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FAIR CREDIT REPORTING ACT

Recovery of Commercial Losses

Prepared Remarks of Richard Cordray Director of the CFPB

Bridging the Gap in the Data Breach Realm

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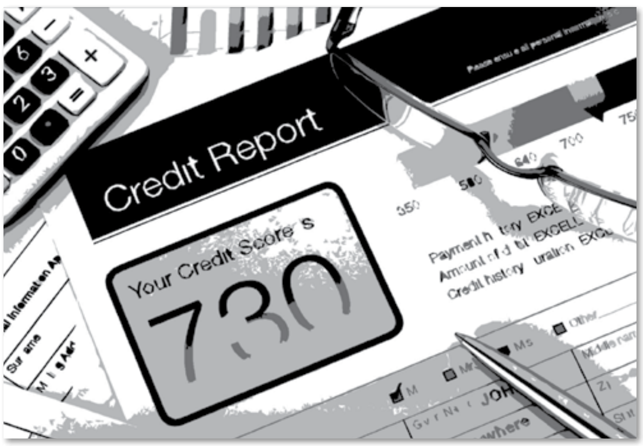

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Articles

Recent Developments

Recovery of Commercial Losses Under the

Fair Credit Reporting Act

By Scott J. Hyman*

Some FCRA plaintiffs attempt to recover for commercial or business losses deriving from allegedly inaccurate information.

I. Introduction

The number of claims filed under the Fair Credit Reporting Act ("FCRA")[11] against Furnishers[2] who provide consumer information to Consumer Reporting Agencies[3] has increased as credit has become more available since the economic meltdown.[4] As the number of FCRA claims increase, so do attempts to expand what the FCRA permits aggrieved consumers to recover as "actual damages".[5]

The FCRA is a "consumer" protection statute. Nevertheless, aggrieved consumers filing suit under the FCRA have attempted to expand recoverable damages to include losses unrelated to extensions of credit for personal, family, or household purposes.[6] Specifically, some FCRA plaintiffs attempt to recover for commercial or business losses deriving from allegedly inaccurate information furnished to consumer reporting agencies about a particular consumer account.

Most courts have barred recovery under the FCRA for such commercial losses because of the FCRA's limited "consumer protection" protection purpose and how the consumer's credit data was "used" – i.e. by the potential commercial creditor. Some courts, on the other hand, have focused on the purpose for which the credit data originally was collected,[7] not who used the data or how the data or consumer report eventually was used, to determine whether a person should be protected by the FCRA for their commercial losses.

This Article explores judicial treatment of recovery of commercial losses under the FCRA and the theoretical and statutory analyses underlying the outcomes of those decisions.

II. The FCRA's Limitation to Consumer Protection Only

A. Commercial Transactions Are Not Protected by the FCRA

The limitation hemming in the FCRA to "consumer" protection is found primarily in the FCRA's definition of "consumer report". The Act defines a "consumer report" as:

> "[A]ny written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for— (A) credit or insurance to be used primarily for personal, family, or household purposes.[8]

This text's limitation reflects Congress' intent: "Congress intended the FCRA to authorize a consumer reporting agency to issue a consumer report to determine 'an individual's eligibility for credit, insurance or employment" and, thus, "[r]eports used for 'business, commercial, or professional purposes' are not within the purview of the statute."[9] Regulatory agencies tasked with interpreting the FCRA, such as the Federal Trade Commission, have recognized this same limitation, "interpret[ing] the FCRA to deny protection for credit reports requested for commercial purposes, writing that '[a] report on a consumer for credit or insurance in connection with a business operated by the consumer is not a consumer report and the [FCRA] does not apply to it."[10]

B. . . . Unless the Commercial Transaction is a Personal Guarantee of a Business Debt?

The FCRA does afford some protection, however, for some originally commercial activities, such as a commercial creditor's "permissible purpose" to obtain a "consumer report" when an individual personally guarantees a commercial transaction. The FTC Official Staff Commentary states that the FCRA's "credit transaction" provision must be read together with the FCRA's definition of "consumer report" – so that the credit transaction for which a potential creditor must have a permissible purpose to obtain a consumer report must involve credit "primarily for personal, family, and household purposes".[11] Accordingly, early FCRA decisions evaluating whether a potential creditor had a "permissible purpose" to obtain credit information from a consumer reporting agency held that the potential creditor's use of a report was not even subject to the FCRA if the consumer report was used for business credit, because the report was by definition not a "consumer" report.[12]

In July 2000, however, the FTC opined that a potential business credit grantor could not obtain a "consumer report" on an individual in a commercial transaction even if the individual might be responsible for the business debt. The FTC applied a simple syllogism: it was not permissible to access a "consumer report" on a "consumer" in a transaction that was "commercial" in nature. ("*Tatelbaum I*").[13]

Commercial lenders and their regulators acted immediately on the FTC's affront to good and proper underwriting of commercial transactions. The Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve Bank, the Office of Thrift Supervision, and the Federal Deposit Insurance Corporation all asked the FTC to reconsider its position set forth in *Tatelbaum I*, which the FTC understandably and promptly did. In June 2001, the FTC "revised" its opinion (i.e., backed off it) in a political compromise that opined that a commercial creditor has a permissible purpose to pull a consumer report on an individual in connection with a commercial credit transaction when the consumer is or will be personally liable on the debt. ("*Tatelbaum II*").[14] Courts deferred to the FTC's new position, and no post*Tatelbaum II* decision has followed the *Tatelbaum I* opinion.[15]

C. . . . Unless the Data Originally Was Collected for Potential Use In Connection with a Transaction Involving Credit or Insurance for the Consumer's Personal, Family, or Household Purposes – Regardless of How the Data Actually Was Used?

Another line of cases in FCRA jurisprudence has held that it is not the 'ultimate use' of the data, but the purpose for which the credit data was collected, that controls whether the FCRA applies.[16] "[M]ost of the cases that have considered this argument have accepted it, and the academic comment and the [FTC Official Staff] Commentary come to a similar conclusion". [17] This jurisprudential conflict between the FCRA's general inapplicability to commercial transactions and courts not focusing on the consumer data's enduse has caused confusion amongst the Courts as to whether the FCRA should permit recovery of commercial losses arising from furnishing inaccurate consumer data to a consumer reporting agency.[18]

III. Judicial Treatment of Claims under the FCRA for Recovery of Non-Consumer Losses

A. Prohibiting Recovery of Commercial Damages: Using a Credit Data for Non-Consumer Purposes Does Not Trigger the FCRA

The vast majority of courts[19] and commentators[20] have concluded that the FCRA does not apply where a consumer report is used for commercial or non-consumer purposes. State credit reporting statutes, to the extent not preempted by the FCRA, are in accord and apply the same analysis as courts interpreting the FCRA.[21]

Judge Morrow's decision from the United States District Court for the Central District of California in *Grigoryan v. Experian Information Solutions, Inc.*,[22] and Judge Hernandez' decision from the United States District for Oregon in *Boydstun v. U.S. Bank National Association, N.D.*[23], provide the typical framework and analysis. In *Grigoryan*, the plaintiff conceded that the only "economic damages he sought from inaccurately furnished consumer information to consumer reporting agency concerned real estate investment business . . . [and that] from 2009 to 2012, he was unable to take advantage of approximately ten to fifteen real estate purchase opportunities, resulting in an estimated loss of at least $1,000,000 to $1,500,000."[24] The Court held that "damages based on lost real estate purchase opportunities . . . are not recoverable under the FCRA or CCRAA, explaining that:

> The [*Johnson*] court observed that "§ 1681b(a)(3)(F) does not state that all business and commercial transactions initiated by an individual fall under this section." *Id.* Thus, although the statute defines a "consumer" as an individual, "the terms are not necessarily interchangeable. In other words, a consumer must be an individual and cannot be a business or a group of people; however, it does not follow that every transaction initiated by an individual is a consumer transaction or that an individual is always acting in a consumer-capacity." *Id.* at 1125. . . In *Mone v. Dranow*, 945 F.2d 306, 308 (9th Cir.1991), the Ninth Circuit interpreted the language of § 1681b(3)(E)—the predecessor to § 1681b(a)(3)(F)177—narrowly. It noted that "Congress intended the FCRA to authorize a credit reporting agency to issue a consumer report to determine 'an individual's eligibility for credit, insurance or employment.' " *Id.* (citing 116 Cong. Rec. 36, 572 (1970) (Statement of Rep. Sullivan)). Thus, it held that "[r]eports used for 'business, commercial, or professional purposes' are not within the purview of the statute," and that such purposes do not give a third party a "business need" to obtain a consumer report. *Id.* . . .Even before the Ninth Circuit held that consumer credit reports "used for business, commercial, or professional purposes are not within the purview of the [FCRA]," *Mone*, 945 F.2d at 308, it held that reports used to extend credit to businesses were not consumer credit reports within the meaning of the CCRAA. *See Mende v. Dun & Bradstreet, Inc.*, 670 F.2d 129, 132 (9th Cir.1982). The Federal Trade Commission, moreover, "has interpreted the FCRA to deny protection for credit reports requested for commercial purposes, writing that '[a] report on a consumer for credit or insurance in connection with a business operated by the consumer is not a consumer report and the [FCRA] does not apply to it.' "

The court, therefore, concluded that Grigoryan could not recover damages resulting from lost real estate investment ventures. The damages either were suffered by non-party, non-consumer limited liability companies, or reflected the use of a credit report for business or commercial purposes, which was outside the purview of the FCRA.[25]

Similarly, in *Boydstun,* the Court was faced with the question whether the Plaintiff's FCRA expert should be precluded from testifying about Plaintiff's commercial losses caused by allegedly erroneous information furnished to the consumer reporting agencies. The Plaintiff was an owner of a closely held corporation, Boyston Metal Works, Inc.[26] When Boydstun Metal Works went bankrupt in 2009, the card issuer, Defendant U.S. Bank, attempted to collect the outstanding balance from Boydstun personally. Boydstun insisted that the debt arose from a business credit card for which he did not agree to be personally liable. U.S. Bank maintained that he was personally liable, and after Boydstun rebuffed further attempts to collect the debt, U.S. Bank reported the outstanding balance on Mr. Boydstun's consumer report.

Boydstun was also the sole shareholder of another business, Miranda Homes that aimed to build "green" residential homes. Miranda Homes applied for credit to purchase an approximately $12,000 forklift, but it was denied. The company attempting to sell Boydstun the machine asked the lender to re-review the application with Boydstun's personal credit-worthiness as an additional factor. But again, the lender denied the application, citing "derogatory information" on Boydstun's consumer report. Boydstun sued, and retained an expert who intended to testify at trial that if Miranda Homes had been able to obtain financing, Boydstun would not have needed to loan an additional $751,000 to the Company, and, therefore, Boydstun's economic damages resulting from the denial of credit was $751,000.[27]

Judge Hernandez excluded the expert's testimony on the basis that FCRA affords no remedy for commercial losses. After surveying the myriad of decisions precluding recovery of commercial losses in an FCRA case, Judge Hernandez concluded:

> the Court agrees with the conclusion that the FCRA does not apply where a consumer report is used for a business purpose. There can be no dispute that the use of Boydstun's report in connection with Miranda Homes' attempt to finance a forklift was for a business, not a consumer, purpose. See 15 U.S.C. 1681a(d)(a) (defining "consumer report" as "[A]ny information ... bearing on a consumer's credit worthiness ... which is used or expected to be used ... as a factor in establishing the consumer's eligibility for (A) credit ... to be used primarily for personal, family, or household purposes."). Therefore, Boydstun is excluded from presenting any

The vast majority of courts19 and commentators20 have concluded that the FCRA does not apply where a consumer report is used for commercial or non-consumer purposes.

> evidence, from Mr. Mettler or from any other source, about economic damages he suffered in connection with the forklift transaction.[28]

Judge Hernandez rejected the Plaintiff's contention that the myriad of decisions favoring exclusion of commercial losses was no longer valid "because those cases relied on Federal Trade Commission ("FTC") guidance regarding the interpretation of the FCRA that the FTC has since withdrawn".[29] Judge Hernandez found that the decisions – like *Grigoryan* – relied on the text and legislative of the history of the FCRA, not just FTC guidance. Moreover, the FTC's comments in 2011 were entitled to no deference because such comments neither rose to the level of policy statement, agency manual, or enforcement guidelines, and, after all, the FTC is no longer the administrative agency charged with interpreting the FCRA anyway.[30]

B. Recovering Commercial Damages: A Consumer Report is a Consumer Report

Consumer advocates concede that "[a] report on . . . an individual in a business capacity is not a consumer report and would not give rise to claims under the FCRA."[31] They argue, however, that a consumer report used for business purposes is still a "consumer report" under the FCRA and, if the consumer suffers a loss from its misuse, business damages should be recoverable.[32] In other words, "[u]nder the FCRA, 'whether a credit report is a consumer report does not depend solely upon the ultimate use to which the information contained therein is put, but instead, it is governed by the purpose for which the information was originally collected in whole or in part by the consumer reporting agency.'"[33]

In *Breed v. Nationwide Insurance Company*,[34] Chief Judge Heyburn discussed this theory under the FCRA as "developing" and, accordingly, reconsidered his previous order that had precluded the Plaintiff from recovering for any commercial losses under the FCRA. Judge Heyburn found that a "more cautious approach in [the court's] interpretation of the FCRA claims" was required. Judge Heyburn perceived an analytical split as to whether the use of information by the potential creditor or the purpose for which the information was obtained by the credit collection agency controlled. Without controlling authority from the Court of Appeals for the Sixth Circuit,[35] Judge Heyburn held that "neither the Sixth Circuit's view nor the developing case law can be viewed as providing a definitive or reliable answer. A majority of the Circuits and the Sixth Circuit actually suggest that the expectations of the credit collection agency at the time it prepared the credit reports and at the time it collected the information contained in the reports should be considered, and no proof has been presented as to those prongs. To avoid injustice, the Court will not dismiss any claims at this time solely because they involve commercial transactions".[36]

Other Courts have rejected the argument that the purpose of collecting the data, as opposed to the data's ultimate use, controls the inquiry of whether the FCRA applies.[37] For example, in *Bacharach v. SunTrust Mortgage, Inc.*,[38] the plaintiff argued that "a consumer report used for business purposes is still a consumer report and, thus, if a consumer suffers damage from its misuse, the damages caused are recoverable." Judge Fallon rejected the argument, stating that the Plaintiff "provide[d] little support for this argument". Judge Fallon noted that "it is generally held that losses resulting from the use of a credit report solely for a business or commercial transaction are not recoverable under the FCRA", citing statements on the House Floor during passage of the FCRA in 1970, support from a number of district courts across the country, and support from FTC interpretative staff letters. Judge Fallon thus rejected both arguments — that the FCRA allowed recovery of commercial losses and that her business losses were actually consumer in nature.

> "As admitted in her deposition, she was claiming damages related to her business of buying and flipping or buying and fixing real estate". . . her damages more particularly relate to the "good income it would have provided us" as she intended to "rent it out and get the income". . In sum, Ms. Bacharach's alleged damages were the result of her inability to buy additional commercial/rental properties, renovate existing properties, and build rental properties on her vacant lots. . . It is therefore beyond dispute that any credit reports she may have used to secure financing for such purchases or construction, even though nominally a consumer credit report, were for a "business purpose"; i.e. purchasing improving, and rending properties. It is therefore not deemed a consumer credit report for purposes of the FCRA."

The Court of Appeals for the Fifth Circuit affirmed, finding that commercial damages are excluded from the FCRA's purview[39].

> "Numerous courts have concluded that the FCRA does not cover reports used or expected to be used only in connection with commercial business transactions." *Hall v. Phenix Investigations, Inc.*, ____ F.3d ____, 2016 WL 1238602, at *3 (5th Cir. Mar. 29, 2016) (unpublished) (collecting cases); *see also Ippolito v. WNS, Inc.*, 864 F.2d 440, 452 (7th Cir. 1988) ("In enacting the FCRA, Congress sought to regulate the dissemination of information used for consumer purposes, not business purposes."); *Matthews v. Worthen Bank & Tr. Co.*, 741 F.2d 217, 219 (8th Cir. 1984) (noting that the "[FCRA] was intended to apply only to reports which relate to the consumer's eligibility for personal credit or other commercial benefits as a consumer, and not to the consumer's business transactions" (citation omitted)). Moreover, courts have specifically held that real estate investment losses due to allegedly inaccurate credit information are not within the scope of the FCRA. *See Podell v. Citicorp Diners Club, Inc.*, 914 F.Supp. 1025, 1036 (S.D.N.Y. 1996), aff'd, 112 F.3d 98 (2d Cir. 1997). Bacharach's failed purchase of property at 2841 Magazine Street was an attempted commercial transaction and is therefore not within the scope of the FCRA. Bacharach, who testified that she was a real estate investor in the business of "buying and flipping or buying and fixing up real estate," also stated that she intended to purchase the property to "rent it out and get the rental income." Indeed, Bacharach seeks as damages the lost rental income she could have earned had she successfully purchased the property. The district court did not err in categorizing these real estate investment losses as a related to a failed "commercial business transaction[ ]" that falls outside the scope of the FCRA. *See Hall*, ____ F.3d at ____, 2016 WL 1238602 at *3.

Courts applying an analysis similar to that set forth in the District Court's decision and Fifth Circuit's affirmance in *Bacharach* appear correct for two reasons. First, they recognize that gathering or aggregation of credit information does not become a "consumer report" under the FCRA *ab initio* until the data is used for consumer purposes as defined by the FCRA. Metaphysically, data maintained by company aggregating the information does not become a "consumer report" under the FCRA until accessed, and compiled, for consumer purposes. Accessing consumer

Credit data information gathered by a credit data company is not a "consumer report" under the FCRA until the data is compiled into a "consumer report" and used for a consumer purpose.

information from a credit data company for commercial purposes never triggers the FCRA in the first instance[40] and, accordingly, the FCRA can afford no right to damages.

Second, even if it is correct that a consumer report is a "consumer report" under the FCRA regardless of the data's ultimate use, liability for commercial losses still should only turn on the "misuse" of a "consumer report" by a business. A business that relies on consumer credit data to make decisions about commercial credit does not "misuse" a consumer report to subject itself to the FCRA – it merely relies on consumer credit data to determine eligibility for non-consumer credit. The consumer credit information relied upon by the business never becomes a "consumer report" under the FCRA. Accordingly, FCRA-based damages should not be recovered under those circumstances.

IV. Conclusion

Credit data information gathered by a credit data company is not a "consumer report" under the FCRA until the data is compiled into a "consumer report" and used for a consumer purpose. Where an individual applies for commercial credit or suffers a commercial loss due to inaccuracies contained in the data furnished to a consumer reporting agency, the FCRA is not triggered and does not afford protection against such commercial losses.

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1 [1] 15 U.S.C. § 1681 *et seq.*

2 15 U.S.C. § 1681s-2 ("Responsibilities of furnishers of information to consumer reporting agencies").

3 15 U.S.C. § 1681a(f) ("The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports").

4 *See generally* http://www.acainternational.org/news-fdcpa-lawsuits-decline-while-fcra-and-tcpa-filings-increase-31303.aspx.

5 A plaintiff may recover actual, punitive, or statutory damages for willful violations, but may recover only actual damages for negligent violations. 15 U.S.C.A. § 1681n(a)(1); *see also,* Willey v. J.P. Morgan Chase, *N.A.*, No. 09–CV–1397, 2009 WL 1938987, at *2 (S.D.N.Y. July 7, 2009) ("Successful plaintiffs may recover actual damages ... for negligent violations and may recover actual damages, statutory damages, and punitive damages ... for willful violations.").

6 15 U.S.C. §1681a(d)(1) (defining a "consumer report" as: "[A]ny written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for—(A) credit or insurance to be used primarily for personal, family, or household purposes").

7 *See generally* Barron & Rosin, *Fed. Reg. Real Estate & Mortgage Lending, Fair Credit Reporting Act* § 9:8 (4th ed. Supp. 2015) (comparing the FCRA's consumer purpose against the "collected for" analysis in determining whether data is a "consumer report" under the FCRA); Note, *Judicial Construction of the Fair Credit Reporting Act: Scope and Civil Liability,* 76 Colum. L. Rev. 458, 474–476 (1976); Comment, *Houghton v. New Jersey Manufacturers Insurance Co.: A Narrow Interpretation of the Scope Provisions of the Fair Credit Reporting Act Threatens Consumer Protection,* 71 Minn. L. Rev. 1319, 1349–1359 (1987) (applying the "collected for" test generally to consumer reporting agencies and to users under more limited circumstances).

8 15 U.S.C. § 1681a(d)(1)

9 Mone v. Dranow, 945 F.2d 306, 308 (9th Cir.1991) *citing* 116 Cong. Rec. 36, 572 (1970) (Statement of Rep. Sullivan).

10 16 C.F.R. Pt. 600, App. § 603 cmt. (6)(B)).

11 FTC Official Staff Commentary, § 604 item 1A.

12 *See, e.g.* Ippolito v. WNS, Inc., 864 F.2d 440, 454 (7th Cir. 1988) ("In short, even if the reports were "consumer reports" because Equifax may have originally collected or expected information in the report to be used for "consumer purposes", WNS cannot be held liable for requesting consumer reports. The purpose for which the Special Service Reports on Plaintiffs were requested and the purposes for which WNS received reports in the past were both non-consumer purposes.")); Matthews v. Worthern Bank & Trust Co., 741 F.2d 217, 219 (8th Cir. 1984) ("We find that this particular transaction was exempt from the FCRA because the credit report was used solely for a commercial transaction.")

13 https://www.ftc.gov/policy/advisory-opinions/advisory-opinion-tatelbaum-07-26-00.

14 https://www.ftc.gov/policy/advisory-opinions/advisory-opinion-tatelbaum-06-22-01.

15 Baker v. American Express Travel Related Services Co., Inc., No. CIVA0226JBC, 2002 WL 1205065 *2-3 (W.D. Ky. May 28, 2002). *See also* Weinberg, FCRA Still Impacts Certain Commercial Leasing Transactions, Monitor Daily, (May/June 2007).

16 *See generally* Barron & Rosin, Fed. Reg. Real Estate & Mortgage Lending, Fair Credit Reporting Act § 9:8 (4th ed. Supp. 2015) (comparing the FCRA's consumer purpose against the "collected for" analysis in determining whether data is a "consumer report" under the FCRA); Note, *Judicial Construction of the Fair Credit Reporting Act: Scope and Civil Liability,* 76 Colum. L. Rev. 458, 474–476 (1976); Comment, *Houghton v. New Jersey Manufacturers Insurance Co.: A Narrow Interpretation of the Scope Provisions of the Fair Credit Reporting Act Threatens Consumer Protection,* 71 Minn. L. Rev. 1319, 1349–1359 (1987) (applying the "collected for" test generally to consumer reporting agencies and to users under more limited circumstances).

17 Hunt v. Experian Information Solutions, No. 8:05cv58, 2006 WL 2528531, at *2 (D. Neb. Aug. 31, 2006); Bakker v. McKinnon, 152 F.3d 1007, 1012 (8th Cir.2002); Phillips v. Grendahl, 312 F.3d

357, 366 (8th Cir.2002); St. Paul Guardian Insurance Co. v. Johnson, 884 F.2d 881, 883 (5th Cir.1989); Comeaux v. Brown & Williamson Tobacco Co. 915 F.2d 1264, 1274 (9th Cir.1990); Rasor v. Retail Credit Co., 87 Wash. 2d 516 (1976); Rice v. Montgomery Ward & Co., Inc., 450 F. Supp. 668, 671-672 (M.D. N.C. 1978); Heath v. Credit Bureau of Sheridan, Inc., 618 F.2d 693, 696 (10th Cir. 1980); Boothe v. TRW Credit Data, 523 F. Supp. 631, 634 (S.D. N.Y. 1981); Maloney v. City of Chicago, 678 F. Supp. 703, 707, (N.D. Ill. 1987); Ippolito v. WNS, Inc., 864 F.2d 440, 453, 12 Fed. R. Serv. 3d 514 (7th Cir. 1988); St. Paul Guardian Ins. Co. v. Johnson, 884 F.2d 881, 884–885 (5th Cir. 1989); Gomon v. TRW, Inc., 28 Cal. App. 4th 1161 (4th Dist. 1994); Korotki v. Attorney Services Corp. Inc., 931 F. Supp. 1269, 1274–1275 (D. Md. 1996), *judgment aff'd,* 131 F.3d 135 (4th Cir. 1997). Yang v. Government Employees Ins. Co., 146 F.3d 1320 (11th Cir. 1998); *Bakker v. McKinnon,* 152 F.3d 1007, 1012 (8th Cir. 1998). *See also* Doyle v. Chilton Corporation, 289 Ark. 258, 263-64 (Ark. 186).

18 Accordingly, at least one commentator argues that "it is not clear whether FCRA covers a report issued by consumer reporting agency in the context of a loan that is secured by a mortgage and made for a business purpose." Barron & Rosin, Fed. Reg. Real Estate & Mortgage Lending, Fair Credit Reporting Act § 9:8 (4th ed. Supp. 2015) ("Although the information must relate to an individual consumer for there to be any possibility of coverage, a consumer may be involved in the transaction in a number of different ways. For example, a consumer may be involved because the consumer is seeking a business loan for investment property; a sole proprietorship may be seeking a business loan and the report may be on the individual owner; a partnership may be seeking the loan and the report may be on one or more of the individual partners; or a corporation may be seeking the loan and the report may cover, in whole or in part, an individual stockholder or a key employee. . . The Commentary rejects FCRA coverage of business credit or insurance for an individual based on this expansive reading of the business transaction permissible use language. Rather, it interprets the business transaction purpose language to mean "a business transaction *with* a consumer primarily for personal, family, or household purposes.").

19 *See, e.g.,* Matthews v. Worthen & Trust Co., 741 F.2d 217, 219 (8th Cir.1984) ("We find that this particular transaction was exempt from the FCRA because the credit report was used solely for a commercial transaction"); Boydstun v. U.S. Bank National Association, N.D., et. al., 3:11-cv-00429-HZ, 2016 WL 2736104, at *4 (D. Or. May 11, 2016) ("Here, by contrast, Miranda Homes was already operating, and Boydstun sought financing for a forklift to be used in that ongoing enterprise. Boydstun's report, while "nominally a consumer credit report," was obviously used for a business purpose, i.e., purchasing equipment for Miranda Homes, and thus it was not covered by the FCRA protections"); Peterson v. American Express, No. CV1402056PHXGMS, 2016 WL 1158881, at *7 (D. Ariz. March 23, 2016) ("Peterson alleged that because the CRAs failed to remove the AMEX account from his credit file, his resulting lower credit score prohibited frost him from participating in various business opportunities . . . because the CRAs' alleged violation affected Peterson's efforts to engage in business transactions, the injury fails to satisfy the damages element of Peterson's FCRA claim"); Toler v. PHH Mortg. Corp., No. 126032, 2014 WL 6891951, at *3 (W.D. Ark. Nov. 5, 2014). The FCRA does not protect business entities or extend coverage to a consumer's business transactions. . . .the Tolers are prohibited from seeking business damages as a matter of law"); Wisdom v. Wells Fargo Bank, No. CV102400PHX6MS Jan. 20, 2012 WL 170900 (D. Az. 2012) (FCRA plaintiff could not recover business losses by his separate company for which he used his credit to finance the purchase of second-hand office equipment for resale); Stich v. BAC Home Loans Servicing, LP, No. CV 1001106 CMA MEH, 2011 WL 1135456, *4 (D. Colo. Mar. 29, 2011) ("Where an individual's credit information is used to obtain credit for business purposes, as opposed to personal purposes, courts have determined that the credit report does not fall within the realm of the FCRA, which was implemented to protect consumers"); George v. Equifax Mortgage Servs., No. 06CV971 DLI LB, 2010 WL 3937308, *2 (E.D.N.Y. Oct. 5, 2010) ("It is well established that the FCRA does not apply to business or commercial transactions, even when a consumer's credit report impact[s] such transactions.... Accordingly, Plaintiff's claim for damages due to lost business opportunities is not actionable under the FCRA"); Lucchesi v. Experian Info. Solutions, Inc., 226 F.R.D. 172, 174 (S.D.N.Y.2005) ("But even assuming that it, like the April 5 report, was a report about the Plaintiff, it too was issued in connection with a business operated by the consumer, and thus cannot form the basis of liability under the FCRA"); Thompson v. Equifax Credit Information Services, Inc., No. 00D1468S, 2002 WL 34367325, at *3 (M.D. Ala. March 6, 2002) ("Defendant seeks to exclude all evidence of Plaintiff's alleged business damages. Credit reports issued for business purposes are not covered by the Fair Credit Reporting Act ("FCRA"), and, thus, evidence relating thereto is irrelevant to damages claimed by Plaintiff pursuant to the FCRA. Such evidence, however, is admissible on the issue of damages on Plaintiff's state law claims for negligence and defamation"); Frost v. Experian, No. 98CIV2016-JGKJCP, 1999 WL 287373 (S.D. N.Y. May 6, 1999); Natale v. TRW, Inc., No. C 97–3661, 1999 WL 179678, *3 (N.D. Cal. Mar. 30, 1999) Plaintiff responds that his businesses are sole proprietorships and thus his situation is distinguishable from the cases cited by defendants. The form of ownership, however, is immaterial; the FTC and the case law hold that the FCRA does not apply to transactions related primarily to businesses operated by the consumer"); Yeager v. TRW, Inc., 961 F.Supp. 161, 162 (E.D.Tex.1997) ("FCRA does not apply to business transactions even those involving consumers and their credit information"); Podell v. Citicorp Diners Club, Inc., 914 F.Supp. 1025, 1036 (S.D.N.Y.1996) (". . . this sort of loss is not cognizable under the FCRA.... [I]t is generally held that a plaintiff may not recover under the FCRA for losses resulting from the use of the credit report solely for a commercial transaction"), aff'd, 112 F.3d 98 (2d Cir.1997); Hussain v. Carteret Sav. Bank, F.A., 704 F.Supp. 567, 569 (D.N.J. 1989) ("The Court finds that the type of transactions alleged by plaintiff to have been interfered with by the mistaken credit information were straight business real estate deals. Plaintiff's bald allegation that certain of the properties involved were partially for plaintiff's personal use is not supported by any convincing tangible evidence; Boothe v. TRW Credit Data, 523 F.Supp. 631 (S.D.N.Y. 1981); Cook v. Equifax Information Systems, Inc., No. CIVAHAR92927, 1992 WL 356119 * 3-4 (D. Md. Nov. 20, 1992) ("credit reports used to acquire commercial or business credit are not afforded the protection of the FCRA"); Wrigley v. Dun & Bradstreet, Inc., 375 F.Supp. 969, 970–971 (N.D.Ga.1974) ("The court is constrained to the view that both the legislative history of the Act and the official administrative interpretation of the statutory terminology involved compel the conclusion that the Act does not extend coverage to a consumer's business transactions"); Sizemore v. Bambi Leasing Corp., 360 F.Supp. 252, 254 (N.D.Ga.1973) (FCRA inapplicable to individual denied credit to lease truck for commercial use); Fernandez v. Retail Credit Co., 349 F.Supp. 652, 655 (E.D. La. 1972) (report relating to corporate president's application for life insurance was not a consumer report where corporation was the sole beneficiary and insurance was necessary for the business to secure a loan).

20 Pitcher, *Commercial Defamation Caused by Erroneous Credit Report Issued by Credit Reporting Agency*, 9 Am. Jur. Proof of Facts 2d § 1 (1976 and 2016 Supp.) ("It does not appear that the FCRA applies to a situation wherein an erroneous credit report causes the termination of a potential business relationship or amounts to some other form of damage caused by commercial defamation. The key word in this context is "business". The FCRA applies only to consumer reports."); Scorza, *Consumer versus Business Damages*, Fin. Priv. L. Gd., Extra Issue No. 152 (May 30, 2008) 2008 WL 10945581 ("The FCRA is designed to protect consumers in their individual capacities; it does not apply to credit reports used for business, commercial, or professional purposes."); Note, *Judicial Construction of the Fair Credit Reporting Act: Scope and Civil Liability,* 76 Colum. L. Rev. 458, 473, n. 95 (1976).

21 The CCRAA expressly excludes from its definition of a consumer credit report "[a]ny consumer credit report furnished for use in connection with a transaction which consists of an extension of credit to be used solely for a commercial purpose." Civ. Code §1785.3(c); Mende v. Dun & Bradstreet, Inc., 670 F.2d 129, 132 (9th Cir.1982). (reports used to extend credit to businesses were not consumer credit reports under the CCRAA); McClain v. Octagon Plaza, LLC, 159 Cal.App.4th 784, 800-801 (2008) ("Only "[c]onsumer credit reporting" is subject to the CCRAA"). *See also* A.R.S. section 44-1691-98 (Arizona statutes do not apply to commercial loans or loan applications by individuals designated as being for a commercial purpose). But, if state common law claims survive preemption, business losses may be admissible solely as to those common law claims. Thompson v. Equifax Credit Information Services, Inc., No. 00D1468S, 2002 WL 34367325, at *3 (M.D. Ala. March 6, 2002) ("Defendant seeks to exclude all evidence of Plaintiff's alleged business damages. Credit reports issued for business purposes are not covered by the Fair Credit Reporting Act ("FCRA"), and, thus, evidence relating thereto is irrelevant to damages claimed by Plaintiff pursuant to the FCRA. Such evidence, however, is admissible on the issue of damages on Plaintiff's state law claims for negligence and defamation").

22 Grigoryan v. Experian Information Solutions, Inc., 84 F.Supp.3d 1044, 1084 (C.D. Cal. 2014).

23 Boydstun v. U.S. Bank National Association, N.D., *et. al.*, 3:11-cv-00429-HZ, 2016 WL 2736104, at *4 (D. Or. May 11, 2016)

24 *Id.*, at 1078-79.

25 *Id.*, at 1080-1082.

26 Boydstun v. U.S. Bank Nat. Ass'n ND, 3:11–cv–00429–AC 2013 WL 5524693, at *1 (D. Or. June 6, 2013).

27 *Id* at *2.

28 *Id.* at *4.

29 *Id. citing* Federal Trade Commission, 40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations (July 2011) ("40 Years Report), available at: http://www.ftc.gov/os/2011/07/110720fcrareport.pdf).

30 *Id.*

31 National Consumer Law Center, Fair Credit Reporting, §11.11.2.2.5 and 2011 Supp.

32 *Id*, *citing* Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147, 1174 (9th Cir. 2009); Commix v. Brown & Williamson Tobacco Co., 915 F.2d 1264, 1274 (9th Cir. 1990). Breed v. Nationwide Ins. Co., No. 3:05CV547H, 2007 WL 1231558 at * 2 (W.D. Ky. Apr. 24, 2007); Dennis v. BEH-1, L.L.C., 520 F.3d 1066, 1069 (9th Cir. 2008); Pourfard v. Equifax Info. Services, L.L.C., No. 07854AA, 2010 WL 55446 at *5 (D. Or. Jan. 7 2010).

33 *See* footnote 16 and 17 and authorities cited therein.

34 Breed v. Nationwide Insurance Company , No. 3:05CV547H, 2007 WL 1231558 (W.D. Ky. April 24, 2007).

35 The Court rejected application of the unreported decision in Cheatham v. McCormick, No. 95-6558, 1996 WL 662887 at *2 (6th Cir. Nov. 12, 1996). In *Cheatham,* the Sixth Circuit noted that

> Our sister circuits have rebuffed efforts, based on expansive interpretations of § 1681b, to extend the Act beyond its original purpose of consumer protection. *See Mone v. Dranow,* 945 F.2d 306, 308 (9th Cir.1991) ("Reports used for business, commercial, or professional purposes are not within the purview of the statute"); *Ippolito*, 864 F.2d at 452 ("In enacting the FCRA, Congress sought to regulate the dissemination of information used for consumer purposes, not business purposes"); id. at 451 ("Evaluating prospective franchisees ... does not fall within the definition of the term 'consumer report' "); *Matthews v. Worthen Bank & Trust Co.,* 741 F.2d 217 (8th Cir.1984) (holding that a credit report on a prospective lessee of commercial real estate was not subject to the Act). We see no reason to question the understanding of the Act reflected in these opinions. Whatever the motivation behind the report at issue in the case at bar, it had no connection to a consumer transaction. Mr. Cheatham may have legally cognizable claims against the defendants for defamation or invasion of privacy, but he has none for violation of the Fair Credit Reporting Act. His remedy, if he has one, lies in the state courts."

Cheatham v. McCormick, 1996 WL 662887, at *3-4 (6th Cir. Nov. 12, 1996).

36 *Id.* at *2.

37 Dennis v. BEH-1, LLC, 520 F.3d 1066, 1069 (9th Cir. 2008) is not inconsistent. There, the FCRA Plaintiff "hoped to start a business and . . . have a clean credit history when he sought financing for the venture". The consumer's losses, however, were his own, the business did not exist, and he was not suing for losses that it sustained. *See also* Wisdom v. Wells Fargo Bank, 2012 WL 170900 (D. Az. Jan. 20, 2012) (accord).

38 2015 WL 6442493 (E.D. La. Oct. 23, 2015) appeal filed November 16, 2015. In her appeal, Bacharach conceded that the FCRA does not apply to commercial losses. She asserted, however, that certain investment losses were, in fact, consumer losses protected by the FCRA.

> The district court was correct in its conclusion that only consumer and not business interests be affected and suffer damage. It string-cited cases which articulate and repeat that principle. It is also conceded that Bacharach is a real estate investor and that damage to her real estate investment business is not "consumer" within the meaning of the FCRA. However, 2838 Camp Street, one of the properties financed by SunTrust, is her home and 2841 Magazine Street is contiguous to and at the rear of her property at 2838 Camp Street. As discussed above, Bacharach attempted to purchase 2841 Magazine Street to extend her yard and to secure her peaceable possession by controlling the use of 2841 Magazine Street and to make sure that her lessees were compatible, none of which has happened. Moreover, and as correctly stated by the district court in its opinion granting reconsideration, "Due to the fact that these errors appeared on her credit report, Bacharach states that she was unable to obtain financing to repair her home when it was damaged by Hurricane Isaac."

Ms. Bacharach argued that, at a minimum, the jury should have decided whether the losses attributable to her adjacent investment property should be recoverable as consumer losses protected by the FCRA.

> While failure to acquire 2841 Magazine Street may be, as argued by the district court (and is not commercial despite the rent that would be received), the inability to finance Isaac repairs on one's home is unequivocally consumer and not commercial. Since at least one transaction was consumer beyond questions, summary judgment on this issue was error, and the case should have gone to trial, letting the jury pick and choose between consumer and commercial transactions.

39 Bacharach v. Suntrust Mortgage, Incorporated, 2016 WL 3568059, at *1-2 (5th Cir. 2016).

40 Grigoryan v. Experian Information Solutions, Inc., 84 F.Supp.3d 1044, 1083 (C.D. Cal. 2014) ("It is therefore beyond dispute that any credit report he may have used to secure financing for such purchases, even though nominally a consumer credit report, was for a "business purpose," i.e., purchasing, improving, and reselling homes. It is therefore not deemed a consumer credit report for purposes of the FCRA or CCRAA").

Bridging the Gap:

How the Injury Requirement in FTC Enforcement Actions and Article III Standing are Merging in

The Data Breach Realm

By Amy Grewal Dunn*

The company's computer network is then attacked and someone gains unauthorized access to the company's servers and becomes privy to your personal information.

Introduction

The story has become all too familiar in recent headlines: you use your credit or debit card at a store and provide a company with your personal information, such as your social security number, address, and phone number. The company's computer network is then attacked and someone gains unauthorized access to the company's servers and becomes privy to your personal information. The company learns of this data breach and, as required by law, notifies you of the breach. You take steps to secure your information: You cancel your cards, purchase credit-monitoring services and consider buying identity theft insurance. This stolen information is then used against you, and you spend considerable time and money to contravene the effects of the breach. You worry you have become a victim of identity theft.

In most cases, federal law protects you against financial loss or the company will reimburse you for the fraudulent charges. But what about the mitigating expenses you incurred to protect your identity? Or what if your information is stolen, but not necessarily misused right away–do you wait, not knowing if it will be next week, next month, or next year? And can you be compensated for the many hours it took to take all the necessary protections?

Technology advances everyday at a speed in which consumers and businesses are unfortunately unable to keep up. Each year, more and more companies collect personal information from consumers–including social security numbers and credit and debit card numbers–and with that comes a rise in the amount of data breaches occurring each year.[2] Thus, it is of no surprise that companies' data security practices have come under scrutiny. Target, Sony, Ashley Madison, Anthem and Home Depot are just a few of the companies that have dominated headlines in recent years for their data breaches.[3] Although 2014 is fondly referred to as "the year of the breach," 2015 managed to double the number of breached records in just eight months.[4] Seven out of ten organizations worldwide in 2015 were victims of successful data breaches.[5] Between 2005 and December 31, 2015, the Identity Theft Resource Center estimates 5,810 data breaches occurred with more than 840 million records compromised.[6] Who holds these companies accountable for their lax security protection?

The Third Circuit recently released its much-anticipated opinion in *FTC v. Wyndham Worldwide Corp*., affirming the United States District Court for the District of New Jersey's decision.[7] This decision is a game changer for the data privacy and security industry, as it establishes the Federal Trade Commission's (FTC) authority to regulate privacy and data security.[8] Specifically, this decision allows the FTC to challenge an entity's data security practices under the unfairness test of section 5 of the FTC Act.[9] The FTC contends the harm that resulted from Wyndham's conduct was sufficient to constitute substantial injury.[10] An FTC Opinion by the Commission in *In Re LabMD* may further embolden the FTC's power to regulate online data privacy under the unfairness test.[11] Although there was no evidence of actual consumer injury, the Commissioners found that disclosure of personal information, including medical records, constituted a substantial injury.[12]

On the other side of the playing field in the data breach realm are private and class action lawsuits. The Seventh Circuit's decision in *Remijas v. Neiman Marcus* has made it easier for consumers to move forward with data breach class-action lawsuits by holding that future harm, such as resolving fraudulent charges and protecting oneself against future identity theft, are injuries sufficient to survive a motion to dismiss under Article III Standing.[13] This holding reverses the District Court for the Northern District of Illinois' decision,[14] which was relied on by Wyndham in its reply brief to the Third Circuit,[15] and supports the FTC's contention that its complaint against Wyndham sufficiently alleged consumer harm.[16] The Administrative Law Judge (ALJ) in *In Re LabMD* also relied on this case in his Initial Decision, noting that a criminal act for the purposes of committing identity theft is more persuasive in determining whether a "substantial injury" has occurred, versus situations in which *no* alleged harm has occurred.[17]

While the FTC's enforcement efforts and private litigation lawsuits are separate and distinct, several recent cases demonstrate that their respective injury requirements—specifically in the context of future harm after a data breach—is not only unsettled in the legal world, but crossing paths.

The purpose of this Note is to shed light on security practices that the FTC and courts deem inadequate in the context of online data privacy, by examining the injury threshold that the FTC and consumers must satisfy in order to bring action against a company. Despite critics' arguments that the FTC cannot or should not regulate online data privacy, *Wyndham* has cemented the FTC's role as our nation's cyber security watchdog.[18] Part I of this Note reviews how the FTC's unfairness authority has evolved since its enactment, and examines the FTC's past policy statements on unfairness to demonstrate its shift from public policy to consumer injury. Part II discusses recent FTC decisions and illustrates how the FTC's three-prong unfairness test is applied in a data breach context, with emphasis on the alleged harm. Part II also discusses and analyzes recent developments in *Wyndham* and *LabMD* to illustrate the arguments the FTC has made to allege sufficient injury against companies that have faced data breaches. Part III explores the injury-in-fact requirement under Article III Standing jurisprudence as it relates to substantial injury under the FTC's unfairness test and provides a brief overview of the data breach cases that led to the Seventh Circuit's decision in *Remijas v. Neiman Marcus*. Finally, the Note concludes by revealing common themes in recent court decisions in regards to future harm.

I. The FTC's Unfairness Authority

A. *History & Development of the Unfairness Test*

Understanding who the FTC is and what it does is important before exploring its role in consumer privacy regulation. The Federal Trade Commission Act (FTC Act) was enacted in 1914 to outlaw unfair methods of competition[19] by establishing the FTC, a federal agency tasked with enforcing the provisions of the FTC Act and preventing the use of unfair methods of competition.[20] The Wheeler-Lea Act of 1938 amended the FTC Act to include not only prohibition of "unfair or deceptive acts or practices," but also to protect consumers in addition to competition.[21] Between 1938 and 1964, the FTC described certain acts as both "unfair and deceptive" without specifying whether an act was "unfair" or "deceptive."[22] It was not until 1964 that the FTC first shed light on its interpretation of "unfair" by setting forth an unfairness test developed in connection with a trade regulation rule regarding the advertising and sale of cigarettes.[23] This test, known as the "Cigarette Rule,"[24] provides three factors for determining whether an act or practice is "unfair":

> (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise-whether, in other words, it is within at least the penumbra of some common- law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).[25]

In 1972, the Supreme Court cited to the "Cigarette Rule" unfairness criteria in a footnote in *FTC v. Sperry & Hutchinson*.[26] Whether the Supreme Court explicitly approved the criteria has been a matter of debate,[27] but the *Sperry* decision nevertheless legitimized the unfairness test and the FTC began a "series of rulemakings relying upon broad, newly found theories of unfairness."[28] However, the FTC struggled with applying the "Cigarette Rule" factors consistently, and in its attempt to attack companies for unethical or immoral behavior, earned the nickname "National Nanny." Concerned, Congress withheld funding from the FTC and enacted legislation to preclude the FTC from using unfairness to ban certain advertisements.[29] This resulted in a limitation of the FTC's use of its unfairness authority in rulemaking actions.[30]

B. Policy Statements & Shift from Public Policy to Consumer Injury

In the late 70s to early 80s, the FTC began to shift away from public policy toward consumer injury.[31] It articulated its unfairness jurisdiction in connection with the 1979 promulgation of a rule in the home insulation industry: sellers had failed to disclose certain information, which caused substantial injury to consumers by impeding their ability to make informed purchasing decisions.[32] Because of Congress' concern that the FTC's power was too broad to regulate "unfair" commercial practices, a unanimous FTC responded with its first policy statement addressing the FTC's unfairness power.[33] Using the "Cigarette Rule" criteria as a starting point, the Unfairness Policy Statement emphasized consumer injury as the most important element of the criteria, rejected the "unethical or unscrupulous standard prong, and seemed to limit the role of public policy."[34] To determine whether a practice unfairly injures consumers, the FTC adopted three factors: (1) the injury must be substantial, (2) the injury must not be outweighed by countervailing benefits to consumers, and (3) it must be an injury that consumers could have reasonably avoided.[35] Apparently chastened by its previous use of the unfairness doctrine, the FTC applied this test sparingly to situations involving consumer injury where a deception analysis would not be appropriate.[36] In 1994, Congress codified the three-part unfairness test in 15 U.S.C. § 45(n) and indicated that the role of public policy was limited; although the FTC could consider public policy, it could not find unfairness on an independent basis of public policy alone.[37] Despite the codification of the Unfairness Policy Statement, the FTC continued to assert its unfairness authority in limited circumstances.[38] It was not until the late 1990s, with the rise of the Internet, that data security became a prevalent issue.[39]

C. Settlements & Consent Orders

The FTC's authority includes two separate authorities: investigative authority and enforcement authority.[40] After an investigation has been conducted, the FTC may exercise its enforcement authority through an administrative or judicial process:

> When there is "reason to believe" that a law violation has occurred, the Commission may issue a complaint setting forth its charges. If the respondent elects to settle the charges, it may sign a consent agreement (without admitting liability), consenting to entry of a final order, and waive all right to judicial review. If the Commission accepts such a proposed consent agreement, it places the order on the record for thirty days of public comment (or for such other period as the Commission may specify) before determining whether to make the order final.[41]

The majority of actions enforced by the FTC result in consent orders, which allow companies "to avoid admitting wrongdoing in exchange for remedial measures" and result in settlements.[42] The FTC relies on these settlements and consent letters to inform companies of the rules it wants them to follow.[43] According to privacy law expert Daniel Solove, these settlements essentially function as common law because the FTC's settlements usually contain complaints and consent orders, and are published on the FTC's website.[44] In addition to their publication, the FTC's settlements "serve as a useful way to predict future FTC activity."[45]

Although the FTC has issued almost two-hundred privacy-related complaints against companies, many of them have settled.[46] And as of last year, the FTC has settled more than twenty cases in which companies' failures to reasonably protect consumer data constituted unfair practices.[47] Only two cases, *FTC v. Accusearch Inc.,*[48] and *FTC v. Wyndham*, have resulted in judicial opinions, and *In re LabMD* was recently decided by an FTC Administrative Law Judge.[49]

II. Applying the FTC's Unfairness Test to Data Breaches & Online Privacy

A. The FTC's Report to Congress

In 1999, the FTC was optimistic that self-regulation was the solution to online consumer protection and privacy.[50] Only a year later, the FTC retreated from this position and indicated it would adhere to a new policy in which it would "expand enforcement of existing laws" instead of attempting to enact legislation.[51] As part of this new policy, the FTC would utilize its unfairness test to hold organizations accountable in the event of a data breach.[52]

To further the goals of its new policy and in response to the growth of the internet marketplace–more specifically, the online consumer marketplace–the FTC issued a report to Congress detailing its recommendations for ensuring and protecting consumer privacy.[53] Among its recommendations were that Congress enact legislation directing all consumer-related Internet sites that collect personal information to comply with four practices: (1) *notice*, which mandates all Internet sites to inform consumers of their information protocol, including the information collected, how it is collected, and how it is used; (2) *choice*, in which sites would provide consumers with options as to how their information is used other than the intention for which it was obtained; (3) *access*, where sites must give consumers "reasonable" access to the information they have collected; and (4) *security*, in which sites would be required to protect consumer information in a "reasonable" manner.[54] With its new policy and initiatives, the FTC "delved into the data-security breach realm, heralding a new era of consumer protection and organizational accountability."[55]

B. Preliminary Cases

1. BJ's Wholesale Club, Inc.

BJ's Wholesale Club marks the first time the FTC solely utilized its unfairness arm without alleging "deceptive" practices in the realm of privacy and data security regulation.[56] BJ's is a nationwide membership store whose members often use credit or debit cards to purchase items.[57] BJ's collected members' personal information via wireless scanners in order to secure approval for these credit card and debit card payments.[58] In late 2003 and early 2004, banks found fraudulent charges that were made using counterfeit copies of debit and credit cards.[59] The same information that BJ's collected and put on its computer network was on these counterfeit cards.[60] In its complaint, the FTC alleged that between November 2003 and February 2004, BJ's did not "employ reasonable and appropriate measures to secure information collected at its stores" and these actions constituted an unfair practice in violation of Section 5(a) of the FTC Act.[61] Specifically, the complaint made the following allegations against BJ's, stating it:

> (1) did not encrypt the information while in transit or when stored on the in-store computer networks;
> (2) stored the information in files that could be accessed anonymously -- that is, using a commonly known default user id and password;
> (3) did not use readily available security measures to limit access to its computer networks through wireless access points on the networks;
> (4) failed to employ sufficient measures to detect unauthorized access or conduct security investigations; and
> (5) created unnecessary risks to the information by storing it for up to 30 days when it no longer had a business need to keep the information, and in violation of bank rules.
> As a result, a hacker could have used the wireless access points on an in-store computer network to connect to the network and, without authorization, access personal information on the network.[62]

Although neither the FTC's Complaint nor Decision and Order stated whether one or all violations constituted an "unfair" practice, it appears that BJ's engaged in a number of practices that from the FTC's viewpoint, amounted to unreasonable security measures for sensitive personal information. As a result of this breach–the fraudulent transactions allegedly totaled $13 million[63]–customers and banks were forced to cancel and re-issue thousands of credit and debit cards. Consumers could not use their cards to access credit and bank accounts in the interim.[64] Being that this case was the first time the FTC sought to apply its unfairness authority without asserting a deceptive practice, this case essentially provided the FTC with an important stepping stone in the realm of data privacy. It demonstrated that in the eyes of the FTC, lack of information security constitutes an unfair practice.

2. DSW, Inc.

Less than four months after the FTC issued its decision in *BJ's*, the FTC announced DSW had agreed to settle charges brought against them for their failure to take reasonable measures to protect consumer data.[65] DSW is a nationwide shoe store and similarly to BJ's, collected information from consumers for credit card, debit card, and check purchases at its stores.[66] The information collected was stored in computer networks in-store and on corporate computer networks.[67] In March 2005, DSW released a press release informing consumers that credit card and purchase information had been stolen.[68] A month later, DSW issued another press release detailing the specific locations affected by the breach and informing customers that checking account and driver's license information had also been stolen.[69] The FTC alleged in its complaint that until March 2005, DSW engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for personal information collected at its stores. Specifically, that DSW:

> (1) created unnecessary risks to the information by storing it in multiple files when it no longer had a business need to keep the information;
> (2) did not use readily available security measures to limit access to its computer networks through wireless access points on the networks;
> (3) stored the information in unencrypted files that could be accessed easily by using a commonly known user ID and password;
> (4) did not limit sufficiently the ability of computers on one in-store network to connect to computers on other in-store and corporate networks; and
> (5) failed to employ sufficient measures to detect unauthorized access. As a result, a hacker could use the wireless access points on one in-store computer network to connect to, and access personal information on, the other in-store and corporate networks.[70]

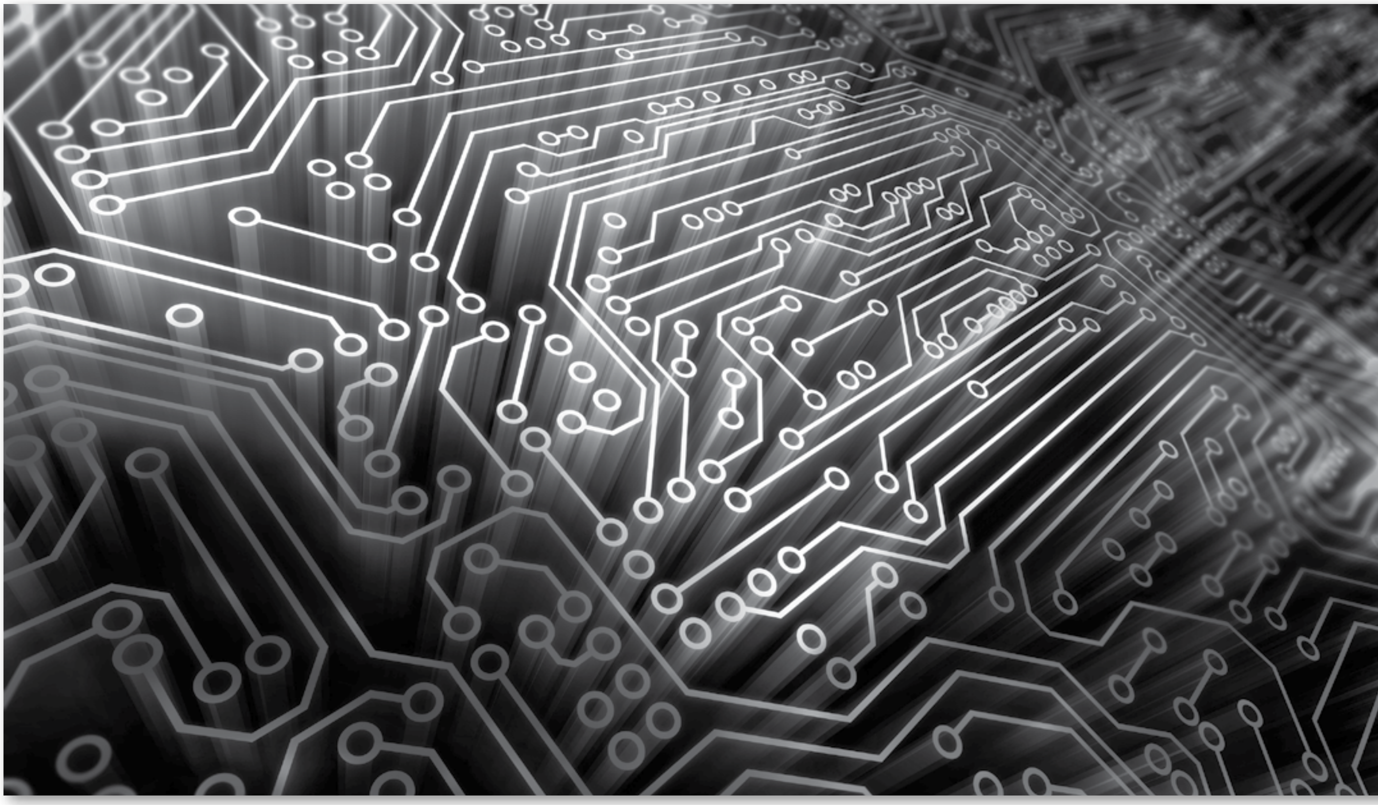
More than 1.4 million credit and debit cards were compromised, as well as 96,385 checking accounts and driver's license numbers.[71] At the time of FTC's complaint, fraudulent charges had already been discovered on some of the accounts.[72] Many customers were advised to close their accounts, and in doing so, not only lost access to those accounts, but incurred expenses.[73]

3. Dave & Buster's, Inc.

Dave & Buster's is yet another case in which sensitive consumer data was stored in the company's network.[74] For a period of four months, someone hacked into Dave & Buster's network, installed software, and obtained personal information while it was in transit from its in-store networks to their credit card processing company.[75] Upon learning of the breach, Dave & Buster's sent notifications to law enforcement and the consumers' credit card companies.[76] By the time FTC issued its complaint, however, banks had collectively claimed several hundred thousand dollars in fraudulent charges.[77] Roughly 130,000 consumer cards were compromised, and as in the cases of *BJ's Wholesale Club* and *DSW*, the FTC utilized its standard go-to language: "Respondent's failure to employ reasonable and appropriate security measures to protect information caused or is likely to cause substantial injury to consumers…"[78]

C. Substantial Injury & Recent Developments in Data Privacy

As noted earlier, the FTC considers consumer injury to be the primary focus of the FTC Act and the most important "Cigarette Rule" criteria.[79] Depending on the circumstances, consumer injury alone is sufficient to render a practice "unfair."[80] An act is unfair if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[81] The primary focus of the remainder of this Note will address the substantial injury requirement, as outlined in 15 U.S.C. § 45(n). In determining what constitutes "substantial injury," the FTC's 1980 Policy Statement is a good starting point. It provides:



> The Commission is not concerned with trivial or merely speculative harms. In most cases a substantial injury involves monetary harm, as when sellers coerce consumers into purchasing unwanted goods or services or when consumers buy defective goods or services on credit but are unable to assert against the creditor claims or defenses arising from the transaction. Unwarranted health and safety risks may also support a finding of unfairness. Emotional impact and other more subjective types of harm, on the other hand, will not ordinarily make a practice unfair. Thus, for example, the Commission will not seek to ban an advertisement merely because it offends the tastes or social beliefs of some viewers, as has been suggested in some of the comments.[82]

The Consumer Financial Protection Bureau further supplements the FTC's definition of substantial injury and provides examples of both monetary harm and non-monetary harm:

> Monetary harm includes, for example, costs or fees paid by consumers as a result of an unfair practice. An act or practice that causes a small amount of harm to a large number of people may be deemed to cause substantial injury.
>
> Actual injury is not required in every case. A significant risk of concrete harm is also sufficient. However, trivial or merely speculative harms are typically insufficient for a finding of substantial injury. Emotional impact and other more subjective types of harm also will not ordinarily amount to substantial injury. Nevertheless, in certain circumstances, such as unreasonable debt collection harassment, emotional impacts may amount to or contribute to substantial injury.[83]

1. *FTC v. Wyndham Worldwide Corp.*

Wyndham Worldwide Corporation ("Wyndham") was the first entity to challenge the FTC's authority to regulate lax data security practices under its unfairness test.[84] The FTC sued Wyndham in 2012 in federal district court, alleging Wyndham "failed to employ and appropriate measures to protect information against unauthorized access," thus violating Section 5 of the FTC Act, 15 U.S.C. §§ 45(a) and 45(n).[85] As a result of these failures, Wyndham suffered from three data breaches between 2008 and 2009.[86] Hackers used similar methods during each breach to access personal consumer information on Wyndham's hotel servers.[87] The FTC provided a list of at least ten ways in which Wyndham failed to provide reasonable security and stated that Wyndham "engaged in unfair cyber security practices that, 'taken together, unreasonably and unnecessarily exposed consumers' personal data to unauthorized access and theft.'"[88] More than 619,000 account numbers were compromised and fraud loss totaled over $10.6 million.[89] "Consumers and businesses suffered financial injury, including but not limited to, unreimbursed fraudulent charges, increased costs, and lost access to funds or credit . . . Consumers and businesses also expended time and money resolving fraudulent charges and mitigating subsequent harm."[90] The FTC's Complaint alluded to the fact that not only had consumers already suffered harm, but they would also *continue to suffer substantial injury*.[91]

At Wyndham's request, the case was transferred to the U.S. District Court for the District of New Jersey,[92] which found that the FTC had sufficiently plead "substantial injury" to consumers caused by Wyndham.[93] Wyndham argued the FTC had not plead sufficient facts to state a claim of "substantial injury" to consumers and alleged the FTC had made conclusory statements without identifying specific consumers who suffered specific financial injury as a result of the criminal cybersecurity attacks on Wyndham.[94] Such preciseness and exactness, Judge Salas countered, is "essentially an appeal for a heightened pleading standard."[95] The court commented on Wyndham's lack of authority for this assertion, but declined to impose a heightened pleading

The FTC stated Reilly concerned Article III Standing and differentiated between particularized injury that is "actual" and "imminent," and practices that "cause or are likely to cause" substantial injury to any class of consumers.

standard.[96] In a footnote recognizing the dispute over whether non-monetary injuries are cognizable under Section 5, the court seemed amenable to recognizing non-monetary harm: "Although the court is not convinced that non-monetary harm is, as a matter of law, unsustainable under Section 5 of the FTC Act, the Court need not reach this issue given the analysis of the substantial harm element above."[97] The court denied Wyndham's motion to dismiss,[98] finding the FTC's allegations allowed the court to reasonably infer that Wyndham's "data security practices caused theft of personal data, which ultimately caused substantial injury to consumers."[99]

The Third Circuit granted Wyndham's appeal.[100] In its opening brief, Wyndham again argued the FTC's conclusory arguments failed to plead sufficient facts to state a claim of "substantial injury" as a result of the criminal cybersecurity attacks on Wyndham. [101] Interestingly, Wyndham argued "as a threshold matter," exposure of consumers' payment information and consumer efforts to remedy such exposure "do not even give rise to an injury sufficient to support Article III Standing."[102] In support of this assertion, Wyndham cited to the Third Circuit's decision in *Reilly v. Ceridian Corp*[103] and the U.S. District Court for the Northern District of Illinois' decision in *Remijas v. Neiman Marcus*.[104] The FTC countered that Wyndham's reliance on *Reilly* was misplaced for two reasons.[105] First, there was no evidence in *Reilly* that data was acquired or misused; instead, the injury rested on speculation that the hacker had obtained information and intended to commit future fraud.[106] Here, the FTC stated, its complaint against Wyndham alleged actual theft and actual misuse of data.[107] Regarding misuse of data, the FTC pointed to two cases to support its assertion that time, expense, and effort to remedy injuries constitutes substantial injury.[108] Second, the FTC stated *Reilly* concerned Article III Standing and differentiated between particularized injury that is "actual" and "imminent," and practices that "cause or are likely to cause" substantial injury to any class of consumers. The Third Circuit ultimately affirmed the district court and held that a company's alleged failure to maintain reasonable and appropriate data security, if proven, *could* constitute an unfair method of competition in commerce.[109] A few months later, Wyndham and the FTC entered into a settlement, in which Wyndham agreed to establish a comprehensive information security program, designed to protect cardholder data, and perform annual security audits to ensure compliance with the program.[110]

2. In Re LabMD, Inc.

LabMD is the first of two organizations, along with Wyndham, to challenge the FTC's authority over data security practices.[111] The FTC began investigating medical testing laboratory LabMD in 2010[112] after learning that personal consumer information LabMD had collected, including medical data, was allegedly available to the public on a peer-to-peer ("P2P") file-sharing network.[113] The FTC then filed an administrative complaint against LabMD in August 2013, alleging it had failed to reasonably protect consumer information, including medical data, which caused or would be likely to cause substantial injury.[114] Thus, LabMD had engaged in an unfair practice and violated Section 5(a) of the FTC Act and 15 U.S.C. §45.[115] Instead of settling, as most companies do, LabMD filed a motion to dismiss.[116]

What began as an enforcement effort on behalf of the FTC evolved into an arduous six-year administrative battle that resulted in multiple lawsuits[117] and the demise of LabMD.[118] Accordingly, background is necessary to flesh out some of the key issues in this case. In 2008, Tiversa, a data security company offering data breach remediation services, contacted and notified LabMD that a file containing LabMD's consumers' personal information had been discovered on a P2P network.[119] In its investigation, LabMD determined that LimeWire–a P2P file-sharing application–had been downloaded and installed on one billing computer, removed LimeWire from that computer, and made efforts to search P2P networks for the file.[120] Tiversa tried to sell its services to LabMD, representing that the file had spread across P2P networks.[121] In what appears to be retaliation and ill motives,[122] Tiversa employees turned over the file to the FTC in hopes that fear of an enforcement action would compel LabMD to purchase Tiversa's services.[123] Documents and deposition testimony from Tiversa formed the basis for one of two incidents in the FTC's complaint,[124] and were relied upon by the FTC's expert witnesses to determine the likelihood of identity theft harm.[125] By the time Tiversa's credibility came to light, the discovery period was long gone and the FTC and LabMD were mid-trial.[126] FTC Chief Administrative Law Judge Michael Chappell dismissed the FTC's complaint against LabMD[127]:

> Complaint Counsel has failed to carry its burden of proving its theory that Respondent's alleged failure to employ reasonable data security constitutes an unfair trade practice because Complaint Counsel has failed to prove the first prong of the three-part test – that this alleged unreasonable conduct caused or is likely to cause substantial injury to consumers.[128]

Without specifically addressing whether LabMD's security practices were in fact "unreasonable," Judge Chappell found there was no evidence that the limited exposure of the file discussed above caused, or would be likely to cause, harm to consumers. Further, the court rejected the FTC's assertions that emotional harm, such as embarrassment, would be likely to occur and that such emotional harm would even constitute substantial injury.[129] "At best, Complaint Counsel have proven the possibility of harm, but not any 'probability or likelihood of harm.'"[130]

Important, however, was Judge Chappell's analysis of an FTC Section 5 unfairness claim and the "substantially injury" prong. He began his analysis of "unfair" conduct by trudging through the history and development of the "unfairness" test and defining "identity theft harm."[131] He then provided a list of the FTC's allegations constituting "substantial injury":

- Likely identity theft harm for consumers whose Personal Information was exposed in the 1718 File and the Sacramento Documents, including monetary losses from NAF, ECF, and ENCF, based on an "increased risk" that consumers whose information is exposed in a data breach will suffer identity theft harm;

- Likely medical identity theft harm for consumers whose Personal Information was exposed in the 1718 File, including monetary losses due to fraudulently procured medical products and services, and health and safety risks;
- "Significant risk" of reputational harm, privacy harm, and/or other harms based on stigma or embarrassment, caused by the unauthorized exposure of asserted "sensitive medical information" in the 1718 File; and,
- "Risk" of harm to all consumers whose information is maintained on LabMD's computer network, which Complaint Counsel variously describes as the "risk," "increased risk," or "significant risk," that Respondent's computer network will suffer a future data breach, resulting in identity theft harm, medical identity theft harm, and/or other harm.[132]

In response to LabMD's argument that no consumer had suffered actual harm, the FTC argued proof of likely harm is sufficient in an unfairness analysis.[133] The ALJ noted the fact that many years had passed by without any indication that any consumer had suffered harm as a result of LabMD's data security practices "undermines the persuasiveness" of the FTC's assertion that harm is "likely" to occur.[134] To hold LabMD liable for unfair practices without proof of actual injury to *any* consumer would "require speculation and would vitiate the statutory requirement of 'likely' substantial consumer injury."[135] The ALJ then cited to several cases to support its theory that historically, actual harm–not "likely" harm–has resulted in liability for unfair practices.[136] Noting that Section 5(n) of the FTC Act does not define the word "likely," he combined case law and dictionary definitions to conclude "likely" means "probable," not "possible." The ALJ also rejected the FTC's argument that the "significant risk" language from the FTC's 1980 Unfairness Policy Statement meets the "likely" requirement, finding Congress's omission of "significant risk" in its Senate Report demonstrates Congress rejected that standard.[137]

In July 2016, the FTC reversed the ALJ's Initial Decision and issued and Opinion and Final Order against LabMD, concluding that the ALJ applied an incorrect legal standard and finding LabMD's security practices to be "unfair" and unreasonable.[138] Specifically, FTC Chairwoman Edith Ramirez stated that the exposure of the file containing LabMD's consumers' personal information not only caused substantial injury, but was was also likely to cause substantial injury.[139] As to the first point, the Commissioners noted that because LabMD failed to notify the customers whose information was disclosed, there is no way to know if the breach of the file resulted in any type of identity theft.[140] However, the Commissioners found that the *disclosure* of medical information itself constituted a "substantial injury" because it caused non-economic harm such as embarrassment and reputation harm.[141] In emphasizing that disclosure of sensitive medical information harms consumers, the Commissioners turned to federal and state cases, tort law, and federal regulations such as HIPPA and the Fair Credit Reporting Act.[142]

The Commissioners also found that a showing of "significant risk" adequately meets the "likely to cause substantial injury" standard.[143] Addressing the ALJ's arguments in turn, the Commissioners disagreed with the ALJ's interpretation and meaning of "likely," noting that different dictionaries use various definitions.[144] In addition, the Commissioners stated there was no evidence in the legislative history of Section 5(n) to indicate that Congress intended to reject "risk of harm" as a substantial injury.[145] In regards to harm, the opinion emphasized that compromised medical records in data breach cases can effect a consumer's health or safety as a result of misdiagnoses or mistreatment of illness.[146] Both the significant risk of harm and "high likelihood of a large harm," the Commissioners concluded, demonstrated that the exposure of the file constituted substantial injury: "We need not wait for consumers to suffer known harm at the hands of identity thieves."[147]

As Judge Chappell recognized in his Initial Decision, this case presented a low risk of identity theft harm, compared to cases like *Wyndham* and *Neiman Marcus*, where stolen personal information was used to commit credit card fraud. Whereas here, it did not appear to be the case that Tiversa downloaded a file in an effort to make fraudulent charges on consumers' credit cards. While Judge Chappell did not entirely foreclose the notion that future harm cannot constitute a "substantial injury," the Commissioners' opinion seems to echo the Seventh Circuit's view in *Remijas v. Neiman Marcus*, discussed below.

III. Private Lawsuits & Class Action Lawsuits

Going back to the hypothetical at the beginning of this Note, there is another recourse available to individuals who have been victims of a data breach: litigation, in the form of either a private lawsuit or class action suit. Claims brought by individuals in response to data breaches often stem from state tort or contract law, such as negligence or breach of implied contract.[148] Both claims "require that the plaintiff be damaged in some cognizable way."[149]

A. *Article III Standing and the "Injury-in-Fact" Requirement*

The biggest obstacle plaintiffs in data breach cases face is whether their injury is even something the law recognizes.[150] Article III of the United States Constitution permits courts to hear a "case" or "controversy" only if a plaintiff has "standing" to sue.[151] Under this "standing" doctrine, a party can sue another party if the following three constitutional requirements are met: (1) *injury-in-fact*, in which the plaintiff must show the harm is "concrete and particularized," and "actual or imminent"; (2) *causation*, in which the injury must be traceable to the defendant's conduct; and (3) *redressability*, meaning it must be likely–and not speculative–that a favorable decision will redress the injury.[152] Defendants in data breach cases often challenge a plaintiff's standing by motioning to dismiss[153] and courts must dismiss these cases if the plaintiff fails to establish standing by meeting these three requirements.[154] This Note further explores the injury-in-fact element.

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If a plaintiff's personal information *has* been stolen and is used to make purchases, then establishing the injury-in-fact requirement is fairly straightforward because the plaintiff has been directly harmed.[155] These plaintiffs usually seek damages for what are considered to be cognizable injuries–unauthorized purchases and damaged credit scores.[156] However, plaintiffs whose stolen information was not used to incur charges face an uphill battle in establishing standing.[157] In such instances, these plaintiffs usually claim they have been harmed by having to spend money on credit monitoring services, identity theft insurance, and replacement cards and checks; in addition, they may seek damages for the increased risk of future injury and emotional distress.[158] Whether this indirect harm constitutes injury-in-fact without a showing of actual damages has been the subject matter of many debates,[159] and courts are currently split on the issue.[160] Case law to date is replete with inconsistencies regarding a plaintiff's right to sue when his or her information has been illegally obtained, but not used for fraudulent purposes.[161] However, the consensus among courts now sways in favor of dismissing such cases for lack of an injury-in-fact.[162]

B. *Recent Developments*

1. Pre-*Clapper* Circuit Split

As cybersecurity law evolved in the 2000s, the issue of standing in data breach cases led to differing outcomes among lower district courts, and ultimately, a circuit split among the Third, Seventh, and Ninth Circuits.[163] In 2007, the Seventh Circuit seemed to adopt a more liberal view of standing in data breach cases as opposed to some of the lower districts and held in *Pisciotta v. Old National Bancorp* that a risk of future harm was sufficient to satisfy Article III standing's injury-in-fact requirement.[164] The plaintiffs in *Pisciotta* sued their bank after a hacker accessed personal information through the bank's website and sought compensation for the purchase of credit monitoring services.[165] Three years later, the Ninth Circuit reached the same conclusion in *Krottner v. Starbucks Corp*, finding a "credible threat of harm" that is "both real and immediate, not conjectural or hypothetical" conferred standing.[166] In *Krottner,* Starbucks employees sued their employer after a laptop was stolen containing unencrypted employee data.[167] If the laptop had not been stolen, the court stipulated, and the employees had sued under the theory that it would be at some point be stolen in the future, the threat of harm would be "far less credible."[168]

In 2011, the Third Circuit diverged from its sister courts and held an allegation of future harm in data breaches was too speculative and neither "imminent" nor "certainly impending" to warrant standing.[169] In *Reilly v. Ceridian Corp.,* employees of a law firm sued Ceridian, a payroll-processing firm, after Ceridian discovered a hacker may have penetrated its firewall and accessed more than 20,000 employees' personal and financial information.[170] Although "whether the hacker read, copied, or understood the data" was unknown, Ceridian offered to provide credit monitoring services and identity theft protection to individuals whose information was potentially stolen.[171] The plaintiffs' allegations included increased risk of identity harm, costs incurred to monitor credit activity, and emotional distress.[172] The court dismissed the case for lack of standing and placed particular emphasis on the fact that the plaintiffs' injuries could not be described without the word "if": "*if* the hacker read, copied and understood the hacked information, and *if* the hacker attempts to use the information, and *if* he does so successfully, only then will [plaintiffs] have suffered an injury."[173] The court found *Pisciotta* and *Krottner* to be of little persuasive value: in *Pisciotta*, the hacker's conduct was "sophisticated, intentional, and malicious" and in *Krottner*, there was evidence of misuse of a plaintiff's personal information.[174]

2. *Clapper v. Amnesty International*

In 2013, the Supreme Court issued its first opinion on standing since the emergence of privacy and data breach cases.[175] In *Clapper v. Amnesty International*, respondents—an individual and several organizations—challenged the constitutionality of the Federal Intelligence Surveillance Act, which authorizes government officials to put individuals under surveillance and intercept foreign communications.[176] The respondents alleged they had satisfied the injury-in-fact requirement under the standing doctrine based on two theories: (1) *future injury*, in which there was an "objectively reasonable likelihood" that confidential information would be intercepted at some point, and (2) the costs and measures expended to protect the confidentiality of their communications from surveillance constituted *present injury*.[177] In addressing these two theories, respectively, the Supreme Court found that the respondents' arguments were based on "a speculative chain of possibilities that [do] not establish that their injury is certainly impending"[178] and fear that caused respondents to incur costs.[179] In a 5-4 decision, the Supreme Court held that the respondents had failed to satisfy the injury-in-fact threshold because respondents had not demonstrated that an "imminent ham" was present[180] or shown that the threatened injury was "certainly impending."[181]

In his dissent, Justice Breyer emphasized that "certainly impending" is a "somewhat elastic concept" that is not to be read literally or refer to absolute certainty,[182] and that the Supreme Court has found standing in cases involving injury that was "far less certain than here."[183] "What the Constitution requires is something more akin to 'reasonable probability' or 'high probability.'"[184]

Despite the fact that *Clapper* did not arise within a data breach context, courts have since turned to the decision to assess whether parties have satisfied standing and it has had a significant impact in data breach cases.[185] Whether *Clapper* has overruled *Pisciotta* and *Krottner* has been the subject of debate,[186] and most federal district courts have found threat of future harm in data breach cases insufficient to establish standing.[187] But all is not lost for plaintiffs. As discussed below, there have been a few cases post-*Clapper* in which threat of future injury sufficiently established standing.

3. Finding a basis for standing in post-*Clapper* cases

Clapper is not the end-all and be-all of the existence of standing in data breach cases, as there have been some courts that have recognized a basis for standing in cases involving threat of future harm. For example, in *Moyer v. Michaels Stores, Inc*., Michaels learned of "possible fraudulent activity" on credit and debit cards used at Michaels' stores.[188] The plaintiffs' claims included future identity theft, costs incurred to protect themselves from this future harm, and miscellaneous expenses resulting from bank withdrawals, fraudulent activity, and bank fees.[189] Relying on *Pisciotta*'s reasoning that an "elevated risk of identity theft is a cognizable injury-in-fact,"[190] the court found Michaels' data breach sufficiently imminent to give the plaintiffs standing.[191] In reaching this conclusion, the court distinguished *Clapper* on the basis that the imminence requirement in *Clapper* was applied in an "'especially rigorous' fashion" in a case involving "national security and constitutional issues."[192]

Similarly, *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.,* is another case in which the court relied on a pre-*Clapper* case, *Krottner*, to hold that the plaintiffs had sufficiently alleged standing.[193] Although the court found both *Clapper* and *Krottner* controlling, the court emphasized "the Supreme Court's decision in *Clapper* did not set forth a new Article III framework, nor did the Supreme Court's decision overrule previous precedent requiring that the harm be 'real and immediate.'"[194]

Recently, in *Spokeo v. Robins*, the Supreme Court provided additional guidance—albeit little—on the proper framework for assessing an Article III Standing injury-in-fact analysis.[2]

Neither *Krottner* nor *Clapper* require allegations that stolen information be misused, the court surmised, and thus the plaintiffs had "plausibly alleged a 'credible threat' of impending harm."[195]

The Northern District of California echoed these sentiments in *In re Adobe Sys. Privacy Litig.* and continued the trend of relying on precedent from the Ninth Circuit.[196] Finding *Krottner* to be good law, the court nevertheless also found the harm alleged sufficient to satisfy *Clapper*.[197] In *Adobe*, hackers obtained access to Adobe's servers and remained in their network for several weeks undetected, retrieving at least 38 million customers' personal information.[198] The court found several factors to distinguish the injury in *Adobe* from *Clapper*: the hackers deliberately targeted Adobe's network and spent weeks removing customer information, eliminating the need to "speculate as to whether Plaintiff's information had been stolen and what information was taken";[199] the hackers used Adobe's system to decrypt credit card numbers, indicating an intent to misuse the information;[200] and some of the stolen information had already surfaced on the Internet at the time of litigation.[201] The court further emphasized that waiting for the plaintiffs to be victims of identity theft for the sake of conferring standing contravened the "well-established principle" that an injury does not have to have taken place or be absolutely certain to occur in order to establish a finding of injury-in-fact.[202] Of the cases Adobe cited in support of its position, the court found *Galaria* to be closest in facts.[203] The court in *Galaria* had declined to find standing based on a risk of future injury, concluding that the harm was dependent upon whether the hackers would even make an attempt to misuse the stolen information.[204] The *Adobe* court declined to follow this reasoning and proceeded to posit the question, "[A]fter all, why would hackers target and steal personal customer data if not to misuse it?"[205]

In 2015, the Seventh Circuit issued its opinion in *Remijas v. Neiman Marcus, LLC*, and the decision is likely to have a significant impact on how courts address *Clapper* in the context of data breaches.[206] In 2013, hackers gained unauthorized access to Neiman Marcus' servers, potentially exposing approximately 350,000 cards.[207] Of those, 9,200 cards were discovered to have been misused.[208] Plaintiffs sued the high-end department store on behalf of the 350,000 customers for failing to take appropriate measures to protect them against a data breach.[209] The plaintiffs pointed to actual injuries: time and money incurred to resolve the fraudulent charges, and the costs associated with protecting themselves against future identity theft.[210] The plaintiffs also asserted two imminent injuries: risk of future fraudulent charges and the risk of identity theft.[211] The district court was satisfied that the possibility of future charges was "imminent," but found the plaintiffs had failed to demonstrate a "concrete" injury because none of the fraudulent charges appeared to be unreimbursed.[212] Acknowledging that 9,200 customers had alleged an injury-in-fact sufficient for Article III standing,[213] the district court remained unconvinced that all 350,000 consumers were at risk of identity theft[214] and granted defendant's motion to dismiss.[215]

On appeal, the Seventh Circuit reversed the district court's dismissal in *Remijas*, becoming the first federal appellate court post-*Clapper* to find standing in a case involving future harm.[216] Although the Seventh Circuit could have limited the class action to just the 9,200 customers whose credit cards were misused,[217] the court noted that *Clapper* does not completely preclude future injuries from satisfying Article III standing if that harm is "certainly impending"[218] nor should courts overread *Clapper*.[219] In addition, the court emphasized that *Remijas* is distinguishable from *Clapper* because here there is no need to speculate whether information was stolen or determine what was stolen.[220] Citing to *Adobe*, the Seventh Circuit contended that "Neiman Marcus customers should not have to wait until hackers commit identity theft or credit-card fraud in order to give the class standing, because there is an 'objectively reasonable likelihood' that such an injury will occur."[221] The court determined that the plaintiffs had made a plausible inference they would suffer from a future risk of harm, emphasizing the purpose of a hack is to "sooner or later" misuse customer data.[222] The Seventh Circuit held that future harm is sufficient to survive a motion to dismiss.[223]

Recently, in *Spokeo v. Robins*, the Supreme Court provided additional guidance—albeit little—on the proper framework for assessing an Article III standing injury-in-fact analysis.[224] *Spokeo*, like *Clapper*, does not arise out of a data breach case, but addresses Article III standing in regards to proof of harm for violation of a federal statute.[225] In *Spokeo*, Thomas Robins brought a class action suit against Spokeo, Inc. under the Fair Credit Reporting Act (FCRA) for allegedly disseminating incorrect information about him.[226] Robins, at the time, was actively seeking employment.[227] He argued the information that Spokeo published made him appear overqualified, which resulted in harm to his employment prospects.[228] The district court dismissed the case, finding he had failed to properly plead an injury-in-fact sufficient to survive Article III standing.[229] The Ninth Circuit reversed, holding that a "violation of a statutory right is usually a sufficient injury to confer standing."[230] The Supreme Court, in a 6-2 decision, found that the Ninth Circuit's injury-in-fact analysis was incomplete because it failed to assess whether Robins' injury was "concrete," and remanded for further consideration.[231] Distinguishing a "particularized" injury as one that "must affect the plaintiff in a personal and individual way" and a "concrete" injury as one that "must actually exist," is "real," and "not 'abstract,'" the court emphasized that an injury must be both particularized and concrete but did not take a position on whether the Ninth Circuit ultimately reached the right result.[232] The court further noted that "concrete" injuries can be both tangible or intangible, and that a "risk of real harm" *could* satisfy this requirement.[233]

How *Spokeo* will be applied to consumers in data breach cases remains to be seen. Although it does not appear to completely bar lawsuits involving intangible injuries or those that create a "risk of harm," it does make clear that an injury must be both particularized and concrete, which may create an obstacle for plaintiffs at the pleading stage. It is evident from the cases discussed above that the law in regards to standing in data breach cases remains unsettled, and will continue to evolve.

IV. Conclusion

In light of the cases discussed above, fear of identity theft and incurring costs to protect oneself from future identity theft *may* be sufficient to establish injury in the eyes of the FTC or the courts. The FTC and plaintiffs may point to certain other factors to strengthen their argument that future harm constitutes an injury: the "sophistication" of the hacker, the extent of the exposure, types of information stolen,[234] items stolen,[235] the intent or target of the hacker, the length of time that has passed since the breach, and whether the organizations—arguably the "victim" of the breach—from whom the information was stolen took remedial action.[236]

Thus far, FTC has been able to rely upon the "likely to cause substantial injury" clause articulated in Section 5 of the FTC Act to hold companies liable for an unfair act or practice where no actual injury occurred. *LabMD* goes further in declaring that disclosure of sensitive personal information constitutes substantial injury even if there is no economic harm and consumers are unaware their information has been compromised. While *LabMD* does not have the final word just yet,[237] companies and consumers should take heed that an increased risk of harm or emotional harm may be sufficient to establish injury in the eyes of the FTC. The Seventh Circuit has bridged the gap between the FTC's substantial injury requirement and the Article III's injury-in-fact requirement by allowing victims of data breaches to bring forth private lawsuits where future identity theft—in other words, future harm—and fraudulent charges constitute "injury." Keeping the foregoing in mind, consumers should keep apprised of developments on both sides, as it will likely have significant implications as to whether they can bring lawsuits after a data breach if no actual injury has occurred.

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2 *See, e.g.*, Rick Robinson, *Two Important Lessons from the Ashley Madison Breach*, Security Intelligence (October 28, 2015), https://securityintelligence.com/two-important-lessons-from-the-ashley-madison-breach/ [https://perma.cc/K8K6-HKMC]; Jonathan Stempel, *Home Depot settles consumer lawsuit over big 2014 data breach*, Reuters (March 8, 2016 12:56 PM), http://www.reuters.com/article/us-home-depot-breach-settlement-idUSKCN0WA24Z [https://perma.cc/E7CF-FVES]; Edvard Pettersson, *Sony to Pay as Much as $8 Million to Settle Data-Breach Case*, Bloomberg Business (October 20, 2015), http://www.bloomberg.com/news/articles/2015-10-20/sony-to-pay-as-much-as-8-million-to-settle-data-breach-claims [https://perma.cc/4BK5-VKXF].

3 Williamson, *supra* note 1.

4 CyberEdge Group, *2015 Cyberthreat Defense Report: North America & Europe*, http://www.novell.com/docrep/2015/03/CyberEdge_2015_CDR_Report.pdf?utm_campaign=NetIQ%20-%20GL%20-2015-cyberthreat-defense-report-TY-15393&utm_medium=email&utm_source=Eloqua (last visited Jan. 26, 2016) [https://perma.cc/ZC96-ZG6M] (up from 6 out of 10 in 2014).

5 *Data Breaches*, Identity Theft Resource Center, www.idtheftcenter.org/id-theft/data-breaches.html (last visited Jan 25 9:39 PM) [https://perma.cc/7D77-H6X4].

6 FTC v. Wyndham Worldwide Corp., 799 F.3d 236, 240 (3rd Cir. 2015).

7 *Id.*

8 *Id.* Section 5 of the FTC Act is codified in 15 U.S.C. § 45(n).

9 First Amended Compl. for Injunctive and Other Equitable Relief at 19 ¶ 42, FTC v. Wyndham Worldwide Corp., No. CV 12-1365-PHX-PGR (D. Ariz. filed Aug. 9, 2012) (the complaint also alleged Wyndham engaged in "deceptive" acts, which is not discussed here).

10 Opinion of the Commission at *1, *In Re LabMD*, Docket No. 9357 (July 29, 2016).

11 *Id.*

12 Remijas v. Neiman Marcus Group, LLC, 794 F.3d 688, 696 (7th Cir. 2015).

13 *Id.*

14 App. Reply Br. 34, Dec. 8, 2014, ECF No. 14-3514.

15 Pl.'s Br. 57, Nov. 5, 2014, ECF No.14-3514.

16 Initial Decision, In the Matter of LabMD Inc., 2015 FTC Lexis 135 at *200, No. 9357 (Nov. 13, 2015) (this decision was later reversed by an Opinion of the Commission).

17 *See, e.g.,* Liviu Arsene, *FTC Granted Authority as Corporate Cybersecurity Watchdog by US Court*, Hot for Security (Aug. 25, 2015), http://www.hotforsecurity.com/blog/ftc-granted-authority-as-corporate-cybersecurity-watchdog-by-us-court-12552.html [https://perma.cc/W7NG-M9V4].

18 15 U.S.C. § 45(a)(1) (Lexis 2015).

19 15 U.S.C. § 45(a)(2).

20 Wheeler-Lea Act of 1938, 75 P.L. 447, 52 Stat. 111, 75 Cong. Ch. 49 (Lexis 2015).

21 J. Howard Beales, Bureau of Consumer Protection, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, (May 30, 2003), https://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection#N_7_ (last visited November 25, 2015, 8:48 PM) [https://perma.cc/MQH4-H5RS].

22 Statement of Basis and Purpose, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (1964).

23 The test is also referred to as the "S&H Rule" or "Sperry's Rule". For purposes of this Note, I will refer to it as the "Cigarette Rule."

24 Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, *supra* note 22.

25 FTC v. Sperry & Hutchinson, 405 U.S. 233, n.5 (1972).

26 Beales, *supra* note 21 ("apparent approval"); John Harrington, Note, *Up in Smoke: The FTC's Refusal to Apply the "Unfairness Doctrine" to Camel Cigarette Advertising*, 47 Fed. Comm. L. J. 593 (1995) ("tacitly approved the criteria"); David Belt, *Should the FTC's Current Criteria for Determining "Unfair Acts or Practices" Be Applied to State "Little FTC Acts"?*, 2010 A.B.A. Sec. The Antitrust Source ("it is unclear whether the Court actually approved the criteria").

27 Beales, *supra* note 21.

28 *Id.*

29 *Id.*

30 *Id.*

31 Statement of Basis and Purpose, Labeling and Advertising of Home Insulation, 44 Fed. Reg. 50, 218 (1979).

32 *See* Letter from the FTC Commissioners to Sen. Ford and Sen. Danforth (Dec. 17, 1980) [hereinafter "Unfairness Policy Statement"], reprinted as an appendix to *International Harvester Co.,* 104 F.T.C. 949.

33 *Id.*

34 *Id.*

35 Beales, *supra* note 21.

36 15 U.S.C. § 45(n) (Lexis 2015).

37 Beales, *supra* note 21.

38 Daniel Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 Colum. L. Rev. 583 (2014).

39 A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority, FTC, July 2008, https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority (last visited Nov. 25, 2015, 8:50 PM) [https://perma.cc/8TBK-BV8B].

40 *Id.*

41 Solove & Hartzog, *supra* note 37.

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id*.
46 Prepared Statement of the Federal Trade Commission, FTC, *Protecting Consumer Information: Can Breaches Be Prevented?* (Feb. 5, 2014), https://www.ftc.gov/system/files/documents/public_statements/prepared-statement-federal-trade-commission-protecting-consumer-information-can-data-breaches-be/140205databreaches.pdf (last visited Nov. 25, 2015, 8:54 PM) [https://perma.cc/9XW2-CKVV].
47 FTC v. Accusearch, Inc., 570 F.3d 1187 (Lexis 2009); *Wyndham*, 799 F.3d 236; *LabMD*, 2015 FTC Lexis 272.
48 *LabMD*, 2015 FTC Lexis 272 at *200.
49 Privacy Online: Fair Information Practices in the Electronic Marketplace, A Report to Congress, FTC, https://www.ftc.gov/sites/default/files/documents/reports/privacy-online-fair-information-practices-electronic-marketplace-federal-trade-commission-report/privacy2000.pdf (last visited Jan. 26, 2016, 10:36 PM) [https://perma.cc/BH3L-TEG3].
50 Elie Freedman, Article, *An Era of Rapid Change: The Abdication of Cash & the FTC's Unfairness Authority,* 14 PGH. J. Tech. L. & Pol'y 351 (2014).
51 *Id*.
52 Privacy Online, *supra* note 48.
53 *Id*.
54 Freedman, *supra* note 49.
55 *Id*.
56 Complaint, BJ's Wholesale Club, Inc. No. C-4148 (F.T.C. Sept. 20, 2005).
57 *Id*.
58 *Id*.
59 *Id*.
60 *Id*.
61 *Id*.
62 Michael Scott, Article, *The FTC, The Unfairness Doctrine, and Data Security Breach Litigation: Has the Commission Gone Too Far?*, 60 Admin. L. Rev. 127 (2008).
63 *BJ's Wholesale Club*, No. C-4148.
64 Press Release, FTC, *DSW Inc. Settles FTC Charges*, (Dec. 1, 2005), https://www.ftc.gov/news-events/press-releases/2005/12/dsw-inc-settles-ftc-charges (last visited Nov. 25, 2015, 8:55 PM) [https://perma.cc/W6ZD-A5KF].
65 Complaint, DSW Inc., No. C-4157 (F.T.C. Mar. 7, 2006).
66 *Id*.
67 *Id*.
68 *Id*.
69 *Id*.
70 *Id*.
71 *Id*.
72 *Id*.
73 Complaint, Dave & Buster's, Inc., No. C-4291 (F.T.C. May 20, 2010).
74 *Id*.
75 *Id*.
76 *Id*.
77 *Id*.
78 Unfairness Policy Statement, *supra* note 31.
79 *Id*.
80 15 U.S.C. § 45(n).
81 Unfairness Policy Statement, *supra* note 31.
82 Consumer Financial Protection Bureau, *CFPB Supervision and Examination Manual*, Version 2.0, October 2012), http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf (last visited Nov. 25, 2015, 8:56 PM) [http://perma.cc/XSX7-5HVE] (internal citations omitted).
83 *Wyndham,* 799 F.3d 236.
84 First Amended Compl. for Injunctive and Other Equitable Relief at *19, *Wyndham*, No. CV 12-1365-PHX-PGR (the complaint also alleged Wyndham engaged in "deceptive" acts, not discussed here).
85 *Id*.
86 *Id*.
87 *Id*.
88 *Id*.
89 FTC v. Wyndham Worldwide Corp,, 10 F. Supp. 3d 602, 609 (D.N.J. 2014).
90 First Amended Compl. for Injunctive and Other Equitable Relief at *19, *Wyndham*, No. CV 12-1365-PHX-PGR.
91 *Wyndham*, 799 F.3d at 242.
92 *Wyndham,* 10 F. Supp. 3d at 625.
93 *Id*. at 622.
94 *Id*. at 625.
95 *Id*.
96 *Id*. at 602 n.15.
97 *Id*. at 631.
98 *Id*. at 626.
99 *Wyndham*, 799 F.3d 236.
100 Appellant's Opening Br., 45, October 6, 2014, No. 14-3514.
101 *Id*.
102 *See infra* Part III.B.1.
103 Appellant's Opening Br., No. 14-3514 (*Remijas v. Neiman Marcus* was later reversed by 7th Circuit).
104 Brief for the FTC, 58-59, Nov. 5, 2014, No. 14-3514.
105 *Id*. at 59.
106 *Id*.
107 *Id*. at 60-61.
108 *Wyndham*, 799 F.3d 236 (The Third Circuit did not specifically address whether Wyndham's conduct violated 15 U.S.C. § 45).
109 Stipulated Order for Injunction at *4, *Wyndham*, 10 F. Supp. 3d 602 (D.N.J. 2014) (No. 2:13-CV-01887-ES-JAD) (providing Wyndham's obligations in the settlement are in effect for 20 years).
110 *LabMD*, 2015 FTC Lexis 272.
111 *Id*. at *12.
112 *Id*. at *13.
113 *Id*. at *26.
114 *Id*. at *1.
115 Def.'s Mot. Dismiss, No. 9357 (Apr. 24, 2015).
116 LabMD, Inc. v. Tiversa, Inc., 509 Fed. Appx. 842 (11th Cir. 2013); LabMD, Inc. v. FTC, 776 F.3d 1275 (11th Cir. 2015); Tiversa Holding Corp. v. LabMD, Inc., 2014 U.S. Dist. LEXIS 166052 (W.D. Pa. Dec. 1, 2014).
117 Dan Epstein, *Hounded Out of Business by Regulators*, Wall St. J., Nov. 19, 2015, http://www.wsj.com/articles/hounded-out-of-business-by-regulators-1447978301 (last visited Nov. 25, 2015, 8:58 PM) [http://perma.cc/4RRY-2BVZ].
118 *LabMD*, 2015 FTC Lexis 272 at *50.
119 *Id*. at *51.
120 *Id*.
121 *Id*. at *67.
122 *Id*. at *66.
123 *Id*. at *14. The second incident involved documents that were found in the possession of alleged identity thieves; however, the court stated the FTC had failed to establish a causal connection between these documents and LabMD's network. There was also no evidence that this exposure had caused or would be likely to cause consumer harm.
124 *Id*. at *91.
125 *Id*. The FTC requested to re-depose Tiversa's CEO and allow its expert witnesses to revise their opinions based on the revised testimony, but these requests were denied.
126 *Id*. at *16.
127 *Id*. at *25-26. Judge Chappell rejected LabMD's argument that the burden of proof standard is "clear and convincing evidence"; instead, Judge Chappell stated the FTC "has the burden of proving each factual issue…by a preponderance of credible evidence." (p. 46).
128 *Id*. at *26.

129 *Id*. at *50.
130 *Id*. at *102-105.
131 *Id*. at *110.
132 *Id*. at *113.
133 *Id*. at *114.
134 *Id*. at *27.
135 *Id*. at *114-117.
136 *Id*. at *118.
137 Opinion of the Commission at *1.
138 *Id*. at 16.
139 *Id*.
140 *Id*. at 17.
141 *Id*. at 18-19.
142 *Id*. at 20-21.
143 *Id*. at 20.
144 *Id*. at 21.
145 *Id*. at 24-25.
146 *Id*. at 21-23.
147 Caroline C. Cease, *Giving Out Your Number: A Look at the Current State of Data Breach Litigation*, 66 Ala. L. Rev. 395, 397 (2014).
148 *Id*.
149 *Id*.
150 U.S. CONST. art. III, § 2.
151 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).
152 Barry Goheen, *Expert Q&A: Standing in Data Breach Class Actions,* Practical Law (Mar. 27, 2015) (standing challenges are specifically made under FRCP 12(b)(1) or FCRP(h)(3)).
153 Miles Galbraith, *America the Virtual: Security, Privacy, and Interoperability in an Interconnected World*, 62 Am. U.L. Rev. 1365, 1376 (2013).
154 Cease, *supra* note 136.
155 *Id*.
156 *Id*.
157 *Id*.
158 *See e.g.,* Galbraith, *supra* note 142 (noting plaintiffs' harm and expenses incurred in data breach cases are analogous to those made by plaintiffs in cases involving toxic exposure, environmental harm, and defective medical devices).
159 Cease, *supra* note 136.
160 Galbraith, *supra* note 142.
161 *Id*.
162 *Id*.
163 Pisciotta v. Old Nat'l Bancorp, 499 F.3d 629, 634 (7th Cir. 2007).
164 *Id*. (affirming the district court's dismissal of the action, however, because damages could not be recovered as a matter of Indiana law).
165 Krottner v. Starbucks Corp., 628 F.3d 1139, 1143 (9th Cir. 2010).
166 *Id*.
167 *Id*.
168 Reilly v. Ceridian Corp., 664 F.3d 38, 42 (3rd Cir. 2011) (noting that the risk of injury here is "even more attenuated" than the issue in *Lujan* because "it is dependent on entirely speculative, future actions of an unknown third party" rather than the actions of the plaintiffs).
169 *Id*. at 40.
170 *Id*.
171 *Id*.
172 *Id*. at 43.
173 *Id*. Also distinguishing future harm in data breaches from cases involving medical devices, toxic torts, and environmental issues because of the lack of bodily harm and ability to monetarily return plaintiffs to their original position.
174 Barry Goheen, *Expert Q&A: Standing in Data Breach Class Actions,* Practical Law (Mar. 27, 2015).
175 Clapper v. Amnesty International, 185 L. Ed. 2d 264, 268 (2013) (Respondents are interested parties including attorneys, human rights entities, and media organizations who allege to engage in communications with individuals that may be targeted and put under surveillance).
176 *Id*. at 268-269.
177 *Id*. at 269.
178 *Id*. at 270.
179 *Id*. at 264 (reversing the Second Circuit's holding that the respondents had demonstrated an "objectively reasonable likelihood" that their international communications would be intercepted in the future).
180 *Id*. at 271.
181 *Id*. at 290.
182 *Id*. at 291.
183 *Id*. at 295.
184 Goheen, *supra* note 163 (noting that Clapper has been used mostly to dismiss cases).
185 *Id*. (noting that most district courts in the Seventh Circuit have applied *Clapper*, not *Pisciotta*, whereas district courts in the Ninth Circuits have suggested *Clapper* does not overrule *Krottner*).
186 *Id*. *See e.g.,* Lewert v. P.F. Chang's China Bistro, No. 14-4787, 2014 U.S. Dist. LEXIS 171142 (N.D. Ill. Dec. 10, 2014) (finding speculation of future harm and mitigation expenses do not constitute "actual injury" or "imminent harm"); Green v. ebay Inc., No. 14-1688, 2015 U.S. Dist. LEXIS 58047 (E.D. La. May 4, 2015) (finding plaintiff has failed to allege facts he has suffered an "actual or imminent injury"); Peters v. St. Joseph Servs. Corp., 74 Supp. 3d 847 (S.D. Tex. 2015) (finding future injuries are speculative and hypothetical but not imminent, and as such, the plaintiff lacks standing because she has not alleged a cognizable injury under Article III jurisprudence); Storm v. Paytime, 90 F. Supp. 3d 359 (finding access of data by an unknown third party doesn't equate to "misuse" and the length of time that has passed without such misuse "undercuts the imminency requirement"); Galaria v. Nationwide Mutual Ins. Co., 998 F. Supp. (mere exposure of plaintiff's personal information did not result in any "adverse consequences apart from the speculative injury of increased risk of identity theft").
187 Moyer v. Michaels Stores, Inc., No. 14-C561, 2014 U.S. Dist. LEXIS 96588, at *3 (N.D. Ill. Jul. 14, 2014).
188 *Id*. at *12
189 *Id*. at *15 (disagreeing with the defendants and other courts that *Clapper* overrules *Pisciotta*'s holding and imposes a stricter "imminent" requirement).
190 *Id*. at *19 (ultimately dismissing plaintiffs' claims despite a finding of standing because they had failed to plead actual damages as required by Illinois law). *But see* Strautins v. Trustwsave Holdings, Inc., 27 F. Supp. 3d 781 (finding *Clapper* essentially overrules the Seventh Circuit's standard in Pisciotta).
191 *Id*. The court also gave credence to a separate complaint involving a NY resident who used her credit card at a Michaels store during the alleged time frame of the breach and approximately two weeks later, incurred fraudulent charges. Although she was not a party to the present litigation, the court found her allegations to "inform [the] analysis."
192 In re Sony Gaming Networks & Customer Data Sec. Breach Litig., 996 F. Supp. 2d 942, 961 (S.D. Cal. 2014) (involving a class action suit arising out of a "criminal intrusion into a computer network system" in which millions of customers' personal information was stolen. Of the eleven named plaintiffs, only one alleged unauthorized charges).
193 *Id*.
194 *Id*. at 962.
195 In re Adobe Sys. Privacy Litig., 66 F. Supp. 3d 1197, 1214 (N.D. Cal. 2014).
196 *Id*. at 1213-1214.
197 *Id*. at 1206.
198 *Id*. at 1214-1215 (distinguishing from *Clapper*, in which there was not any evidence that international communications had been or needed to be monitored).
199 *Id*. at 1215.
200 *Id*.
201 *Id*.

202 *Id*. at 1216.
203 *Id*.
204 *Id*. In addition to finding standing, the court found mitigation costs as an "additional cognizable injury" in light of the fact that the future harm being mitigated was itself imminent.
205 *Remijas*, 794 F.3d 688.
206 *Id*. at 690.
207 *Id*.
208 Remijas v. Neiman Marcus, No. 14-C1735, 2014 U.S. Dist. LEXIS 129574, at *2 (N.D. Ill. Sept. 16, 2014) (plaintiffs also sued Neiman Marcus for failing to disclose notice of the breach immediately).
209 *Remijas*, 794 F.3d at 692 (plaintiffs also alleged financial loss for purchasing products at Neiman Marcus that they wouldn't have bought had they been aware of the store's lax cybersecurity practices, and loss of control over the value of their personal information; neither of these allegations are discussed here).
210 *Id*.
211 *Remijas*, 2014 U.S. Dist. LEXIS 129574, at *9.
212 *Id*.
213 *Id*. at *8 (permitting a "plausible" inference that others among the 350,000 customers may face an "impending risk" of fraudulent charges, but rejecting the notion that any of the 350,000 customers face a "certain impending" risk of identity theft).
214 *Id*. at *14.
215 *Remijas*, 794 F.3d at 692.
216 John Hutchins, *Keeping the Data-Breach Headlines in Perspective*, JD Supra Business Advisor, (Oct. 22, 2015), http://www.jdsupra.com/legalnews/keeping-the-data-breach-headlines-in-29514/ [https://perma.cc/CP6X-N8KN].
217 *Remijas*, 794 F.3d at 693.
218 *Id*. at 694 (specifying "Clapper was addressing speculative harm based on something that may not even have happened to some or all the plaintiffs. In our case, Neiman Marcus does not contest the fact that the initial breach took place").
219 *Id*. at 693.
220 *Id*.
221 *Id*.
222 *Id*. at 694.
223 Spokeo v. Robins, 136 S. Ct. 1540, 1545 (2016).
224 *Id*.
225 *Id*. at 1544. Spokeo is a Web site that provides users with personal information about other individuals. Robins asserts Spokeo incorrectly published information pertaining to his marital status, age, occupation, and education.
226 *Id*. at 1554.
227 *Id*.
228 *Id*. at 1542.
229 Robins v. Spokeo, Inc., 742 F.3d 409, 412 (9th Cir. 2014).
230 *Spokeo*, 136 S. Ct. at 1550.
231 *Id*. at 1548.
232 *Id*. at 1549.
233 Such as phone number versus social security numbers.
234 For example, a laptop versus an online database.
235 Such as providing credit monitoring services or identity theft insurance.
236 Respondent LabMD, Inc.'s Application for Stay of Final Order Pending Review by a United States Court of Appeals, *In Re LabMD*, Docket No. 9357 (Aug. 30, 2016).

Prepared Remarks of Richard Cordray Director of the Consumer Financial Protection Bureau Field Hearing on Debt Collection

Sacramento, California
July 28, 2016

Thank you all for coming today. I am glad to be here in California, which has actively sought to protect its consumers from bad debt collection practices. In fact, the Rosenthal Fair Debt Collection Practices Act was enacted in 1977, at the same time as its federal counterpart. Yet it goes further by applying most of its provisions to first-party creditors as well as third-party contract collectors, a premise we will be considering carefully ourselves as we proceed.

These laws were enacted to put an end to abusive practices by debt collectors. They have made a large difference in the lives of consumers. Yet even today, we continue to hear about serious problems with debt collection – debiting accounts without authorization, calling at all hours of the day or night, threats of arrest or criminal prosecution, or threats of physical harm to consumers and even their pets. Together, the Consumer Financial Protection Bureau and the Federal Trade Commission have worked to curb some of these worst abuses with vigorous enforcement of existing federal laws. To date, we have ordered creditors and debt collectors to refund hundreds of millions of dollars in enforcement actions based on unlawful debt collection practices.

But still there is much work to be done to assure that consumers are treated with the dignity and respect they deserve throughout the debt collection process. And that is what we are here to talk about today.

We estimate that about one in three consumers – more than 70 million people in all – were contacted by a creditor or collector seeking to collect a debt within the past year.

We recognize that debt collection serves an important role in the proper functioning of consumer credit markets. If people owe money that they borrowed on their credit card, or because they took out a student loan or received service from their telephone company, they are obligated to pay the money back and they should do so. But for many understandable reasons, huge numbers of Americans fall behind on their debts at one time or another. We estimate that about one in three consumers – more than 70 million people in all – were contacted by a creditor or collector seeking to collect a debt within the past year.

In the debt collection market, notably, consumers do not have the crucial power of choice over those who do business with them when creditors turn their debts over to third-party collectors. They cannot vote with their feet. They have no say over who collects their debts, and they likely know next to nothing about the collector until they receive a call or a letter. This can quickly lead to a barrage of communications, which in some cases are designed to be harassing or intimidating. Often debt collectors are motivated to go to almost any lengths to try to extract as much as they possibly can from the debtor. This is because they are typically paid based on the amount they collect, the relationship may be fleeting, and the more distant risk of being called to account later may not outweigh the immediate urgency of getting paid today.

It is not surprising, then, that for many years, the debt collection industry has drawn more complaints than any other, not only complaints to the Consumer Bureau but also to other agencies and officials in federal, state, and local government. To date, we have handled about 250,000 debt collection complaints, which is about one-quarter of all the complaints we have received. Last year alone, we fielded 85,000 debt collection complaints. The largest segment had to do with continued attempts to collect a debt that the consumer said was improper, because it was not their debt in the first place or because it had already been repaid or discharged in bankruptcy. Without clear rules of the road that can be effectively enforced in an even-handed manner, the companies that try to collect debts in the right way will have trouble competing against others that are willing to bend the rules or push the limits of the law to get an advantage.

A collections item can start as an overdue car payment, medical bill, or utility bill, or any kind of unpaid invoice. The story of how a financially struggling consumer gets to the point of owing money can reflect all the many limitations of human nature and the human condition. Some people just put their head in the sand and avoid payment. Other problems result from poor or unfortunate choices. Often the overdue bill is due to bad luck or some unexpected larger tragedy like job loss, illness or injury, or the dislocations caused by divorce. Those living under the shadow of indebtedness already tend to bear an emotional toll, which is intensified as they experience the new trials of the debt collection process.

When a consumer fails to pay the original creditor, that creditor usually makes some effort to collect on its own, but eventually may hire a third-party collector or sell the debt to a debt buyer. When the creditor sells off the debt, that typically means it has given up trying to recover the funds owed and has settled for recouping what it can by selling the delinquent debts, perhaps for as little as pennies on the dollar. The new debt owner then has the legal right to seek to collect the full amount of the original debt. In addition to trying to contact the consumer to seek payment, the debt owner may report the debt to the credit reporting companies, which creates pressure to pay it off, or may file a lawsuit against the consumer.

The main federal law that protects consumers and governs the industry is the Fair Debt Collection Practices Act, enacted almost forty years ago. Since then, courts have come to different interpretations of the statute, creating uncertainty for debt collectors and consumers alike. Moreover, as new forms of technology have emerged, many questions have arisen as to how to apply the law. For example, the law explicitly addresses the use of postcards, collect calls, and telegrams – but is silent about the use of voicemail, email, and text messages.

In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act authorized the Consumer Bureau to

Our proposal under consideration would make clear that collectors must meet a higher threshold before pursuing a lawsuit than before they make a verbal or written claim to a consumer.

be the first agency to issue comprehensive federal rules on debt collection. Since we opened our doors, we have been studying this industry as we engaged in enforcement and supervisory activity to improve legal compliance. We have engaged extensively with stakeholders across the spectrum and conducted our own research. And we have also looked to the good work done in this area by our colleagues at the Federal Trade Commission. One of their research reports concluded that debt collectors need to have better information so they are more likely to collect from the right person in the right amount.

Today we are considering proposals that would drastically overhaul the debt collection market. Our rules would apply to third-party debt collectors and to others covered by the Fair Debt Collection Practices Act, including many debt buyers. As part of our overhaul, we also plan to address first-party debt collectors soon, but on a separate track. The basic principles of the proposals we are considering are grounded in common sense. Companies should not collect debt that is not owed. They should have more reliable information about the debt before they try to collect. They would have to limit the number of attempts to make contact and should give consumers better information and more control over the process. Collectors also would have to make it easier for consumers to pursue disputes, and they would be barred from collecting on disputed debt that lacks proper documentation. These same requirements would follow along with any debts that are sold or transferred to another collector.

Both consumers and responsible businesses stand to benefit by improved standards for debt collection. Consumers deserve to be treated with dignity and respect, and businesses should be able to operate fairly and reasonably to collect the debts they are legitimately owed.

* * *

In the United States today, debt collection is a $13.7 billion industry that employs more than 130,000 people across approximately 6,000 collection companies. When these companies receive a portfolio of debts to begin collection, they may get only basic data – for example, name, address, creditor, and an amount claimed to be due. If the account is later sold or transferred, the information that goes with it is often incomplete, and anything a consumer had submitted may not be passed along. That breeds inaccuracy.

Our proposal under consideration would require collectors to substantiate a debt before seeking to collect on it. Collectors would have to confirm that they have sufficient information to start collection, such as the full name, last known address, last known telephone number, account number, date of default, amount owed at default, and the date and amount of any payment or credit applied after default. In addition, we are considering requiring collectors to refrain or cease from collecting if certain "warning signs" appear, such as a portfolio with large amounts of missing information or a high dispute rate.

These rules would apply to each successive debt collector. Each new collector would have to review their files to establish a reasonable basis for demanding payment. And if debt gets sold, it would have to be accompanied by specific information about the debt – information that benefits the consumer, not just the collector. For example, if a debt collector learns that a consumer is represented by an attorney, that information would have to be passed on to the next collector. For an active-duty servicemember with protections under the Servicemembers Civil Relief Act, that information would have to be passed from one collector to the next so those protections would be readily known and maintained.

Documentation of claims has long been a problem at all phases of the debt collection process. But let me focus on the process of seeking repayment through the courts, which is where bad information can hurt consumers the most. When debt collectors file a lawsuit to collect on a debt, as they often do, few consumers have the resources, the time, or the ability to appear and defend their cases in court. This will often lead to a default judgment and a victory for the debt collector, regardless of whether the suit is against the wrong person or for the wrong amount. It is even true where the time allowed for filing the lawsuit has already expired. Our research indicates that default judgments are entered in 60 to 90 percent of the lawsuits that are filed.

These situations encourage sloppy or even fraudulent practices. Nearly a year ago, we took enforcement actions against two of the largest debt buyers in the country, Encore Capital Group and Portfolio Recovery Associates, for churning out lawsuits using robo-signed court documents. In numerous cases, the companies had no intention of proving the debts in court. Instead, they relied on consumers defaulting – even where the paperwork often stated incorrect balances, interest rates, and due dates. The two companies were ordered to pay $61 million in consumer refunds and stop collection on more than $128 million worth of debts.

We also have been active on the debt seller side of the equation. Along with attorneys general from 47 states and the District of Columbia, we took action against JPMorgan Chase for selling invalid credit card debt and for robo-signing documents. The bank was ordered to pay $50 million in consumer refunds and $136 million in penalties and payments. It also agreed to halt collection activity on more than 528,000 consumer accounts, including a permanent ban on collecting the accounts, enforcing them in court, or selling them to someone else.

But enforcement actions alone cannot fully resolve these problems. Our proposal under consideration would make clear that collectors must meet a higher threshold before pursuing a lawsuit than before they make a verbal or written claim to a consumer. And the proposal under consideration would make clear that collectors are barred from filing a lawsuit to collect on a debt where the statute of limitations has expired.

* * *

It is not enough simply to assure that debt collection is premised on the right person and the right amount. Consumers need to understand what the collector is doing and why. Consumers also need protection when it comes to what, when, where, and how collectors communicate with them. Debt collectors are generally prohibited from engaging in acts that harass, oppress, or abuse consumers. But many consumers still complain about frequent or repeated phone calls; debts that are wrongly disclosed to third parties; and contacts at inconvenient times or places, such as when they are in the hospital. Our proposal under consideration would give consumers more information and control in their dealings with collectors and limit excessive contact.

When consumers are contacted by collectors for debt they do not recognize or barely remember, they may not know what their next move should be. They may wonder if it is a scam. They may feel pressure to pay a debt they do not believe is accurate just to make the collector go away. So one thing we are considering is to enhance the information people receive from collectors. Debt collectors already must give consumers initial notices about the debt that contain limited information. But we have heard from many consumers who remain confused even after getting these notices. We are considering expanding the information in these notices so consumers get much more detail about the debt.

We also want consumers to be better informed about the debt collection process. Many people do not know what rights they have, when they can invoke their rights, or how they can dispute a debt. The initial notices consumers receive from collectors often are written in legalese that can be hard to understand. On the other side, industry has been hesitant to edit or improve these letters because of concerns about potential liability if they do not repeat what the law says word for word. So we would require collectors to provide a statement with specific information about a consumer's federal rights, written in plain language. This would include a notice of their right to stop or limit communications, a statement that the debt is too old to support a lawsuit, and information about the Consumer Bureau's website, where they can file a complaint or "Ask CFPB" to answer their debt collection questions.

The proposal we are considering would also put consumers in control of their communications with collectors. One provision would limit collectors on each account to no more than six attempts per week to contact a consumer they have not previously reached. This cap would cover all contact attempts through various phone numbers, email addresses, or postal addresses, including unanswered calls and voicemails. After the consumer has been contacted initially, a collector then would generally be limited on each account to one actual contact per week and no more than three attempted contacts per week.

Consumers would also be able to stop collectors from using specific channels to contact them. For example, they could more easily block collectors from calling on a particular phone line, such as a work phone, or calling during certain hours. If consumers say not to call on their cell phone, then the collector would have to comply. We also are considering a 30-day waiting period for collectors seeking to collect the debt of a consumer who has passed away. This would protect the dignity of surviving spouses or others who may be coping with the early stages of the grieving process.

* * *

The third category of protections we are considering has to do with disputes. Under current federal law, consumers can dispute the debt or ask for more information if they are unsure whether they owe money to a creditor or how much. But few consumers fully understand their rights to question or dispute a debt.

Under the proposal we are considering, just by asserting a disagreement about the validity of the debt or the right of the collector to collect that debt, consumers would obligate the collector to go back and check their documentation. Collection activity could not resume until the information is confirmed. We would make it easier for consumers who do not believe they owe that amount to file a dispute at the very beginning of the process by including a "tear off" sheet at the bottom of the notice sent to the consumer. Consumers could mail this form back to the collector and simply check the relevant boxes on the form, explaining why they think the collector is wrong. If they do so within 30 days after receiving the notice, the collector would be blocked from contacting them until after the dispute has been investigated and written verification has been provided.

A key point is that collectors would not be able to bury the dispute just by selling the debt to a new collector. If they have not resolved the dispute before selling the debt, any new collector would have to investigate and address the dispute before seeking payment.

* * *

Today we are sharing this outline of proposals to reform debt collection with representatives of small entities engaged in debt collection. Next month, these representatives will meet with a Small Business Review Panel we are forming along with our colleagues from the Office of Management and Budget and the Office of Advocacy of the Small Business Administration. The panel will explore the potential impact of these measures on small businesses. We also will be meeting with consumer and industry stakeholders to obtain their input.

As Thomas Fuller once said, "Debt is the worst poverty." It can overwhelm people and imbue them with a sense of helplessness. By cleaning up the integrity of this process, we would resolve many of the problems at their foundation. Consumers should not be limited to being passive participants in a system they do not trust or understand. We are determined to put the burden of proof on the debt collector and take some of this weight off the consumer. We will remain determined to address these issues in ways that improve people's lives. Thank you.[1]

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1 An outline of the proposals being considered and alternatives considered may be found at, http://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf

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. If a link does not work, it may be necessary to cut and paste it to your browser. To subscribe and begin receiving your free copy of the Consumer News Alert in your mailbox, visit www.peopleslawyer.net.

U.S. SUPREME COURT

Supreme Court rules state attorney general's outside counsel did not violate the Fair Debt Collection Practices Act. Under Ohio law, overdue debts owed to state-owned agencies and instrumentalities are certified to the State's Attorney General, who may appoint, as independent contractors, private attorneys, as "special counsel" to act on the Attorney General's behalf. Special counsel must use the Attorney General's letterhead in communicating with debtors. Attorneys appointed as special counsel, sent debt collection letters on the Attorney General's letterhead to debtors, with signature blocks containing the name and address of the signatory as well as the designation "special" or "outside" counsel to the Attorney General. Each letter identified the sender as a debt collector seeking payment for debts to a state institution. Debtors filed a putative class action, alleging violation of FDCPA. The Sixth Circuit vacated, concluding that special counsel, as independent contractors, are not entitled to the FDCPA's state-officer exemption. The Supreme Court reversed. The Court found that even if special counsel are not "state officers" under the Act, their use of the Attorney General's letterhead does not violate Section 1692e. The letterhead identifies the principal—Ohio's Attorney General—and the signature block names the agent—a private lawyer. A debtor's impression that a letter from special counsel is a letter from the Attorney General's Office is "scarcely inaccurate." *Sheriff v. Gillie*, 136 S. Ct. 1594 (2016). https://www.supremecourt.gov/opinions/15pdf/15-338_lkgn.pdf

Supreme Court Holds That "Actual Fraud" Under Section 523(a)(2)(A) of the Bankruptcy Code May Include Fraudulent Transfers That Occur Without False Representations. The United States Supreme Court held that the phrase "actual fraud" under section 523(a)(2)(A) of the Bankruptcy Code may include fraudulent transfer schemes that were effectuated without a false representation. Section 523(a)(2)(A) provides that an individual debtor will not be discharged from certain debts to the extent that those debts were obtained by false pretenses, false representations or actual fraud. The Court's decision resolves a conflict in the interpretation of actual fraud under section 523(a)(2)(A) between the Fifth and Seventh Circuits. *Husky Int'l Elecs. v. Ritz*, 136 S. Ct. 1540 (2016). https://www.supremecourt.gov/opinions/15pdf/15-145_nkp1.pdf

Standing under FCRA requires "injury in fact." An injury in fact is a requirement for standing under Article III of the Constitution. In the instant case, Robins filed a class-action complaint in the United States District Court for the Central District of California, claiming, among other things, that Spokeo willfully failed to comply with the FCRA. The Court noted that to establish injury in fact, a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." A "concrete" injury must be "de facto"; that is, it must actually exist— "real," and not "abstract." The Ninth Circuit's analysis focused on the second characteristic (particularity), but it overlooked the first (concreteness). It did not address the question framed by our discussion, namely, whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). https://www.supremecourt.gov/opinions/15pdf/13-1339_f2q3.pdf

FEDERAL CIRCUIT COURTS

NLRA prohibits class action waivers. The Ninth Circuit followed the Seventh Circuit's lead and held that an arbitration agreement with employees that included a waiver of the right to bring claims through a collective, representative, or class action violated employees' right to engage in collective activity under the National Labor Relations Act (NLRA) and was, therefore, unenforceable. The courts of appeal for the Second Circuit, Fifth Circuit, and Eighth Circuit previously reached opposite holdings, making this issue ripe for Supreme Court review. *Morris v. Ernst & Young, LLP* ____ F.3d ____ (9th Cir. 2016). https://cdn.ca9.uscourts.gov/datastore/opinions/2016/08/22/13-16599.pdf

Arbitration agreement in employee handbook not enforceable unless it contains a savings clause. Following *In re Halliburton*, 80 S.W.3d 566 (Tex. 2002), the Fifth Circuit held that the employer's arbitration agreement, contained within its employee handbook, failed to include a *Halliburton*-type savings clause that required advance notice before termination of an arbitration agreement became effective—and thus the agreement was illusory and unenforceable. *Nelson v. Watch House Int', L.L.C.*, 815 F.3d 190 (5th Cir. 2016). http://caselaw.findlaw.com/us-5th-circuit/1728016.html

Defendant Not Liable for Faxes Sent Outside of Agreed-Upon Range. The Seventh Circuit held that a Telephone Consumer Protection Act defendant was not liable in a case involving notorious marketing company Business to Business Solutions (B2B). The court found that the defendant did not authorize B2B to send thousands of faxes on its behalf. *Bridgeview Health Care Ctr v. Clark*, 816 F.3d 935 (7th Cir. 2016). https://jenner.com/system/assets/assets/9370/original/Bridgeview_20v._20Clark.pdf

No agreement to arbitrate in online contract. The Seventh Circuit analyzed TransUnion's website and the user experience. It noted that the user was required to take steps through a scroll-through menu, with a button to click through to authorize TransUnion to request the user's financial information. The court also noted that the website did not call the user's attention to the Service Agreement, which contained the arbitration clause "buried at page 8," nor did the scroll-through buttons advise the user of the agreement or that he or she was agreeing to its terms. Thus, the court stated that there was no notice to the TransUnion customers that they were agreeing to the terms of the Service Agreement, and that it was not enough that the website provided a scroll-through menu and a hyperlinked copy of the agreement. The court agreed with the district court order, holding that no agreement that contained an arbitration clause was formed, and it thus affirmed the denial of TransUnion's motion to compel arbitration. *Sgouros v. TransUnion Corp.*, 817 F.3d 1029 (7th Cir. 2016). http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2016/D03-25/C:15-1371:J:Wood:aut:T:fnOp:N:1726817:S:0

DTPA does not apply to suit against lender. The Fifth Circuit affirmed the dismissal of a borrower's claims against her lender arising out of a foreclosure, holding among other things that alleged discrepancies as to the lender's automatic payment withdrawal services did not state a claim under the Texas Deceptive Trade Practices Act (DTPA). The court noted a claim under the DTPA requires that: (1) the plaintiff is a consumer; (2) the defendant was false, misleading, or deceptive; and (3) the defendant's acts were a producing cause of the plaintiff's damages. To qualify as a consumer under the DTPA, the borrower must have "sought or acquired goods or services" and those "goods or services . . . must form the basis of the complaint." The goods or services must be an "objective of the transaction and not merely incidental to it." The Fifth Circuit held that automatic withdrawal "services" that the lender provided were "incidental to the loan" and served no other purpose but to facilitate the loan. *Villarreal v. Wells Fargo Bank, N.A.*, 814 F.3d 763 (5th Cir. 2016). http://www.ca5.uscourts.gov/opinions%5Cpub%5C15/15-40243-CV0.pdf

Discrepancies as to the lender's automatic payment withdrawal services did not state a claim under the Texas Deceptive Trade Practices Act (DTPA).

Litigation for eight months waives right to arbitration. Employee brought claims in Minnesota state court against employer. In response, the employer removed the case to federal court, filed an answer asserting 24 affirmative defenses, and later moved to transfer the case to federal court in California. Only after the federal judge in Minnesota denied the motion to transfer did the employer move to compel arbitration. That motion came eight months after the plaintiff had filed his complaint. The district court denied the motion to compel, finding the employer had waived its right to arbitrate, and the appellate court affirmed that result. *Messina v. North Cent. Distrib., Inc.*, 821 F.3d 1047 (8th Cir. 2016). http://caselaw.findlaw.com/us-8th-circuit/1734521.html

Filing a proof of claim in a time-barred debt violates FDCPA. The U.S. Court of Appeals for the Eleventh Circuit affirmed its 2014 holding that a debt collector violates the Fair Debt Collection Practices Act when it files a proof of claim in a bankruptcy case on a debt that it knows to be time-barred. In this case, the debt collector argued that the earlier decision put the FDCPA and the Bankruptcy Code in irreconcilable conflict. The court disagreed. The court explained:

> Although the Code certainly allows all creditors to file proofs of claim in bankruptcy cases, the Code does not at the same time protect those creditors from all liability. A particular subset of creditors—debt collectors—may be liable under the FDCPA for bankruptcy filings they know to be time-barred.

Johnson v Midland Funding LLC, 823 F.3d 1334 (11th Cir. 2016). http://business.cch.com/BFLD/johnson_05252016.pdf

Seventh Circuit accepts NLRB's position regarding class action waivers in arbitration. The long-running battle between National Labor Relations Board and employers regarding the lawfulness of class and collective action waivers in employment arbitration agreements continues. The U.S. Court of Appeals for the Seventh Circuit issued the first federal appellate court decision to agree with the NLRB's position that mandatory employment arbitration agreements that require employees to waive the right to engage in class or collective actions in court violate the National Labor Relations Act. *Lewis v. Epic Sys.*

Corp., 823 F.3d 1147 (7th Cir. 2016). http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2016/D05-26/C:15-2997:J:Wood:aut:T:fnOp:N:1760877:S:0

Debt collector's letter to consumer is subject to Fair Debt Collection Practices Act. The Eleventh Circuit joined the Third, Fourth, and Seventh Circuits in holding a collection notice sent to a consumer's attorney is an indirect communication. The court held that an attorney is a channel to the consumer, and thus a collection letter sent to the consumer's attorney is an indirect communication with the consumer. The court also held that the letter must contain a notice the consumer may dispute the debt "in writing." The defendant debt collectors argued that the "in writing" requirement should be analyzed separately from the other 15 U.S.C. §1692g protections. The court, however, held that there is no textual basis for treating the "in writing" requirement differently from the other rights. Instead, the court held, only by applying §1692g to attorney communications can it be ensured that consumers receive both legal representation and the full protections intended by Congress. *Bishop v. Ross Earle & Bonan, P.A.*, 817 F.3d 1268 (11th Cir. 2016). http://media.ca11.uscourts.gov/opinions/pub/files/201512585.pdf

Fair Debt Collection Practices Act (FDCPA) does not prohibit debt collectors from filing a collection lawsuit without intending to proceed to trial to obtain a judgment. The defendant debt collectors filed suit in state court to recover on the plaintiffs' delinquent credit card accounts. When the debtors contested the collection lawsuits, the debt collectors moved to voluntarily dismiss the actions with prejudice. The Seventh Circuit held that the plaintiffs failed to state a viable claim under the FDCPA. The court held that the plaintiffs did not sufficiently allege that the defendants did not intend to proceed to trial when they initially filed their complaints in state court. The Seventh Circuit noted that the fact that the defendants voluntarily moved to dismiss their suits prior to trial did not suggest that they had no intention of ever going to trial, indicating there are many reasons why a litigant would want to dismiss its own case. *St. John v. Cach, LLC*, 822 F.3d 388 (7th Cir. 2016). http://caselaw.findlaw.com/us-7th-circuit/1735519.html

Debt collection letter violated FDCPA. The U.S. Court of Appeals for the Seventh Circuit recently held that neither extrinsic evidence of confusion, nor materiality, is required for claims under § 1692g(a) of the federal Fair Debt Collection Practices Act (FDCPA). The Court also held that a company that is itself a debt collector may be liable for the violations of the FDCPA by its debt collector agent. *Janetos v. Fulton Friedman & Gullace, LLP*, 825 F.3d 317 (7th Cir. 2016). http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2016/D04-07/C:15-1859:J:Hamilton:aut:T:fnOp:N:1733811:S:0

Good faith reliance on law is a bona fide error under FDCPA. Collector filed a collection lawsuit against Oliva in the first municipal district of the Circuit Court of Cook County. Under the Seventh Circuit's 1996 *Newsom* decision, interpreting the Fair Debt Collection Practices Act (FDCPA) venue provision, debt collectors were allowed to file suit in any of Cook County's municipal districts if the debtor resided in Cook County or signed the underlying contract there. While the Oliva suit was pending, the Seventh Circuit overruled *Newsom*, with retroactive effect (Suesz, 2014). One week later, Blatt voluntarily dismissed the suit. Oliva sued Blatt for violating the FDCPA's venue provision as newly interpreted by Suesz. The district court granted Blatt summary judgment, finding that it relied on *Newsom* in good faith and was immune from liability under the FDCPA's bona fide error defense, 15 U.S.C. 1692k(c), which precludes liability for unintentional violations resulting from a good-faith mistake. The Seventh Circuit affirmed the district court's decision upholding the collector's bona fide error defense. The court rejected an argument that the defense should not apply because the firm's violation resulted from its mistaken interpretation of the law. It found the firm simply followed the circuit's controlling law; its failure to foresee the retroactive change of law was not a mistaken legal interpretation, but an unintentional bona fide error. *Oliva v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 825 F.3d 788 (7th Cir. 2016). http://www.insidearm.com/wp-content/uploads/Oliva-v-Blatt.pdf?d323c3

Approval of marketing strategy is sufficient to establish TCPA liability. The Sixth Circuit held that approval of the marketing strategy used by a third party was sufficient to establish the possibility of liability under the Telephone Consumer Protection Act. The court reversed summary judgment in favor of a defendant in a putative class action. The dispute centered around an allegedly unsolicited fax advertisement received by Siding and Insulation Company in November 2005 promoting the services of Alco Vending. *Siding & Insulation Co. v. Alco Vending, Inc.*, 822 F.3d 886 (6th Cir. 2016). http://www.opn.ca6.uscourts.gov/opinions.pdf/16a0110p-06.pdf

Discovery rule applies to Fair Debt Collection Practices Act claims. The Ninth Circuit held that the discovery rule applies equally regardless of the nature of the federal Fair Debt Collection Practices Act (FDCPA) violation alleged by a plaintiff. Therefore, according to the Ninth Circuit, the FDCPA statute of limitations begins to run in all cases when the plaintiff knows or has reason to know of the injury which is the basis of the action. *Lyons v. Michael & Assoc.*, 824 F.3d 1169 (9th Cir. 2016). https://cdn.ca9.uscourts.gov/datastore/opinions/2016/06/08/13-56657.pdf

FDCPA unambiguosly requires any debt collector, first or subsequent, to send a validation notice within five days of its first communication with the consumer. The Ninth Circuit reversed the lower court, which held that the validation notice requirement of section 1792(g)(a) applied to only the first collector. Applying well-established tools of statutory interpretation and construing the language in section 1692g(a) in light of the context and purpose of the FDCPA, the Ninth Circuit held that the phrase "the initial communication" refers to the first communication sent by any debt collector, including collectors that contact the debtor after another collector already did. *Hernandez v. Williams, Zinman & Parham PC*, ____ F.3d ____ (9th Cir. 2016). http://business.cch.com/BFLD/hernandez_07212016.pdf

Procedural violation of FDCPA constitutes a concrete injury. In an unpublished opinion, the U.S. Court of Appeals for the Eleventh Circuit held that a consumer alleging that she did not receive disclosures required by the federal Fair Debt Collections Practices Act (FDCPA) sufficiently alleged that she suffered a concrete injury, and thus satisfied the standing doctrine's injury-in-fact requirement under Article III of the U.S. Constitution.

The court discussed the holding in *Spokeo*, in which the Supreme Court explained that in order to "establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." While an injury must be "concrete," which means "real" and not "abstract," the Supreme Court in *Spokeo* held that "an injury need not be tangible to be concrete and reiterated that Congress may elevate to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law." Accordingly, "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact." *Church v. Accretive Health Inc.*, 2016 ____F.3d ____ (11th Cir. 2016). http://media.ca11.uscourts.gov/opinions/unpub/files/201515708.pdf

Whether communication states it is from a debt collector is measured by least sophisticated consumer standard. The Ninth Circuit held that if a subsequent communication is sufficient to disclose to the least sophisticated debtor that the communication was from a debt collector, there is no violation of § 1692e(11) even if the debt collector did not expressly state, "this communication is from a debt collector." The court stated, "We conclude, given the extent of the prior communications, that the voicemail message's statement that the call was from "Gregory at Hollins Law" was sufficient to disclose to a debtor with a basic level of understanding that the communication at issue was "from a debt collector," Indeed, any other interpretation of Daulton's voicemail message would be "bizarre or idiosyncratic." *Davis v. Hollins Law*, ____ F.3d ____ (9th Cir. 2016). http://cdn.ca9.uscourts.gov/datastore/opinions/2016/08/08/14-16437.pdf

Filing proof of claim in bankruptcy on a stale debt does not violate FDCPA. The Seventh Circuit, recognizing a split among the circuits, held that filing a proof of claim for a debt barred by limitations does not violate the Fair Debt Collection Practices Act. The court recognized possible harm that could be caused to the consumer and other creditors, but stated, "the risk of this outcome in such cases is not sufficient to support a FDCPA claim in the cases currently before us, where plaintiffs' attorneys successfully objected to proofs of claim that were neither false nor misleading." *Owens v. LVNV Funding, LLC*, ____ F.3d ____ (7th Cir. 2016). http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2016/D08-10/C:15-2044:J:Flaum:aut:T:fnOp:N:1808685:S:0

Parking lot ticket is debt for purposes of FDCPA. The Seventh Circuit reversed a lower court decision finding that unpaid parking obligations are not "debts" as that term is defined in section 1692a(5). The Seventh Circuit stated, "the obligations at issue are 'debts' within the meaning of the FDCPA. That statutory term comprises obligations 'arising out of' consumer 'transactions.' Parking in a lot that is open to all customers subject to stated charges is a 'transaction.' The obligation that arises from that transaction is a 'debt,' and an attempt to collect it must comply with the FDCPA." *Franklin v. Parking Revenue Recovery Servs., Inc.*, ____ F.3d ____ (7th Cir. 2016). http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2016/D08-10/C:14-3774:J:Sykes:aut:T:fnOp:N:1808788:S:0

Court refuses to enforce Chinese arbitration award. In a substantial addition to US arbitration jurisprudence, the Tenth Circuit affirmed the ruling of the district court and declined to enforce the award. Applying US due process standards, the Tenth Circuit concluded that the "Chinese-language notice was not reasonably calculated to apprise LUMOS of the proceedings" where "[a]ll previous communications between CEEG and LUMOS had been in English, the Contract reinforced that English would govern the relationship by requiring that the English language version of the Contract would control, and the Agreement memorialized the parties' understanding that all interactions and dispute resolution proceedings would be in English." *CEEG (Shanghai) Solar Sci. & Tech. Co., Ltd v. LUMOS LLC*, ____ F.3d ____ (10th Cir. 2016). https://www.ca10.uscourts.gov/opinions/15/15-1256.pdf

FEDERAL DISTRICT COURTS

Arbitration agreement did not waive all class actions, and class action waiver may still be unconscionable outside of arbitration. Applying California law, the U.S. District Court for the Southern District of New York, held that imprecise language in an arbitration agreement did prohibit a class action outside of arbitration. The court also ruled that the *Discover Bank* rule applied to class action waivers outside of arbitration. *Meyer v. Kalanick*, ____ F.Supp. 2d ____ (S.D.N.Y 2016). http://www.bloomberglaw.com/public/desktop/document/Meyer_v_Kalanick_No_15_Civ_9796_2016_BL_146530_SDNY_May_07_2016_C?1462978067

Voluntary language to pay off a debt in a demand letter is not misleading and thus does not violate the FDCPA. The demand letter to the consumer stated that the consumer had "the chance to pay what [he] owe[s] voluntarily." The Southern District of Illinois reviewed the language offering the consumer a chance to pay voluntarily as being, at most, puffery and held that such statements are allowed under the FDCPA since "it is perfectly obvious to even the dimmest debtor that the debt collector would very much like him to pay the amount demanded straight off, sparing the debt collector any further expense." *Blanchard v. North Am. Credit Servs.*, ____ F.Supp. 2d ____ (S.D. Ill. 2016). http://www.insidearm.com/wp-content/uploads/Blanchard-v.-N.-Am.-Credit-Servs..pdf?d323c3

Failure to sign agreement defeats motion to compel arbitration. The Eastern District of Pennsylvania held that by its own terms an arbitration agreement must be signed to be a valid contract. The court concluded that this language was a clear and unambiguous statement of mutual intent that the parties would only relinquish their litigation rights if they signed the agreement. Because defendant had not signed the "Mutual Agreement" and was not formally bound by it, neither was the plaintiff. Accordingly, the court overruled the motion to dismiss. *Shank v. Fiserv, Inc.*, ____ F.Supp. 2d ____ (E.D. Pa. 2016). http://www.paed.uscourts.gov/documents/opinions/16d0047p.pdf

Freestanding class action waiver enforceable. The Eastern District of Pennsylvania held that a freestanding class action waiver—that is, a waiver that was "independent and outside of an arbitration agreement"—was enforceable and that it rendered the plaintiffs inadequate class representatives. Each of the named plaintiffs' agreements included a clause stating that the plaintiff "waives any right to assert any claims against [the defendant] as a representative or member in any class or representative action." The court held that this language precluded the plaintiffs from serving as adequate class representatives. In so doing, the court rejected the plaintiffs' argument that a class action waiver is substantively unconscionable when executed outside the context of an arbitration clause. *Korea Week Inc. v. Got Capital, LLC*, ____ F.Supp. 2d ____ (E.D. Pa. 2016). https://www.paed.uscourts.gov/documents/opinions/16D0418P.pdf

The Eastern District of Pennsylvania held that a freestanding class action waiver—that is, a waiver that was "independent and outside of an arbitration agreement"—was enforceable and that it rendered the plaintiffs inadequate class representatives.

Letter offering settlement on a time barred debt did not threaten litigation and, therefore, did not violate the FDCPA. A district court in New Jersey recently held that a letter offering settlement on a time barred debt did not threaten litigation and therefore did not violate the FDCPA. The court found that the FDCPA permits the debt collector to seek voluntary repayment so long as it does not initiate or threaten legal action. The court was persuaded by the fact that the letter set forth a single lump sum payment option and used the word "settle." The court concluded that under the Circuit's "least sophisticated consumer" standard, the letter did not threaten litigation. *Lugo v. Firstsource Advantage,* ____ F.Supp. 2d ____ (D.N.J. 2016). http://law.justia.com/cases/federal/district-courts/new-jersey/njdce/2:2015cv06405/323834/17/

Letter to consumer sent to address of brother by debt collector does not violate Fair Debt Collection Practices Act. A New York district court considered several claims under the FDCPA involving third party communications. A collection letter addressed to the consumer was sent to his brother's address. According to the complaint, the consumer never resided at the brother's address, never provided the creditor with the address and never used that address to receive mail. According to the plaintiff, the communication violated the FDCPA, including sections 1692c(b) and 1692c(a)(1) of the FDCPA. The court disagreed. Section 1692c(b) of the FDCPA generally prohibits debt collectors from communicating with most third parties except with the prior consent of the consumer. The court noted that the letter was properly addressed to the consumer and "plaintiff's brother only learned of Plaintiff's alleged debt after he violated federal criminal law by opening an envelope that was not addressed to him." The consumer also asserted the letter violated 1692c(a)(1) because, after previously sending correspondence to the consumer at his correct address, the debt collector sent a letter to the consumer at his brother's address, an unusual place or place known or which should have been known to be inconvenient to him. The court found that even if the brother had simply delivered the envelope to plaintiff without opening it, defendant would still have communicated with plaintiff at an unusual or inconvenient place. *Duran v. Midland Credit Mgmt., Inc.,* ____ F.Supp. 2d ____ (S.D.N.Y 2016). http://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2015cv05940/445423/26/

The court also held that the individual defendants may be liable not just for illegal *profits*, but for all of the *revenue* generated by the defendants› alleged illegal practices.

Individual members of law firm may be liable for violations of FDCPA. The U.S. District Court for the Western District of Wisconsin ruled that the Consumer Financial Protection Bureau (CFPB) may hold the owners of two law firms offering debt relief services liable for alleged violations of federal consumer protection laws. The court also ruled that the defendants misrepresented their services to consumers and charged consumers impermissible advance fees. In its opinion, the court punted on the question of whether the defendant law firms' debt relief services qualified as the practice of law and thus were outside of the CFPB's authority. Lastly, the court also held that the individual defendants may be liable not just for illegal *profits*, but for all of the *revenue* generated by the defendants› alleged illegal practices. *Consumer Fin. Prot. Bureau v. Mortgage Law Grp., LLC*, 157 F. Supp. 2d. 813 (W.D. Wis. 2016). http://law.justia.com/cases/federal/district-courts/wisconsin/wiwdc/3:2014cv00513/35529/144/

STATE COURTS

No indemnification by insurer for settlement reached without notice. In a blow to policyholders, the Colorado Supreme Court determined that an insured could not be indemnified for a settlement agreement reached without providing notice of the claim to the insurer, upholding the validity of the policy's "no-voluntary-payments" clause. Insured reached a deal with its contractor over a construction accident before litigation was initiated—and before notifying Travelers Property Casualty Company about the claim. When Travelers refused to indemnify the settlement agreement, relying upon a no-voluntary-payments clause in the policy, Stresscon sued. The Colorado Supreme Court noted the policy provision unambiguously excluded any payments made or obligations assumed without the insurer's consent regardless of whether or not the insurer could demonstrate prejudice and, therefore, Stresscon's deal with the contractor fell outside the scope of coverage. Three members of the court dissented, writing that the state's existing rule requiring insurers to demonstrate prejudice from a failure to comply with a notice requirement should be extended to no-voluntary-payments provisions, a standard clause in commercial general liability policies. *Travelers Prop. Cas. Co. v. Stresscon Corp.*, 370 P.3d 140 (Colo. 2016). https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Opinions/2013/13SC815.pdf

Statute of limitations does not apply to claim to invalidate a homestead lien under the Texas Home-Equity Law. The Texas Supreme Court examined §50(c) of the Texas Constitution, which states, "No . . . lien on the homestead shall ever be valid unless it secures a debt described by this section[.]" The court noted this language is clear, unequivocal, and binding. The primary issue in the instant case is whether a statute of limitations applied to an action to quiet title where a lien securing a home-equity loan does not comply with constitutional parameters. The parties also disputed whether petitioners were entitled to a declaration that respondents forfeited all principal and interest on the underlying loan. The court concluded that liens securing constitutionally noncompliant home-equity loans are invalid until cured and thus not subject to any statute of limitations. The court also denied the forfeiture claim based on its decision *Garofolo v. Ocwen Loan Servicing,* 50 Tex. Sup. J. 920 (Tex. 2016), in which it explained that section 50(a) does not create substantive rights beyond a defense to a foreclosure action on a home-equity lien securing a constitutionally noncompliant loan and that forfeiture is not a constitutional remedy. *Wood v. HSBC Bank USA, N.A.*, 59 Tex. Sup. J. 877 (Tex. 2016). http://caselaw.findlaw.com/tx-supreme-court/1736070.html

Manifest disregard is not grounds for vacating arbitration award under Texas Arbitration Act. The Texas Supreme Court held that the enumerated grounds for vacatur delineated in the Texas Arbitration Act are exclusive. Therefore, manifest disregard of the law is not grounds for vacating an award under the TAA. *Hoskins v. Hoskins*, 59 Tex. Sup. J. 895 (Tex. 2016). http://www.txcourts.gov/media/1376257/150046.pdf

State court is not obligated to follow certain terms of the Federal Arbitration Act. The New Hampshire high court held that an action to compel arbitration under section 2 of the FAA could be enforced in either state or federal court, as the language of section 2 applies to any transaction in interstate commerce. Per the court, however, the state court in an action to confirm or vacate need not be bound by sections 9-11 of the FAA, because those sections specifically reference the federal courts. Thus, the state court could follow the state standards in an action to confirm or vacate. *Finn v. Ballentine*

Partners, LLC, ____ A.3d ____ (N.H. 2016). http://law.justia.com/cases/new-hampshire/supreme-court/2016/2015-0332.html

Delegation clause in arbitration agreement unenforceable. The Supreme Court of New Jersey refused to enforce the delegation clause in a for-profit college's enrollment agreement in a 5-1 opinion. Although the delegation clause had never been specifically challenged by the plaintiffs, as is required by the Supreme Court's decision in *Rent-A-Center,* in order to avoid delegating the issue of arbitrability to the arbitrator, the court found that was immaterial. *Morgan v. Sanford Brown Institute*, 137 A.3d 1168 (N.J. 2016). http://www.chamberlitigation.com/sites/default/files/cases/files/16161616/Opinion%20--%20Morgan%20v.%20Sanford%20Brown%20Institute%20%28NJ%20Supreme%20Court%29.pdf

Arbitration clause does not apply to parties on the same side. A Texas court of appeals held that an arbitration agreement between two individuals and a financial adviser does not apply to a dispute between the two individuals. The court noted that under the purchase agreement, the words "we," "us," and "our" referred to UCFA, and "you" and "your" referred to David and William individually and collectively and to their firm, Swearingen Financial Group. The agreement provided that if a dispute arose related to the agreement, "you and UCFA agree" to arbitrate such claim "upon notice by either party to the other." It also provided that, in the event of such arbitration, "[y]ou and we will, by joint agreement, select a single arbitrator." The Court held that, although the agreement did not specifically state it only applied to disputes between UCFA on the one hand and David and William on the other, that is the only reasonable interpretation of the agreement. *Swearingen v. Swearingen*, ____ S.W.3d ____ (Tex. App.—Dallas 2016). http://law.justia.com/cases/texas/fifth-court-of-appeals/2016/05-15-01199-cv.html

DECEPTIVE TRADE PRACTICES AND WARRANTY

"AS IS" DOES NOT DEFEAT DTPA CLAIM

Bishop v. Creditplex Auto Sales LLC., ____ S.W.3d ____ (Tex. App. — Dallas 2016).
https://casetext.com/case/christin-bishop-v-creditplex-auto-sales-2

FACTS: Appellant, Christin Bishop bought a used car from Appellee, Creditplex Auto Sales. An "AS IS – NO WARRANTY" sticker was displayed on the window of the car and the sales contract Bishop signed incorporated an as-is clause. A Creditplex salesperson told Bishop that she could trade in the car for something bigger after paying on it for about a year. After purchasing the car, Bishop took the car to a dealership and the dealership refused to take it in on trade because it had frame damage. No one told Bishop that the car had frame damage.

Bishop filed suit alleging Creditplex violated the Deceptive Trade Practices Act ("DTPA") by failing to disclose that the car had previously been in a wreck. The trial court granted Creditplex's directed verdict based on the as-is clause displayed on the car's window and incorporated into the sale contract. Bishop appealed.

HOLDING: Reversed.

REASONING: Bishop argued that the evidence raised a genuine fact issue regarding whether the "as-is" clause was enforceable based on the totality of the circumstances surrounding the transaction. A buyer is not bound by an agreement to purchase something "as is" when he is induced to purchase because of a fraudulent representation or concealment of information by the seller.

The court agreed with Bishop that her testimony created a reasonable inference that she relied on Creditplex's representation, and would not have bought the car but for the statement that she could trade it in. Further, Bishop's expert's testimony that the car was worthless because of the undisclosed accident created a reasonable inference that Bishop was injured by Creditplex's fraudulent representation. Because Bishop raised a genuine issue of fact regarding the fraudulent representation exception, the as-is clause did not conclusively defeat the DTPA claim.

HOMEOWNER'S WARRANTY ARBITRATION CLAUSE IS NOT UNCONSCIONABLE

PORTION OF ARBITRATION AGREEMENT STRIPPING THE ARBITRATORS OF AUTHORITY TO AWARD FEES IS INVALID

Bonded Builders Homewarranty Ass'n of Tex., Inc. v. Smith, 488 S.W.3d 468 (Tex. App. — Dallas2016).
https://casetext.com/case/bonded-builders-home-warranty-assn-of-tex-inc-v-smith-1

FACTS: Appellees, James B. Smith and Michelle Eyrich bought a home that included an express limited warranty (the "Warranty") issued by Appellant, Bonded Builders Home Warranty Association of Texas. Appellees later filed suit against Appellant based on alleged defects in the home and Appellant's subsequent refusal to accept Appellees' claims under the warranty. In response to the lawsuit, Appellant filed a motion to compel arbitration asserting that Appellees' claims arose exclusively out of the Warranty and that there was no valid defense to the enforceability of the arbitration agreement. Appellees answered by contending that the entire arbitration clause was unconscionable. Appellees argued that the clause, in combination with a general condition in the Warranty that attempted to eliminate their right to seek reimbursement of attorney's fees, was grossly one-sided and was meant to oppress potential plaintiffs and deter them from bringing claims against Appellant.

The trial court denied Appellant's motion to compel arbitration in its entirety. Appellant timely filed an interlocutory appeal.

HOLDING: Reversed and remanded.

REASONING: Appellant asserted that Appellees' procedural unconscionability argument—namely, that a gross disparity existed between the two parties—was not made in the trial court and was wholly unsupported by evidence. The court agreed, noting that no evidence existed in the record that showed a gross disparity between Appellees and Appellant. Therefore, the court ruled that the trial court erred to the extent that it concluded the arbitration agreement was unconscionable based on gross disparity.

While certain DTPA remedies may be contractually waived, such a waiver must be conspicuous and in bold-face type of at least ten points in size, identified by the heading "Waiver of Consumer Rights."

Additionally, Appellees argued that even if a gross disparity did not exist, the arbitration clause was unconscionable because Appellant's warranty deprived arbitrators of the authority to grant Appellees' damages and attorney's fees otherwise available to them under the Deceptive Trade Practices Act ("DTPA"). The court agreed, noting that while certain DTPA remedies may be contractually waived, such a waiver must be conspicuous and in bold-face type of at least ten points in size, identified by the heading "Waiver of Consumer Rights." The court explained that nothing in the record showed that Appellees had been presented with, nor agreed to, such a waiver. Therefore, the court held that this portion of the arbitration agreement was invalid.

Finally, the arbitration provision stated that if any portion of the agreement was found to be unenforceable by a court, that the remaining provisions would be deemed to be severable there from and enforceable according to their terms. For this reason, the court ordered the severing of the provision's limitation on Appellee's statutory right to recovery of attorney's fees and the granting of Appellant's motion to compel arbitration.

DTPA DOES NOT APPLY TO SUIT AGAINST LENDER

Villarreal v. Wells Fargo Bank, N.A. 814 F.3d 763 (5th Cir. 2016).
https://casetext.com/case/villarreal-v-wells-fargo-bank-na

FACTS: Zaida Villarreal became the sole obligor of a home mortgage with Wells Fargo Bank, N.A. after her divorce. The terms of the mortgage included monthly mortgage installments and authorized Wells Fargo to foreclose upon default. The terms also specified that all correspondence was to be sent to Villarreal's address on Bales Road unless Wells Fargo was notified by first-class mail to send the notices elsewhere. Villarreal was over $7,300 in default when Wells Fargo foreclosed on the home. Villarreal filed suit alleging that Wells Fargo had violated the DTPA for failure to make automatic withdrawals from her checking account to pay the loan.

The district court dismissed the case for failure to state a claim and denied Villarreal's motion to amend the complaint. Villarreal appealed.

HOLDING: Affirmed.

REASONING: The court ruled that Villarreal was not a "consumer" under the Deceptive Trade Practices Act ("DTPA"). The DTPA defines a consumer as a plaintiff who "sought or acquired goods or services by purchase or lease," and those "goods or services… must form the basis of the complaint." The goods and services must be an objective of the transaction, not merely incidental. The court reasoned that automatic payment withdrawals are not services that form the basis of a DTPA claim because they are incidental to the loan and would "serve no purpose apart from facilitating the mortgage loan."

The goods and services must be an objective of the transaction, not merely incidental.

INSURANCE

THE TERM "NARCOTIC" IN AN INSURANCE POLICY EXCLUSION INCLUDES ECSTASY.

Crose v. Humana Ins. Co., 823 F.3d 344 (5th Cir. 2016).
https://casetext.com/links/9fipc2jb8cyq6w51ey6jbe64h

FACTS: Plaintiff-Appellant Crose was informed by her husband that he was nauseated and sick after ingesting ecstasy. The next morning, Crose found her husband on the ground in the backyard non-responsive with his face covered in vomit. Crose called for an ambulance and told the operator that she believed her husband had overdosed. The doctor who initially treated Crose's husband ordered a urine drug screen and found evidence of ecstasy, prescription tranquilizer, and marijuana.

Crose's husband had an individual health insurance policy with Defendant-Appellee ("Humana") and submitted a claim with Humana to cover the cost of medical services and treatments as a result of his stroke. Humana denied the claim by citing the causation exclusion policy, which did not cover loss due to being intoxicated or under the influence of any narcotic unless administered on the advice of a health care practitioner. Crose brought suit, claiming breach of contract and unfair insurance practices. Humana filed a motion of summary judgment, which the district court granted. Crose appealed.

The court explained that the district court did not err in applying the ordinary and generally accepted meaning of the term "narcotic" as a drug sold for non-medical purposes which is either prohibited or under strict legal control.

HOLDING: Affirmed.

REASONING: Crose argued that ecstasy should be classified as "hallucinogen" instead of a "narcotic." The court rejected this argument by explaining that ecstasy was a narcotic, not a hallucinogen, because classifying it as a "hallucinogen" would be technical in nature and therefore unreasonable. The court reasoned further that since the policy did not define the term "narcotic," it was necessary to determine whether the term had a "definite or certain legal meaning."

The court explained that the district court did not err in applying the ordinary and generally accepted meaning of the term "narcotic" as a drug sold for non-medical purposes which is either prohibited or under strict legal control. Texas law requires that an undefined term in an insurance policy be given its ordinary and generally accepted meaning. The court held that since Humana met its burden of showing that the term "narcotic" included ecstasy and showed that the ingestion of ecstasy was a significant or substantial cause of his stroke, Humana proved the insurance policy's exclusion of ecstasy.

CONSUMER CREDIT

STANDING UNDER THE FCRA REQUIRES "INJURY IN FACT"

Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016), *as revised* (May 24, 2016).
https://casetext.com/case/spokeo-inc-v-robins-2

FACTS: Robins brought suit, on his own behalf and on behalf of a class of similarly situated individuals, against Spokeo, Incorporated. Robins alleged procedural violations of the Fair Credit Reporting Act of 1970 ("FCRA"), resulting in dissemination of inaccurate personal information.

The district court dismissed Robins' complaint for failure to properly plead injury in fact, as required by Article III standing. The Ninth Circuit reversed, finding Robins had a particularized personal interest in the handling of his credit information. The Ninth Circuit concluded the alleged violations of Robins' statutory rights under the FCRA were sufficient to satisfy the injury in fact requirement for standing. The Supreme Court granted certiorari.

HOLDING: Vacated and remanded.

REASONING: After Robins appealed to the United States Court of Appeals for the Ninth Circuit, the Supreme Court vacated and remanded the Ninth Circuit's holding that the plaintiff had standing to pursue his claims under the FCRA. The Court held that the Ninth Circuit's injury-in-fact analysis only examined the particularization element, and omitted the independent "concreteness" requirement of Article III standing.

The Court emphasized that concreteness requires an injury "to actually exist," but the "risk" of injury still satisfies the concrete injury requirement. In the holding, the question addressed is the extent of the risk that plaintiffs must allege. The Court concluded that the Ninth Circuit failed to determine whether Spokeo's alleged violations of the FCRA caused a concrete injury required for Article III standing, and remanded for further consideration.

CUSTOMERS WHO MAY HAVE HAD PERSONAL INFORMATION COMPROMISED HAVE STANDING, AT THE MOTION-TO-DISMISS STAGE, TO SUE THE COMPANY

Lewert v. P.F. Chang's China Bistro, Inc., 819 F.3d 963 (7th Cir. 2016).
https://casetext.com/case/lewert-v-pf-changs-china-bistro-inc

FACTS: After dining at Defendant P.F. Chang's China Bistro, Plaintiffs John Lewert and Luca Kosner (collectively as "Plaintiffs") learned that P.F. Chang's computer system was hacked and that their debit and credit card information was stolen.

Plaintiffs sued P.F. Chang's and sought damages for time and resources spent as a result of the data breach. The district court dismissed the suit for lack of standing, reasoning that Plaintiffs did not suffer the requisite personal injury. Plaintiffs appealed.

HOLDING: Reversed and remanded.

REASONING: P.F. Chang's argued that Plaintiffs lacked standing for failing to show requisite injury and causation. The Seventh Circuit rejected P.F. Chang's argument, holding that Plaintiffs satisfied all elements of Article III standing – concrete and particularized injury, causation and redressability.

First, Plaintiffs alleged sufficient future and present injuries to support standing. The increased risk of fraudulent charges and identity theft, as future injuries, were concrete enough to support a lawsuit. It was plausible to infer a substantial risk of harm from the data breach, considering hackers' primary incentive to make fraudulent charges or assume consumers' identities. The court further noted that a potential factual dispute about the scope of the breach did not destroy standing.

Second, Plaintiffs satisfied the causation element by alleging their personal information was compromised because of the data breach, and by including enough facts to make the allegation plausible. Merely identifying potential alternative causes did not destroy standing.

Finally, Plaintiffs satisfied the redressability element because a favorable judgment would redress their injuries. Plaintiffs have easily quantifiable injuries such as costs for purchasing credit-monitoring services.

A TRANSFER OF A TAX LIEN TO A TAX BUYER DOES NOT CONSTITUTE AN EXTENSION OF CREDIT THAT IS SUBJECT TO THE FEDERAL TRUTH IN LENDING ACT (TILA)

Billings v. Propel Fin. Servs., L.L.C., 821 F.3d 608 (5th Cir. 2016).
http://caselaw.findlaw.com/us-5th-circuit/1733533.html

FACTS: Plaintiff David Billings obtained property tax loans from Defendants Propel Financial Services, L.L.C. and other lenders (collectively as "Defendants"), in exchange for transfer of Plaintiff's tax liens. The tax liens were evidenced by promissory notes executed by Plaintiffs and payable to Defendants.

Plaintiffs sued Defendants alleging that Defendants committed Truth in Lending Act ("TILA") violations. Defendants moved to dismiss the suit, contending that TILA does not apply because tax lien transfers are not "consumer credit transactions" as defined by TILA. The district court dismissed the suit and held that TILA does not apply to the tax lien transfers. Plaintiffs appealed.

To be subject to TILA, the tax lien transfers must constitute "consumer credit transactions."

HOLDING: Affirmed.

REASONING: Plaintiffs argued that the tax lien transfers are "consumer credit" subject to TILA because the purpose of the loans was to pay property tax obligations assessed against the property owners' homes and avoid foreclosure. The Fifth Circuit rejected Plaintiffs' argument and held that TILA does not apply to the tax lien transfers because such transfers are not extensions of "credit" subject to TILA.

To be subject to TILA, the tax lien transfers must constitute "consumer credit transactions." However, tax obligations imposed by taxing authority are not debt for purposes of TILA. Tax lien transfers consequently are not debt for purposes of TILA because such transfers preserve the existing claims and only change the entity that property owners are indebted to for taxes. Therefore, Defendants' payments to the relevant taxing authorities and the subsequent transfer of the tax liens and execution of the promissory notes did not change the nature of the underlying debt, nor create new debts that are subject to TILA but instead resulted in transfer of preexisting tax obligations to new entities.

CREDITORS' RIGHTS

LIENS SECURING CONSTITUTIONALLY NONCOMPLIANT HOME-EQUITY LOANS ARE INVALID UNTIL CURED AND THUS NOT SUBJECT TO ANY STATUTE OF LIMITATIONS

Wood v. HSBC Bank USA, N.A. ____ S.W.3d ____ (Tex. 2016). http://law.justia.com/cases/texas/supreme-court/2016/14-0714.html

FACTS: Plaintiffs Alice and Daniel Woods ("Woods") obtained a home-equity loan secured by their homestead in 2004 from Defendants HSBC Bank USA, N.A., and Ocwen Loan Servicing, LLC ("Lenders"). The statute of limitations for constitutional noncompliance claims is four years after closing. Nearly eight years after closing, Woods filed suit against the Lenders alleging that the home equity loan did not comply with the Texas Constitution and Lenders did not attempt to cure the alleged defects. The Woods moved for summary judgment, arguing that the lien was void. Lenders also moved for summary judgment asserting that the lien was voidable and the statute of limitations barred all claims.

The trial court granted summary judgment for Lenders and the court of appeals affirmed. The Woods appealed.

HOLDING: Reversed.

REASONING: The Woods argued that a home-equity lien securing a constitutionally noncompliant loan is invalid until the defect is cured, and that if a lender chooses not to cure after notice the defect is no longer curable, voiding the lien.

The court accepted the Woods's argument, holding that because the Woods were initially charged excessive fees on their home-equity loan in violation of the Texas Constitution, the lien was not valid unless and until the loan defect was cured. Thus, no statute of limitations applied to the Woods's action to quiet title where the lien was not within constitutional parameters.

TEXAS CONSTITUTION § 50(a) DOES NOT CREATE SUBSTANTIVE RIGHTS BEYOND A DEFENSE TO A FORECLOSURE ACTION ON A HOME-EQUITY LIEN SECURING A NONCOMPLIANT LOAN AND FORFEITURE IS NOT A CONSTITUTIONAL REMEDY

Garofolo v. Ocwen Loan Servicing, L.L.C., 626 F. App'x 59 (5th Cir. 2015).
http://law.justia.com/cases/texas/supreme-court/2016/15-0437.html

FACTS: Plaintiff Garofolo sued defendant Ocwen Loan Servicing claiming Ocwen failed to cancel and return the note upon full repayment of a home equity loan. Garofolo sought relief under Article XVI, § 50(a) of the Texas Constitution in the form of Ocwen's forfeiture of all principle and interest payments made under the loan. In the alternative Garofolo requested such relief through a breach-of-contract action.

The district court granted Ocwen's motion to dismiss. Garofolo appealed. The United States Court of Appeals for the Fifth Circuit certified two questions to the Supreme Court of Texas, asking 1) is there a state constitutional right to forfeiture and 2) is forfeiture available through breach-of-contract action when lender or holder fails to return a cancelled note or lease upon full repayment?

HOLDING: Certified questions answered negatively.

REASONING: The court explained that § 50(a) of the Texas Constitution does not directly regulate home equity lending, and only creates the right to freedom from forced sale to satisfy debts other than the exceptions made. There is no constitutional guarantee of a lender's performance. Although there is a harsh remedy when the lender fails to honor the terms and conditions of a loan, forfeiture is not a constitutional remedy. It is a term a home equity loan must include in order to be foreclosure eligible. Garofolo could only rely on the constitutional right to freedom from forced sale if her loan failed to include the release of lien requirement and Ocwen sought to foreclose. However, Ocwen did not seek to foreclose and the plaintiff made all of her timely payments.

The court also decided that Garafolo could not seek forfeiture through her breach of contract claim without actual damages. The forfeiture remedy term in the Garafolo's loan did not apply to a failure to deliver a release of lien, but its forfeiture provision did reference the Texas Constitution. The court elaborated that the forfeiture penalty of the Texas Constitution is only triggered when a lender fails to correct the complained-of deficiency by performing one of six available corrective measures.

Forfeiture is only available if one of the six specific constitutional corrective measures would actually correct the lender's failure to comply with its obligations under the terms of the loan. Ocwen's performance of any of these corrective measures would not provide Garafolo with her release of lien, so forfeiture is an unavailable remedy. Garafolo argued that Ocwen was then required to perform the catch-all corrective measure of a $1000 refund, but the court maintained that because it would not provide her with a release of lien, this remedy was not available and Ocwen's failure to deliver a release was not a violation of the Texas Constitution.

DEBT COLLECTION

PURCHASER OF DEFAULTED DEBT WHO THEN COLLECTED THE DEBT WAS NOT A DEBT COLLECTOR FOR PURPOSES OF FDCPA

Henson v. Santander, 817 F.3d 131 (4th Cir. 2016).
https://casetext.com/case/henson-v-santander-consumer-united-states-inc

FACTS: Plaintiffs brought action against Santander Consumer USA, Inc. under the Fair Debt Collection Practices Act ("FDCPA") after Santander attempted to collect on the defaulted loans it purchased from CitiFinancial. CitiFinancial made the original automobile loans to Plaintiffs.
HOLDING: Affirmed.
REASONING: The Fourth Circuit affirmed the district court's decision that a consumer finance company collecting on its own behalf is a creditor and thus not subject to the FDCPA. The Court concluded that the default status of a debt has no bearing on whether a person qualifies as a debt collector under the threshold definition set forth in 15 U.S.C. § 1692a(6). Rather, the determination is based on whether a person collected debt on behalf of others or for its own account, the main exception being when the principal purpose of the person's business is to collect debt.

Section 15 U.S.C. § 1692a(6) defines a debt collector as (1) a person whose *principal purpose* is to collect debts; (2) a person who *regularly* collects debts *owed to another;* or (3) a person who collects *its own debts,* using *a name other than its own* as if it were a debt collector. It was apparent to the court that Santander did not fall within either of the definitions of "debt collector" set forth by Congress. The complaint also did not allege that Santander's principal business was to collect debts. Nor did the complaint allege that Santander was collecting debts owed to others or using a name other than its own in collecting the debts.

DEBT COLLECTOR'S LETTER TO CONSUMER IS SUBJECT TO FAIR DEBT COLLECTION PRACTICES ACT

COLLECTOR'S LETTER MUST INFORM CONSUMER OF RIGHT TO DISPUTE DEBT "IN WRITING"

Bishop v. Ross Earle & Bonan, P.A., 817 F.3d 1268 (11th Cir. 2016).
https://casetext.com/case/connie-bishop-v-ross-earle-bonan-pa-1

FACTS: Appellees Ross Earle & Bonan, P.A., and Jacob Ensor ("Collectors") sent a debt collection letter to the attorney of Appellant, Connie Bishop. The letter properly informed Bishop that she had thirty days to dispute the debt, but neglected to inform her that she must dispute the debt in writing.

Bishop filed a complaint against the Collectors under the Fair Debt Collection Practices Act ("FDCPA") alleging that the collection letter violated the act by failing to notify Bishop of the requirement that disputes must be in writing. The district court dismissed the complaint with prejudice for failure to state a claim. Bishop appealed.
HOLDING: Reversed and Remanded.
REASONING: The Collectors argued that because the debt-collection letter was sent to Bishop's attorney, and not to Bishop herself, it was not a "communication with a consumer" within the meaning of the FDCPA. The court rejected this argument, explaining that the FDCPA protections could be triggered when a debt collector makes an initial communication with the consumer. Under FDCPA, communication is defined as "the conveying of information regarding a debt directly or indirectly to any person through any medium." Thus, a notice sent to a consumer's attorney is the precise "indirect communication" described in the act. Therefore, debt collector's letter to consumer's attorney is subject to FDCPA.

A notice sent to a consumer's attorney is the precise "indirect communication" described in the act.

Additionally, the Collectors argued that by omitting the "in writing" requirement, they were waiving that requirement and agreeing to allow Bishop to dispute her debt either orally or in writing. The court rejected this argument, noting that the FDCPA does not give debt collectors discretion to omit the "in writing" requirement. The court reasoned that the statute is clear that the collector must notify the consumer of the "in writing" requirement.

Finally, the collectors contended that the "in writing" requirement was unnecessary because a consumer's attorney is capable of researching that requirement and explaining it to the consumer. The court rejected this argument reasoning that a lawyer would not have been less likely to be deceived or misled than a consumer.

VOLUNTARY LANGUAGE TO PAY OFF A DEBT IN A DEMAND LETTER IS NOT MISLEADING AND DOES NOT VIOLATE THE FDCPA

Blanchard v. N. Am. Credit Services, 2016 WL 1408592 (S.D. Ill. Apr. 11, 2016).
http://law.justia.com/cases/federal/district-courts/illinois/ilsdce/3:2015cv01295/72087/14/

FACTS: Plaintiff Bobbie Blanchard filed a complaint alleging that North American Credit Services ("Defendant") violated the Federal Debt Collection Practices Act ("FDCPA") due to defects in their initial demand letter ("the Letter"). The Letter contained conflicting information as to where to correspond. At the top of the letter, a particular address was marked for correspondence. At the bottom of the letter, the address was listed again, but with instructions not to correspond. The Letter also provided debt validation language that met the validation notice requirements under the FDCPA.

At trial, Plaintiff asserted two issues with language of the letter. First, the opportunity to pay voluntarily was a veiled threat of suit. Second, Plaintiff asserted that the conflicting information for where to direct the correspondence was confusing and overshadowed the validation notice. The Defendant filed a Motion to Dismiss contending that Plaintiff failed to state a cause of action.
HOLDING: Granted.
REASONING: The court reviewed the language offering the

consumer a chance to pay voluntarily as being at most, puffery. The court did not believe the Plaintiff provided any evidence that the Defendant's claims were misleading. The court also dismissed the argument of conflicting information being misleading, as Defendant also gave Plaintiff an option to use a website portal to pay the debt.

INDIVIDUAL MEMBERS OF LAW FIRM MAY BE LIABLE FOR VIOLATIONS OF FDCPA

Consumer Finance Protection Bureau v. The Mortgage Law Group, LLP, ____ F.Supp. 3d____ (W.D. Wis. 2016).
http://law.justia.com/cases/federal/district-courts/wisconsin/wiwdc/3:2014cv00513/35529/144/

FACTS: Consumer Finance Protection Bureau ("CFPB") brought action against two limited liability companies and four lawyers associated with them (collectively as "Defendants"), it alleged violations of Consumer Financial Protection Act ("CFPA") and the Bureau's Regulation O, arising from defendants' provision of mortgage assistance relief services to consumers, and relating to alleged misrepresentations about services, failures to make required disclosures, and improper collection of advance fees. Defendants believed they were not subject to the CFPA because of the exceptions set out in Regulation O, however the CFPB disagreed. However, the court found it could not decide as a matter of law whether the corporate defendants qualify for the exemption for attorneys in Regulation O and the Consumer Protection Act. Defendants moved for summary judgment.
HOLDING: Granted in part and remanded, denied in part.
REASONING: Defendants argued that their companies qualified for the attorney exemption in CFPA. This part of the motion was denied. However, the question as to whether the attorneys themselves qualified for the exemption under the act was a question that must be answered by the trial court in further proceedings, because there was a genuine factual dispute as to whether they practiced law in jurisdictions where they served consumers.

FILING A PROOF OF CLAIM IN BANKRUPTCY ON A TIME-BARRED DEBT VIOLATES FDCPA

Johnson v. Midland Funding, LLC., ____ F.3d ____ (2016).
http://caselaw.findlaw.com/us-11th-circuit/1736319.html

FACTS: Plaintiff Johnson filed a Chapter 13 bankruptcy petition in March 2014. Two months later, Midland Funding filed a proof of claim seeking payment of $1,879.71. Midland, a buyer of unpaid debt, had a claim against Johnson from a transaction on her account from May 2003. The claim had occurred before Johnson filed for bankruptcy. The claim arose in Alabama, which has a statute of limitations for a creditor to collect on overdue debt of six years. Johnson and another debtor ("Debtors") sued their respective creditors under the Fair Debt Collection Practices Act ("FDCPA"). The Debtors alleged in their lawsuits that claims were barred by the statute of limitations and the proofs were unfair and in violation of the FDCPA.

The district court saw the Bankruptcy Code ("Code") as giving the creditor a right to file a proof of claim—including a time-barred one if the creditor has a "right to payment" under the state law. The court found the conflict between the code and the FDCPA irreconcilable and held that creditor's right to file a time-barred claim under the Code did not allow debtors to challenge the practice as a violation of the FDCPA. Johnson appealed.
HOLDING: Reversed and remanded.
REASONING: The Court of Appeals reversed the district court's ruling that there was an "irreconcilable conflict" between the Bankruptcy Code and the FDCPA. Further, the court rejected Midland's assertion that the FDCPA effectively forces a debt collector to "surrender its right to file a proof of claim" because of the time-bar. The court explained that the Code does allow claims in a Chapter 13 bankruptcy proceeding by a party who does not necessarily have a right to collect on a claim, and that while creditors can file proofs of claim they know are barred by a particular state's statute of limitations, the creditors can face consequences of filing these claims.

Debt collectors who use unfair, deceptive, misleading or unconscionable means to collect may face civil liability to the debtor. However, the FDCPA applies only to a subset of debt collectors. The court also explained that when two statutes are capable of coexisting, the courts have a duty to regard both as effective. When a debt collector specifically defined by the FDCPA files a proof of claim for a debt that the collector knows to have run its statute of limitations, that creditor must face the consequences imposed by the FDCPA for a misleading or unfair claim. The Code's rules do not protect debt collectors from constraints that Congress has placed on them.

LETTER TO CONSUMER SENT TO ADDRESS OF BROTHER BY DEBT COLLECTOR DOES NOT VIOLATE FAIR DEBT COLLECTION PRACTICES ACT

LETTER SENT TO ADDRESS KNOWN TO NOT BE THE CONSUMER'S VIOLATES FDCPA

Duran v. Midland Credit Mgmt. Inc., ____ F.Supp.3d ____ (S.D.N.Y. 2016).
http://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2015cv05940/445423/26/

FACTS: Plaintiff Jonathan Duran filed suit alleging that Defendant Midland Credit Management violated various sections of the Fair Debt Collection Practices Act ("FDCPA") when it mailed a debt collection letter to Plaintiff at the address of Plaintiff's brother, where Plaintiff had never resided.

Defendant sought to dismiss Plaintiff's second amended complaint for failure to state a claim upon which relief can be granted.
HOLDING: Denied in part, granted in part.
REASONING: Plaintiff argued that Defendant violated §§1692c(b) and 1692c(a)(1) of the FDCPA by mailing a single debt collection letter bearing Plaintiff's name to Plaintiff's brother's address. §1692c(b) prohibits debt collectors from communicating with parties other than the consumer. §1692c(a)(1) prohibits debt collectors from communicating with consumers at an unusual or inconvenient time or place.

The court dismissed Plaintiff's §1692c(b) claim, reasoning that Defendant did not communicate with any person other than Plaintiff in connection with the collection of a debt. The court came to this conclusion because it addressed a sealed envelope to Plaintiff, included no information on the envelope itself concerning a debt, and sent that envelope to Plaintiff's brother's address. The court accepted Plaintiff's §1692c(a)(1) claim, reasoning that Plaintiff sufficiently pled that Defendant communicated with him at an unusual place or a place known or which should be known to be inconvenient to him because it had previously sent correspondence to Plaintiff's correct address, then sent correspondence to Plaintiff's brother's address, where he does not reside.

STATEMENTS OR CONDUCT DIRECTED TO NON-DEBTOR THIRD PARTIES MAY VIOLATE FDCPA

Chung v. Lamb, ____ F. Supp.3d ____ (D. Colo. 2016).
http://www.leagle.com/decision/In%20FDCO%2020160316926/CHUNG%20v.%20LAMB

FACTS: The Plaintiff, Emily Boscoe Chung, discussed a settlement agreement via phone and email with Defendant, Timothy J. Lamb, for amounts due to a third party. The parties reached a settlement agreement (the "Agreement") that did not include a provision releasing Chung from future claims. Subsequent to the Agreement, Chung sought to add a provision releasing her from all future claims, to which Lamb refused.

Chung filed a FDCPA claim, asserting that Lamb's activities violated the FDCPA. Specifically, the claim alleged that Lamb pursued legal action against Chung even after the settlement agreement was reached and refused to accept Chung's payment as full performance of her obligations under the settlement agreement.

The court noted that in other sections of the FDCPA, Congress expressly limited its breadth by distinguishing between consumers and third parties as audiences.

Lamb argued that the borrower must show that the alleged misrepresentation or threats of legal action was made to a "consumer." The court was not persuaded and found that all of the debt collector's alleged conduct was in connection with the debt collection activity that stemmed from the Agreement. Lamb filed a motion to dismiss, arguing that Chung's claims should be dismissed because statements made to Chung's attorney and to the court in court filings are not statements made to the consumer and so do not constitute violations of the FDCPA.

HOLDING: Denied.

REASONING: The court denied Lamb's Motion to Dismiss, holding that all of the debt collector's alleged conduct was in connection with the debt collection activity. The FDCPA is to be construed liberally and no provisions implicated in Chung's claim should be dismissed on the basis that the alleged abusive conduct was communicated to third parties other than the consumer. The court noted that in other sections of the FDCPA, Congress expressly limited its breadth by distinguishing between consumers and third parties as audiences.

FDCPA UNAMBIGUOUSLY REQUIRES ANY DEBT COLLECTOR, FIRST OR SUBSEQUENT, TO SEND A VALIDATION NOTICE WITHIN FIVE DAYS OF ITS FIRST COMMUNICATION WITH THE CONSUMER

Hernandez v. Williams, Zinman & Parham PC, ____ F.3d ____ (9th Cir. 2016).
http://caselaw.findlaw.com/us-9th-circuit/1742734.html

FACTS: Plaintiff-Appellant, Maria Hernandez took out a loan to purchase an automobile. Hernandez was unable to continue making payments, and Thunderbird Collection Specialists, Inc., a debt collector, sent a letter to Hernandez and demanded payment. After their unsuccessful attempt to collect, Thunderbird retained Defendant-Appellee Williams, Zinman & Parham PC ("WZP"), a law firm to continue the collection efforts. WZP sent another collection letter, which outlined the debt owed and informed Hernandez that she could dispute the debt or request additional information about the original creditor. WZP did not include a validation notice informing Hernandez that any dispute or inquiry must be done in writing along with the letter.

Hernandez filed the lawsuit, alleging that WZP violated the Fair Debt Collection Practices Act ("FDCPA") by sending a debt collection letter that lacked the disclosures required under section 1692g(a) of the FDCPA, which specifies that within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector send the consumer a written notice containing the required disclosures. The parties filed cross motions for summary judgment on Hernandez's FDCPA claims. WZP contended that it was not required to comply with that provision because Thunderbird's March letter was initial communication. The district court agreed and granted summary judgment in favor of WZP. Hernandez appealed.

HOLDING: Reversed and remanded.

REASONING: WZP argued that Congress intended the FDCPA § 1692g(a) to require only the initial communication by a debtor to trigger the validation notice requirement. Therefore, WZP argued that it was not obligated to send a validation notice because the initial communication was sent by Thunderbird in the form of a collection letter. The court rejected WZP's argument. The court concluded that when read alone, the phrase "the initial communication" is ambiguous, but when examined in relation to the broader structure of the FDCPA, the phrase unambiguously means that each debt collector, first or subsequent, must satisfy the validation notice requirement when that respective debt collector makes an initial communication.

LETTER OFFERING SETTLEMENT ON A TIME BARRED DEBT DID NOT THREATEN LITIGATION AND, THEREFORE, DID NOT VIOLATE THE FDCPA

Lugo v. Firstsource Advantage, ____ A.3d ____ (D.N.J. 2016).
https://casetext.com/case/lugo-v-firstsource-advantage-llc

FACTS: Wendy Lugo ("Plaintiff") defaulted on payment on her account and incurred a financial obligation to First Source Advantage ("Defendant"). Defendant mailed Plaintiff a letter seeking payment to settle the debt.

Plaintiff filed suit, alleging that Defendant engaged in

unfair and deceptive acts in violation of the Fair Debt Collection Practices Act ("FDCPA"). Specifically, Plaintiff alleged that Defendant sent the letter to mislead her into paying the entire debt, or to deceive her into making partial payment in order to reset the statute of limitations. This would have the effect of renewing its ability to legally collect the debt. Defendant filed a motion to dismiss.
HOLDING: Granted.
REASONING: Plaintiff argued that precedent that interprets the FDCPA as permitting a debt collector to seek voluntary repayment of a time-barred debt, so long as the debt collector does not threaten legal action in connection with its debt collection efforts, should not control.

The court rejected Plaintiff's argument, reasoning that the letter here did not threaten legal action and thus did not violate the FDCPA.

FILING PROOF OF CLAIM ON TIME-BARRED DEBT DOES NOT VIOLATE FDCPA

Nelson v. Midland Credit Mgmt., ____ F.3d ____ (8th Cir. 2016).
http://media.ca8.uscourts.gov/opndir/16/07/152984P.pdf

FACTS: Plaintiff-Appellant Domick R. Nelson defaulted on a consumer debt in November 2006 and in February 2015 she filed a Chapter 13 petition in bankruptcy court. Defendant-Appellee Midland Credit Management, Inc., as agent for the creditor, filed a proof of claim in bankruptcy court for the amount of the debt. Nelson objected to the proof of claim as time-barred and the bankruptcy court agreed, disallowing Midland's claim. Nelson then sued Midland, alleging that by filing the proof of claim on the time-barred debt, Midland violated the Fair Debt Collection Practices Act ("FDCPA").

The district court dismissed for failure to state a claim, holding that the FDCPA is not implicated by a debt collector filing an accurate and complete claim on a time-barred debt. Nelson appealed.
HOLDING: Affirmed.
REASONING: Nelson alleged that Midland violated the FDCPA by falsely representing "the character, amount, or legal status" of the debt, 15 U.S.C. §1692e(2)(A) and by threatening to take action "that cannot legally be taken or that is not intended to be taken," §1692e(5). Specifically, Nelson argued that Midland, by submitting its claim, represented that the claim was valid and enforceable. Nelson then urged the court to follow the Eleventh Circuit and extend to bankruptcy claims the prohibition of actual or threatened litigation on time-barred debts. The Eighth Circuit rejected this argument by reasoning that a defendant's FDCPA liability turns on whether an unsophisticated consumer would be harassed, misled, or deceived by the debt collector's acts, and the bankruptcy process protects against such harassment and deception.

In explaining why they declined to follow the Eleventh Circuit, the Eighth Circuit reasoned that the Eleventh Circuit ignored the differences between a bankruptcy claim and actual or threatened litigation. The court noted that defending a lawsuit to recover a time-barred debt is more burdensome than objecting to a time-barred proof of claim. Unlike defendants facing a collection lawsuit, a bankruptcy debtor is aided by trustees who owe fiduciary duties to all parties and have a statutory obligation to object to unenforceable claims. As such, the court stated that the protections of the bankruptcy process against harassment and deception satisfy the relevant concerns of the FDCPA.

GOOD FAITH RELIANCE ON LAW IS A BONA FIDE ERROR UNDER FDCPA

Olivia v. Blatt, Hasenmiller, Leibsker & Moore, LLC, ____ F.3d ____ (7th Cir. 2016).
http://law.justia.com/cases/federal/appellate-courts/ca7/15-2516/15-2516-2016-06-14.html

FACTS: Defendant Blatt, Hasenmiller, Leibsker & Moore LLC, ("Blatt") filed collection lawsuit against Plaintiff Ronald Oliva, in compliance with Seventh Circuit's interpretation of the Fair Debt Collection Practices Act's ("FDCPA") venue provision in *Newsom v. Friedman*, 76 F.3d 813 (7th Cir. 1996). The circuit court later overruled *Newsom* with retroactive effect in *Suesz v. Med-1 Solutions, LLC*, 757 F.3d 636 (7th Cir. 2014).

After the *Suesz* decision, Blatt voluntarily dismissed its action without prejudice and Oliva sued Blatt for violating the FDCPA venue provision based on *Suesz* ruling. The district court granted summary judgment in favor of Blatt concluding that Blatt was protected from liability under the FDCPA's bona fide error defense. Oliva appealed.
HOLDING: Affirmed.
REASONING: Oliva argued that Blatt was retroactively liable under *Suesz* because it filed suit in violation of *Suesz*. The circuit court rejected Oliva's argument and held that Blatt was not liable because Blatt's violation of the FDCPA's venue provisions was the result of a bona fide reliance.

The court concluded that Blatt relied in good faith on the then-binding precedent.

Blatt was protected from liability under the bona fide error defense because it successfully showed "by preponderance of evidence that its violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid such error.: The court concluded that Blatt relied in good faith on the then-binding precedent, *Newsom*. *Newsom* was the settled law for nearly 18 years at the time and failure to foresee the retroactive change of law was not a mistaken legal interpretation, but an unintentional bona fide error.

OUTSIDE COUNSEL FOR STATE ATTORNEY GENERAL DID NOT VIOLATE FDCPA

Sheriff et al. v. Gillie et al., 136 S.Ct. 1594 (2016).
https://www.supremecourt.gov/opinions/15pdf/15-338_lkgn.pdf

FACTS: Mark Sheriff and Eric Jones ("Petitioners"), acting as special counsel to the Ohio Attorney General, sent debt collection letters on the Attorney General's letterhead to Hazel Meadows and Pamela Gillie ("Respondents"), respectively. Respondent Meadows owed debt for a University of Akron loan, and Respondent Gillie had a medical debt with a state-run hospital. Under Ohio law, the Attorney General certifies debts owed to state-owned agencies and appoints private attorneys as independent contractors to serve as "special counsel" on behalf of the Attorney General for debt collection purposes. The Attorney General requires that debt collection letters be sent on their letterhead. The letters received by the Respondents contained a signature block with Petitioners' respective name and address, and specified that Petitioners were acting as "special" or "outside" counsel to the Attorney General. The notices also informed Respondents that the letters were an attempt to collect debt. Respondents filed suit alleging that Petitioners used deceptive and misleading practices in violation of the Fair Debt Collection Practices Act ("FDCPA") by sending debt collection notices on the Attorney General's letterhead rather than the letterhead of their private firms.

The close working relationship between the Attorney General's Office and Petitioners, as special counsel, demonstrates that debt collection was carried out on the Attorney General's behalf.

The district court granted Petitioners' summary judgment, concluding that the use of the Attorney General's letterhead was not false or misleading. The 6th Circuit reversed and remanded the case to trial on the issue of whether an unsophisticated consumer would be misled "into believing it is the Attorney General who is collecting on the account." At trial, the judge found that Petitioners' use of the Attorney General's letterhead "accurately describes the relevant legal realities" of their principal-agent relationship. Respondents appealed.

HOLDING: Reversed and remanded.

REASONING: Petitioners argued that the debt collection letters were in compliance with the FDCPA. The court agreed with Petitioners in holding that their use of the Attorney General's letterhead accurately conveys that special counsel act on behalf of the Attorney General in the collection of debt. The court reasoned that the close working relationship between the Attorney General's Office and Petitioners, as special counsel, demonstrates that debt collection was carried out on the Attorney General's behalf. Furthermore, the court reasoned that the requirement to use the Attorney General's letterhead further conveyed on whose authority the Petitioners were contacting Respondents.

FAIR DEBT COLLECTION PRACTICES ACT (FDCPA) DOES NOT PROHIBIT DEBT COLLECTORS FROM FILING A COLLECTION LAWSUIT WITHOUT INTENDING TO PROCEED TO TRIAL TO OBTAIN A JUDGMENT

St. John v. Cach, LLC, 822 F.3d 388 (7th Cir. 2016). http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2016%2FD05-19%2FC%3A14-2760%3AJ%3AManion%3Aaut%3AT%3AfnOp%3AN%3A1756266%3AS%3A0

FACTS: Defendants Cach, LLC, debt collectors, previously filed suit against Plaintiffs St. John in a state court to recover on Plaintiffs' delinquent credit card accounts. Defendants later voluntarily dismissed the suit without prejudice, prior to trial.

Plaintiffs sued Defendants in federal court alleging that Defendants initiated the state court proceeding with no intention of going to trial, in violation of the Fair Debt Collection Practices Act ("FDCPA"). The district court dismissed Plaintiffs' claims for failure to state a plausible claim to relief. Plaintiffs appealed.

HOLDING: Affirmed.

REASONING: Plaintiffs argued that while Defendants' act of filing a lawsuit included an implied representation, or "threat," that the case will go to trial, Defendants violated FDCPA by never intending to go to trial. The Seventh Circuit rejected Plaintiffs' arguments and held that Defendants did not violate FDCPA.

First, Plaintiffs failed to state a plausible claim because they never alleged that the Defendants represented anywhere in the state court complaints that Defendants intended to go to trial simply by filing the complaint. Nor was there any indication that Defendants did not file the complaints in good faith. Additionally, Plaintiffs failed to show Defendants ever intended to go to trial. Filing a civil action did not include an implicit declaration that the Defendant intended to advance the action all the way through trial.

Moreover, the FDCPA does not punish Defendants for engaging in a customary cost-benefit analysis when conducting litigation. The FDCPA does not constrain Defendants to mechanically steer the proceedings toward trial with no regard for expense or efficiency.

Lastly, under the state law, Defendants were allowed to voluntarily dismiss their actions at any time before trial, for any reason.

ARBITRATION

FILING LAWSUIT WITHIN TIME TO REJECT ARBITRATION AGREEMENT CONSTITUTES NOTICE OF REJECTION AND TOLLS THE TIME TO GIVE NOTICE REJECTING A CLASS ACTION WAIVER

Bickerstaff v. Suntrust Bank, ____ So. 3d ____ (Ga. 2016).
https://casetext.com/case/bickerstaff-v-suntrust-bank

FACTS: Plaintiff-Appellant Jeff Bickerstaff, Jr. was a depositor with Defendant-Appellee SunTrust Bank. Bickerstaff filed a class-action suit against SunTrust. After Bickerstaff's complaint had been filed, SunTrust amended the arbitration clause in their deposit agreement to permit a window of time for a depositor to reject arbitration by sending SunTrust written notification that complied with certain requirements. SunTrust had not notified Bickerstaff or its other customers of this change at the time Bickerstaff filed his complaint, but the complaint was filed prior to the amendment's deadline for giving SunTrust written notice of an election to reject arbitration. SunTrust filed a motion to compel arbitration on the first business day after the notice deadline. That motion was denied by the trial court in an order finding that Bickerstaff had substantially complied with the contract's arbitration rejection requirements. Bickerstaff's motion to certify a class was also denied by the trial court. Both SunTrust and Bickerstaff appealed.

The court of appeals affirmed the trial court's holdings for both SunTrust and Bickerstaff. In considering Bickerstaff's appeal, the court held that the contractual language requiring individual notification of the decision to reject arbitration did not permit Bickerstaff to reject the deposit agreement's arbitration clause on behalf of other putative class members by virtue of the filing of his class action complaint. Bickerstaff appealed.

HOLDING: Reversed and remanded.

REASONING: SunTrust argued that although the filing of a lawsuit within the time to reject an arbitration agreement constituted notice of rejection, the complaint could not be brought as a class action because the filing of a class action cannot serve to reject arbitration on behalf of class members who were not individually given notice.

In rejecting this argument, the court began their analysis by noting that putative class representatives may satisfy certain conditions on behalf of those class members who ratify the representatives' actions by remaining in the class after the class is certified. Further, the court noted that many federal courts and at least one other state has held that because the filing of a class action commences suit for the entire class for purposes of the statute of limitations, the same rule applies to a contractual period of limitation for filing suit or giving notice of a claim. Finally, the court reasoned that a class member's decision to remain in the class after class certification and notification is what will serve as his or her own election to reject the arbitration clause.

The court also held that Bickerstaff's lawsuit tolled the required time period for giving notice to SunTrust for all putative class members until a certification decision was made and members elected to opt out or remain in the class. The court extended the reasoning of the U.S. Supreme Court in *American Pipe Constr. Co. v. Utah* to a contractual period of limitation for filing suit or giving notice of a claim.

STATE COURT NOT OBLIGATED TO FOLLOW CERTAIN TERMS OF THE FEDERAL ARBITRATION ACT

Finn v. Ballentine Partners, LLC, ____ A. 3d ____ (NH Sup. Ct).
https://casetext.com/case/finn-v-ballentine-partners

FACTS: The plaintiff, Alice Finn, appealed an order of the Superior Court denying her motion to affirm and granting the motion of the defendants, Ballentine Partners, LLC ("BPLLC") to vacate a final arbitration award in part pursuant to RSA 542:8 ("RSA"). RSA mandates that at any time within one year after the award is made, any party to the arbitration may apply to the superior court for an order confirming the award, correcting or modifying the award. The award can be modified for plain mistake, or vacating the award for fraud, corruption, or misconduct. Roy C. Ballentine ("Ballentine") and Finn founded Ballentine & Company, Inc. (BFI) and each owned one half of the company's stock. Finn served as the CEO. Ballentine forced Finn out of the corporation and terminated her employment, asserting it was for cause. Finn challenged her termination before an arbitration panel. The panel found that her termination was unlawful and awarded her $5,721,756 for the stock that BFI forced her to sell and $720,000 in lost wages. BFI then formed BPLLC, contributed all of its assets and some of its liabilities to BPLLC, became its sole member, and sold a 40% membership interest. The defendants asserted that the membership interest had to be sold in order to raise funds to pay the arbitration award to Finn. In 2013, Finn filed a complaint and a motion to compel arbitration in superior court, alleging that she was entitled to relief under the "Claw Back" provision of the agreement, which mandates that if a founding shareholder sells shares back to the corporation and they are resold at higher price within eight years, the founder is entitled to recover a portion of the additional price paid for the shares. Defendants BFI (now BPLLC) moved to dismiss Finn's complaint, arguing that it was barred by res judicata. The trial court granted Finn's motion to compel arbitration. The second arbitration panel held a hearing ruling that the first panel resolved her contract claim for the "claw backs," but she was entitled to an award because the defendants were unjustly enriched by the sale of shares. Finn returned to court and moved to affirm, and the defendants moved to vacate the second arbitration award. Applying the plain mistake standard of review found in RSA 542:8, the trial court ruled that the second panel's award of additional damages to Finn on her unjust enrichment claim was barred, under res judicata, by the award of damages she received

The fact that a state law affecting arbitration is less deferential to an arbitrator's decision than the FAA does not create an obstacle so insurmountable as to preempt state law.

from the first panel. The trial court denied her motion to reconsider and she appealed.
HOLDING: Affirmed.
REASONING: The Supreme Court of New Hampshire concluded that the trial court did not err in ruling that RSA is not preempted by the Federal Arbitration Act ("FAA") and that the arbitration panel committed a plain mistake of law by concluding that res judicata did not bar Finn's claim. Finn argued that the FAA applied because her agreement with BPLLC affected interstate commerce. Therefore, the trial court should have applied the more deferential FAA standard, because the FAA preempts state law. The court concluded that not all aspects of the FAA are applicable to this proceeding and that there was not a conflict between state and federal law. The fact that a state law affecting arbitration is less deferential to an arbitrator's decision than the FAA does not create an obstacle so insurmountable as to preempt state law. The FAA only preempts state law impediments to arbitration agreements, so for the FAA to preempt state law, state law must refuse to enforce an arbitration agreement that the FAA would enforce.

THE ENUMERATED GROUNDS FOR VACATUR DELINEATED IN THE TEXAS ARBITRATION ACT ARE EXCLUSIVE.

MANIFEST DISREGARD OF THE LAW IS NOT GROUND FOR VACATING AN AWARD UNDER THE TAA

Hoskins v. Hoskins ____S.W.3d____ (Tex. 2016).
https://casetext.com/case/hoskins-v-hoskins-63

FACTS: Clifton Hoskins, a beneficiary of a marital trust filed a petition to confirm an arbitration award pursuant to the Texas Arbitration Act ("TAA"). Leonard Hoskins and another beneficiary filed a motion to vacate the award on grounds that the arbitrator demonstrated a manifest disregard of established Texas law.

The trial court granted Clifton's petition, denied Leonard's motion to vacate. Leonard appealed. Leonard argued that arbitrator's dismissal of supplemental claims without a hearing provided a statutory ground for vacatur of the award. The court of appeals affirmed, holding that manifest disregard of the law was not a valid argument to vacate arbitration under the TAA. The Supreme Court granted Leonard's petition for review.
HOLDING: Affirmed.
REASONING: Leonard argued that the TAA contained gaps that need common-law supplementation in order to foreclose arbitration awards that are unquestionably improper. The court rejected this argument and stated that they could not rewrite or supplement a statute to overcome its perceived deficiencies. TAA mandates that unless a statutory vacatur ground is offered the court shall confirm the award. The Court found that the TAA's plain language confirms that section 171.088 provides the exclusive grounds for vacatur of an arbitration award. However, manifest disregard of law is not included in section 171.088. TAA does not extend courts authority to expand on the sections of the Code. Therefore, the court held that parties may not obtain vacatur of an arbitration award on a common law ground that is not enumerated in the TAA.

SEVENTH CIRCUIT ACCEPTS NLRB'S POSITION REGARDING CLASS ACTION WAIVERS IN ARBITRATION

Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016).
https://casetext.com/case/lewis-v-epic-sys-corp

FACTS: Appellant Epic Systems sent an email to Appellee Jacob Lewis and other employees that contained an arbitration agreement. The agreement mandated that wage-and-hour claims could only be brought through individual arbitration, and that the employees waived the right to participate in or receive money or any other relief from any class, collective, or representative proceeding. The e-mail further stipulated that employees were deemed to have accepted the agreement if they continued to work at Epic, as Lewis did.

According to the court the provision at issue was unlawful under Section 7 of the NLRA, and met the criteria of the FAA's saving clause for non-enforcement.

When Lewis had a dispute with Epic, he sued Epic in federal court for violation of Fair Labor Standards Act. Epic moved to dismiss Lewis's claim and compel individual arbitration pursuant to the e-mailed agreement. Lewis responded that the arbitration clause was unenforceable under the National Labor Relations Act ("NLRA") because it interfered with employees' right to engage in concerted activities for mutual aid and protection. The district court agreed and denied Epic's motion. Epic appealed.
HOLDING: Affirmed.
REASONING: Epic argued that Rule 23 of the Federal Rules of Civil Procedure did not exist at the time NLRA was passed, the Act could not have been meant to protect employees' rights to class remedies. The court rejected this argument based on two reasons. First, the NLRA Section 7's text signals that protective activities are to be construed broadly. Further, there was no evidence that Congress intended the NLRA to protect only "concerted activities" that were available at the time of the NLRA's enactment. Second, the contract purported to address all collective or representative procedures and remedies, not just class actions.

Additionally, Epic argued that the Federal Arbitration Act ("FAA") overrides the labor law doctrines and entitled it to enforce its arbitration clause in full. The court rejected Epic's claim because it found no conflict between the NLRA and the FAA. According to the court the provision at issue was unlawful under Section 7 of the NLRA, and met the criteria of the FAA's saving clause for non-enforcement.

Lastly, Epic contended that even if the NLRA did protect a right to class or collective action, any such right was procedural only, not substantive and thus FAA demanded enforcement. The court rejected this argument and found that the NLRA did not merely allow class or collective action, but guaranteed the collective process.

CLASS ACTION WAIVERS ARE NOT PER SE UNENFORCEABLE OUTSIDE OF ARBITRATION

Meyer v. Kalanick, ____ F.Supp.3d ____ (S.D.N.Y. 2016).
https://casetext.com/case/meyer-v-kalanick

FACTS: Spencer Meyer ("Plaintiff") filed a complaint in this class action lawsuit against defendant Travis Kalanick, CEO and co-founder of Uber Technologies, Inc. ("Defendant"). Plaintiff alleged that Defendant, as CEO of Uber, had conspired with Uber drivers to fix prices through the Uber mobile application in violation of federal and state antitrust laws.

Defendant filed a motion to dismiss, which the court denied. The court also denied Defendant's motion for partial reconsideration, challenging the court's finding that Plaintiff had not waived his right to proceed via class action. The court concluded that the class action waiver clause in the User Agreement (the "Agreement") applied only to the arbitration section, was not a blanket waiver for all actions, and was unconscionable because the Agreement was a contract of adhesion. Defendant argued that the Plaintiff did not plead that the class action waiver in the Agreement was unconscionable.
HOLDING: Denied.
REASONING: Defendant argued that the sentence of the User Agreement referring to class actions consists of two distinct waivers—the right to a trial by jury or to participate as a class—and that the sentence is not limited to the arbitration context. However, the court noted that this sentence is in a section of the Agreement tiled "Dispute Resolution." The surrounding sentences concerned arbitration, and elaborated on features of the arbitration proceedings.

The court reasoned that the sentence about waiving the right to a trial or class action refers to the rights given up in agreeing to arbitrate disputes instead of an independently effective waiver outside of the arbitration context. Because no motion to compel arbitration has been made, Plaintiff had not waived any right to file a class action. Also, even if the class action waiver was included in the Agreement, it would be unconscionable under the applicable law of California, which states that waivers in certain contracts of adhesion are unconscionable. The contract at issue involved small amounts of damages that were in dispute and the party with the superior bargaining power carried out a scheme to deliberately cheat consumers out of individual small sums of money. Waivers are unconscionable in this type of contract.

DELEGATION CLAUSE IN ARBITRATION AGREEMENT UNENFORCEABLE

Morgan v. Sanford Brown Institute, 2016 ____ A. 3d ____ (N.J. 2016).
https://casetext.com/case/morgan-v-sanford-brown-inst-career-educ-corp

FACTS: A group of students ("the Students") brought action against a private, for-profit secondary education institute, known as the Sanford Brown Institute ("the Institute"), and its administrators, alleging that misrepresentations and deceptive business practices led them to enroll in an ultrasound technician program. To enroll, the Students signed the enrollment agreement, containing an arbitration provision that nowhere mentioned that students were surrendering their right to resolve their legal claims in a judicial forum.

At trial, the Institute and administrators filed a motion to compel arbitration, but the trial court declined to submit the lawsuit to arbitration; the appellate court reversed. The Supreme Court of New Jersey granted petition for certification.
HOLDING: Reversed and remanded.
REASONING: The Supreme Court of New Jersey held that the arbitration agreement did not meet state law requirements because it did not contain a clearly identifiable delegation clause. The Institute argues that the Students failed to challenge the delegation clause, as required by the Supreme Court decision in *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63 (2010) in order to avoid delegating the issue of arbitrability to the arbitrator.

The court reasoned that the failure to challenge by the Students is immaterial, because state law governs not only whether the parties formed a contract to arbitrate their disputes but also whether the parties entered an agreement to delegate the issue of arbitrability to an arbitrator. Like an arbitration agreement, an agreement to delegate arbitrarily to an arbitrator must satisfy the elements necessary for the formation of a contract under state law.

ARBITRATION AGREEMENT IN EMPLOYEE HANDBOOK NOT ENFORCEABLE UNLESS IT CONTAINS A SAVINGS CLAUSE

Nelson v. Watch House Int'l, L.L.C., 815 F.3d 190 (5th Cir. 2016).
https://casetext.com/case/nelson-v-watch-house-intl-llc

FACTS: Defendant-Appellee Watch House International L.L.C offered Plaintiff-Appellant Michael Nelson a position as a Recurrent Training Instructor. Watch House sent Nelson an electronic copy of its employee handbook, which contained Watch House's Arbitration Plan (the "Plan").

Nelson worked for Watch House for four years and claims, during his employment, coworkers harassed him based on his religion and race. Nelson reported the racial comments to his supervisor and fifteen days after the report, Watch House terminated Nelson. Nelson alleged that the discharge was a violation of Title VII of the Civil Rights Act of 1964 and Chapter 21 of the Texas Labor Code.

Watch House moved to compel arbitration pursuant to language in the employee handbook. Nelson opposed the motion because he did not fall within the Plan's definition of "employee" since he did not sign the Plan. Additionally, Nelson asserted the Plan was unenforceable because it was illusory under *In re Halliburton Co.,* 80 S.W.3d 566 (Tex. 2002). The district court, finding the arbitration agreement enforceable, granted Watch House's motion to compel arbitration and dismissed the case. Nelson timely appealed.
HOLDING: Reversed and remanded.
REASONING: Nelson argued that the Plan was illusory because it failed to include a savings clause related to existing claims. Citing the three-prong test from *Halliburton*, the court stated that although a mutual agreement to arbitrate a claim is sufficient consideration, the agreement is illusory where one party has unilateral authority to terminate its obligation to arbitrate.

The court explained the *Halliburton* decision, which held that the agreement was not illusory because the arbitration agreement contained a savings clause that prevented the employer from avoiding its promise. The court also explained its own three-prong test as articulated in *Lizalde v. Vista Quality Mkts.*, 746 F.3d 222 (5th Cir. 2014) to determine whether a *Halliburton*-type savings clause sufficiently restrained an employer's unilateral ability to terminate it's obligation to arbitrate.

The three-prong test as articulated by the court requires power (1) to extend only to prospective claims, (2) apply equally to both the employer and employee's claims and (3) so long as advance notice to the employee is required termination is effective. The court held that the Plan failed the third prong.

The court agreed with Nelson that the Plan was illusory because it failed to include a *Halliburton*-type savings clause that required advance notice of termination. The Plan provided that Watch House could make unilateral changes. The court explained that Watch House's retention of unilateral power to terminate the Plan without advance notice renders the Plan illusory under a plain reading of *Lizalde.* Nelson was not bound by the Plan and Watch House may not compel arbitration.

MONETARY AMOUNT SOUGHT IN THE UNDERLYING ARBITRATION IS THE AMOUNT IN CONTROVERSY FOR PURPOSES OF DIVERSITY JURISDICTION

Pershing, L.L.C., v. Kiebach, 819 F.3d 179 (5th Cir. 2016). https://casetext.com/case/pershing-llc-v-kiebach-2

FACTS: Appellants Kiebach and other investors (collectively as "Appellants") suffered financial losses from a Ponzi scheme. Appellants sought $80 million in damages from Appellee Pershing L.L.C., a clearing broker, for failing to disclose adverse financial information to Appellants. Appellants were awarded $10,000 in arbitration.

Appellants sought dismissal of the arbitration award, arguing that the award did not meet the $75,000 amount in controversy requirement for federal jurisdiction. The district court rejected Appellants' motion for dismissal. Appellants appealed.

HOLDING: Affirmed.

REASONING: Appellants argued that under the award approach, the amount in controversy is determined by the amount of the arbitration award, and therefore, the arbitration award did not meet the amount in controversy requirement. The Fifth Circuit disagreed with Appellants and held that under the demand approach, Appellants' arbitration demand met the requirement.

Under the demand approach, the amount in controversy is the amount sought in the underlying arbitration rather than the amount awarded.

Under the demand approach, the amount in controversy is the amount sought in the underlying arbitration rather than the amount awarded. The court applied the demand approach for three reasons. First, the demand approach recognizes the true scope of the controversy between the parties. The controversy began with Appellant's $80 million demand and not the arbitration award. Therefore, the amount at stake was Appellants' demand in arbitration.

Second, the demand approach avoids the application of two conflicting jurisdictional tests for the same controversy. Under the approach, the district court has diversity jurisdiction over a motion to compel arbitration based on the demanded amount, preventing frivolous litigation efforts.

Lastly, the amount in controversy will be measured the same way in federal court for litigation and for matters submitted to arbitration.

WEBSITE ARBITRATION CLAUSE NOT ENFORCEABLE

Sgouros v. TransUnion Corp., 817 F.3d 1029 (7th Cir. 2016). https://casetext.com/case/sgouro-v-transunion-corp

FACTS: Gary Sgouros, Plaintiff, purchased a "credit score" package from the defendant, TransUnion. When Sgouros went to a car dealership and tried to use the number from his credit score to negotiate a favorable loan, it was 100 points higher than the score pulled by the dealership. Believing that he had been duped into paying money for a worthless number, Sgouros filed this lawsuit against TransUnion. In it, he asserts that TransUnion violated various state and federal consumer protection laws. TransUnion countered with a motion to compel arbitration. It asserted that the website through which Sgouros purchased his product included an agreement to arbitrate all disputes relating to the deal. Sgouros needed to follow three steps to purchase the credit report. During the last step, in which he needed to continue by clicking the "I Accept & Continue to Step 3," he was not required to view the contents of the agreement. There was also no attention to any arbitration clauses. An arbitration statement was at the end of the 10-page document on page 8. Sgouros filed a putative class action suit. The district court concluded that no arbitration contract had been formed and denied TransUnion's motion. TransUnion appealed.

HOLDING: Affirmed.

REASONING: Although the law governing internet contracts is still in early stages in Illinois, the court applied general contract principles, noting that contract formation requires mutual assent in all jurisdictions. Illinois contract law requires that a website provide a user reasonable notice that his use of the site or click on a button constitutes assent to an agreement. A party who signs a written contract is presumed to have notice of all of the contract's terms. In newer forms of contracting, a fact based inquiry is required because a party signing a written contract may not have notice of all of its terms when there is more action required to find out about all of the contents of the contract.

In *Hubbert v. Dell Corp.*, an online purchaser of a computer agreed to the seller's terms of service because all five pages required to complete the purchase contained a visible hyperlink labeled "Terms and Conditions of Sale." The online forms also stated that all sales were subject the Terms and Conditions of Sale, and the court concluded that this was sufficient notice of terms and conditions for a reasonable person to read. *Hubbert* is distinguishable from this case because TransUnion did not ensure that Sgouros, the purchaser, would see critical language before signing the agreement. The box that contained "Service Agreement" did not specify what, if anything, the Agreement regulated. The hy-

It did not warn the user that by completing purchase he would be bound by terms that included arbitration. Illinois contract law requires that a website provide a user reasonable notice that his use of the site or click on a button constitutes assent to an agreement.

perlinked version of the Agreement was only labeled "Printable Version." Furthermore, the court concluded that TransUnion actively mislead Sgouros because there was no notice about contractual terms in the short description below the "I accept & Continue to Step 3" button. The text stated that clicking on the box constituted authorization for TransUnion to obtain his personal information, therefore no reasonable person could be expected to know that clicking on that button would also convey that he would accept the terms of the Agreement. Even if Sgouros's use of the site and purchase constituted acceptance of the Agreement by conduct, as TransUnion argued, there was no visible text that required that purchaser to agree to abide by any terms and conditions. Additionally, it did not warn the user that by completing purchase he would be bound by terms that included arbitration. Illinois contract law requires that a website provide a user reasonable notice that his use of the site or click on a button constitutes assent to an agreement.

ARBITRATION CLAUSE DOES NOT APPLY TO PARTIES ON THE SAME SIDE

Swearingen v. Swearingen, ____ S.W.3d____ (Tex. App. — Dallas 2016).
https://casetext.com/case/swearingen-v-swearingen-9

FACTS: Plaintiff-Appellant David Swearingen and Defendant-Appellee William Swearingen are brothers who co-owned Swearingen Financial Group. In 2007, the brothers sold the business to United Capital Financial Advisors, Inc. ("UCFA"). David alleged that UCFA paid profits to William in 2012 and William refused to share those profits with David. David brought suit against William for breach of their agreement to divide the UCFA profits equally, fraud in the inducement for David's efforts to create and build the business with William, as well as other causes of action. David later amended his petition, adding UCFA as a defendant and alleging William and UCFA conspired to defraud David from his share of the business. The court ordered arbitration, citing the arbitration provision in the contract for the sale of the business. After David brought the arbitration proceeding against UCFA pursuant to the contract's arbitration provision, he then amended the arbitration complaint to add William as a defendant with UCFA in the arbitration proceeding. William filed a motion asking the court to stay David's arbitration proceeding against William and enjoin David from further attempts to force William to participate in the arbitration proceeding. William alleged that there was no agreement to arbitrate disputes between the brothers. The trial court granted William's motion. David appealed.
HOLDING: Affirmed.
REASONING: David argued that the arbitration provision in the contract required arbitration of any disputes related to the contract that may arise among any of the three participants in the contract, including disputes between David and William. The court rejected this argument, noting that while the arbitration provision did not expressly state that it applied only to disputes involving David or William or both of them on one side and UCFA on the other side, the terms of the arbitration provision made clear that was the parties' intent.

The court began by noting that arbitration is a creature of contract and, when construing the written contract, the court's primary concern is to ascertain the true intentions of the parties as expressed in the instrument. The court stated that the intent of the parties must be ascertained from the instrument as whole and not from isolated parts thereof. Applying this standard, the court reasoned that because the arbitration agreement defined "you" as meaning David or William or both of them collectively and "we" as meaning UCFA, the arbitration provision intended for David and William to be on one side and UCFA on the other.

MISCELLANEOUS

DEFENDANT NOT LIABLE FOR FAXES SENT OUTSIDE OF AGREED-UPON RANGE

Bridgeview Healthcare Ctr., Ltd. v. Clark, 816 F.3d 935 (7th. Cir. 2016).
http://www.leagle.com/decision/In%20FCO%2020160321099/BRIDGEVIEW%20HEALTH%20CARE%20CENTER,%20LTD.%20v.%20CLARK

FACTS: Jerry Clark, the Defendant-Cross Appellant/Appellee, a small business owner located in Terre Haute, Indiana, instructed a marketing company to send one-hundred faxes advertising his business to local businesses within a twenty-mile radius of his location. The marketing company sent 4,849 faxes across three states. Bridgeview Health Care Center, Ltd., the Plaintiff-Cross Appellant/Appellee, an Illinois corporation, received a fax advertisement of Clark's business at its location outside of Chicago. Bridgeview brought a class-action lawsuit against Clark, under the Telephone Consumer Protection Act ("TCPA").

The court reasoned that applying strict liability to Clark's situation would produce absurd results.

The district court granted partial summary judgment in Bridgeview's favor stating Clark was liable for violating the TCPA in sending faxes within a twenty-mile radius. However, the court stated that Clark was not liable for the faxes sent more than twenty miles from Terre Haute. Both parties appealed.
HOLDING: Affirmed.
REASONING: Bridgeview argued that Clark is liable for all junk faxes sent including those distributed outside of the agreed upon twenty-mile radius. The court rejected Bridgeview's appeal and agreed with the District Court's conclusion that Clark was not liable for faxes sent outside the 20-mile radius he authorized.

To determine Clark's liability, the court analyzed the sender's liability under a combination of agency and direct-liability theories. The court reasoned that applying strict liability to Clark's situation would produce absurd results. The court then noted that federal regulations define "fax sender" as either the person on whose behalf the unsolicited ad is sent or the person whose services are promoted in the ad. The court reasoned that Clark did not confer express actual authority to the marketing company to send 4,849 faxes across three states. Based on the circumstantial evidence, there was no implied or actual authority given on behalf of Clark to send thousands of faxes across states. Additionally, the court ruled that Clark did nothing to create an appearance that the marketing company had authority to send faxes on behalf of either Clark's business or Clark himself.

GENERAL CONTRACTOR IS NOT A "SELLER" ENTITLED TO SEEK INDEMNITY UNDER CHAPTER 82

Centerpoint Builders GP, LLC v. Trussway, Ltd. ____ S. W. 3d ____ (Tx. 2016)
http://law.justia.com/cases/texas/supreme-court/2016/14-0650.html

FACTS: Centerpoint Builders GP, LLC was hired as the general contractor to construct an apartment complex. In order to complete their project, Centerpoint purchased trusses from Trussway, Ltd. Centerpoint hired an independent subcontractor ("Fernandez"), who was injured when he stepped on a truss that broke and collapsed. Fernandez filed suit against parties, including Centerpoint and Trussway, and Centerpoint filed a cross-action against Trussway for statutory indemnity. The district court held that Centerpoint qualified as a truss "seller" eligible to seek indemnity from the manufacturer. The Beaumont Court of Appeals reversed.
HOLDING: Affirmed.
REASONING: The Texas Supreme Court held that Centerpoint, as the general contractor, is not a seller of every material it incorporates into its construction project for statutory indemnity purposes. Texas Civil Practice and Remedies Code Chapter 82 protects an innocent "seller" of a defective product and entitles the seller to indemnity from the product manufacturer for certain losses.

The court noted that other jurisdictions have taken a similar approach in denying seller status to contractors whose business is providing construction services and not any particular building material that may be utilized in that process. The court found that although a contractor may as part of a construction or remodeling project, install certain products. However, a contractor without doing more is not engaged in the business of manufacturing or selling such products . Therefore, contractors do not come within the ambit of strict products liability.

CFPB CANNOT FORCE FOR-PROFIT COLLEGE GROUP TO COMPLY WITH INVESTIGATIVE DEMAND

Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Sch., ____ F.Supp.3d ____ (D.D.C. 2016).
https://casetext.com/case/consumer-fin-prot-bureau-v-accrediting-council-for-indep-colls

FACTS: Petitioner Consumer Financial Protection Bureau ("CFPB") issued a Civil Investigative Demand ("CID") to Respondent Accrediting Council for Independent Colleges and Schools ("ACICS"), an accreditor of for-profit colleges. The stated purpose of the CID was to determine whether any entity or person had engaged in unlawful practices in connection with accrediting for-profit colleges. The CID required ACICS to follow certain procedures to comply with CFPB's investigation. ACICS refused to follow the procedures regarding the CID, reasoning that CFPB's investigation was beyond the scope of CFPB's authority.

The CFPB filed a petition seeking an order requiring ACICS to comply with the CID.

HOLDING: Denied and dismissed.
REASONING: The CFPB argued that because it had the authority to investigate for-profit schools in relation to the schools' lending and financial-advisory services, it also had the authority to investigate any unlawful acts related to the accreditation of the schools. The district court rejected the CFPB's argument for two reasons. First, under the Dodd-Frank Act, the CFPB's investigative authority was limited to determining whether a violation of any consumer financial laws existed. None of the consumer financial laws address, regulate, or implicate the accrediting process of for-profit colleges. Moreover, the accreditation process had no connection to a school's private lending practices and ACICS was not involved in the financial aid decision of the schools it accredited. Second, the CFPB lacks statutory authority to conduct investigations that target the accreditation process in general. The CFPB may be entitled to learn ACICS's involvement in any potential violations of the consumer financial laws by the ACICS-accredited schools. However, the CID's statement of purpose said nothing about an investigation into the lending or financial-advisory practices of the schools.

UNACCEPTED OFFER OF JUDGMENT ON A PLAINTIFF'S INDIVIDUAL CLAIMS UNDER FEDERAL RULE OF CIVIL PROCEDURE 68 DOES NOT MOOT CLASS ACTION

Chen v. Allstate Ins. Co., 819 F.3d 1136 (9th Cir. 2016).
https://casetext.com/case/chen-v-allstate-ins-co-3

FACTS: Richard Chen and Florencio Pacleb filed a class action complaint against Allstate Insurance Company, alleging they received unsolicited automated telephone calls in violation of the Telephone Consumer Protection Act (TCPA). The TCPA makes it unlawful, in part, "to make any call (other than a call made for emergency purposes or made with the proper express consent off the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a . . . cellular telephone service, . . . unless such call is made solely to collect a debt owed to or guaranteed by the United States."

Before any motion for class certification had been made, Allstate made an offer of judgment to Chen and Pacleb under Rule 68 of the FRCP. Allstate offered to settle claims against it by Chen and Pacleb on their individual claims, and to stop sending non-emergency telephone calls and short message service messages. The offer provided fourteen days to accept. Chen and Pacleb did not accept. Allstate sent their counsel a letter extending the offer of judgment, then moved to dismiss the complaint for lack of subject matter jurisdiction.

Allstate argued that all of Chen and Pacleb's claims were moot because Allstate made an offer of judgment that satisfied their demands for relief. While the motion to dismiss was pending, Chen accepted the Rule 68 offer, but Pacleb did not. Allstate then deposited $20,000 in an escrow account "pending entry of a final District Court order or judgment." The district court denied Allstate's motion to dismiss. Allstate appealed.
HOLDING: Affirmed.
REASONING: The court agreed with Allstate's argument that the judgment if consented to would afford Pacleb complete relief on his individual claims for damages and injunctive relief. However, Pacleb could still seek certification and continue the action because the court had previously held in *Pitts v. Terrible Herbst,* 653 F.3d 1081 (9th Cir.2011), that if defendants can avoid a class action by "picking off" the named plaintiffs, the class claims evade review and make an exception to the mootness rule. Only once the denial of class certification is final does the defendants' offer moot the merits of the case. Allstate argued that the *Pitts* rule was no longer good law in light of the Supreme Court' decision in *Genesis Healthcare*, Genesis Healthcare Corp. v. Symczyk, ____ U.S. ____, 133 S.Ct. 1523, 185 L.Ed.2d 636 (2013),which stated that the nature of the actions may only be responding to the defendants' litigation strategy rather than their conduct. *Genesis* addressed actions brought under the Fair Labor Standards Act rather than actions under the Federal Rules of Civil Procedure.

The court cited several cases that ruled that a claim only becomes moot when the plaintiff actually receives all of the relief to which he or she is entitled on the claim, or when it is impossible for a court to grant any effectual relief whatsoever to the prevailing party.

Even if *Pitts* did not control, the court would reject Allstate's attempt to moot this action before Pacleb had a fair opportunity to seek certification, so a live controversy would exist until then. The court cited several cases that ruled that a claim only becomes moot when the plaintiff actually receives all of the relief to which he or she is entitled on the claim, or when it is impossible for a court to grant any effectual relief whatsoever to the prevailing party. Therefore, when Allstate offered monetary relief pending entry of a final District Court order, the court did not enter judgment on Pacleb's claims.

FREESTANDING CLASS ACTION WAIVER ENFORCEABLE

Korea Week, Inc. v. Got Capital, LLC, ____ F. Supp. 3d ____ (E.D. Pa. 2016).
https://casetext.com/case/korea-week-inc-v-got-capital-llc

FACTS: Plaintiffs Korea Week, Inc. alleged that Defendants GOT Capital LLC, targeted the Korean-American and Asian-American business communities through marketing, advertising, and soliciting of merchant cash advance financing arrangements ("MCA") financing. Plaintiffs sought to certify a class of businesses who signed MCA with Defendants, arguing that Plaintiffs' claims satisfied the numerosity, commonality, typicality, and adequacy of representation requirements of class certification. Defendants opposed class certification, arguing all the contracts between the parties contained class action waivers barring such actions by Plaintiffs.

Plaintiffs moved for class certification hearing.
HOLDING: Denied.

REASONING: Plaintiffs argued that class action waivers are void as procedurally and substantively unconscionable. The district court rejected Plaintiffs' arguments and held that the class action waivers were not unconscionable, and therefore, such waivers are enforceable.

First, although plaintiffs spoke Korean as a principle language, they could text and understand English. Plaintiffs understood and met the terms of repayment. They were neither employees nor consumers suffering under a disproportionate leverage in contract negotiations.

Second, the court rejected substantive unconscionability argument and held that a class action waiver independent and outside of an arbitration agreement is enforceable. Plaintiffs separately agreed to class action waiver and to mandatory arbitration. Mandatory arbitration did not prohibit class actions. Therefore, the waivers in financing contracts between two businesses could not be found unconscionable.

Class action waiver independent and outside of an arbitration agreement is enforceable.

Finally, the court held that RICO did not suggest legislative intent or policy reasons weighing against enforcement of such waivers. While the court recognized the remedial purposes of RICO, it found no reason to interpret it as encouraging class actions. At best, RICO may be interpreted as silent as to the individual versus collective rights of alleged victims.

Consumer and Commercial Law Section meets at the 2016 Annual Meeting of the State Bar

Michael O'Connor is recognized for his outstanding job as Chair of the Section by Andy Sattler.

Right: Mark Steiner was recognized as "best dressed."

THE LAST WORD

As I have mentioned many times before, in each issue of the *Journal* we strive to provide our readers with a wide variety of topics related to the practice of consumer and commercial law. We recognize that this is not a "one size fits all" endeavor, and that while some may like to read an in-depth article on a single legal issue, others want to be able to quickly discover what is going on generally in the area of consumer and commercial law.

This issue is a good example of this wide variety of topics. Whether you want a quick update on recent case law, are curious about what's new at the Consumer Financial Protection Bureau, or want to read an in depth article discussing commercial damages under the Fair Credit reporting Act, or standing in a claim based on a data breach, you will find it in the pages of this issue.

I know you will enjoy this issue. And remember, if you have written something you think would be interest to the *Journal's* readers, please send it to me, alderman@uh.edu.

Richard M. Alderman
Editor-in-Chief

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