongful foreclosure. Part II focuses on the action for wrongful foreclosure, specifically the curious and unevenly applied element of a "grossly inadequate sales price," and the reasons it should be clarified or eliminated entirely from the Texas common law's requirements. Finally, Part III examines the recent Dallas Court of Appeals opinion in the *Wells Fargo Bank v. Robinson*, and questions the wisdom of adding additional burdens for homeowners seeking to recover under a wrongful foreclosure claim.

Part I: The Non-Judicial Foreclosure Preference in Texas

There are two types of foreclosure proceedings—judicial and non-judicial. Judicial foreclosure is so named because the lender must file an action in court to foreclose upon the homeowner. This type of foreclosure benefits the homeowner through the use of judicial oversight of the process, which tends to hold lenders more accountable, thereby helping to ensure that homeowners in default are aware that a foreclosure action has been taken against them. Additionally, by being called to court, a homeowner who is otherwise not legally or business-savvy can be alerted to the available, such as loan modification and mediation. In states where judicial foreclosure is the only option, homeowners in default are more likely able to save their home from foreclosure through modification or mediation.

In Texas, the vast majority of foreclosures occur through the second type of foreclosure: the species known as non-judicial foreclosure.[1] Non-judicial foreclosure has numerous benefits over judicial foreclosure. Unfortunately, those benefits advantage the lender, not the homeowners. Specifically, lenders in a non-judicial foreclosure do not have to go through the courts, and instead, exercise the power of sale written into the security instrument, which is a trust deed or deed of trust in Texas. This process makes non-judicial foreclosure much more expedient and less costly for lenders. They can acquire equitable title from homeowners through non-judicial foreclosure in a matter of weeks or months, with no court interaction.

In fact, excepting any additional procedures written into the individual trust deed itself, Texas law does not require much else of the lender. The foreclosure process has been reduced to statute and is contained within Section 51.002 of the Texas Property Code.[2] Under the law, to have a valid foreclosure, the lender must only send by certified mail a notice to the homeowner's last address on record with the lender.[3] There is no requirement of actual notice. Under Texas law, notice is served to the homeowner when, to the lender's best knowledge, the notice is addressed to the homeowner's last address on record and deposited in the mail twenty-one days before the foreclosure sale. Testimony or an affidavit from someone with knowledge of the mailing is prima facie evidence of service.[4] "The dispositive inquiry under section 51.002(e) . . . is not receipt of notice, but, rather, service of notice."[5] Thus, a homeowner who is sent the required notice but does not actually receive or see that notice might lose the small window of opportunity he or she may have had to attempt a loan modification or to halt foreclosure by acquiring a temporary restraining order.

Section 51.002 of the Property Code also requires that notice of the sale must be posted at the courthouse of the county where the property is located for at least twenty-one days prior to the foreclosure sale.[6] That notice of impending sale must also be sent to the homeowner's last address of record, but again, there is no requirement of actual receipt.[7] Section 51.002 dictates the time and place of sale but is silent on the way the auction should be handled.[8] It also fails to require the borrower to attend the sale or for the property to be sold for any particular price.[9] Indeed, Texas law fails to even include the element of fiduciary duty between the trustee who is auctioning off the property and the defaulted homeowner. Additionally, Texas' Property Code and case law also fail to imply a duty of good faith on the part of the trustee. "[A] mortgagee is under no *duty* to take affirmative action, beyond that required by statute or the deed of trust, to ensure a 'fair' sale."[10] Compliance with the limited formalities of the Property Code is normally sufficient to execute a valid foreclosure, and no extra effort on the part of the lender or trustee would be required.

Unfortunately, unless a homeowner is able to cure the default between the time that the lender gives notice and the time that foreclosure auction occurs, which can be as short as a 20-day period to cure, there is no redemption period for the homeowner, except in specific circumstances, such as tax liens and Home Owners Associations liens. Unlike many other states, in Texas, there is no period of time where a homeowner has the right to pay off the debt and regain his or her home following a normal foreclosure sale. The only option available to homeowners in this position is to attempt to have a sale set aside in equity or to obtain money damages in a suit against the lender. In order to successfully sue the lender, the homeowner must plead and prove the elements of a wrongful foreclosure claim, which are highly favorable to the lender and difficult to prove. To understand the process and remedies, it is first necessary to understand the elements that constitute a cause of action for wrongful foreclosure.

A wrongful foreclosure claim in Texas includes three elements: (1) a defect in the foreclosure sale proceedings; (2) a grossly inadequate selling price; and (3) a causal connection between the defect and the grossly inadequate selling price.[11] Under

Texas law, the first two elements are unclear and unsettled. While the third element is fairly straightforward it can be difficult because it requires a cause-and-effect between the first two elements.

Understanding exactly why the three elements of a wrongful foreclosure claim inadequately protect homeowners requires an analysis of their legal limitations. Specifically, the limitations in these elements are the law's failure to (1) address situations where the property sells for a low price and (2) protect homeowners who can show defects in the foreclosure proceedings. First, the law completely fails to address situations in which the property sells for low prices at the auction but the lender and trustee nonetheless have met the minimum technical requirements for the foreclosure process. When ambiguous behavior occurs, courts have shown themselves to be quite lenient in interpreting whether lenders and trustees have met those minimum requirements.

For instance, in *First State Bank v. Keilman*, the homeowners put forth four contentions of defects in the proceedings, all of which were shut down by the appellate court.[12] In regard to the Keilmans' first contention that the trustee refused to postpone the sale for a few minutes so the homeowner could arrive back at the court, the court emphasized that Texas law does not provide for any absolute right for a homeowner to witness or participate in the auction.[13] While it can be an advantage to require the notification of a homeowner in default of the time and place of the foreclosure sale is so that the borrower has the option of being present at the sale to ensure compliance by the trustee or to bid for the property themselves, the borrower's presence is not necessary if notice was properly mailed.[14] In the Keilmans' second contention, they attested that the deed of trust specifically included a clause requiring the trustee to "advertise" the foreclosure sale, to which the court responded that it would construe the meaning of "advertise" in the broadest sense such that tacking a notice of sale onto a bulletin board at the courthouse was sufficient under Texas law.[15] In this instance, when given the opportunity to expand or contract the Keilmans' rights based on the contractual language, the court resoundingly chose to contract the homeowners' rights. The court also struck down the Keilmans' third contention that failing to include a street address of the property on the notice of sale either constituted a default in proceedings or chilled potential bidding on the property.[16] Although it seems reasonable to assume that potential bidders are less likely to bid if they are hampered from easily finding the property's location, the court decided that a legal description of the property was satisfactory. Fourth, the court wholly struck down the contention that the disclaimers of warranty on the notice conflicted with language in the deed of trust.[17] Again, the court chose to construe the language in favor of the lender.

In another case, the court noted that despite a $957,600 selling price on a property with a fair market value of at least $1,500,000, the homeowners had no claim under wrongful foreclosure law because the appellate court negated their defect claims entirely.[18] Though the appellate court upheld the trial court's decision that the selling price was grossly inadequate, it determined that absent "any finding that [the lender] committed some act of wrongdoing, misconduct, or unfairness," the property owners had no claim.[19]

Second, the law fails to protect homeowners who can show defects in the foreclosure proceedings—even when there are severe mistakes or deliberate malice on the part of lenders—as long as the property does not sell for a grossly inadequate price. "Mere inadequacy of consideration alone does not render a foreclosure sale void if the sale was [otherwise conducted] legally and fairly."[20] The element of grossly inadequate selling price is particularly problematic and, unsurprisingly, is treated differently by different courts. A line of reasoning originating from *Charter National Bank Houston v. Stevens* contends that the element of a grossly inadequate sales price has "inadvertently crept into the picture as to *all* lawsuits for wrongful foreclosure."[21] Further, the court contends that a homeowner who has shown a defect or irregularity in the proceedings should be allowed to recover for the difference in price if the defect or irregularity results a chilling effect on the sale price, whether the effect be large or small. This makes sense, in the court's reasoning, when the claim is viewed as akin to conversion.[22] The exception to the requirement of a grossly inadequate sales price is where a borrower can show that the lender or trustee deliberately "chilled" the bidding at auction, but even this recovery depends on the jurisdiction. In this situation, to chill the bidding means to take affirmative steps that adversely affect the final sale price. The requirement of a grossly inadequate sales price and the concept of bid chilling warrant further discussion in Part II of this article.

Part II: The Grossly Inadequate Requirement

Although the law requires a "grossly inadequate" sales price to establish an action for wrongful foreclosure, Texas appellate courts cannot seem to agree on how to defeine the term. .In fact, one appellate court has openly rejected including that element in a wrongful foreclosure claim where the remedy sought is money damages. Courts currently operate without guidance from either statutory materials or a Texas Supreme Court ruling as to a threshold amount. This lack of guidance has led to inconsistent application across the state of Texas regarding what is considered "grossly inadequate" for plaintiffs seeking recovery.

When precedent has been created at the appellate level, it sometimes attempts to create safe-harbor percentages that hover around half of the fair market value. When the line of cases where this reasoning is derived from is closely examined, however, it is not at all obvious that a legal safe harbor should be the logical conclusion. Somewhere along the line, it seems that a showing of a grossly inadequate sales price morphed from being a way to presumptively evidence bad behavior into a required element of proof.

A plaintiff seeking to show a grossly inadequate sales price must first establish the fair market value of the land prior to the foreclosure sale. The sale amount can then be calculated as a percentage of that fair market value, and this is the number courts use to decide whether the price was grossly inadequate. This, in turn, is determinative of whether the plaintiff can fulfill that element of the claim for wrongful foreclosure. The math is

very straightforward, but the complication arises in defining the proper interpretation. With no bright-line rule to delineate the upper and lower limits, every case requires a fresh interpretation by the court of what qualifies as a grossly inadequate sales price. Indeed, the issue of what amounts to a grossly inadequate sales price is always purported to be a question of fact for the jury.[23] However, as stated, some appellate courts have attempted to establish a safe-harbor percentage for mortgagees at fifty to sixty percent of the fair market value, sometimes setting aside jury findings of a grossly inadequate sales price to rule favorably instead for the mortgagees. Working backward through this line of cases raises questions regarding the proper presumptive role of "grossly inadequate" and why it continues to form an element of a wrongful foreclosure claim, along with causation, in cases where courts already know that fraud or other defects are present.

For instance, in *Federal Deposit Insurance Corporation v. Blanton*, the Fifth Circuit affirmed a trial judge's verdict in favor of the mortgagee, despite the jury's finding of a grossly inadequate sales price.[24] The auction price was 62.3% of the fair market value of the property in question, and the jury found both defect and causation to be present as well.[25] While not addressing or overriding the elements of defect and causation, the trial and appellate judges believed the 62.3% was sufficient as a matter of law, and thus the claim must fail.[26] "The weight of Texas authority rejects a determination of gross inadequacy where, as here, property sells for over 60% of fair market value."[27] To justify affirming the trial court's decision, the Fifth Circuit further contends that "a jury finding of 'grossly inadequate price' sometimes oversteps legal limits."[28] On the other hand, in dicta, the court conversely states, "We certainly do not promote mechanical application of a '60% test' . . . . Cases with a finding of gross inadequacy typically fall far below the 60% line."[29] In effect, while the Fifth Circuit appears to be establishing precedent for a safe-harbor threshold or legal limit on acceptability, it denies that this is what it is doing.

In *Blanton*, the court relies on a 1932 Texas case *Richardson v. Kent*,[30] wherein the court states, "The term 'grossly inadequate consideration' in a foreclosure action means, a consideration so far short of the real value of the property as to shock a correct mind, and thereby raise a presumption that fraud attended the purchase."[31] The *Richardson* court further notes that it "know[s] of no case holding that, when property at a forced sale brings 50 [percent] of its value, the consideration paid by the purchaser is decreed as a matter of law, to be grossly inadequate; hence no presumption of fraud can be indulged in respect to this sale."[32] Many court opinions refer to *Richardson* and incorporate its language into their arguments that all wrongful foreclosure claims must be accompanied by a grossly inadequate sales price in addition to defect and causation. However, this deserves a closer look to see how and why the element of a grossly inadequate sales price exists. Was the original purpose to evidence a rebuttable presumption of fraud, or has it always been a logical component of all wrongful foreclosure claims? At least one appellate court, the Fourteenth District in Houston, has spoken out in its opinion in *Charter National Bank-Houston v. Stevens*, noting that the requirement of a grossly inadequate sales price does not belong in a wrongful foreclosure where the remedy sought is simply money damages and not a setting aside of the sale.[33] The court stated:

> In the development of Texas law, however, a universal need for the plaintiff to prove a grossly inadequate selling price may have inadvertently crept into the picture as to all lawsuits for wrongful foreclosure. We believe this to be an erroneous portrayal. It was never intended that there should be an automatic need to prove a grossly inadequate selling price in a situation where the bidding at a non-judicial foreclosure sale was deliberately "chilled" by the affirmative acts of a mortgagee and the injured mortgagor seeks a recovery of damages rather than a setting aside of the sale itself.[34]

In *Stevens*, the court found ample evidence of bid chilling on the part of the appellant bank, the mortgagee.[35] In the days leading up to the auction of the property in dispute, a then-tenant of the commercial property called the substitute trustee multiple times and communicated an intent to bid for the property.[36] The tenant also made loan arrangements for a sum of $400,000 in preparation to bid on the property and was prepared to bid more than that amount, if necessary, to outbid the bank.[37] The tenant's Dallas attorney attested to making the loan arrangements and to being in Houston the day before in preparation of attending the auction.[38] The substitute trustee repeatedly told the tenant that he was not sure the property would go to auction, and the jury found that the tenant was told over the phone that he would be notified ahead of time if the property would go to auction on the scheduled day.[39] The tenant was not notified ahead of time, and relying on the substitute trustee's assurance, he did not show up to the auction.[40] The resulting sale of the property went to the bank as the only bidder and sold for $355,000, which was approximately eighty-four percent of the $430,000 fair market value as determined by the jury.[41] Based on these determinations, the trial court awarded the mortgagor damages in the amount of $54,315, which amounted to the difference between the fair market value and the auction price.[42]

The appellant bank's point of error was that the mortgagor needed to show the auction price was grossly inadequate and that the lower price was caused by the defect. It was denied by the court, on the basis that monetary damages are awardable to the mortgagor if there is misconduct on the part of the mortgagee, regardless of the resulting inadequacy in price.[43] In other words, as long as there is reasonable causation between the defect and the final price, the court rightly concluded that the mortgagor has suffered an injury and should be compensated for it.[44] The court goes on to distinguish its reasoning in the case at hand, which involved money damages, from a line of cases discussing grossly inadequate sales price when a rescission of the sale itself is sought. In short, where there is no third party involved, the public's trust in the finality of the auction process is not in jeopardy.[45] Therefore, as the court reasons, there is no need for a showing of grossly inadequate sales price to justify action.[46] "Society and the injured mortgagor are properly served through money damages, if that election has been made, where deliberate acts of the mortgagee had a 'chilling' effect on the bidding."[47] The court found "no rational grounds" for a showing of "grossly" inadequate price.[48] The plaintiff may logically recover damages, no matter the amount.[49] This exception to the three-pronged requirement for a wrongful foreclosure claim based on deliberate or negligent "chilling" of the bids has since been recognized by the Fifth Circuit and other courts of appeals.[50]

Part III: The *Robinson* Case Limits a Plaintiff's Remedies

A successful wrongful foreclosure has two possible remedies: (1) the plaintiff may have the sale rescinded or (2) the plaintiff may choose an award of money damages. If monetary damages are elected, the measure of the damages is lost equity—that is, the difference between the value of the property in question at the date of foreclosure and the remaining balance due on the indebtedness.[51] However, in 2012, the Dallas Court of Appeals changed everything in its *Wells Fargo Bank, N.A. v. Robinson* decision.[52] Specifically, it held that there is an exception to the recovery of money damages when (1) title to the property has not passed to a third party and (2) the borrower's possession of the property has not been materially disturbed.[53] Essentially, two additional elements were created in regard to a wrongful foreclosure case where the plaintiff elects monetary damages.

The underlying case at the trial level is generally representative of wrongful foreclosure cases. The borrower, Ray Robinson, defaulted under the terms of a home equity note issued by Wells Fargo Bank.[54] Despite making some payments following the initial default and after failing to find a buyer for the home, Robinson and Wells Fargo eventually reached an agreement that authorized Wells Fargo to foreclose on the home that served as collateral for the note.[55] The court overseeing and authorizing the foreclosure proceedings explicitly directed the bank to "post [the] property on or before April 14, 2008 for the May 6, foreclosure sale."[56] However, for unknown reasons, the substitute trustee did not follow the court's directives, and instead, waited until May 12, 2008, to post the property for sale, and did not conduct the foreclosure auction until June 3, 2008.[57] It is not discernible from the appellate opinion if any evidence existed as to whether other bidders attended the auction on the unauthorized date. What is known is that Wells Fargo purchased the property on that unauthorized date.[58]

By eliminating money damages as a possible remedy, plaintiffs are once again in the legal position of facing foreclosure proceedings on the same mortgagee. This is not an efficient use of money or time for either the plaintiff or the court.

Robinson's argument was simple; because the substitute trustee failed to comport with the original authorization and did not have a valid court order to foreclose on that date, this constituted a defect, and thus Robinson had a claim for wrongful foreclosure. The trial court agreed and awarded Robinson $47,007.37, which represented the difference between fair market value of the property and the remaining balance on the equity note.[59] However, the Dallas Court of Appeals reversed the trial court's ruling and rendered judgment to set aside the sale, awarding Robinson no damages. The court's reasoning was that Robinson, being still in material (if not legal) possession of the property on the date of trial, did not suffer a "compensable injury."[60] In essence, the court removed one of the two avenues of recovery for Robinson and for other homeowners in his position.

The reasoning behind this ruling is not entirely clear. Purportedly, it is because "no third party rights to the property have been created, [and therefore,] the borrower has suffered no compensable injury."[61] However, in addition to the reasoning the Dallas Court of Appeals gave in *Robinson*, there are at least two additional points of contention worth mentioning that argue in favor of greater plaintiffs' rights to recover. First, by eliminating the plaintiffs' right to damages and instead placing them back in legal possession of the property that they could not afford payments on in the first place, the court puts plaintiffs into a precarious situation. Some defect and wrongdoing by the mortgagee, either intentional or negligent, had to occur in the first place for the plaintiff to prevail and to obtain a judgment setting aside the sale. By eliminating money damages as a possible remedy, plaintiffs are once again in the legal position of facing foreclosure proceedings on the same mortgagee. This is not an efficient use of money or time for either the plaintiff or the court. Notably, it also subjects plaintiffs to another possible round of mistreatment from big banks and lenders.

Building on that, the second point concerns another important practical result of this ruling. Under *Robinson*, lenders presumably can go so far as to commit malicious or grossly negligent acts in the foreclosure process while plaintiffs are still left without an avenue to claim money damages, unless the plaintiff can also conclusively show a cause-and-effect relationship between the acts and a grossly inadequate sales price to a third-party purchaser. By requiring a third-party purchaser, lenders escape culpability for wrongdoing where, as in many cases, the purchaser at auction is the mortgagee itself. To say definitively that the mortgagor has suffered no compensable damage only because the property has not passed to a third party is to turn a blind eye to the wrongs committed by mortgagees in these cases and to the time and money invested into these cases by plaintiffs and courts. The *Robinson* court did not address this, and so the ruling is doubly unsatisfactory. Moreover, the ruling does not address the potential monetary losses to plaintiffs in cases where the defect itself, such as posting and selling on the wrong days, potentially prevented a third party from outbidding the mortgagee at auction and obtaining rights to the property. The logic is revealed to be somewhat circular. The case must involve a third-party purchaser to obtain money damages from the defect. But, the defect itself may have prevented any potential third-party purchasers from obtaining the property to begin with. Without evidence that there would have been a third-party purchaser, there is no evidence of a defect. It is win-win for the mortgagees in this situation.

Conclusion

Cases such as *Richardson* and *Robinson* exemplify the trend most courts have taken in regard to the continued narrowing of borrowers' rights. It is disturbing to contemplate the ramifications for borrowers based on these and similar cases. For instance, in keeping with the *Robinson* ruling, it is possible for lenders to escape culpability for any wrongdoing, no matter how malicious, simply by assuring that they are the highest bidder at auction so that no third-party rights are called into question. It is curious that among the concern for lenders' rights and third-party rights, the rights of everyday homeowners are being left by the wayside. Even more worrisome for borrowers is the continuing emphasis in common law on the illogical element of a grossly inadequate sales price. More courts should take an approach similar to that taken in *Stevens* and *Miller*, and they should carefully analyze and trace the creation of this element and call its continued application into doubt. One thing is certain: these decisions, and others, should act as a motivating factor for either the Texas Legislature or the Texas Supreme Court, if given the chance, to clarify the rights and limitations placed on borrowers across Texas.

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1 Anna Kalinina, Note and Comment, *A Grossly Inadequate Procedure: Non-Judicial Foreclosure in Texas*, 65 Baylor L. Rev. 1061, 1066-67 (2013).

2 *See* Tex. Prop. Code Ann. § 51.002 (West Supp. 2012).

3 *Id.* § 51.002(d)

4 *Id.* § 51.002(e)

5 Adebo v. Litton Loan Servicing, L.P., No. 01-07-00708-CV, 2008

WL 2209703, at *4 (Tex. App.—Houston [1st Dist.] May 29, 2008, no pet.)

[6] *See* Tex. Prop. Code Ann. § 51.002(b)

[7] *Id.* § 51.002(d)

[8] *See id.* § 51.002(a)

[9] *See generally id.* § 51.002

[10] Pentad Joint Venture v. First Nat'l Bank of La Grange, 797 S.W.2d 92, 96 (Tex. App.—Austin 1990, writ denied) (emphasis added).

[11] Sauceda v. GMAC Mortg. Corp., 268 S.W.3d 135, 139 (Tex. App.—Corpus Christi 2008, no pet.). Additionally, the Dallas Court of Appeals recently added the burden of essentially two new elements for wrongful foreclosure cases where non-dispossessed homeowners seek monetary damages, which are discussed in further detail in Part III.

[12] *See* First State Bank v. Keilman, 851 S.W.2d 914, 921-24 (Tex. App.—Austin 1993, writ denied).

[13] *Id.* at 924.

[14] *Id*. at 923-24.

[15] *Id.* at 923.

[16] *Id*.

[17] *Id.*at 924.

[18] Resolution Trust Corp. v. Westridge Court Joint Venture, 815 S.W.2d 327, 330 (Tex. App.—Houston [1st Dist.] 1991, writ denied)

[19] *Id*. at 331.

[20] Tarrant Sav. Ass'n v. Lucky Homes, Inc., 390 S.W.2d 473, 475 (Tex. 1965).

[21] Charter Nat'l Bank—Houston v. Stevens, 781 S.W.2d 368, 371 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

[22] *Id*. at 374.

[23] *See* F L R Corp. v. Blodgett, 541 S.W.2d 209, 215 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.), *cert. denied*, 434 U.S. 915 (1977). *Accord* Intertex, Inc. v. Walton, 698 S.W.2d 707, 710, 711 (Tex.App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

[24] Fed. Deposit Ins. Corp. v. Blanton, 918 F.2d 524, 526 (5th Cir. 1990).

[25] *Id*. at 527.

[26] See *id*. at 526.

[27] *Id*. at 531.

[28] *Id*.

[29] *Id* at 530 n.7.

[30] *Id.* at 532 (citing Richardson v. Kent, 47 S.W.2d 420 (Tex.Civ. App.—Dallas 1932, no writ))

[31] *Richardson* 47 S.W.2d at 425.

[32] *Id.*.

[33] Charter Nat'l Bank—Houston v. Stevens, 781 S.W.2d 368, 371 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

[34] *Id*.

[35] *Id*. at 374.

[36] *Id*. at 369.

[37] *Id*. at 370.

[38] *Id*. at 369.

[39] *Id*. at 369-70.

[40] *See id.*at 370.

[41] *Id.*at 370-71.

[42] *Id*. at 370.

[43] *Id*. at 371.

[44] *Id*.

[45] *See id*. at 374.

[46] *See id*.

[47] *Id*.

[48] *Id*.

[49] *See id*.

[50] *See, e.g.,* Miller v. BAC Home Loans Servicing, L.P., 726 F.3d 717 (5th Cir. 2013); *Villanova v. FDIC*, No. 08-11-00361-CV, 2014 WL 2881540 (Tex. App.—El Paso June 25, 2014, no. pet. h.).

[51] *See* John Hancock Mut. Life Ins. Co. v. Howard, 85 S.W.2d 986, 988-89 (Tex. Civ. App.—Waco 1935, writ ref'd).

[52] *See* Wells Fargo Bank, N.A. v. Robinson, 391 S.W.3d 590 (Tex. App.—Dallas 2012, no pet.).

[53] *Id.*at 594.

[54] *Id* at 592.

[55] *See id.* at 593

[56] *Id*. (internal quotation marks omitted).

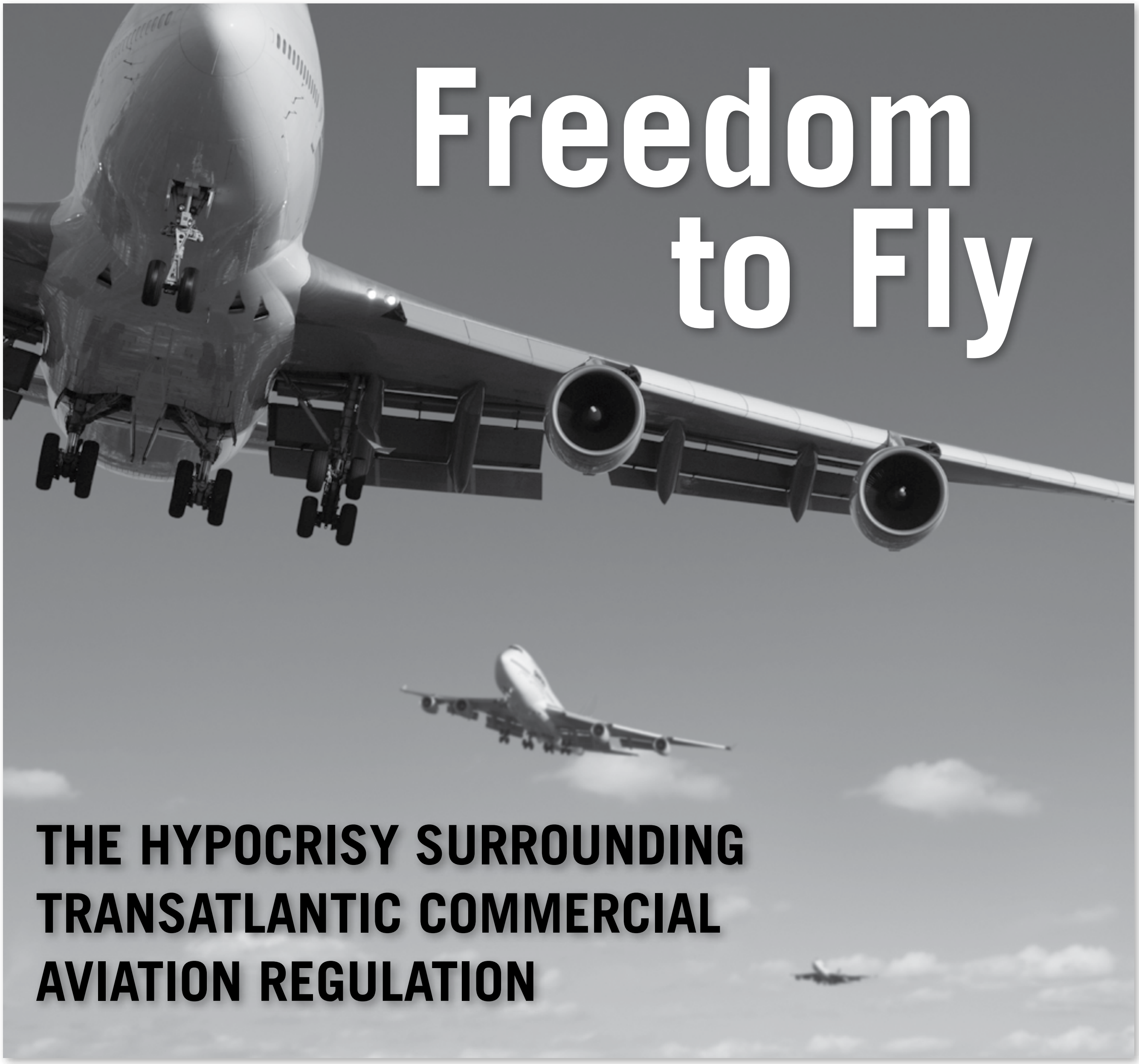
[57] *Id*.

[58] *See id*.

[59] *Id*.

[60] *Id.* at 594.

[61] *Id*.



Freedom to Fly

THE HYPOCRISY SURROUNDING TRANSATLANTIC COMMERCIAL AVIATION REGULATION

By Taylor Strosnider*

On the cold morning of February 18, 2015, over 50 flight attendants and employees of the airline Norwegian Air Shuttle stood on the steps of the U.S. Department of Transportation's (DOT) offices in Washington, D.C. in protest of the agency's delay of Norwegian's foreign air carrier operating permit.[1] The sight was an unusual one: not only is it out of the ordinary to see airline personnel protesting outside of the DOT's headquarters, but Norwegian was, and still is, a carrier with only a handful of flights to and from the U.S. The permit being sought from the Federal Aviation Administration (FAA) had been pending for over a year, resulting in the entirety of Norwegian's U.S. operations being caught in a seemingly endless period of limbo.[2] FAA approval for the airline would allow it the long-sought opportunity to expand its transatlantic services to more cities throughout the country—each of them on state-of-the-art Boeing 787s, in contrast to the often decades-old aircraft used by existing carriers.[3] However, despite the protest, petition, and lobbying taking place in Washington, Norwegian still sits in limbo today awaiting formal authorization of its foreign air carrier permit. Moreover, a total of 38 U.S. senators signed a letter to the DOT urging the rejection of the airline's application.[4]

Despite the fact that increased competition on transatlantic routes would be an unqualified win for consumers—many of whom pay a minimum of $1,000 to fly across the Atlantic during the peak summer season—the senators' objections are for the most part on behalf of the American airline industry. After a full 30 years of often-devastating levels of competition from upstart airlines such as Southwest, jetBlue, and Spirit—which were in large part responsible for the collapse of airlines such as Pan Am and TWA, as well as a seemingly endless flow of red ink at the country's remaining "legacy carriers"—America's airlines are now faced with a scenario they have dreaded for years: the entry of Europe's low-cost carriers (LCCs) into the sphere of transatlantic travel, which has long been one of the industry's most lucrative cash cows. Indeed, Norwegian launched its North American operations with nonstop flights to Europe priced as low as $370, including all taxes and fees.[5] Even its lengthiest flight, the 5,500-mile stretch between Los Angeles and Stockholm, was initially priced at a roundtrip cost of $470—possibly the lowest cost-per-mile of any transatlantic flight in recent memory.[6]

To a Singaporean company that typically hires Thai pilots and crews willing to work for far less money and benefits than their often-unionized American and European counterparts.

In an interesting twist—one that is discomfiting to American officials—Norwegian's current FAA application is, in reality, seeking approval of a wholly owned subsidiary based out of Ireland, of all places, and operating under the name Norwegian Air International (NAI-Ireland). This peculiarity is one of the reasons American carriers are crying foul. Norwegian set up its Irish base of operations for the specific purpose of evading Norway's strict labor and tax laws—including the ability to hire pilots from third-party nations.[7] Indeed, NAI-Ireland does just that; the airline has outsourced its pilot recruitment to a Singaporean company that typically hires Thai pilots and crews willing to work for far less money and benefits than their often-unionized American and European counterparts.[8]

During the same week Norwegian's FAA protest took place, Delta Air Lines CEO Richard Anderson found himself in spin-control mode over remarks he made in reaction to a threat to U.S. airlines on an nearly exact-opposite front.[9] While NAI-Ireland threatens American carriers on the lower end of the transatlantic market, the so-called "Gulf Three"—Emirates, Etihad Airways, and Qatar Airways—threaten it at the high end. In a CNN interview, Anderson was asked about the short-term subsidies the American airline industry received following the 9/11 attacks, and noted:

> [I[t's a great irony to have the United Arab Emirates from the Arabian Peninsula talk about that, given the fact that our industry was really shocked by the terrorism of 9/11, which came from terrorists from the Arabian Peninsula, that caused us to go through a massive restructuring.[10]

Despite Anderson's subsequent apology, representatives of the Gulf Three remained outraged, with Emirates even claiming that his initial remarks were "deliberately crafted," presumably to paint the Gulf airlines in a negative light.[11] (In reality, not only did Qatar and the United Arab Emirates—homes to the three airlines—have no role whatsoever in the 9/11 attacks, the UAE subsequently joined America's "coalition of the willing" during its subsequent invasion of Iraq.)

While the impetus for Anderson's remarks remains a mystery, his remarks on whole clearly illustrate the problem presented by the Gulf Three. Each of them is owned by an oil-rich Middle Eastern state happy to pour billions of petrodollars into making them the *ne plus ultra* of the commercial aviation world, with amenities the "legacy" American carriers—each of which is a publicly traded company with far less fiscal freedom—can't possibly afford to match. This state of affairs was not a significant problem when the Gulf Three limited themselves to flying directly between the Middle East and U.S.—American carriers only fly a handful of routes between the two regions—but the status quo recently changed: via roundabout means, Emirates recently secured approval for nonstop flights between New York's John F. Kennedy Airport ("JFK") and Malpensa Airport in Milan ("MXP"). To state that this new route presents a problem to the legacy carriers would be putting it quite mildly—as Delta's CEO's on-air tirade amply demonstrated. In a nutshell, the U.S. airlines are receiving simultaneous body blows, delivered by Norwegian at the low end and the Gulf Three—Emirates in particular—at the top.

Both situations present the legacy carriers with a bitter irony: since 1979 they have each broadly encouraged the signing of "Open Skies" agreements with various foreign nations. The philosophical basis for such accords rests primarily on free-market economics, and their impetus stems from a lengthy history of U.S. airlines being systematically denied an adequate number of landing slots at key international airports. This is almost entirely due to favoritism towards current or former flag carriers for various nations, Europe's in particular. At London's Heathrow Airport, for instance, British Airways alone held over 40% of its takeoff and landing slots as recently as 2004, while the Star Alliance—then composed of 15 airlines, most of which offered flights to London—held a lowly combined 25% of its slots.[12]

The American carriers eventually achieved many of their Open Skies objectives. For example, in 2007 a large alliance of European Union carriers agreed to the broadest such agreement to date.[13] The problem now, however, is the fact that their attitude can perhaps best be described as "do as we say, not as we do." After spending over 35 years championing broader slot availability at foreign airports for American carriers, both the U.S. government and the carriers themselves are decrying open-skies philosophies in two ways: by virulently opposing Emirates' adoption of a route between the U.S. and Europe, as well as engaging in unequivocally hypocritical actions in its continual denial of slots to Norwegian—which has launched the website "Open Our Skies" in protest of the FAA's "new interpretation" of the U.S.-EU Open Skies Agreement.[14] Meanwhile, Delta CEO, Richard Anderson has changed his tune considerably, and now calls for "fair skies, not open skies."[15] This paper will analyze the situations faced by Norwegian and Emirates, and discuss whether the U.S. government is defying its own agency-issued guidance in its challenges to the two airlines.

OPEN SKIES AND THE LUCRATIVE TRANSATLANTIC MARKET

The U.S. Department of State defines "Open Skies" as:

> [Agreements] between the United States and other countries [which] expand international passenger and cargo flights by eliminating government interference in commercial airline decisions about routes, capacity and pricing. This frees carriers to provide more affordable, convenient and efficient air service to consumers, promoting increased travel and trade and spurring high-quality job opportunity and economic growth. Open Skies policy rejects the outmoded practice of highly restrictive air services agreements protecting flag carriers.[16]

Nearly 600 flights cross the North Atlantic everyday, most carrying a full load of business-class travelers who have paid between $4,000 and $8,000 for the privilege of flying in a seat that can be converted into a bed.[17] The movement of people from the United States to Europe is constant, so much so that British Airways has now instituted daytime flights between JFK and Heathrow on what has long been a redeye-only route.[18] The profitability of transatlantic routes has spurred airlines to shift away from using the wide-body aircraft that formerly dominated them; today even single-aisle Boeing 757s are routinely flown across the Atlantic, along with "smaller" wide-bodies such as the Boeing 767 and 787.

A TALE OF TWO AIRLINES, PART I: NAI-IRELAND

The sizable frequency of transatlantic routes is exactly what NAI-Ireland wants to capitalize on. Its fleet of Boeing 787s—notable for their medium-size passenger capacity and remarkably ahead-of-the-curve fuel efficiency—plays a large role as well, allowing it the flexibility to generate profits even with low ticket prices thanks to healthy demand and the efficiencies of scale it can achieve. That is, assuming the FAA sees fit to grant it the airport slots it needs to fully thrive.

Created by the Department of Transportation Act of 1966,[19] the FAA has evolved into an agency wielding formidable power within the global-aviation sphere. While Congress maintains its right to keep the agency's rulemaking in check—sometimes to the extent of circumventing it entirely—the FAA has nonetheless come to broadly dictate how commercial aviation should be regulated and controlled on a worldwide level. Its powers include administration over air traffic control, aircraft and aircraft engine standards, airmen certificates, air carrier operating certificates, airport operating certificates, and research on aviation safety.[20] The FAA also has immense power in terms of how foreign carriers conduct business within the U.S.[21] As an independent agency, the FAA's rulemaking processes ostensibly center on "public interest" when considering the certification of a new foreign carrier for operation to and from the U.S. As is typically the case under traditional *Chevron* guidelines, American courts broadly defer to their decisions.[22] Under FAA rules, a commercial airline may not operate civil aircraft without a valid "airworthiness certificate."[23]

Clearly, airlines that fail to meet the FAA's regulatory standards should not be granted certificates to operate within the U.S., but this has never been an issue for NAI-Ireland: its entire fleet of 787s is nearly brand-new, and the FAA has never cited it for airworthiness problems. Instead, the FAA apparently objects to the airline's operational structure—a dubious proposition at best, and quite possibly a brazen abuse of its authority at worst.

The corporate structure of Norwegian Air Shuttle ASA is complicated,, but on the other hand it's common in the industry for airlines and lessors to structure themselves in a similar fashion as Norwegian .[24] The company currently has two wholly owned subsidiaries: NAI-Ireland and Norwegian Long Haul.[25] As of this writing, Norwegian Long Haul offers service into JFK and Ft. Lauderdale from Stockholm and Oslo.[26] The question, however, is why the FAA continues to bar NAI-Ireland—a subsidiary of the same airline—from obtaining a valid operating permit for U.S. service, and whether this course of action exceeds the FAA's mandate. Further, it raises the question of whether the agency is engaging in unambiguous protectionism for U.S. airlines.

The reasoning behind the FAA's decision almost certainly begins and ends in Ireland, where it elected to incorporate its budget-priced subsidiary.[27] Ireland plays a surprisingly significant role in the aviation industry, for two key reasons: its corporate tax rate is highly favorable compared to most other European countries, and the former "Celtic Tiger" has emerged as a hub for aircraft finance.[28] A number of airlines wishing to purchase additional aircraft tap into London's capital market for financing purposes and subsequently register their new acquisitions in Ireland.[29] Ryanair, Europe's largest airline, has used this capitalization structure with tremendous success.[30] But here's the rub: no other airlines engage in this means of acquisition and proceed to employ their Norwegian-branded, Irish-registered 787s on transatlantic routes.[31]

With new four Boeing 787s ordered and possibly more to come,[32] NAI-Ireland had planned to use their Irish-registered aircraft to connect American cities from major European hubs—though not necessarily Norway[33]—until the FAA grounded its efforts.[34] Powerful lobbying organizations such as Airlines for America have been wielding their considerable influence to prevent the European LCC model from hopping the pond.[35] Indeed, the idea of NAI-Ireland's $350 transatlantic flights are precisely what scares the industry, given the virtual certainty of American carriers having to lower their prices to compete.

Still, Norwegian's actions in forming NAI-Ireland have given U.S. government officials considerable grist to chew on. Thanks to both its "evasion" of Norway taxes as well as its use of "cheap" Asian flight crews, the narrative that's emerged inside the Beltway is that the company is circumventing the spirit, if not the literal text, of the current Open Skies agreement between the U.S. and EU.[36] Nonetheless, the reader will likely not find a single statement in the plain language of the multilateral Open Skies Agreement between the two indicating what precisely Norwegian Air Shuttle has done with its Irish subsidiary that is contrary to any part of the Open Skies Agreement.

Somewhat bizarrely, the push in Washington to bar NAI-Ireland from commencing service became so forceful last year that Congress circumvented the FAA—presumably for not acting quickly enough—to pass language in an omnibus spending bill directing the DOT to grant NAI-Ireland an operating permit only if it does not violate the Open Skies Agreement.[37] Both industry lobbyists and Norwegian welcomed the language—the only problem being that the two sides disagree entirely as to its interpretation. And while Congress intervened in the context of meddling with the terms of a spending bill, it has yet to take any conclusive steps to fix—or end—the impasse. Meanwhile, the American consumer remains stuck paying sky-high transatlantic plane ticket prices for the foreseeable future.

A TALE OF TWO AIRLINES, PART II: EMIRATES

On December 17, 2014, the Italian Supreme Administrative Court ruled to allow Emirates to continue with its Milan-to-New-York route. The decision predictably caused a firestorm at Assaereo, the Italian equivalent of Airlines for America, which

represents flagship carrier Alitalia and other smaller Italian airlines.[38] Their basic fear is the same as the one NAI-Ireland presents for American carriers: competition. While it is perhaps surprising that the Emirati airline successfully gained certification from the Italian Civil Aviation Authority to operate the route, the more salient question is why Emirates faced so little opposition in the U.S.—at least if one takes into account Norwegian's travails. The sets of circumstances differ considerably, to be sure, but nevertheless, one can argue that both airlines violated the spirit—if not the literal language—of the Open Skies Agreement.

Emirates' situation is an unusual one, and to explain it some historical context is necessary. In 1944 a total of 52 nations signed the Convention on International Civil Aviation, better known as the Chicago Convention.[39] It established what are known today as the Freedoms of the Air, of which nine exist.[40] However, only the first five were put into broad effect. The first freedom allows an airline to fly over a foreign country unencumbered; the third and fourth authorized international service between two points; and so forth. The eighth freedom turned out to be not so free: officially called "consecutive cabotage," it is defined as:

> [The] right or the right or privilege, in respect of scheduled international air services, of transporting cabotage traffic between two points in the territory of the granting State on a service which originates or terminates in the home country of the foreign carrier or (in connection with the so-called Seventh Freedom of the Air) outside the territory of the granting State.[41]

Emirates' JFK-MXP flight clearly fits the Eighth Freedom. The problem? Cabotage is widely illegal, with the exception of certain flights within the EU.[42] In the U.S. it's long been illegal, and yet government officials allowed Emirates to introduce a cabotage flight in the U.S.

The likely reason for the exception is both simple and cynical: greed. The UAE is one of the world's leading producers of oil, and it is thus in American's best interests to maintain strong ties with them. It's a sign of prestige at American airports to see an Emirates jet, most likely an Airbus A380, the largest of them all, parked at a surprisingly large number of U.S. airports. Given the political clout of Emirates in the American decision making process—so as to avoid aggravating a key oil supplier—the airline faced little opposition stateside when receiving its foreign air carrier permit from the FAA to begin flying to the U.S., and to later service the Milan route with its airport slot at JFK. Unlike the NAI-Ireland case, the fight has taken place entirely in Europe inside the Italian administrative court system.

Milan is no exemption on the profitability of transatlantic routes. It is Italy's largest city by GDP, with ample room for growth as the airport remains somewhat small in size when compared to other more established European airports, and as Milan begins to grow out of the recent EU recession hit relatively hardest by the financial sector of its countrymen.[43] What seemingly frightens Assaereo is the threat against the Italian airlines from continuing to capitalize on what is already a profitable route for them. Furthermore, as a member of Skyteam,[44] Alitalia has the opportunity to operate the route and participate in profit sharing with its alliance partner Delta Airlines, which also services a New York–Milan flight.[45] In contrast, Emirates participates in no profit-sharing with another airline that serves Milan as Alitalia does with Delta on this particular route—nor does it engage in much profit- or code-sharing anywere else.

What was kept relatively quiet from consumers throughout the administrative proceedings was Alitalia's newest venture with another Emirati airline, Etihad Airways. Etihad had not only began a code-sharing campaign with Alitalia for passengers to conveniently transit through Rome en route to the Middle East, Etihad had further purchased a 49% stake in Alitalia.[46] Luckily for Emirates, the purchasing of the stake in Alitalia on behalf of Etihad took place in the midst of the pending appeal of before the Supreme Administrative Court in Italy- almost four months after the original regional administrative court's decision in Lombardy to bar the Emirates operation.[47]

CONCERNS RELATED TO THE U.S.--EU OPEN SKIES AGREEMENT

A growing number of concerns surrounded the Open Skies Agreement since its 2007 signing. One involved the percentage ownership of airlines, and the potential to allow foreign investors to own more than the current allotment of no more than 49.9% of an American carrier.[48] Predatory pricing, a "free for all" transatlantic competitive environment,[49] and the possibility of waning profitability for the American carriers[50] top the list of current concerns for what the 2010 Protocol and the original 2007 Open Skies Agreement bring to the minds of those heavily invested in the aviation industry. Rightfully so, considering that North American and Europe make up 64% of the world's global employment in aviation.[51] Although potentially negative for the commercial aviation industry from a price-stabilization perspective, consumers should be particularly excited at the prospect of such low transatlantic fares. On the other end, wealthy travelers who readily pay full price for first- or business-class tickets should be enthralled by ideas like Etihad's latest volley in the high-end aircraft accommodations: The Residence, the equivalent of a small apartment on-board. It comes equipped with an en-suite, private bathroom; a private living room; a real queen-size bed; and a butler to cater to one's every whim.[52]

The entrance of foreign carriers into the transatlantic market is among the largest concern for carriers in the United States.[53] With this emergence of foreign airlines, especially in Europe, there is a strong pressure for the U.S. to remove barriers to the market for emerging strong global competitors.[54] This urge to remove barriers is seen in direct correlation with the current situation with NAI-Ireland. With the liberalization of the U.S. barriers to entry, comes a growing competitive environment for the American carriers to provide the same service at such a low, more competitive, price point.[55]

CEO of Irish carrier Ryanair, Michael O'Leary, has begun toying with the idea of the $12 transatlantic ticket for Americans and Europeans to affordably cross the Atlantic;[56] in March 2014, the Ryanair board approved plans to commence transatlantic flights by the Irish ultra-budget airline.[57] Are American carriers really in a position to compete with prices such as this?

Furthermore, will American carriers begin to scream foul as they claim the existence of predatory pricing and the steadfast position against predatory pricing as held in *Brooke*?[58] This argument will hardly hold water considering that the *Brooke* dealt with an oligopoly setting,[59] and the transatlantic commercial aviation market is anything but an oligopoly with the current number of carriers. The fear for this price competition came from the large number of aircraft orders that were expected for delivery in 2007 given that "in the event demand growth in services takes a downward path, large scale new deliveries could force airlines to enter into cutthroat competition just as airlines are beginning to make a profit . . ."[60]

Competition within the aviation industry consists of the business and leisure markets.[61] For the business sector, the passenger typically flies on the company's dime, so the price conscious passengers show little concern for the fare, and more concern for the service provided.[62] Even more so for the demand for business class is rising as the economy rebounds, and many well-established international are begging to answer the call for those companies that require executives to travel in business and first class.[63] However, for the leisure market, which NAI-Ireland would mainly serve, there is a great demand for lower fares.[64] The leisure market merits a different kind of competition where the fare is the utmost of consideration, while other aspects such as facilitates may only play a part in the passenger's consideration to fly on the carrier.[65] Specifically, the American legacy liners can make an argument for the FAA to continue its stringent regulating of the transatlantic market so that "mushroom" airlines that undercut pricing of the larger carriers do not upset the current price balance in the market.[66] However, leisure flier can seemingly enjoy the low fares while the startup airline attempts to gain a loyal consumer base during its relatively short existence, with Norwegian already serving the Untied States for nearly two years now, they have established a relatively enduring and expanding presence.

Europe has always had a far more liberal stance on the commercial aviation market than their counterpart across the Atlantic.

The eighth freedom of flight grants the right of cabotage, meaning that a foreign carrier can operate domestically within the borders of the foreign territory.[67] In accordance with the 2007 Open Skies Agreement Article 3 paragraph 1 (c) (i), airlines of the United States have the right to fly from Europe to the United States via "intermediate points in any EU Member State."[68] The EU has granted the U.S. this intra-EU traffic right, however, there is no comparable right for European carriers to operate within the United States.[69] Despite the EU's willingness to grant U.S. airlines intra-Union traffic rights, the U.S. remains steadfast in their "25% percent" rule, which does not allow for any domestic airline to have more than 25% of foreign voting stock ownership.[70] This remains an issue for the EU, because from the EU's perspective there should be a mutual benefit for both sides of the Atlantic to enjoy all rights and benefits granted to parties by the Open Skies Agreement.[71] However, this does not remain a "deal breaker" for EU,[72] as the Union still signed the 2010 Protocol.[73]

Europe has always had a far more liberal stance on the commercial aviation market than their counterpart across the Atlantic.[74] From the view of European carriers, they would like to have the right to service between the EU and the United States, and further that right for service within the United States.[75] To state bluntly, European carriers would like the same privilege of foreign domestic service American carriers can enjoy in the EU. Although the eighth freedom of flight is not widely practiced in the EU, it is likely not exercised for strategic reasons.[76] The last idea that American carriers want to put in the minds of their European competitors is the thought that they deserve the same right to operate domestic service in the United States. Furthermore, the impression of a third protocol to the Open Skies Agreement that allows for foreign carriers to operate in the United States is a growing concern for airlines.[77] The question remains, how far is too far when it comes to liberalizing the market?

THE TEXAS CONNECTION: OIL AND UNIQUE TRANSATLANTIC FLIGHTS

Texas enjoys the ability to market itself as a state that can connect one major oil-producing jurisdiction to another major oil producing epicenter anywhere in the world. Departing from Houston alone, there are a number of airlines that solely operate service and market their routes as connecting oil capitals. From Houston's George Bush Intercontinental Airport, these routes include Singapore Airlines service to Moscow,[78] Scandinavian Airlines service to Stavanger, Norway,[79] Emirates service to Dubai,[80] and Qatar Airways service to Doha.[81] Singapore Airlines service is a clear example of how useful the fifth freedom of flight is, by strategically connecting to foreign destinations en route to the home country, as Emirates did with New York and Milan. Singapore saw an opportunity to operate on a route that would connect two energy hubs in the world, and capitalized on it using the Chicago structure that allowed for the fifth freedom for the route between Houston-Bush and Moscow-Domodedovo.[82] Furthermore, Emirates has expanded service beyond Houston and has begun servicing Dallas as well—utilizing yet another jumbo A380,[83] with the articles already being published stating that Austin might soon see service within the decade.[84] Furthermore, Qatar openly marketed their service from Houston to Doha as "linking the world's energy capitals."[85]

The economic environment in Texas clearly services well for foreign competition, and with Scandinavian's Stavanger, Norway service, it remains an open question whether Norwegian will expect its served there along with whether or not the airline will begin their own service to Texas to undercut Scandinavian's Stavanger route. In the event NAI-Ireland is able to obtain a permit from the FAA, they will have much lower operating costs than their other Scandinavian competitor, and there is no reason why another foreign carrier would not want to begin this profitable service for consumers in the oil and gas industry. Emirates could also entertain the idea of connecting either Houston or Dallas to its potential newfound secondary home at Milan-Malpensa to give consumers in Texas another option to cross the Atlantic. Though both of these hypotheticals have not been subject to the limelight quite yet, they continue to open the possibility of continued competition for consumers to utilize—all resulting from the Chicago structure and what an Open Skies Agreement as to offer.

CONCLUSION

Although the situation surrounding NAI-Ireland and Emirates differs in many ways, they share two crucial aspect in common; they are likely harbingers of the future of air travel—similar to how American carriers finally upgraded their international business-class sections to include flat-bed seating—and they serve as a reminder that sovereign territories still hold the right to regulate their own airspace.[86] Even today, the rules defined at the 1944 Chicago Convention allows for states to decide on the regulatory environment of their own airspace.[87] Despite the age of the Chicago Convention, its force still remains the pinnacle for countries to retain their aviation sovereignty. Both the United States and Italy have multiple bilateral and multilateral open skies agreements with various foreign jurisdictions—once again thanks to this Chicago Convention.

The Council of State has already ruled in favor of Emirates, yet in retrospect, and according to Article 1 of the Chicago Convention, a state does have the sovereign rule to regulate its own airspace.[88] Had the Council of State applied a Chicago Convention test rather than one that incorporates the 2007 Open Skies Agreement, Emirates could have seen an unfavorable outcome. The EU must fully define whether member states, or the economic union, control the airspace above their respective countries. A gray area now exists as to how the "Single European Sky" initiative brought forth in 2004 for by the European Parliament[89] affects Article 1 of the Chicago Convention or Article 6 of the 2007 Open Skies Agreement.[90] However, from a legal perspective, "carriers of [member states] of the EU cannot have a European nationality since the EU does not have the sovereign status of a state."[91] Regardless of the influence with Etihad's stake in Italian flagship carrier, Alitalia, Etihad cooperated with Article 20 of the Open Skies Agreement, which does not allow for non-member states to own more than 49.9% total equity of a European carrier.[92] Etihad played the game according to the provisions of the Open Skies Agreement to break into the European market, rather than immediately beginning service as Emirates has done. Luckily, on appeal, the Council of State felt the need to apply a test provided by the Open Skies Agreement, rather than one that would encompass the *ad coelum* legal argument behind Article 1 of the Chicago Convention.[93]

The supposed circumventing of Norwegian labor standards and taxes should not be a concern for the governing FAA, nor should they be taken under consideration for NAI-Ireland's application for an airline foreign air carrier permit to service U.S. markets. Despite "Norwegian" being placed in the name of the airline, the aircraft are Irish and were granted an Air Carrier Operating License by the Irish Commission for Aviation Regulation as well as an Air Operator's Certificate by the Irish Aviation Authority.[94] The question of why the aircraft were registered in Ireland should not be considered as circumventing any Norwegian law; it is a conscious business practice about which the Irish authorities are well-aware, with NAI-Ireland's potential to operate the majority of its business mainly outside of Ireland. Further, there is no indication that Norwegian has breached any U.S. law or regulation, again questioning this lengthy delay in NAI-Ireland's foreign air carrier permit.[95] Airline names need not literally define their operations. If they did, Southwest Airlines would have had to change its name years ago, among many other examples. Because it was up to the Irish government's discretion to grant Norwegian's operating permit, the airline should thus be considered as Irish, not as some sort of shifty Norwegian corporation. The Irish government capitalized on an opportunity to collect the duties imposed on aircraft registered in their country, and there was no mention of care in any known documentation regarding the name "Norwegian Air Shuttle" painted on the side of its aircraft.

Furthermore, the FAA is failing to uphold the Open Skies Agreement by not granting NAI-Ireland a permit to operate.[96] As discussed above, every variation of the Open Skies Agreement and its amending protocols has a consistent call for the opening of the commercial aviation market to allow for more competition.[97] NAI-Ireland is continually being stalled, and the airline is suffering as a result.[98] Given the facts of the matter, Norwegian has the capacity to bring a case against the FAA for causing undue harm against the airline for failing to grant an operating permit when all procedures have been met.[99] An airline should not be punished for outsmarting a regulatory agency within the boundaries of the agency's own ambiguous regulations.[100] Rather than argue, American carriers such as Delta Air Lines could very well similarly adopt a similar flag-of-convenience approach by registering their aircraft in Ireland to take advantage of the Open Skies Agreement.

What scares the political giants in the American aviation world is the idea of European competition entering the market with newer aircraft at a lower price. If anything, this newfound competition will likely result in American carriers to lessen their profit margins in order to continue to operate at their current capacity.[101] If there is one aspect of the regulatory environment that mimics the same fight Howard Hughes had in the Senate War Investigation Subcommittee when disclosing Senator Ralph Owen Brewster's intent to merge Pan American Airways and TWA,[102] it's that money continues to dictate and influence the aviation world, both domestic and abroad, all under the auspice of increased competition for the consumer.

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[80] *Emirates Airline, Big Oil Now Fly Nonstop to Dubai*, eTurboNews (Dec. 17 2007), http://www.eturbonews.com/407/emirates-airline-big-oil-now-fly-nonstop-dubai.

[81] *Qatar Airways Marks Five Years of Flying to Houston*, PR Newswire (Apr. 7, 2014), http://www.prnewswire.com/news-releases/qatar-airways-marks-five-years-of-flying-to-houston-254163181.html.

[82] *Top 15: Longest Fifth Freedom Flights In The World*, Weekend Blitz (Apr. 21, 2014), http://weekendblitz.com/top-15-longest-fifth-freedom-flights-world/#content-anchor.

[83] Press Release, *DFW Airport Welcomes the Launch of Emirates Airbus A380 Service To Dubai*, DFW Airport (Oct. 1, 2014), https://www.dfwairport.com/pressroom/printrelease/DFW_Welcomes_Emirates_A380.php.

[84] Vinay Bhaskara, *Emirates to Launch Dubai – Boston As Part of Plan to Grow US Operations*, Airways News (Feb. 15 2014), http://airwaysnews.com/blog/2013/09/20/analysis-emirates-to-launch-dubai-boston-as-part-of-plan-to-grow-us-operations/.

[85] Press Release, *Qatar Airways Unveils Advertising Campaign Promoting New Houston Route*, Qatar Airways (Jan. 14, 2009), http://www.qatarairways.com/ye/en/pressrelease.page?pr_id=PressRelease_14Jan09&locale_id=en_gl.

[86] Convention on International Civil Aviation, art. 1, December 7, 1944.

[87] *Id.*

[88] *Id.*

[89] Official Journal of the European Union, OJ L96 1-42, *available at* http://eur-lex.europa.eu/legal-content/en/ALL/?uri=OJ:L:2004:096:TOC.

[90] Air Transport Agreement, U.S.-EU, art. 6 annex 4 para. 1, April 30, 2007. I. H. Ph. Diederisks-Verschoor, *An Introduction to Air Law*, 94-96 (8th ed. 2006).

[91] 72 J. Air L. & Com. 21, 28 (2007).

[92] Air Transport Agreement, U.S.-EU, art. 6 annex 4, April 30, 2007.

[93] Convention on International Civil Aviation, art. 1, December 7, 1944.

[94] Gerry Thornton and Chris Quinn, *Irish Aviation Sector*, Matheson 140-43, http://www.matheson.com/images/uploads/documents/Airfinance_Annual_Irish_Aviation_Sector.PDF (last visited Feb. 16, 2015).

[95] *Id.*

[96] Keith Laing, *Feds Reject Norwegian Air Bid for Expedited US Flight Approval*, The Hill (Sep. 2, 2014, 5:17 PM), http://thehill.com/policy/transportation/216434-feds-dismiss-norwegian-air-bid-for-expedited-us-flight-approval.

[97] *OpenSkies.travel to Promote Open Skies Policies and Robust Aviation*, Business Travel Coalition (Jan. 22, 2015), http://www.businesstravelcoalition.com/press-room/2015/january-22---openskiestrave.html.

[98] Norwegian recently launched an online campaign called Open our Skies to emphasize the loss of employment the company is suffering from the FAA's continual stalling to grant an operating certificate. Further information can be found at www.openourskies.com.

[99] Phil Davies, *Norwegian Crew Lobby Washington for US Permit Approval*, Travel Weekly (Feb. 19, 2015, 8:21 AM), http://www.travelweekly.co.uk/Articles/2015/02/19/53224/norwegian-crew-lobby-washington-for-us-permit-approval.html.

[100] City of Arlington, Texas v. Federal Communications Commission et. al., 133 S.Ct. 1863, (2013) (*holding* that the [F.C.C.] can go no further than the ambiguity will fairly allow).

[101] *OpenSkies.travel to Promote Open Skies Policies and Robust Aviation*, Business Travel Coalition (Jan. 22, 2015), http://www.businesstravelcoalition.com/press-room/2015/january-22---openskiestrave.html.

[102] *Investigation of the National Defense Program: Hearing on S. Res. 46 Before the Senate Subcommittee of the Special Committee to Investigate the National Defense Program*, 80th Cong. 24119 (1947) (statement of Howard Hughes, Hughes Tool Co.).

Consumer News Alert Recent Decisions

Since 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 discussed during the past few months. To subscribe and begin receiving your free copy of the Consumer News Alert in your mailbox, visit www.peopleslawyer.net.

UNITED STATES SUPREME COURT

Board of Dental Examiners concerted action to exclude non-dentists from the market for teeth whitening services constituted an anti-competitive and unfair method of competition under the Federal Trade Commission Act. The United States Supreme Court held the Board could not assert state-action immunity and upheld the FTC's decision that the action was anti-competitive. The Court noted that because a controlling number of the Board's decision-makers are active market participants in the occupation being regulated, the Board could invoke immunity only if the challenged restraint was clearly articulated and affirmatively expressed as state policy, actively supervised by the state. That requirement was not met. *N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n*, 135 S. Ct. 1101 (Feb. 25, 2015). http://www.supremecourt.gov/opinions/14pdf/13-534_19m2.pdf

Class action law helps defendants remove cases to federal court. The U.S. Supreme Court held that a defendant removing a class action lawsuit to federal court under the Class Action Fairness Act of 2005 does not need to include actual evidence to establish the required amount in controversy. The Court ruled that a lower court's decision to remand the case to state court was based in part on its erroneous application of a presumption against removal — a rule that federal courts must "narrowly construe" removal statutes and resolve all doubts in favor of remand. By a 5-4 vote, the court held that no such presumption exists when removal is sought pursuant to the Class Action Fairness Act of 2005. *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547 (Dec. 15, 2014). http://www.supremecourt.gov/opinions/14pdf/13-719_8mjp.pdf

UNITED STATES CIRCUIT COURTS

FTC Act imposes strict liability for false advertising. The D.C. Circuit held that when the FTC does not seek restitution or monetary relief, and the sole remedy sought is injunctive relief, the Act imposes strict liability. There is no exception for the unwitting dissemination of false advertising. *POM Wonderful, LLC v. Fed. Trade Comm'n*, 777 F.3d 478 (D.C. Cir. Jan. 30, 2015). http://www.cadc.uscourts.gov/internet/opinions.nsf/CF44C4FA22F615C585257DDD00549353/$file/13-1060-1535012.pdf

Mere delay in seeking arbitration without some resultant prejudice is insufficient grounds to find a conduct-based waiver. The First Circuit held that to find a conduct based waiver of an arbitration clause there must be more than mere delay, but the required showing of prejudice is "tame at best." Prejudice may be inferred from a protracted delay in assertion of arbitration rights when the delay is accompanied by sufficient litigation activity. *Joca-Roca Real Estate, LLC v. Brennan*, 772 F.3d 945 (1st Cir. Dec. 1, 2014). https://scholar.google.com/scholar_case?case=17838254500929537585&q=Joca-Roca+Real+Estate,+LLC+v.+Brennan,&hl=en&as_sdt=6,32&as_vis=1

Classwide measure of damages not required for class certification. The Second Circuit held that the Supreme Court's 2013 decision in

Comcast v. Behrend does not foreclose the certification of a class action where the plaintiffs' damages must be calculated individually. Rather, the individualized nature of damages is just one factor courts should examine. *Roach v. T.L. Cannon Corp.*,788 F.3d 401 (2d Cir. Feb. 10, 2015). http://law.justia.com/cases/federal/appellate-courts/ca2/13-3070/13-3070-2015-02-10.html

Debt collector does not have to total amounts due. The Third Circuit held that a debt collector does not violate the Fair Debt Collection Practices Act by failing to total the two amounts due. The court noted that even the least sophisticated consumer is able to perform simple addition. *DiBattista v. Buckalew, Frizell & Crevina, LLP*, 574 Fed. Appx. 107 (3d Cir. Jul. 21, 2014). http://digitalcommons.law.villanova.edu/thirdcircuit_2014/748

Attempt to collect fees for services not yet performed violates Fair Debt Collection Practices Act. The Third Circuit held that by attempting to collect fees for legal services not yet performed in a mortgage foreclosure, an attorney violated FDCPA sections 1692e(2)(A), (5), and (10). The court found the Act imposes strict liability on debt collectors who "use any false, deceptive, or misleading representation or means in connection with the collection of any debt," and section 1692f(1) by attempting to collect "an amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." *Kaymark v. Bank of Am., N.A.*, 783 F.3d 168 (3d Cir. Apr. 7, 2015). http://www2.ca3.uscourts.gov/opinarch/141816p.pdf

Fair Debt Collection Practices Act does not apply to a person collecting a debt that was not in default when it was obtained. The Fourth Circuit held that the FDCPA does not apply to a rental agent to whom a lease was assigned before payment was due. Under the lease, the tenant was required to submit her monthly rental payments to the agent. Therefore, the agent's acquisition of the rent payments occurred before they were in default. *Ramsay v. Sawyer Prop. Mgmt. of Md., LLC*, 593 Fed. Appx. 204 (4th Cir. Dec. 9, 2014). http://law.justia.com/cases/federal/appellate-courts/ca4/13-1795/13-1795-2014-12-09.html

The Fifth Circuit held that if an arbitration panel could have been interpreting a contract, its interpretation may not be appealed on the grounds that the panel exceeded his

Interpretation of contract is for the arbitrators. The Fifth Circuit held that if an arbitration panel could have been interpreting a contract, its interpretation may not be appealed on the grounds that the panel exceeded his authority. [(9 U.S.C. §10(a)(4)]. The court noted that, " the Supreme Court has made clear that district courts' review of arbitrators' awards under § 10(a)(4) is limited to the "sole question . . . [of] whether the arbitrator (even arguably) interpreted the parties' contract." *BNSF Ry. Co. v. Alstom Transp., Inc.*, 777 F.3d 785 (5th Cir. Feb 6, 2015). http://www.ca5.uscourts.gov/opinions%5Cpub%5C13/13-11274-CV0.pdf

Advertisements are not immune from Lanham Act scrutiny simply because their claims are open to scientific or public debate. The Fifth Circuit noted that although the First Amendment ensures a robust discourse in the pages of academic journals, it does not immunize false or misleading commercial claims from Lanham Act liability. *Eastman Chem. Co. v. PlastiPure, Inc.*, 775 F.3d 230 (5th Cir. Dec. 22, 2014). https://scholar.google.com/scholar_case?case=7293483340641616634&hl=en&as_sdt=6&as_vis=1&oi=scholarr

Arbitration awards may be vacated when arbitrators exceed the express limitations of the contractual mandate, or act contrary to express contractual provisions. The Fifth Circuit affirmed a decision vacating an arbitration award where the arbitrator-selection mechanism in the contracts was not followed, and the arbitrator "acted contrary" to a forum selection requirement of the arbitration clause. *PoolRe Ins. Corp. v. Organizational Strategies, Inc.*, 783 F.3d 256 (5th Cir. Apr. 7, 2015). http://www.ca5.uscourts.gov/opinions/pub/14/14-20433-CV0.pdf

Online payments must be credited the day the consumer authorizes them. The Seventh Circuit looked at whether a payment made directly through the creditor must be credited at the time of the consumer's authorization or when received. The court noted that,

> "When a consumer interacts directly with a mortgage servicer (such as by delivering a check, personally paying by telephone, or filling out an electronic authorization form on a servicer's website), it is the servicer that decides how quickly to collect that payment through the banking system. The servicer is in control of the timing, and without the directive to credit the payment instrument when it reaches the servicer, the servicer could decide to collect payment through a slower method in order to rack up late fees."

The court held that that an electronic authorization for a mortgage payment entered on the mortgage servicer's website is a "payment instrument or other means of payment," and TILA requires mortgage services to credit these authorizations when they "reach the mortgage servicer." *Fridman v. NYCB Mortg. Co. LLC*, 780 F.3d 773 (7th Cir. Mar. 11, 2015). https://scholar.google.com/scholar_case?case=10951445704027384088&hl=en&as_sdt=6&as_vis=1&oi=scholarr

Fees in excess of plaintiff's possible recovery not enough to invalidate prohibition against class action. Relying on *American Express Co. v. Italian Colors*, the Eighth Circuit noted that courts were not interested in the comparison between each class member's damage and their potential costs of arbitration. Instead, it focused on whether plaintiffs had proven that the costs of arbitration were so high that they could not proceed. It found the plaintiffs' themselves did not submit any affidavits stating that they could not afford the costs of arbitration, relying on an affidavit of their lawyer to that effect. The Court held "[t]he Appellants failed to carry their burden to show that the costs of individual arbitration 'are so high as to make access to the forum impracticable' or to prevent them from effectively vindicating their rights in the arbitral forum." *Torres v. Simpatico, Inc.*, (8th Cir. Mar. 25, 2015). https://scholar.google.com/scholar_case?case=9685188042806718444&hl=en&as_sdt=6&as_vis=1&oi=scholarr

Former employee lacks standing to challenge employer's new arbitration clause. A former server alleged the restaurant where she had worked violated the FLSA. A month later, the restaurant rolled out a new arbitration agreement for employees essentially preventing them from joining the class. The plaintiffs asked the court to enjoin the restaurant from using its new arbitration agreement to reduce the number of potential plaintiffs. The district court granted the injunction "to prevent a chilling effect on future collection actions under the [FLSA]."

The Eighth Circuit reversed. It found that the plaintiffs "lacked standing to challenge the current employees' arbitration agreement," which deprived the district court of jurisdiction to enjoin enforcement of the new arbitration agreement. The court did not buy the argument that the new arbitration agreement caused plaintiffs to suffer a "concrete and particularized injury" in the form of an increased pro rata share of litigation expenses. The court concluded, "one must resort to pure speculation to conclude the former employees' portion of the litigation costs is any greater than it would have been absent the agreement." *Conners v. Gusano's Chicago Style Pizzeria*, 779 F.3d 835 (8th Cir. Mar. 9, 2015). https://scholar.google.com/scholar_case?case=475929258926369417&hl=en&as_sdt=6&as_vis=1&oi=scholarr

Failure to file suit within three years bars right of rescission. The Eight Circuit, following *Jesinoski v. Countrywide Home Loans*, 135 S. Ct. 790 (2015), held that a claim for rescission under Truth in Lending was not time-barred by 15 U.S.C. 1635(f) because of the failure to file a lawsuit within three years of their transaction with Bank of America. *Bank of Am., N.A. v. Peterson*, 746 F.3d 357 (8th Cir. Apr. 15, 2015). http://cases.justia.com/federal/appellate-courts/ca8/12-2508/12-2508-2015-04-15.pdf?ts=1429111867

Courts should not intervene mid-arbitration. The Ninth Circuit held that a court should intervene in an arbitration only in truly "extreme" situations. The court noted that courts may only engage in the very front and very back end of an arbitration. At the outset, courts may determine whether the parties agreed to arbitrate the dispute, and at the end, courts may determine if the arbitration met the basic fairness requirements of the Federal Arbitration Act. *Sussex v. U.S. Dist. Ct. for D. Nevada*, 776 F.3d 1092 (9th Cir. Jan. 27, 2015). http://cdn.ca9.uscourts.gov/datastore/opinions/2015/01/27/14-70158.pdf

Defendant may not moot class action by offer to named plaintiff. The Eleventh Circuit held that a plaintiff's individual claim is not mooted by an unaccepted Rule 68 offer of judgment, and a proffer that moots a named plaintiff's individual claim does not moot a class action, even if the proffer comes before the plaintiff has moved to certify the class. *Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698 (11th Cir. Dec. 1, 2014). http://media.ca11.uscourts.gov/opinions/pub/files/201315417.pdf

UNITED STATES DISTRICT COURTS

Facebook to face class action over children's online purchases. A U.S. district judge in California held that Facebook must face a nationwide class-action lawsuit seeking to force the social media company to provide refunds when children spend their parents' money on its website without permission. The judge noted, however, that although the plaintiffs could not pursue refunds as a group under U.S. Supreme Court precedent, they could still seek individual refunds. *I.B. et al v. Facebook, Inc.*, 2015 U.S. Dist. LEXIS 29357 (N.D. Cal. Mar. 10, 2015). http://www.leagle.com/decision/In%20FDCO%2020150311971.xml/I.B.%20v.%20FACEBOOK,%20INC.

Class action against Facebook not dismissed. A federal district court in California rejected a motion to dismiss a class action against Facebook for intercepting the content of users' electronic messages in order to determine if users "like" a webpage (for purposes of Facebook's "like" counter) and in order to help Facebook send users targeted advertising. *Campbell v. Facebook, Inc.*, 2014 U.S. Dist. LEXIS 177331 (N.D. Cal. Dec. 23, 2014). https://cases.justia.com/federal/district-courts/california/candce/4:2013cv05996/273216/43/0.pdf?ts=1419413755

STATE COURTS

Unconscionable provisions in an arbitration clause may be severed. A California Court of Appeals held that an arbitration clause found unconscionable may be enforced if the offensive provisions are severed. The court noted that the unconscionable provisions concern only exceptions to the finality of the arbitration award, and can be deleted without affecting the core purpose and intent of the arbitration agreement. The deletion of these exceptions creates a binding arbitration award and promotes the fundamental attributes of arbitration, including speed, efficiency, and lower costs. *Trabert v. Consumer Portfolio Servs., Inc.*, 184 Cal. Rptr. 3d 596 (Cal. Ct. App. Mar. 3, 2015). http://cases.justia.com/california/court-of-appeal/2015-d065556.pdf?ts=1425402024

A California Court of Appeals held that an arbitration clause found unconscionable may be enforced if the offensive provisions are severed.

Consumer must arbitrate home invasion and assault. A Missouri Court of Appeals held that the dispute between a man who rented a refrigerator and company service man wearing a company uniform who allegedly assaulted an robbed him, must go to arbitration. The court held that it has to enforce the arbitration clause, and let the arbitrator decide whether the dispute over the person beating up the consumer is covered by the consumer's contract about renting the refrigerator. *Johnson v. Rent-A-Center*, 2014 Mo. App. LEXIS 1227 (Mo. Ct. App. Nov. 4, 2014). https://scholar.google.com/scholar_case?case=13210190760421860693&hl=en&as_sdt=6&as_vis=1&oi=scholarr (opinion withdrawn)

Plaintiff entitled to costs even if defendant voluntarily paid amount requested before judgment. Defendant owed $277 to a cash-advance company, which assigned the debt to Plaintiff. Plaintiff filed a complaint for the recovery of money in county court, but prior to the entry of judgment, defendant voluntarily paid plaintiff the full amount sought. The Nebraska Supreme Court held plaintiff was entitled to its costs in the action notwithstanding payment. *Credit Mgmt. Servs., Inc. v. Jefferson*, 861 N.W.2d 432 (Neb. Apr. 10, 2015). http://cases.justia.com/nebraska/supreme-court/2015-s-14-545.pdf?ts=1428674537

Individual differences in treatment or potential damages with respect to the various vehicle contracts does not defeat commonality in putative class action. The supreme court of North Dakota reversed and remanded the district court's order denying certification of a usury class action. Among other things, the court noted, "Each putative plaintiff signed the same standard form contract, albeit with varying price terms written in for each respective vehicle. The district court noted the potential class members were not all charged the same usurious rates or excessive fees or subject to varying inaccurate or incomplete disclosures. However, these variations speak more to the issue of damages, and it is well established that differences in the degree of injury or damages will not bar a finding of commonality." *Baker v. Autos, Inc.*, 860 N.W.2d 788 (N.D. Mar. 24, 2015). http://law.justia.com/cases/north-dakota/supreme-court/2015/20140033.html

Federal Arbitration Act preempts Section 74.451 of the Texas Civil Practice and Remedies Code, relating to agreements to arbitrate health care liability claims. The Texas Supreme Court held that the section of the Texas Medical Liability Act requiring an attorney to sign a clause requiring arbitration is preempted by federal law. The court held that it is not saved by the provisions of the McCarran-Ferguson Act, which provides an exemption from preemption that applies to state statutes enacted for the purpose of regulating the business of insurance. The court noted that Section 74.451 of the Texas Civil Practice and Remedies Code was not a law enacted by the Texas Legislature for the purpose of regulating the business of insurance. It simply applies to agreements to arbitrate health care liability claims between patients and health care providers. Accordingly, the MFA does not exempt section 74.451 from preemption by the FAA, and the trial court should have granted the motion to compel arbitration. *Fredericksburg Care Co., L.P. v. Perez*, 58 Tex. Sup. J. 452 (Tex. Mar. 6, 2015). http://caselaw.findlaw.com/tx-supreme-court/1694070.html

Timeliness of claim is for arbitrator to decide. The Texas Supreme Court considered whether a court or an arbitrator decides if a demand for arbitration was timely under the arbitration agreement's statute of limitations. The court held that "courts must defer to arbitrators to determine the meaning and effect of a contractual deadline." *G.T. Leach Builders, LLC v. Sapphire V.P., L.P.*, 58 Tex. Sup. J. 532 (Tex. March 20, 2015). http://www.txcourts.gov/media/907938/130497.pdf

Guest in a hotel is a mere licensee, not a tenant. A Texas Court of Appeals held that no landlord tenant relationship exists between a hotel and its guest, and has no right of possession to the hotel room. *Olley v. HVM, L.L.C.*, 449 S.W.3d 572 (Tex. App.–Houston [14th Dist.] Oct. 14, 2014). http://cases.justia.com/texas/fourteenth-court-of-appeals/2014-14-13-00779-cv.pdf?ts=1413278971

DECEPTIVE TRADE PRACTICES AND WARRANTIES

PROFESSIONAL NEGLIGENCE CLAIM MAY NOT BE "FRACTURED" TO CREATE A DTPA CLAIM

Gonzalez v. Sloan, 447 S.W.3d 98 (Tex. App. 2014).
http://www.leagle.com/decision/In%20TXCO%2020140829F93/LAW%20OFFICE%20OF%20OSCAR%20C.%20GONZALEZ%20v.%20SLOAN

FACTS: Plaintiff, Isabel Sloan ("Sloan"), sued Defendant, Attorney Oscar C. Gonzalez ("Gonzalez"), and his firm for negligence and violation of DTPA based on the attorney and firm's failure to safeguard Sloan's settlement proceeds awarded in an underlying action. Eric R. Turton ("Turton"), the attorney to whom Gonzalez had referred the case, misappropriated the settlement funds. Gonzalez's deceptive conduct in failing to disclose Turton's disciplinary history and failure to supervise him was the basis for Sloan's claims.

Sloan asserted that Gonzalez failed to inform her of Turton's substantial disciplinary history, and claimed if she had known of Turton's prior professional misconduct and suspensions, she would not have agreed to his representation or his access to her settlement money. The trial court rendered judgment awarding Sloan damages under the DTPA. Gonzalez and his firm appealed.

HOLDING: Affirmed in part and reversed in part.

REASONING: A complaint that a lawyer misrepresented his competence to provide legal services or failed to disclose his incompetence, implicated only the lawyer's duty of ordinary care and is not independently actionable as a DTPA claim. A complaint related to a lawyer's competence ultimately speaks to the adequacy of the lawyer's legal representation and is, therefore, a negligence claim, which may not be fractured.

The court concluded that the DTPA claim was part of an improperly fractured professional negligence claim. The court reversed the judgment based on Client's DTPA claim, and rendered judgment against Gonzalez and his firm based on the jury's finding of professional negligence.

TEXAS ADMINISTRATIVE CODE, SECTION 137.55(j) IS NOT A "TIE-IN" STATUTE

Lopez v. Osuna, 453 S.W.3d 60 (Tex. App. 2014).
http://caselaw.findlaw.com/tx-court-of-appeals/1685253.html

FACTS: Appellee Marina Edith Osuna ("Osuna") brought suit against Appellant Enrique Lopez d/b/a Maternidad La Piedad ("Lopez") for failure to provide promised medical services while Osuna was in labor. Osuna did not file an expert report pursuant to §74.351(a) of the Texas Civil Practice and Remedies Code. Lopez filed a motion to dismiss on the grounds that Osuna had not provided the required report.

The trial court denied the motion, finding that Osuna's claims were not health care liability claims and therefore were not subject to the expert reporting requirements. Lopez appealed.

HOLDING: Reversed and remanded.

REASONING: Osuna contended that her claims were not health care liability claims subject to the expert reporting requirements of Chapter 74 because section 137.55(j) of the Texas Administrative Code ("TAC") is a "tie-in" statute governing birthing centers, permitting her to file suit under the DTPA. Under section 17.50(h), a claim based on a tie-in statute may be brought under the DTPA, notwithstanding the fact it would normally be exempt from the DTPA under §17.49(e).

The court looked at other tie-in statutes that contain language authorizing a plaintiff to bring a cause of action under the DTPA and noted that section 136.55(j) only stated birthing centers may not engage in deceptive acts or practices under the DTPA. To give effect to the legislature's intent, the court was unwilling to look past the plain meaning of the statute and add words not contained in the language. Thus, the court held section 137.55(j) was not a tie-in statute that would Osuna to bring an action under the DTPA.

The court looked at other tie-in statutes that contain language authorizing a plaintiff to bring a cause of action under the DTPA and noted that section 136.55(j) only stated birthing centers may not engage in deceptive acts or practices under the DTPA.

CONSUMER CREDIT

CONSUMER REPORT NEED NOT BE PUBLISHED TO A THIRD PARTY FOR CONSUMER TO RECOVER DAMAGES

Collins v. Experian Info. Solutions, Inc., 775 F.3d 1330 (11th Cir.).
http://media.ca11.uscourts.gov/opinions/pub/files/201411111.pdf

FACTS: Plaintiff, Curtis Collins ("Collins"), prevailed in a prior lawsuit against Equable Ascent Financial, LLC ("Equable") for a debt Equable claimed Collins owed them. Defendant, Experian Information Solutions, Inc. ("Experian") listed the purported debt on Collins' credit report. After a judgment against Equable, Collins wrote two letters to Experian requesting the debt be removed from his credit report. Experian then sent an Automated Consumer Dispute Verification form to Equable stating that Collins disputed the debt because he had obtained judgment against Equable. Equable responded that Collins's debt was still valid, and Experian left the Equable debt on Collins' credit report.

Collins filed suit, alleging that Experian negligently violated its duty under the Fair Credit Reporting Act ("FCRA") to conduct a reasonable reinvestigation of disputed information contained in his credit file. Experian removed the case to federal court. The district court granted summary judgment to Experian, finding that Collins could not prove actual damages because he failed to present evidence that the report containing the Equable debt was ever published to a third party. Collins appealed.

The court noted that when FCRA uses the term "consumer report," communication to a third party is required, but the court distinguished the term "consumer report" from the term "file."

HOLDING: Reversed and remanded.
REASONING: The court looked to the plain language of FCRA to determine whether the statute required the disputed information to be published to a third party for Collins to prevail. The court noted that when FCRA uses the term "consumer report," communication to a third party is required, but the court distinguished the term "consumer report" from the term "file." The court found the term "file" refers to information retained by a consumer reporting agency, and does not require information be communicated to a third party.

The court held that because Congress chose to use "file" instead of "consumer report," there is no requirement that the disputed information be published to a third party for a consumer to recover actual damages.

ONLINE PAYMENT MUST BE CREDITED THE DAY THE CONSUMER AUTHORIZES IT

Fridman v. NYCB Mortgage Co., 780 F.3d 773 (7th Cir. 2015).
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2015/D03-11/C:14-2220:J:Easterbrook:dis:T:fnOp:N:1515508:S:0

FACTS: Plaintiff, Elena Fridman ("Fridman"), used Defendant, NYCB Mortgage Co. LLC's ("NYCB") website to pay her mortgage. Fridman completed the authorization for the payment the day that it was due but after the NYCB cutoff time to be submitted the same day. NYCB did not credit Fridman's account until three days later and charged Fridman a late fee.

Fridman sued, alleging that NYCB's failure to credit the online payments on the day the consumer authorized them violated the Truth in Lending Act ("TILA"). The trial court granted NYCB's motion for summary judgment, and Fridman appealed.
HOLDING: Reversed and remanded.
REASONING: The court first noted that TILA required mortgage services to credit payments to consumer accounts on the date or receipt of payment, unless delay has no effect on either late fees or consumers' credit reports. The court then discussed that the "date of receipt" under TILA was when the payment instrument or other means of payment reached the mortgage servicer, including by electronic fund transfer. The court concluded that "[a]n electronic authorization for a mortgage payment entered on the mortgage servicer's website is a 'payment instrument or other means of payment.' TILA requires mortgage services to credit these authorizations when they 'reach[] the mortgage servicer.'"

FAILURE TO FILE SUIT WITHIN THREE YEARS BARS TRUTH IN LENDING RIGHT OF RESCISSION

Bank of Am., N.A. v. Peterson, 746 F.3d 357 (8th Cir. 2014).
http://law.justia.com/cases/federal/appellate-courts/ca8/12-2508/12-2508-2014-03-21.html
FACTS: In December of 2006, Plaintiffs Gary and Sally Peterson ("Petersons") closed on a home mortgage refinance loan with the Defendant, Bank of America ("BOA"). After executing a Notice of Right to Cancel and a Truth in Lending Disclosure Statement, the Petersons received a letter stating that the statement did not accurately reflect the APR or the finance charge related to their loan. In October of 2009, BOA discovered the original mortgage was never properly recorded and subsequently asked the Petersons to execute a duplicate original mortgage. The Petersons refused and requested rescission of the loan based on BOA's failure to provide the disclosures.

BOA filed suit in 2010 and the district court granted summary judgment to BOA, concluding that the Petersons' rescission claim was time-barred under 15 U.S.C. §1635(f) because of their' failure to file a lawsuit within three years of the transaction with BOA. The Petersons appealed.
HOLDING: Affirmed.
REASONING: The court first discussed that in transactions secured by a principal dwelling, TILA gives borrowers an uncondi-

tional three-day right to rescind. The court explained that if the creditor fails to make the required disclosures or rescission notices the borrower may rescind beyond the unconditional three-day period, but that right of rescission shall expire three years after the date of consummation of the transaction.

The court then stated that a plaintiff seeking rescission must file suit as opposed to merely giving the bank notice within three years in order to preserve that right pursuant to §1635(f). The court held that because the Petersons notified BOA of their intent to rescind but failed to file a lawsuit within the three-year period, the district court did not err in determining that the Petersons right to rescission had expired and that their rescission was time-barred under §1635(f).

SUPREME COURT RULES TRUTH-IN-LENDING LANGUAGE THAT A BORROWER "SHALL HAVE THE RIGHT TO RESCIND . . . BY NOTIFYING THE CREDITOR . . . OF HIS INTENTION TO DO SO," INDICATES THAT RESCISSION IS EFFECTED WHEN THE BORROWER NOTIFIES THE CREDITOR OF HIS INTENTION

Jesinoski v. Countrywide Home Loans, Inc., 135 S. Ct. 790, (2015).
http://www.leagle.com/decision/In%20SCO%2020150113D36/JESINOSKI%20v.%20COUNTRYWIDE%20HOME%20LOANS,%20INC.

FACTS: Plaintiffs, Larry and Cheryle Jesinoski ("Jesinoski"), refinanced their home mortgage by borrowing money from Defendant, Countrywide Home Loans/Bank of America Home Loans ("Countrywide"). Exactly three years later, Jesinoski mailed a letter to Countrywide purporting to rescind the loan, but they refused to acknowledge the validity of the rescission.

Jesinoski then filed suit in Federal District Court seeking a declaration of rescission and damages. Countrywide moved for judgment on the pleadings claiming that Jesinoski needed to bring suit within three years to affect a rescission, not just mail a letter. The District Court agreed and the Eighth Circuit affirmed.

HOLDING: Reversed and remanded.

REASONING: The Court explained that Section 1635(a) of the Truth and Lending Act stated in unequivocal terms how the right to rescission must be exercised by its plain language; The Act provides that a borrower "shall have the right to rescind . . . by notifying the creditor, in accordance with regulations of the Board, of his intention to do so." The Court stated that although the act states when the right to rescind must be exercised, it does not dictate how that right must be exercised, and that does not require the borrower to sue within three years.

The Court stated that although the act states when the right to rescind must be exercised, it does not dictate how that right must be exercised, and that does not require the borrower to sue within three years.

The Court concluded that the language left no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind, and so long as the borrower notified the lender within three years after the transaction is consummated, his rescission was timely.

> "Section 1635(a) explains in unequivocal terms how the right to rescind is to be exercised: It provides that a borrower "shall have the right to rescind ... by notifying the creditor, in accordance with regulations of the Board, of his intention to do so" (emphasis added). The language leaves no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind. It follows that, so long as the borrower notifies within three years after the transaction is consummated, his rescission is timely. The statute does not also require him to sue within three years."

DEBT COLLECTION

FAIR DEBT COLLECTION PRACTICES ACT DOES NOT APPLY TO A PERSON COLLECTING A DEBT THAT WAS NOT IN DEFAULT WHEN IT WAS OBTAINED

Ramsay v. Sawyer Prop. Mgmt., 593 Fed. App'x. 204 (4th Cir. 2014).
http://law.justia.com/cases/federal/appellate-courts/ca4/13-1795/13-1795-2014-12-09.html

FACTS: Plaintiff, Kharyn Ramsay ("Ramsay"), was a residential tenant at a property owned by SRH Woodmoor L.L.C. ("Woodmor") and managed by defendant, Sawyer Property Management of Maryland, L.L.C. ("Sawyer"). Ramsay defaulted on her rent obligations, and Sawyer hired an agent to collect the debt.

Ramsay sued Sawyer as a debt collector under the Fair Debt Collection Practices Act ("FDCPA"). Ramsay argued that Sawyer was Woodmor's rental agent, and thus, a debt collector. The district court dismissed the suit. Ramsay appealed.
HOLDING: Affirmed.
REASONING: The court first defined a debt collector under the FDCPA and noted that the definition excludes any person collecting or attempting to collect any debt owed or due or asserted be owed or due another to the extent such activity concerns a debt that was not in default at the time it was obtained by such person.

The court stated that a rental agent obtains a debt when a lease is executed, which comes before a default under the lease, unless the principal-agent relationship begins at some later date. Because Sawyer was listed on the lease as Ramsay's landlord, she was contractually obligated to pay Sawyer monthly rent, and Sawyer obtained Ramsay's debt before it was in default. Therefore, Sawyer was not a debt collector under the FDCPA.

MISLEADING CONSUMER TO BELIEVE HE QUALIFIED FOR A LOAN MODIFICATION DOES NOT VIOLATION TEXAS DEBT COLLECTION ACT

Troy Chavez v. Wells Fargo Bank, N.A., 578 Fed. App'x 345 (2014).
http://600camp.com/wp-content/uploads/2014/08/Chavez-v.-Wells-Fargo-Bank-N.A..pdf

FACTS: Plaintiff, Troy Chavez ("Chavez"), contacted Defendant, Wells Fargo Bank N.A. ("Wells Fargo"), to discuss a loan modification. A Wells Fargo representative encouraged Chavez to apply for the Home Affordable Modification Program ("HAMP"). The representative instructed him to cease payments on his loan during the process and promised that they would not foreclose on the property.

Chavez submitted documents to Wells Fargo for the HAMP application. Wells Fargo notified him about his lack of required documentation and his disqualification for HAMP because his loan did not meet the "imminent default criteria". Wells Fargo scheduled a foreclosure sale on his home.

Chavez filed suit under the Texas Debt Collection Act ("TDCA"). The district court granted Wells Fargo's motion to dismiss and Chavez appealed.
HOLDING: Affirmed.
REASONING: The TDCA prohibits the use of "fraudulent, deceptive, or misleading representation" by "misrepresenting the character, extent, or amount of debt". To bring a successful claim under the TDCA, a borrower must allege that the lender made a false or misleading "affirmative statement" about a debt. Because Chavez never alleged Wells Fargo's affirmative misrepresentation of the loan modification statement, Chavez's complaint was properly dismissed. The court reasoned that loan modification statements do not concern the "character, extent, or amount of a consumer debt."

The TDCA prohibits the use of "fraudulent, deceptive, or misleading representation" by "misrepresenting the character, extent, or amount of debt".

ATTEMPT TO COLLECT FEES FOR SERVICES NOT YET PERFORMED VIOLATES FAIR DEBT COLLECTION PRACTICES ACT

Kaymark v. Bank of America, 11 F.Supp.3d 496 (3rd Cir. 2015).
http://www2.ca3.uscourts.gov/opinarch/141816p.pdf

FACTS: Plaintiff, Dale Kaymark ("Kaymark"), defaulted on a mortgage held by Defendant, Bank of America ("Bank"), who initiated foreclosure proceedings against Kaymark. Kaymark received a foreclosure complaint that listed certain fees for not yet performed services, title report fees, and property inspection fees. Kaymark filed suit and alleged that the listing of these not yet performed fees violated the Fair Debt Collection Practices Act.

The district court granted Bank's motion to dismiss Kaymark's complaints, agreeing that the inclusion of not yet incurred fees was not prohibited. Plaintiff appealed.
HOLDING: Reversed.
REASONING: The court viewed the Foreclosure Complaint through the lens of the least sophisticated consumer and in the light most favorable to Kaymark. The court found Bank in violation under 15 U.S.C. §1692e(2)(A), (5), (10) and §1692f(1) by attempting to collect fees for services not yet performed in the mortgage foreclosure, and also attempting to collect fees that were not expressly authorized by the agreement.

DEBT COLLECTOR DOES NOT HAVE TO TOTAL AMOUNTS DUE

Dibattista v. Buckalew, Frizzel & Crevina, L.L.P., 574 Fed. App'x. 107 (3rd Cir. 2014).
http://www2.ca3.uscourts.gov/opinarch/134486np.pdf

FACTS: Plaintiff, Barbara Dibattista ("Dibattista"), a member of the Kensington Gate Homeowners Association, Inc. ("Association"), was obligated to pay dues. After Dibattista repeatedly failed to pay dues, Defendant, the law firm of Buckalew, Frizzel

& Crevina ("Buckalew"), sent a letter to Dibattista, stating the amount due, fee for preparing the letter, and the remedial actions that would be undertaken upon Dibattista's continued failed payments.

Dibattista filed suit alleging that Buckalew violated the Fair Debt Collection Practices Act ("FDCPA") by sending the letter. The district court dismissed the suit, finding that Dibattista failed to state a claim. Dibattista appealed.

HOLDING: Affirmed.

REASONING: The FDCPA requires debt collectors to provide the consumer with written notice stating the amount of the debt. Dibattista argued that Buckalew failed to meet this standard, because the letter stated the amount due and Buckalew's attorney's fees separately. Dibattista also argued that the letter sent by Buckalew was misleading and deceptive under 15 U.S.C. § 1692e.

The court found that even the most unsophisticated of debtors could add the two amounts together to find the total amount of the debt. The court also found this argument to be unpersuasive because of the Homeowner's agreement that Dibattista signed upon entering the Association stated that attorney's fees are recoverable by the Association in the event of past-due assessment payments.

LOAN SERVICER IS NOT DEBT COLLECTOR UNDER FDCPA

Fenello v. Bank of Am., 577 F. App'x. 899 (11th Cir. 2014).
http://law.justia.com/cases/federal/appellate-courts/ca11/13-15558/13-15558-2014-08-12.html

FACTS: Appellants, Beverly and Vito Fenello (the "Fenellos"), purchased a home and took out a loan serviced by Appellee, Bank of America. Per Bank of America's advice, the Fenellos stopped making their monthly payments in order to modify the loan's terms. Subsequently, Bank of America sent the Fenellos debt collection letters and initiated foreclosure proceedings.

The Fenellos filed suit claiming Bank of America violated the FDCPA, and the district court dismissed the claims. The Fenellos appealed.

HOLDING: Affirmed.

REASONING: The Fenellos argued that Bank of America was a debt collector because correspondence received from the bank stated that it was a debt collector under the FDCPA. The court rejected this argument because it assumed that a party could define the statutory term "debt collector." The court reasoned that the Bank did not fall under the stator definition and could not identify itself as a debt collector within the meaning of the FDCPA by stating in a letter that it was considered one.

ARBITRATION

A PARTY DOES NOT WAIVE A RIGHT TO ARBITRATION MERELY BY DELAY

Richmont Holdings, Inc. v. Superior Recharge Sys., L.L.C., 392 S.W.3d 633 (Tex. 2014).
http://caselaw.findlaw.com/tx-supreme-court/1687308.html

FACTS: Plaintiff, Richmont Holdings, Inc. ("Richmont") entered into an agreement to purchase assets of Defendant, Superior Recharge Systems, L.L.C. ("Superior Recharge"), who hired Defendant Jon Blake ("Blake") as the owner and manager. The purchase agreement provided a provision for binding arbitration of any dispute relating to the agreement, but Blake's employment agreement did not include an arbitration provision.

After Blake's employment was terminated, he sued Richmont for fraud and inducement. Richmont answered, but delayed 18 months before moving to compel arbitration. Blake argued Richmont waived its right to arbitrate through delay. The lower courts denied Richmont's motion to compel arbitration. Richmont appealed.

HOLDING: Reversed and remanded.

REASONING: The only defense Blake raised to the agreement was waiver. Blake conceded the underlying dispute in his suit and did not contest the validity or scope of the agreement. The supreme court stated the court of appeal's failure to recognize the arbitration agreement is in contrast with precedent, which mandates enforcement of arbitration absent proof of a defense. The court noted that merely filing suit does not waive arbitration, even when the movant, as in this case, files a second, separate suit in another county based in part on a contract at issue in the first action. Additionally, mere delay in moving to compel arbitration is not enough for waiver. The court remanded the case to consider Blake's waiver defense.

FEDERAL ARBITRATION ACT PREEMPTS SECTION 74.451 OF THE TEXAS CIVIL PRACTICE AND REMEDIES CODE, RELATING TO AGREEMENTS TO ARBITRATE HEALTH CARE LIABILITY CLAIMS

Fredericksburg Care Co., L.P. v. Perez, ___ S.W. 3d ___, (Tex. 2015).
https://scholar.google.com/scholar_case?case=17225655864440051708&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Plaintiffs, Beneficiaries of Elisa Zapata's estate ("Beneficiaries"), sued Defendants, Fredericksburg Care Company ("Fredericksburg"), and Zapata's nursing home, for negligent care and wrongful death. Fredericksburg moved to compel arbitration based on the arbitration a signed agreement's arbitration clause. Fredericksburg asserted that the Federal Arbitration Act ("FAA") preempts §74.451 of the Texas Civil Practice and Remedies Code and triggered arbitration. The issue was whether the federal McCarran-Ferguson Act ("MFA") would provide an exemption from preemption under the FAA, and invalidate arbitration.

The trial court denied the Defendant's motion to compel arbitration under the MFA. The Defendant filed an interlocutory appeal, and the court of appeals affirmed.

HOLDING: Reversed and Remanded

REASONING: The court found that the MFA does not exempt §74.451 from preemption by the FAA. The court applied a three-part test to determine whether the MFA preempts the FAA. The MFA applies if (1) the federal statute does not specifically relate to the business of insurance, (2) the state law was enacted for the purpose of regulating the business of insurance, and (3) the federal statute operates to invalidate, impair, or supersede the state law.

The court determined the FAA does not relate specifically to the business of insurance. There was no proof that the state law was enacted for the purpose of regulating the business of insurance. The court concluded that the FAA directly conflicts with, and preempts, §74.451 absent an exemption, and, therefore, operates to supersede state law. Thus, the MFA does not exempt §74.451 from preemption by the FAA.

FEES AND COSTS IN EXCESS OF PLAINTIFF'S POSSIBLE RECOVERY IN ARBITRATION NOT ENOUGH TO INVALIDATE PROHIBITION AGAINST CLASS ACTION

Torres v. Simpatico, Inc., 781 F.3d 963 (8th Cir. 2015).
https://scholar.google.com/scholar_case?case=9685188042806718444&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Torres ("Torres"), unit franchisees that brought a putative class action suit against the Stratus franchise system ("Stratus"), asserted claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Torres entered into a standard unit-franchise agreement (the "Agreement") that included an arbitration provision. The district court granted Stratus' motion to compel arbitration under the terms of the Agreement.

Torres appealed, arguing that the arbitration clause in the Agreement was unconscionable because it required individual arbitration. The arbitration provision also required Torres to prepay filing and other fees, and to reimburse Stratus' costs and expenses if Stratus prevailed in an individual arbitration proceeding. Torres argued that the clause was unconscionable because they would be prevented from pursuing their claims because of the prohibitively high costs of individual arbitration.

HOLDING: Affirmed.

REASONING: The court stated that in order to overcome the Federal Arbitration Act's ("FAA") policy favoring arbitration, Torres bore the burden of showing that individual arbitration would be prohibitively expensive, and that it was likely, as opposed to merely speculative, that the prohibitive costs would actually be incurred. To meet the burden, Torres had to present specific evidence of likely arbitrator's fees and evidence of their own financial inability to pay those fees.

The court found that the evidence presented by Torres was not specific enough to establish that individual arbitration was cost prohibitive.

Torres's evidence included (1) a general schedule of filing fees and average daily arbitrator fees; (2) an affidavit estimating that each individual hearing would take three days to complete, that the average loss among all class members was $6,100, that the cost of arbitration would exceed the amount of any member's claim, and that Torres could not afford the costs to individually arbitrate the claim.

The court found that the evidence presented by Torres was not specific enough to establish that individual arbitration was cost prohibitive. The court noted that the fee schedule provided by Torres did not necessarily reflect the cost to arbitrate, and that the counsel's affidavit contained mere conjectural declarations. The court further noted that Torres did not provide fee data for the states in which Torres resided. The court held that Torres failed to offer specific evidence that the individual arbitration clause was unconscionable.

BANKRUPTCY

ANTIQUE BIBLE WORTH $10,000 EXEMPT UNDER BANKRUPTCY CODE

Robinson v. Hagan, 527 B.R. 314 (S.D. Ill. 2014).
https://cases.justia.com/federal/district-courts/illinois/ilsdce/3:2013cv01239/65647/12/0.pdf?ts=1415102608

FACTS: Appellant, Anna Robinson ("Robinson"), filed for Chapter 7 bankruptcy and claimed an exemption under Illinois state law's personal property exemption for a First Edition Mormon Bible ("the Bible") worth at least $10,000. Appellee, Cynthia Hagan, ("the Trustee"), objected to the exemption, arguing the statute was not meant to exempt Bibles of extraordinary value.

The bankruptcy court found the Bible was not exempt per order. Robinson appealed.

HOLDING: Vacated and remanded.

REASONING: The court held that the plain language of the statute expressly exempted the Bible. The statute is meant to allow the debtor to keep specific personal items without regard to value, including a bible. The court looked at whether Robinson's purpose in owning the Bible was to defraud creditors and determined that, because she needed the money but did not sell the Bible, Robinson owned the Bible for its non-monetary value.

MISCELLANEOUS

REMOVING A CLASS ACTION LAWSUIT TO FEDERAL COURT UNDER THE CLASS ACTION FAIRNESS ACT OF 2005 DOES NOT NEED TO INCLUDE ACTUAL EVIDENCE TO ESTABLISH AMOUNT IN CONTROVERSY

Dart Cherokee Basin Operating Co., LLC v. Owens, 135 S.Ct. 547 (2014).
http://www.leagle.com/decision/In%20SCO%2020141215961.xml/DART%20CHEROKEE%20BASIN%20OPERATING%20CO.%20v.%20OWENS

FACTS: Plaintiff, Brandon Owens ("Owens"), filed a class action alleging that Defendant, Dart Cherokee Basin Operating Company, LLC, et al. ("Dart"), underpaid royalties owed to class members under oil and gas leases. Under the Class Action Fairness Act ("CAFA"), Dart removed the case to the district court. CAFA gives federal courts jurisdiction over class actions if the class has at least 100 members, the parties are minimally diverse, and the amount in controversy exceeds $5 million. Dart's notice of removal alleged all three requirements were satisfied.

A defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold; the notice need not contain evidentiary submissions.

Owens moved to remand to state court, asserting that Dart's notice was deficient as a matter of law because there was no evidence that the amount in controversy exceeded $5 million. In response, Dart submitted a detailed damages calculation that showed the amount in controversy did exceed the requirement. Without challenging the calculation, Owens urged that Dart's submission was late.

The District Court granted Owens' remand motion. Dart filed a petition for certiorari to the Supreme Court requesting resolution of the issue of whether a defendant seeking removal to federal court must include evidence supporting federal jurisdiction in the notice of removal.

HOLDING: Vacated and remanded.

REASONING: The Supreme Court held that a plaintiff's amount-in-controversy allegation invoking federal jurisdiction is accepted if made in good faith. Similarly, the amount-in-controversy allegation of a defendant seeking federal jurisdiction should be accepted when not contested by the plaintiff or questioned by the court. A defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold; the notice need not contain evidentiary submissions. The Court therefore ruled that the district court erred in ruling that Dart's amount-in-controversy allegation failed for want of proof because said amount was plausibly alleged.

"AS IS" AGREEMENT INEFFECTIVE TO NEGATE LIABILITY FOR STAUTORY FRAUD

COURT AFFIRMS AWARD OF $141,000 FOR STAUTORY FRAUD

Harstan, Ltd. v. Kim, 441 S.W.3d 791 (Tex. Ct. App. 2014).
http://leagle.com/decision/In%20TXCO%2020140728C58.xml/HARSTAN,%20LTD.%20v.%20SI%20KYU%20KIM

FACTS: Plaintiff, Si Kyu Kim ("Kim"), purchased commercial real property from Defendant, Harstan Ltd. ("Harstan"), which was in violation of city regulations due to structural damages. Harstan advised Kim during negotiations that the property would be repaired as required by the city, and Kim purchased the property "as is" for $515,000. Harstan never completed the repairs. The city held Kim in violation of regulations and property was to undergo condemnation and foreclosure proceedings. Kim stopped making payments and Harstan purchased the property for $406,000 at the foreclosure sale.

Kim filed suit under section 27.01 of the Texas Business and Commerce Code. The jury found Harstan guilty of statutory fraud and awarded Kim $141,000 in out-of-pocket damages. Harstan appealed.

HOLDING: Affirmed.

REASONING: The court reasoned that a buyer is not bound by an "as is" agreement if seller made fraudulent representations or concealed information. Because Harstan assured Kim that all required repairs would be completed, by failing to complete the repairs, the "as is" provision was invalid.

As to damages, the court reasoned that when trial evidence supports a range of damages, an award within that range is an appropriate exercise within the jury's discretion. The court applied this standard and determined $141,000 fell within the evidence presented to the jury, and was legally sufficient to support the damages award.

CLASSWIDE MEASURE OF DAMAGES NOT REQUIRED FOR CLASS CERTIFICATION

Roach v. T.L. Cannon Corp., 778 F.3d 401 (2d Cir. 2015).
https://scholar.google.com/scholar_case?case=6976473782454409648&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Plaintiffs, former employees represented by Roach ("Employees"), alleged Defendant, T.L. Cannon Corp. ("T.L."), failed to pay them an extra hour of pay for a ten-hour workday as required by New York law and the Fair Labor Standards Act ("FLSA"). T.L. required its staff to subtract pay for statutorily mandated rest breaks that employees did not take.

Following discovery, Employees moved to certify subclasses for each claim pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. The district court denied certification on both claims and Plaintiffs filed an interlocutory appeal.

HOLDING: Vacated and remanded.

REASONING: The court asserted that because damages may have to be computed on an individual basis does not defeat class certification. Instead, damages ascertained on an individual basis is one factor to consider in deciding whether issues susceptible to generalized proof outweigh individual issues when certifying the case as a whole.

The court found that certifying Employees' class would not contradict precedent because a Rule 23(b)(3) class must measure damages that result from the class's asserted theory of injury. In addition, class certification does not need to rely on a class wide damages model to demonstrate predominance. The court held that class certification is not precluded when a class wide measure of damages is not available.

COURT FIND "CASH PRICE" VIOLATION

Neal Autoplex, Inc. v. Franklin, 441 S.W.3d 444 (Tex. App. 2014).
http://caselaw.findlaw.com/tx-court-of-appeals/1656696.html

FACTS: Plaintiffs, Lonny and Lisa Franklin purchased a new vehicle from Defendant, Neal Suzuki ("Suzuki"). At the time of purchase, Suzuki displayed a window sticker denoting a cash price of $16,464 on the vehicle. However, the installment contract listed the cash price as $20,865 because a finance company purchased the contract and charged the dealership a processing fee. Suzuki argued that the price discrepancy did not arise from these finance-related fees, but rather from the Franklins' poor price negotiating skills. The Franklins subsequently brought suit over the difference in cash price, alleging a violation of Chapter 348 and 349 of the Texas Finance Code.

The trial judge ruled in favor of the Franklins on their cash price violation claim and found that Suzuki violated Chapters 348 and 349 of the Texas Finance Code because it charged more than it would have charged a cash customer. Suzuki appealed.

HOLDING: Affirmed.

REASONING: Under the Texas Finance Code, a "cash price" violation occurs when a retail seller sells a vehicle for more than a cash price previously established. The cash price is the price the retail seller offers to all customers in the ordinary course of business. A cause of action for a cash price violation is intended to prevent a dealership from charging a finance customer more than a cash customer for the same vehicle.

The court stated that Suzuki's focus on the Franklins' poor negotiation tactics was irrelevant for purposes of finding a cash violation. Even assuming the Franklins were fully aware of and agreed to the increased price, the cash price of the vehicle is the sticker price and not the price ultimately agreed upon or stated in the contract The cash price of the Franklins' vehicle is the price offered to all customers in the ordinary course of business. The court found that the price increase and the processing fee resulting from the vehicle's financing supported the trial court's finding of a cash violation.

DEFENDANT MAY NOT MOOT CLASS ACTION BY OFFER TO NAMED PLAINTIFF

Stein v. Buccaneers Ltd. P'ship, 772 F.3d 698 (11th Cir. 2014).
https://scholar.google.com/scholar_case?case=7156442822876805609&q=Stein+v.+Buccaneers+Limited.+Partnership&hl=en&as_sdt=6,32&as_vis=1 [Link must be pasted in browser]

FACTS: Plaintiff, Stein ("Stein"), received unsolicited faxes from Defendant, Buccaneers Limited Partnership ("BLP"). Stein filed a class action lawsuit alleging BLP violated the Telephone Consumer Protection Act ("TCPA").

BLP removed the action from state to federal court and offered relief to only the named plaintiffs. When the offers were rejected, BLP moved to dismiss the action for lack of jurisdiction, asserting that the unaccepted Federal Rule of Civil Procedure ("FRCP") 68 offers rendered the case moot. The plaintiffs moved to certify the class. The district court found that the action was moot and granted BLP's motion to dismiss. Stein appealed.

The court held that FRCP 68 did not have a controlling effect because the other plaintiffs had a continued stake in the controversy, even when the name plaintiffs' claims became moot.

HOLDING: Reversed.

REASONING: BLP argued that because the named plaintiffs moved to certify the class only after BLP served the FRCP 68 offers, the case was moot. The court examined whether an unaccepted FRCP 68 offer had a controlling effect. The policy behind FRCP 68 was to hold the party that rejected an offer liable for attorney's fees, not preclude action altogether. In addition, when the named plaintiffs rejected their offers, the other plaintiffs' interests in the lawsuit did not change. The court held that FRCP 68 did not have a controlling effect because the other plaintiffs had a continued stake in the controversy, even when the name plaintiffs' claims became moot.

CLASS ACTION SETTLEMENT FOUND TO BE "A SELFISH DEAL BETWEEN CLASS COUNSEL AND THE DEFENDANT"

Pearson v. NBTY, Inc., 772 F.3d 778 (7th Cir. 2014).
http://www.leagle.com/decision/In%20FCO%2020141119115.xml/PEARSON%20v.%20NBTY,%20INC

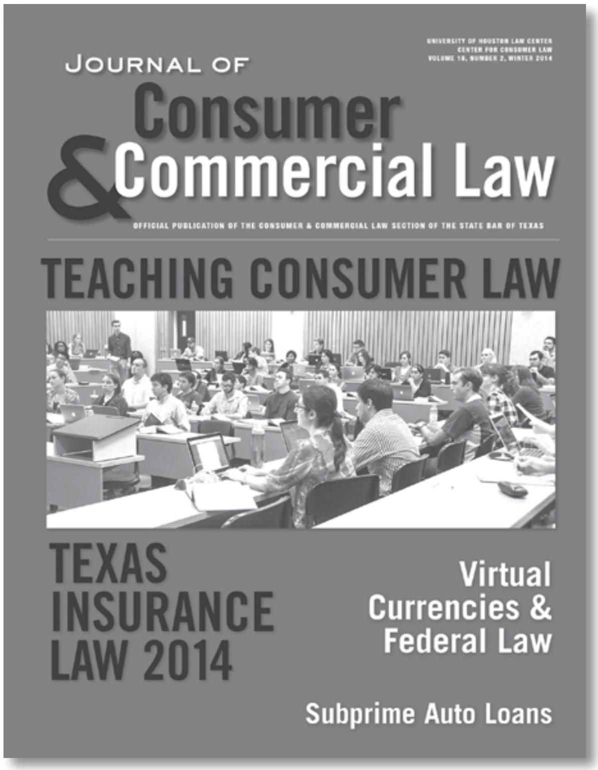
FACTS: Defendant-appellee NBTY ("NBTY") manufactured vitamins and nutritional supplements including glucosamine pills. A class action suit led by Nick Pearson ("Pearson") was filed against NBTY for making false claims regarding the efficacy of glucosamine. The district court approved a settlement of $5.63 million. After overhead costs and expenses, class counsel received roughly 69% of the approved settlement offer, with only $865,284 available to class members.

Pearson appealed, alleging that an unfair share of the ap-

proved settlement offer was allocated to class counsel.
HOLDING: Reversed and remanded.
REASONING: The court held the district judge's modifications were insufficient and remanded the case. First, the court found the reasonableness of the attorney fees allowed to class counsel should be based the potential rather than the actual or foreseeable benefits to the class. The court noted that "ratio that is relevant... is the ratio of (1) the fee to (2) the fee plus what the class members received." Second, the court found that the "reversion or kicker" clause was an unfair part of the agreement because the clause stated that if the judge reduced the amount of fees, any savings would go to the defendant, not the class.

In conclusion, the court stated:

> We thus have "remarked the incentive of class counsel, in complicity with the defendant's counsel, to sell out the class by agreeing with the defendant to recommend that the judges approve a settlement involving a meager recovery for the class but generous compensation for the lawyers — the deal that promotes the self-interest of both class counsel and the defendant and is therefore optimal from the standpoint of their private interests." That is an accurate description of this case; and it is why objectors play an essential role in judicial review of proposed settlements of class actions and why judges must be both vigilant and realistic in that review.



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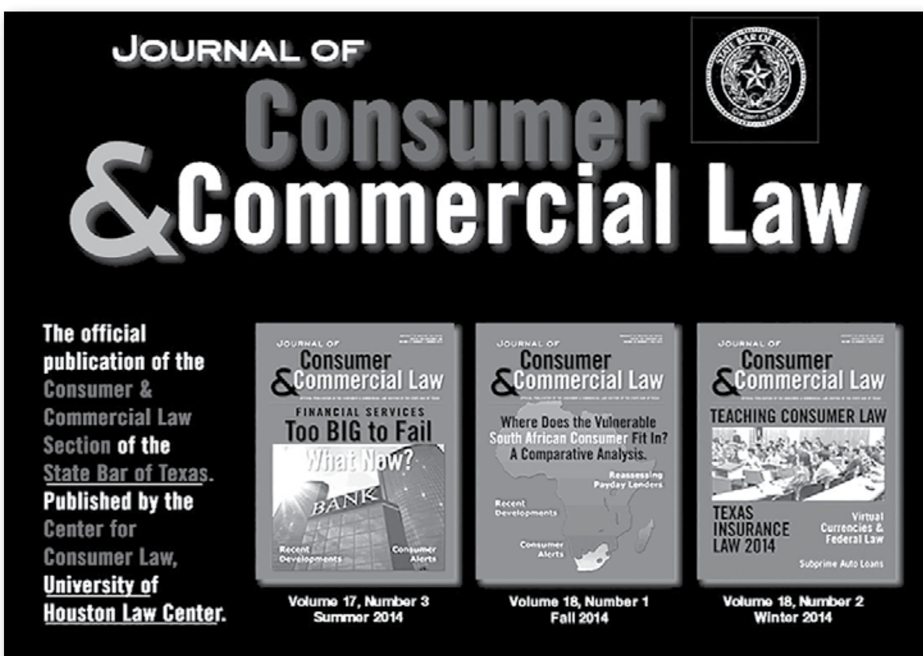

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THE LAST WORD

Once again, this issue of the *Journal* contains a cornucopia of useful and interesting information. The articles in this issue include an empirical study of data breach litigation, a look at Texas foreclosure laws and a policy discussion of international airline competition.

In light of all the recent reported data breaches, you should find the empirical study of data breach litigation particularly informative. Although the media might lead you to believe there is an excess of class action litigation following a breach, the data shows otherwise. For those who do not handle foreclosure cases, the wrongful foreclosure article may be eye opening. And if you fly internationally and are concerned with the cost, you may be surprised about the "hypocrisy" surrounding trans-atlantic aviation.

And, as usual, there also are numerous recent decisions discussed in the "*Alert" and "Recent Developments"* sections. All in all, this is a pretty diverse and interesting issue.

Richard M. Alderman
Editor-in-Chief

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