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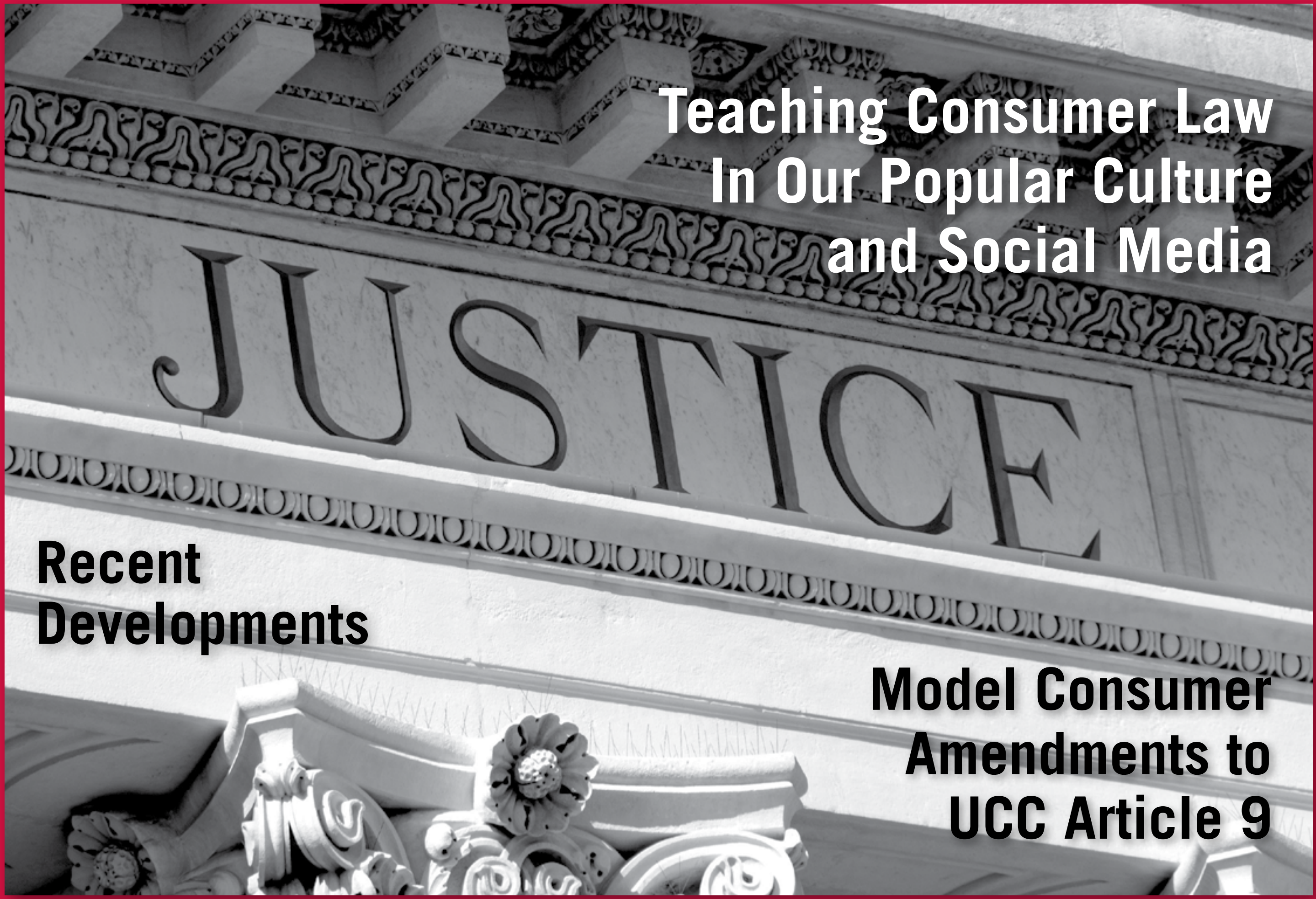
Annual Survey of TEXAS INSURANCE LAW



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

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Articles

Recent Developments

Annual Survey of TEXAS Insurance Law

By Phil Maxwell*, Suzette Selden** and Elizabeth von Kreisler***

I. INTRODUCTION

The most significant events in Texas insurance law this year did not happen. The Supreme Court did not decide whether a policyholder must show an "independent injury" beyond policy benefits in order to recover under the Texas Insurance Code because the parties in *In re Deepwater Horizon* settled on the eve of oral argument. The Texas Department of Insurance did not move forward on Texas Farm Bureau's proposal to put arbitration clauses in policies sold to homeowners in counties with high storm risk or a high incidence of policyholder lawsuits, apparently punting the issue to the Legislature. And the Legislature did not try to pass a bill to restrict or eliminate policyholder protections because the Legislature does not meet in even-numbered years.

But this is about to change. Taking the place of *In re Deepwater Horizon* before the Texas Supreme Court is *USAA Texas Lloyds v. Menchaca*, which was argued on October 10, 2016. USAA v. Menchaca, (Tex., No. 14-0721), available at http://www.search.txcourts.gov/Case.aspx?cn=14-0721&coa=cossup The principal issues are: (1) whether an insured must prove an injury independent from denied policy benefits to recover under Insurance Code Chapter 541, or if not; (2) whether the jury's failure to find that USAA did not comply with the insurance contract precludes the insured from recovering policy benefits under the Insurance Code. Menchaca sued under the policy and the Insurance Code after USAA determined her homeowner's policy covered Hurricane Ike damages to her home, but her total damage fell below her deductible. After hearing how USAA conducted the investigation and listening to competing experts argue over the amount of storm related losses Menchaca suffered, the jury answered "yes" to the question asking whether USAA violated the Insurance Code by not reasonably investigating her claim, answered "no" to the question asking whether USAA failed to comply with the insurance contract, and awarded Menchaca $11,350 for unpaid policy benefits and $130,000 for attorney fees. USAA moved for post-judgment verdict in its favor, arguing the jury had found that the policy was not breached and that precluded bad-faith or extra-contractual liability. The trial court denied USAA's motion. The court of appeals affirmed the trial court's judgment for Menchaca. *USAA Texas Lloyds v. Menchaca*, No. 13-13-00046-CV, 2014 WL 3804602 (Tex. App.—Corpus Christi 2014, pet. granted).

The Supreme Court did not decide whether a policyholder must show an "independent injury" beyond policy benefits in order to recover under the Texas Insurance Code.

When the Legislature convenes, expect bills like those that failed last session. They would have (1) limited recovery for property damage claims; (2) allowed insurers to force suits into federal court; (3) immunized insurance company adjusters from liability for unfairly low estimates and other misconduct, while criminalizing excessive estimates by policyholders and their public adjusters; (4) required policyholders to document every detail of their damages as a prerequisite to filing suit; and (5) shortened limitations to one year. Last session's Senate Bill 1628 by Sen. Larry Taylor and House Bill 3646 by Rep. John Smithee were offered in response to perceived abuses arising from hailstorm claims, but both bills proposed changes that would have affected all property damage claims. The bills died after substantial opposition from businesses and others. Potentially bearing on possible legislation this session, the House Committee on Insurance was charged last November with an interim study that examines available data on the cost of weather-related property insurance claims and the "incidence of litigation" of these claims, studies whether these data reveal trends or patterns over time, identifies what the drivers of these trends might be, and identifies the impacts of "claims litigation" on the property insurance market and on consumers. Interim Committee Charges, Texas House of Representatives, 84th Leg., (Nov. 2015) at 33, available at http://www.house.state.tx.us/_media/pdf/interim-charges-84th.pdf

As with other survey periods, hundreds of cases involving insurance were decided by the state and federal courts this survey year. For consumer lawyers, however, none are more important than *Menchaca*. The most significant of the remaining decisions are discussed below.

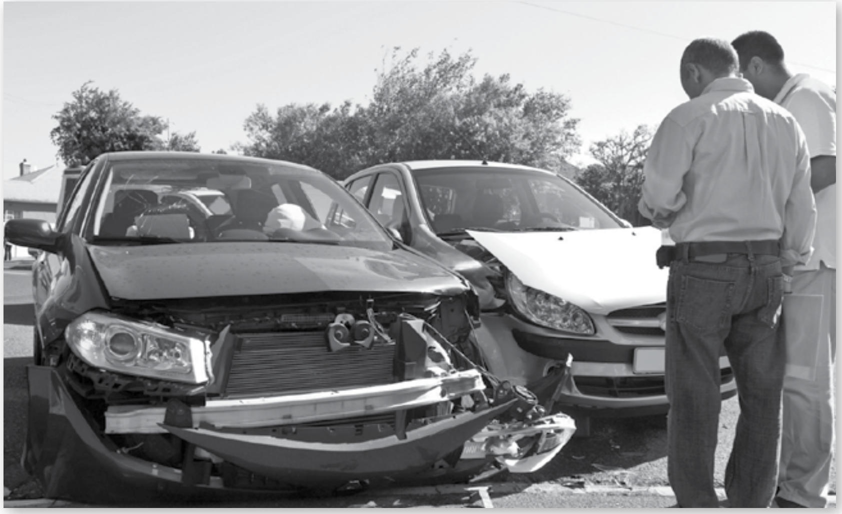
Another event this year that bears solemn mention is the loss a great advocate for consumers and policyholders. Mark L. Kincaid, who coauthored this article for many years, passed away in January. (See page 77). The authors of this years' edition knew and worked closely with Mark for many years and are grateful for all we learned from him about law, legislation, and life. It is our privilege to carry on his legacy. He was a beloved friend and is sorely missed.

II. FIRST PARTY INSURANCE POLICIES & PROVISIONS

A. Automobile

The Texas Supreme Court held that the owner of personal property that has been destroyed and not just partially damaged may recover loss-of-use damages and therefore, those damages may be recovered under the underinsured motorist provision in the owner's auto policy. *J&D Towing LLC v. American Alternative Insurance Corp.*, 478 S.W.3d 649 (Tex. 2016). J&D lost its only tow truck in an accident, settled with the other driver's insurance for policy limits, and then claimed damages for the time it was out of business under its own policy's underinsured protection. The trial court awarded J&D damages for its lost profits, but the appeals court reversed and rendered judgment for the insurance company. The court followed cases holding that loss-of-use damages were recoverable only when a vehicle could be repaired. Citing the modern trend of allowing recovery, the Texas Supreme Court reversed. According to the court, the distinction between loss-of-use damages for partially damaged property versus destroyed property was unpersuasive and that allowing recovery was consonant with the full-and-fair-compensation tort principle.

The amount of a policy's UM/UIM limits was a question of law that should not have been submitted to the jury. *Liberty Mut. Ins. Co. v. Sims*, No. 12-14-00123-CV, 2015 WL 7770166 (Tex. App. — Tyler Dec. 3, 2015, pet. denied) (mem. op.). A commercial automobile insurer appealed the trial court's entry of a $1,000,000 judgment against it following a jury trial. The plaintiff, a commercial driver, was hit by an underinsured motorist and sought UM/UIM benefits from his employer's commercial auto policy. Right before the trial, the insurer tendered $250,000, which it contended were the available UIM limits. The plaintiff then amended his petition alleging that the commercial insurer's UIM limits were actually $1,000,000, as it initially stated in its discovery responses. Before jury selection, the insurer submitted its supplemental discovery responses, stating that its limits were only $250,000, and seeking a ruling on that issue as a matter of law. The trial court declined to rule on the limits as a matter of law, and the trial proceeded. The jury found the limits were $1,000,000, and that the plaintiff's damages were over $2 million. On appeal,



the insurer argued that the UIM limits were only $250,000 as a matter of law, and that the UIM limits should not have been submitted to the jury, and were material only to calculating the amount of the judgment after the verdict. The court of appeals first determined what the policy's UIM limit was, and concluded the policy unambiguously set the limit at $250,000. The policy's declarations page noted the limits were $1,000,000, but also noted the policy's endorsements "may reduce the amount payable to less than the stated limit of insurance." The policy attached an endorsement that listed UIM coverage limits of $250,000, which was controlling. Contrary to the plaintiff's position, the insurer's discovery responses did not create a fact question for the jury. Further, the insurer's mistakes in its discovery responses did not change the trial court's obligation to review and make a legal determination of the policy's terms and UIM limits.

B. Homeowners

The Texas Supreme Court, without granting petition for review, has requested and received merits briefing on whether a fence attached to an insured's house is a "structure attached to the dwelling" (with the same policy limit as the dwelling itself), as the homeowner contends, or is an "other structure on the residence premises" (with a policy limit of 10% of the dwelling's), as the insurer contends. *Nassar v. Liberty Mutual Fire Insurance Company,* No. 15-0978 (Tex.) http://www.search.txcourts.gov/Case.aspx?cn=15-0978&coa=cossup) The court of appeals, in a split decision, sided with the insurer. *Nassar v. Liberty Mut. Fire Ins. Co.,* 478 S.W.3d 65 (Tex. App.—Houston [14th Dist.] 2015, pet. filed).

In *Nassar*, the insured's fence, which attached to his dwelling, sustained $58,000 in damage from Hurricane Ike, well within the policy limit for the dwelling and "any structures attached to the dwelling". However, the insurer insisted the fence was not part of the dwelling but rather an "other structure on the residence premises" with a policy limit of 10% of the dwelling, or $24,720. The policy said:

COVERAGE A (DWELLING)

We cover:

1. the dwelling on the residence premises shown on the declarations including structures attached to the dwelling.

2. other structures on the residence premises set apart from the dwelling by clear space. This includes structures connected to the dwelling by only a fence, utility line or similar connection. The total limit of liability for other structures is the limit of liability shown on the declaration page or 10% of Coverage A (Dwelling) limit of liability, whichever is greater.

The policy did not define "structures" in subsection (1) or "other structures" in subsection (2).

A majority of the court of appeals held that the policy language was unambiguous and the insured's proposed interpretation of the policy language claiming the fence is part of the structure would render meaningless the subsection that "includes structures connected to the dwelling only by a fence." The majority explained:

> If a fence attached to the dwelling already is part of the dwelling under subsection (1) as a "structure . . . attached to the dwelling," then any structure connected to the attached fence likewise would become a "structure . . . attached to the dwelling" under subsection (1). And, if any structure connected to the attached fence already is part of the dwelling under subsection (1), then no purpose would be served by the language in subsection (2) providing for distinct treatment of "other structures" that are "connected to the dwelling by only a fence . . . ."

Further, the court affirmed summary judgment on the extra-contractual claims finding no breach of contract, no extreme conduct that could support a bad faith claim without a breach of contract, and "there is no general fiduciary duty between an insurer and its insured." Lastly, the court rejected the insured's arguments disputing an appraisal award based in part on a waiver theory and affirmed summary judgment in favor of the insurer.

A homeowner's policy provision setting forth a "reconstruction cost less depreciation" standard for dwelling loss was held to be a limitation of liability provision on which the insurer had the burden of proof. *Ayoub v. Chubb Lloyds Ins. Co. of Tex.*, 641 F. App'x 303 (5th Cir. 2016). The insureds' home was damaged when pipes burst during a severe cold front. The insurer and the insureds disagreed on the full extent of the insureds' covered loss. After striking insureds' expert on depreciation, the district court granted summary judgment for the insurer, concluding that the insureds could not meet their burden of proof. The Fifth Circuit reversed. Under Texas law, an insured has the burden of proving his losses, while an insurer has the burden to prove a contractual limitation of liability or cap on what it will have to pay out. Here, the policy's Verified Replacement Cost endorsement contained the following sentence: "If you have a covered partial loss to your dwelling or another structure, and do not begin to repair, replace or rebuild the lost or damaged property within 180 days from the date of loss, we will only pay the reconstruction cost less depreciation." In isolation, that sentence seemed to be a measure of damage, rather than a limit on coverage. However, viewed in context, the sentence was clearly part of a limitation on coverage provision and was the insurer's burden to prove. The sentence was part of an endorsement that began with limitation language: "Our limit of liability for covered losses…." The insurer also acknowledged that all but the last sentence of the endorsement was a limit of liability. Further, the insurer's interpretation was not reasonable: "It makes no sense to put the onus on the insured to prove they did not begin repairs on the dwelling within 180 days in order to have access to a lesser recovery—a burden they would never seek." Construing the final sentence of the endorsement consistently with its other parts, the court concluded the insurer had the burden of establishing the depreciation of the property, and reversed the lower court's summary judgment.

C. Commercial Property

A Water Exclusion Endorsement stating that the insurer "will not pay for loss or damage caused directly or indirectly by . . . [w]ater that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment" unambiguously excludes all such water damage whether the origin of the overflow or back up is inside or outside the insured's property. *Kelley Street Associates v. United Fire and Casualty Co.*, No. 14-14-00755-CV, 2015 WL 7740450 (Tex. App.—Houston [14th Dist., Nov. 30, 2015, no pet.) (mem. op). Kelley's building flooded after City of Houston employees repaired a water meter and valves on the street in front of the building. According to Kelley, in making the repairs city workers dislodged debris that then traveled through the water main into Kelley's building, damaging toilet flush valves and causing septic holding tanks to fill rapidly, pushing septic water up through floor drains and flooding the building. Kelley argued the exclusion applied only to an overflow of water originating outside the insured's plumbing system and not to losses caused by an internal plumbing problem. The court rejected Kelley's argument, refusing to rewrite the policy language and noting that, unlike the water exclusion, other provisions of the policy described coverage or exclusions based on whether the loss's origin was internal or external to the insured's property. The court also rejected Kelley's claim that the word "drain" did not include floor drains, concluding that nothing in the dictionary definitions of the word limited it to a "pipe to remove water from a building to a treatment facility or body of water," as asserted by Kelley.

The statutory requirements of interpleader were satisfied: there was a single fund and adverse claimants competing for it.

A policy deductible provision was unambiguous and meant 5% of the aggregate sum of the insured value of each damaged property. *Saratoga Resources, Inc. v. Lexington Ins. Co.,* 642 F. App'x 359 (5th Cir. 2016) (*per curiam*). A policy insured various oil and gas properties owned by the insured, each of which had a different insured value. These properties were damaged by Hurricane Isaac. The insurer and the insured disagreed how the deductible should be calculated. The policy stated that the deductible was "5% of Total Insurable Values at the time and place of the loss . . . If two or more deductible amounts apply to a single occurrence, the total to be deducted shall not exceed the largest deductible applicable unless otherwise stated." The insured argued this meant the deductible should be calculated to be 5% of the value of the property with the highest total insured value, whereas the insurer argued this meant the deductible was 5% of the total insurable values of all damage properties, added together. The Fifth Circuit agreed with the insurer. The policy was not ambiguous. Only one interpretation gave meaning to all parts. The words "total" and "values" indicated that more than one value was to be included in the calculation. The court rejected the insured's argument that "Total" was part of the term "Total Insurable Values Per Interest" used in a different part of the policy because, if the drafters of the deductible provision had intended to refer to that part, they would have included the qualifier "Per Interest." Because the insured sought to depart from the ordinary meaning of "Total Insurable Values" and could not establish a technical or different meaning applied, its interpretation was held to be unreasonable.

D. Life insurance

Substantial evidence supported an ERISA plan administrator's denial of accidental death benefits. *Hagen v. Aetna Ins. Co.*, 808 F.3d 1022 (5th Cir. 2015). A beneficiary sought to recover the benefits from her husband's group life insurance plan, issued and administered by Aetna. The policy provided accidental death benefits. It excluded benefits for a loss caused by illness, infection, use of alcohol and intoxicants, or medical treatment. While the policy was in place, the insured fell and fractured his hip. He ultimately died a couple of weeks afterwards. The autopsy report stated the cause of death was "complications of blunt force trauma" from the hip fracture, and listed contributory causes of COPD, chronic alcoholism, and hypertensive cardiovascular disease. The beneficiary submitted a claim for benefits, but Aetna denied it. After urging her claim a second time, Aetna concluded his death was more consistent with "his pulmonary compromise, and not his injuries from the fall," and that the fall was caused by his overall poor health status. The beneficiary argued that Aetna had a conflict of interest and its claims process was procedurally unreasonable because Aetna took 400 days to make a determination, a medical opinion purportedly relied upon was missing, and Aetna did not take precautions to avoid bias. The Fifth Circuit disagreed. The delay in the determination did not support an inference it was a "fishing expedition." The missing medical opinion was explained by Aetna as a medical review that was initially requested but later determined to be unnecessary because there was sufficient evidence to deny the claim without it. Also, the fact that Aetna gave different reasons for its first and second denials was not evidence of procedural unreasonableness, but rather demonstrated Aetna's review process involved giving the claim a meaningful second look. The evidence was also insufficient to show a history of biased claims administration: the fact the nurse who reviewed the beneficiary's claims had denied a majority of the claims she had reviewed, without additional information of the context, did not show that the claims administration was biased. Having found Aetna's administration process was not biased, the court then considered the substantive issue of whether the insured's fall was due to or contributed to by his illness. The beneficiary argued that the insured had no symptoms of illness before the fall, and the evidence showed he slipped or tripped. However, the court held there was sufficient evidence in the record to support Aetna's denial. Two days before the fall, the insured reported to his doctor that he felt fatigued and dizzy, and his doctor noted that he was weak, tired, and had trouble breathing. The medical records overall reflected the insured's complaints and low functionality resulting from his COPD. Consequently, the evidence was sufficient to permit Aetna to conclude the fall was due to or contributed to by illness and deny the claim, even accounting for Aetna's conflict of interest.

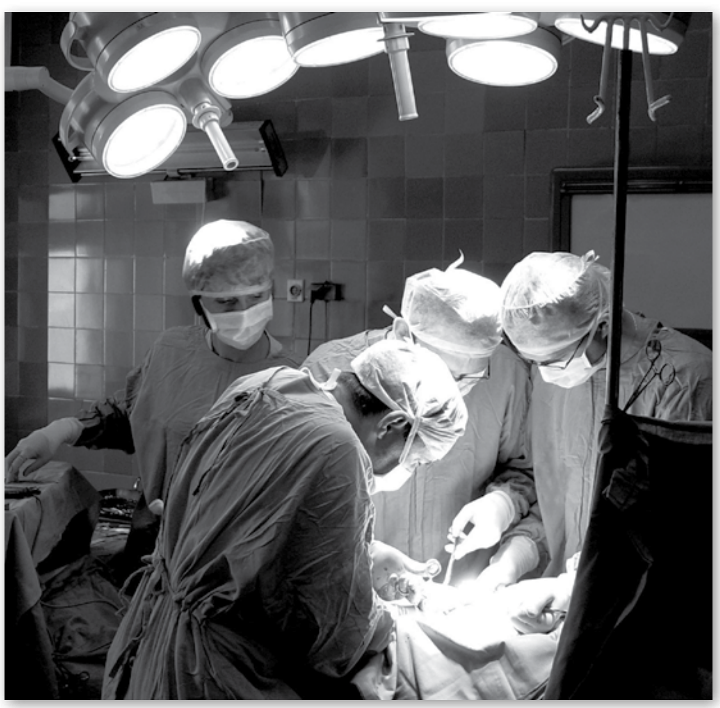
A life insurer was permitted to interplead life insurance proceeds and be dismissed as a party over objection. *Jackson Nat'l Life Ins. Co. v. Dobbins*, No. 3:16-CV-0854-D, 2016 WL 4268770 (N.D. Tex. Aug. 15, 2016). The defendant claimants objected to the insurer's dismissal, arguing that dismissal was premature and prejudicial because they might have counterclaims against the insurer in connection with its performance of obligations under the policy or its duty to deal fairly and in good faith. The court concluded, however, that the insurer could be dismissed and discharged of further liability under the policy. The claimants could still bring claims in a separate lawsuit unrelated to the policy proceeds, and neither explained why a certified copy of the policy was necessary before the insurer could be dismissed. The statutory requirements of interpleader were satisfied: there was a single fund and adverse claimants competing for it. The insurer was also entitled to attorney's fees to be paid from the policy proceeds.

E. Health insurance

In *Crose v. Humana Ins. Co.*, 823 F.3d 344 (5th Cir. 2016) an insured's spouse sued his health insurer for breach of contract and unfair insurance practices after it denied healthcare coverage related to the insured's stroke. The insured ingested ecstasy the night before his stroke. He had little prior medical history. The insurance policy contained a causation exclusion for "Loss due to being intoxicated or under the influence of any narcotic unless administered on the advice of a health care practitioner." The policy did not define the term "narcotic." At issue was whether "narcotic" included ecstasy. The insured argued that a reasonable definition was the common one used in federal and state criminal law as well as in medical and pharmaceutical contexts, which limit "narcotic" to drugs derived from a plant, such as opiods, and classify ecstasy as a "hallucinogen" instead of a "narcotic." The court, however, adopted the much broader definition proposed by the insurer: "a drug affecting mood or behavior which is sold for non-medical purposes, especially one whose use is prohibited or under strict legal control but which tends nevertheless to be extensively used illegally." In reaching its decision, the court circumvented the normal rule of construction that an ambiguous policy terms must be construed in favor of coverage by concluding the insured's definition was not reasonable because it was overly "technical." Having found ecstasy to be a narcotic, the court then considered whether the insured's stroke was "due to" being intoxicated or under the influence of ecstasy. The court concluded the record showed that: ecstasy causes hypertension, hypertension causes strokes, the insured took ecstasy and had a stroke due to hypertension. The court held this was sufficient to prove proximate causation necessary for the exclusion to apply and bar coverage, even though many people who take ecstasy do not have strokes.

A Texas Insurance Code provision requiring health insurers to make coverage determinations and pay providers' claims within specified time or face penalties did not apply to self-funded plans or state government plans. *Health Care Serv. Corp. v. Methodist Hosps. of Dallas*, 640 F. App'x 314 (5th Cir. 2016). Chapter 1301 of the Texas Insurance Code requires healthcare insurers to make coverage determinations and pay claims made by preferred healthcare providers within a specified time or face penalties. Anticipating that a hospital would seek relief under Chapter 1301, a health plan administrator, BCBSTX, sought a declaration Chapter 1301 did not apply to it as the administrator of self-funded health plans, plans providing benefits to state employees, or plans in its BlueCard program. The Fifth Circuit held Chapter 1301 did not apply to those plans because BCBSTX did not provide coverage through its "health insurance policy" when it administers the plans at issue, nor was it a "person" with whom an "insurer" contracts to perform administrative services. Although BCBSTX is a licensed insurance carrier and authorized to issue health insurance policies in Texas, it did not provide payments through its "health insurance policy" when administering the plans at issue in this case. Under its administration agreement, BCBSTX did not provide benefits for medical expenses, but merely distributed claim payments from plans to providers. The Fifth Circuit also concluded the FEHBA preempted Chapter 1301 in the context of federal employee plans (see Preemption section below).

In an ERISA case, an insurer did not abuse its discretion in denying benefits where there was evidence that the medical services were rendered after the insured's employment was terminated. *Kidder v. Aetna Life Ins. Co.*, No. SA-14-CV-665-XR, 2016 WL 1241549 (W.D. Tex. Mar. 28, 2016). The insured had a health plan through his employer. He underwent a back surgery, and his insurer denied coverage for it. The insurer stated the claim was not payable because his coverage ended before he received the services. The surgery was in April. The insurer argued the insured's employment ended on March 31, that his termination was effective April 1, and his health coverage also ended on April 1. However, the insurer was notified by the employer of the insured's termination on May 26, and the insured did not get a letter notifying him of the termination of his plan benefits and his COBRA options until May 23. The insured contacted the COBRA administrator but did not submit an election form or pay a COBRA premium. The insured claimed he was not terminated on March 31, but rather he was on an unpaid leave of absence, and that the COBRA notice was untimely. Furthermore, he tried to send premium checks to the insurer during his leave of absence, but they were returned with a letter explaining it did not know how to apply it. The court found the insurer did not abuse its discretion in denying the insured's claim. There was substantial evidence in the administrative record that the insured's employment had been terminated. The insurer was informed by the employer that his employment was terminated on March 31. A personnel form from the employer stated the same thing. And a letter from the COBRA administrator on June 1 stated that the date of coverage loss was March 31. As a result, the insurer's decision to deny benefits was proper, and the insurer was entitled to summary judgment.



F. Disability insurance

An insured worker was not entitled to disability benefits because she failed to present evidence of a competent disability certification by an approved practitioner. *Trejo v. Board of Trustees of the Employees Retirement Sys. of Tex.*, No. 03-14-0060-CV, 2016 WL 105947 (Tex. App. — Austin Jan. 6, 2016, no pet.) (mem. op.). After her claim was denied, the worker argued on appeal that the Board of Trustees of the Employees Retirement System of Texas erred in finding her not to be disabled during her employment because she had been continually hobbled by her back problems and missed much work throughout this period. However, the disability plan's text unambiguously stated: "The Employee will be conclusively deemed not to be disabled if employed and compensated in any manner." Whether or how often the employee missed work or her capabilities while working was not determinative. The Board, accordingly, did not act unreasonably in deeming her not to be disabled during the time she continued to work. The more critical question was whether the Board acted unreasonably in determining this Plan provision effectively meant that any medical records from the time the employee continued to work could not be evidence of a disability and, in turn, could not provide "objective medical evidence" to support the employee's doctor's certification opinion. The court held the Board was not unreasonable in this regard. If the employee was conclusively deemed not to have been disabled for as long as she was employed, one could reasonably infer as the Board did, that any condition or impairment reflected in her medical records from her employment period cannot, by definition, rise to the level of a "Total Disability" and is thus no evidence of one. Because the doctor's certification was not founded (nor could be founded) on any bases other than those reflected in those records, it followed that his opinion vouching for the employee's claimed disability was not competent proof of a "Total Disability" and could not suffice as the required certification of one.

The insured argued that the coverage provision expanded the definition of "theft" to include losses from employee forgery.

An ERISA plan administrator's denial of a participant's claim for long-term disability benefits was not an abuse of discretion. *Burell v. Prudential Ins. Co. of America*, 820 F.3d 132 (5th Cir. 2016). An insured was diagnosed with multiple sclerosis (MS) in 2008. He went on medical leave and filed for long-term disability benefits in 2011, and a few months later stopped working altogether. In support of his claim, the insured submitted medical records from his doctors and psychiatrist. The administrator (also the insurer) had a nurse and neurologist review the claim. The neurologist found that the insured's MS diagnosis was unsupported by his medical records, and that job stress was the source of his complaints, not a neurological disorder. The nurse concluded that the insured's claim of depression and anxiety was not sufficient to prevent him from working. Based on their reports, the administrator denied the claim. On an administrative appeal, a neuropsychologist performed an evaluation of the insured and found he did not suffer any cognitive impairment, and so the administrator again denied the claim.

On appeal to the Fifth Circuit, the insured argued the administrator should be given a less deferential standard of review than abuse of discretion because it was both the administrator and the insurer. The court disagreed, however, because the plan expressly granted the administrator discretionary authority. The court next considered whether the insured was entitled to long term disability benefits. Although the administrator conceded the insured met the requirements for the MS diagnosis, the MS diagnosis alone was insufficient to establish coverage. Under the policy, the insured's MS needed to render him "unable to perform the material and substantial duties of [his] regular occupation." None of the health care providers the administrator consulted found that the insured had physical or cognitive impairments, which left the administrator with the "permissible choice" between its consultant's position or that of the insured's physicians. The fact that the Social Security Administration had found the insured disabled and entitled to SSA benefits was insignificant because the eligibility criteria differed, and so the administrator did not need to give the SSA determination any particular weight.

G. Other policies

The term "theft" in a commercial crime insurance policy did not include a loss from an employee's forgery of security documents. *Tesoro Refining and Marketing Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, No. 15-50405, 2016 WL 4166173 (5th Cir. July 29, 2016). An insured oil and gas company sought coverage under its commercial crime policy for losses from its employee's alleged forgery of line of credit documents that suggested a customer was adequately collateralized. The insured sought coverage under the employee theft provision, which stated, that "theft shall also include forgery." In its definition section, the policy defined "theft" as "the unlawful taking of property to the deprivation of the insured." The insured argued the coverage provision expanded the definition of "theft" to include losses from employee forgery. The court, however, found the insured's interpretation was unreasonable because it viewed the sentence about forgery in isolation. The policy also had a separate, limited coverage for forgery that excluded coverage for forgery by employees. The court did "not consider it reasonable to read the policy as excluding all employee forgery involving commercial paper from the 'Forgery or Alteration' insuring agreement, only then to include all kinds of employee forgery under the 'Employee Theft' insuring agreement." The court thus found that the policy unambiguously required a "theft" as defined to mean an "unlawful taking" for coverage to apply. The court also concluded the employee's conduct did not amount to a theft. In reaching its conclusion, the court considered, as the insured posited, whether the employee had committed a theft by deception under Texas criminal law, and found that he did not because there was no evidence that the forged security documents were a substantial or material factor in the insured's decision to continue selling fuel to the customer.

III. FIRST PARTY THEORIES OF LIABILITY

A. Breach of Contract

The insured's warehouse and day care center were damaged in Hurricane Ike. After appraisal, the insurer paid the insured the determined damage, which the insured deposited. Months later, the insured brought a breach of contract claim for the contents damage against the insurer. The court held the insurer's timely payment of the appraisal award estopped the insured from maintaining a breach of contract claim against the insurer. *Quibodeaux v. Nautilus Ins. Co.*, No. 15-40567, 2016 WL 3644641 (5th Cir. July 7, 2016).

B. Unfair Insurance Practices, Deceptive Trade Practices & Unconscionable Conduct

As we reported last year, the Fifth Circuit certified a significant question to the Texas Supreme Court regarding the continued validity of *Vail v. Texas Farm Bureau Mutual Ins. Co.* in Chapter 541 cases. *In re Deepwater Horizon*, 807 F. 3d 689 (5th Cir. 2015). That case arose from the Deepwater Horizon oil spill. Liberty Insurance Underwriters, Inc. insured Cameron International Corporation, the manufacturer of the blowout preventer used on the Deepwater Horizon. After the spill, Cameron settled with the well owner, BP, and sought policy benefits from Liberty to help cover the settlement. Liberty refused to pay, on account of the complicated indemnification arrangement between the parties involved in the spill, and so Cameron sued. Cameron alleged Liberty violated Chapter 541 by wrongfully denying its claim under the policy, and sought as actual damages only the policy benefits that Liberty denied and its attorney's fees related to the suit. Liberty argued that, under the Fifth Circuit's decision in *Great American Ins. Co. v. AFS/IBEX Financial Services, Inc.*, Cameron was required to assert some injury other than the policy benefits and attorney's fees to maintain a Chapter 541 claim. However, that case is in conflict with *Vail v. Tex. Farm Bureau Mut. Ins. Co.*, in which the Texas Supreme Court held that an insured who is wrongfully denied policy benefits need not show any injury independent from the denied policy benefits. 754 S.W.2d 129 (Tex. 1988). Given the importance of this question to Texas state law, the Fifth Circuit submitted a certified question to the Texas Supreme Court: "namely, the availability of a cause of action under the Texas Insurance Code where the insurer wrongfully denied the policy benefits but caused the insured no damages other than those denied benefits." The court noted that if the issue had arisen immediately following *Vail*, it would not have required certification, but the subsequent case of *Provident American Insurance Co. v. Castañada*, 988 S.W.2d 189, 198-99 (Tex. 1998), and its interpretation by the Fifth Circuit in *Great American* as setting out the opposite rule from *Vail*, created a question about Texas law requiring clarity: is *Vail* still good law? The specific question certified by the court was:

> Whether, to maintain a cause of action under Chapter 541 of the Texas Insurance Code against an insurer that wrongfully withheld policy benefits, an insured must allege and prove an injury independent from the denied policy benefits?

However, we will not get an answer from this case. A few months after this opinion and certified question were issued, Cameron and Liberty reached a compromise, and, at their joint request, the court withdrew the certified question and dismissed the appeal. As a consequence, we are left with the ongoing mess of federal cases that contradict *Vail*, misapply the plain language of § 541.151, ignore the mandate of liberal construction in §541.008, and create an absurd result by which a statute meant to remedy unfair claim practices does not allow the insured to recover the claim.

C. Breach of the Duty of Good Faith and Fair Dealing

An employee of an insured was injured in a hit-and-run accident while driving a company vehicle covered under the policy. The insured filed a claim with the insurer under its policy's uninsured motorist provision. The insurer denied the claim on the basis that the insured had declined uninsured motorist coverage. The insured met with the insurance agent who presented him with a falsified insurance policy showing the insured had rejected uninsured motorist coverage. The insured later found the document reflecting that it had not rejected uninsured motorist coverage, and the insurer paid the uninsured motorist benefits. The insured sued the insurer and insurance agency for causes of action under the DTPA and the Insurance Code, breach of contract, and breach of the duty of good faith and fair dealing. The insurance agency's suit was severed, and the trial court granted its motion to dismiss all claims against the insurance agency. Surprisingly, the court held that many of the sections sued for did not apply to the insurance agency and the alleged misrepresentation about coverage to the insured did not cause its damages. Thus, the court upheld the dismissal of all claims against the insurance agency. *Tex. City Patrol, L.L.C. v. El Dorado Ins. Agency, Inc.*, No. 01-15-01096-CV, 2016 WL 3748780 (Tex. App.—Houston [1st Dist.] Jul. 12, 2016, no pet.).

A trial court abused its discretion by denying a worker's compensation carrier's plea to the jurisdiction as to a claimant's bad faith claims. *In re Illinois Employers Insurance of Wausau*, No. 14-16-00032-CV, 2016 WL 3131823 (Tex. App. — Houston [14th Dist.] June 2, 2016, orig. proc.). The claimant suffered a compensable injury in 1978 that resulted in a heart condition, requiring the worker's compensation carrier to pay for his disability and medical expenses. The insurer did not appeal the initial order that it make the payments. In subsequent years, the claimant submitted additional medical expenses related to his condition. The Texas Workers' Compensation Commission ordered them paid, and the carrier appealed. The carrier was successful in one of its appeals, at which time the reviewing trial court found the claimant's heart condition was unrelated to his workplace accident. However, that ruling was overturned by the court of appeals.

The claimant then brought actions of common law bad faith and violations of the Texas Insurance Code in connection with the carrier's handling of his claims. The carrier responded by asserting that the claimant had no statutory extra-contractual or common law bad faith causes of action in light of *Texas Mutual Ins. Co. v. Ruttiger,* 381 S.W.3d 430 (Tex. 2012), and filed a plea to the jurisdiction. The claimant argued Ruttiger did not have any retroactive application to his claims. The issue on petition for mandamus relief was whether the claimant could pursue common law and statutory bad faith claims arising from the carrier's 2015 denial of worker's compensation benefits relating to a pre-1989 injury and agency determination of benefits. The court summarized the legal history, noting that the workers' Compensation Act in effect in 1978 governed the claimant's claims for benefits. In 1989, the statute was amended to prevent a worker from maintaining those claims in connection with the carrier's improper handling of compensation claims, and *Ruttiger* overruled prior case law that allowed injured workers to pursue common law bad faith causes of action related to claims handling. So the question was whether *Ruttiger* barred bad faith claims based on post-*Ruttiger* conduct but pertaining to a pre-1989 compensable injury. With very little explanation, the court held the bad faith claims were not available to the claimant because the asserted bad faith conduct occurred after *Ruttiger* was decided.

D. ERISA

United Healthcare Ins. Co. actively tried to get several cases against it dismissed relating to its pattern of failing to pay pre-approved bills at various medical providers. In *Tex. Gen. Hosp., L.P. et al. v. United Health Care Co. et al.,* a medical provider relied on pre-approval from an insurer, United Healthcare, prior to treating almost 2,000 patients. No. 3:15-CV-02096-M, 2016 WL 3541828 (N.D. Tex. Jun. 28, 2016). However, after treatment was provided, the insurer only paid a quarter of the bills for these 2,000 patients. The provider sued the insurer alleging that it led the provider to believe that the medical services provided to the insurer's subscribers would be covered under the plans, the insurer wrongfully denied or reduced coverage under the terms of the plans, and that the insurer's calculations of benefits resulted in substantial underpayment to the provider. The insurer sought to dismiss the provider's claims for failure to state a claim, but the court held that the provider's allegations contained enough facts to give the insurer adequate notice as to which provisions of ERISA were breached. The court also stated the claims should not be dismissed as the provider should be excused from exhausting administrative remedies because of the insurer's alleged failure to provide meaningful access to administrative remedies and the futility of further efforts by the provider. *See also Allied Ctr. for Special Surgery, Austin, L.L.C. v. United Healthcare Ins. Co.*, No. H-16-1273 (S.D. Tex. Aug. 9, 2016) (holding that insurer was not entitled to dismissal of claims in suit brought by medical providers against insurer for not paying full amount of pre-approved claims); *Outpatient Specialty Surgery Partners, Ltd. v. United Healthcare Ins. Co.,* No. 4:15-CV-2983, 2016 WL 3467139 (S.D. Tex. Jun. 24, 2016) (allowing claim for breach of fiduciary duty against the insurer as the breach was based on insurer's alleged failure to provide plan documents as requested, not based on a claim for benefits).

A worker sued her employer's benefit plan for wrongful denial of benefits and attorney's fees under ERISA. The worker was diagnosed with encephalopathy, major depressive disorder, and frontal lobe syndrome. She received short-term and long-term disability benefits. However, several doctors said they had no concerns from a cognitive standpoint with her intention to return to work. Therefore, the plan terminated her long-term benefits. Her appeal was denied, as the plan found she no longer had a physical disability and (b) she had used the maximum amount of benefits - 24 months - for a mental disability. The court held the plan did not abuse its discretion in denying continued benefits: the report showed she had significant improvement and a normal electroencephalography, supported by the administrative record. *Sarmiento v. Metro. Life Ins. Co.*, No. H-15-1943, 2016 WL 3906757 (S.D. Tex. Jul. 13, 2016).

E. RICO

The Fifth Circuit affirmed a district court's dismissal of the plaintiffs' RICO complaint for failing to state a claim, holding that the plaintiffs did not plausibly allege that their injuries were proximately caused by the alleged RICO violations. *Shannon v. Ham*, 639 F. App'x 1001 (5th Cir. 2016) (per curiam). The plaintiffs were farmers who sought to purchase crop insurance. The defendant was an insurance agent who allegedly misrepresented he was licensed to sell crop insurance through mail and telephone communications, prompting plaintiffs to purchase crop insurance from him. Seven years after initially purchasing the insurance, the plaintiffs alleged the defendant mishandled their policies and claims, costing them over $200,000. The court held that the plaintiffs' complaint did not show a causal connection between the defendant's lack of an insurance license and his mishandling of their policies. A RICO claim requires a plaintiff to show that the RICO predicate offense proximately caused his injury. Here, the basic complaint was that the defendant did not have the proper license to write crop insurance policies, the injurious conduct alleged was mail and wire fraud, and the injury was when "the quality of [defendant's] services was well below that of a licensed and qualified crop insurance agent." The court reasoned the causation theory did not plausibly allege proximate cause between the fraud and the mishandled claims. If the lack of licensure was plausibly the cause of the injury, "common sense" dictates that it would have manifested itself during the first seven years of their relationship, and the fact they were satisfied with service for seven years "casts significant doubt on the idea that any loss is directly attributable to" the lack of a license. The court did not address—and perhaps neither did the pleadings—whether the plaintiffs had any claims in the first seven years of the relationship, or whether insurance licensure helps to assure that agents know how to properly handle claims.

The Fifth Circuit affirmed a district court's dismissal of the plaintiffs' RICO complaint for failing to state a claim, holding that the plaintiffs did not plausibly allege that their injuries were proximately caused by the alleged RICO violations.

IV. AGENTS, AGENCY, AND VICARIOUS LIABILITY

A. Individual liability of agents, adjusters, and others

An insured purchased insurance for his deceased father's mobile home and property. The insured told his insurance agent that the property was vacant. However, the insurance policy and application obtained for the insured did not cover vacant properties. When the mobile home was consumed in a grass fire, the insurance company denied the claim stating the property was not insured because the insured had lied on the application and stated the property was occupied. The insured did sign the application but says he was not aware of that provision, as he told the agent the property was unoccupied. The insured sued the insurer, the insurance agency and the agent. The trial court found in favor of the defendants, ruling against the insured. However, the appellate court reversed the ruling, holding that an affidavit provided by the insured that he told the insurance company several months prior to the loss that the property was vacant created a genuine issue of material fact to defeat the summary judgments. *Wallace v. AmTrust Ins. Co. of Kansas, Inc., et al.*, No. 10-14-00209-CV, 2016 WL 3136875 (Tex. App.—Waco Jun. 2, 2016, no pet.).

V. THIRD PARTY INSURANCE POLICIES & PROVISIONS

A. Comprehensive general liability insurance

"Physical injury" and "replacement" are not ambiguous in CGL "your product" and "impaired property" exclusions and exclude coverage for property damage and consequential losses incurred during safety repairs made to avoid the risk of catastrophic losses that the policy would cover. *U.S. Metals Inc. v. Liberty Mut. Group, Inc.*, 490 S.W.3d 20 (Tex. 2015). After discovering that flanges supplied by U.S. Metals were leaking, and fearing the risk of fires and explosions that posed, ExxonMobil ("Exxon") replaced them, which required shutting down two refineries in order to cut out the flanges, unavoidably destroying or damaging the adjoining parts and structures of the diesel units to which the flanges were welded. Exxon sued U.S. Metals for the costs of replacement and the loss of use of the refineries, which U.S. Metals settled. U.S. Metals sought indemnity under its CGL policy in federal court. Liberty Mutual defended its denial of coverage, relying on Exclusion K ("Property Damage to Your Product") and Exclusion M ("Damage to Impaired Property or Property not Physically Injured"). Responding to certified questions from the Fifth Circuit, the Texas Supreme Court said, first, that Exclusion K barred recovery for loss of U.S. Metal's own product, the defective flanges, noting that U.S. Metals was not claiming them anyway. The court then turned to Exclusion M, which denies coverage of damages to property, or for the loss of its use, if the property was not physically injured or if it was restored to use by replacement of the flanges, and thus became "impaired property" excluded by Exclusion M. The existence and extent of coverage thus depended, on whether Exxon's property was (1) physically injured or (2) restored to use by replacing the flanges. The court held the mere installation of defective flanges did not cause physical injury and leaks from the flanges, which would have caused physical injury, were averted by Exxon's replacement and repair work. The court also held that because the diesel units were "restored to use" by replacing the flanges, they were impaired property to which Exclusion M applied, denying coverage for Exxon's loss of their use.

General contractor was not entitled to recover any damages based on its defense costs in the underlying suits from its subcontractor's CGL insurer because the total amount paid by the insurer exceeded the sum of the defense costs. *Coreslab Structures (Texas), Inc. v. Scottsdale Ins. Co.*, No. 14-14-00865-CV, 2016 WL 4060256 (Tex. App. — Houston [14th Dist.] July 28, 2016, no pet.). A Houston building sustained water damage during two separate rain events, and the insured asserted claims against various parties including the general contractor and its subcontractor. The general contractor demanded a defense as an additional insured under the subcontractor's insurance policy. The CGL insurer refused to pay the general contractor's defense costs, saying there was no additional-insured coverage. The general contractor's insurer paid some of its defense costs. The general contractor then sued the subcontractor's insurer, asserting, among other things, a claim for statutory bad faith under Chapter 541 of the Insurance Code. The trial court granted a partial summary judgment, ruling that the insurer had a duty to defend the general contractor and pay for some of its defense costs in the underlying suit. In its suit against the insurer, the general contractor sought to recover attorney's fees and expenses its defense counsel billed in the underlying law suit but that it did not actually pay. On appeal, the insurer argued the general contractor was not entitled to damages in connection with attorney's fees or costs incurred in the underlying suit because the total amount it and the contractor's insurer paid exceeded the sums of the defense costs in the underlying suit and attorney's fees and costs in the instant suit. The court agreed.

Without granting petition for review, the Texas Supreme Court requested merits briefing on whether Exxon Mobil is an "additional insured" under liability policies issued to a service contractor whose work at the Exxon Mobil refinery ended three years before the injuries leading to the underlying suit against Exxon Mobil occurred. *Liberty Surplus Ins. Corp. and Commerce & Industry Ins. Co v. Exxon Mobil Corporation*, No. 16-0074 (Tex., Sept. 2, 2016) (case detail at http://www.search.txcourts.gov/Case.aspx?cn=16-0074&coa=cossup). Affirming Exxon Mobil's summary judgment against the insurers, the court of appeals relied on Endorsement 3, which stated that "WHO IS AN INSURED is amended to include as an insured any person or organization with whom you have agreed to add as an additional insured by written contract but only with respect to liability arising out of your operations . . . ." (emphasis added). The court held Exxon Mobil's summary judgment evidence that the service contractor (Wyatt Field Service Company) had worked on that part of the refinery that caused the injuries was sufficient to show "liability arising out of [Wyatt's] operations" and that neither Texas law nor the policy language require the named insured to be liable for the underlying injuries, that the additional insured be blameless for them, or that "operations" be read to require that the "operations" be ongoing at the time of the liability is incurred. *Liberty Surplus Ins. Corp., v. Exxon Mobil Corporation*, 483 S.W.3d 96 (Tex. App.—Houston [14th Dist.] 2015, pet. filed).

B. Construction liability insurance

Evidence extrinsic to the policy could not be used to interpret an unambiguous policy term under the parol evidence rule. *Broughton v. Castlepoint Nat'l Ins. Co.*, No. 15-20708, 2016 WL 4245449 (5th Cir. Aug. 10, 2016) (per curiam). A group of homeowners sued the general contractor that built their cluster of five homes. The contractor filed a claim with its commercial insurer. The insurer denied the claim based on the policy's "Tract Housing" exclusion that excluded bodily injury, property damage, and personal and advertising damage caused by an insured's operations "incorporated into a 'tract housing' project or development," which was defined to mean "any housing project or development that includes the construction of five or more residential buildings in any or all phases of the project or development." The contractor and the homeowners settled their suit, which included entry of a final judgment that awarded damages to the homeowners. After, the homeowners sued the insurer, asserting breach of contract arising out of the denial of the contractor's claim. The issue on appeal was whether the Tract Housing exclusion excluded coverage for construction of more than five units or on five or more units. The homeowners argued that a questionnaire submitted to the contractor by the insurer and the deposition testimony of the insurance agent created a fact issue on the scope of the exclusion that would defeat the insurer's motion for summary judgment and provide coverage as a matter of law.

The Fifth Circuit disagreed. The policy was not ambiguous—on its face, the exclusion unambiguously excluded claims for construction defects on a project of five or more units. The questionnaire and deposition testimony were not part of the policy and were thus parol evidence. Although parol evidence may be introduced to determine the meaning of ambiguous policy terms, it cannot be considered to determine the meaning of unambiguous policy terms, nor can it be admitted to create an ambiguity. Because the policy unambiguously excluded the contractor's work on the homeowners' five homes, the questionnaire and deposition testimony could not be admitted and were not material to their breach of contract claim. The eight-corners rule applicable in duty to defend cases was not relevant or applicable to this case.

C. Directors & officers liability insurance

On November 9, 2016, the Texas Supreme Court heard argument on whether the D&O "insured v. insured" exclusion for claims made against any insured by a person who succeeds to the interest of the insured bars a claim by the insured's assignee. *Great American Ins. Co. v. Primo,* No. 15-0317. The court of appeals, with one justice dissenting, held the exclusion did not bar the claim. *Primo v. Great Am. Ins. Co.*, 455 S.W.3d 714 (Tex. App.—Houston [14th Dist.] 2015, pet. granted). Primo was an officer and director of Briar Green Condominiums. Briar Green asserted a claim against Travelers, its fidelity insurer, asserting that Primo had taken from its account. Travelers paid the claim and Briar

Green assigned to Travelers all its claims against Primo. Travelers then sued Primo, who tendered his defense request to Great American, the D&O insurer. Great American denied the claim under the "insured versus insured" exclusion, which excluded claims "made against any Insured … by, or for the benefit of, or at the behest of … any person or entity which succeeds to the interest of [Briar Green]." The court of appeals held Travelers was an assignee of Briar Green's rights, but that did not make it a successor in interest. The case law on successor-in-interest includes a party that acquires the other party's rights and responsibilities. While Travelers acquired Briar Green's rights under the policy, it did not acquire any of Briar Green's responsibilities. Further, the policy did not define successors in interest and the term was at least ambiguous regarding whether it included or did not include an assignee. Therefore, the court of appeals concluded the trial court erred in rendering summary judgment for Great American based on the exclusion.

A directors and officers insurer is liable for the costs to defend against a disgorgement claim, even if insuring against disgorgement is against public policy. *Burks v. XL Specialty Ins. Co.*, No. 14-14-00740-CV, 2015 WL 6949610 (Tex. App.—Houston [14th Dist] Nov. 10, 2015), *appeal dismissed by agrmnt., opinion not withdrawn* 2015 WL 191988 (Jan. 12, 2016). The claim was made by the Chapter 11 bankruptcy plan agent against Burks, the company's CFO, seeking return of company property and cancellation of the company's future obligations to him under a separation agreement. The company's claims-made D & O carrier, XL Specialty Insurance Company, refused to advance defense costs to Burks, contending that (1) the agent's claim was made after the policy's termination date and could not be deemed timely made under the "interrelated claims" clause because the agent's claim was not the same as made in earlier shareholder derivative actions against Burks; and that (2) there was no duty either to advance defense costs to Burks or to indemnify him for the settlement he reached with the plan agent following XL's denial of coverage because, as a matter of law, the policy definition of "loss" did not apply to a claim for disgorgement. The trial court granted summary judgment to XL and the court of appeals reversed, holding that agent's claim was "interrelated" with the earlier shareholder claims; and that neither the agent's claim nor the settlement agreement proved that the claim was solely for disgorgement. "Further, no Texas court has held that insuring a settlement of a claim seeking restitution or disgorgement is against public policy or otherwise generally 'uninsurable under the law' of Texas; nor has the Legislature enacted any legislation on point. Under these circumstances, we cannot hold as a matter of law that the parties intended for a settlement such as this one to be excluded from coverage."

D. Other policies

An insured home purchaser lacked evidence to support his claims of negligent misrepresentation and breach of contract against a title insurer. *Love v. Chicago Title Ins. Co.*, No. 05-15-00154-CV, 2016 WL 4045400 (Tex. App. — Dallas Jul. 26, 2016, no pet.). The insured purchased a title policy in connection with his purchase of property. He alleged that he rented the property to tenants and had the home remodeled. Several years later, his tenants were told by the police that the home actually belonged to the insurer, and the insured alleged that the insurer had deeded the property back to itself. The insurer argued that the insured actually owned the adjacent property, a vacant lot. The motion was supported by deeds showing the chain of title of both addresses. The chain of title to the vacant lot showed that the insured conveyed the lot to a different person, but after he added a statement that the property was "also known as" the adjacent address. Four days later, the vacant lot was conveyed back to the insured. Once again, the property description was identical to the description in the title policy with the addition of "also known as" the adjacent address. The chain of title to the adjacent address (with the house) showed a deed to the title insurer from individuals not a party to this case. The court held that the trial court properly granted the insurer's no-evidence summary judgment. As to the negligent misrepresentation claim, which was not pled, there was no evidence that the insurer made any representation that the legal description in the title policy applied to the developed property. As to the breach of contract claim, there was no evidence that the insurer acted on the insured's behalf in issuing the title policy. It did not undertake any contractual obligations to ensure that a flawless title was transferred, but only that such title was transferred that the insurer would insure despite any flaws. Any and all activities performed by the insurer or its agents that are indispensable to the determination of insurability constitutes acts in its own behalf and not on behalf of a prospective grantee or lienholder to whom the policy will finally issue.

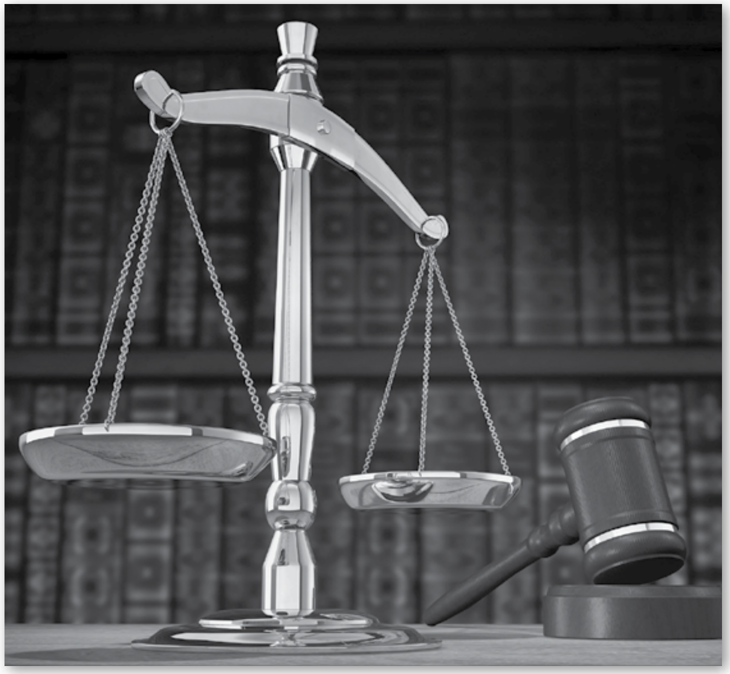
VI. DUTIES OF LIABILITY INSURERS

A. Duty to defend

An insured company was sued for alleged infringement by another company, and the insured requested its insurer defend it. *Awards Depot, L.L.C. v. Scottsdale Ins. Co.*, No. H-15-3201, 2016 WL 613909 (S.D. Tex. Feb. 16, 2016); 2016 WL 1090110 (S.D. Tex. March 21, 2016) (motion to reconsider denied). A "Knowing Violation of Rights of Another" exclusion in the policy excludes coverage for "personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury." The plaintiff in the underlying suit alleged the insured acted with knowledge that its conduct would violate the plaintiff's rights in its trade dress and would inflict "personal and advertising injury." Therefore, the court held the insurer had no duty to defend the insured in the underlying lawsuit. See also *Laney Chiropractic and Sports Therapy, P.A. v. Nationwide Mut. Ins. Co.*, No. 4:15-CV-135-Y, 2016 WL 3916005 (N.D. Tex. July 20, 2016) (holding insurer had no duty to defend because complaint did not state a claim for misappropriation of advertising ideas, which would have been covered under the policy, but rather merely stated a claim for trademark infringement, which the policies excluded from coverage).

B. Duty to indemnify—Four corners rule—Conflict of defense counsel

In *Allstate County Mut. Ins. Co. v. Wootton*, 494 S.W.3d 825 (Tex. App.—Houston [14th Dist.] 2016) pet. filed, response requested (Tex. No. 16-0546) http://www.search.txcourts.gov/Case.aspx?cn=16-0546&coa=cossup, the court held that there is only a narrow exception to the "four corners" rule, which allows extrinsic evidence on the duty to defend only if it is "impossible" to tell whether the coverage is "potentially implicated" by looking only at the claim and the policy. That exception did not apply, the court concluded, because the tort plaintiff alleged negligent entrustment in the operation of a covered vehicle, which triggered coverage and thus precluded consideration of extrinsic evidence to show that the driver was an employee of the insured thus bringing the claim within a policy exclusion. Though the insured was entitled to a defense, the court held that the insured was not entitled to choose its own defense counsel paid for by the insurer because the insured's summary judgment motion had raised only a "potential" conflict of interest of defense counsel. "On appeal, the Woottons assert that Gonzalez, Sr. [the tort plaintiff] pleaded facts sufficient to give fair notice of a negligent-entrustment claim and that adjudication of the negligent-entrustment claim will require adjudicating facts upon which coverage depends. They also claim a conflict of interest exists because Allstate conditioned its defense of the Woottons upon an unreasonable extra-contractual demand that the Woottons agree to the attorney chosen by Allstate, thus allegedly subjecting them to waiver of their right to invoke the rule allowing them to obtain independent counsel. Because the Woottons did not assert either of these arguments as grounds for summary judgment in their motion, we cannot affirm the trial court's summary judgment on either of these grounds."



An insurer owed a duty to indemnify its insured home builder. *Great Am. Lloyds Ins. Co. & Mid-Continent Cas. Co. v. Vines-Herrin Custom Homes, et al.*, No. DC-03-6903, 2016 WL 4486656 (Tex. App.—Dallas Aug. 25, 2016). After a builder lost in arbitration to a homeowner for negligent construction, the builder assigned its rights against its insurer to the homeowner, as the insurers had refused to defend the builder in the underlying lawsuit. The court held that the insurers provided coverage to the builder during the entire period the house was built until the time damages first manifested. Therefore, "actual damages must have occurred during the coverage provided by [the insurers]," and the insurer owed a duty to indemnify to the builder.

An employee of an insured business was killed on the job by an energized line operated by a co-worker. After the insured settled with the employee's estate, the insurer sought declaratory judgment that it owed no duty to indemnify the insured for the settlement under the policy terms. The court held the insurer had no duty to indemnify the insured because the policy provided coverage for "bodily injury by accident" that had not been caused by the intentional conduct of the employer. The court noted the insured knew that the power lines were live yet still had its employee working in close proximity to the live wires, which violated the safety manual. *Liberty Ins. Corp. v. Dixie Elec., L.L.C.*, 637 F. App'x 113 (5th Cir. 2015).

A "professional services" exclusion applied to plaintiffs' allegations against an insured engineering firm, relieving insurer of its duty to defend but not its duty to indemnify, which cannot be determined at the pleadings stage. *Hartford Casualty Insurance Company v. DP Engineering, L.L.C.*, 827 F.3d 423 (5th Cir. 2016). DP requested Hartford provide a defense for suits arising from a crane accident at Entergy's nuclear power plant: Entergy's suit for property damage and workers' suits for personal injuries and wrongful death. The suits alleged several acts or omissions relating DP's failure to perform a load test that would have avoided the accident. Hartford refused the defense and brought a declaratory judgment action contending that it had no duty to defend or indemnify based on the "professional services" exclusion. The district court ruled for Hartford on both duties. The Fifth Circuit affirmed the district court's no duty to defend ruling, but reversed the district court's no duty to indemnify holding, stating that "[t]he underlying lawsuits here involve complex facts and multiple allegedly negligent parties,. . . there is 'an array of possible factual and legal scenarios' that could have caused the crane and stator to fall, some of which may create coverage[,] [and that] [t]he allegations in the underlying lawsuits here do not conclusively foreclose that facts adduced at trial may show DP Engineering also provided non-professional services, which would be covered under the policy."

The district court granted summary judgment for the insurer on the insured's indemnity claim, in part, on the ground that policy Exclusion M precluded coverage for "damage that occurr[ed] during the replacement process to property other than [the flanges] - in this case, the temperature coating, the gaskets, the piping, and the insulation." The Fifth Circuit previously certified four questions to the Texas Supreme Court regarding the interpretation of this policy. The supreme court held that the insulation and gaskets destroyed in the process were not restored to use, but were replaced. Because they were not impaired property to which Exclusion M applied, the cost of replacing them was covered by the policy. Therefore, the Fifth Circuit reversed and remanded the district court's holding for further proceedings consistent with the Texas Supreme Court's opinion. *U.S. Metals, Inc. v. Liberty Mut. Group, Inc.*, No. 13-20433, 2016 WL 3689181 (5th Cir. Jul. 11, 2016).

An insurer moved to dismiss the portion of an insured's declaratory judgment claim that would establish the insurer's obligation to pay future defense costs and indemnity payments for potential future lawsuits that implicate one or more of the umbrella policies. The insured, Boy Scouts of America, conceded that it received pre-suit claims that had not evolved into actual litigation. Therefore, the court held any determination of the duty to defend or indemnify was premature because it was unknown whether suit would be filed or whether a judgment or settlement would be reached. *Boy Scouts of Am. v. Nat'l Union Fire Ins. Co. of Pittsburgh PA,* No. 3:15-CV-2420-B, 2016 WL 495599 (N.D. Tex. Feb. 8, 2016).

An insurer had no duty to defend or indemnify its insured, a builder and plaintiff in the underlying suit. *Vinings Ins. Co. v. Byrdson Servs.*, LLC, No. 1:14-CV-525, 2016 WL 3626226 (E.D. Tex. Jun. 17, 2016). The insured builder sued an individual to foreclose on its lien on the defendant's property when it was not paid for the repair work it performed, and the defendant filed a counterclaim against the builder alleging it did not timely complete his reconstruction contract and the work was defective. In the coverage suit, the insurer filed a motion for summary judgment arguing it had no duty to defend or indemnify the builder because the factual allegations in the underlying suit did not fall within the necessary policy language to trigger coverage for "property damage." The builder did not respond to the motion. The counterclaim in the underlying suit stated the builder did not properly lay the slab, necessitating it to be redone and resulting in delays that displaced him from his home. While the court found the pleading fell within the scope of the policy's "property damage" coverage, it was specifically excluded from that coverage under the "your work" exclusion as "property damage" arising from the builder's work on the property. As such, the insurer had no duty to defend. The court further found that because the insurer had no duty to defend, the possibility that it had any duty to indemnify was negated. The court noted that, while it could look outside the state court pleadings in determining the duty to indemnify, the parties submitted very little extrinsic evidence and thus no additional information was presented to alter the court's analysis.

VII. THIRD PARTY THEORIES OF LIABILITY

A. Breach of contract

A tenant caused damage to her apartment complex when her dryer caught on fire. The apartment complex's insurer paid for the damages, and then sought reimbursement from the tenant under the Reimbursement Provision in the lease. Under Texas law, landlords have no obligation to repair premises conditions that a tenant caused, and they are not restrained from contracting with tenants for reimbursement of associated repair costs. Here, the tenant signed a reimbursement provision in her lease, and therefore, the Texas Supreme Court reversed the appellate court's judgment invalidating the Reimbursement Provision on public-policy grounds, and remanded the case for consideration of the tenant's remaining defenses to enforcement of the Reimbursement Provision. *Philadelphia Indem. Ins. Co., et al. v. White*, 490 S.W.3d 468 (Tex. 2016).

An automobile insurer did not breach its contract or any other duty when it paid a settlement within policy limits. *Martin v. State Farm Mut. Auto. Ins. Co*., No. 05-14-01473-CV, 2016 WL 1104878 (Tex. App. — Dallas Mar. 22, 2016, pet. denied) (mem. op.). After an insured's son was involved in a car accident, the other driver filed a liability insurance claim with the insured's insurance company, State Farm. The insured sued State Farm even though it paid the claim, alleging State Farm breached its contract and exercised bad faith by determining the insured's son was at fault. The court of appeals affirmed the insurer's summary judgment finding that the insurer did not breach the contract. The insured argued that State Farm took action to "limit [his] contract rights" under the policy and withheld reimbursement for property damage to the extent of the deductible. But the court noted that the other driver filed a claim for property damage against the insured that was within the scope of coverage, and State Farm settled the claim within the policy limits and without any liability to the insured. The policy also allowed State Farm to "settle or defend, as we consider appropriate." There was no evidence that State Farm breached the contract or acted in bad faith. State Farm satisfied its duty under the policy to settle the claim as it considered appropriate, and satisfied its duty under *Stowers* to accept a reasonable settlement demand within policy limits.

B. Unfair insurance practices

Violations of the Texas Insurance Code need to be pleaded with specificity, or the allegations may be found deficient. This is precisely what happened in *Columbia Mut. Ins. Co. v. Trewitt-Reed-Lacy Funeral Home, Inc*., No. 4:15-CV-568-A, 2016 WL 524597 (N.D. Tex. Feb. 5, 2016). An insured's property was damaged in a storm, but her insurer refused to pay arguing the damage was caused by a previous storm that the insured had received compensation for but failed to repair. The insurer filed a declaratory judgment action, and the insured counterclaimed for unfair insurance practices, bad faith, and breach of contract. The court held that the alleged violations of the Texas Insurance Code were conclusory and did not contain allegations as to who said what, when, and where, and how the harm was caused. Because those facts were missing the court found the allegations to be deficient, and dismissed the claims for violations of the Texas Insurance Code and bad faith.

C. Fraud

An insured company's claim for fraud against its insurer was dismissed because the insured did not state, "with particularity the circumstances consisting of fraud or mistake," because it failed to include any facts regarding time, place, and content of any false representation during the insurer's attempt to effectuate settlement of the insurance claim. Instead, the insured relied on the substantial disparity between the public adjuster's estimate and the insurer's estimate to infer that the insurer did not make a good faith effort to settle the insured's claim. *Columbia Mut. Ins. Co. v. Cedar Rock Lodge, L.L.C*., No. 1:15-CV-111-P-BL, 2016 WL 1059677 (N.D. Tex. March 17, 2016).

VIII. SUITS BY INSURERS

A. Declaratory relief

An insurer filed for declaratory relief after its insured's car was in an accident that injured another party. The driver of the car was not the insured. Rather, the insurance company argued the driver of the car was specifically excluded on the policy. The insurer also filed a motion for summary judgment asserting that its policy provided no coverage for the collision because the insured's truck was driven by an excluded driver. The appellate court affirmed the trial court's summary judgment ruling in favor of the insurer. *Antoine v. Am. Service Ins. Co., Inc*., No. 09-14-00235-CV, 2016 WL 422524 (Tex. App.—Beaumont Feb. 4, 2016, no pet.).

B. Subrogation

Employees of a sub-contractor were injured due to the contractor's negligence. The sub-contractor's worker's compensation insurer paid benefits to them. The contractor asked the worker's compensation insurer to waive its subrogation rights, which it refused to do, and the trial court granted a motion for summary judgment in favor of the contractor that the worker's compensation insurer take nothing on its subrogation claim. However, the appellate court reversed the underlying ruling. Because the sub-contractor had no duty to indemnify the contractor for its own negligence in the contract, the sub-contractor never assumed liability for the injuries in this case and thus had no contractual duty to seek a waiver of subrogation rights from its insurer. The court looked to the indemnity clause of the contract to determine what liabilities the sub-contractor had assumed, and found only those instances in which the subcontractor promised to indemnify the contractor would trigger the sub-contractor's obligation to obtain a waiver of subrogation rights from its insured. The sub-contractor did not agree to indemnify the contractor for personal injury claims attributable to its own negligence. Because the sub-contractor was not required to indemnify the contractor under the contract, it did not "assume liability" under the insurance provisions of the contract. Because the sub-contractor did not "assume liability" for the damages alleged in this suit, it was not contractually obligated to cause its insurer to waive its subrogation rights against the contractor. *Ins. Co. of the State of Penn. v. Roberts*, No. 01-15-00453-CV, 2016 WL 3902163 (Tex. App.—Houston [1st Dist.] July 14, 2016, pet. granted).

C. Fraud by insured

An insured was required to repay all amounts his insurer paid to him and on his behalf under the "loss of use" policy because he made fraudulent representations with regard to his claim for per diem payments and living expenses while his property was being repaired. *Safeco Insurance Company of Indiana v. Igwe*, No. AU-14-CV-587-DAE, 2016 WL 866360 (W.D. Tex. Mar. 3, 2016). An insured sued his homeowner's insurer for breach of contract and violations of the Texas Insurance Code after the insurer failed to fully pay two claims made under the policy. The insurer counterclaimed for fraud in connection with the insured's second claim. The trial court granted the insurer's motion for summary judgment so that the insurer's fraud claim was the only issue at trial. After his home was water damaged, the insured lived outside his home while the insurer assessed and repaired the damage. The policy covered living expenses in the event the premises were rendered uninhabitable due to a covered event. The insurer made some payments to cover temporary housing and meals while the insured lived outside his home. The insurer attempted to find a long-term housing option, but the insured rejected it as too small and unworkable for his family. He stated in particular that he had a wife and four children living with him. However, during trial the insured admitted his wife and children were living elsewhere and only visited him on weekends or when school was out, which contradicted his statements to the insurer. Additionally, the insured had requested per diem expenses for his entire family every day during the nearly four-month period while the home was being repaired. At trial, he testified that he did not actually provide all of the meals to his family. He testified he needed two hotel rooms to store his children's belongings, but he was also reimbursed for driving to his home to obtain their belongings from time to time. The court found that the insurer acted in good faith in attempting to relocate the insured and that the insured intentionally lied to the insurer and misrepresented his family's living situation. In the court's view, the insured committed fraud, which under the terms of the policy, rendered the policy void. The insured was found liable to the insurer for the amounts it paid him for per diem expenses and temporary housing.

IX. DAMAGES & OTHER ELEMENTS OF RECOVERY

A. Policy benefits

The insured-oilfield drilling contractor was hired to drill a well, and purchased an insurance policy that covered "well out of control" events such as blowouts. After a blowout occurred, the contractor sought costs from the insurer for running a casing, liner, extra drilling time, and pro-rated logging. The contractor won in the trial court, and the insurer appealed arguing those costs were not caused by an occurrence, and thus were not a covered loss. The court held the only reasonable interpretation of the insurance policy's language is that the scope is limited to re-drill expenses incurred because of an occurrence, i.e. the well out of control event. Applying the undisputed facts to the policy's plain language, the casing and liner costs were not incurred as a result of an occurrence, as they would have been incurred even if a blowout did not occur. Therefore, the court reversed the summary judgments in favor of the insured on the coverage issue, and rendered judgment in favor of the insurer, declaring the disputed expenses were not covered under the insurance policy. *Gemini Ins. Co. v. Drilling Risk Mgmt., Inc.*, No. 04-15-00318-CV, 2016 WL 3625666 (Tex. App.—San Antonio July 6, 2016, pet. filed).

B. Attorney's fees

An insurer was entitled to an award of attorney's fees from another insurer under Tex. Civ. Prac. & Rem. Code § 38.001(8). *Colony Nat'l Ins. Co. v. United Fire & Cas. Co.*, No. 5:14-CV-10-JRG-CMC, 2016 WL 3896832 (E.D. Tex. Apr. 14, 2016). United Fire & Casualty Company entered into an insurance contract with its insured to provide additional insurance coverage for Carothers Construction, Inc. But United refused to provide a defense to Carothers when it was sued, and so Carothers' insurer, Colony National Insurance Company paid all necessary fees and expenses to defend it in the underlying suit. Colony, as subrogee to Carothers, then sued United for breach of contract and prevailed. Colony then moved for attorney's fees, and the court granted the motion. United's breach caused Colony to bring suit to force United to pay what it owed, and Colony incurred attorney's fees in prosecuting the suit. The award of reasonable attorney's fees is mandatory under Tex. Civ. Prac. & Rem. Code § 38.001(8), and because Colony prevailed on its breach of contract claim and recovered damages, it was entitled attorney's fees. The amount of fees was supported by affidavit and detailed time records, and was not disputed.

An insurer's attorney's fees were reasonable and therefore deducted from the policy benefits held in the registry of the court in an interpleader action. *Dearborn Nat'l Life Ins. Co. v. Jeitani*, No. SA:15-CV-855-DAE, 2016 WL 3546434 (W.D. Tex. Jun. 22, 2016). As a disinterested stakeholder, the insurer was entitled to recover the reasonable costs and attorney's fees associated with bringing the interpleader action. Its attorney submitted an affidavit to prove the costs fees, and the court awarded the amount requested.

An insured was not entitled to attorney's fees because it did not plead a breach of contract claim against either its insurer or agent. *Integon National INS. Co. v. Rizo*, NO. 3:14-CV-1641-G-BK2016 WL 3647796 (N.D. Tex. Mar. 22, 2016). An insurer filed a declaratory judgment action seeking declaration it owed no duty to defend or indemnify its insured in connection with an automobile accident. The insured filed a cross-claim against its agent for DTPA and Insurance Code violations. The parties settled the case, and the insured filed a motion seeking reimbursement for attorney's fees, arguing it was entitled to reimbursement because it was the prevailing party in a declaratory judgment action wherein the substantive law involved a breach of contract. However, the court disagreed. The court first observed the Texas declaratory judgment statute is not a basis for attorneys' fees in federal actions because the statute is procedural in nature, not substantive, and the federal statute did not authorize attorney's fees. Further, the insured never brought a claim for breach of contract against the insurer or the agent and thus was not a prevailing party under section 38.001 of the Texas Civil Practice and Remedies Code.

A court enforced a mediated settlement agreement between an insured and a plan administrator, but the administrator was not entitled to attorney's fees in connection with the enforcement. *Sanders v. Unum Life Ins. Co. of Am.*, No. SA-15-CV-310-DAE, 2016 WL1436695 (W.D. Tex. Apr. 11, 2016). An insured under a long-term disability benefits plan and the plan's administrator mediated their claims against each other and signed a mediated settlement agreement. The administrator tendered a check to the insured's attorney, pending execution of the final release and dismissal of the suit. However, the insured refused to sign the release, and so the administrator filed a motion to enforce the settlement agreement and requested attorney's fees. The court granted the motion to enforce but denied the request for attorney's fees. The evidence showed there was offer, acceptance, and meeting of the minds, and the agreement complied with Tex. R. Civ. P. 11 because it was written and filed with the court. The insured was therefore ordered to sign the final release and comply with the settlement agreement. However, the administrator was not entitled to attorney's fees. The claims for which attorney's fees could have been claimed were released by the settlement agreement and were separate from the right to fees regarding enforcement of the mediated settlement agreement. The administrator did not provide any statutory support for its request. Therefore, its request was denied without prejudice.

An insurer interpleaded the proceeds of a trade credit insurance policy. The court found that the insurer should receive attorney's fees in accordance with the general rule in interpleader cases. *Coface N. Am. Ins. Co. v. Woodlands Exp., LLC*, No. 4:15-CV-621, 2016 WL 4361462 (S.D. Tex. Aug. 15, 2016). The court noted that, although the case was simple, one of the claimants improperly protracted the proceedings by filing an "inconsistent" response to the insurer's motion to dismiss and by filing counterclaims against the insurer that were not supported by law. The court found that the lodestar calculation of fees was reasonable and made an award in accordance.

X. DEFENSES & COUNTERCLAIMS

A. Limitations

In a breach of contract action between the two named parties, an insurer was the bonding agency for INet on the contract at issue. The insurer asserted the affirmative defense that the claim was barred by statute of limitations, and the district court dismissed DFW's claim against the insurer, Hartford, on that basis. The Fifth Circuit reversed and remanded holding the contract was not abandoned or terminated over a year before suit was brought. *Dallas Fort Worth Int'l Airport Bd. v. INet Airport Sys., Inc.*, 819 F.3d 245 (5th Cir. 2016).

An insured's suit for breach of contract against his disability insurer was time barred. *Fernandez v. Mut. of Omaha Ins. Co.*, 630 F. App'x 232 (5th Cir. 2015) (per curiam). Following discontinuance of benefits payments under a disability insurance policy, the insured brought action against his insurer for breach of contract as well as violations of the Texas Insurance Code and the Texas Deceptive Trade Practices Act. The policy contained a three-year limitations period. At issue was when the insured's cause of action accrued. The insured argued his cause of action did not accrue and commence the running of the limitations period until the policy ended on its own terms in September 2013, meaning that the latest possible date he could have filed suit would have been three years later in September 2016. By contrast, the insurer argued the cause of action accrued after the coverage was terminated under the policy, i.e., June 15, 2009, and the limitations period began to run on September 15, 2010, which accounted for the 15-month grace period after the last disability payment was issued on June 15, 2009. Accordingly, the last possible date the insured could have filed suit would have been September 15, 2013, two weeks before the insured filed his suit. Both the district court and the Fifth Circuit agreed with the insurer. The insured was required to submit an annual form to remain eligible for continued coverage under the policy, but he failed to submit one following the insurer's request in May 2009. Under the Policy, the 15-month grace period for sending the form began to run on the 2009 request date. Once the grace period ended, the 3-year limitations period under the policy began to run. This meant the insured would have been required to file suit on his contract claims under the policy by August 2013. Because he did not file suit until the following month, his contractual claims were time-barred. Additionally, the court concluded the insured's extra-contractual claims and his claims for violations of the Texas Insurance Code and the Texas Deceptive Trade Practices Act expired no later than two years after he received the insurer's letter notifying him that it would not continue to cover his claims. Accordingly, his suit on those claims was also time-barred.

The court concluded that the insured's extra-contractual claims and his claims for violations of the Texas Insurance Code and the Texas Deceptive Trade Practices Act expired no later than two years after he received the insurer's letter notifying him that it would not continue to cover his claims.

A homeowner's claims against an insurer were barred by limitations. *Meredith v. Rose*, No. 05-15-00054-CV, 2016 WL 4205686 (Tex. App. — Dallas Aug. 9, 2016, no pet.) (mem. op.). After purchasing a townhome, the homeowner learned a home warranty had never issued. The homeowner sued the builder, his company, and the home warranty company that was to provide a warranty on her home. The homeowner later amended her petition to add claims against the insurer that was to issue the warranty. The insurer moved for summary judgment on the basis of limitations. At issue was whether the discovery rule applied—that is, whether the homeowner's injury was inherently undiscoverable and objectively verifiable—and, if it applied, when the homeowner discovered or in the exercise of reasonable diligence should have discovered the injury. The homeowner's claims for negligence, gross negligence, and negligent misrepresentation were based on the actions of the builder allegedly as agent for the insurer. Thus, these causes of action against the insurer accrued at the same time as they accrued against the builder. Although she sued the builder within the limitations period, she did not sue the insurer until more than two years later, thus barring her claims against the insurer with a two-year statute of limitations. Her claims with four-year limitations were also barred because the homeowner knew or should have known she did not receive a warranty as represented. Although she received a sample warranty book when she closed on the house, she did not receive a validation sticker for a warranty within ninety days of her receipt of the sample, as clearly stated in the sample. Further, the type of injury, i.e., the existence of a home warranty, was not inherently undiscoverable. The homeowner could have inquired with the warranty provider about the status of the warranty, and in fact learned there was no warranty from another HOA member after he called to inquire. Thus, even if the discovery rule applied, the homeowner's claims were barred.

B. Misrepresentation or fraud by insured

An insured's misrepresentations in applying for coverage voided the policy. *Perfit Vision v. Mount Vernon Fire Ins. Co.*, No. H-15-408 (S.D. Tex. Sep. 22, 2016). The owner of a corporate entity, which in turn owned an eyewear store named Perfit Vision, obtained a one-year casualty policy for his business, naming him individually, "DBA Perfit Vision." The owner filed a claim with the insurer, reporting that the store was burgled over a weekend. The insurer denied the claim. When he applied for the policy, the owner was required to disclose earlier policies and information about claims and cancellations of coverage. In his application, the owner expressly warranted he had not made a claim under a policy in the preceding three years when, in reality, he had filed two similar claims during that period. This misrepresentation rendered the policy void. The court also found the owner did not have standing to bring the claim. The policy's named insured was the individual doing business as Perfit Vision. But the court found "the appending of 'DBA Perfit Vision' to [the owner's] name is a nullity because it was registered to the company. [The owner] cannot buy insurance in his name on a distinct company's assets nor sue for their loss. [The owner] has not shown precisely what his interest is in Eyewear." In other words, the DBA was really a DBA of a corporate entity, not of the individual owner. The company, under either name, had no standing to complain of a breach of a policy issued to the individual owner.

C. Preemption

A Texas Insurance Code provision requiring health insurers to make coverage determinations and pay providers' claims within specified time or face penalties did not apply to federal employee benefit plans. *Health Care Service Corp. v. Methodist Hosps. of Dallas*, 640 F. App'x 314 (5th Cir. 2016). Chapter 1301 of the Texas Insurance Code requires healthcare insurers to make coverage determinations and pay claims made by preferred healthcare providers within a specified time or face penalties. Anticipating a hospital would seek relief under Chapter 1301, a health plan administrator, BCBSTX, sought a declaration that Chapter 1301 did not apply to it as the administrator of health plans providing benefits to federal employees because the Federal Employee Health Benefits Act of 1959 (FEHBA) preempts it. BCBSTX serviced benefit plans for federal employees in Texas. Preemption under the FEHBA occurs when the FEHBA contract terms at issue relate to the nature, provision, or extent of coverage or benefits, and the state law relates to health insurance or plans. Here, the parties did not dispute that the contract terms related to coverage or benefits, so the only issue was whether Chapter 1301 related to health insurance or plans. The hospital argued Chapter 1301 does not relate to the FEHBP plans because it permits a claim for statutory penalties only after an affirmative coverage decision and therefore requires no substantive coverage determination. The Court disagreed: "By imposing penalties for late payments of approved claims, Chapter 1301 also imposes claims-processing deadlines on FEHBP carriers." Because Chapter 1301 would directly affect the operation of the plans and expand FEHBP carriers' duties under the plans, it related to health insurance or plans. The FEHBP therefore preempted Chapter 1301.

D. Insurer's waiver of, or estoppel to assert, defenses

An insured moved to strike nearly all of the insurer's affirmative defenses, claiming they were "mere boilerplate statements lacking a factual or legal context." The Court noted that the Fifth Circuit has never held that the plausibility standards of *Twombly* and *Iqbal* apply to affirmative defenses. Rather, affirmative defenses are examined under the less stringent "fair notice" standard of *Woodfield*. The court held the insured's affirmative defenses in this case provide the insured with fair notice as they are sufficiently articulated such that the plaintiff is not unfairly surprised. *Frederick v. Am. Heritage Life Ins. Co.*, No. 4:15-CV-01982, 2016 WL 2839284 (S.D. Tex. May 13, 2016).

XI. PRACTICE & PROCEDURE

A. Choice of law

An insured business and its insurer sued the manufacturer of a failed component on an underwater structure in an offshore production installation that caused the structure to fall to the sea floor. The business alleged $400 million in damage. The district court granted summary judgment for the manufacturer based upon the maritime economic loss doctrine. Then the insurer sought leave to amend its complaint, alleging for the first time that Louisiana law applied. The Outer Continental Shelf Lands Act (OCSLA) prescribes the applicability of either maritime law or adjacent state law as "surrogate federal law" to govern the Outer Continental Shelf. The court held since the incident did not disrupt maritime commercial activities, maritime law did not apply, reversing and remanding the case for further proceedings under Louisiana law. *Petrobras Am., Inc., Certain Underwriters at Lloyd's v. Vicinay Cadena, S.A.*, 815 F.3d 211 (5th Cir. Mar. 7, 2016). The court later noted that its holding did not address waiver of choice of law argument outside of the OCSLA context. No. 14-20589, 2016 WL 3974098 (5th Cir. July 22, 2016).

B. Jurisdiction

An insurer filed a declaratory judgment action in federal court arguing it was not required to defend or indemnify its insured contractor in a lawsuit brought against it. The court held the insurer failed to show that no facts could possibly be proven in the underlying case that would trigger a duty to indemnify. Moreover, the insurer admitted in its own pleadings that it needed discovery to establish a lack of a duty to defend or indemnify. Therefore, the case was dismissed. *Mid-Continent Cas. Comp. v. Christians Dev. Co., Inc.*, No. A-16-CA-31-LY, 2016 WL 1734114 (W.D. Tex. Apr. 28, 2016).

An insured was hit by a US Postal Service worker. The insured's insurance company sued the United States in state court for negligence. USPS removed the case to federal court pursuant to the Federal Tort Claims Act (FTCA) and filed a motion to dismiss for lack of jurisdiction, which the court granted. The court held that because the insurer alleged its insured was injured by a federal government employee acting within the scope of her employment for USPS, the insurer must proceed with this action under the Federal Tort Claims Act. Therefore, the state court had no jurisdiction to consider this action, and therefore, under the derivative jurisdiction doctrine, the federal court did not have subject matter jurisdiction either. Under the derivative jurisdiction doctrine, when a case is removed from state to federal court, "the jurisdiction of the federal court is derived from the state court's jurisdiction." Since the state court did not have subject matter jurisdiction, the federal court did not either. However, the federal court would have jurisdiction if the insurer had originally filed its lawsuit in federal court. *Colonial Co. Mut. Ins. Co. v. U.S.,* No. SA-15-CV-917-XR, 2015 WL 7454698 (W.D. Tex. Nov. 23, 2015).

C. Venue

Factors for forum non conveniens weighed in favor of dismissing a liability insurer's coverage action against an insured developer and general contractor. *Crum & Forster Specialty Insurance Company v. Creekstone Builders, Inc.*, 489 S.W.3d 473 (Tex. App. — Houston [1st Dist.] 2016, no pet.). Prior to the trial of a construction defects lawsuit, the insurer filed a declaratory judgment action against the insureds seeking a declaration that it had no coverage obligation to them under the policies at issue. The insureds moved to dismiss, arguing the insurer had failed to join the plaintiff from the South Carolina construction defects suit, a necessary party, and the case would more appropriately be resolved in South Carolina. The court of appeals held that the case should be dismissed on forum non conveniens grounds.

hail damage from "multiple storms," some of which may have occurred after expiration of the policy. In opposition, the insureds submitted an expert affidavit from a structural engineer who inspected the property and testified "hail did in fact occur" on the date in question and that the hail was consistent with the damages he observed. The Fifth Circuit, like the district court before it, held that the insureds failed to meet their burden of proving the loss occurred during the policy period. The engineer's affidavit was "little more than an allusion to his credentials, a recitation of the hail damage observed, and a conclusory, 'subjective opinion' that the damage resulted from a hail storm within the policy period." It was not supported by any facts or explanation of the basis for concluding that the observed damage was due to a particular hail storm during the policy period.

An insured's expert report and testimony withstood an insurer's Daubert challenge. *Overcoming Word Praise Center, Internat'l v. Philadelphia Indem. Ins. Co.*, No. 7:15-cv-00060-O, 2015 WL 11120668 (N.D. Tex. Oct. 13, 2015). An insured retained an expert to testify about its lost profits following alleged storm damage to its business property. The expert's report included a statement that the building's damages were caused by hailstorm. The cause of damages was central to the dispute between the insured and its insurer. The insurer sought to strike the expert on grounds there was "an analytic gap between [the expert's] opinion on lost sales and the basis for his conclusion." The court, however, found that the testimony was reliable. The expert was permitted to assume that the water damage was caused by the storm and assume that this event caused the lost profits. In other words, he could assume the ultimate fact of liability for the purposes of opining on what the damages would be if that fact were found true. The insurer also argued the expert's opinion was based on improper "other sources," referring to the insured's profit and loss statements and a sample of similarly situated businesses, as well as statements by the insured. The court found the expert reasonably relied on these sources, because experts may base opinions on facts or data the expert has been made aware of or personally observed, even if the sources themselves are not admissible

A defendant internet installation company could not strike an insurer's designated fire experts. *Allstate Ins. Co. v. Helmsco Inc.*, No. 6:15-CV-114, 2016 WL 3232726 (W.D. Tex. Feb. 16, 2016). A home insurer, as subrogee of its insureds, filed suit for damages that arose from a fire at the insureds' residence. The suit asserted that the defendant failed to properly ground an antenna and related components, which contributed to causing the fire. The defendant sought to preclude the insurer's three fire experts. However, the court found they were all qualified and their opinions would assist the trier of fact. Moreover, each was going to testify about his own observations and not simply repeat each other's opinion.

In the same case, by separate motion, the defendant sought to exclude the insurer's three damage experts for failing to provide reports. *Allstate Ins. Co. v. Helmsco, Inc.*, No. 6:15-CV-114, 2016 WL 3223324 (W.D. Tex. Feb. 2, 2016). The experts were all employees of the insurer, but even so the insurer was obliged to give a detailed expert witness report under Rule 26, because it did not establish that the employees were not specially employed to provide expert testimony or that their duties as employees did not regularly involve giving expert testimony. Rather than exclude the witnesses' testimony, the court ordered they provide reports.

The insurer was a non-resident plaintiff, which meant its forum choice was entitled to substantially less deference than if it were a Texas resident. One of insureds was a South Carolina entity. The condominiums that were the subject of the underlying construction defects suit were located in South Carolina, the plaintiffs in that suit had obtained a judgment in South Carolina, the witnesses were located in South Carolina, and a related suit was pending in South Carolina federal court. At least some of the insured's sources of proof and witnesses were located in South Carolina, and the insurer's employees who would be witnesses would be required to travel regardless of which state the trial was in. Although Texas had an interest in adjudicating the dispute because one insured and the broker that issued the policies were in Texas, the greater interest lay in South Carolina because the only insured that was party to the judgment in the construction defects suit was a South Carolina entity. Thus, although the case involved a connection to Texas, it was more appropriately characterized as a South Carolina controversy. The fact that the insured failed to present evidence at the hearing was not automatically fatal to its ability to meet its forum non conveniens burden, as the insured had attached evidence to its motion to establish the relevant facts.

D. Discovery

The court upheld the trial court's ruling requiring GEICO to produce three years of invoices and supporting documents, evidencing GEICO's payment of claims involving charges and fees associated with the towing and storage of its insureds' vehicles in a three-county area. *In re Gov't Employees Ins. Co.*, No. 09-15-00436-CV, 2015 WL 9311656 (Tex. App.—Beaumont Dec. 23, 2015, pet. denied).

E. Experts

An engineer's expert affidavit finding hail damage was insufficient to prove the loss occurred during the policy period. *Stagliano v. Cincinnati Ins. Co.*, 633 F. App'x 217 (5th Cir. 2015) (per curiam). The insureds owned several commercial properties. After a hail storm, the insureds submitted a claim for damage to one of the properties, which the insurer paid. Approximately one year and eight months later, the insureds submitted claims for some of their other properties damaged in the same storm, which the insurer denied. After suit commenced, the insurer moved for summary judgment, arguing that the insureds could not establish that the damage to their properties was caused by a hail storm that took place within the policy period. In support, the insurer submitted an affidavit from one of its property claims managers, which stated the roofs of the properties at issue had

F. Arbitration

An annuity-payment assignee did not impliedly waive right to arbitrate by bringing action against annuity issuers and assignors. *RSL Funding, LLC v. Pippins*, No. 14-0457, 2016 WL 3568134 (Tex. Jul. 1, 2016) (per curiam). The assignee had arbitration agreements with the annuity sellers, but neither the assignee nor the sellers had arbitrations agreements with the insurers that wrote the annuities. The assignee sued one of the insurers and the sellers, and then later sought to initiate arbitration with the sellers and stay the suit pending completion. The lower courts found that the assignee waived its right to arbitrate by its litigation conduct involving both the sellers and the insurer. The Texas Supreme Court held that the assignee did not waive its right to arbitrate by litigation conduct, but nevertheless affirmed. Under the court's decision in *Perry Homes v. Cull*, a party's right to arbitrate may be waived by its substantially invoking the judicial process to the other party's detriment, in view of the totality of the circumstances. 258 S.W.3d 580 (Tex. 2008). Here, the assignee sued the insurer (with which there was no arbitration agreement) seeking a judgment declaring the parties' rights under the assignments, but did not allege any dispute with the sellers, who, at that time supported the assignee's actions. According to the court, "the existence of possible future disputes among parties to agreements where there is no current dispute among them … does not weigh in favor of a party having waived its right to arbitrate possible future disputes by filing suit when there are no disputes." Arbitrable disputes between the assignee and the sellers arose through the sellers' filing of a counterclaim, but the counterclaim was dismissed in a week, followed immediately by the assignee's dismissal of all of its claims against the sellers. Thereafter, the sellers filed a separate suit in district court seeking to withdraw annuity payments the insurance company had paid into the court registry, and within two weeks, the assignee sought arbitration against the sellers. The assignee sought arbitration in less than eight months, a delay the court found too short to prove a waiver of the right to arbitrate. The discovery conducted by the assignee was served on the insurer and concerned non-arbitrable disputes. The discovery against the sellers was initiated by the insurer, and not by the assignee. The assignee's actions having the insurance company pay the funds at issue into the court's registry did not create a dispute with the sellers. After concluding that the assignee had not waived its right to arbitrate by litigation conduct, the court nevertheless affirmed the lower court's decision to deny the motion to stay the litigation. The assignee did not challenge one ground on which the lower court could have ruled, namely that the assignee failed to join its assignees in the arbitration.

A doctor did not expressly waive his right to arbitrate his claims against a health care provider. *Sofola v. Aetna Health, Inc.*, No. 01-15-00387-CV, 2016 WL 67196 (Tex. App. — Houston [1st Dist.] Jan 5, 2016, no pet.) (mem. op.). Aetna Health, Inc. sued a doctor for fraud and breach of contract, alleging he doctor was improperly sending patients to an out-of-network facility in which he held an ownership interest to draw more money from Aetna. The doctor was a participating provider of health care services to Aetna's members, and their agreement contained an arbitration provision applying to "any controversy or claim arising out of or relating to this Agreement," but carved out equitable claims. The doctor moved to compel arbitration. In the course of litigation, the doctor filed multiple pleadings asserting his right to arbitration, and Aetna filed pleadings indicating an agreement to arbitrate. Eventually, the doctor withdrew his pending arbitration motion "without prejudice" and filed a counterclaim "subject to the arbitration agreement." In response, Aetna argued the doctor's notice of withdrawal of his motion to dismiss acted as a judicial admission and estopped him from later seeking arbitration—essentially a waiver. The court disagreed, finding neither express nor implied waiver of the right to arbitrate. Express waivers of arbitration must be clear and specific, and acts merely inconsistent with the right to arbitrate are insufficient to demonstrate express waiver. The parties' agreed motion requesting new docket control dates did not constitute an express waiver of arbitration rights, even though it contained a statement that the doctor intended to withdraw his motion to compel arbitration, because it was not a clear waiver and also mentioned the parties' efforts to agree to arbitration. The court also held there was no implied waiver. Implied waiver of arbitration occurs when a party has substantially invoked the judicial process and caused the other party to suffer prejudice. Neither the doctor's plea to the jurisdiction regarding Aetna's equitable claims nor his motion for summary judgment on the single remaining claim amounted to substantially invoking the judicial process. The plea to the jurisdiction was intended to address the equitable claims Aetna brought to avoid arbitration, and the motion for summary judgment expressly stated it was subject to the arbitration agreement. Any arguable prejudice Aetna suffered from delay or expense was attributable to its attempt to plead around the arbitration agreement. Consequently, the doctor did not waive its right to arbitration.

Insureds and agent were compelled to arbitrate their claims against an insurer. *Hudson Ins. Co. v. Bruce Gamble Farms*, No. 13-115-00098-CV, 2015 WL 6758654 (Tex. App.—Corpus Christi, Nov. 5, 2015, no pet.) (mem. op.) An insurer challenged the trial court's order denying its motions to compel arbitration of the lawsuit filed by its insureds, a group of farmers, and of its agent's cross-petition against the insurer for indemnity. The insurer filed two motions to compel arbitration, one addressing the insureds' suit and the other addressing the agent's third party action. The insured farmers' policies contained an arbitration clause, which they argued was unconscionable because they did not have a copy of the relevant terms (mandatory "Basic Provisions" propounded by the Department of Agriculture and published in federal regulations) when they entered into the insurance contracts. The court disagreed, however, because none of the insureds asserted they were unaware of the Basic Provisions or that the provisions were unavailable for review. Also, the fact that the policy declaration sheets specifically stated they formed only a "part of" the policy provisions should have put the insured farmers on notice of the Basic Provisions. Regarding the motion to compel arbitration against the agent, the agent argued the agency contract containing an arbitration clause was not with it but with a different entity and therefore did not apply to it. However, the agent, not the other entity, signed and returned several other documents related to the role of the agent, and the insurer paid the agent, not the other entity, commissions in accordance with the agency contract. The agent therefore "insisted that it be treated as a party" to the agency contract and, in doing so, subjected itself to the arbitration clause.

An insurer's appointed special deputy receiver was required to arbitrate its common law claims against the insurer's attorney for breach of fiduciary duty. *Rich v. Cantilo & Bennett, L.L.P.,* No. 03-15-00408-CV, 2016 WL 611804 (Tex. App. — Austin Feb. 9, 2016, pet. filed). An attorney agreed to represent an insurer and other defendants in a suit against it. The representation agreement stated, "Any dispute regarding payment shall be submitted to arbitration." Several years later, the Texas Commissioner of Insurance placed the insurer into liquidation and appointed a special deputy receiver over the insurer. The receiver was statutorily authorized to pursue claims on behalf of the insurer's policyholders, shareholders, and creditors. The receiver sued the attorney, bringing several statutory and common law causes of action including fraudulent transfers under the

Uniform Fraudulent Transfer Act and the Insurance Receiver Act, as well as breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and negligence. The receiver alleged that the attorney billed and was paid only by the insurer for services he provided to co-defendants, knew of the insurer's financial condition but continued to act to its detriment by receiving weekly payments from the insurer, and purported to represent one of the insurer's officers and thereby creating a conflict of interest. The suit sought damages and fee disgorgement. The attorney moved to stay proceedings and compel arbitration, that the trial court denied, but the court of appeals reversed. The receiver took the position that the arbitration agreement was only applicable to claims that the receiver inherited from the insurer but not to claims that arose solely by virtue of the receiver's appointment or that belong to the insurer's creditors. The court agreed that if the insurer would be bound by the arbitration agreement with respect to particular claims, then the receiver would also be bound on those claims, but not for claims the insurer itself could not have brought. The court thus held that the statutory claims raised under the Insurance Code and the UFTA were not subject to the arbitration agreement. However, the actions for breach of fiduciary duty, conspiracy, and negligence accrued independently of the receiver's appointment and arose under the representation agreement. For those claims, the receiver stood in the shoes of the insurer and was thus bound by the arbitration agreement to the same extent as the insurer. The court held that all of those common-law claims were subject to arbitration because they concerned the attorney's billing for services he did not perform for the insured and thus were "regarding payment."

An insurer could not be forced to arbitrate two subrogation actions brought after it had withdrawn from a voluntary arbitration forum.

An insurer could not be forced to arbitrate two subrogation actions brought after it had withdrawn from a voluntary arbitration forum. *Watts Regulator Co. v. Texas Farmers Ins. Co.*, No. 02-16-00025-CV, 2016 WL 3569423 (Tex. App. — Fort Worth Jun. 30, 2016, pet. filed). Insurer, a former member of a voluntary arbitration forum, brought claims for subrogation against a manufacturer, a member of an arbitration forum. Under the terms of the arbitration forum agreement, a member could withdraw by giving 60 days' notice, if there was no pending arbitration before it. The insurer had previously given its notice to withdraw from the arbitration forum, and the parties did not have arbitration agreements with each other. The trial court denied manufacturer's motions to compel arbitration. The question on appeal was whether claims that accrued prior to the insurer's decision to withdraw from the forum were nevertheless subject to arbitration through the arbitration forum even though they were not pending cases before an arbitration panel at any time during the insurer's association with the arbitration forum. Here, the arbitration agreement at issue was not between the manufacturer and the insurer as parties to a contract or parties to an overall transaction that incorporated an arbitration clause by reference. Instead, each party unilaterally signed a form provided by the arbitration forum, and the claims at issue were unrelated to the breach of any agreement between the parties. The arbitration agreement form expressly states that no company shall be required to arbitrate any claim or suit if it is not a signatory company unless it has given written consent. When the insurer sued the manufacturer, it was no longer a signatory. The arbitration agreement form's plain language addresses which cases—not claims—were still subject to arbitration upon a signatory's withdrawal. Because they were not "cases then pending before arbitration panels," these two subrogation actions did not fall within the post-withdrawal cases that would remain subject to arbitration. The same basic facts and issue were considered and the same conclusion reached by the Beaumont Court of Appeals in *Watts Regulator Co. v. Foremost County Mut. Ins. Co.*, No. 09-16-00033-CV, 2016 WL 4045502 (Tex. App. — Beaumont Jul. 28, 2016, pet. filed) (mem. op.).

Parties had to submit the question of whether the case should be arbitrated to an arbitrator. *Beaumont Foot Specialists, Inc. v. United Healthcare of Tex., Inc.*, No. 1:15-CV-216, 2016 WL 9703796 (E.D. Tex. Dec. 22, 2015). A plaintiff healthcare provider performed medical services for patients covered by health plans insured or administered by United Healthcare in exchange for a timely payment at a reduced contractual rate. The healthcare provider sued United for violating the agreement by making incorrect or untimely payments. United moved to compel arbitration and further argued an arbitrator, and not the court, should determine whether the parties' agreement required arbitration. The court found the parties clearly agreed that an arbitrator should determine whether the dispute should be submitted to arbitration. The agreement stated that the parties would "resolve all disputes between us" by submission to arbitration in accordance with AAA procedures. The AAA's Commercial Arbitration Rules and Mediation Procedures provide that the arbitrator "shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part." Consequently, the court concluded the dispute should be referred to arbitration, and it took no position on the enforceability or scope of the arbitration clause, leaving that to determination by the arbitrator.

An insured farming entity sued its insurer for failing to pay its claim. The insurer moved to arbitrate the case under the terms of the policy. The arbitration clause provided that if the parties "fail to agree on any determination made by [the insurer]," the disagreement will be resolved through binding arbitration. Disagreement and determination are not defined in the policy, so the plain meaning applies. The court held the insured filed suit because it disagreed with the insurer's determination. Therefore, its claim falls within the scope of the arbitration clause and should be arbitrated. *Hudson Ins. Co. v. BVB Partners*, No. 13-15-00163-CV, 2015 WL 6758540 (Tex. App.—Corpus Christi Dec. 1, 2015, pet. denied).

G. Appraisal

Two buildings were damaged in a hurricane. The umpire in the appraisal process based his decision for damages partially on the plaintiff's failure to mitigate damages by up keeping the buildings. The court held the appraisal panel acted within their authority when they determined whether the damage was caused by a covered event or non-covered pre-existing conditions like wear and tear, under the terms of the policy. *United Neurology, P.A. v. Hartford Lloyds Ins. Co.*, 624 Fed. Appx. 225 (5th Cir. 2015).

After an insureds' home was damaged by a tornado, an appraisal occurred to determine the loss. The insurer paid the insured $17,000 less than the appraisal award, arguing it had paid a restoration crew $17,000 for clean-up of the home after the tornado. However, the court held these affidavits regarding the clean-up costs were not part of the original motion for summary judgment and should not have been considered. Therefore, the insureds were entitled to the full appraisal award. *Halton v. Am. Risk Ins. Co.*, et al., No. 05-15-00864-CV, 2016 WL 2609286 (Tex. App.—Dallas May 5, 2016, pet. granted).

By paying an appraisal award, an insurer was entitled to summary judgment on an insured's claims against it. *Anderson v. Am. Risk Ins. Co.*, No. 01-15-00257-CV, 2016 WL 3438243 (Tex. App. — Houston [1st Dist.] Jun. 21, 2016, no pet.) (mem. op.). An insured brought contractual and extracontractual claims against her home insurer after her house was damaged during a storm. After reporting the damage to her insurer, an adjuster inspected the property within three days and recommended an initial payment amount and a completion payment amount. Over four months, the insurer made a series of payments, greater than the adjuster's initial payment but less than the total he recommended. The insured sued for breach of contract, prompt payment violations, and breach of the duty of good faith and fair dealing. The insurer invoked appraisal and subsequently paid the appraisal award. The insurer then moved for summary judgment on all claims. The court of appeals held that the insurer did not breach the contract because it paid the appraisal award and thus fulfilled its obligations under the policy. The fact that the insurer did not pay the amount of the award earlier, alone, did not raise a fact issue on the breach of contract claim. Regarding the prompt payment statute, the court held the insurer was entitled to summary judgment because it timely paid the appraisal award. The court also held that the insurer did not breach the duty of good faith and fair dealing: the insurer did not breach the contract, and insured did not present evidence the insurer did something so extreme that would cause independent injury nor failed to timely investigate the claim. The evidence demonstrated only a bona fide dispute about the amount necessary to compensate the insured for the damage to her home. Further, the insurer inspected the property three days after the loss was reported. The court reached the same result concerning the insured's DTPA bad faith claim.

Regarding the prompt payment statute, the court held that the insurer was entitled to summary judgment because it timely paid the appraisal award.

A federal district court found that timely payment of an appraisal award precluded contractual and extra-contractual recovery and addresses the "written notice" requirement of Prompt Payment of Claims Act. *Cantu v. State Farm Lloyds*, No. 7:14-CV-456, 2016 WL 5372542 (S.D. Tex. Sep. 26, 2016). In a case involving hail damage to property, the court ordered an abatement until proper notice was provided under § 541.154 of the Insurance Code. During the abatement period, the insureds demanded appraisal under their policy but did not file any confirmation of proper notice until several months later. Following appraisal, the insurer paid the appraisal award, less depreciation and deductible. Following payment, the insureds sought to lift the abatement, amend their pleadings, and conduct discovery; the insurer sought to lift the abatement and filed a motion for summary judgment. The court denied the insureds' motion to lift the abatement to conduct discovery, but granted the insurer's motion to grant the summary judgment. The insureds were not entitled to conduct discovery because they "failed to identify any additional discovery likely to create a fact issue as to each essential element" or "explain their basis for believing depositions, written discovery, and a copy of the claim file would create a fact issue on their claims." Further, the insureds were estopped from maintaining a breach of contract claim as a matter of law based on the insurer's timely payment of the appraisal award. The insurer properly deducted prior payments from the appraisal award and timely investigated the claim. The insureds also asserted breaches of §§ 541 and 542, fraud, and bad faith. The court found that because there had been no breach of contract, there was likewise no bad faith conduct absent injury independent of the policy benefits. And as the bad faith causes of action related solely to the insurer's investigation and handling of the policy claim, the insureds did not allege an action that would constitute an independent injury. The prompt payment and fraud claims similarly failed. In sum, because the insurer complied with the appraisal provision (invoked by the insureds), the insureds were estopped from asserting a breach of contract claim as a matter of law absent a viable breach of contract claim, the insureds' extracontractual claims could not survive.

H. Motions for summary judgment

An insured daycare was sued after a child left in a bus unattended was injured. The insured daycare reported the incident to its agent, but the court held that the daycare did not report the incident to the insurer timely under the policy. The report to the agent did not qualify as notice to the insurer. Therefore, summary judgment was granted in favor of the insurer on the issue of duty to defend and indemnify. *Evanston Ins. Co. v. Cheetah, Inc.*, No. 7:15-CV-082, 2016 WL 4494440, (S.D. Tex. Aug. 26, 2016).

Four crew members on a boat were severely injured. The policy insuring the boat stated the boat was insured in the amount of $550,000, with a protection and indemnity limit of $500,000 and a crew sublimit of $100,000. The insurer moved for summary judgment that it owed only $100,000 total to the four injured crew members. The court held that "crew sublimit" had one clear and definite legal meaning, "a group of people associated in common activity." If the insured was entitled up to $500,000 for crew claims, there would be no purpose in including the sublimit in the policy, therefore, the crew sublimit would be rendered meaningless in violation of Texas law on contract interpretation. Therefore, summary judgment was granted in favor of the insurer. *United Specialty Ins. Co. v. Porto Castelo, Inc.*, No. H-15-1036, 2016 WL 2595072 (S.D. Tex. May 5, 2016).

An injured motorcyclist did not adequately present evidence on his promissory estoppel claim to avoid an insurer's no-evidence summary judgment. *Chambers v. Allstate Ins. Co.*, No. 05-15-01076-CV, 2016 WL 3208710 (Tex. App. — Dallas Jun. 9, 2016, pet. denied) (mem. op.). A motorcyclist sued an automobile insurer that insured the driver that struck him, asserting a claim for promissory estoppel concerning his medical expenses. The motorcyclist alleged an adjuster for the insurer made two oral promises to pay "all medical expenses which had currently been incurred" directly to the providers and approximately $3,000 for the motorcycle directly to the motorcyclist. He alleged the insurer did not make any of the promised payments. The trial court granted the insurer's no-evidence motion for summary judgment. On appeal, the court considered whether the motorcyclist (a pro se litigant) had adequately connected the evidence in the record to the elements of promissory estoppel. The court disagreed with the motorcyclist's position that evidence of the insurer's undisputed promise to pay approximately $3,000 in property damage for the motorcycle constituted evidence of a promise to also pay more than $200,000 in medical expenses. Statements at the hearing were also not summary judgment evidence. The motorcyclist argued at the hearing that he relied on "affidavits of fact" contained in "the appendix that went with [the amended petition] and stuff." However, no affidavits filed by the motorcyclist in this case or in the cause of action from which this case was severed were attached to or cited in his summary judgment response. As such, the motorcyclist did not itemize the evidence or otherwise connect it to the elements of his claim.

I. Severance & separate trials

A UM/UIM auto insurer was entitled to sever and abate extra-contractual claims from breach of contract claim. *In re AAA Tex. County Mut. Ins.* Co., No. 12-15-00277-CV, 2016 WL 4395817 (Tex. App. — Tyler Aug. 18, 2016, orig. proc.) (mem. op). An insurer sought mandamus relief from the trial court's orders denying its motion to sever and abate its insured's extra-contractual claims and compelling discovery. Following an accident, the insured sued its auto insurer for breach of contract under the UIM portion of his policy, violations of the DTPA, and the Insurance Code. The insurer filed a motion to sever and abate the extra-contractual claims, which the trial court denied. The court of appeals found the denial incorrect, explaining that, in most circumstances, an insured may not prevail on a bad faith claim without first showing that the insurer breached the contract, and further, in the context of UIM coverage, an insurer is under no contractual duty to pay UIM benefits until the insured proves that the insured has UIM coverage, that the other driver negligently caused the accident that resulted in covered damages, the amount of the insured's damages, and that the other driver's insurance coverage is deficient. As a result, Texas case law establishes that severance and abatement of extra-contractual claims is required in many instances in which an insured asserts a claim for UIM benefits. Here, the insurer contested liability for breach of contract, and the insured had not established liability. The insured's extra-contractual claims would be rendered moot by a determination the insurer was not liable on the breach of contract claim. The insured also sought production of documents related to the insurer's claim handling process and procedures. The court found that, "while these may be relevant to the extra-contractual claims, they are irrelevant to the breach of contract claim and privileged from discovery." Because the insured's extra-contractual claims ultimately could be rendered moot, the insurer was not required to put forth the effort and expense of conducting discovery, preparing for a trial, and conducting voir dire on those claims. Severance of the extra-contractual claims was thus required.

An insurer was not entitled to mandamus relief concerning the denial of its motion for severance because it delayed too long in filing its petition. *In re Farmers Tex. County Mut. Ins. Co.*, No. 13-16-0098-CV, 2016 WL 1211314 (Tex. App. — Corpus Christi Mar. 28, 2016, orig. proc.) (mem. op.). Insureds were injured in an automobile accident with an uninsured driver. They sued the uninsured driver and their automobile insurer asserting claims based on the UM/UIM provisions of their policy. The insurer moved to sever and abate the extra-contractual claims against it until a final judgment was rendered on their contractual causes of action. The trial court denied the insurer's motion, but the insurer delayed filing its petition for mandamus relief for eight months after the trial court's denial of its motions and six months after the trial court denied rehearing. Under these circumstances, the court of appeals concluded that the insurer did not meet its burden to obtain mandamus relief and denied the insurer's petition for writ of mandamus.

J. Bifurcation of damages

An insured's failure to introduce evidence to allocate damages between covered and uncovered losses was fatal to the claim. *One Way Investments, Inc. v. Century Surety Co.*, No. 3:14-cv-02839-D (N.D. Tex. Sep. 21, 2016). An insured had a commercial property insurance policy covering its hotel. The property was damaged in a severe hailstorm, and the insured submitted a claim for wind and hail damage, seeking the cost to repair or replace the roof, air conditioning units, and damage to the interior walls. The adjuster concluded that the damage was less than the amount of the deductible, and so the insurer did not pay the claim. The insured sued, asserting contractual and extra-contractual causes of action, and the insurer moved for summary judgment, arguing there was no expert testimony that the property damage was caused by wind, and its expert testimony showed the property damage was caused by wear and tear. The court found the insured did not introduce any evidence that would enable a reasonable jury to estimate the amount of damage or the proportionate part of the damage caused by a covered cause, here hail and wind. The insured's experts' reports only provided estimates of the cost to repair the property and some evidence that the property was damaged by hail, but neither provided evidence from which a reasonable jury could allocate damage from wear and tear, on the one hand, and wind and hail, on the other. The insured thus failed to create a genuine fact issue concerning whether its damages were covered by the policy. The court further noted that the insureds' expert reports did not provide evidence that the damages sought for repairs were reasonable and necessary; they only provided an estimate of the cost to repair the property. Concerning the extra-contractual causes of action, the court found that there was a bona fide dispute regarding the coverage that precluded liability for bad faith and insurance code violations. The insurer presented expert testimony from its adjuster, who concluded that wear and tear, not hail, caused the damage, which was a reasonable basis to deny coverage. The insured did not provide any evidence to refute that conclusion or enable a jury to find the insurer did not have a reasonable basis to deny the claim.

K. Removal and Remand

Once again this year, in suits where adjusters or agents were named as defendants, insurers continued to seek removal based on improper joinder, and insureds continued to seek remands. The trend seemed to crest, as can be observed by the number of cases. Plaintiffs lawyers, be forewarned: at least one court views this trend in removal and remand as an improper tactic by insureds, rather than as one initiated by insurers attempting to forum shop. In *Patel v. Acceptance Indemnity Ins. Co.*, No. 4:15-CV-944-A (N.D. Tex. Jan. 28, 2016), the court noted that the case was "but another off a long line of cases in which attorneys for an insured-plaintiff joined as a defendant in a lawsuit filed against an insurance company to recover policy benefits the insurance adjuster of another representative of the insurance company in an effort to removal of the case from state court to federal court."

Remand was **granted** in the following cases: *B&B Car Wash v. State Auto. Mut. Ins. Co.*, No. 3:16-CV-1800-B, 2016 WL 4494323 (N.D. Tex. Aug. 25, 2016) (insurer did not respond to motion to remand and therefore did not meet burden to prove improper joinder); *Exxon Mobil Corp. v. St. Paul Fire & Marine Ins. Co.*, No. 6:15-CV-875, 2016 WL 4491869 (E.D. Tex. Aug. 5, 2016) (Exxon properly stated claim against non-diverse contractor for breach of contract for allegedly failing to procure excess liability coverage for Exxon); *Spar Enterprises, LP v. Cincinnati Ins. Co.*, No. 5:15-CV-00661-RP (W.D. Tex. Oct. 30, 2015) (although claims against adjuster for breach of contract and bad faith likely could not be maintained, DPTA and Insurance Code claims could be maintained and pleading sufficiently stated those claims under fair notice standard); *Royal Architectural Prods. Ltd. v. Acadia Ins. Co.*, No. 2:16-CV-00265, 2015 WL 7313405 (N.D. Tex. Nov. 19, 2016) (insured alleged specific factual allegations against non-diverse adjusters that stated a plausible claim under Ch. 541); *Manziel v. Seneca Ins. Co.*, No. 3:15-CV-03786-M, 2016 WL 3745686 (N.D. Tex. Jul. 13, 2016) (non-diverse adjuster was properly joined where insureds pled facts that adjuster failed to prepare estimates, falsely represented there was no hail damage to insured property, and failed to maintain effective communication thereby prolonging and delaying resolution of insured's claim, which were sufficient to sustain claim under § 541.060(a)(2)); *Exchange Servs., Inc. v. Seneca Ins. Co.*, No. 3:15-CV-01873-M, 2015 WL 6163383 (N.D. Tex. Oct. 16, 2015) (adjusters were properly joined when insured alleged adjusters estimated payment far below repair costs, made errors in valuing claim with intent of minimizing the loss, conducted an incomplete investigation, failed to consider insured's public adjuster's estimates, and failed to provide reasonable explanation for value, which were sufficient facts to sustain a claim under § 541.060(a)(7)); *Chen v. Metropolitan Lloyds Ins. Co. of Tex.*, No. 4:15-CV-00501-RC-DBB, 2016 WL 675805 (E.D. Tex. Feb. 19, 2016) (adjuster properly joined when insured alleged adjuster was hired by insurer to perform inspection and adjust claim, his inspection generated an estimate of damage including certain repairs and totaling a certain amount less than the policy deductible, he stated there was no hail storm damage to roof shingles and that damage was wear and tear and that inspection of interior revealed no water damage, and he conducted a substandard and improper inspection of the property that grossly undervalued cost of repairs and yielded unrealistic amount to underpay coverage); *Clark Restoration Consultants, LP v. Columbia Mut. Ins. Co.*, No. 2015 WL 6956579 (N.D. Tex. Nov. 10, 2015) (applying 12(b)(6) standard, court held adjuster was properly joined in suit for violation of § 541.060 where insured alleged adjuster selected biased appraiser because conduct occurred prior to settlement of claim); *Roach v. Allstate Vehicle & Prop. Ins. Co.*, No. 3:15-3228-G, 2016 WL 795967 (N.D. Tex. Feb. 29, 2016) (adjuster could be held liable under § 541.060(a)(2); pleading specifically alleged adjuster failed to effectuate equitable settlement conducing a substandard inspection, failing to include many of the damages in his report, misrepresenting cause of, scope and cost to repair damages, and making other specified misrepresentations upon which insured relied); *Leidy v. Alterra Am. Ins*. Co., No. H-15-2497, (S.D. Tex. Oct. 15, 2015) (insureds properly alleged claim against adjuster under § 541.060(a) by pleading that adjuster "conducted a substandard, results-oriented inspection… and failed to discover covered damages and/or fully quantify covered damages," that adjuster's investigation as inadequate and lasted "approximately one hour," and that adjuster "misrepresented material facts," and further alleging in Motion to Remand that adjuster's results-oriented investigation led to a coverage decision based on his incorrect belief that there was no hailstorm at the property when there were heavy storms throughout the area on the date in question); *Shade Tree Apartments, LLC v. Great Lakes Reinsurance (UK) PLC*, No. A-15-Ca-843-SS, 2015 WL 8516595 (W.D. Tex. Dec. 11, 2015) (applying Texas fair notice pleading standard, insured sufficiently pled claim for violation of § 541.060 by alleging adjuster conducted substandard inspection, as evidenced by report, which failed to include specified items of damage and did not allow adequate funds to cover repairs to restore home, and further misrepresented cause, scope, and cost of repair and amount of coverage, which both insured and insurer relied upon and caused insured's damage, and adjuster gave negligent advice about how property could be repaired to prevent further damage); *Puente v. Pillar Ins. Co.*, No. 4:16-0138, 2016 WL 931059 (S.D. Tex. Mar. 11, 2016) (complaint gave fair notice of claims under § 541.060(a) by alleging adjuster misrepresented to insured that damage was not covered); *Western Healthcare, LLC v. Nat'l Fire and Marine Ins. Co.*, No. 3:16-CV-00565, 2016 WL 4039183 (N.D. Tex. Feb. 29, 2016) (granting remand and inviting motion for attorney's fees); *Polansky's Wrecker Serv. v. Universal Underwriters Ins. Co.,* No. 6:15-CV-170 (W.D. Tex. Dec. 21, 2015) (consolidated actions were severed so that cases naming non-diverse adjuster as defendant could be remanded); *Landero v. Liberty Ins.,* No. 1:16-CV-008-P-BL, 2016 WL 3866358 (N.D. Tex. Jun. 15, 2016) (insureds sufficiently pled § 541.060 claim against adjuster where they pled "three facts that rise above the statutory boilerplate and conclusory allegations which are insufficient under the federal pleading standard .... First, [insureds] allege that [adjuster] inspected the property for fifteen minutes. Second, [insureds] claim that [adjuster] made coverage decisions without providing reasonable explanations. Finally, [insureds] assert that [adjuster] made note of damage caused by the storm, and then declined to list that damage in his report."); *Sai Hotel Group Ltd. v. Steadfast Ins. Co.*, No. W-15-CV-263, 2015 WL 6511434 (W.D. Tex. Oct. 27, 2015) (internal adjuster was proper party where he was unlicensed in Texas, failed to perform thorough investigation, grossly underestimated extent of damage to property, and the insurer relied exclusively on the adjuster's substandard investigation in determining what amounts, if any, to pay the insured).

Plaintiffs lawyers, be forewarned: at least one court views this trend in removal and remand as an improper tactic by insureds, rather than as one initiated by insurers attempting to forum shop.

Remand was **denied** in the following cases: *Lopez v. United Property & Cas. Ins. Co.*, No. 3:16-CV-0089, 2016 WL 3671115 (S.D. Tex. Jun. 11, 2016) (adjuster improperly joined in insured's action against home insurer); *Fernandez v. Allstate Fire & Cas. Ins. Co.*, No. 3:15-CV-2689-D, 2015 WL 6736675 (N.D. Tex. Nov. 4, 2015) (agent improperly joined where claims were asserted against all defendants generally and only alleged misrepresentation specific to agent was true); *Hernandez v. Safeco Ins. Co. of Indiana,* 3:15-CV-4016-L, 2016 WL 4217838 (N.D. Tex. Jun. 27, 2016) (insured failed to state claims for relief under DTPA and Texas Insurance Code against adjuster); *Gonzalez v. Security Nat'l Ins. Co.*, No. H-15-2785, 2016 WL 1222151 (S.D. Tex. Mar. 29, 2016) (amending petition to allege less than $75,000 in damages after removal was ineffective to destroy diversity jurisdiction where original petition failed to specify allegations regarding adjuster's actions); *James v. Chubb Custom Ins. Co.*, No. 4:15-CV-3102 (S.D. Tex. Jan 21, 2016) (considering summary-judgment type evidence to conclude that sole in-state defendant was the producer/broker of the policy and not party to policy, which precluded it from any liability under claims brought by insured); *Resendez v. Scottsdale Ins. Co.*, No. 1:15-CV-1082-RP, 2016 WL 756576 (W.D. Tex. Feb. 26, 2016) (applying state "fair notice" standard to pleadings and concluding that non-diverse agent did not owe duty to disclose that policy did not cover flooding or water damage, thereby precluding recovery on that basis); *Walters v. Metropolitan Lloyds Ins. Co. of Tex.*, No. 4:16-CV-307, 2016 WL 3764855 (E.D. Tex. July 14, 2016) (adjuster improperly joined where plaintiffs alleged "only boilerplate allegations" that adjuster was "improperly trained to handle claims of this nature and performed an unreasonable investigation of Plaintiffs' damages," and utilized "unfair settlement practices" and nothing more); *Johnson v. Travelers Home and Marine Ins. Co.*, No., 2016 WL 4061146 (S.D. Tex. Jul. 29, 2016) (allegation that adjuster performed an "outcome oriented and unreasonable investigation" stated a conclusion without identifying any specifics that made adjuster's investigation "unreasonable"); *Elizondo v. Metropolitan Lloyds Ins. Co. of Tex.*, No., 2016 WL 4182729 (E.D. Tex. Aug. 8, 2016) (adjuster improperly joined where petition alleged insurer used adjusters to investigate claim and general allegations that adjuster was inadequately trained and failed to thoroughly investigate, conducted outcome-oriented investigation, made misrepresentations and omissions and unfairly investigated claim); *Young v. Travelers Personal Security Ins. Co.*, No. 4:16-CV-235, 2016 WL 4208566 (S.D. Tex. Aug. 10, 2016) (allegations against adjuster were conclusory, "formulaic recital of the statutory elements," and lacked specificity to state a claim); *Kelcey v. Penn-America Ins. Co.*, No. 4:16-CV-337-A, 2016 WL 3647626 (N.D. Tex. Jun. 30, 2016) ("[Plaintiffs] seem to believe that because they have parroted the language of the Texas Insurance Code and DTPA they have pleaded claims that would suffice under Rule 8. They have not. Instead, they have alleged mere labels and conclusions, which the court is not bound to accept as true…. [P]laintiffs say that [adjuster] made misrepresentations, but they do not allege what he said to whom or when. Nor do they allege what actions they took in reliance on any specific representations or how they were harmed….They do not allege any damages caused by [adjuster] individually. Nor have they alleged any actions outside the scope of [adjuster's] employment."); *Monclat Hospitality, LLC v. Landmark Am. Ins. Co.*, No. 4:15-CV-632-A, 2015 WL 5920757 (N.D. Tex. Oct. 8, 2015) (insured did not properly plead claim for conspiracy between insurer and adjuster because corporation cannot conspire with itself and there was no allegation that adjuster was acting outside scope of agency, and because conspiracy to breach contract is not actionable); *Meritt Buffalo Events Ctr., LLC v. Central Mut. Ins. Co.*, No. 3:15-CV-3741-D, 2016 WL 931217, N.D. Tex. Mar. 11, 2016) (finding that adjusters cannot be held liable under §§ 541.060(a)(1), (a)(2)(A), and (a)(7) because only insurance companies can be held liable under those sections, and that allegations supporting other claims were conclusory); *Southlake Campus, Inc. v. Allstate Ins. Co.*, 4:15-CV-720-A, 2015 WL 7587355 (N.D. Tex. Nov. 25, 2015) (factual allegations related to adjuster in declaratory judgment action were "nothing more than mere conclusions" and no facts would lead to conclusion that insured suffered any damage from adjuster's conduct).

One case was of particular interest because the court initially denied the insured's motion to remand but subsequently found sua sponte that it lacked jurisdiction. *Petree v. Metropolitan Lloyds Ins. Co. of Tex.*, No. 3:16-CV-0735-G, 2016 WL 3090592, 2016 WL 4211764 (N.D. Tex. 2016). In the initial order, decided on June 3, 2016, the court found that the insured's allegations that adjusters "were inadequately trained and failed to thoroughly investigate the damages" and "set about to deny properly covered damages" were conclusory and did not provide a reasonable basis to predict insureds could recover against adjuster. However, the court later reviewed the insured's amended complaint, which alleged additional claims against the adjuster, and in its order of August 9, 2016, concluded the insured pled a potentially valid claim for relief against the adjuster under section 541.060(a)(1) of the Texas Insurance Code. This time, the insureds alleged the adjuster misrepresented material facts relating to the coverage. In particular, the insureds alleged the adjuster failed to thoroughly investigate the damages and "focused exclusively on finding a cause of loss that would be readily excluded under the [insurance] [p] olicy." Specifically, the insured claimed that the adjuster "ignored the moisture that was entering the property via the wind driven rain (a covered cause of loss) and focused exclusively on water that was allegedly entering the property via groundwater (an excluded loss)." According to the court, which applied the federal pleading standard, the insured had "pleaded factual content that allows the court to draw the reasonable inference that [the adjuster] is liable for the misconduct alleged." Lesson: plead specifically the misrepresentations made or the errors in the adjustment.

Apparently recognizing some division among the district courts and inconsistency in decisions, the Fifth Circuit recently weighed in on whether state or federal pleading standards apply in improper-joinder analysis and unambiguously concluded that "a federal court must apply the federal pleading standard." The court explained:

> At bottom, the improper-joinder analysis in the context of removal and remand is solely about determining the federal court's jurisdiction. That is it. As state courts never consider the scope of such jurisdiction, this analysis applies to federal courts exclusively. When determining the scope of its own jurisdiction, a federal court does so without reference to state law, much less state law governing pleadings.
>
> …
>
> In concluding that a plaintiff has not stated a claim against a nondiverse defendant under a Rule 12(b)(6)-type analysis in this context, the federal court decides only that it has jurisdiction over the plaintiff's claims against the diverse defendants — not that the plaintiff does not have a claim at all against the nondiverse defendant. This is because the federal court never has diversity jurisdiction over a claim against a nondiverse defendant.

IEVM v. United Energy Grp., Ltd., 818 F.3d 193 (5th Cir. 2016). Consequently, Plaintiffs are advised to take care that their petitions would meet federal pleading standards if there is any risk of removal. Additionally, in reviewing or comparing the district courts' decisions cited above, take note of what pleading standard was applied, because several cases were decided before the IEVM opinion was issued.

The federal courts were also presented with other insurer removals and insured motions for remand based on different fact situations. *Clear Vision Windshield Repair, LLC v. Allstate Fire and Cas. Ins. Co.*, No. 3:15-CV-880-L, 2015 WL 11120588 (N.D. Tex. Oct. 30, 2015) (remand granted in case involving multiple named plaintiffs where there was only one real plaintiff because various insureds had assigned their claims to one plaintiff; therefore, there were no individual claims to aggregate and amount in controversy was less than $75,000; petition's statement that it sought greater relief lacked credibility); *Cantu v. Allstate Vehicle & Prop. Ins.* Co., No. 7:16-CV-084 (S.D. Tex. Apr. 28, 2016) (diversity jurisdiction existed because insured's damages exceeded $75,000, where pleadings reflected $24,000 in actual damages, as well as requests for attorney's fees, penalties, and exemplary damages); *Beaumont Foot Specialists, Inc. v. United Healthcare of Tex., Inc.*, No. 1:15-CV-216, 2016 WL 9257026 (E.D. Tex. Dec.

14, 2015) (two of the defendants in the case were "acting under" a federal officer or agency while engaging in conduct that was the subject of the original petition, which invoked protection of federal forum under 28 U.S.C. § 142(a)(1)).

Finally, *Air Evac EMS, Inc. v. Texas*, presented a fairly unique situation. No. A-16-CA-060-SS, 2016 U.S. Dist. LEXIS 106460 (W.D. Tex. Aug. 11, 2016). In that case, an emergency transportation service provider, Air Evac, sued the Texas Department of Insurance Worker's Compensation Division, the Commissioner of Insurance and the Commissioner of Workers' Compensation in their official capacities to challenge several provisions of the Texas Workers Compensation Act that limited the amount Air Evac could charge for its services, arguing that the Texas statutes are preempted by the federal Airline Deregulation Act (ADA). The district court dismissed Air Evac's complaint, concluding that, while it had subject matter jurisdiction over the case, it should abstain under *Colorado River Water Conservation District v. United States*, 434 U.S. 800 (1976). Further, Air Evac did not meet the requirements of the Ex parte Young exception to Eleventh Amendment immunity because it failed to show an imminent or threatened enforcement proceeding.

L. Motions for new trial

A court of appeals reversed an order granting a new trial in a UM/UIM case. *In re State Farm Mut. Auto. Ins. Co.*, 483 S.W.3d 249 (Tex. App. — Fort Worth 2016, orig. proc.). An insured sued his auto insurer to recover UIM benefits for injuries sustained in a low speed rear end collision. The jury awarded only $198 in damages for past medical care, and the trial court granted the insured's motion for new trial. The insurer petitioned for writ of mandamus. The court of appeals found the trial court's order granting new trial was facially sound, as it was understandable, reasonably specific, and based on evidence presented at trial. Nevertheless, the court of appeals held that the jury's finding that the insured sustained no compensable pain and suffering was supported by the evidence. The court summarized the trial evidence at some length, including testimony of the insured, his wife, and his doctors. Among other things, the court pointed out that the accident was low speed, causing less than $800 damage to the insured's car. The jury heard conflicting evidence about the severity of the injuries and whether they were caused by the collision. Given the presence of conflicting evidence, the jury's finding that the insured sustained no compensable physical pain and suffering was not so clearly against the "great weight and preponderance of the evidence" as to be clearly wrong and unjust. The order granting new trial was reversed.

XII. OTHER ISSUES

A. Subrogation

A settlement agreement did not bar a worker's compensation insurer, as assignee, from enforcing its subrogation and reimbursement rights connected to worker's past medical treatment. *Continental Ins. Co. v. Dawson*, 642 F. App'x 309 (5th Cir. 2016) (per curiam). A worker was severely injured on the job in Iraq. The employer had a workers' compensation policy, and the worker also had health insurance through an ERISA plan. The worker was treated in Germany, and his health insurer paid for the initial overseas medical treatments. The worker's compensation carrier paid for subsequent treatments. When the worker later sued the company that managed his living quarters in Iraq for his injury, both insurers intervened and asserted liens for the amounts they had paid. The worker and the worker's compensation carrier entered into a settlement agreement, approved by the US Department of Labor, under which the carrier agreed to pay a lump sum for a discharge of liability for past medical care. After the worker's suit settled and the worker's compensation carrier was paid for the full amount of its lien under their settlement agreement, the health insurer filed a claim with the Department of Labor against the worker's compensation carrier for the reimbursement of medical benefits it paid. The two insurers agreed to settle the claim, and in exchange for a payment, the health insurer assigned its subrogation and reimbursement rights to the worker's compensation carrier, which then sued the worker. The question on appeal was whether the earlier settlement agreement between the worker and the worker's compensation carrier precluded the carrier from enforcing the subrogation rights assigned to it by the health insurer and limited its recovery from the worker to the amount of its lien that was specified in the settlement and that had already been paid. The settlement agreement stated that the carrier would provide payment for medical treatments that "should arise prior to the approval of this agreement." According to the court, this meant the parties agreed the carrier would only be required to pay for future medical expenses incurred between the date of the agreement and the date of its approval by the Department of Labor, rather than for all past medical expenses before execution. Thus, the settlement agreement did not require the carrier to repay the health insurer for the worker's past medical treatment and did not preclude the carrier's recovery of the subrogation and reimbursement rights the health insurer assigned to it. Additionally, the court held the health insurer did not waive its rights before assigning them.

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Remembering Mark L. Kincaid

This year we lost a legal giant and a marvelous person. Mark L. Kincaid passed away on January 19, 2016, at the all-to-young age of 56. It is a great loss, personally and professionally, to the many people who knew and loved him. But he leaves a legacy of legal work that will benefit Texans for years to come.

Mark began his legal career as a law clerk for Texas Supreme Court Justice Franklin Spears, before going to work for two notorious force majeures in consumer law, Joe Longley and Phil Maxwell. With Longley & Maxwell, Mark tried and argued many cases and became involved at the Texas Legislature.

One of Mark's early accomplishments was his most well-known. The case was *Vail v. Texas Farm Bureau Mut. Ins.Co.*, 754 S.W.2d 129 (Tex. 1988), which concerned an insured who was wrongly accused of arson by his insurer. Finding violations of the duty of good faith, the DTPA, and what was then Chapter 21.21 of the Insurance Code, the jury awarded Mr. Vail damages in the form of actual property damages set by the insurance policy, treble damages, and attorney's fees. Surprisingly, the Texas Supreme Court upheld the verdict and greatly expanded the law on policyholders' rights and remedies, holding that there was a right to recover under the DTPA and the Insurance Code for unfair claims settlement practices. The court also held that the loss of contract benefits could be a form of actual damages recoverable for bad faith claims practices. *Vail* is the seminal case forging a trail to treble damages based on the loss of policy benefits. It is still good law, despite the federal courts' disregard of it. The case is testament to Mark's creativity and depth of knowledge.

Mark also had an impressive career lobbying at the Legislature to advance the interests of consumers and policyholders. He acted as friend to the Interim Joint Committee on Deceptive Trade Practices from 1987-1988, and helped prevent the Legislature from restricting either the DTPA or article 21.21. In 1991, Mark participated in co-drafting the claims handling portions of H.B. 2, which enacted the first "prompt pay" provisions involving "any insurer," placed the burden of proof on the insurer to prove the applicability of a policy exclusion, and created the Office of Public Insurance Counsel. Fittingly, Mark was appointed to that office by Governor Richards in 1994. In 1995, Mark helped to codify *Vail*, so that the Insurance Code now prohibits certain defined "unfair settlement practices," including the very conduct *Vail* declared to be an unfair settlement practice. Mark's legislative work continued in the 2015 session, in which S.B. 1628 was introduced and would have overruled *Vail's* damages holding by requiring "an injury independent of the harm resulting from the insurer's denial of policy benefits." But, largely thanks to Mark, this attempt to repeal Vail's damage holding was rejected. We can continue to learn from Mark's work: the Mark L. Kincaid Papers were donated to the Texas Legislative Reference Library. They include legislation, bill analyses, testimony transcripts, PowerPoint presentations, and correspondence with interested parties. This body of work will help others continue Mark's path of legislative advocacy.

For many years, Mark served with distinction on the State Bar's Pattern Jury Charge Committee on Business and Consumer Law, including as its Chair. He also co-authored, with Christopher W. Martin, the *Texas Practice Guide: Insurance Litigation*, published by West, and wrote numerous papers, including a CLE article published for the State Bar's Eighth Advanced DTPA/Insurance/Consumer Law Course that reached iconic status for legislative intent researchers. (Mark L. Kincaid, *Unfair Insurance Practices—The Law Under Vail, Watson & the 1995 Amendments*, State Bar of Texas 1995.) The readers of this Journal will recognize him as the lead author of the Annual Insurance Law Update for many years.

Mark was an adjunct professor at the University of Texas School of Law, where he taught insurance law. He liked his students and always treated them to beers at the end of the semester. And they liked him, too. Many were inspired by him to work in insurance law.

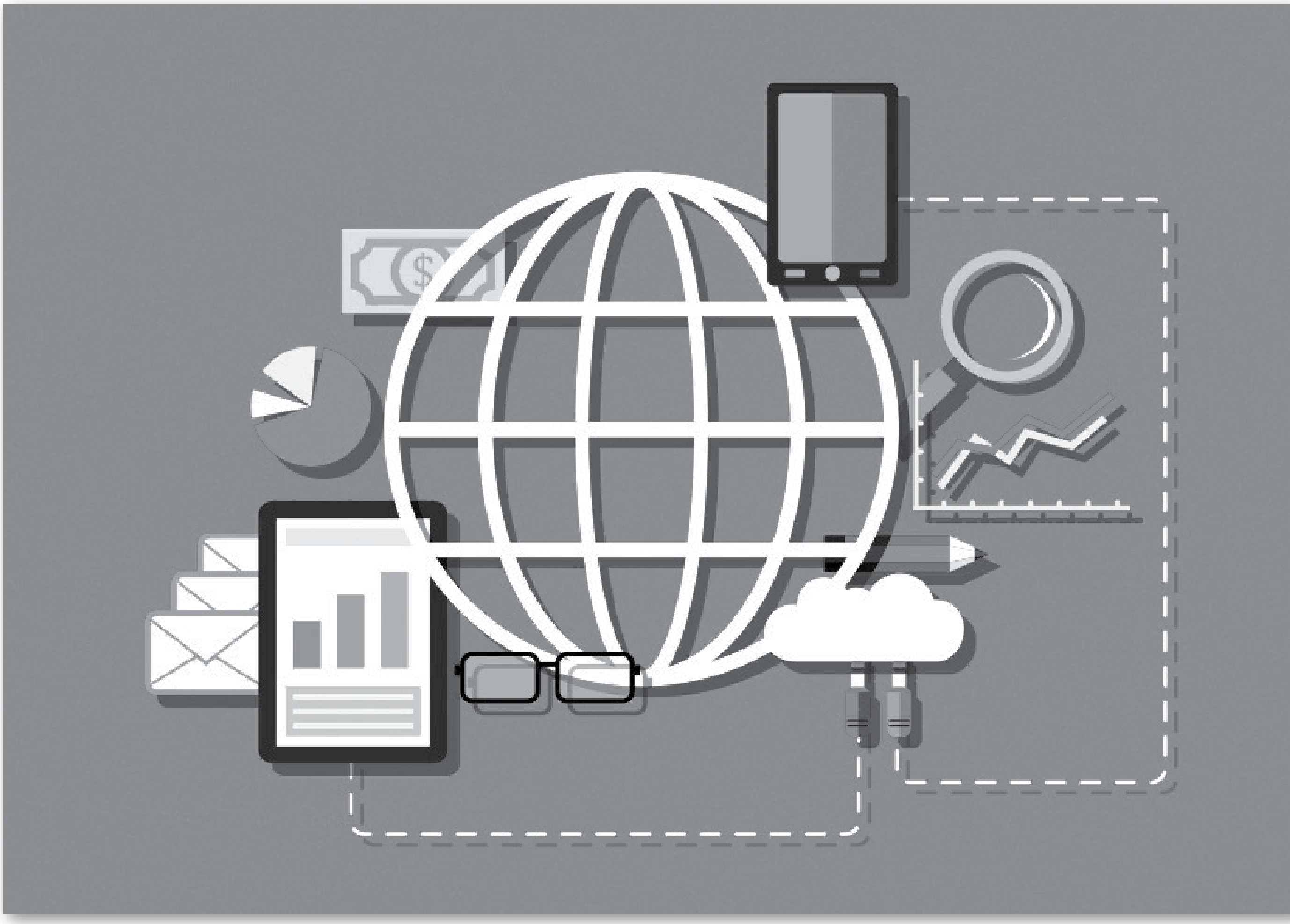
Mark was liked and admired by just about everyone who knew him, including his adversaries. One remarkable illustration is that he met his best friend and law partner, Russ Horton, because they were opposed to each other on a case.

At the time of his death, Mark was a founding partner of the Austin firm George, Brothers, Kincaid & Horton, LLP, and President-Elect of the Texas Trial Lawyers Association. He is sorely missed at his firm and TTLA.

We both considered Mark to be a dear friend and mentor for reasons that would be clear to anyone who knew him. He was fun and funny; diligent and organized; honest and fair. He praised a job well done and provided constructive criticism. He found the good in everyone. He took many cases simply because he wanted to help those in need.

One of Mark's essential qualities was treating everyone with respect, without exception. This quality, coupled with his obvious intellect, made him a great lawyer. But it also made him *become* a lawyer. Mark believed everyone deserved respect and dignity and so, if someone was abused or mistreated, he wanted to right that injustice. He was ideologically inspired and inspiring as a lawyer. The "fire in his belly," as he put it, never dulled when it came to helping individuals fight bullies. He fearlessly did what was right. We are all fortunate that he did.

– Elizabeth von Kreisler and Suzette E. Selden



Teaching Consumer Law

In Our Popular Culture and Social Media

By Alvin C. Harrell*

I. Introduction

This report describes the 2016 conference on "Teaching Consumer Law in our Popular Culture and Social Media," held in Santa Fe, New Mexico on May 20-21, 2016 [the Conference].[1] The Conference was sponsored by the Center for Consumer Law at the University of Houston Law Center, in cooperation with the National Association of Consumer Advocates and the University of New Mexico. Conference Co-Chair Richard M. Alderman[2] introduced the program and Co-Chair Nathalie Martin,[3] noting that this was the eighth edition of the bi-annual program; the first being held in 2002.[4]

As with the reports on previous conferences in this series, this report is intended to reflect the comments of the Conference participants and not, necessarily, the views of your author. However, there is an ever-present risk of error, and, as in past reports, your author is responsible for any such.

II. Consumer Law Topics

A. Are FDCPA Validation Notices Valid?

Jeff Sovern of St. John's University School of Law noted the alleged incidence of failures in the disclosure approach to consumer credit protection under the Truth in Lending act [TILA]. So, he queried, what about the viability of disclosure as required in the Fair Debt Collection Practices Act (FDCPA) for the section 1692g validation notice [the notice]? Are these FDCPA disclosures effective? What about the writing requirement? The thirty-day deadline? The prohibition on overshadowing?

Professor Sovern presented the results of an empirical study (the study), that focused on the notice as upheld in a Seventh Circuit case,[5] and also compared a simpler notice drafted by the National Consumer Law Center [NCLC], which tested as being more readable . [6] The study created four sample letters with different sample notices and displayed them to consumers. The consumers then answered questions that indicated their understanding of the notices. Professor Sovern received 700- plus survey responses [the responses, or respondents].

On most questions, the respondents who saw a debt collection letter with the notice approved by the Seventh Circuit did not show significantly better understanding of the validation notice than respondents who saw an otherwise identical letter without any validation notice at all. More than half the respondents were mystified by the disclosure about when the collector would assume the debt to be valid. Many did not take in that they had a right to verification of the debt, and many who did thought that an oral request would protect their rights when the notice indicated that a writing is required. On some questions, respondents shown the validation notice did worse than respondents who did not see a validation notice.

At least a third of the respondents said that if they missed the deadline in the thirty-day notice, either they would have to pay a debt they didn't owe or could not defend against a suit to collect the debt.

Professor Sovern noted all courts that have considered the issue hold that consumers are charged with a duty to read the FDCPA notice, but he opined that this survey indicates the shortcomings of this approach.

B. An Empirical Look at State UDAP Statutes

Prentiss Cox teaches consumer protection law and other subjects at the University of Minnesota School of Law. He presented an empirical study in progress [the study] examining the effectiveness of public enforcement of laws governing Unfair and Deceptive Acts and Practices [UDAP].[7] The study will examine UDAP cases that have reached a final resolution; it excluded *per se* violations. The study covers 2014 only. The majority of the cases were brought by state Attorneys General. The Bureau of Consumer Financial Protection [CFPB] was just ramping up -- there were only seventeen federal cases. There were nineteen multi-state cases, one-half with a federal partner, indicating that federal agencies are more likely to cooperate with states than with other federal agencies.

The study will seek to provide a descriptive analysis as to what UDAP enforcers do, *e.g.,* who are the targets, and what is their location? Preliminary results show that many of the targets appear to be small entities. How were they resolved? Preliminary results show that no UDAP enforcer appears to have lost a case. It was also common to mix UDAP and non-UDAP claims, but Cox said that some states don't use their UDAP statute extensively.

This report describes the 2016 conference on"Teaching Consumer Law in our Popular Culture and Social Media."

C. When Peace Is Not the Goal of a Class Action Settlement

Teddy Rave teaches at the University of Houston Law Center, covering subjects that include civil procedure, complex litigation, constitutional law and election law. He began by noting that class action settlements are common and usually benefit both sides. This "peace" is good for both sides, and more efficient than protracted litigation. Plaintiffs can deliver peace by agreeing to satisfactory terms offered by the defendant. Usually this includes settlement of the class and related individual claims.

But it does not always work that way: The *Trans Union* privacy litigation settlement was not designed for peace, in that future individual claims were not barred.[8] The parties settled only the right to proceed on a class action basis; plaintiffs were free to march right back into court and sue individually. This begs the question: Why would a defendant agree and pay to settle a class action without achieving peace? In *Trans Union,* the claimed violations of the Fair Credit Reporting Act [FCRA] created a massive potential class liability. There was a 190 million-member class, with $190 billion in potential damages. The value of the resulting settlement was protection from this class liability, much like an *ex post* version of the class action waivers that have become ubiquitous in arbitration clauses. The modest individual claims remaining represent a small individual risk -- most cases won't be brought despite the prospect for individual statutory damages. Trans Union is essentially betting that most individuals won't litigate, so it doesn't need protection from this risk. Moreover, the exclusion (and therefore preservation) of these individual claims allowed a lower class settlement amount. Thus, Trans Union agreed to class certification and to settle the class action liability, in order to reduce the risk of massive class action liability.

The *Trans Union* settlement allowed the defendant and class counsel to receive a handsome settlement with low litigation risks and costs. Does this illustrate the risk of a sell-out? Class members are not precluded from bringing their individual cases, and they received some benefit as class members. Internet advertising produced 100,000 claims, despite the lack of any actual harm. Still, that was only a fraction of the 190 million potential claims, meaning that the deterrent effect was far less than if a class action had gone forward. But, given that the statutory damages available were not tied to any measure of actual harm from the defendant's conduct, Professor Rave concluded that the defendant's payments to settle class members' rights to proceed as a class may have actually come closer to an optimal level of deterrence than making Trans Union pay $190 billion in statutory damages. But he noted that this sort of settlement structure is not suitable for negative-value claims (*i.e.,* claims that are too small to be viable on an individual basis).

D. Debt Collection Update

Dick Rubin is a well-known consumer protection lawyer with a national practice based in Santa Fe. He presented a Fair Debt Collection Practices Act [FDCPA] update. He noted that debt collection complaints comprise the largest number of complaints to the CFPB, with a focus on intrusive telephone collection practices. He also noted two recent and important United States Supreme Court decisions, in the *Gomez* and *Spokeo* cases.[9] In *Gomez*, the Court held that an offer of judgment does not moot the issues. In *Spokeo,* he opined, the Court punted – in a good way – reaffirming its Article III case or controversy standing and jurisdiction caselaw without disturbing extant jurisprudence.

Debt collection complaints comprise the largest number of complaints to the CFPB.

Rubin then noted *Sheriff v. Gillie,*[10] an unusual FDCPA class action. The State of Ohio [State] hired private lawyers to collect debts owed to the State. The State required the private lawyers to send a letter on the State Attorney General's [AG] letterhead - - it was argued that this was false and misleading under the FDCPA (although the letters identified the lawyer as a special counsel for the AG). The State argued that this was exempt from the FDCPA. The court did not reach this issue, because it found that the practice was not deceptive. The lawyer was designated as a special counsel acting as an agent for the State AG, and thus was not misleading. As the letters were truthful, the other issues were not addressed.

Rubin said that *Spokeo* was intended by the industry to stop class actions for statutory damages, and that this was *Edwards* redux.[11] The basic question was: Does a case or controversy require actual damages? Or can Congress create an injury in the form of statutory damages? Rubin observed that everyone expected a five-to-four loss for consumers, but Justice Scalia's death changed this. *Spokeo* concerned a FCRA violation due to errors in a credit report; the United States Court of Appeals for the Ninth Circuit said this injury was sufficient (as likely to occur, even without actual damages). The Supreme Court remanded (not reversed), directing the Ninth Circuit to reanalyze the distinction between the standards of "particularized" and "concrete." Justice Ginsberg said that statutory damages will meet the required test, even without actual damages, because there is a particularized and concrete injury. Thus, a mere disclosure failure would be sufficient. Rubin noted that the Court's failure to reverse was a victory for class actions, as it essentially continues prior law.

E. Payments Update

Julie Hill is a Professor of Law at the University of Alabama School of Law, where she teaches banking and commercial law subjects. She provided an update on payment law issues, including overdrafts and illegal payments.

Professor Hill noted that the Federal Reserve revised Regulation E, effective 2010, to prevent institutions holding consumer accounts from charging an overdraft fee for debit card transactions unless the consumer has consented to debt overdraft protection.[12] Professor Hill reported that a Federal Reserve Bank of Boston survey indicates that the number of debit card overdrafts has declined since the changes, though the revision has not eliminated the problem.[13] In 2012-2013 a Pew study asked if consumers remembered opting-in to overdraft protection programs -- it reported that most did not.[14] Professor Hill also noted there has been litigation regulatory enforcement actions involving financial institutions' efforts to implement the new opt-in requirements.[15]

Professor Hill also noted a new issue in overdraft fees: available balance disputes. These cases often target credit unions, which may charge for overdrafts based on the customer's available account balance rather than the current balance. In some cases, the available balance may be lower than the actual balance because debit card authorizations and holds on deposits of checks in collection[16] are not included in the available balance. Using the available balance may cause the consumer to incur unanticipated overdraft charges. It appears that if a financial institution uses the available balance, the institution should disclose the practice. Orange County's Credit Union has already settled a class action lawsuit involving available balance overdrafts[17] and other class actions suits are percolating.[18]

On the issue of consumer overdraft fees Professor Hill reported that the CFPB has mostly conducted studies only on these issues,[19] with only a few enforcement actions (such as *Regions Bank*).[20] However, the CFPB may become more active in overdraft enforcement in the future.[21]

Regarding illegal payments, Professor Hill noted that anti-money laundering requirements are receiving renewed emphasis, and there is a danger that this may discourage legitimate transactions in underserved areas.[22] For example, banks are closing branches on the Mexican border to avoid money laundering concerns.[23] This may mean that needed money transfers to poor consumers are being curtailed.

F. An Overview of Developments in Consumer Credit

Your author presented a sequel to his earlier paper for the 2014 conference,[24] this time entitled "Ten More Trends and Developments in Consumer Financial Services Law,"[25] noting that, although many of the obvious candidates for inclusion on this list were covered in the earlier paper, there are still many "hot topics" in this area of law, so that coming up with ten more was not difficult.

The ten topics identified and covered this year were:

- Plight of the Millennials;
- Impact of Technology;
- The Deleveraged Economy;
- Abusive Practices and the Role of the CFPB;
- Emerging Alternatives to Traditional Consumer Financial Services;
- The Scope of CFPB Jurisdiction;
- State Regulation of Out-of-State Internet Lenders;
- The *Madden* Case (federal preemption);
- The *Luis* Case (federal asset freezes); and
- The *MetLife* Case (designation of systemically-significant entities).[26]

With regard to The Deleveraged Economy,[27] your author opined that the crackdown on subprime mortgage lending since 2006 means that (with relatively few exceptions for subsidized target groups) only prime mortgage loans have been originated, and sometime soon this should mean the end of the recent high volume of home mortgage foreclosures.[28] During the

subsequent audience participation session, Suffolk University Professor Kathleen Engel disagreed, noting that a large number of mortgage loans were modified during the foreclosure crisis pursuant to various loan modification programs, and many of these are now going back into default again, suggesting that yet another wave of mortgage foreclosures may be on the way. Your author concedes that this is a significant possibility, and takes this opportunity to also observe that, no matter how cautious and prudent the underwriting, when an asset bubble has been created (*e.g.,* by very low interest rates and an accommodative monetary policy) and then bursts, there will be foreclosures. There is clearly some risk of that today,[29] not only in some housing markets but in commercial real estate as well.[30]

III. Teaching Consumer Law

A. Teaching Consumer Law Based on Performance-Based Learning

Marie Jull Sorensen of Aalborg University, Denmark, discussed a teaching exercise in which her students created a web site for consumer sales transactions that conformed to the applicable legal requirements. This has similarities to the concept of experiential learning in U.S. Professor Sorensen teaches Danish and E.U. consumer law. She found that lectures alone did not increase student interest. Her performance-based learning [PBL] approach follows the Aalborg PBL model, though it is not fully implemented in this context due to the need to also teach doctrinal law.

Professor Sorensen noted that teamwork affects the brain and the learning process. In the PBL model, courses are tailored to support the project. Cooperative efforts are a driving force, including knowledge sharing; cooperative decision-making; and mutual feedback. Features include:

- a problems orientation;
- integration of theory and practice;
- participant directions, with teacher supervision;
- a team-based approach;
- collaboration and feedback.

The goal is to raise the students' level of learning. The results include a high completion rate, thus helping students without a strong academic background. The sessions consist of seven workshops of five and one-half hours each. Each session includes a lecture, group work and class discussion. This is fundamentally different from a book-based approach; some students miss this overview, but most achieve their own overview.

One workshop focuses on the sharing economy. The professor teaches for thirty minutes, then becomes a supervisor. The students are encouraged to draw mindmaps. The students choose a chair to help organize the session, then return to the classroom afterward to discuss the results. The approach is problem- and research-based. The students create power-point presentations, and discuss potential directives, *e.g.,* regarding Uber and AirBNB. The process is helpful even if the results are not.

In another project, the students create a matrix to describe Danish contract law. There is a chapter on reflection to assess learning objectives. These are met but at some expense to broad superficial knowledge -- Professor Sorensen reported that in the PBL approach there is more in-depth learning at the expense of broader knowledge.

B. Bringing the Outside in — Creating Experiential and Hands-On Opportunities

Richard Frankel of the Drexel University Thomas R. Kline School of Law, where he directs the Appellate Litigation Clinic, continued the discussion of experiential learning techniques, which, he said, provide a more effective learning experience.[31] This includes: seeking skills development; a deeper internalization of knowledge; reaching those with different learning styles; and an increased understanding of real-world issues. His course is a first year (1L) course elective. It meets once each week, for two hours' credit.

For one course assignment, there is a debt collection simulation. The students form debtors and creditors teams; they have two weeks to resolve the issues. Typically they have no statutory background. In Part 1 of the exercise the students log their communications; and examine issues such as: How did you feel? In Part 2 they study the FDCPA and other statutory structures and analyze their prior behavior under the law. This generates sympathy for both sides, and creates a rubric for evaluation.

A second hands-on opportunity involved client-based interviews: Last semester a former client provided a prototype-issue interview by Skype. This produced many teachable moments. Students may ask inappropriate questions, such as: "What is your problem?" Students are often abrupt and lack communication skills. This is not graded. But the students became engaged.

The third stage of the course focuses on Payday/Pawn transactions: Actual transactions are investigated by students, then analyzed. However, payday lending is illegal in Pennsylvania. This made the students think, where else can you go? The resulting exposure to creditor marketing is instructive. In the future, more interaction with live clients is planned, with help from legal aid.

C. How to Create and Energize Consumer Law in the Curriculum and Academy

Katherine Porter is a Professor of Law at the University of California, Irvine, where she teaches commercial and consumer law subjects, including bankruptcy, mortgage foreclosure and credit cards. She is the author of a new consumer law casebook[32] and a leading bankruptcy casebook,[33] among other publications. She began her presentation by issuing a call to action to build an academic community dedicated to consumer law. She analogized to the success of the Olin Law and Economics Foundation, which encourages a market-based approach to law, and identified the importance of a powerful counter perspective. Professor Porter then queried: What is consumer law? She noted that one cannot energize an undefined concept. But should it be a definition of exclusion (*e.g.*, by excluding non-consumers)? And, who is a consumer? Consumer law is a core component of business law, but many law firms don't recognize this or list consumer law as an area of practice. Instead, consumer law typically is treated as a component of other areas of practice, including "commercial" litigation or banking law or general business counseling.

Iinternationally, consumer law is primarily centered on sales transactions.

Professor Porter then defined consumer law as the study of how individual people engage in marketplace transactions with businesses. Within well-established academic topics, she posited consumer law as the statutory framework that addresses weaknesses in the doctrines and theories of tort law and contract law. She then proposed a test for the audience, inviting each attendee to quickly list the elective courses a student should take to prepare for a consumer law practice. Your author made the following list:

- commercial paper and payments;
- secured transactions;
- electronic commerce;
- debtor-creditor law;
- bankruptcy;
- consumer law; and
- healthcare law.

Professor Porter then provided her list, which included most of the above plus:

- remedies;
- litigation skills classes;
- class actions or complex litigation;
- consumer finance;
- residential real property law;
- landlord-tenant law;
- immigration law;
- poverty law; and
- consumer protection clinic.

Professor Porter urged academics to: create a Consumer Law Society for law students; organize a Scholars of Consumer Law conference to compliment the Teaching Consumer Law Conference; advocate for the hiring of full-time consumer law faculty; and encourage junior faculty to engage in teaching and scholarship related to consumer law.

D. Starting Millennials Out Right: Consumer Law for 1Ls

Neil L. Sobol teaches at Texas A&M University School of Law, and is the school's Director of Legal Analysis, Research & Writing. He noted that about two-thirds of U.S. law schools do not offer a course on consumer law. Those that do offer a course typically do so as an upper-division elective with limited times during a student's tenure in law school, meaning (among other things) that many students do not take the course. To your author, this is an unfortunate reflection of the widespread failure of the academy (and, less surprisingly, the larger society) to recognize the importance of transactional law, including contract, commercial and consumer law (except, notably, in academia where the subjects are commonly tested on the bar exam).[34] As a result, Professor Sobol noted, consumer law not only takes a back seat, sometimes it is not even in the car. Millennials now outnumber all other generations, and (by-and-large) they are being educated without consumer law.

Millennials, he noted, have seven core traits:[35]

- They believe they are "special," having been told so from birth. Thus, they have high expectations.
- They have been sheltered; and they need encouragement.
- They are team oriented -- they like to join groups.
- They are confident.
- They are high achievers (perhaps due partly to grade inflation!).
- They feel pressured and become multi-taskers.
- But, in many ways, they are still conventional.

Why do they need consumer law? Their generation faces unprecedented "student loan debt, poverty and unemployment" levels.[36] They need and use consumer transactions, often complicated by new technologies, and in doing so face some unique challenges.[37]

To capitalize on student interest in consumer issues, Professor Sobol advocates introducing consumer law exercises and scenarios in required first-year classes. For example, in his writing and research classes, he has assigned research projects involving the FDCPA, in which students are asked to identify potential violations, determine if a debt is covered by the FDCPA, and assess whether a collector is one who "regularly collects debt" for purposes of the FDCPA. Students submit e-mail and traditional memorandum assignments in response to these questions. Additionally, students can be assigned letter writing assignments based on their findings – e.g., a demand letter to the collector or an advice letter to the client.[38] Professor Sobol also recommends addressing consumer law topics in first-year doctrinal classes – e.g., a shrink-wrap agreement in Contracts, a landlord-tenant dispute in Property, an identity-theft problem in Criminal Law. Providing students with consumer law topics in their first-year courses can generate interest and demand for upper-division consumer law courses and clinical offerings.

IV. Teaching Consumer Law Around the World

A. Introduction to Asian Consumer Law

Geraint Howells is Chair Professor of Commercial Law and Dean of the School of Law at City University of Hong Kong and former President of the International Association of Consumer Law, has held various academic positions in the U.K., and is the author of numerous publications. He noted that, internationally, consumer law is primarily centered on sales transactions. In Hong Kong commercial law comprises three topics, one of which is consumer law. U.S. consumer law is not on the agenda with the EU model often being the reference point. Although consumer law teaching elsewhere tends to focus on commercial law, including sales, emerging consumer issues include telecommunications and utilities. One challenge is to transmit old consumer law concepts into new consumer issues. In the U.K., there is a general agreement that reasonable consumer law is a good thing. In contrast, Asian consumer law is roughly where UK consumer law was thirty years ago.

Professor Howells noted that the common law countries in Asia all have the basic English system, as modified. Hong Kong is the most traditional, with English common law from the 1980s. Not much has changed in this regard, so Hong Kong still has a relatively "pure" common law structure. Singapore and Malaysia have changed more, but retain the same basic structure. Enforcement is a challenge everywhere. Asians are hesitant to go to court, sometimes due to the limitations of the court system. In addition, not much law is geared to the internet age in Asia. There are only minimal disclosure requirements.

Sale of goods law is based on the English common law, although Malaysia has adopted a modern consumer protection law based on New Zealand law. As to unfair contract terms: Hong Kong has English law, including unconscionability; Singapore likewise has English inspired law; Malaysia is more progressive, based on the influence of Indian law, but there is little public enforcement. The countries are moving toward more civil enforcement. Malaysia has adopted a products liability statute, but the others have not. However, Singapore has listed forty-five products that require prior approval.

Small claims courts and alternative dispute resolution (ADR) are widely available. There also are special provisions for tourists, *e.g.,* in Hong Kong there is a six months return law to protect buyers. There is no class action procedure, and only minimal public enforcement, compared to UK. There is some movement toward the European model, but large gaps remain.

B. Teaching Consumer Law in the Countries of the Western Balkans

Mateja Durovic is an Assistant Professor at the School of Law, City University of Hong Kong. His research currently focuses on seven countries in the west Balkans. All have a common goal to join the European Union [E.U.]. He opined that E.U. consumer law is the most advanced in the world. E.U. membership requires an alignment with E.U. law. Thus, consumer law development in the West Balkans comes largely from the E.U., not from these countries themselves.

The main characteristics/problems in these countries include: Slow updates of law; minimal enforcement; and little or no litigation or education. He noted that having black letter law is not the same as having effective law. There is a tendency to adopt E.U. law but without effective implementation.

There is also little or no education regarding consumer law, and the courts may be unfair. There are many new laws, but they are not widely understood in practice. When this is criticized, the solution is that more new laws are enacted but usually with the same result.

Many foreign banks provide credit, with a result that some consumers are overburdened with debt. Utility services, telecommunications and sales of goods are problem areas. Public education is the biggest problem, but even the courts and lawyers often don't understand the laws. As a result, general law rather than consumer law is sometimes applied. He said that few students take a consumer law course; and more education clearly is needed.

C. Teaching Consumer Law in Ireland

Stephan Calkins is a Professor of Law (and former Interim Dean) at Wayne State University Law School (as well as Associate Provost of the University). He has also taught at the Universities of Michigan, Pennsylvania and Utrecht , Netherlands, and served as General Counsel of the U.S. Federal Trade Commission [FTC], from 1995 to 1997. He recently returned from four years of service in Ireland, as a Commissioner of the Competition and Consumer Protection Commission [the Commission] and a member of the Competition Authority, while also teaching at the University of Dublin Sutherland College of Law.

Professor Calkins noted that the recent Irish recession resulted in a consolidation of agencies and reduced funding, which was felt during the four years he worked on competition and consumer law enforcement. Irish consumer law is based on E.U. consumer law, but law school offerings are limited. There is little private litigation, and public enforcement is only beginning to become important. Consumer law topics in Ireland include especially unfair terms, and consumer rights. E.U. directives set out the legal standards, but enforcement is national and varies greatly.

In one sense, consumer law resides only on the periphery of Irish teaching. The leading written authority is a book by Mary Donnelly and Fidelma White of University College Cork, but even at Cork the only consumer law course is an LLM offering. The same is true at Trinity College -- indeed, at Trinity the course has only recently been reintroduced and addresses European (not Irish) consumer law. University College Dublin is the exception and offers an undergraduate course, but it is far from a mainstay of the curriculum. The problem, not surprisingly, is that consumer law is only sporadically enforced either by the government (although the Commission is changing this) or by private parties, who are handicapped by the "English Rule" for attorney fees and the difficulty of bringing collective (class) actions.

In a broader sense, however, consumer law is quite central to Irish education. The Commission and its predecessor consumer agency have devoted substantial resources to consumer education. Efforts include: a dedicated website (www.consumerhelp.ie); a consumer helpline, also available through email, with 50,000 consumer contacts a year; social media postings; paid commercial advertisements; and the "Money Skills for Life" outreach program. Perhaps most remarkably, the Commission makes available without charge three different modules of consumer education appropriate for use in the Irish equivalent of middle schools and high schools. Ireland is only beginning to develop a cadre of consumer lawyers, but because of these educational efforts, may well exceed the U.S. in terms of the legal savvy of its consumers.

D. Teaching Consumer Law in Canada

Freya Kodar is an Associate Professor at the Faculty of Law, University of Victoria in British Columbia. She teaches courses on Debtor-Creditor Relations, Pension Law and Policy, Torts, and Statutory Interpretation. Previously the Debtor-Creditor Relations course was a traditional enforcement of money judgments course, but she has expanded it into a broader-based consumer law course that also includes discussion of the benefits and problems of access to unsecured credit; the regulation of credit reporting and debt collection practices; rising debt levels; the expansion of the alternative financial services sector, payday loan litigation and regulation; and bankruptcy. Students seem to be more engaged with the course than they were when it only focused on judgment enforcement.

There are no consumer law clinics in Canada.

She has structured the course in this manner in part, because the size of the law school makes it difficult to regularly offer separate courses in consumer law, money judgment enforcement and bankruptcy. She noted two developments that prompted her to become interested in the extent of consumer law teaching in Canadian law schools: (1) consumer law problems rank fairly high on surveys of unmet legal need;[39] and (2) the federal Office of Consumer Affairs has noted a downward trend in consumer interest research programs within universities, along with very few undergraduate courses focused on consumer protection or consumer legal issues.[40]

Consumer law courses in Canadian law schools, *e.g.,* courses that include some discussion of the legal frameworks for consumer transactions, include courses on consumer law; bankruptcy; debtor-creditor law; sale of goods; secured transactions; and poverty law. Twenty-three law schools in Canada offer a common or civil law degree, or both. A survey of the course information available on their websites found that five offer a consumer law course. Secured transactions courses are offered at all schools (most likely by full-time faculty); most schools also offer bankruptcy courses. Sales of goods courses are offered at approximately half of the schools (often focused on commercial transactions); as are judgment enforcement courses (*e.g.,* debtor-creditor law). A few schools offer class action courses, and their course descriptions highlight the use of class actions to address consumer law issues.

There are no consumer law clinics. Seven schools offer a course on poverty law, though only one course description mentions consumer protection as a possible topic of discussion. Consumer law is not mandatory anywhere. However, in contrast to the common law schools, all civil law schools in the province of Quebec offer a consumer law course. In summary, in Canada: (1) secured transactions and bankruptcy are the most common consumer law courses (heavily oriented to commercial law); (2) most consumer law is covered as an adjunct to other courses; and (3) there appears to be little teaching about the regulation of consumer lending, or of Internet transactions, including online lending.

V. Consumer Law Topics Around the Globe

A. Comparative Standards for Assessing Misleading Advertising

Joasia Luzak teaches at the University of Exeter in the U.K., and previously taught at the University of Amsterdam. She described her empirical research in consumer law cases involving "up to" advertising claims (*e.g.,* "save up to 50%").[41] She focused on price claims because, as between price and performance savings claims, price claims are easier to verify for factual accuracy. She noted the risk that advertisements may indicate potential and not the actual price savings. She said that, to be effective on this issue, the E.U. anti-commercial practices directive must be implemented uniformly. If claims are not true or are deceptive for the purpose of inducing the average consumer to make the transaction, then the claim is misleading.

She also noted that an advertising claim can be true but still misleading, *e.g.,* if the benefits are overstated. For example, "50% off" is different from "up to 50% off." She reported that the standard Netherlands test is: If buyers in at least ten percent of sales realize the savings, the advertisement is not misleading. If at least one item is available at the sale price, this is ok.

Compared to the FTC standard, she reported that the ten percent test for price claims is similar. The FTC test is whether ten percent of consumers are able to experience the "maximum" benefits advertised. In contrast, performance claims should be: available to most all consumers; and not contradicted by small print. With regard to price claims, Professor Luzak said that consumers in the survey did not distinguish regarding the "up to" language. The FTC has concluded there is a need for a higher standard of proof to support price claims, but the ten percent test is still applied. Clearly, if a majority of the customers realize the advertised savings, this is ok.

The E.U. directive disclaims any statistical test, but courts can still consider it. However, cases on this issue rarely go to court in the E.U., as cases are usually resolved in administrative proceedings. Thus, the enforcement standard is not clear and merchants are essentially given a free bite at the apple. And she said, as a result, many consumers are being misled.

B. Writing Seminar

Nathalie Martin, Co-Chair of the Conference and Frederick M. Hart Chair in Consumer and Clinical Law at the University of New Mexico School of Law, described a consumer-oriented writing seminar designed to encourage the development of student-written publishable manuscripts. It is a two-credit class that satisfies the law school writing requirement. Essentially, the students choose from a list of possible topics. Professor Martin provides sources and alternatives and lets the students choose their topics. The class meets once each week, for a two-hour class. The students present their works in progress, and there is a peer review.

Topics last year included: medical marijuana; car dealership issues; stolen antiquities; and sophisticated/unsophisticated consumer tests. Five of the resulting ten papers were publishable.

C. What's New in Washington?

Ira Rheingold is Executive Director and General Counsel of the National Association of Consumer Advocates [NACA], an organization directed at protecting consumers from unfair and deceptive practices; and a cosponsor, with the University of Houston Law Center's Center for Consumer Law and the University of New Mexico, of the Conference. He observed that Washington, D.C. is the same dysfunctional place as usual. He said that no significant consumer legislation is expected this year. The budget process is being used to make law, *e.g., by* providing an exception to the Telephone Consumer Protection Act [TCPA] for collectors of government debts, based on the need to save the government $9 million to balance the budget projections.

He noted that pending bills of interest include: Dodd-Frank revisions; the structure of the CFPB (appointing a Board or Commission versus a Director); funding of the CFPB; UDAAP authority; auto dealers/fair lending; and payday lenders. A possible future consumer agenda includes: the use of international law and treaties, *e.g.,* using international treaties' dispute resolution processes to sue governments to provide consumer regulation; debt overhang issues versus access to consumer credit; credit report errors; and economic inclusion.

He noted important new CFPB regulations that are coming soon: the CFPB arbitration rule (essentially prohibiting class action waivers); arbitration as regards the contract provision requiring arbitration; and a proposed rule for payday lending (issued later in the summer).[42] A usury cap for payday loans is not permitted by the Dodd-Frank Act, but an ability-to-repay requirement was expected (and was forthcoming). Rheingold opined that overdraft protection rules are coming later this year, then new FDCPA and FCRA rules. In all, he predicted a busy twelve months ahead for the CFPB.

VI. Consumer Law Topics

A. What's New with the *Restatement of Consumer Contracts*

Dee Pridgen is a well-known consumer law specialist, and the Carl M. Williams Professor of Law and Social Responsibility at the University of Wyoming College of Law. She is the co-author of a well-known consumer law casebook,[43] and three legal treatises (including two practitioners' texts co-authored with Richard Alderman and the new fourth edition of *Consumer Law in a Nutshell*). Professor Pridgen described the American Law Institute (ALI) consumer contracts project.[44] She reported that the Consumer Contracts Project has been four years in the making so far, but largely settles for the status quo, thereby losing an opportunity for major change. She described the history and work of the ALI (2,000-plus members, with a maximum 3,000 allowed). The most influential solo work of the ALI is the *Restatements of the Law*, but of course the ALI is also a co-sponsor (with the Uniform Law Commission, and in cooperation with the American Bar Association) of the Uniform Commercial Code (UCC).

The official goal of the *Restatements* - which are addressed to courts although widely used in academia (and Professor Pridgen noted that this is a legally conservative goal) - is restating current law, though in this process there is the potential for pushing to improve the law. The Consumer Contracts Project started in 2012; the second preliminary draft has not been publicly circulated. The Reporters, Oren Bar-Gill, Omri Ben-Shahar, and Florencia Marotta-Wurgler, are the primary drafters. The Reporters are well-respected academics, but the result must be approved by the ALI Counsel and ALI membership.

Professor Pridgen noted that some might argue that contract law is largely irrelevant to consumer law today because so much consumer law is statutory and regulatory.[45] But she said this is not true because consumer contracts, including online contracts, are the basis for most consumer transactions and obligations and thus remain important. Online contracts present some unique issues because they permit an unlimited number of clauses and the consumer often clicks "I agree" without reading them at all. In this context, the doctrine of assent is relaxed, allowing assent based on an opportunity to read. But no one reads the full contract terms. Professor Pridgen cited a study indicating that only one or two out of every 1,000 consumers reads the terms for even one second. But the assumption is that the terms are standard. Problems may include matters such as unexpected monthly service charges, privacy and arbitration. The Reporters conceded that consumers know they are ignorant of the terms, but nonetheless concluded that a manifestation of assent is sufficient if the consumer signifies this assent after having an opportunity to read the provisions as referenced in a conspicuous hyperlink.[46] Professor Pridgen agreed that standard terms are needed in order to allow online commerce. Consumers at least know the basic terms of the transaction. But the approach taken in the ALI Consumer Contracts Project contemplates something of a grand bargain: A relaxed standard of assent applicable to consumer contracts is balanced by the doctrines of unconscionability and deception. Neither the UCC nor the *Restatement Second of Contracts* defines unconscionability but the ALI Consumer Contracts Project defines unconscionability to include both substantive and procedural aspects. Substantive unconscionability includes provisions that are fundamentally unfair or unreasonably one-sided. Terms are procedurally unconscionable if they amount to unfair surprise or deprive the consumer of meaningful choice. Deception is defined as a deceptive act or practice. However, this does not include deception by omission or half-truth.[47]

Arbitration issues are at the essence of consumer law, because the goal is to deny consumers a chance to assert their rights, not to provide a more convenient forum.

The common law of contracts is reaffirmed in the Consumer Contracts Project even though, according to Professor Pridgen, consumer assent is a "legal fiction." Of course, although the courts generally will not interfere with contractual bargains, unconscionability and deception are different. Professor Pridgen argued for enforcement of the parties' agreement only to the extent it includes conscionable and non-deceptive terms, and the merchant would have the burden on this issue. Thus, she urged more of a consumer protection approach. During the subsequent question-and-answer session, Nathalie Martin opined that either substantive or procedural unconscionability is enough if strong, though otherwise both are needed.[48]

B. Arbitration

Richard Alderman provided an update on arbitration.[49] He argued that arbitration issues are at the essence of consumer law, because the goal is to deny consumers a chance to assert their rights, not to provide a more convenient forum. He said that almost all consumer contracts now contain an arbitration clause. Such clauses can sometimes be challenged successfully in court but most challenges are unsuccessful. Most consumer arbitration clauses also include a class action waiver precluding the consumer from asserting or joining a class action. As a result, consumers are effectively precluded from seeking redress through the civil justice system.

He then reported the following history: At the turn of the century, the Federal Arbitration Act (FAA)[50] was passed to overcome courts refusing to enforce arbitration per se. The FAA says that arbitration contracts are like any other contract. But courts now interpret the FAA to say there is a strong policy in favor of arbitration.

Alderman discussed several representative cases. For example, *Buckeye Check Cashing,*[51] concluding that there is no difference between consumer and commercial arbitration, the Court upheld an arbitration clause in an illegal contract on grounds that the issue of legality had to be arbitrated; and, *AT&T Mobility,*[52] which challenged class action waivers, but they were upheld. In *Italian Colors,*[53] the court upheld a class action waiver notwithstanding the fact that the cost of bringing suit exceeded the amount in controversy. He also mentioned the decision in *Sprint Spectrum,*[54] a Posner decision, which questions the "strong federal policy" favoring arbitration.

Professor Alderman cited the following as problems with arbitration: costs and fairness; repeat player advantages; and the elimination of one of our three branches of government---the judiciary. He noted that arbitration precludes the courts from playing their essential role in our common law system. He cited, as an example, that when Alabama courts were ruling against homebuilders and car dealers, the businesses "exempted" themselves from the civil justice system via arbitration. He also recognized that the businesses could easily revert back to the judicial system by simply revising their contracts when the judicial climate changed. Alderman also emphasized that "manifest disregard of the law" may no longer be a basis to challenge the decision of an arbitrator.

As to the future: States may pass the National Consumer Law Center (NCLC) model law; the Supreme Court may change; and, the CFPB has propose a rule to ban class action waivers, based on the initial CFPB report. Alderman believes, however, that the CFPB needs to look at consumer arbitration more broadly, and not just the problem with class action waivers. Finally, he also noted the *General Mills* case -- where public pressure forced the removal of an arbitration clause on cereal boxes.[55]

C. FinTech's Potential to Help and Harm Consumers

Kathleen C. Engel is a Research Professor of Law at Suffolk University Law School in Boston. She has written extensively on mortgage finance, foreclosure and regulation, subprime and predatory lending, consumer credit and housing discrimination. Last year, she was appointed to the Consumer Advisory Board of the CFPB.

Professor Engel defined "FinTech" as including start-up companies that provide electronic financial services using new technologies. One example is where a FinTech firm functions like a broker, *i.e.*, a financial institution provides the loan and ensures TILA compliance, but the FinTech company facilitates, underwrites and ultimately buys the loan. Most FinTech companies employ "big data" for underwriting. They obtain the data from data aggregators that collect as many as 75,000 data points per person, hence the term "big data." The information may include the state of the consumer's marriage, his or her health, the consumer's Facebook friends, shopping habits, music preferences, taste in autos, travel, subscriptions, web surfing, and other transactions.[56]

What do FinTech companies do with this data? They use a technique called machine learning, which sorts through the data to predict how consumers will behave. The computers can then determine things like the propensity for credit applicants to default. Unlike regression analysis, where human beings specify the variables, with machine learning, computers sort through vast amounts of data to detect patterns from which the computers generate a set of rules that are used to predict outcomes. The result is a complex set of variables and rules that interact with each other to generate propensities. Through machine learning, companies can predict the propensity of various human behaviors, *e.g.*, whether someone is an impulsive shopper or likely to experience job loss.

The machine-generated algorithms can be valuable to consumers because they can be an alternative method for credit scoring, offer products the rules predict will be desirable to a consumer, or match consumers with appropriate credit and other products. Machine learning can also facilitate exploitation of consumers by predicting, for example, the relative likelihood that someone can be lured into a high-cost product.

With most machine learning, human beings are not involved in developing the actual algorithms and, more importantly, the rules themselves are inscrutable. Without humans selecting the variables or otherwise being involved with the creation of the actual rules, there is no risk of intentional discrimination. That does not mean that there is no discrimination.

The machines themselves can engage in discrimination by making discriminatory inferences. For example, if a person is African-American, computers might consider her at risk of committing a crime because the computer "learned" that African-Americans are more likely to be arrested. There is no way of seeing or disentangling the rules that machine learning uses to generate propensity scores. As a result, it is impossible under extant law to bring discrimination claims based on machine learning.

In addition to the discrimination risk, there can be errors in the data, which can effect the propensity calculations. Likewise, computers may confuse people's identities, especially if people have identical names and relatively few data points. The data from one person can be used to fill gaps in another person's record. Lastly, machines can make false inferences, *e.g.*, predict that because a person is Hispanic, her propensity to understand complex mortgage products is low. Currently there is little or no regulatory oversight of FinTech companies, data aggregators or machine learning. Federal agencies that have studied these domains are not sure what to do, and they are far behind the technology curve. Professor Engel contends that legislators and regulators need to update consumer protection and discrimination laws that were designed in the manual underwriting age to take into account the new age of FinTech.

VII. Consumer Law Topics Around the Globe, Part Two

A. Will the Real "Consumer" Please Stand Up?

Trish O'Sullivan is a Senior Lecturer in Business Law in the School of Accountancy at Massey University, Auckland, New Zealand, and a Ph.D. candidate at the University of Auckland. She outlined the differing definitions of the term 'consumer' contained in the New Zealand Consumer Guarantees 1993 Act and related Australian and New Zealand law.[57]

She opined that there could be four considerations in the definition:

- the purpose of the transaction;
- the type of goods being acquired;
- the identity of the parties; and
- the value of the transaction.

The definition of "consumer" in the New Zealand Consumer Guarantees Act 1993 focuses on the type or 'ordinary use' of the goods being acquired. The definition covers both individuals and businesses who acquire goods that are ordinarily acquired for personal, domestic or household use. Some goods may commonly be acquired for either personal or commercial use, for example, a pen. In *Nesbit v. Porter,*[58] the purchaser of a small pickup truck was held to be a 'consumer.'[59] The trial court said there could be only one use, and it was predominantly commercial, but on appeal the court disagreed, saying the farmer could be a consumer because this type of truck was commonly used for private

use (the evidence showed that twenty percent of buyers purchased for private use).

Trish O'Sullivan noted that, the Australian statute[60] uses the amount of the price as a distinction, *e.g.,* a presumption that transactions valued at $40,000 or less are consumer transactions. Tests based on the "ordinary use" of goods are uncertain and may require a statistical analysis, but a dollar limit is arbitrary and covers all business purchases below the limit. The E.U. definition focuses on the identity of the buyer and the purpose of the transaction (a consumer transaction must be outside the person's trade or course of business). She said that American law is not consistent on the issue; it focuses on a purpose test but the test varies across states.[61] Texas has a wide definition, including an entity with less than $25 million in assets and excluding transactions over $100,000 conducted with legal advice. This raises a big issue: Should the definition exclude businesses from consumer protection? Should it define "consumer" to include individuals and small businesses and then define a small business (*e.g.,* by net assets, turnover or number of employees), or should it go very broad, to include all sales of goods or services. Trish O'Sullivan noted that it is important to consider the policy issues, including equality of bargaining power, when developing a new definition of "consumer."

B. Standard Contract Legislation in Japan

Hisakazu Hirose is a Professor Emeritus of the University of Tokyo, where he taught contract law, consumer law and other subjects for twenty-nine years. Professor Hirose described proposed Japanese legislation (the bill) which aims to reform the Japanese contract law that is part of the Civil Code of 1898. He reported that the bill had been presented to the Diet (legislature) on March 31, 2015. The bill includes "standard terms" provisions which entail both potential benefits and dangers for consumers as well as others. His written Conference program materials provide several examples on this point, and include excerpts from the bill showing the proposed statutory language and changes, and examples as to how it might work.[62]

VIII. The CFPB and the FTC

A. What's New at the FTC

Lesley Fair is a Senior Attorney in the FTC Bureau of Consumer Protection. She noted that there has been a rise in deceptive advertisements directed at aging baby boomers concerned with, *e.g.,* impending dementia (among other health issues), based on unsubstantiated claims -- she noted that these claims need to be backed-up by sound science.[63] She also noted safety concerns, and VW's device that masked emissions in government testing.

Ms. Fair observed that the FTC works with the CFPB on joint cases in the financial services arena. The *Green Tree* settlement is an example.[64] Areas of agency cooperation include debt collection cases, such as: collection of phantom debts; use of inappropriate (threatening) language; and false threats of criminal prosecution. The enforcement tools now being utilized include: lifetime bans on defendants; contempt orders; and civil penalties. Current focuses also include: for-profit education; the lead generation industry; FinTech lending; mobile phone deception; illegal charges; and do-not-call violations. Social media endorsements are another area of interest -- these require disclosure of any connections between the tweeters, etc. and merchants. Data security and privacy issues are also a priority. She noted the *Wyndham* case,[65] as illustrating that the FTC covers data security and privacy issues (under the unfairness standards). She urged participation in FTC projects by academics, and suggested ways to do this.

B. What's New at the CFPB

Karen Meyers is Assistant Deputy Enforcement Director for Policy and Strategy at the CFPB. She was previously a plaintiff's attorney handling consumer protection and personal injury matters, and served as Assistant Attorney General and Director of the Consumer Protection Division of the New Mexico Attorney General's office from 2007 - 2014.

There has been a rise in deceptive advertisements directed at aging baby boomers.

Ms. Meyers described the history and background of the CFPB, including its Unfair, Deceptive and Abusive Acts and Practices (UDAAP) authority and the twenty federal consumer protection statutes implemented by the CFPB. The CFPB has a diverse framework of tools (in its "toolbox"), including responses to consumer complaints, and examination and supervision of non-bank financial entities. The CFPB has recently defined "larger participants" subject to its jurisdiction.[66]

The first five years of CFPB history resulted in $11 billion in consumer recoveries, for more than twenty-five million consumers. Research and markets data also have been developed (the CFPB is data driven), including numerous studies and reports. Also, a regulatory agenda is regularly issued, currently, *e.g.,* focusing on: arbitration; payday lending; prepaid accounts; overdraft protection plans; and debt collection. Supervisory Highlights are also issued to explain violation views. The CFPB is also active in consumer engagement, *e.g.,* by soliciting consumer complaints. The CFPB covers all consumer financial markets.

CFPB enforcement is intended to deter adverse behavior and provide remediation for consumers. The CFPB looks to the FTC history with regard to UDAP standards and violations, while developing the new "abusive" prong. The definitions of "persons" and "service providers" are crucial to the scope of CFPB jurisdiction.

As noted above at Part VI.C., FinTech lead generators buy and market consumer information, *e.g.,* if you apply for a payday loan this data is sold to other lenders. The CFPB alleges that there is a failure to vet this data as between buyers and sellers. This may result in unfair and abusive creditor claims. Consumers then lose control of their information, which is sold to the highest bidder.

Other important concerns include: student debt relief schemes; data security cases, including *Dwolla*;[67] false promises of data security; auto finance and FCRA issues, including abuses of "buy here – pay here" in vehicle credit sales where the auto dealer fails to accurately disclose the credit terms;[68] and debt collection, including: debt buyers; false legal process (resulting in pursuit of law firms under the FDCPA); false allegations in law suits; and sales of paid accounts.

C. The CFPB and Consumer Law Teachers

Judith Fox is a Clinical Professor of Law at Notre Dame Law School, where she practices and teaches consumer law. She described ways that consumer law faculty can interact with the CFPB.[69] She noted that the CFPB 2014 toolkit is no longer posted, as the new "Your Money Your Goals Toolkit" replaced it. The new Toolkit: provides an overview of the CFPB and federal consumer laws; defines terms and basic concepts; explains credit reports; and provides sample letters, *e.g.,* for sending disputes to the CFPB (this is a means to interact). Familiarity with this shows students how to file complaints with the CFPB (and the CFPB will respond).

The CFPB also holds conference calls with law school clinics once each semester. During these calls the CFPB solicits input and information. Free brochures are also available from the CFPB, and can be ordered in bulk for the students.

Classroom "podium issues" include the fact that many students dislike books, and prefer online information. Some will not read books, but will read online posts. This invites the use of CFPB online resources, *e.g.*, students can read and file comments with regard to proposed rules, and follow the CFPB regulatory agenda.

D. The CFPB in Action

Angela Littwin is a Professor at the University of Texas School of Law, where she focuses on bankruptcy, consumer law and commercial law. She teaches a course on credit cards. As part of this course she has students go to the CFPB website to read credit card agreements. She reported that the students say it is their hardest day in law school.

The credit industry has a new focus on compliance management functions -- including an emphasis on self-enforcement.

Professor Littwin mentioned two articles she wrote or co-authored, addressing fundamental issues including how to assure enforcement of consumer protection.[70] She discussed CFPB examinations as a means of consumer protection – saying that they can address the problem of there being much law on the books but little enforcement. She argued that the statutory framework needs to, and does in fact, facilitate enforcement. In this regard, she said that rules are better than broad standards (*e.g.,* unconscionability), but the best approach of all is to have rules backed by standards. This provides for more compliance, even with less effective rules. She opined that private enforcement is insufficient, and public enforcement best.

She noted the CFPB Supervisory Highlights, and stated that the CFPB has been providing long-overdue enforcement. In addition, she said that company compliance without direct enforcement is improving. The credit industry has a new focus on compliance management functions -- including an emphasis on self-enforcement. This requires an independent compliance function within the company, with auditing, extensive review of documents, interviews with consumers, and the full spectrum of enforcement tools, and affects the basic risk-benefit analysis of the company.

In addition, she noted that CFPB enforcement tools include:

- non-public enforcement tools, such as:
  - non-binding recommendations;
  - matters requiring attention; and
  - non-public enforcement actions; and
- public enforcement actions, such as:
  - consent decrees; and
  - lawsuits.

Public enforcement efforts are effective partly because they affect the public relations of the defendant. However, the pitfalls of a reliance on public enforcement tools include:

- the risk of industry capture;
- the risk of a hostile presidential administration; and
- the risk of revealing confidential information (this may discourage full disclosure) (the CFPB Supervisory Highlights reveal the disposition without disclosing the identity of the parties).

Consumer complaints play a major role. The purposes include:

- dispute resolution (for smaller claims);
- regulation development; and
- creating goodwill for the CFPB.

Professor Littwin noted that the CFPB responds to complaints by extending an inquiry to the company, and also asks the consumer what he or she thinks would be a fair resolution. The company views this information and has fifteen days to respond; nonresponse is a cardinal sin and may result in an enforcement action. Roughly seventy-five percent of the company responses are explanations. She noted that it is difficult to measure the effectiveness of the process. The consumer can dispute the company's response, but the CFPB follow-up is uncertain. Consumers respond to the company's explanation in about twenty-one percent of the cases.

Professor Littwin reported that over sixty percent of the resulting relief is provided in response to complaints about products that are likely to provide lower levels of relief. Forty percent of the complaints are mortgage complaints, but only twenty percent of these result in relief. Only credit cards grant fifty percent relief, mostly in a waiver of late charges. This relief is likely to be far less valuable than mortgage relief would have been.

IX. Conclusion

Once again, as in previous years, the 2016 Conference featured a lively and informative presentation of views on consumer law issues, held for the second time in the lovely setting of Santa Fe, New Mexico. The usual academic divisions also were evident, *e.g.,* between conflicting perspectives on consumer protection, teaching styles and other fundamental issues. As in the recent years, this reflected notable differences in the approaches of doctrinal and clinical faculty, and significant across-the-board differences in the content, focus and basic approaches to teaching consumer law, along with an increased emphasis on experiential learning. Once again, a variety of perspectives from around the world added to this diversity, bringing an international tenor to this unique Conference.

A significant trend that was apparent again this year, and understandably so, was an increased emphasis on regulation and public enforcement by the CFPB and FTC. This may raise a question, at least for doctrinal faculty, as to how much of a consumer law course to devote to these issues (as opposed to private litigation and remedies). Ideally, of course, there would be a separate course on the CFPB and FTC, given their importance. But in a world of limits, where this is not possible, expanded coverage of federal supervision, regulation and enforcement must come at the expense of other issues.

Something like this has long been a challenge for consumer law faculty, but it may become increasingly so. This may mean that traditional, private consumer law and remedies will recede somewhat in importance, both in doctrinal consumer law courses and the "outside" world, as perhaps already indicated in the surprisingly small (and possibly declining) number of schools that offer a traditional Consumer Law course taught by full-time faculty. If this trend continues and the number of consumer law courses and research faculty dwindle further, this will represent a significant change in the academic landscape. Consumer law clinics and other forms of experiential learning may then become the primary focus of consumer law teaching (possibly with a mandate to focus more broadly on additional issues beyond the scope of traditional consumer law[71]). We shall see, but as academics in this field we may at least find it interesting to reflect on these and the other issues highlighted at the 2016 Conference. So again, thank you, Richard and Nathalie, and thanks to all of the speakers who contributed to this article and the 2016 Conference.

** Alvin C. Harrell is Professor of Law at Oklahoma City University School of Law and Executive Director of the Conference on Consumer Finance Law.*

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1 Reports on previous bi-annual Conferences in this series are available as follows: Alvin C. Harrell, *Teaching Consumer Law in a Virtual World,* 18 J. Consumer & Comm. L. 34 (2014); Alvin C. Harrell, *Teaching Consumer Law, Part Five,* 14 J. Consumer & Comm. L. 87 (2011); Alvin C. Harrell, *Teaching Consumer Law, Part Four,* 12 J. Consumer & Comm. L. 8 (2008); Alvin C. Harrell, *Teaching Consumer Law, Part Three,* 10 J. Consumer & Comm. L. 46 (2006); Alvin C. Harrell, *Teaching Consumer Law, Part Two,* 8 J. Consumer & Comm. L. 2 (2004); Alvin C. Harrell, *Teaching Consumer Law,* 6 J. Consumer & Comm. L. 50 (2003).

2 Professor Emeritus and Director, Center for Consumer Law, University of Houston Law Center.

3 Frederick M. Hart Chair in Consumer and Clinical Law University of New Mexico School of Law.

4 *See supra* note 1. Your author has participated in all except one, and has written reports accordingly. *Id.*

5 Zemeckis v. Global Credit & Collection Corp., 679 F.3d 632 (7th Cir.), *cert. denied,* 133 S.Ct. 584 (2012). The sample notices and other information about the study are available in Professor Sovern's written Conference materials. *See* Jeff Sovern & Kate Walton, "Are FDCPA Validation Notices Valid," program materials for Teaching Consumer Law (Center for Consumer Law 2016). Note: Although referenced through-out this article as "written" Conference materials (in the sense that the materials were written and provided by the Conference speakers), the materials are in fact available in electronic format.

6 The study will be published in, *Are Validation Notices Valid? An Empirical Evaluation of Consumer Understanding of Debt Collection Validation Notices*, 75 Md. L. Rev. 1 (2017 forthcoming), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2808531.

7 The study is also described in the written program materials for the Conference. *See* Prentiss Cox, "An Empirical Look at Public UDAP Enforcement," program materials for Teaching Consumer Law (Center for Consumer Law 2016).

8 *In re* Trans Union Corporation Privacy Litigation, 741 F.3d 811 (7th Cir. 2014). The case is discussed more fully in Professor Rave's published article on the subject, also included in the written materials for the Conference. *See* D. Theodore Rave, *When Peace is not the Goal of a Class Action Settlement*, 50 Ga. L. Rev. 475 (2016).

9 Campbell-Ewald Co. v. Gomez, 136 S.Ct. 663, 193 L.Ed.2d 571, 84 USLW 4051 (2016); Spokeo, Inc. v. Robins, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016).

10 136 S.Ct. 1594, 194 L.Ed.2d 625, 84 USLW 4259 (2016).

11 *See* Edwards v. First American Corp. 610 F.3d 514 (9th Cir. 2010).

12 Electronic Fund Transfers, 74 Fed. Reg. 59,033 (Nov. 17, 2009) (codified at 12 CFR pt. 205). Regulation E implements the Electronic Fund Transfers Act, 15 U.S.C. §§ 1693 *et seq.*

13 *See* Claire Greene & Mi Luo, Consumers' Use of Overdraft Protection, The 2013 Survey of Consumer Payment Choice: Summary Results, Federal Reserve Bank of Boston Research Data Report 15-8 (2015), *available at* https://www.bostonfed.org/publications/research-data-report/2015/consumers-use-of-overdraft-protection.aspx. .

14 Pew Charitable Trusts, Overdrawn: Persistent Confusion and Concern About Bank Overdraft Practices (2014), *available at* http://www.pewtrusts.org/~/media/assets/2014/06/26/safe_checking_overdraft_survey_report.pdf.

15 *See, e.g.,* Gray v. Los Angeles Fed. Credit Union, Case No. 2:15-CV-7266 (C.D. Cal.) (Sept 16, 2015) (Complaint) (case has been dismissed) (alleging that member opt-in did not contain the amount of the overdraft fee); Regions Bank, Consent Order, No. 2015-CFPB-0009 (Apr. 29, 2015), *available at* http://files.consumerfinance.gov/f/201504_cfpb_consent-order_regions-bank.pdf (resolving problem that resulted when Regions did not provide opt-in procedures for consumers with linked checking and savings accounts, but charged overdrafts on debit transactions that exceeded the balance in both linked accounts).

16 The Expedited Funds Availability Act allows financial institutions to place holds on some account deposits. 12 U.S.C. § 4001-10 (2012) (This means that those funds need not be available for withdrawal, even though they may still be visible to the consumer on the bans web-based account portal.

17 Casey v. Orange County's Credit Union, Settlement Agreement and Release, Case No. 30-2013-00658493-CU-BT-CXC (Cal. Orange Co. Super. Ct. Dec. 16, 2014) *available at* http://www.orangecounty-creditunionoverdraftsettlement.com/Documents/OCU0001/Fully%20Executed%20Settlement%20Agreement%20and%20Release.pdf

18 *Class-Action Lawsuits Target CU Overdraft Programs*, CUtoday.info, http://www.cutoday.info/THE-feature/Class-Action-Lawsuits-Target-CU-Overdraft-Programs (May 25, 2015).

19 CFPB Study of Overdraft Programs: A White Paper of Initial Data Findings (2013), *available at* http://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf; CFPB, Data Point: Checking Account Overdraft (2014), *available at* http://files.consumerfinance.gov/f/201407_cfpb_report_data-point_overdrafts.pdf.

20 Regions Bank, Consent Order, No. 2015-CFPB-0009 (Apr. 29, 2015), *available at* http://files.consumerfinance.gov/f/201504_cfpb_consent-order_regions-bank.pdf

21 *See infra* Parts V.C. and VIII., noting the likelihood of future CFPB action as to overdraft protection issues.

22 The Department of Justice announced an initiative dubbed "Operation Choke Point" in 2013. The initiative scrutinized financial institutions that do business with "high-risk" industries like payment, processors and payday lenders. *See* Alan Zibel & Brent Kendall, *Probe Turns Up Heat on Banks*, Wall St. J., Aug. 7, 2013; Staff of Comm. On Oversight and Government Reform, 113th Cong., Report on The Department of Justice's "Operation Choke Point": Illegally Choking Off Legitimate Business (May 29, 2014), *available at* https://oversight.house.gov/wp-content/uploads/2014/05/Staff-Report-Operation-Choke-Point1.pdf.

23 Emily Glazer, *Big Banks Shut Border Branches in Effort to Avoid Dirty Money*, Wall St. J., May 25, 2015.
24 *Available at:* Alvin C. Harrell, *Ten Current Issues Affecting Consumer Financial Services Law*, 68 Consumer Fin. L. Q. Rep. 286 (2014).
25 Subsequently published as: Alvin C. Harrell, *Ten More Trends and Developments in Consumer Financial Services Law,* 69 Consumer Fin. L. Q. Rep. 250 (2015).
26 For further discussion, *see id.* The paper also appears in the written Conference program materials.
27 Which has come despite near-zero or even negative interest rates, an amazing and (at least in the U.S.) unprecedented phenomenon. *See, e.g.,* Robert J. Barro, Opinion, *The Reasons Behind the Obama Non-Recovery,* Wall Str. J., Sept. 21, 2016, at A13 ("... weak opportunities for private investment [have] motivated banks and other institutions to hold the Fed's added obligations despite the negative real interest rates paid"). Barro is a professor of economics at Harvard University.
28 The obvious theory being that prime loans are less likely to go into foreclosure. Of course, some other factors are also involved. *See, e.g.,* Alvin C. Harrell, Commentary: *The Surprising Decline (and Fall?) of Consumer Mortgage Law and Litigation,* 69 Consumer Fin. L. Q. Rep. ___ (2015). *See also infra* note 22.
29 *See, e.g.*: Barro, *supra* note 20 ("The 2007-08 financial crisis [has been] followed by [a] vast monetary expansion . . . ."); Michael S. Derby, *Fed "Dove' Warns of Low-Rate Risk,* Wall Str. J., Sept. 19, 2016, at c1 ("Boston Federal Reserve Bank President Eric Rosengren has a reputation as one of the Fed's leading doves — advocates of easy money policies . . . . But more recently, he has developed strong concerns that easy money could be letting markets get out of hand the way they did before the financial crisis."); Martin Feldstein, Opinion, *Why the Fed Should Raise Rates Now,* Wall Str. J., Oct. 7, 2016, at A13 ("The Fed's policy of exceptionally low interest rates causes investors to reach for yield, continuing to raise the overvalued prices of equities, longer-term bonds, commercial real estate and other riskier assets."). Feldstein is a professor at Harvard and was Chair of President Reagan's Counsel of Economic Advisors. His article goes on to cite specific examples of current asset bubbles, including commercial real estate.
30 *See, e.g.*: Derby, *supra* note 29 (reporting that Boston Federal Reserve Bank President Rosengren's "main source of concern is commercial real estate — the soaring market for office buildings, warehouses and apartment buildings."); Feldstein, *supra* note 29.
31 More information on this presentation is available in the written Conference program materials. *See* Richard Frankel, "Bringing The Outside In: Creating Experiential and Hands-On Opportunities," program materials for Teaching Consumer Law (Center for Consumer Law 2016).
32 Katherine Porter, Modern Consumer Law (2016).
33 Elizabeth Warren, Jay Westbrook, John Pottow, and Katherine Porter, The Law of Debtors and Creditors: Text, Cases and Problems (7th ed. 2014).
34 Although it must be conceded that, as these subjects become more regulatory in nature, the issues may increasingly fall to a small cadre of regulatory specialists and be of less interest to the broader range of legal practitioners. *See, e.g.,* Harrell, *supra* note 28; *see generally* Opinion, Notable & Quotable: *Presidential Economics,* Wall Str. J., Sept. 21, 2016, at A13 (quoting David Henderson: "We live in a regulatory state."). *See also infra* Part IX.
35 Neil Howe & William Strauss*,* Millennials Go to College 59-80 (2d ed. 2007).
36 Pew Research Center, Millennials in Adulthood, (Mar. 7, 2014), *available at* http://www.pewsocialtrends.org/2014/03/07/millennials-in-adulthood/
37 *See, e.g., supra* Part II.F. (your author's presentation at this Conference), noting the "Plight of the Millennials" as the first of ten topics; this issue is discussed further in Harrell, *supra* note 18.
38 Additional materials relating to these exercises, including an In-Class Rule Exercise, a Sample E-Mail and Traditional Memorandum Assignment, and a Letter-Writing Assignment, are included in the written Conference program materials. *See* Neil L. Sobol, "Starting Millennials Out Right: Consumer Law for 1Ls," program materials for Teaching Consumer Law (Center for Consumer Law 2016).
39 Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (Ottawa: Department of Justice Canada, 2007): www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07_la1-rr07_aj1/rr07_la1.pdf.
40 Office of Consumer Affairs, Industry Canada, *Consumer Trends Update: An Overview of Academic Consumer Interest Research in Canada* (Industry Canada, 2013) at 11-12, online: https://www.ic.gc.ca/eic/site/oca-bc.nsf/vwapj/ConsumerTrendsUpdate_Spring2013-eng.pdf/$file/ConsumerTrendsUpdate_Spring2013-eng.pdf.
41 Also described in her written Conference program materials. *See* Dr. Joasia Luzak, "Empirical Evidence in Consumer Law Cases: 'Up to' Claims," program materials for Teaching Consumer Law (Center for Consumer Law 2016).
42 *See* Bureau of Consumer Financial Protection, Payday, Vehicle Title, and Certain High-Cost Installment Loans, proposed rule with request for public comment, 81 Fed. Reg. 47863 (July 22, 2016).
43 Consumer Law: Cases and Materials (West 4th ed. 2013).
44 The proposed Restatement of Consumer Contracts [the Consumer Contracts Project]. *See also* Professor Pridgen's written Conference materials: Dee Pridgen, *"What's New with the Restatement of Consumer Contracts*," program materials for Teaching Consumer Law (Center for Consumer Law 2016).
45 *See, e.g., supra* notes 28 & 29.
46 Your author will take this opportunity to note his brief article on essentially this issue. *See* Alvin C. Harrell, *Electronic Commerce and Incorporation by Reference in Contract Law,* 86 Okla. Bar J. 2351 (2015).
47 An interesting case on this issue, suggesting that an arbitration clause may be invalid on the basis of a duty to "say nothing or to tell the whole truth," is Key Finance, Inc. v. Koon, 2016 OK CIV APP 27, 2015 WL 10734036 (Okla. Ct. App. Oct. 6, 2015). This case has generated some differences of opinion between your author and at least one academic colleague. The court's analysis may partly reflect a judicial antipathy toward arbitration, rather than contract law as such, in which case it belongs instead with the discussion below at Part VI.B.
48 While the point is true on a technical basis, consider also Professor Murray's observation that "a holding that a contract or term is unconscionable on the basis of procedural unconscionability, alone, would be more than rare." John Edward Murray, Jr., Contracts: Cases and Materials 478 (7th ed. 2015) [the Murray casebook]. In addition, while there are cases (*e.g.,* as cited in the Murray casebook, *id.* at 472) rendering contracts unenforceable on the basis of substantive unconscionability alone, one may wonder how often this will be enough as an invalidating cause, in the face of a complete absence of procedural unconscionability and other issues. The approach advocated by Professor Pridgen (as noted in the text immediately above) could change this, but query whether we are there yet. *See, e.g.,* Ingle v. Circuit City Stores, Inc., 328 F.3d 1165 (9th Cir. 2003) (presented in the Murray casebook, *supra* this note, at 479, as illustrating the current state of the law). While *Ingle* does a reasonable job of explaining the basic law of unconscionability (both procedural and substantive), including recognition of Professor Martin's basic point that both types need not be present in the same degree, parts of the *Ingle* court's analysis (*e.g.,* suggesting that the unilateral right to propose a future modification of an executory contract renders it substantively unconscionable) may have been unduly influenced by the same kind of antipathy noted *supra* at note 36.
49 Professor Alderman provided extensive written Conference program materials on this topic. *See* Richard M. Alderman," Arbitration Update," (Center for Consumer Law 2016).
50 Pub. L. No. 80-282, ch. 392, 61 Stat. 609 (1947) (codified as amended at 9 U.S.C. §§ 1 - 16). *See* 9 U.S.C. § 2.

51 Buckeye Check Cashing Inc. v. Cardegna, 126 S. Ct. 1204 (2006). *See generally* Thomas Ishmael, Buckeye Check Cashing v. Cardegna: *Enforcing Arbitration Clauses Within Void Contracts,* 61 Consumer Fin. L. Q. Rep. 235 (2007).

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

53 American Express Co. v. Italian Colors Restaurants, 133 S.Ct. 2304 (2013).

54 Andermann v. Sprint Spectrum L.P., 785 F.3d 1157 (7th Cir. 2015).

55 *See* press release, General Mills, "We've listened - and we're changing our legal terms back," http://www.blog.generalmills.com/2014/04/weve-listened-and-were-changing-our-legal-terms-back-to-what-they-were/.

56 Professor Engel noted that efforts to correct errors in such data may be dangerous, *e.g.*: about the data.com reveals your information to you, but also installs cookies on your computer.

57 *See also* her written Conference program materials: Trish O'Sullivan, "Who is the Consumer? Will the Real 'Consumer' Please Stand Up," program materials for Teaching Consumer Law (Center for Consumer Law 2016).

58 [2000] 2 NZLR 465.

59 [2000] 2 NZLR 465. *See generally* The Law of Truth in Lending ¶¶ 2.01[1] & 2.04[1] (Alvin C. Harrell ed. 2014 & 2015 Supp.). [Truth in Lending].

60 Section 3 of the Australian Consumer Law set out in Schedule 2 of the Competition and Consumer Act 2010.

61 *See, e.g.,* Truth in Lending, *supra* note 59.

62 *See* Hisakazu Hirose, "Standard Contract Legislation in Japan," program materials for Teaching Consumer Law (Center for Consumer Law 2016).

63 Ms. Fair provided extensive written Conference program materials covering these and related issues. *See* Lesley Fair, "Federal Trade Commission Advertising Enforcement," program materials for Teaching Consumer Law (Center for Consumer Law 2016).

64 *See* Federal Trade Commission and Consumer Financial Protection Bureau v. Green Tree Servicing, LLC, 15-cv-02064 (SRN-JSM) (U.S. D. Ct. D. Minn. April 23, 2015).

65 Federal Trade Commission v. Wyndham Worldwide Corporation, *et al,* 799 F.3d 236 (3rd Cir. 2015).

66 For example, the fifth and latest "larger participant" rule covers vehicle finance by non-banks. *See, e.g.,* Consumer Financial Protection Bureau, Defining Larger Participants of the Automobile Financing Market and Defining Certain Automobile Leasing Activity as a Financial Product or Service, Final Rule, 80 Fed. Reg. 37496 (June 30, 2015).

67 *In the Matter of* Dwolla, Inc., Consumer Financial Protection Bureau, File No. 2016-CFPB-0007 (Mar. 2, 2016).

68 *See* consent decree in *Herbies* case, Administrative Proceeding File No. 2016-CFPB-0001 (Jan. 21, 2016), *available at* http://files.consumerfinance.gov/f/201601_cfpb_consent-order_y-kings-corp-also-doing-business-as-herbies-auto-sales.pdf.

69 *See also* her written Conference program materials: Judith Fox, "The CFPB and Consumer Law Teachers," program materials for Teaching Consumer Law (Center for Consumer Law 2016).

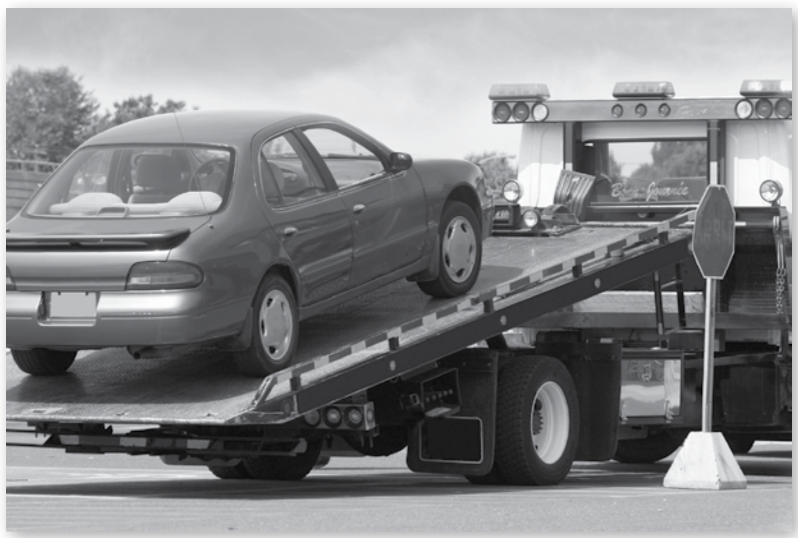
70 *Examination as a Method of Consumer Protection*, 87 Temple L. Rev. 807–873 (2015) (with Jean Braucher); *Why Process Complaints? Then and Now*, 87 Temple L. Rev. 895–946 (2015).

71 As possibly reflecting the broad needs of clinical clientele.

Model Consumer Amendments to Uniform Commercial Code Article 9®

National Consumer Law Center*

Introduction



Existing law governing repossession of motor vehicles and other personal property leaves consumers vulnerable to the whims of creditors and largely in the dark as to the nature of the process. Secured creditors can, without any court or other government supervision, decide when to repossess a consumer's property, seize it without notice, and sell it in a manner it chooses—often at an auction from which the consumer is barred and that is held at a time and place hidden from the consumer.

Repossession of consumer collateral often involves stealth or entry onto private property. Physical confrontations, high-speed chases, and the use of weapons are all too common.[1]

After seizure, typically the property is sold for far below its value, sometimes to an insider, large fees are tacked on, and the secured party then seeks a deficiency—the outstanding debt plus repossession, storage, processing, and sale costs as well as attorney fees, crediting only the below-value sale price of the consumer's property. The consumer has lost not only the property but also owes a deficiency, a debt that is often unaffordable and will follow the consumer for many years.

The harm to the consumer, though, is far more than the deficiency obligation. Repossession of cars in particular causes great financial disruption to families, preventing access to employment, day care, schooling, medical care, and other essential services. Other seized property may have special significance or utility to the consumer and his or her family not replaceable by a substitute purchase, even if such a substitute were affordable.

The basic law regulating consumer repossessions is found in Uniform Commercial Code Article 9, in effect in all fifty states. Article 9 rules, with few exceptions, apply equally to commercial and consumer transactions. The rules are essentially the same whether the seizure involves a major corporation's oil rig or a consumer's ten-year-old car.

Model consumer amendments to Article 9 rationalize the rules for consumer repossessions, because consumer transactions require different considerations than secured transactions among commercial entities. The amendments temper for consumers the harsh aspects of existing repossession law. Yet they do so in a way carefully crafted to accommodate creditors' interests. The amendments do not prohibit self-help repossession or restrict the sale of consumer goods at dealer-only auctions, and the creditor is still entitled to a full recovery on the debt.

Key elements of the model amendments

Avoiding unnecessary repossessions. Both the creditor and the consumer benefit when a secured transaction is ultimately successful and the consumer acquires full ownership of the collateral after paying the debt. Thus, both have an interest in avoiding unnecessary repossession. The model amendments give consumers additional avenues to avoid loss of their property by allowing them a right to cure: a limited period of time to catch up on back due payments before repossession.[2] Many states already provide a right to cure.[3]

The model amendments would thus not only extend this right to cure to more jurisdictions, but would also promote uniformity.

The model amendments also give the consumer the right to reinstate the contract during the 20 days after repossession, by paying all past due amounts plus the expenses of the repossession.[4] A number of states already give consumers a right to reinstate,[5] so this amendment adopts a proven, workable approach. It benefits both the creditor and the consumer by providing one more chance to make the transaction successful.

These model consumer amendments to Article 9 rationalize the rules for consumer repossessions, because consumer transactions require different considerations than secured transactions among commercial entities.

Public safety. Addressing certain public safety concerns involved with self-help repossessions, the model amendments codify the rule that the creditor must stop a repossession upon the objection of an individual who appears on the scene of the repossession.[6] This rule, which many courts already adopt,[7] is designed to prevent repossessions from turning into violent confrontations that can result in injury to consumers, repossession agents, and bystanders. If the repossession agent encounters an objection, the creditor can try again another day, or can seek a court order. The model amendments also seek to deter dangerous high-speed chases by applying the rule against breach of the peace throughout the repossession process, until the secured party or its agent has moved the collateral to a fixed location that it controls.[8]

Low values on repossession sales. One of the issues that roiled the drafting of Revised Article 9 was the problem of low sales prices at repossession sales.[9] Consumer advocates proposed amending Article 9 to require a secured party to credit the consumer with the fair market value of the collateral.[10] The drafters did not accept this approach, although they did incorporate a more limited provision in the case of a low-price sale to an insider.[11]

The model amendments expand the definition of an insider for the purposes of the limited protection against low-price sales.[12] But they also reopen the issue more generally by proposing that Article 9 explicitly provide that the price is one of the terms of the repossession sale that must be commercially reasonable.[13] This approach makes use of the well-accepted and widely-applied concept of commercial reasonableness. Some courts have already interpreted Article 9 as requiring that the price is one of the terms that must be commercially reasonable.[14] Even those that do not go that far typically take the view that a low sale price is an important factor in determining commercial reasonableness.[15] The model amendments also codify the rule, already in force in a number of states, that a secured party is not entitled to a deficiency if it fails to prove that the collection, enforcement, disposition, or acceptance was conducted in accordance with Article 9's requirements.

Greater transparency for consumers. The model amendments provide greater transparency for consumers. If the collateral will be sold at a dealer-only auction, the amendments require the consumer be notified of the date and time of the auction.[16] The amendments lift the veil of secrecy from the creditor's calculation of the amount still owed after a repossession sale, and require the creditor to share its calculations with the consumer.[17] The amendments also ensure that consumers receive proper refunds on service contracts and the like when their property is seized.[18]

Scope. Except for a few clarifying provisions, the amendments apply only to consumer transactions, and leave untouched the relationship between commercial lenders and commercial borrowers. All states recognize that consumer repossessions require different rules than commercial ones—in fact virtually all the model amendments here have been enacted as consumer legislation or adopted by court decisions in at least some states with no adverse consequences to a consumer's ability to access consumer credit. The model amendments provide uniform rules that are easily grafted onto existing Article 9. They modernize consumer repossession law in ways designed to offer much-needed protection for consumers while not prejudicing creditors.

Listing of Amended Sections

Section 9-102. Definitions and Index of Definitions.
Section 9-103. Purchase-Money Security Interest; Application of Payments; Burden of Establishing.
Section 9-601. Rights After Default; Judicial Enforcement; Consignor or Buyer of Accounts, Chattel Paper, Payment Intangibles, or Promissory Notes.
Section 9-607. Collection and Enforcement by Secured Party.
Section 9-608. Application of Proceeds of Collection or Enforcement; Liability for Deficiency and Right to Surplus.
Section 9-609. Secured Party's Right to Take Possession After Default.
Section 9-610. Disposition of Collateral After Default.
Section 9-611. Notification Before Disposition of Collateral.
Section 9-612. Timeliness of Notification Before Disposition of Collateral.
Section 9-614. Contents and Form of Notification Before Disposition of Collateral: Consumer-Goods Transaction.
Section 9-615. Application of Proceeds of Disposition; Liability for Deficiency and Right to Surplus.
Section 9-616. Explanation of Calculation of Surplus or Deficiency.
Section 9-620. Acceptance of Collateral in Full or Partial Satisfaction of Obligation; Compulsory Disposition of Collateral.
Section 9-623. Right to Redeem Collateral.
Section 9-624. Waiver.
Section 9-625. Remedies for Secured Party's Failure to Comply with Article.
Section 9-626. Action in Which Deficiency or Surplus Is in Issue.
Effective Date

ARTICLE 9.
SECURED TRANSACTIONS

Section 9-102. Definitions and Index of Definitions.
(a) [**Article 9 definitions**.] In this article:
* * *
(63) "Person related to", with respect to an organization, means:
(A) a person directly or indirectly controlling, controlled by, or under common control with the organization;
(B) a person that had previously owned the obligation that the organization is enforcing, or a person directly or indirectly controlling, controlled by, or under common control with such a person;
(~~B~~C) an officer or director of, or a person performing similar functions with respect to, the organization;
(~~C~~D) an officer or director of, or a person performing similar functions with respect to, a person described in subparagraph (A) or (B);
(~~D~~E) the spouse of an individual described in subparagraph (A), (B), (C) or (D); or
(~~E~~F) an individual who ~~is related by blood or marriage to an individual described in subparagraph (A), (B), (C), or (D) and~~ shares the same home with the individual described in subparagraph (A), (B), (C), (D) or (E).

Comment:
The UCC provides protections where collateral is sold to an insider, but the definition of an insider is unnecessarily limited: a person living with an insider is considered an insider only if related by blood or marriage to the insider. Moreover, often credit sellers have close relationships with their assignees and thus the assignor should be considered an insider when the assignee sells the collateral back to the assignor. The limited protections offered by existing Section 9-615(f) concerning sales to assignors are inadequate for consumer transactions. See Comment 3 to Section 9-610.

Section 9-103. Purchase-Money Security Interest; Application of Payments; Burden of Establishing.
(a) [**Definitions**.] In this section:
* * *
(2) "purchase-money obligation" means an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used. In consumer transactions involving the purchase of property or the extension of credit to purchase property, the purchase-money obligation does not include amounts necessary to pay off another debt.

Comment:
When an obligation is a purchase-money one, as defined by state law, the U.S. Bankruptcy Code gives rights to a secured creditor beyond the value of its security interest, thus prejudicing other creditors and the debtor. The part of an obligation used to purchase the collateral is logically a purchase-money obligation, but not that part of a loan used to pay off an unrelated debt of the consumer, such as the amount necessary to pay off "negative equity" on a trade-in.

Section 9-601. Rights After Default; Judicial Enforcement; Consignor or Buyer of Accounts, Chattel Paper, Payment Intangibles, or Promissory Notes.
* * *
(g) [**Consignor or buyer of certain rights to payment**.] Except as otherwise provided in Section 9-607(c), this part:
(1) imposes no duties upon a secured party that is a consignor; and ~~or is~~
(2) imposes no duties running from a buyer of accounts, chattel paper, payment intangibles, or promissory notes to the seller of the accounts, chattel paper, payment intangibles, or promissory notes.

Comment:
The language of existing subsection (g), if interpreted literally, would exempt many creditors from its provisions, and this amendment clarifies that this was never the intent.

Section 9-607. Collection and Enforcement by Secured Party.
* * *
(d) [**Expenses of collection and enforcement**.] A secured party may deduct from the collections made pursuant to subsection (c) reasonable expenses of collection and enforcement, including reasonable attorney's fees and legal expenses incurred by the secured party, but in a consumer transaction only where such fees are allowed by Section 9-615(h).

Comment:
This change is necessary to be consistent with new Section 9-615(h), which limits the right to attorney fees in consumer transactions**.**

Section 9-608. Application of Proceeds of Collection or Enforcement; Liability for Deficiency and Right to Surplus.
(a) [**Application of proceeds, surplus, and deficiency if obligation secured**.] If a security interest or agricultural lien secures payment or performance of an obligation, the following rules apply:
(1) A secured party shall apply or pay over for application the cash proceeds of collection or enforcement under Section 9-607 in the following order to:

(A) the reasonable expenses of collection and enforcement and, to the extent provided for by agreement and not prohibited by Section 9-615(h) or other law, reasonable attorney's fees and legal expenses incurred by the secured party;

Comment:
This change is necessary to be consistent with new Section 9-615(h), which limits the right to attorney fees in consumer transactions.

Section 9-609. Secured Party's Right to Take Possession After Default.
(a) [**Possession; rendering equipment unusable; disposition on debtor's premises.**] After default and, for a consumer transaction, after expiration of the cure period provided in subsection (f), a secured party:
(1) may take possession of the collateral; and
(2) without removal, may render equipment, but not consumer goods, unusable and dispose of collateral on a debtor's premises under Section 9-610.
* * *
(d) **[Objection and Breach of the Peace.]** An example of breach of the peace is failing to stop a repossession upon the objection of an individual who appears upon the scene of the repossession.
(e) **[Applicability Until Repossession Complete.]** A breach of the peace violates this section if it occurs at any time before a repossession is complete. A repossession is complete when the secured party or its agent has moved the collateral to a fixed location that it controls.
(f) **[Right to cure.]** In a consumer transaction, after a default and thirty days before accelerating the obligation or taking possession of the collateral, the secured party shall provide written notice to the debtor and the obligors of the nature of any default, the imminence of any acceleration or seizure of the collateral, and that the debtor and obligors have the right during that thirty day period to cure the default. If the default is cured, no action can be taken based upon that default to accelerate the obligation or take possession of the collateral.
(g) **[Limits on right to cure.]** The rights provided by subsection (f) shall apply no more than three times in any calendar year.
(h) [**Unsecured personal property.**] A secured party has rights only in the collateral. Any other property taken at the time that the secured party takes possession of collateral shall be returned to the debtor within 5 days. Until returned to the debtor, the secured party shall take reasonable measures to preserve and care for such property. The secured party may not impose any fee or condition upon the debtor to obtain the property, except that it may require a signature to indicate receipt and it may require the debtor to recover the property at a reasonable location no more than ten miles from the location where the secured party took possession of the collateral.

Comments:
1. Subsection (a)(2) clarifies that Article 9 allows for disablement of collateral only in the case of commercial equipment, and provides that a secured party shall not disable other types of collateral used by a consumer, such as a motor vehicle.
2. Self-help repossession is inherently dangerous, and all too often results in personal injuries or even death. One of the most effective ways to reduce physical confrontations is to require the repossession agent to discontinue any attempt to repossess the collateral if an individual appears on the scene and objects. Many courts adopt this rule and recognize that it is a breach of the peace to proceed with a repossession over an individual's objection. Subsection (d) codifies this rule.
3. The objection need not be by the debtor, but can be by any individual, such as a neighbor, a friend, or a member of the debtor's family. The purpose of the provision is to protect the public safety rather than to give the debtor additional rights. The identity of the individual objecting does not determine whether a repossession over that objection will lead to a confrontation and a threat to public safety.
4. Subsection (e) provides that seizing property in a manner that breaches the peace is prohibited as long as the repossession is still in progress, until the collateral is secured at another location. This provision is necessary because some courts have held that a breach of the peace that occurs shortly after a repossession agent has acquired control over the collateral—for example, when a tow truck has lifted a car's wheels off the ground—does not breach the peace, because the repossession is already "complete" at that point.
Tolerating repossession that breaches the peace at this point leads to serious threats to public safety. For example, in *Jordan v. Citizens and Southern Nat'l Bank*, 298 S.E.2d 213 (S.C. 1998), the court held that a 30-minute high-speed chase was not a breach of the peace because the chase did not start until the repossessor had already started driving the consumer's truck away. Such rulings encourage repossession agents to continue with a repossession despite the debtor's objection, while the debtor is still on the scene or is chasing the repossessor. This can lead to enhanced threats to public safety as easily or perhaps even more readily than when the objection is earlier in the repossession process.
5. The right to cure in subsection (f), applicable only to consumer transactions, is patterned after many existing state laws and a federal law that applies to manufactured homes. It is an overly harsh and unfair remedy to allow a secured party to accelerate a note without notice and then without notice seize the collateral. The consumer should have the right to cure the secured party's concerns so as to bring matters back to the status quo. Any abuse of this right is limited because it only applies three times in a calendar year.
6. A secured party only has the right to seize property in which it has a security interest. The secured party has no rights in property in which it does not have a security interest. The secured party is also liable for any damage to the unsecured property under its care. Subsection (g) codifies existing law that the secured party has no right to unsecured property it mistakenly or intentionally seizes with the collateral, and must return that property in good condition.

Section 9-610. Disposition of Collateral After Default.
(a) [**Disposition after default**.] After default, and for consumer transactions after complying with Section 9-609(f), a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing, except as limited for consumer transactions by Section 9-614(7).

(b) [**Commercially reasonable disposition**.] Every aspect of a disposition of collateral, including the method, manner, time, place, price, and other terms must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms.
(c) [**Purchase by secured party**.] A secured party or a person related to the secured party may purchase collateral:
* * *
(g) [**Rebates.**] In consumer transactions, in conjunction with the disposition of collateral, the secured party shall seek a rebate of the unearned portion of any insurance, service contract, or other agreement related to the collateral, to the extent that the secured party has the right to seek such a rebate.

Comments:
1. Subsection (a) changes are necessary to be consistent with new Sections 9-609(f) and 9-614(7).
2. Subsection (b) clarifies that the price is one of the terms of a disposition that must be commercially reasonable. Some jurisdictions require that the price used to compute the consumer's obligation be the fair market value, instead of a sale price. This provision allows the secured party to use a sale price as long as that price is commercially reasonable.
3. Subsection (c) ensures that insiders do not purchase collateral at a private sale, where there is great potential for abuse, as the seller may have an incentive to sell the consumer's property to a related party for as little as possible and then recover the difference from the consumer by way of a deficiency.

Section 9-615(f) provides that where a sale is made to an insider, the deficiency or surplus is calculated based not on the actual sale price, but the price if the collateral had not been sold to an insider. This applies only if the sale price is significantly below the range of proceeds that a sale to a non-insider would have brought. This provision is inappropriate in a consumer transaction, requiring the consumer both to determine that the sale was to an insider and to realize when a sale price is significantly below the range of prices that a sale to a non-insider would have brought. Moreover, in commercial settings, there may be a limited market for certain specialized collateral, and a sale to an insider may be the best approach to maximize a sale price. That is not the case for motor vehicles and other typical collateral in a consumer transaction, so that there is no need to sell privately to an insider. Public sales to insiders are permitted, as are private sales to non-insiders.
4. New subsection (g), which applies only to consumer transactions, ensures that consumers receive the benefit of any owed rebate of the consumer's insurance, service contracts and the like that are cancelled when the collateral is no longer in the consumer's possession. Consumers may not know of their rights to such rebates or know how to seek them. Obtaining such rebates is part of the secured party's obligation to make commercially reasonable disposition of the collateral. If such rebates are not obtained, the insurer or service contract company will receive a windfall. This windfall will not only prejudice the consumer, but also the secured party who will instead have to seek a larger deficiency. The secured party must obtain such rebates only if it has the right to seek them.

Section 9-611. Notification Before Disposition of Collateral.
(a) ["**Notification date**."] In this section, "notification date" means the earlier of the date on which:
(1) a secured party sends to the debtor, consumer obligor, and any secondary obligor an authenticated notification of disposition; or
(2) if not a consumer transaction, the debtor and any secondary obligor waive the right to notification.
* * *
(c) [**Persons to be notified**.] To comply with subsection (b), the secured party shall send an authenticated notification of disposition to:
(1) the debtor and any consumer obligor;
* * *
Comments:
1. Article 9 adopts a convention contrary to normal usage, defining a "debtor" as the collateral's owner, who need not also be the party obligated on a debt. Instead it uses the term "obligor" to refer to the party obligated on the debt. While in commercial transactions it may make sense in certain situations to notify only the collateral's owner or the owner and a secondary obligor, and not the party who is primarily obligated on the debt, such a non-intuitive procedure is not appropriate for consumer transactions. For example, where a parent contracts to buy a car titled in a child's name, the parent is a consumer obligor but not a debtor. The parent, not just the child, should receive Article 9 protections.

Throughout these model consumer amendments, when notices and other rights are provided in consumer transactions, rights are given, if appropriate, both to consumer owners and to consumer obligors, if these parties are different.
2. The change in paragraph (a)(2) is required to be consistent with new Section 9-624.

Section 9-612. Timeliness of Notification Before Disposition of Collateral.
* * *
(c) [**25-day period in consumer transactions.**] In a consumer transaction, a notification of disposition must be sent at least 25 days before any disposition of the collateral.

Comment:
Consumers are less likely than commercial entities to understand their rights after receiving notice of disposition, and are not as able as commercial entities to act quickly on those rights. Consumers also need time to determine an amount necessary to reinstate the debt, obtain the necessary funds, and then exercise that right. Thus in consumer transactions it is important to give the debtor at least 25 days' notice before a sale.

Section 9-614. Contents and Form of Notification Before Disposition of Collateral: Consumer-Goods Transaction.
In a consumer-goods transaction, the following rules apply:
(1) A notification of disposition must provide the following information:
(A) the information specified in Section 9-613(1), except that for a private auction the notice shall state its time and place;
* * *
~~(C) a telephone number from which the amount that must be paid to the secured party to redeem the collateral under Section 9-623 is available; and~~
(C) a description of the right to reinstate the obligation pursuant to subsection (7), the 20-day deadline for doing so, and a telephone number from which the amount that must be paid to reinstate the obligation ~~redeem the collateral under Section 9-623~~ is available; ~~and~~
(D)The right at any time before disposition to redeem the collateral by paying its market value or the amount owed, whichever is less; and
(~~D~~E) a telephone number and a ~~or~~ mailing address from which additional information concerning the disposition and the obligation secured is available.
(2) A particular phrasing of the notification is not required.
(3) The following form of notification, when completed, provides sufficient information:
[Name and address of secured party]
[Date]

NOTICE OF OUR PLAN TO SELL PROPERTY

[Name and address of any obligor who is also a debtor]
Subject: [Identification of Transaction]
We have your [describe collateral], because you broke promises in our agreement. You have the right to recover [describe collateral] and reinstate your payment schedule in our agreement by paying, within 20 days of the date of this letter, the past due amount (not the total loan balance) and certain expenses related to the taking, storage and preparation for sale of the collateral. Call xxxxxx to determine the amount owed.
If you prefer, you may redeem the collateral by paying its market value or the total amount owed, whichever is less. This right continues up until the time the collateral is sold. Call xxxxx for more information.
[For a public disposition or private auction:]
Unless you reinstate your payment schedule or redeem the collateral within the time periods stated above, w~~W~~e will sell [describe collateral] at [public sale] or [private auction]. A sale could include a lease or license. The sale will be held as follows:
Date:
Time:
Place
[For a public sale] You may attend the sale and bring bidders if you want.
[For a private auction] Eligible bidders are limited. If you are not eligible to bid, you can arrange for eligible bidders to attend the sale.
[For a ~~private~~ disposition other than a public sale or private auction:] We will sell [describe collateral] at private sale sometime after [date]. A sale could include a lease or license.
The money that we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you [will or will not, as applicable] still owe us the difference. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.
~~You can get the property back at any time before we sell it by paying us the full amount you owe (not just the past due payments), including our expenses. To learn the exact amount you must pay, call us at [telephone number].~~
* * *
(7) If within 20 days of the notice of disposition, the secured party receives all past due amounts (not including accelerated payments) and its reasonable expenses of taking, holding, preparing for disposition, and processing the collateral, the secured party shall promptly:
(A) return the collateral to the debtor; and
(B) reinstate the terms of the obligation as set out prior to acceleration.
(8) The obligations set out in subsection (7) shall apply no more than twice in any calendar year.

Comments:
1. Paragraph (1)(A) provides consumers with the right to know when and where their property is sold at a private auction. Motor vehicles and other collateral are often sold at dealer-only auctions where the general public cannot attend. Such auctions are considered private sales under the UCC, and thus under existing Article 9 the debtor need not be informed as to the place or time of the auction or even if there will be an auction, but only that a private sale will be conducted after a certain date. This contrasts with the debtor's right to receive notice of the place and time of a public auction.

It is important for a consumer to know the exact date of a private auction because the consumer has the right to redeem collateral up until that date. Being told that the collateral will be sold at some time after an earlier date may discourage consumers from exercising their rights to redeem the collateral.

In addition, where a private auction does not allow the consumer entry, the consumer should at least have the opportunity to encourage bidding from someone who is able to attend the private auction. This option will be impossible if the consumer does not know the time and place of an auction or even if the property is to be sold at an auction.
2. Changes to subsections (1) and (3) are required so that the notice to consumers accurately reflects the additional rights that this

model law provides for consumers both prior to and at disposition.
3. New subsection (7) provides consumers with the right to recover the collateral and reinstate the credit agreement by paying all past due payments and the secured party's reasonable expenses of taking, holding, preparing for disposition, and processing the collateral. It is a harsh and one-sided right that allows the secured party to accelerate the obligation without notice, then seize the collateral without notice or court involvement, and then sell the collateral as it wishes without court involvement.

Many states already provide consumers in this situation with the right to reinstate the agreement, and this right is only fair to offset the secured party's rights. The reinstatement returns the parties to the status quo and may even help the creditor if the consumer returns to making regular payments, thus eliminating the need to sue for a deficiency.
4. Subsection (8) prevents abuse of the right to reinstate by making it available only twice in a given year.

Section 9-615. Application of Proceeds of Disposition; Liability for Deficiency and Right to Surplus.
(a) [**Application of proceeds**.] A secured party shall apply or pay over for application the cash proceeds for disposition under Section 9-610 <u>and any rebates obtained pursuant to Section 9-610(g),</u> in the following order to:
(1) the reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing, and, to the extent provided for by agreement, <u>allowed by subsection (h),</u> and not prohibited by law, reasonable attorney's fees and legal expenses incurred by the secured party;
* * *
<u>(h) [**Attorney's fees.**] In a consumer transaction, a secured party in seeking recovery of a deficiency or in calculating a surplus or an amount necessary to cure under Section 9-609(f), to reinstate under Section 9-614(7), or to redeem collateral under Section 9-620, shall not seek attorney's fees or other legal expenses, except for those fees or expenses required to litigate an action in court, and only if those fees are allowed by applicable law.</u>

Comments:
1. Changes to subsection (a) are necessary to make the provision consistent with changes made to Sections 9-610(g) and 9-615(h).
2. Subsection (h) provides that in consumer transactions a secured party cannot seek attorney's fees except for those fees related to an actual court case. There is no reason in a consumer repossession for attorney involvement, much less for the secured party to claim a certain amount in attorney's fees. Such a right instead is subject to significant abuse. Nevertheless, nothing in this provision prevents a secured party from seeking attorney's fees related to a replevin court action or a deficiency court action, as long as applicable law allows for such fees. If applicable law does not allow for such fees in a court proceeding, this provision does not authorize them.

Section 9-616. Explanation of Calculation of Surplus or Deficiency.
* * *
(b) [**Explanation of calculation**.] In a consumer-goods transaction <u>in which a disposition of collateral has occurred,</u> ~~in which the debtor is entitled to a surplus or a consumer obligor is liable for a deficiency under Section 9-615~~, the secured party shall send an explanation to the debtor <u>and to any</u> ~~or~~ consumer obligor after the disposition <u>on or before the earlier of</u> ~~and~~:
(A) <u>the date on which</u> ~~before or when~~ the secured party accounts to the debtor and pays any surplus or first makes written demand on the consumer obligor after the disposition for payment of the deficiency; ~~and~~
(B) ~~within~~ 14 days after receipt of a request <u>for an explanation; or</u>
(C) <u>30 days after the disposition</u>. ~~or~~
~~(2) in the case of a consumer obligor who is liable for a deficiency, within 14 days after receipt of a request, send to the consumer obligor a record waiving the secured party's right to a deficiency.~~
(c) [**Required information.**] To comply with subsection (a)(1)(B), a writing must provide the following information in the following order:
1) the aggregate amount of obligations secured by the security interest under which the disposition was made~~, and, if the amount reflects a rebate of unearned interest or credit service charge, an indication of that fact, calculated as of a specified date~~:
* * *
(2) the amount of proceeds of the disposition, <u>any rebates of interest or credit service charges, and any rebates obtained pursuant to Section 9-610(g), with the amount of the rebate and the date on which it was calculated itemized separately for each rebate</u>;
* * *
(4) <u>itemization of the amount for each</u> ~~the amount, in the aggregate or by type, and~~ type~~s~~ of expense~~s~~, including expenses of retaking, holding, preparing for disposition, processing, and disposing of the collateral, and, attorney's fees secured by the collateral which are known to the secured party and relate to the current disposition <u>to the extent permitted by Section 9-615(h);</u>
(5) <u>Itemization of</u> <u>each</u> ~~in the aggregate or by type, and~~ type of credit~~s~~, including rebates of interest or credit service charges, <u>insurance, service contracts, extended warranties, or other agreements related to the collateral,</u> to which the obligor ~~is known to~~ <u>may</u> be entitled and which are not reflected in the amount in paragraph (<u>2</u>); and
(6) the amount of the surplus or deficiency<u>, and whether the secured party will seek to recover the deficiency</u>.
* * *

Comments:
1. After consumers' property is seized and sold, consumers need to know their rights and obligations. The consumer can request information from the secured party, but Article 9 does not provide any mechanism for notifying consumers of this right. This amendment revises subsection (b) so that the secured party has an affirmative obligation to inform the consumer shortly after disposition whether a deficiency will be sought or not.

Many consumers are surprised that they might owe a deficiency even after their property is sold, and thus are unprepared to defend a deficiency action when such an action is brought many months or even years after their property is seized. By then any records or recollections as to the transaction may be lost. Consumers are better able to defend a deficiency action if they are informed of this liability shortly after disposition.

Other consumers may assume a deficiency will be sought when in fact it may not. It is important to be informed if that threat will not be forthcoming. A consumer who is informed a deficiency is not to be sought might also question whether a surplus is owed.

2. Subsection (b)(1) is revised so that both consumer obligors and consumer debtors are entitled to the notice. See Comment 1 to Section 9-611 concerning the need to extend rights to consumer obligors and not just to debtors.

3. Existing Article 9 provides for a notice to the consumer about the calculation of the deficiency or surplus, but it is a summary notice, without details that consumers need—details that are readily available to the secured party. The section has been amended to provide more precise information to the consumer.

4. The existing section does not provide the consumer information as to what rebates the secured party has and has not obtained on behalf of the consumer (thus applying them to any deficiency) as to insurance, service contracts, or extended warranties, or the amounts of those rebates. Consumers need to know what rebates have not been sought so they can seek them themselves. The consumer also needs to be able to check whether the rebates obtained were in the proper amount and have been properly credited to the consumer.

5. The existing section does not provide consumers with a breakdown of the individual expenses being assessed. As a result, consumers cannot determine their reasonableness. Subsection (c)(4) has been revised to comply with standard business practice of providing consumers with an itemization of any charges assessed to them, particularly charges where the amount has not been determined in advance.

6. The right to seek attorney's fees is limited in subsection (c)(4) to be consistent with new Section 9-615(h).

Section 9-620. Acceptance of Collateral in Full or Partial Satisfaction of Obligation; Compulsory Disposition of Collateral.

* * *

(h) [**Secured Party's Treatment of Collateral.**] In a consumer transaction, a secured party's treatment of the collateral as its own shall, at the debtor's option, be treated as acceptance of the collateral in full satisfaction of the obligation.

Comment:

Article 9 requires the secured party to dispose of the collateral to determine its market value. Section 9-620 currently gives the secured party a limited right to accept the collateral in satisfaction of the debt. Where the secured party does not go through the procedures specified by Section 9-620, there have been cases where the secured party still claims a deficiency, even though it has used the collateral before disposing it or has not disposed of the collateral to determine its value. New subsection (h) provides consumer rights where the secured party, instead of disposing of collateral, retains it and treats it as its own without going through the procedures set forth in Section 9-620. The amendment gives the consumer the option to treat the secured party as having accepted the collateral in full satisfaction of the debt.

Section 9-623. Right to Redeem Collateral.

(a) [**Persons that may redeem**.] A debtor, a consumer obligor on behalf of the debtor, any secondary obligor, or any other secured party or lienholder may redeem collateral.

(b) [**Requirements for redemption**.] To redeem collateral, a person shall tender the lesser of

(1) fulfillment of all obligations secured by the collateral, plus~~(2)~~ the reasonable expenses ~~and attorney's fees~~ described in Section 9-615(a)(1) and attorney's fees to the extent permitted by Section 9-615(h);

(2) in a consumer transaction, the collateral's fair market value, less reasonable expenses to sell the collateral.

* * *

(d) [**Debtor's interest in collateral.**] Until expiration of the periods set out in Section 9-623(c), the debtor has an interest in the collateral.

(e) [**Appraisal.**] The amounts specified in subsection (b)(2) shall be determined by an independent professional appraiser selected and paid for by the party redeeming the collateral, and agreed to by the secured party. The secured party shall not unreasonably reject the appraiser selected by the person redeeming the collateral or prevent the appraiser from inspecting the collateral.

(f) [**Deficiency remaining after redemption.**] Redemption shall terminate the secured party's security interest in the collateral. Redemption under subsection (b)(2) shall not affect the obligors' liability under Section 9-615(c) for any deficiency remaining after payment of the redemption amount.

Comments:

1. The addition of consumer obligor in subsection (a) is explained at Comment 1 to Section 9-611.

2. The limitation on attorney's fees in subsection (b)(1) makes the section consistent with Section 9-615(h).

3. The current right of redemption in subsection (b) provides a windfall for secured parties and places unreasonable pressures on a consumer debtor. On repossession, all the secured party can expect from possession and disposition of the collateral is the collateral's value less sales expenses. The secured party also retains the right to seek a deficiency.

The current right of redemption, on the other hand, gives the secured party a windfall at the expense of the consumer. Instead of the value of the collateral less sales expenses, the secured party immediately receives in exchange for the collateral the total outstanding obligation and all expenses to repossess, store, process and condition the collateral, even if this is far more than the collateral's value.

For many consumers, though, this bad deal may be a necessity. Consumer collateral may have special significance to the consumer over its monetary value. Inefficiencies in the marketplace, particularly for low-income consumers or consumers with blemished credit records, may make finding a replacement far more costly than the collateral's value. Existing subsection (b) thus authorizes secured parties to hold consumers' collateral hostage unless the consumer pays the secured party in many cases far more than the collateral is worth to the secured party.

4. Amended subsection (b) allows consumers to recover their property by paying the secured party in full for everything that the repossessed property is worth to the secured party. Subsection (f) allows the secured party to seek a deficiency for the amount owed less the redemption amount.

Thus the secured party is in no worse a position than if the consumer did not redeem and instead the secured party disposed of the collateral and sought a deficiency. The secured party would recover from the sale the collateral's value less sale expenses, and this is exactly what the amended subsection (b) requires the consumer to pay the secured party to redeem the collateral. Indeed, the secured party may be better off because the consumer will not be able to defend a deficiency action by claiming that the disposition was not commercially reasonable, since there is no disposition.

5. Subsection (e) provides that the collateral's market value is determined by an appraisal at the consumer's expense, by an appraiser approved by the secured party. This provision is patterned on a similar provision in the federal Consumer Leasing Act regulations. See 12 C.F.R. § 1013.4(*l*).

6. The appraisal determines not only the market value, but also reasonable selling expenses. The collateral's sale price may be related to the size of the selling expenses—selling a vehicle on the lot may bring a higher price than a dealer-only auction, but selling expenses may be higher. In addition, the market value less the sales expenses is the amount required to redeem, so the appraisal will include an estimate of selling expenses.

Section 9-624. Waiver.

(a) [**Waiver of disposition notification**.] A debtor or secondary obligor may waive the right to notification of disposition of collateral under Section 9-611, but not in a consumer transaction, and only by an agreement to that effect entered into and authenticated after default.

* * *

Comment:

Notice before disposition is critical for consumers, providing the right to reinstate the loan and recover the collateral, the right to redeem the collateral, and the right to purchase the collateral at the repossession sale. Typical consumers will have no knowledge of these rights and notice of these rights should not be waivable, even after default. Otherwise important consumer protections will be meaningless. Even after default, the waiver might be included in small print buried in another document the consumer signs, and the rights here are too fundamental to be lost in this manner.

Section 9-625. Remedies for Secured Party's Failure to Comply with Article.

* * *

(b) [**Damages for noncompliance**.] Subject to subsections (c), (d), and (f), a person is liable for damages in the amount of any loss caused by a failure to comply with this article. Loss caused by a failure to comply may include loss resulting from the debtor's or a consumer obligor's inability to obtain, or increased costs of, alternative financing.

(c) [**Persons entitled to recover damages: statutory damages if collateral is consumer goods**.] Except as otherwise provided in Section 9-628:

* * *

(2) if the collateral is consumer goods, a person that was a debtor or an ~~secondary~~ obligor at the time a secured party failed to comply with this part may recover for that failure in any event an amount not less than the credit service charge plus 10 percent of the principal amount of the obligation or the time-price differential plus 10 percent of the cash price. There can be only one recovery under this paragraph for each instance in which the secured party seeks to enforce its interest.

* * *

(e) [**Recovery in consumer transactions when deficiency eliminated or reduced.**] In a consumer transaction in which the deficiency is eliminated or reduced under Sections 9-620(h) or 9-626(b) or otherwise, a debtor or obligor may recover damages for the loss of any surplus and may also recover under subsection (b) or (c) for noncompliance with the provisions of this part relating to collection, enforcement, disposition, or acceptance.

(~~e~~f) [**Statutory damages: noncompliance with specified provisions**.] In addition to any damages recoverable under subsection (b), the debtor, consumer obligor, or person named as a debtor in a filed record, as applicable, may recover $500 in each case from a person that:

* * *

(4) fails to cause the secured party of record to file or send a termination statement as required by Section 9-513(a) or (c); or

(5) fails to comply with Section 9-616(b)~~(1) and whose failure is part of a pattern, or consistent with a practice, of noncompliance; or (6) fails to comply with Section 9-616(b)(2)~~.

* * *

Comments:

1. See Comment 1 to Section 9-611 for a discussion of the change made in subsection (b) and a similar change made to subsection (c). Because both the owner and the obligor have a remedy in a consumer transaction, subsection (c)(2) is changed to clarify that there can be only one recovery of statutory damages between the owner and obligor.

2. Article 9 allows secured parties extraordinary powers—to seize and sell the consumer's property without court or other governmental supervision, only limited by Article 9's requirements. But typically a consumer will not know whether the secured party in fact complies with Article 9's standards. There must be a deterrent to prevent widespread abuse in the seizure and sale of consumer collateral. Because Article 9 does not provide for such a deterrent through government agency enforcement, it must provide for it by its own terms. Subsection (e) is thus amended to be consistent with a number of court rulings. If the secured party cannot prove the

reasonableness of its claimed deficiency, this should not prevent the secured party from being liable under Article 9 for its Article 9 violations.
3. Section 9-616 provides an important notice to a consumer as to the status of the obligation after the repossession sale (see Comment 1 to Section 9-616) and new section 9-616(b) requires that the notice be sent to the consumer. Violation of this requirement merits a remedy for the individual consumer who is deprived of this important notice, and there is no reason for that consumer to have to prove that the failure to send the notice is part of a pattern or practice of non-compliance.

Section 9-626. Action in Which Deficiency or Surplus Is in Issue.
* * *

(b) [~~Non-~~**Consumer transactions;** ~~no inference~~.] ~~The limitation of the rules in subsection (a) to transactions other than consumer transactions is intended to leave to the court the determination of the proper rules in consumer transactions. The court may not infer from that limitation the nature of the proper rule in consumer transactions and may continue to apply established approaches.~~ In an action arising from a consumer transaction in which the amount of a deficiency or surplus is in issue, the following rules apply:
(1) a secured party has the burden of proving compliance with the provisions of this part relating to collection, enforcement, disposition, or acceptance whether or not the debtor or an obligor places the secured party's compliance in issue.
(2) a secured party is not entitled to a deficiency if it fails to prove that the collection, enforcement, disposition, or acceptance was conducted in accordance with the provisions of this part.

Comments:
1. Existing Section 9-626 specifies the rules for actions for a deficiency or surplus in commercial transactions, but not for consumer transactions. Instead, existing subsection (b) leaves that to the courts. Article 9 sets out specific rules and burdens governing secured transactions. But Section 9-626 fails to specify consumer rights when at issue is one of the most important aspects of a consumer repossession—the consequences of a repossession or sale that violates Article 9.

Unlike commercial entities that have clear rules, this section leaves consumers uncertain as to their rights. To promote clarity and uniformity, these amendments provide specific rules in actions involving a deficiency or a surplus in a consumer transaction—rules that have been adopted by many courts for many years.
2. For commercial transactions the debtor must first place in issue the commercial reasonableness of a sale before the secured party has the burden to establish its compliance with Article 9. While this rule may make sense between two commercial entities, it is inappropriate for consumer transactions, particularly where the consumer, after having lost the collateral, is defending a deficiency action unrepresented.

The secured party has sold the collateral without court or other governmental supervision, often at a sale from which the consumer and other consumers are barred. The consumer is unlikely to be knowledgeable about the secured party's sale procedures and whether they are commercially reasonable. If the secured party wishes to establish the value of the collateral through a sale procedure over which it has complete control, it should bear the burden in consumer transactions to show that the procedures it chose are reasonable. It is not burdensome for a secured party to detail the procedures it used.
3. New subsection (b)(2) adopts the absolute bar rule that is utilized today in many jurisdictions for consumer transactions. Article 9 provides secured parties with extraordinary rights. They can accelerate a note without notice, and then without notice can seize the consumer's property without supervision by a court or any government agency. They can then sell the property without any court or other government agency supervision, and can do so in almost any manner they choose. The secured party then can recover the total amount of the obligation less whatever price results from the sale.

There are enough instances of abuse to merit a strict standard for a secured party if it does not follow the minimal standards placed upon it. For example, the secured party should not be able to obtain a deficiency after seizing and selling the consumer's collateral in a commercially unreasonable manner. The sale price cannot be presumed to be reasonable in the absence of proof that the sale was conducted in a commercially reasonable manner, so the amount sought in a deficiency cannot be shown to be reasonable.

Effective Date
This Act takes effect 90 days after enactment and applies to any aspect of enforcement of a security interest occurring after the effective date, even if the security interest was created before the Act takes effect. This Act does not affect an action, case, or proceeding commenced before this Act takes effect.

Comment:
These amendments take effect 90 days after enactment. Even if a credit agreement was consummated before enactment, the amendments apply to actions to enforce a security interest or recover a deficiency after the amendments' effective date. For example, if notice of a planned disposition took place before the effective date, the secured party's pre-disposition notice need not comply with these amendments. In the same transaction, if the required post-disposition notice is sent after the effective date, that notice must comply with the amendments. The amendments do not apply to any court proceedings brought before the effective date.

** The principal authors of these model consumer amendments are NCLC staff attorneys Jonathan Sheldon, Carolyn Carter, and John Van Alst. They are also the principal authors of Repossessions (8th ed. 2013), updated at www.nclc.org/library.*

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1 *See* J. Van Alst and R. Jurgens, National Consumer Law Center, Repo Madness: How Automobile Repossessions Endanger Owners, Agents and the Public (2010), at https://www.nclc.org/images/pdf/special_projects/auto/report-repo-madness.pdf.

2 Model amendment to U.C.C. § 9-609(f), (g).

3 *See* National Consumer Law Center, Repossessions § 4.5, Appx. B (8th ed. 2013), *updated at* www.nclc.org/library.

4 Model amendment to U.C.C. § 9-614(7).

5 *See* National Consumer Law Center, Repossessions § 9.2 (8th ed. 2013), *updated at* www.nclc.org/library.

6 Model amendment to U.C.C. § 9-609(d).

7 *See* National Consumer Law Center, Repossessions § 6.4.4 (8th ed. 2013), *updated at* www.nclc.org/library.

8 Model amendment to U.C.C. § 9-609(e).

9 *See* Gail Hillebrand, *The Uniform Commercial Code Drafting Process: Will Articles 2, 2B and 9 Be Fair to Consumers?*, 75 Wash. U. L. Q. 69, 133—144 (1997).

10 *Id.* at 139—140.

11 U.C.C. § 9-615(f).

12 Model amendment to U.C.C. § 9-102(a)(63).

13 Model amendment to U.C.C. § 9-610(b).

14 *See* National Consumer Law Center, Repossessions § 10.9.3 (8th ed. 2013), *updated at* www.nclc.org/library.

15 *Id*. at § 10.6.2.

16 Model amendment to U.C.C. § 9-614.

17 Model amendment to U.C.C. § 9-616.

18 Model amendment to U.C.C. § 9-610(g).

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.

FEDERAL CIRCUIT COURTS

Arbitration clause requiring arbitration at Cheyenne River Sioux is unenforceable. The Eleventh Circuit held that an arbitration agreement's forum selection clause mandating the use of an illusory and unavailable arbitral forum rendered the clause unenforceable. Because neither party disputed that the Cheyenne River Sioux Tribe (CRST) forum was unavailable, the court agreed with the district court that it cannot enforce the delegation clause or the underlying arbitration agreement. *Parm v. National Bank of CA*, 835 F.3d 1331 (11th Cir. 2016). http://law.justia.com/cases/federal/appellate-courts/ca11/15-12509/15-12509-2016-08-29.html

Arbitration designating NAF as forum unenforceable. Plaintiff signed an arbitration agreement providing that any disputes between her and her payday lender would be resolved by arbitration before the National Arbitration Forum (NAF). When plaintiff tried to take her case to arbitration, however, NAF refused to accept it pursuant to a consent decree that prohibited NAF from accepting consumer arbitrations. The Second Circuit agreed with the district court that the arbitration agreement contemplated arbitration only before NAF and thus affirmed the district court's decision declining to compel arbitration before a different arbitrator. *Moss v. First Premier Bank,* 835 F.3d 260 (2nd Cir. 2016). http://www.stuevesiegel.com/assets/Documents/Current%20case%20links/SecondCircuitOpinionMossvPremier2016.pdf

Traditional arbitration waiver analysis does not apply where there is a substantial change in the law. The Third Circuit held that that the traditional waiver analysis is not applicable where it would have been futile to try to exercise the right to compel individual arbitration that was unenforceable under then-existing law. After confirming that it would have been futile under then-existing law for the Defendants to have sought to compel individual arbitration prior to the *Concepcion* decision, the court found that the Defendants could not be penalized for failing to pursue a right that did not exist under New Jersey law. Because they had sought individual arbitration shortly after *Concepcion* had been decided and no prejudice had resulted there from, the Defendants had not waived their right to compel individual arbitration. *Chassen v. Fidelity Nat'l Fin., Inc.,* 836 F.3d 291 (3rd Cir. 2016). http://www2.ca3.uscourts.gov/opinarch/153789p.pdf

Automobile dealer is a creditor under Equal Credit Opportunity Act. The Sixth Circuit recently held that an automobile dealer is a "creditor" under the federal Equal Credit Opportunity Act, and was not excepted from the requirement to provide adverse action notices, as the dealer did not "merely arrange for credit by referring applicants to lenders." The court pointed out that under Regulation B, "those who merely arrange for credit by referring applicants to lenders are considered 'creditors' solely for the purposes of the ECOA's prohibitions on discrimination and discouragement. … Under Regulation B, in other words, 'creditors' who act as mere middle-men between applicants and lenders have no affirmative obligation to provide applicants with notice stating the reasons for any adverse action." The Sixth Circuit, however, agreed with the district court that the dealer was a "creditor" subject to the ECOA's notice requirement because it was a "person who regularly arranges for the extension, renewal or continuation of credit" and fell within the statutory definition. *Tyson v. Sterling Rental,* 836 F.3d 571 (6th Cir. 2016). http://caselaw.findlaw.com/us-6th-circuit/1747483.html

Unlawful charge for interest upon interest violates Fair Debt Collection Practices Act. The Eighth Circuit held that there exists no de minimis exception to FDCPA liability based upon low dollar amounts. The court found that debt collectors' false representations about the availability of remedies or amounts owed under state law, like representations of fact, are to be viewed through the unsophisticated-consumer standard and may be actionable pursuant to the FDCPA. *Haney v. Portfolio Recovery Assoc.,* 837 F.3d 918 (8th Cir. 2016). http://law.justia.com/cases/federal/appellate-courts/ca8/15-1932/15-1932-2016-09-21.html

Uber arbitration agreement is valid and enforceable. The Ninth Circuit reversed the district court and ordered Uber drivers to individually arbitrate the claims in arbitration. The court found that the agreements were not unconscionable, particularly given that drivers were provided with the option to opt out of the arbitration provision. *Mohamed v. Uber Tech., Inc.,* 836 F.3d 1102 (9th Cir. 2016). https://cdn.ca9.uscourts.gov/datastore/opinions/2016/09/07/15-16178.pdf

Claims under the Fair Credit Reporting Act barred by statute of limitations discovery rule. The 6th Circuit held that the statute of limitations under the FCRA commences when the claimant discovers the facts of the claim, not that the facts constitute a legal violation. The plaintiff filed suit against the employer and the reporting agency for violations of the FCRA. The FCRA's statute of limitations require claims be commenced the earlier of two years after the date of discovery or five years after the date of the violation. Consequently, the limitations period commenced when the plaintiff discovered that the employer had obtained his credit report without his consent. *Rocheleau v. Elder Living Construction,* 814 F.3d 398 (6th Cir. 2016). https://scholar.google.com/scholar_case?case=7122940732568780766&q=Rocheleau+v.+Elder+Living+Constr.,+814+F.3d+398&hl=en&as_sdt=4006&as_vis=1

Law firm and substitute trustees were "debt collectors" subject to the FDCPA's regulation. The Fourth Circuit noted that although the defendants were engaged ion foreclosure proceedings, "nothing in [the] language [of the FDCPA] requires that a debt collector's misrepresentation [or other violative actions] be made as part of an express demand for payment or even as part of an action designed to induce the debtor to pay." The court stated, "It is clear from the complaint in this case that the whole reason that the White Firm and its members were retained by Wells Fargo was to attempt, through the process of foreclosure, to collect on the $66,500 loan in default. *McCray v. Federal Home Loan Mortg. Corp.*, 839 F.3d 354 (4th Cir. 2016). http://caselaw.findlaw.com/us-4th-circuit/1750605.html

Court refuses to certify a class action based on alleged late filing of mortgage satisfaction. Citing Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016), the Eleventh Circuit held that, because the lead plaintiff did not allege the violations actually caused him any harm or could do so, he lacked standing to sue and the Court thus lacked subject matter jurisdiction. *Nicklaw v. CitiMortgage, Inc.*, 839 F.3d 993 (11th Cir. 2016). http://media.ca11.uscourts.gov/opinions/pub/files/201514216.ord.pdf

Credit reporting agency has no obligation to hire expert to verify signature.
TransUnion prepared a credit report which revealed, based on information obtained from Toyota, that Brill was in arrears on an extension of a vehicle lease. Brill claimed that his signature was forged by a former girlfriend. He demanded that TransUnion "conduct a reasonable reinvestigation" under the Fair Credit Reporting Act, 15 U.S.C. 1681i(a)(1)(A). At TransUnion's request, Toyota confirmed that the name on the extension was Brill; it did not try, and was not asked to try, to determine whether the signature was a forgery. The Seventh Circuit affirmed dismissal of Brill's suit against Transunion. TransUnion had no duty to verify the accuracy of Brill's signature. The court stated:

> Forcing a credit reporting agency to hire a handwriting expert in every case of alleged forgery would impose an expense disproportionate to the likelihood of an accurate resolution of the dispute over whether it was indeed forgery. And so the Fair Credit Reporting Act's provisions for identity theft, 15 U.S.C. §§ 1681c-1, c-2, sensibly ask persons who believe they are or may be victims of credit fraud to report to the police before turning to the credit reporting agency. As far as we know, Brill didn't do that.

Brill v. TransUnion LLC, 838 F.3d 919 (7th Cir. 2016). http://law.justia.com/cases/federal/appellate-courts/ca7/16-1091/16-1091-2016-10-04.html

Attempting to collect time-barred debt can violate fair Dent Collection Practices Act, even if it does not threaten litigation. The Fifth Circuit considered whether a collection letter for a time-barred debt which contained a discounted "settlement offer" but which was silent as to the unenforceability of the debt and did not threaten litigation could mislead an unsophisticated consumer to believe that the debt could be enforceable in court and thus violate the FDCPA. The court reversed the district court and ruled that, regardless of whether litigation is threatened, a collection letter violates the FDCPA if its statements could mislead an unsophisticated consumer to believe that the time-barred debt is legally enforceable. *Daugherty v. Convergent Outsourcing, Inc.,* 836 F.3d 507 (5th Cir. 2016). http://www.ca5.uscourts.gov/opinions%5Cpub%5C15/15-20392.0.pdf

Continuing work constitutes acceptance of arbitration agreement. The Sixth Circuit, in an unpublished decision, held that under Kentucky law, merely continuing to work for an employer constitutes assent to an arbitration agreement when that agreement is a condition of employment—even if the employee has not signed an acknowledgement form. *Aldrich v. University of Phoenix, Inc.,* No. 16-5276, 2016 U.S. App. LEXIS 19296 (6th Cir. Oct. 24, 2016). http://www.lexislegalnews.com/articles/12216/6th-circuit-no-signature-necessary-to-enforce-arbitration-agreement-under-kentucky-law

Enforcing a security interest in not debt collection under Fair Debt Collection Practices Act (FDCPA). Borrower sued ReconTrust and Countrywide, claiming they violated federal law in pursuing foreclosure after she defaulted on her loan. In particular, the borrower alleged that ReconTrust violated the FDCPA by sending her default notices stating the amounts owed. The district court dismissed that claim, finding the trustee was not a debt collector engaged in debt collection under the FDCPA The Ninth Circuit affirmed, holding that merely enforcing a security interest is not "debt collection" under the FDCPA. In so holding, the court disagreed with earlier decisions by the Fourth and Sixth Circuits, creating a split between the circuits. *Ho v. ReconTrust Co., NA.,* No. 56884, 2016 U.S. App. LEXIS 18836 (9th Cir. Oct. 19, 2016). https://cdn.ca9.uscourts.gov/datastore/opinions/2016/10/19/10-56884.pdf

HOA fine is debt for purposes of Fair Debt Collection Practices Act. Plaintiffs filed suit against defendants, alleging that the five letters sent to them between May 16 and December 13, 2013 violated the Fair Debt Collection Practices Act (FDCPA). The district court granted summary judgment to defendants. The Eleventh Circuit reversed. The court concluded that the district court erred in concluding that the HOA fine at issue is not a debt for FCCPA purposes and granting summary judgment on that basis. *Agrelo v. Meloni Law Firm,* 841 F.3d 944 (11th Cir. 2016). http://law.justia.com/cases/federal/appellate-courts/ca11/15-14136/15-14136-2016-11-09.html

Federal Arbitration Act deadline for filing to vacate an award may be tolled. Move started a FINRA arbitration against Citigroup. Move expressed its strong desire to have an experienced attorney as chair, given the complexity of the claims. It gave top ranking to "James H. Frank," who certified to FINRA that he had a law degree and was licensed in three states. Mr. Frank then served as the chair of the three-person panel, signing a unanimous award denying Move's claims in December of 2009. In fact, the person who served as chair had lied about his qualifications and was not even a licensed attorney. Move did not discover this fact until 2014. Move then filed a motion to vacate the arbitration award. The district court denied the motion, noting that the Federal Arbitration Act requires that the losing party move to vacate an arbitration award within three months. The Ninth Circuit reversed, finding "that the FAA is subject to equitable tolling." *Move, Inc. v. Citigroup Global Markets, Inc.,* 840 F.3d 1152 (9th Cir. 2016). http://law.justia.com/cases/federal/appellate-courts/ca9/14-56650/14-56650-2016-11-04.html

Bank's Failure to Stop Theft of Deposit Funds Could Constitute "Aiding and Abetting."

The Eleventh Circuit held that a noncustomer pleaded sufficient facts to bring state law negligence and fraud causes of action against a bank when a bank customer engaged in the fraud. The Court held that "[b]ecause banks do have a duty to safeguard trust funds deposited with them when confronted with clear evidence indicating that those funds are being mishandled, a bank's inaction — that is, its failure to stop the theft of such trust funds — can constitute substantial assistance" sufficient to state a claim for "aiding and abetting fraud" against a bank. *Chang v. JPMorgan Chase Bank, N. A.*, 814 F.3d 914 (11th Cir. 2016). http://media.ca11.uscourts.gov/opinions/pub/files/201513636.pdf

FEDERAL DISTRICT COURTS

Court awards $84,000 to collector's attorney in a Fair Debt Collections Practices Suit. In an FDCPA suit, consumer's attorney failed to communicate settlement offer to client because the offer did not include payment of his fees in the related state law collection action. The court awarded sanctions in the amount of $84,000. The court noted, "The responsibility to convey the existence and terms of settlement offers to clients is one of an attorney's most important duties." *Blowers v. Lerner,* No. 1:15-cv-889-GBL-MSN, 2016 U.S. Dist. LEXIS 118773 (E.D. Va. Aug. 31, 2016). http://www.bloomberglaw.com/public/document/Blowers_v_Lerner_No_115cv889GBLMSN_2016_BL_286739_ED_Va_Aug_31_20

Ban on nursing home use of pre-dispute arbitration agreements blocked. A federal court enjoined the federal Centers for Medicare and Medicaid Services ("CMS") from enforcing a rule, promulgated on September 28, 2016, which barred pre-dispute arbitration agreements between nursing facilities in the Medicare or Medicaid programs and their nursing home residents. The rule was to take effect on November 28. The court concluded that in promulgating the Rule, CMS had failed to prove that a ban on pre-dispute arbitration agreements was necessary to protect nursing home residents and within its existing statutory authority. This ruling means that nursing homes would not be in regulatory jeopardy while the preliminary injunction is in place if they do not act by November 28. However, as the court's decision is preliminary only, the Rule may be reinstated in future legal proceedings in the case. *Am. Health Care Ass'n v. Burwell*, No. 3:16-CV-00233, 2016 U.S. Dist. LEXIS 154110 (N.D. Miss. Nov. 7, 2016). https://consumermediallc.files.wordpress.com/2016/11/nursingarbinj.pdf

STATE COURTS

Initiating a lawsuit five years before requesting arbitration does not constitute a waiver. In 2010, Citibank filed a debt collection action against Perry. In 2015, Perry filed an answer to Citibank's complaint and a class counterclaim alleging that Citibank had violated the West Virginia Consumer Credit and Protection Act. Citibank then filed a motion asking the court to compel arbitration of the parties' claims. The circuit court concluded that Citibank had implicitly waived its right to arbitration by filing suit in circuit court and waiting nearly five years before seeking to invoke its contractual right to arbitrate. Citibank appealed. The West Virginia Supreme Court reversed, holding that Citibank did not waive its right to compel arbitration in this matter. *Citibank, N.A. v. Perry,* No. 15-1121, 2016 W. Va. LEXIS 821 (Nov. 10, 2016). https://casetext.com/case/citibank-na-v-perry

State of Georgia has authority to regulate out of state payday lenders. Defendants operate outside the State of Georgia and their dealings with Georgia borrowers occurred telephonically or over the Internet. When a loan is funded, the funds are transferred to the borrower via electronic transfer to the borrower's bank account. The State sought civil penalties and injunctive and other equitable relief thru its payday lender statute. The Georgia Supreme Court affirmed the trial courts refusal to dismiss. *Western Sky Fin., LLC v. Georgia,* 2016 WL 6407256 (Ga. Oct. 31, 2016). http://cases.justia.com/georgia/supreme-court/2016-s16a1011.pdf?ts=1477915285

Common-law defense cannot be raised to defeat a claim under the Texas DTPA or the Insurance Code. In a case that involved a claim by an insured based on a policy he did not read, a Texas appellate court recognized that common law defenses cannot be raised to defeat a claim based on a misrepresentation under the Texas Deceptive Trade Practices Act or Insurance Code. The court noted that "Appellant's uncontested affidavit avers that he did not read the policy before accepting it because he relied upon Geisler's assurances the policy provided coverage from "loading to unloading," as well as all of the scenarios appellant posited. *Wyly v. Integrity Ins. Sols.,* No. 14-15-00042-CV, 2016 Tex. App. LEXIS 11264 (App.—Houston [14th Dist.] Oct. 18, 2016). http://cases.justia.com/texas/fourteenth-court-of-appeals/2016-14-15-00042-cv.pdf?ts=1476807046

DECEPTIVE TRADE PRACTICES AND WARRANTY

COMMON-LAW DEFENSE CANNOT BE RAISED TO DEFEAT A CLAIM UNDER THE DTPA OR THE INSURANCE CODE

Wyly v. Integrity Ins. Solutions, ____ S.W.3d ____ (Tex. App. –Houston [14th Dist.] 2016).
http://cases.justia.com/texas/fourteenth-court-of-appeals/2016-14-15-00042-cv.pdf?ts=1476807046

FACTS: Appellant, Benson Scott Wyly, contacted Garner Geisler, an agent for Appellee, Integrity Insurance, to obtain insurance on an aircraft Wyly was transporting. Wyly detailed the extent of the coverage he was seeking by expressing to Geisler the need for a comprehensive policy to protect from all foreseeable loss to the aircraft from loading through unloading. Geisler then contacted a third party, US Risk, who obtained a policy from Essex insurance. Geisler relayed to Wyly that he had secured a policy with the requested full coverage. Wyly relied on Geisler's description of coverage and arranged for the plane to be shipped. Upon arrival it was discovered that the fuselage of the plane had been damaged during transit by a tie strap that secured the plane to the trailer. Wyly filed a claim under the policy. Essex denied coverage on the basis that the policy contained an express exclusion for "the improper packing, preparation for shipment or loading by you or the shipper." This led Wyly to discover that the policy was not as comprehensive as Geisler had expressed to him. Wyly then filed suit against Integrity alleging deceptive trade practices under the DTPA and violations of the Texas Insurance Code.

The trial court granted Integrity's motion for summary judgment, based partially on Integrity's assertion that Wyly had a duty to read the policy and failed to satisfy that duty by relying solely on Geisler's description. Wyly appealed.

HOLDING: Reversed and Remanded.

REASONING: Wyly argued that "failure to read" was a common-law defense that could not be raised to defeat a claim under the DTPA or the Insurance Code. The court agreed and relied on multiple precedents to reach its decision. The first case the court looks to is *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980), wherein the Texas Supreme Court stated that "A primary purpose of the enactment of the DTPA was to provide consumers a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in a common law fraud or breach of warranty suit." The court also cited *Frank B. Hall & Co. v. Beach, Inc.*, 733 S.W.2d 251 (Tex. App. –Corpus Christi 1987) wherein the court held that the inability to raise a common law defense under the DTPA was equally applicable to Insurance Code claims and "any contributory negligence attributable to the insured could not defeat recovery on its Insurance Code claims."

"A primary purpose of the enactment of the DTPA was to provide consumers a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in a common law fraud or breach of warranty suit."

Integrity denied raising a common law defense and contended that the rule that an insured is charged with knowledge of the contents of his policy (the "deemed to know" rule) is not an affirmative defense. The court, however, rejected this argument stating that it saw no distinction between "failure to read" and "deemed to know" and would, therefore, apply the rule despite Integrity's attempt to characterize its defense as one not arising under common law.

DEBT COLLECTION

LAW FIRM AND SUBSTITUTE TRUSTEES WERE "DEBT COLLECTORS" SUBJECT TO THE FDCPA'S REGULATIONS

McCray v. Federal Home Loan Mortgage Corp., ____ F.3d ____ (4th Cir. 2016).
http://caselaw.findlaw.com/us-4th-circuit/1750721.html

FACTS: Plaintiff Renee McCray ("McCray") defaulted on a mortgage that was held by Freddie Mac and was serviced by Wells Fargo. Following the default, Wells Fargo retained the White Firm to pursue foreclosure. The White Firm sent McCray a letter stating the firm had been instructed to initiate foreclosure proceedings on her mortgage. The letter concluded with the statements: "This is an attempt to collect a debt. This is a communication from a debt collector. Any information obtained will be used for that purpose." A few days after they sent this initial letter, the White Firm sent McCray a more detailed notice of intent to foreclose. Several members of the White Firm were substituted as trustees ("Substitute Trustees") on the deed of trust to facilitate foreclosure. The Substitute Trustees commenced the foreclosure proceeding in state court, McCray brought suit alleging, among other things, that the White Firm and the Substitute Trustees violated the FDCPA. The White Firm filed a motion to dismiss for failure to state a claim.

The district court granted the White Firm's motion to dismiss. It reasoned McCray had failed to sufficiently allege The White Firm was a "debt collector" under the FDCPA because the letters that the firm sent to McCray did not expressly demand payment and other specific information about the debt. McCray appealed.

HOLDING: Reversed and remanded.

REASONING: The White Firm and the Substitute Trustees argued McCray's complaint failed to establish their status as debt collectors because she failed to plead any facts indicating they had made demands for payment, or communicated deadlines and penalties for McCray's failure to make payment. The court rejected Defendants' argument because the FDCPA's definition of debt collector does not include any requirement that a debt collector be engaged in an activity by which it makes a "demand for payment." The court stated in order to be actionable under the FDCPA, a debt collector needs only have used a prohibited practice in connection with the collection of any debt or in an attempt to collect any debt. The court noted that debt remained a debt even after foreclosure proceedings commenced and Defendants' actions surrounding the foreclosure proceeding were attempts to collect that debt.

Finally, the court reasoned if they were to accept the Defendants' argument, it would create an enormous loophole in the Act. The loophole would immunize any debt from coverage if that debt happened to be secured by a real property interest and foreclosure proceedings were used to collect the debt. The court saw no reason to make an exception to the Act when the debt collector uses foreclosure instead of other methods.

FORECLOSURE TRUSTEE IS NOT A DEBT COLLECTOR UNDER THE FDCPA

Vien-Phuong Thi Ho v. ReconTrust Co., ___ F.3d ___ (9th Circuit 2016).
https://cdn.ca9.uscourts.gov/datastore/opinions/2016/10/19/10-56884.pdf

FACTS: Plaintiff, Vien-Phuong Thi Ho ("Ho"), financed a home in Long Beach, California, using a loan from Countrywide Bank secured by a deed of trust in the property. Defendant, ReconTrust, was a third party trustee who was an agent of both Ho and Countrywide Bank and charged with selling the property if Ho defaulted. Ho missed payments on her loan and ReconTrust, first, sent her a notice of default, which informed her of an amount owed of $20,000. After Ho failed to respond to the notice with payment, ReconTrust sent Ho a notice of sale.

Subsequently, Ho filed the present suit against ReconTrust alleging, in part, that ReconTrust violated the FDCPA when it sent her the notice to default and notice of sale that misrepresented the amount of debt she owed. The district disagreed with Ho and granted ReconTrust's motion to dismiss Ho's FDCPA claims. Ho appealed.

HOLDING: Affirmed in part, vacated in part

REASONING: Ho argued that both the notice of default and notice to vacate were attempts to collect a debt and, therefore, ReconTrust was a "debt collector" for the purposes of the FDCPA. The court disagreed. The court used statutory interpretation to illustrate that ReconTrust does not fall into the category of a "debt collector" as anticipated by the FDCPA. The court noted that the statue has a broad, general definition of a "debt collector" and a supplemental more narrow one, contained in 15 U.S.C.S. §1692a. The general definition applies to entities that regularly collect or attempt to collect, indirectly or directly, debts owed or due or asserted to be owed or due to another. The statute, however, later expressly identifies entities whose principal business purpose is the enforcement of security interests. The court found that these specifically acknowledged entities enforcing a security interests were already covered under the general definition of "debt collector" and, therefore, the statute must be interpreted to intend that there are certain entities whose principal business purpose is the enforcement of security interests that are not deemed to be "debt collectors."

Ho further argued that the actions of ReconTrust rose to the level of debt collection activities and subjected ReconTrust to the FDCPA. Specifically, Ho offered evidence that she reasonably believed that both of the notices were sent to demand her to pay Countrywide Bank because the threat of foreclosure accompanied both notices. Again, the court disagreed. The court argued that giving a notice of sale, which is required by California Civil Code, does not rise to the level of debt collection activity as anticipated by the FDCPA. The court held that a security enforcement entity does not become a debt collector if their sole role in debt collection process is the enforcement of a security interest, and it is commonplace for a forecloser to communicate with the consumer via notices during the foreclosure process. Further, the court rationalized that the notices did not request payment from Ho, rather, they only informed Ho of her default status and oncoming proceedings. This created an incentive to pay the debt owed but did not turn the notices into debt collection activities.

ReconTrust argued that if third party trustees were labeled "debt collectors" under the FDCPA it would frustrate, if not prohibit, them from complying with their obligations under the California Civil Code. The court agreed and found that "debt collector" is an ambiguous term, and an ambiguous federal statute should not yield an interpretation that would be in conflict with a state's foreclosure laws.

"Debt collector" is an ambiguous term, and an ambiguous federal statute should not yield an interpretation that would be in conflict with a state's foreclosure laws.

It is important to note that the court does not create a blanket rule that a trustee could never rise to the level of a "debt collector" under the FDCPA. The court held that the requirements under the California Civil Code did not constitute debt collection activities. However, the court seems to infer that there could be circumstances in which a trustee, or the functional equivalent, could be considered a "debt collector" under the FDCPA by following requirements set out in a State's law dependent on what that State's law call for.

COURT FINDS MULTIPLE CALLS TO PERSON NOT THE CONSUMER DID NOT VIOLATE FAIR DEBT COLLECTION PRACTICES ACT

Kuntz v. Rodenburg LLP, ____ F.3d ____ (8th Cir. 2016).
http://law.justia.com/cases/federal/appellate-courts/ca8/15-2777/15-2777-2016-09-22.html

FACTS: Appellant, Kuntz, alleged that Rodenburg LLP, unlawfully called him numerous times to obtain his daughter's contact information and that the number of calls constituted unlawful harassment. Rodenburg attempted to contact Kuntz multiple times to collect the credit card debt of Kuntz's daughter before he spoke to a representative in charge of collecting the debt. Following the conversation with Kuntz, Rodenburg called twice more. Kuntz brought suit, alleging that the calls violated the Fair Debt

Collection Practices Act ("FDCPA").

The district court granted Rodenburg's motion for summary judgment because the court determined that the unanswered phone calls were not considered "communications". The answered calls were also deemed incomplete communications under the FDCPA. Kuntz appealed.

HOLDING: Affirmed.

REASONING: Kuntz argued during appeal that the calls were considered harassment under §1692d(5) of the FDCPA and that his claim should have survived summary judgment because that determination was a matter of fact. The court rejected that argument. It found Rodenburg's calls were in regard to any information he had acquired concerning his daughter, or if he was willing to provide correct or complete information.

The court noted that Kuntz failed to argue the merits of harassment and only asserted that one phone call can be harassing. The circuit court conceded that this issue was indeed fact intensive depending on factors such as: volume, frequency, pattern, and substance of the phone calls. However, because the court found no reasonable jury could find the requisite level of harassment from the facts of the case, summary judgment should be affirmed.

PARKING LOT TICKET IS DEBT FOR PURPOSES OF FDCPA

Franklin v. Parking Revenue Recovery Servs., Inc., 832 F.3d 741 (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

FACTS: Plaintiffs Carmen Franklin and Jennifer Chism parked their cars in a public parking lot operated by CPS Chicago Parking, LLC ("CPS"). When Franklin and Chism failed to pay their parking fees, Defendant Parking Revenue Recovery Services, Inc. ("Parking Revenue") sent collection letters to Franklin and Chism on behalf of CPS for the parking fees and nonpayment penalties.

Parking in a public lot that is subject to a parking fee is a "transaction."

Franklin and Chism filed a class action against Park Revenue alleging that the collection letters violated the FDCPA. The district court granted summary judgment for Parking Revenue, holding that the FDCPA did not apply because the unpaid parking obligations were not "debts" within the meaning of the FDCPA. Franklin and Chism appealed.

HOLDING: Reversed.

REASONING: The circuit court disagreed with the district court and held that the FDCPA applies to the unpaid parking obligations because the obligations were "debts" within the meaning of the FDCPA.

"Debts" within the meaning of the FDCPA are obligations "arising out of" consumer "transactions." Obligations arise out of transactions when those obligations are created by the contracts that give legal force to the transactions. The court held that parking in a public lot that is subject to a parking fee is a "transaction." Also, a contract was formed when CPS offered a parking spot to the public subject to a parking fee and Franklin and Chism accepted the offer by parking in the CPS's lot. Therefore, parking fee payment obligations arising from parking in the lot were "debts" within the meaning of the FDCPA.

FILING PROOF OF CLAIM IN BANKRUPTCY ON A STALE DEBT DOES NOT VIOLATE FDCPA

Owens v. LVNV Funding, LLC, 832 F.3d 726 (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

FACTS: Plaintiff-debtor filed for bankruptcy, represented by an attorney. During the bankruptcy proceeding, Defendant-debt collector filed a proof of claim for a stale debt. The proof of claim accurately noted the origin of the debt, the date of the last payment on the debt, and the date of the last transaction. Plaintiff objected to the claim, realizing the debt was time-barred. As a result, the proof of claim was disallowed and discharged.

After the discharge, Plaintiff filed a separate suit against Defendant, alleging filing a proof of claim on a stale debt was in violation of the FDCPA because the filing such a claim constituted a misleading and deceptive means of collecting a debt. The district court granted Defendant's motion to dismiss. Plaintiff appealed.

HOLDING: Affirmed.

REASONING: Plaintiff argued that filing a proof of claim on a stale debt violated the FDCPA's prohibition against false, deceptive, misleading, unfair, and unconscionable debt collection practices because the claim was: (1) misleading the Plaintiff about the legal status of the debt; and (2) deceptive as the Plaintiff and his attorney could have failed to object to the claim, allowing the Defendant to collect on an unenforceable obligation.

The court rejected both of Plaintiff's arguments. First, the court held that a proof of claim on a stale debt was not inherently misleading because the claim did not purport to be anything other than a claim subject to dispute in the bankruptcy case. The Bankruptcy Code extensively defined the term "claim" as a right to payment and did not intend to include only legally enforceable obligations. A stale debt is still a debt even if the creditor cannot file a collection suit because there can be other avenues of collection. Filing a proof of claim on the stale debt, therefore, is not misleading.

In addition, the proof of claim was not deceptive because the claim contained accurate and complete information about the status of the debts. Plaintiff was represented by an attorney who was familiar with the statutes of limitations for different types of debt. Under the reasonable competent lawyer standard, Plaintiff's attorney would have had no trouble evaluating whether the debt was timely. In sum, Plaintiff failed to present any evidence that Defendant engaged in deceptive, misleading, unfair, or otherwise abusive conduct prohibited by the FDCPA.

MISLEADING VALIDATION NOTICE IN A DEBT COLLECTION COMPLAINT VIOLATED THE FAIR DEBT COLLECTION PRACTICES ACT

PLEADINGS OR FILINGS IN COURT CAN BE SUBJECT TO THE FDCPA

Marquez v. Weinstein, Pinson & Riley, P.S., 836 F.3d 808, (7th Cir. 2016).
https://scholar.google.com/scholar_case?case=3046187119030165159&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Defendant NCO in conjunction its attorneys attempted to collect on student loan debts allegedly owed by the Plaintiffs. The Plaintiffs stated that in attempting to collect on those debts Defendants violated the FDCPA. However, NCO contended the court did not need to address that FDCPA challenge at all because 15 U.S.C. §1692e does not regulate the content of state court proceedings.

The district court rejected this argument and ruled against NCO.
HOLDING: Reversed and remanded.
REASONING: NCO argued the court did not need to address the FDCPA claim because pleadings or filings in court cannot be subjected to the FDCPA as 15 U.S.C.§1692e does not regulate the content of state court pleadings. NCO based their argument on the Supreme Court's decision in *Heintz v. Jenkins*, 514 U.S. 291, 115 S. Ct. 1489 (1995) that the FDCPA was inapplicable to lawyers due to an implied exemption in 15 U.S.C. §1692e for debt-collecting of activities of lawyers that consist of litigating, and the fact that the post-1995 version of 15 U.S.C.§ 1692e(11) excludes formal legal pleadings.

The Seventh Circuit rejected both of the arguments that NCO put forth citing the prior body of case law as well as principals of statutory interpretation. The court held that, contrary to the claim of NCO, the FDCPA applies to attorneys who regularly engage in consumer-debt-collection activity, even when that activity consists of litigation.

The second argument put forth by NCO was rebutted by the Seventh Circuit, noting that while Congress may have exempted legal pleadings from 15 U.S.C. §1692e(11), it did not exempt them from the statute as a whole. The Seventh Circuit employed the statutory interpretation rule against surplusage to interpret that the aforementioned exemption should be applied to 15 U.S.C. §1692(e)11 rather than the statute as whole. If the statute were interpreted differently, the stated purpose of the FDCPA, "to eliminate abusive debt collection practices, to ensure that those debt collectors who abstain from such practices are not competitively disadvantaged, and to promote consistent state action to protect consumers" would be undermined.

UNLAWFUL CHARGE FOR INTEREST UPON INTEREST VIOLATES FAIR DEBT COLLECTION PRACTICES ACT

Haney v. Portfolio Recovery Assocs., ____ F.3d ____ (8th Cir. 2016).
http://media.ca8.uscourts.gov/opndir/16/09/151932P.pdf

FACTS: Portfolio Recovery Associates, L.L.C. ("PRA") bought and was assigned charged-off credit card debts that had been incurred by Daniel Haney and owed to GE Money Bank, F.S.B., and HSBC Bank Nevada, N.A./Orchard Bank. PRA's legal counsel Gamache & Myers, P.C. ("Gamache") sent Haney three collection letters demanding Haney to pay the charged-off debt along with statutory prejudgment interest calculated from before and after PRA acquired the debts. Haney filed suit against PRA and Gamache, asserting that they violated the FDCPA by attempting to collect statutory prejudgment interest on the interest portion of the charged-off accounts.

The court found the communication plainly deceptive and misleading to an unsophisticated consumer as a matter of law.

PRA and Gamache jointly moved for dismissal pursuant to Fed. R. Civ. P. 12(c), and the district court granted the motion. Haney appealed.
HOLDING: Affirmed in part, reversed in part and remanded.
REASONING: Haney argued that PRA and Gamache's attempt to collect statutory prejudgment interest on the interest portion of the charge-off balances violates Missouri restrictions on the collection of compound interest.

The court ruled that Missouri law permits parties to contract, in writing, for the payment of interest upon interest. However, the interest at issue is statutory, not contractual. Also, PRA and Gamache failed to cite statutory authority permitting a creditor or assignee to collect compound interest by assessing statutory prejudgment interest on the portion of a liquidated sum comprising already accrued contractual interest. Therefore, Haney stated a claim that should have survived a motion for judgment on the pleading.

ATTEMPTING TO COLLECT TIME-BARRED DEBT CAN VIOLATE FAIR DEBT COLLECTION PRACTICES ACT, EVEN IF IT DOES NOT THREATEN LITIGATION

Daugherty v. Convergent Outsourcing, Inc., 836 F.3d 507 (5th Cir. 2016).
http://www.ca5.uscourts.gov/opinions%5Cpub%5C15/15-20392.0.pdf

FACTS: Plaintiff, Daugherty, defaulted on a debt which Defendants, Convergent Outsourcing, Inc. and LVNV Funding, L.L.C., sought to collect. The statute of limitations for collecting the debt had expired, but Defendants sent Plaintiff a letter to attempt to collect the debt. The letter offered a discounted settlement offer, but did not mention the time-bar or litigation. Plaintiff filed suit alleging violations of the FDCPA. Plaintiff claimed that the Defendants, as debt collectors, used false, deceptive, or misleading representations or means in connection with the collection of the debt, and that Defendants used unfair or unconscionable means to attempt to collect that debt- in violation of 15 U.S.C. § 1692e and 15 U.S.C. § 1692f. Defendants moved to dismiss the suit.

The district court granted Defendants' motion. The court found that the FDCPA allows a debt collector to seek voluntary repayment of a time-barred debt so long as they do

not initiate or threaten legal action in connection with the debt collection efforts. Plaintiff appealed.
HOLDING: Reversed and remanded.
REASONING: Plaintiff argued that the letter was unfair and unconscionable, as well as false, deceptive and misleading because it did not disclose that the debt was statutorily unenforceable. Plaintiff also emphasized that settling the debt through a partial payment would trigger tax liability and would revive the entire debt. The court accepted that argument and explained that to determine if a collection letter violates § 1692e or § 1692f a court must view the letter from the perspective of an unsophisticated or least sophisticated consumer.

The FDCPA applies to attorneys who regularly engage in consumer-debt-collection activity, even when that activity consists of litigation.

The court further explained that the FDCPA must be construed broadly and in favor of the consumer. Citing case law, the Fifth Circuit held that a collection letter can be deceptive or misleading enough to violate the FDCPA when it does not mention litigation but offers to settle a time-barred debt without acknowledging that the debt is judicially unenforceable and without mentioning the possible pitfalls of partial payment.

FAIR DEBT COLLECTION PRACTICES ACT VENUE PROVISION DOES NOT APPLY TO GARNISHMENT ACTION

Ray v. McCullough Payne & Haan, LLC, 838 F.3d 1107 (11th Cir. 2016). https://casetext.com/case/ray-v-mccullough-payne-haan-llc

FACTS: After successfully obtaining a judgment against consumer-debtor and plaintiff Bryson Ray ("Ray"), judgment-creditor and defendant McCullough Payne & Haan, LLC ("McCullough firm") initiated a garnishment proceeding against Ray's bank to collect on the judgment. However, Ray filed a suit against the McCullough firm alleging its garnishment proceedings violated the FDCPA provision stipulating "[a]ny debt collector who brings any legal action on a debt against any consumer shall ... bring such action only in the judicial district or similar legal entity—(A) in which such consumer signed the contract sued upon; or (B) in which such consumer resides at the commencement of the action." Ray filed suit in the United States District Court for the Northern District of Georgia, which dismissed Ray's action. Ray appealed.
HOLDING: Affirmed.
REASONING: The court looked to state law to determine that garnishment proceedings initiated after original legal actions arising under the FDCPA are not subject to the FDCPA provisions governing venue. Specifically, the court noted the Georgia state law provision requiring post-judgment garnishment proceedings involve the creditor and garnishee rather than the debtor. Ray argued that the court's construction of the FDCPA should not be informed by the meaning of state law but rather strictly by federal law. However, the court rejected Ray's argument by looking to Supreme Court precedent, which held that, absent a federal rule stating otherwise, the courts may look to state law when interpreting a federal statute. The court found further support for its holding by looking to the Federal Trade Commission's interpretation of the FDCPA, which stated that "[i]f a judgment has been obtained from a forum that satisfies the requirements of [the FDCPA], a debt collector may bring suit to enforce it in another jurisdiction." The court found that its interpretation and similar interpretations from other circuits supported the FDCPA's purpose of preventing debt collectors from filing suits against consumers in distant and inconvenient forums.

COURT AWARDS $84,000 TO COLLECTOR'S ATTORNEY IN A FAIR DEBT COLLECTIONS PRACTICES SUIT

Blowers v. Lerner, ____ F. Supp. 3d ____ (E.D. Va. 2016).
https://casetext.com/case/blowers-v-lerner

FACTS: In a previous case, Debt collectors ("Defendants") sued Blowers after he failed to pay debt he owed them. Mr. Francis, allegedly on behalf of Blowers, filed the instant case asserting violations of the FDCPA for not properly serving Blowers. Defendants sent settlement offers to Mr. Francis, but Mr. Francis declined every offer. It came to light that Mr. Francis had denied the offer without consulting with his client. Mr. Francis claimed the offer was not within the parameters preset by Blowers.

The case ended when Blowers testified that he had no contact with Mr. Francis throughout the case, had suffered no harm that would justify litigation, did not want the relief sought, and had no interest in pursuing the case. Blowers settled the underlying case. Pursuant to 28 U.S.C. § 1927, Defendants moved for sanctions against Mr. Francis. The magistrate judge recommended that Mr. Francis pay reasonable attorney's fees to Defendants. Francis objected.
HOLDING: Adopted Report and Recommendation.
REASONING: The court reviewed the record and found no error in the judge's factual findings or legal conclusions in the Report and Recommendation. The court found the judge correctly applied the standards under 28 U.S.C. § 1927 to conclude that Francis' conduct was sufficient to warrant sanctions and award attorney's fees and costs.

The responsibility to convey the existence and terms of settlement offers to clients is one of an attorney's most important duties. This is not simply a matter of legal ethics, but a duty which a lawyer owes to his adversaries, the court and his clients. Mr. Francis' failure to convey the settlement offer demonstrated reckless indifference to the law and did not satisfy his obligations to Blowers, Defendants or the court. By not speaking with Blowers about the settlement offer, Francis caused the Defendants to spend unreasonable attorney's fees. The court broke down the hourly rates of the attorneys and compared it with affidavits and previous cases. The award of attorney's fees and costs totaling $84,752.00 was reasonable.

INSURANCE

CHARGING UNINSURED PATIENTS MORE THAN INSURED PATIENTS MAY BE BASIS FOR UNCONSCIONABILITY CLAIM

Moran v. Prime Healthcare Mgmt., Inc., 3 Cal. App. 5th 1131 (2016).
https://casetext.com/case/moran-v-prime-healthcare-mgmt-inc

FACTS: Gene Moran ("Plaintiff"), a self-pay patient went three times to the emergency room of a hospital owned and operated by Prime Healthcare Management ("Defendant"). Each time, Plaintiff signed a preprinted conditions of admission agreement and received medical treatment. Plaintiff received bills for the treatments that exceeded $10,000. Plaintiff's amended complaint was based on allegations the rates defendants charge self-pay patients are discriminatory, exceed the value of treatment and are excessive. Defendants argued that the counts in each pleading failed to state a cause of action. Plaintiff's third amended complaint ("TAC") had an attachment of the contract the Plaintiff had signed. Specifically, paragraph 18 of the contract provided that charity care and discounted payment programs were available.

The Legislature finds it in the public interest to ensure citizens receive high quality health care. This is met by permitting negotiations of different contracts.

The TAC alleged that the Plaintiff sent correspondence to the hospital stating his unemployment status and asked the hospital to take into consideration his financial status but the Defendants had never responded. Defendants demurred to the TAC. The trial court sustained the demurrer without leave to amend and concluded plaintiff failed to allege sufficient facts.

HOLDING: Reversed.

REASONING: The Defendants argued that the Plaintiff could not maintain his cause of action because the hospital's variable pricing structure was legislatively endorsed. The court stated the argument only had partial merit. The court explained the safe harbor doctrine does not stop an action under the unfair competition law ("UCL") just because some other statute does not provide for the action or prohibit the conduct. The court found that the safe harbor doctrine applied in this case. The court explained that the Legislature finds it in the public interest to ensure citizens receive high quality health care. This is met by permitting negotiations of different contracts.

The court highlighted portions of the Hospital Fair Pricing Act, which requires hospitals to maintain a written policy regarding discounts for financially qualified patients. The court explained that the Hospital Fair Pricing Act imposes on licensed hospitals the duty to give notice and administer financial aid and charity care policies. The Plaintiff, to support the unlawful prong, alleged that the defendants billing and collection practices violated the CLRA as set form in the TAC's second cause of action. Specifically, defendants violated prong four because defendants inserted an unconscionable provision into their contracts. The Plaintiff argued the contract's financial liability provision is unconscionable. The Plaintiff argued that the defendants failed to charge the self-pay emergency room patients reasonable rates as required by the contract. The court explained the unconscionability doctrine ensures that the contracts, especially those of adhesion do not impose terms that are overly harsh or unduly oppressive. The court stated that in a contract of adhesion, the party of superior bargaining strength relegates the inferior party only the opportunity to accept the contract or reject it. The court concluded, unconscionable terms may take various forms but may generally be described as unfairly one-sided. In this case, the contract plaintiff signed was preprinted documents and the TAC alleged all emergency room patients had to sign the same document before being treated. The court wrote that the plaintiff had established a basis for maintaining his UCL cause of action based on the defendants' policy of billing self-pay patients the entire amount of the description rates.

ARBITRATION

LOUISIANA REJECTS ARBITRATION CLAUSE IN CONTRACT OF ADHESION

Duhon v. Activelaf, LLC, ___ So. 3d ___ (La. 2016)
https://www.lasc.org/opinions/2016/16CC0818.OPN.pdf

FACTS: Plaintiff accompanied three minors to Defendant's premise, an indoor trampoline park, and was injured in the course of participating in such activities there. Prior to the occurrence of injury, Plaintiff digitally signed an agreement acknowledging awareness of the risk of injuries that could not be eliminated without jeopardizing the essential qualities of the activity. The agreement that Plaintiff consented to also served as a waiver of any all responsibilities or duties owed to Defendant as indemnitees for personal injuries, death and/or property loss/damage sustained by Plaintiff or any minor children while on Defendant's premise or with respect to activities there. The agreement Plaintiff signed also agreed that if there were any disputes regarding the agreement Plaintiff was waiving any right to a trial and any dispute shall be brought within one year of the date of the agreement and will be determined by binding arbitration before one arbitrator.

Following Plaintiff's injury, Plaintiff filed suit against Defendant. In response, Defendant filed several exceptions, including an exception of prematurity. Defendant alleged the agreement contained a mandatory arbitration clause, thereby rendering Plaintiff's suit premature. Plaintiff asserted he did not knowingly consent to arbitration, and argued the agreement was a contract of adhesion and ambiguous.

The district court determined that there was a lack mutuality in the agreement relative to the arbitration clause because only Plaintiff was bound to arbitrate claims. Thus, the district court refused to enforce the arbitration agreement and overruled Defendant's exception of prematurity.

The Supreme Court of Louisiana reversed the district court's ruling and granted certiorari to review the correctness of the appellate court's ruling.

HOLDING: Reversed and remanded.

REASONING: Plaintiff argues that the arbitration clause is unenforceable on general principals of consent and adhesion. Defendant contended that both Louisiana and federal law explicitly favor the enforcement of arbitration clauses in written contracts. Furthermore, Defendant argues that the paragraph containing the arbitration clause was sufficiently distinguished and brought to patrons' attention through the use of a box that had to be digitally checked.

The Louisiana Supreme Court agreed with Plaintiff's argument that the arbitration clause is unenforceable on general principals of consent and adhesion. The Supreme Court opined that the lack of distinguishing features and the specific placement of the arbitration clause serve to conceal the arbitration language from Defendant's patrons. The court determined that when considering the agreement as a whole, the arbitration language appeared to be the only specific provision not relegated to a separate paragraph or set apart in some explicit way. The court related that the effect of the placement of the arbitration language was to cloak it within boilerplate language. The court's rejection of the arbitration clause was further bolstered by a lack of mutuality within the fact that it applied solely to Plaintiff.

Alicea v. Activelaf, LLC, ___ So. 3d ___ (La. 2016) was decided on the same day. As the case occurred under the same fact pattern, the Louisiana Supreme Court rejected the validity of an arbitration clause in a contract of adhesion, applying the same reasoning as Duhon. The two cases are virtually indistinguishable.

ARBITRATION DESIGNATING NAF AS FORUM UNENFORCEABLE

Moss v. First Premier Bank, 835 F.3d 260 (2d Cir. 2016).
http://law.justia.com/cases/federal/appellate-courts/ca2/15-2513/15-2513-2016-08-29.html

FACTS: Deborah Moss took out three payday loans from an online payday lender, SFS. The loan agreement contained an arbitration clause that specified all disputes were to be resolved through the National Arbitration Forum ("NAF"). SFS relied on First Premier Bank and Bay Cities Bank ("The Banks") to debit the customer's account. Moss filed a putative class action against The Banks in federal court, alleging The Banks unlawfully facilitated high-interest payday loans.

The court granted The Banks motion to compel arbitration and stayed the proceedings. Moss sent a letter to NAF indicating her intent to arbitrate her claims. NAF responded that it was unable to handle Moss' claims pursuant to a consent judgment prohibiting it from accepting consumer arbitrations. Moss returned to federal court and moved to vacate the district court's order compelling arbitration. The court granted Moss's motion and held Moss could not be compelled to arbitrate. The Banks appealed.

The agreement in this case contained many indicators showing that the parties intended to arbitrate exclusively before NAF.

HOLDING: Affirmed and remanded.

REASONING: The Banks argued that the NAF's inability to accept the case constituted a "lapse" within the meaning of Section 5 of the Federal Arbitration Act such that the district court was required to appoint a substitute arbitrator. The court disagreed noting that "lapse" in the context of Section 5 referred to a time lapse in the naming of the arbitrator or some mechanical breakdown of the arbitrator selection process. The court noted previous cases, which made it explicit that Section 5 could not be used by a district court to circumvent the parties' designation of an exclusive arbitral forum.

The court reasoned that the agreement in this case contained many indicators showing the parties intended to arbitrate exclusively before NAF. The agreement named the NAF as the chosen forum, it discussed the requirement of conducting the arbitration under the Code of Procedure of the NAF, it required that all claims be filed in an NAF office, and it provided no provision for the appointment of a substitute arbitrator in the event

NAF became unavailable. These terms led the court to determine that the parties had designated an exclusive arbitral forum. Therefore, the district court was not authorized to appoint a substitute arbitrator. With the parties' chosen arbitrator unable to hear the claims, and the district court unable to appoint a substitute, the arbitration agreement at issue was deemed unenforceable and the stay of the proceedings in federal court was lifted.

ARBITRATION CLAUSE REQUIRING ARBITRATION AT CHEYENNE RIVER SIOUX IS UNENFORCEABLE

Parm v. Nat'l Bank of California, N.A., 835 F.3d 1331 (11th Cir. 2016).
http://media.ca11.uscourts.gov/opinions/pub/files/201512509.pdf

FACTS: Appellee Jessica Parm entered into a loan agreement with Western Sky Financial, LLC, a South Dakota limited liability company owned by a member of the Cheyenne River Sioux Tribe ("CRST"). The loan provided that Western Sky could initiate automated or other electronic fund transfers from the bank account Parm included in the loan application. Appellant Northern Bank of California ("NBCal") authorized these electronic transfers. The loan agreement also provided that any dispute would be resolved by arbitration conducted by the CRST. Parm filed a class action lawsuit against NBCal challenging the enforceability of the arbitration provision in the agreement. Parm claimed the purported tribal arbitral forum and governing rules did not exist at the time of the lawsuit or at the time the agreements were electronically signed. NBCal filed motions to compel arbitration under Parm's loan agreement.

The district court denied NBCal's motion to compel arbitration because it was unconscionable and required the parties to arbitrate in an unavailable forum. NBCal appealed.
HOLDING: Affirmed.
REASONING: NBCal argued that the agreement did provide an arbitral forum, and the district court erred when it failed to submit the question of arbitrability to an arbitrator under the agreement's delegation clause.

The court rejected this argument and affirmed the district court's order by holding that arbitration agreements must be enforced in accordance with their express terms. The terms of Parm's arbitration agreement contained a forum selection clause requiring arbitration in a tribal forum that was both unavailable and integral to the parties' agreement to arbitrate. Therefore, the arbitration clause was unenforceable.

ARBITRATION CLAUSE NOT UNCONSCIONABLE OR ONE-SIDED

Dalton v. Santander Consumer United States, Inc., ____ P.3d ____ (N.M. 2016).
http://law.justia.com/cases/new-mexico/supreme-court/2016/35-101.html

FACTS: Eileen Dalton filed suit against Santander Consumer USA, Inc. for: fraud, violations of New Mexico's Uniform Commercial Code, unfair trade business practices, conversion, breach of contract, breach of covenant of good faith and fair dealing, and breach of warranty of title arising from car repossession. Dalton purchased cars under finance contracts. The amounts in the contracts exceeded the jurisdiction of a small claims court, which in New Mexico is $10,000. Santander assisted Dalton in the financing of these purchases. After Dalton missed her first payment, Dalton's car was repossessed without judicial action. She brought suit alleging a variety of violations, breaches, and unfair practices.

The district court denied Santander's motion to compel arbitration, finding that the effect of the small claims and self-help provisions of the contract made the arbitration clause unenforceable because it was substantively unconscionable. The court of appeals upheld the district court's ruling. Santander appealed.

As a matter of public policy, the bilateral small claims carve-out from the finance contracts could have been enforceable if the claim was worth less than $10,000.

HOLDING: Reversed and remanded.
REASONING: Dalton argued that self-help repossession (as opposed to judicial repossession) is a remedy that must be obtained through an arbitral forum if the parties have agreed to arbitrate all disputes, and, therefore, the arbitration clause was one-sided. The court rejected that argument by explaining that allowing the parties to retain private self-help remedies did not make the arbitration clause one-sided, and that the explicit exclusion of self-help remedies from mandatory arbitration was irrelevant in regard to assessing unconscionability. The court further explained the provision was not unconscionable on its face because the arbitration provision did not unambiguously benefit the drafting party alone.

As a matter of public policy, the bilateral small claims carve-out from the finance contracts could have been enforceable if the claim was worth less than $10,000. Because Dalton's finance contracts exceeded $10,000, arbitration would be justified as a matter of judicial efficiency.

UBER ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE

Mohamed v. Uber Techs., Inc., 836 F.3d 1102 (9th Cir. 2016).
http://cdn.ca9.uscourts.gov/datastore/opinions/2016/09/07/15-16178.pdf

FACTS: Plaintiffs Abdul Mohamed and Ronald Gillette ("Plaintiffs") were drivers for Defendant Uber Technologies, Inc. Upon the employment, Plaintiffs signed Software License and Online Services agreements containing an arbitration provision. The arbitration provision required drivers to submit to arbitration to resolve most disputes with the company. The drivers could opt out of arbitration by delivering notice of their intent to opt out, but Plaintiffs did not opt out. Later, Plaintiffs were fired from Uber due to negative information on their consumer credit reports.

Plaintiffs sued Uber alleging that Uber's use of consumer credit reports violated the FCRA and various state statutes. Uber moved to compel arbitration in the lawsuits. The district court denied the motion to compel arbitration, reasoning that the delegation clauses were ineffective because they were not clear and unmistakable, and even if they were clear and unmistakable, they were unenforceable because they were unconscionable. Uber appealed.

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

REASONING: Uber argued the arbitration provisions were enforceable because the delegation provisions delegated the arbitrability issue to an arbitrator and, even if the court had the authority to consider arbitrability question, the court erred in concluding that the arbitration provisions are invalid. The circuit court agreed with Uber and found the arbitration agreement is valid and enforceable because the delegation provision is clear and unmistakable, and not unconscionable.

First, the court noted the delegation provisions in the agreements clearly and unmistakably delegated the question of arbitrability to the arbitrator. Language delegating to the arbitrators the authority to determine the validity or application of any of the arbitration provisions constitutes an agreement to arbitrate threshold issues concerning the arbitration agreement. In this case, the Ninth Circuit found that the language of the agreements delegated to arbitrators the authority to decide issues relating to the enforceability, revocability or validity of the arbitration provisions.

The court also found that the delegation provisions were not unconscionable. Both substantive and procedural unconscionability must be present for a court to find a contract unconscionable. Unconscionable contracts are those that are "so one-sided as to 'shock the conscience.'" An arbitration agreement is not adhesive if there is an opportunity to opt-out. The court found that the delegation provisions are not procedurally unconscionable because the agreements gave drivers an opportunity to opt out of arbitration altogether and the Plaintiffs chose not to opt out of arbitration.

Finally, the court disagreed with the Plaintiffs argument that the delegation provisions were invalid due to effective vindication doctrine because the agreements contained a fee term requiring drivers to split the costs or arbitration equally with Uber, thus precluding drivers from effectively vindicating their federal statutory rights. Because Uber committed to paying the full costs of arbitration, the court found that the fee term in the arbitration agreement presented Plaintiffs with no obstacle to pursuing vindication of their federal statutory rights in arbitration.

ARBITRATOR, NOT COURT, DECIDES WHETHER ARBITRATION AGREEMENT ALLOWS CLASS-WIDE ARBITRATION

Sandquist v. Lebo Automotive Inc., 376 P.3d 506 (Cal. 2016).
http://www.courts.ca.gov/opinions/documents/S220812.PDF

FACTS: Timothy Sandquist ("Sandquist") was hired by Lebo Automotive ("Defendant") to work as a salesperson at a dealership. On Sandquist's first day, he was given approximately 100 pages of preprinted forms with instructions to fill out and sign each document as quickly as possible so he could begin work. The documents included three different form arbitration agreements. Sandquist finished the paperwork as quickly as possible and did not realize he was signing multiple arbitration agreements. Sandquist sued Defendant alleging racial discrimination and the complaint brought claims on behalf of a class of former and current employees. Defendant moved to compel individual arbitration based on the arbitration agreements signed by Sandquist on his first day of work. The trial court granted the motion agreements after finding them enforceable and not unconscionable. The trial court dismissed the class claims with prejudice. On appeal, the court reversed in part and declined to address Sandquist's claim that the arbitration agreements were unconscionable because that ruling was not appealable, but it considered his challenge to the dismissal of class allegations. It concluded the availability of class proceedings under an arbitration agreement is a question of contract interpretation for the arbitrator to decide. Defendant petitioned for review, arguing that the Court of Appeal's decision contributed to an existing state and federal split over who should decide whether an arbitration agreement permits class arbitration.

HOLDING: Affirmed.

REASONING: The court concluded when the allocation of a matter to courts or arbitration is uncertain, arbitration is favored. The question of who has the power to decide the availability of class arbitration depends on what the parties agreed about the allocation of that power. Ordinary state-law principles that govern the formation of contracts should be applied. In this case, the parties did not expressly opt for the application of state law, so federal law must be applied to determine if an arbitrator should decide the availability of class arbitration. As a matter of federal law, doubts about the matter should be addressed by arbitration. Even though the Federal Arbitration Act [FAA] directs courts to decide whether an issue is arbitrable, this only applies if it is specified in the parties' agreement. Furthermore, the presumption that arbitrators decide the availability of class arbitration is more consistent with the desire for "expeditious results" that arbitration agreements are designed for. The court concluded there was nothing in the FAA that would support submitting the issue to a court rather than an arbitrator unless the parties explicitly agreed. The court explained that it would not determine how an arbitrator would have decided the issue and by doing so it would violate the agreement. The dissent wrote that the majority is charting a different part from what the Supreme Court has held.

When the allocation of a matter to courts or arbitration is uncertain, arbitration is favored.

TRADITIONAL ARBITRATION WAIVER ANALYSIS DOES NOT APPLY WHERE THERE IS A SUBSTANTIAL CHANGE IN THE LAW

Chassen v. Fid. Nat'l Fin., Inc., 836 F.3d 291 (3d Cir. 2016).
http://law.justia.com/cases/federal/appellate-courts/ca3/15-3789/15-3789-2016-09-08.html

FACTS: Chassen ("Plaintiffs") are a putative class of real estate purchasers and refinancers who were overcharged by title agents and attorneys for deed recordings and mortgage instruments. Plaintiffs filed a complaint against Defendants in the U.S. District Court for the District of New Jersey alleging breach of contract. Defendants did not at the time seek to compel arbitration pursuant to the arbitration clause in the contract. In 2011, the Supreme Court ruled in *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333

that the FAA preempted state laws that prohibited a party from compelling bipolar (individual) arbitration in certain situations, even when it was specifically agreed to by contract. Thereafter, Defendants filed a motion to compel arbitration in the District Court. The court granted the motion, and the Plaintiffs appealed.
HOLDING: Affirmed and remanded.
REASONING: Plaintiffs argued that Defendants should not be allowed to compel arbitration because their actions constituted a waiver. Specifically, Plaintiffs argued that Defendants waited two and a half years to file a motion to compel arbitration. The court rejected these arguments and refused to apply traditional arbitration waiver analysis to situations where there is a substantial change in the law, as the *Concepcion* decision was to the present case.

The Third Circuit ruled that there was no requirement for Defendants to pursue what would have been a futile attempt at obtaining bipolar arbitration. Accordingly, the court found that Defendants should not be penalized for failing to pursue a right that did not exist under New Jersey law at the time of the initial suit. Defendants maintained the right to seek bipolar arbitration and did not waive that right since the ruling in Concepcion marked a substantial change in the law.

CONSUMER CREDIT

CLAIMS UNDER THE FAIR CREDIT REPORTING ACT BARRED BY STATUTE OF LIMITATIONS DISCOVERY RULE

Rocheleau v. Elder Living Construction, 814 F.3d 398 (6th Cir. 2016).
https://casetext.com/case/rocheleau-v-elder-living-constr-llc-1

FACTS: Plaintiff, Richard Rocheleau filed a lawsuit against defendants Elder Living Construction, LLC, and First Advantage LSN Screening Solutions, Inc., for violating 15 U.S.C. §1681, the Fair Credit Reporting Act. On September 15, 2011, Elder Living ordered a background screening report on Rocheleau from LexisNexis Screening Solutions, Inc. when he applied for employment. LexisNexis notified Rocheleau that the contents in the background report could adversely affect his employment status. LexisNexis notified him that he had not been hired because of the contents of his background report. Rocheleau did not dispute the accuracy of the background report and complained he had not authorized the release of the background report. Two years later, November 2013, Rocheleau filed for action against Elder Living and First Advantage.

The FCRA's statute of limitations requires claims to be commenced no later than two years after the date of discovery of the violation.

The district court granted summary judgment for both First Advantage and Elder Living, holding that the FCRA's two-year statute of limitations barred Rocheleau's lawsuit.
HOLDING: Affirmed.
REASONING: The court reasoned that Rocheleau's claim was time-barred because it was not filed within the two-year limitations period provided in 15 U.S.C. §1681p and the limitations period in 15 U.S.C. §1681s-2(b) did not apply because Rocheleau never disputed the completeness or accuracy of the report.

The FCRA's statute of limitations requires claims to be commenced no later than two years after the date of discovery of the violation that is the basis of liability. Rocheleau did not dispute that each of the alleged violations occurred in September 2011 and that he received notices on three separate dates in September 2011. So, his claim that he filed in November 2013 was barred by the statute of limitations.

The court also held 1681s-2b applies to disputes regarding the completeness or accuracy of any information provided by a person to a consumer reporting agency. Rocheleau did not dispute the completeness or accuracy of his background report in his appeal, district court filings or communications with LexisNexis. Therefore, his allegation regarding §1681-2(b)'s dispute process has no relevance to this action and does not affect the applicable statute of limitations in any way.

MISCELLANEOUS

NLRA PROHIBITS CLASS ACTION WAIVERS

Morris v. Ernst & Young, LLP., 834 F.3d 975 (9th Cir. 2016). https://cdn.ca9.uscourts.gov/datastore/opinions/2016/08/22/13-16599.pdf

FACTS: Plaintiffs Stephen Morris and Kelly McDaniel worked for Defendant Ernst & Young, LLP. As a condition of employment, Morris and McDaniel were required to sign a "concerted action waiver" stating that they will not to join with other employees in bringing legal claims against the company. The waiver required Ernst & Young's employees to (1) pursue legal claims against Ernst & Young exclusively through arbitration and (2) arbitrate only as individuals in separate proceedings. Morris and McDaniel nonetheless brought a class and collective action against Ernst & Young in federal court alleging the employees were misclassified and Ernst & Young relied on the misclassification to deny the employee's overtime wages. Ernst & Young moved to compel arbitration pursuant to the concerted action waiver.

Under the NLRA, employees have the essential and substantive right to pursue work-related legal claims together.

The district court granted Ernst & Young's motion to compel arbitration and ordered individual arbitration. Morris and McDaniel appealed.

HOLDING: Reversed and remanded.

REASONING: Morris and McDaniel argued that their concerted action waiver was unenforceable because the waiver violated the National Labor Relations Act ("NLRA").

The Ninth Circuit, recognizing a circuit split, accepted Morris and McDaniel's arguments and held that Ernst & Young violated the NLRA by requiring its employees to sign the concerted action waiver as a condition of employment. Under the NLRA, employees have the essential and substantive right to pursue work-related legal claims together. The NLRA precludes contracts that foreclose the possibility of concerted work-related legal claims, and an employer may not condition employment on the requirement that an employee sign such a contract. Here, Ernst & Young interfered with the substantive right by requiring its employees to resolve all of their legal claims in "separate proceedings." Accordingly, the concerted action waiver violated the NLRA and was unenforceable.

ANALYSIS OF ANTI-STEERING COMPLAINT MUST CONSIDER BOTH SIDES OF THE MARKET—MERCHANTS AND CONSUMERS

United States v. Amn. Express Co., ___ F.3d ___ (2d Cir. 2016). http://www.ca2.uscourts.gov/decisions/isysquery/d964fafd-ae57-43fe-aa11-3a98a78284b1/9/doc/15-1672_opn.pdf

FACTS: The United States Government and seventeen Plaintiff States (collectively, "Plaintiffs") sued American Express Company and American Express Travel Related Services Company (collectively, "Amex") for unreasonably restraining trade in violation of §1 of the Sherman Act ("§1"). Plaintiffs alleged Amex's "anti-steering" or nondiscriminatory provision (NDPs) prevented merchants from encouraging cardholders' use of alternative and less costly network services at the point of sale, thus suppressing inter-brand competition.

The district court concluded that Plaintiffs showed by a preponderance of the evidence that Amex's NDPs precluded anything from offsetting payment-card networks' incentive to charge merchants inflated prices for their services. The district court's rational was supported by its findings that the relevant market for its analysis only limited to payment-card network services, did not include the market for cardholders. Amex appealed.

HOLDING: Reversed and remanded.

REASONING: The court found the district court's exclusion of the market for cardholders from its definition of the relevant market in the case was fatal to its conclusion that Amex violated §1. The district court had patterned its definition of the relevant market in this case largely after the Second Circuit's definition of the relevant market in *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003). The court held that the relevant market in this case was not the same as the relevant market in *Visa* because the two-sided platform at issue in this case was a single firm operating within the broader network services industry at issue in *Visa*.

The court ruled that the district court should have considered the extent to which price increases from network services such as Amex could cause merchants to influence cardholders' switch to alternative forms of payment outside of payment-card network, thus acknowledging the need to analyze Amex's vertical restraints on both merchants and cardholders. The court's rationale was the price charged to merchants would necessarily affect cardholder demand that in turn affects merchant demand for payment-card network services. Ultimately, the court found that the District Court's analysis failed to acknowledge that any price increase promulgated by Amex against merchants necessarily affected both merchant and cardholder demand and was therefore an incomplete analysis. As a result, it was determined that the Plaintiffs had not met their burden under a rule of reason analysis by establishing a nexus between Amex's NDPs and anticompetitive effects suffered by both merchants and cardholders.

RICO CLAIM SURVIVES VICTIM'S DEATH

Malvino v. Delluniversita ___ F.3d ___ (5th Cir. 2016). http://law.justia.com/cases/federal/appellate-courts/ca5/15-41435/15-41435-2016-10-20.html

FACTS: Bonnie Pereida spent hundreds of thousands of dollars on rare coins. The coins were purchased from PCA Collectibles, a rare coin dealer owned by Anthony Delluniversita and his son, Paul Delluniversita. Each coin PCA sold Pereida came with an invoice that showed the grade as determined by independent third party grader PCI Coin Grading, Inc. However, Anthony owned, operated, and was the sole coin grader for PCI. Anthony had no formal training in numismatics. Pereida passed away and Albert Malvino became the executor of her estate. Malvino had the coin collection appraised by Heritage Auction Appraisal Services. Heritage determined that the fair market value of the PCA coins was only 26.2% of the amount Pereida paid.

Malvino filed suit against Anthony, Paul, PCA, and PCI, asserting a substantive civil RICO violations and various state common law claims. The district court entered judgment for Malvino against Anthony and PCA ("Defendants") for the RICO claims. Defendants appealed.

HOLDING: Reversed and Remanded.

REASONING: Defendants first argued that a RICO claim does not survive the victim's death. The court characterized survivability as an issue of statutory standing. Specifically, the general rule for survivability of federal statutes articulated by the court was that penal statutes do not survive, whereas remedial statutes do.

Whether a statute was penal or remedial turned on whether the wrong sought to be redressed was a wrong to the public, or a wrong the individual. Factors considered included: (1) whether the purpose of the statute was to redress individual wrongs or more general wrongs to the public; (2) whether recovery under the statute runs to the harmed individual or to the public; and (3) whether the recovery authorized by the statute is wholly disproportionate to the harm suffered.

Focusing on the last inquiry, Defendants argued that the availability of treble damages under RICO demonstrates the statute is punitive. However, the court presented a number of statutes that provided remedies beyond actual damages, which survived as remedial. Further, the court clarified that availability of treble damages under RICO does not prevent it from being classified as a remedial statute. The court concluded RICO's remedial purpose predominates and held that a claim under the statute survives the victim's death.

THE LAST WORD

Unless you started reading this issue of the Journal from back to front, you already know it includes an impressive and diverse collection of articles. For those wondering what is new in legal education, "*Teaching Consumer Law*" discusses what went on at the recent conference for consumer law professors. You also will find an interesting proposal from the National Center for Consumer Law for *Consumer Amendments to Article 9*. And, as always, the *Alert* and *Recent Decisions* sections discuss more than twenty recent consumer law cases.

Finally, for more than two decades the winter issue of the *Journal* has included an *Annual Survey of Texas Insurance Law*, written by Mark Kincaid, often with the help of others. This issue again includes the *Survey*, but unfortunately, it was not written by Mark. Mark passed away earlier this year at the age of 56, a great loss to his family and all who knew him. I was privileged to be able to call Mark a friend. I hope all of you, friends, acquaintances or strangers, take the time to learn a little bit about Mark's life and dedication to the people of the state of Texas, by reading *Remembering Mark L. Kincaid,* on page 77.

Richard M. Alderman
Editor-in-Chief

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