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Assessing *Spokeo, Inc. v. Robins*

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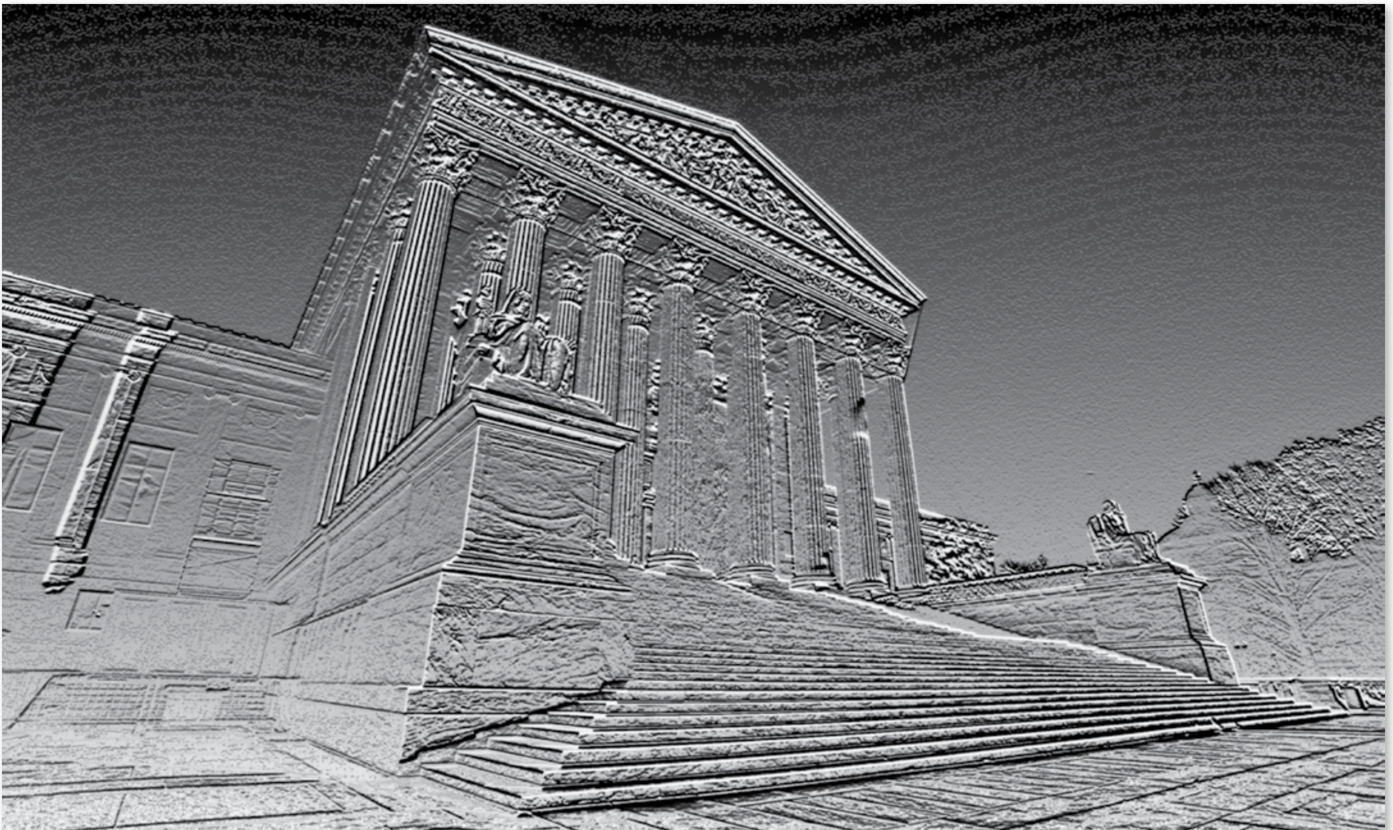
Assessing *Spokeo, Inc. v. Robins*: The Future of Statutory Damage Class Actions in the Consumer Protection Arena

by Tyler Kasperek Somes*



1. Introduction

About one year from the date of this issue's publication,[1] the United States Supreme Court decided *Spokeo, Inc. v. Robins*.[2] The eight-member bench declined to answer the case's central question of whether the plaintiff had standing, but it did provide new instructions on how to analyze the "concrete harm" requirement of the standing doctrine. [3]

In wake of the *Spokeo* decision, lower courts will have to apply these new instructions to a variety of statutes and fact patterns. Given the lingering ambiguities in the "concrete harm" analysis left open by the Court, it seems likely that divergent applications will emerge both across and within circuits.

Claims seeking statutory damages in the absence of actual damages will be especially affected by the development of this jurisprudence. Indeed, its evolution will determine the viability of the private enforcement consumer protection regime established by Congress, where statutory damages are particularly common and often invoked in class action litigation.

This article endeavors to measure the impact of *Spokeo* on claims arising under consumer protection statutes providing for statutory damages via an empirical study. It also proposes an application of the *Spokeo* decision which would protect against frivolous claims and simultaneously preserve access to the courts, promote economically efficient litigation and respect Congressional prerogatives.

2. Jurisprudential Background and the *Spokeo* Decision

A. Trends in Class Action Jurisprudence Before *Spokeo*

Recent Supreme Court decisions have substantially raised the barriers to class action certification. As a result, entire categories of class actions have become much harder to prosecute, including employment discrimination cases and any dispute where an arbitration agreement exists. One way the Court has accomplished this is by raising the threshold for commonality and predominance before class certification in cases like *Wal-Mart Stores, Inc. v. Dukes*[4] and *Comcast Corp. v. Behrend*.[5]

In the consumer law context, however, another line of decisions has been particularly consequential. In *AT&T Mobility LLC v. Concepcion,* the Court elevated an arbitration agreement with a class action waiver above a California doctrine holding such contracts unconscionable.[6] As a result, consumers asserting claims against their phone company were prohibited from participating in class-wide adjudication.[7]

These decisions have had significant real-world implications. Arbitration agreements have since proliferated across consumer industries as diverse as medical care, financial services and rental cars.[8] With the class action mechanism unavailable, many consumers' claims have become less valuable than the expense required to litigate them.[9] Since very few consumers elect to pursue individual arbitration, an increasing number of small consumer claims have been left unaddressed .[10]

An example from the financial services industry illustrates the scale of this problem. When the Consumer Financial Protection Bureau recently proposed a rule banning class action waivers across an array of financial services, it estimated consumers would reap an additional $342 million *per year* by regaining access to class actions.[11] It estimated plaintiffs' attorneys would earn an additional $66 million per year.[12] Thus, a relatively narrow rule covering banking accounts, credit cards and loan providers will return substantial monies to consumers and their advocates.

B. Against the Tide, Statutory Damage Class Actions Have Survived and Thrived

Since the 1960s, Congress has passed about a dozen consumer protection laws which provide consumers with private rights of action and statutory damages on a per-incident basis. Corporate defendants sued under these laws often have no contract with the aggrieved consumers, and therefore no opportunity to enforce an arbitration clause. Moreover, violations of these laws are typically uniform in character, widespread in scope and light on individual damages. As a result, they are well adapted for class certification, even under the heightened commonality and predominance requirements articulated by *Dukes* and *Comcast*.

Consider the case of a retailer who uses an automatic dialing system to solicit consumers without express prior consent as required by Telephone Consumer Protection Act (TCPA). The retailer probably has no contractual relationship with the consumers and the solicitation is probably systematic across a wide portfolio of phone numbers. For each violation, there is a penalty of $500 to $1,500.[13] Class certification is much easier in this scenario than, for example, a nationwide sex discrimination case because there are fewer individualized inquiries and the statutory damages are harmonized across the class.

Given the trends in class action jurisprudence, many commentators anticipated an expansive ruling that would curtail statutory damages class actions.

Lawsuits under these statutes represent a large and growing industry. According to WebRecon LLC, which tracks consumer litigation, the three most popular consumer protection statutes for private litigants are the Fair Debt Collection Practices Act (FDCPA), Fair Credit Reporting Act (FCRA) and the TCPA. In 2015, over 1,900 putative class actions were filed under the FDCPA, almost 900 under the TCPA, and over 600 under the FCRA.[14] The number of private litigants suing under these statutes has increased three-fold in less than a decade.[15] Despite the general trend restricting class action litigation, statutory damages consumer class actions have survived and thrived.

C. Defendants Raised the Standing Doctrine as a Fundamental Challenge to Statutory Damages Class Actions

In light of this success, the class action defense bar raised a new objection to statutory damages-only claims: that the plaintiffs cannot establish standing. This argument made it to the Supreme Court in *Spokeo, Inc. v. Robins*.[16] Given the trends in class action jurisprudence, many commentators anticipated an expansive ruling that would curtail statutory damages class actions.

The case presented a typical complaint under the Fair Credit Reporting Act. Spokeo, Inc. operates a "people search engine" where subscribers can obtain information about individuals such as contact information, criminal history, marital status, income, etc.[17] As a consumer reporting agency (CRA), Spokeo is obligated to follow "reasonable procedures to assure maximum possible accuracy" of the information it provides.[18] For willful violations of this provision, the Act provides for actual damages, as well as statutory damages ranging from $100 to $1,000 per incident.[19]

Robins sued Spokeo for misrepresenting his marital status, age, income level and educational attainment without taking reasonable measures to assure the accuracy of the information.[20] Significantly, he did not allege that he had lost an employment offer or suffered any other tangible injury as a result of the misrepresentation. Nor did he make a claim for actual damages.

In order to gain access to the federal courts, a plaintiff

must establish three elements of standing: injury-in-fact, causation and redressability.[21] Importantly, Congress may not create a cause of action absent any element — they are constitutionally mandated.[22] Spokeo honed in on the injury-in-fact element, which requires that a plaintiff "must have suffered or imminently will suffer injury—an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent."[23] It asserted that Robins failed to allege a concrete harm to a legally protected interest.[24] Rather, it suggested that he had alleged a mere technical violation of the FCRA without suffering any harm, which would be insufficient to confer standing.[25]

Spokeo's petition for a writ of *certiorari* underscored the sweeping implications of its argument. The petition names at least 16 federal statutes "likely to raise the same question," all of which include provisions of statutory damages.[26] When the Supreme Court granted *certiorari*, district courts across the country stayed statutory damages cases.[27] Given the Court's ideological composition and its recent jurisprudential trends, the case seemed to present an existential risk to statutory damages consumer class actions.[28]

D. *Spokeo, Inc. v. Robins:* The Supreme Court's Decision

The Supreme Court granted *certiorari* in *Spokeo* on April 27, 2015. Oral arguments were presented on November 2, 2015. Three months later, Justice Antonin Scalia died on a ranch in Shafter, Texas. Commentators quickly speculated about the effect of Justice Scalia's death on the *Spokeo* case.[29] He had authored each of the major class action decisions of the Roberts court, including *Walmart*, *Comcast*, *AT&T Mobility* and *Italian Colors*. He had a keen interest in standing issues and had signaled support for Spokeo's position during oral arguments.[30]

When the decision was released, advocates for both sides claimed victory. It is easy to see why: the eight-member Court did not decide the central question of whether Robins had standing.[31] Instead, it returned the case to the Ninth Circuit with an instruction to conduct a specific analysis of the "concrete harm" prong of the injury-in-fact requirement.[32]

The Court did provide guidance about the appropriate way to conduct a "concrete harm" analysis, however. This is the case's major contribution to standing jurisprudence. The method of analysis articulated by the court includes language which will be helpful for both plaintiffs and defendants in future statutory damages class actions, leaving the issue very much alive for case-by-case determinations in the lower courts.[33]

In principle, Spokeo won the case. The holding established that a "bare, procedural violation" of a statute, without more, is insufficient to satisfy the injury-in-fact requirement of standing.[34] Defendants will be emboldened by the Court's requirement that a concrete injury be "*de facto*, that is, actually exist."[35]

However, the Court also made clear that "intangible injuries can nevertheless be concrete."[36] Thus, a showing of actual damages is not required to trigger statutory damages, avoiding the worst-case scenario envisioned by the plaintiff's bar. Moreover, the Court preserved the possibility that an increased "risk of harm" could be "concrete."[37]

Now the debate will shift to where the line is drawn between "intangible," but "actually existing" harm. The Court provided two considerations to guide this analysis. First, it wrote that courts must consider the intention of Congress in enacting the statute. Second, it required courts to ask whether the harm has traditionally been redressable at law.[38]

In the context of the FCRA, the Court provided two examples of technical violations that would likely fall short of causing concrete harm. First, it suggested that the failure of a credit reporting agency to certify that its information is accurate would not suffice if, indeed, the information was accurate.[39] Second, it said it is "difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm."[40]

E. Open Questions and Emerging Answers

The Supreme Court's decision in *Spokeo* clarified the parameters of the standing doctrine and provided lower courts with important new guidance on how to conduct a "concrete harm" analysis. However, the Court declined to determine the central question of whether Robins had standing to assert his claim and its decision provided rhetorical ammunition for both sides of the docket in statutory damages class actions. As a result, I hypothesize that lower courts will reach divergent conclusions about which types of harm are sufficient to allege a "concrete harm" in these cases.

The period following the *Spokeo* decision provides a window of opportunity to analyze its impact on the lower courts. As stays were lifted on dozens of cases around the country, courts directly grappled with the decision's ambiguities and applied it across a wide variety of consumer protection contexts.

3. Empirical Analysis: *Spokeo's* Impact on Statutory Damages Consumer Claim

The Supreme Court's decision in *Spokeo, Inc. v. Robins* preserved considerable uncertainty about what types of injuries are sufficient to confer standing where no actual damages are alleged. This section presents an empirical analysis of *Spokeo's* impact on statutory damages consumer claims in federal district and circuit courts in the first ten months after the decision.

A. Impetus and Goals

The first objective of this study is to determine which consumer protection claims with statutory damages at stake have been most, and least, susceptible to defeat on the basis of a standing defense. This will be relatively simple to ascertain based on the outcome of defendants' standing arguments.

The first objective of this study is to determine which consumer protection claims with statutory damages at stake have been most, and least, susceptible to defeat on the basis of a standing defense.

The second objective is to determine what types of intangible harms have been most, and least, successful at clearing the "concrete harm" threshold. Typical examples of intangible harms include "invasion of privacy," "informational injury," "waste of time," "nuisance" and "emotional stress." Answering this question will require isolating various causes of action, mapping the potential harms which could be pled for each and comparing them to the quantitative results of the study.

The results of these inquiries should be of interest to practitioners on both sides of the docket in statutory damages class actions. They also have implications for the broader integrity of the American consumer protection regime as it has been designed by Congress.

B. Methodology

For this study, I catalogued every federal court decision published from May 16 to October 16 which cited to *Spokeo*. From this catalogue, I identified each case which raised a cause of action under one of the below-listed consumer protection stat-

utes. Each of these statutes allows statutory damages in the absence of actual damages, at least in some jurisdictions. As a result, each could be affected by a strict application of *Spokeo's* "concrete harm" requirement.

Next, I determined whether there was a holding on standing in each case. If a case went up on appeal, I used only the holding of the circuit court. This created an initial universe of 108 cases in the federal system which cited to *Spokeo* for a holding on standing in the five months after the decision. The statutes, their acronyms, and the number of cases in this universe are as follows:

- Fair Credit Reporting Act (FCRA) [25 cases]
- Fair and Accurate Credit Transactions Act (FACTA) [6 cases]
- Fair Debt Collection Practices Act (FDCPA) [27 cases]
- Telephone Consumer Protection Act (TCPA) [27 cases]
- Video Privacy Protection Act (VPPA) [2 cases]
- Driver's' Privacy Protection Act (DPPA) [5 cases]
- Electronic Communications Privacy Act (ECPA) [1 case]
- Stored Communications Act (SCA) [zero]
- Computer Fraud and Abuse Act (CFAA) [1 case]
- Electronic Funds Transfer Act (EFTA) [zero]
- Employment Retirement Income Security Act (ERISA) [1 case]
- Truth in Lending Act (TILA) [3 cases]
- Consumer Product Safety Act (CPSA) [zero]
- Real Estate Settlement Procedures Act (RESPA) [5 cases]
- Homeowner Protection Act (HOPA) [zero]
- Consumer Credit Protection Act (CCPA) [2 cases]

The vast majority of the cases falling within the scope of this survey were concentrated across three statutes: the FCRA, FDCPA and TCPA. Due to this concentration, I honed in on these statutes for a second round of data collection spanning from October 16, 2016 through March 15, 2017. This yielded an additional 114 cases wherein a holding on standing cited to the *Spokeo* decision, for a total of 193 cases across the three major statutes.

C. Empirical Results

The overarching initial trends suggest that a split is developing amongst district courts with respect to the application of *Spokeo* to FCRA suits. On the other hand, TCPA and FDCPA suits have been comparatively more insulated. The following table summarizes the number of times *Spokeo* was cited in a holding on standing for these three most frequently litigated statutes:

Time Frame: May 15, 2016 – March 15, 2017	*Spokeo* invoked and plaintiff had standing (number of cases)	*Spokeo* invoked and plaintiff lacked standing (number of cases)
FCRA	31	34
FDCPA	44	15
TCPA	53	11

i. Fair Credit Reporting Act

The FCRA was the statute at issue in *Spokeo*. It regulates the production, use and provision of credit reports. It imposes statutory damages of between $100 and $1000 for each violation.[41] Some of the most commonly litigated provisions of the FCRA include the:

- "Stand alone disclosure" requirement: employers seeking consumer reports on their current or prospective employees must provide them with a "clear and conspicuous disclosure" in a document "that consists solely of the disclosure" that such a report will be obtained for employment purposes;[42]
- "Reasonable procedures" requirement: CRAs must maintain "reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates;"[43]
- "Accurate disclosure" requirement: upon the request of a consumer, CRAs are obligated to fully and accurately disclosure the content of their file, the sources of information in the file and the persons or entities who have procured the file.[44]

Under the FCRA, I was able to identify eighty-two causes of action across the 63 cases which cited to *Spokeo* for a holding on standing. In two cases, multiple claims under the Act produced different holdings on standing.

Over one third of the causes of action captured by the survey arose under the "stand alone disclosure" requirement, making it the most frequently litigated provision by a wide margin. The empirical analysis shows an emerging trend in "stand alone disclosure" cases: the plaintiffs lacked standing by a ratio of 2:1 (twenty without standing, ten with standing).

The individual facts of the case are certainly a factor in the "stand alone disclosure" outcomes. Many of the plaintiffs without standing alleged only that extra information was included in the disclosure. This claim failed far more often than those claiming to have never received a disclosure.

The type of harm pled in "stand alone disclosure" cases did not seem affect the outcomes. Informational injury and invasion of privacy harms, the most commonly alleged by a large margin, failed at approximately the same rate as "stand alone disclosure" claims writ large. There may be some certainty on the horizon, however, as the 9th Circuit recently held that an invasion of privacy suffices as concrete harm in these cases.[45]

Tied for the second most frequent causes of action under the FCRA were "unauthorized purpose" claims under 15 U.S.C. § 1681b(f) and "inaccurate disclosure" claims under 15 U.S.C. § 1681g(a). Each of these appear relatively more insulated from standing challenges, as six of eight "unauthorized purpose" claims survived, as did seven of eight "inaccurate disclosure" claims. Invasion of privacy was the most successful harm alleged in "unauthorized purpose" claims, while risk of harm succeeded in the most "inaccurate disclosure" claims.

Seven claims asserting a failure to maintain "reasonable procedures" to ensure accuracy of consumer information in violation of 15 U.S.C § 1681e were captured in the survey. In only one case did the plaintiff lack standing. If this trend holds, Robins should find himself with standing to sue Spokeo when the 9th Circuit rules on remand. Whether this will be a nationwide trend remains to be seen, however, since four of these decisions came from the Northern District of California.

Violations of 15 U.S.C. 1681b(b)(3)(A) alleging that employers took action based on a credit report without providing a copy of the report or a disclosure of rights to the consumer also appeared seven times. Only three of these claims survived a standing challenge, suggesting potential hostility to

these claims where the harm is not apparent.

No other category of FCRA claim registered more than three appearances in the ten months since the *Spokeo* decision. As a result, it is difficult to identify even the earliest signs of a trend for these causes of action. Across the totality of claims, however, it appears that the *Spokeo* decision will present a challenge to plaintiffs asserting statutory damage-only claims under the FCRA. This particularly true with regard to "stand alone disclosure" claims.

ii. Telephone Consumer Protection Act

The TCPA regulates commercial solicitations conducted via telephone, text message and fax. It provides for $500 in statutory damages per violation and $1500 in statutory damages per willful violation.[46] The vast majority of litigation under the act arises from one of the two following requirements:

- Automated Telephonic Dialing Systems: Prior express consent is required for any commercial solicitation made via call or text via an auto-dialing system or using a prerecorded message;[47]
- Junk Fax Prevention Act: Unsolicited advertisements may not be sent to fax machines.[48]

Unlike FCRA claims, *Spokeo* has had only a limited effect on TCPA claims. Of the sixty-nine TCPA claims falling within the scope of the study, only fifteen failed on standing grounds. A closer examination further reveals the weakness of a standing defense in the TCPA context. Several of the unsuccessful claims involved remarkably weak facts. One centered on a professional plaintiff who entrapped companies into accidentally calling her cell phone for the purpose of filing TCPA complaints.[49] Another involved an advertisement consisting of a single line of text on an otherwise solicited fax.[50] At least two featured poorly pled complaints which failed to advance any theory of "concrete harm."[51]

Several other cases failed on the basis of a particular legal theory regarding automated dialer claims. This theory is probably best articulated in *Romero v. Dep't Stores Nat'l Bank*, where the court reasons that the alleged harms (invasion of privacy and nuisance) would have been the same if the calls had been manually dialed.[52] It cites to the language in *Spokeo* that a "bare procedural violation, divorced from any concrete harm, [does not] satisfy the injury-in-fact requirement" to find that the plaintiff lacked standing.[53] For the time being, only a small minority of district courts have taken this view.

In terms of alleging a concrete harm, pleading an invasion of privacy seems to reliably satisfy the requirement (thirty-four out of thirty-seven cases where the plaintiff had standing). This makes sense, since "invasion of privacy" is both a common law cause of action and reflects the Congressional rationale for statute. "Waste of time" was also generally successful -- it was deemed a concrete harm in fifteen of the eighteen cases where it appeared.

These results suggest that the *Spokeo* decision will not present an obstacle to many TCPA claims cases, but the line of argument advanced in *Romero* has the potential to develop into a wider challenge.

iii. Fair Debt Collection Practices Act

The FDCPA regulates how debt collectors interact with consumers. It generally applies only to third party debt collectors, not internal collectors for an original creditor. It imposes statutory damages of $1,000 per violation.[54] Its most frequently litigated provisions:

- Prohibit repeated calls with an intent to harass any person;[55]
- Prohibit false or misleading representations;[56]
- Require the collector to notify consumers of their right to dispute a debt within 30 days of initiating communication with the consumer;[57]
- Prohibit the collector from sending any communication which "overshadows," or contradicts, the information required in the initial communication notice.[58]

FDCPA claims in the ten months following the *Spokeo* decision have survived standing challenges at about the same rate as TCPA claims. Among eighty causes of action, only eighteen failed for lack of standing. This is a somewhat surprising result, given the many provisions of the FDCPA which can convey liability and their often informational nature.

In every category of FDCPA claim, plaintiffs had standing more often than they lacked standing, with the sole exception of "overshadowing" claims based on 15 U.S.C. § 1692g. These claims essentially assert that a debt collector "overshadowed" a consumer's thirty day window to dispute a debt by threatening adverse action earlier. These claims failed on standing grounds three out of four times, suggesting that they are the most susceptible to a standing defense.

Finally, the FDCPA decisions took significantly less care to identify a specific concrete harm than those addressing TCPA or FCRA claims. It appears courts are applying the *Spokeo* analysis less rigorously in FDCPA suits, which may provide grounds for appeal by defendants. Seventeen of the sixty-two FDCPA decisions finding standing did not cite a specific concrete harm or refer to a precedential case that did. By contrast, only five of the thirty-one FCRA cases with standing failed to cite a specific concrete harm. In TCPA cases, only four of fifty-three cases with standing failed to cite a specific concrete harm.

4. Rationalizing *Spokeo* within the Private Enforcement Regime of Consumer Protection Law

A. Introducing the Private Enforcement Consumer Protection Regime

Consumer protection laws in the United States are enforced largely through a regime of private litigation. This regime can be divided into two categories: statutory damages class actions and state-level Deceptive Trade Practices Act litigation.[59] We know legislators intended to create such a regime by their inclusion of private rights of action in these statutes. These rights essentially create a regulatory "market" for the enforcement of consumer protection laws in the United States.

In the absence of a private enforcement regime, there would be minimal enforcement of consumer protection law, as things stand today. There are potential alternatives, however. For example, public sector consumer protection in Europe is dramatically higher than in the United States, while private litigation is less frequently available.[60] A robust non-profit consumer protection community could also be a substitute for private sector enforcement, but the ban on class action litigation for federally funded legal services has effectively neutralized that alternative, at least for the time being.[61]

In the absence of a private enforcement regime, there would be minimal enforcement of consumer protection law, as things stand today.

One fundamental challenge of building a private enforcement regime revolves around inducing attorney participa-

tion. Without such participation, the statutory rights of consumers would be largely precatory. In cases where actual damages are small but insufficient to finance the cost of litigation, the class action tool makes the claims economically efficient. However, where unlawful conduct does not result in actual damages, as is often the case under the statutes discussed above, an additional element is required to bring private attorneys into the courthouse.

Statutory damages can fill that gap by effectively transforming no-damages claims into small-damages claims which are efficient in the class action context. Some commentators have suggested, however, that statutory damages over-incentivize private sector participation in the consumer protection regime.[62] Under this theory, statutory damages encourage frivolous suits seeking huge statutory penalties where no harm was actually inflicted -- all for the purpose of enriching plaintiffs' attorneys.[63]

This section advances an argument that even a liberal application of *Spokeo*'s "concrete harm" analysis would be sufficient to limit frivolous statutory damages consumer class actions. Such an application has the added advantage of preserving the incentive-generating effect of statutory damages class actions which bring private attorneys into the consumer protection regime. It also strikes a better balance with regard to separation of powers concerns by recognizing the Congressional prerogative to provide remedies for intangible injuries.

B. Attorney Incentives in the Private Enforcement Regime

Many consumer protection statutes include provisions authorizing attorneys' fees for a prevailing party.[64] This raises a question: are class actions really essential to incentivizing attorney participation when statutory attorneys' fees are available? At the very least, it appears that the class action device provides a greater incentive for attorneys to participate. This likely translates into higher caliber lawyers taking consumer protection cases and more competition for plaintiffs seeking representation. Concerns about over-incentivization in the statutory damages context are addressed in the next subsection.

Sole reliance on attorneys' fee provisions would reduce the incentives which currently bring attorneys into the private enforcement regime, not least by raising the disincentives. A key reason for this is that attorneys' fees provisions often require a party to "prevail" or be "successful" before fees can be awarded.[65] According to Supreme Court precedent, a "prevailing party" exists only where there is a judgement on the merits or a court ordered consent decree.[66] Thus, many settlements do not enable counsel to claim statutory attorneys' fees. Moreover, if a plaintiff loses on the merits, her counsel may be obligated to pay the defendant's fees and costs.[67]

Even if a plaintiff prevails on the merits, her attorney's award will be less under statutory attorneys' fees than under the class action mechanism. The Supreme Court has said that attorney compensation under an attorneys' fees provision should be determined via the lodestar method.[68] It has further held that a strong presumption against lodestar multipliers applies to attorneys' fees statutes.[69] However, plaintiffs' lawyers are able to escape these strictures by entering into a class action settlement where there is no "prevailing party."[70]

A class action settlement frees the district court to apply multipliers to the lodestar amount or to determine attorney compensation based upon a percentage of the common fund. According to a recent study, the lodestar method was applied in 29% of consumer class action settlements and 45% of debt collection settlements.[71] The median multipliers were 1.13 and .66, respectively.[72] This represents a 113% and 66% increase in attorney compensation over the pure lodestar approach that would be used under an attorneys' fees provision.

The remaining settlements applied the percentage of the common fund method, which generally provides higher returns than the lodestar method.[73] Thus, it is clear that the class action mechanism provides stronger incentives than statutory attorney's fees to induce lawyer participation in the private enforcement of consumer protection laws.

Finally, some consumer protection statutes do not even include an attorneys' fees provision; the TCPA is a notable example. In these cases, Rule 23's provision permitting recovery of attorneys' fees and costs in class actions is absolutely essential to the creation of an economically viable litigation landscape.[74]

C. "Concrete Harm" as a Limitation on Frivolous Claims

Strong financial incentives to participate in class actions inevitably give rise to concerns about encouraging litigation that has the effect of extorting corporate defendants into entering unwarranted settlements.[75] In the statutory damages context, this concern may be particularly acute due to the strict liability nature of the financial penalties.[76] However, even a liberal application of the "concrete harm" requirement would effectively filter out class actions which seek to frivolously take advantage of statutory damages. A liberal approach would also preserve the incentives for private attorneys to participate in the private enforcement of consumer protection law and, crucially, protect the power of Congress to regulate intangible harms.

The Supreme Court's decision in *Spokeo* articulated a new methodology. Courts should conduct their analysis of "concrete harm," but provided little guidance on how courts should draw the line in a close case. Here, I propose that "concrete harm" should be interpreted as merely a procedural backstop for ensuring that litigation arising under a statutory violation is aligned with Congress's rationale for enacting the statute. This should address the concern about frivolous statutory damages claims, as long as "frivolous" is conceptualized from the perspective of the legislation-enacting Congress. The Supreme Court's instruction that lower courts should consider the intention of Congress when conducting their analysis suggests this is an appropriate conceptualization.

Given the availability of "risk of harm" as a concrete injury, this proposal would represent a liberal interpretation of *Spokeo*. For example, it would permit a finding of "concrete harm" in the *Gubala* case, because Congress's intent in enacting the CCPA was to reduce the risk of identity theft. There, the plaintiff could successfully argue that any retention of personal information beyond the statutorily limited period increased the risk of identity theft and therefore confers a "concrete harm." This also makes sense intuitively: why would Congress have enacted the limitation otherwise?

This interpretation would not be a blank check for plaintiffs, however. An example illustrates the type of limitation that would remain: the FACTA prohibits vendors from publishing receipts which display "more than the last 5 digits of the [credit] card number or the expiration date." Under the language of the statute, a receipt which publishes only the *first* five digits would technically be illegal. Without any "concrete harm" limitation, that consumer would be eligible for $100 to $1,000 in statutory damages.

However, under my interpretation the court would have to investigate whether this technically illegal conduct increased the risk of harm that Congress sought to prevent. We know that Congress sought to reduce the risk of identity theft by enacting the FACTA. Thus, the relevant question would become: does printing the first five digits of a credit card instead of the last five digits increase the risk of identity theft? If not, then there would be no "concrete harm" and no standing to bring the claim.

This interpretation is faithful to the standing analysis established by *Lujan*. It is also consistent with the examples provided by the Supreme Court in *Spokeo* where they noted that it was

The Supreme Court's "concrete harm" analysis in *Spokeo* should be interpreted to knock out marginal claims that do not reflect the goals of Congress in enacting these statutes.

difficult to imagine an increased risk of harm. However, it has the advantages of preventing judicial overreach into the legislative prerogatives of the United States Congress and preserving the incentives for private attorney participation in the consumer protection regime.

5. Conclusion

There are good reasons why Congress would chose to impose liability for intangible harms such as invasion of privacy, informational injury and exposure to a risk of harm. Statutory damages class actions incentivize private attorneys to take up these cases and enforce consumer's substantive rights. Yet, this system is not without the potential for abuse, as some of the cases discussed above make clear.

The Supreme Court's "concrete harm" analysis in *Spokeo* should be interpreted to knock out marginal claims that do not reflect the goals of Congress in enacting these statutes. It should not be construed any more broadly, however, since Congress needs the ability to provide remedies for non-tangible harms in order to effectively legislate in the consumer protection arena.

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4 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541 (2011).
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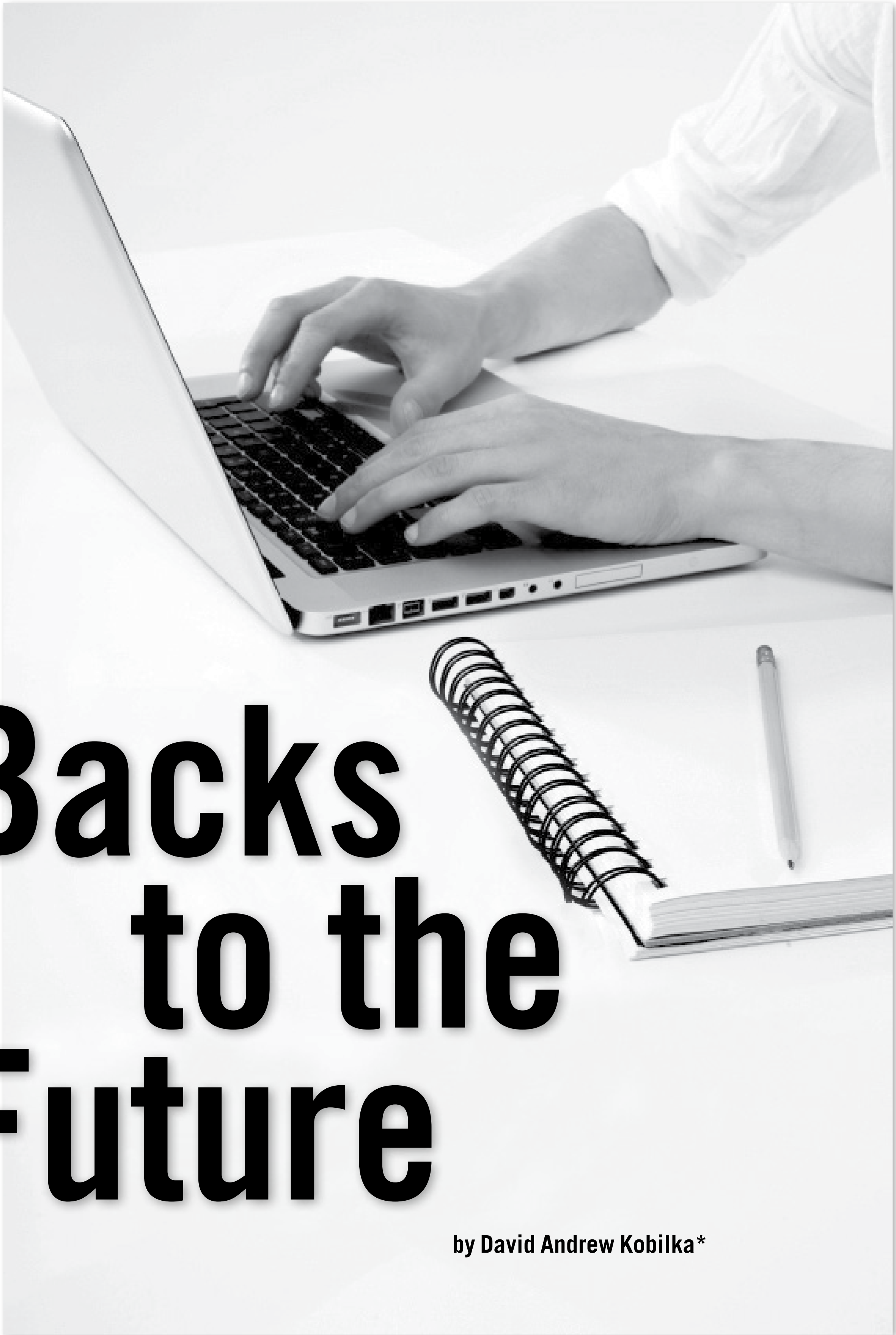


Backs to the Future

by David Andrew Kobilka*

How the Legal Profession Has Ignored the Malpractice Gap Created by Technology

I. Introduction

The year is 2035. Betty Bracket is a tax lawyer who believes she has invested wisely, and at the end of the year she is planning on retiring. Unfortunately, right before Thanksgiving she receives notice that she is part of an injured class of plaintiffs, all of whom have been scammed by the same hedge fund manager, Ernie Nadoff. Her life savings has been stolen. Betty wants to find out what her individual rights are, but she is virtually broke. A friend tells her about an affordable solo practitioner who works with a robotic legal assistant, ROBB, designed by a major software corporation. Betty retains the solo practitioner and asks him to represent her in the proceedings to try to get her the biggest recovery possible. After New Year's, she finds out that Ernie Nadoff has settled with the class of plaintiffs for nearly 75% of the principal lost. She is ecstatic that she will be able to recover such a huge chunk of her savings, and grinning ear to ear Betty calls her lawyer to see when she will have her award. However, when her lawyer picks up the 3-D video phone, he clearly does not share her jubilance. He tells Betty to come by his home office and that he has some bad news.

When Betty arrives she finds her lawyer in a cold sweat, sitting slouched behind his desk. His robotic assistant, ROBB, sits on the corner of his desk. Betty's lawyer informs her that because ROBB did not file her complaint in time, she was not certified as a part of the class and she has now lost substantial bargaining power with the company if she intends to try to recover on her own. "I swear I input all the dates and information correctly Ms. Bracket," he stammers, "It must be some kind of glitch in the software." A quick look around Betty's solo practitioner's office tells her that suing him for malpractice will not enable her to recover anywhere close to the amount of money she lost to Ernie Nadoff. It appears the attorney virtually broke as well, there is no point in suing him for malpractice. Then Betty focuses on ROBB, standing on the corner of his desk. ROBB was designed and coded by a major software corporation, and surely lawyers were involved to make ROBB think like a lawyer. ROBB's designer or manufacturer might not be as insolvent as his owner. Betty's mind begins to race as she considers her possible sources of recovery. Perhaps, instead of suing her lawyer for legal malpractice Betty could sue the software company.

As technology continues to permeate the legal industry, malpractice liability must be extended to all technology companies engaged in the practice of law, or that create products that autonomously engage in the practice of law. This article begins by illustrating the current definitions of the practice of law and legal malpractice. Subsequently, this article names technology companies as actors practicing in the legal community; actors held to a different standard of negligence than practicing human attorneys. This illustration reveals a gap in legal malpractice coverage that exposes consumers to potential negligent legal services from technology companies and their products. This article goes on to analyze the nature of the malpractice gap, specifically the advantages that have allowed it to continue and the disadvantages that should lead to its end. This article concludes by focusing on where technology is driving change in the practice of law and the specific risks that still propel the widening malpractice gap. Finally, the conclusion predicts what the legal market of the future will look like and how to protect consumers of legal services.

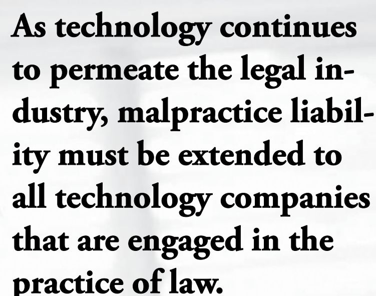
II. Background

A. We're Talking About Practice, Not a Game.

In order to later illustrate how technology has created a constantly growing malpractice gap, this article first discusses how it is possible for technology to practice law. This requires a solid understanding of what exactly it means to "practice" law. The rule in the vast majority of jurisdictions is that any service beyond simply providing a legal consumer with fill-in-the-blank documents is the "practice" of law.[1] For example, paralegals in Michigan and Texas have been held liable for the unauthorized practice of law for helping a debtor fill out bankruptcy forms, and a litany of other states have held that assisting consumers in the preparation of legal documents equals the practice of law.[2] In Texas, "practice of law" is defined as:

> "the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined."[3]

This statute left technology capable of preparing a legal document in a gray area until 1999, when The Unauthorized Practice of Law Committee alleged that Parsons Technology was practicing law in



Texas.[4] Parsons Technology is the parent company of the popular "Quickens" software as well as "TurboTax," and was alleged to have been practicing law in connection with its software called "Quicken Family Lawyer '99.[5] Quicken Family Lawyer offered over 100 different legal forms along with instructions, and a claim that all forms were "reviewed by expert attorneys."[6] The case was brought to the Fifth Circuit, where the court vacated the case because, as the court stated, "Subsequent to the filing of this appeal … the Texas Legislature enacted an amendment to § 81.101 providing that "the 'practice of law' does not include … computer software, or similar products.[7] The court interpreted the software in the amendment to be referring to the same form of interactive legal service form that Quicken had created for legal consumers.[8] However, simply because legal technology providers escaped unauthorized practice of law board discipline does not mean they can, nor should, escape the definition of practicing law from a client's perspective. After all, legal consumers rely on the effectiveness of legal technology providers in the same way they rely on human lawyers. If legal technology providers are allowed to practice law in the same form into the future, the clear danger exists that the person providing service on the other end isn't a licensed attorney, even though they might represent themselves as such. Therefore, legal ethics board regulation in some form is required from the states. Exactly how and what technology is engaged in the practice of law is further explored below.

Although courtrooms have not changed physically in hundreds of years, technology has influenced research, evidence, and the way records are kept.

B. The Alpha and the Omega of Legal Malpractice

To illustrate the malpractice gap in the greatest detail possible, it is first necessary to explore what exactly legal malpractice is. Legal malpractice is largely a creature of negligence law,[9] with elements of contract law wedged in between.[10] To prove malpractice, a client must show: (1) an attorney client relationship creating a duty; (2) the attorney breached that duty; (3) the breach proximately caused damage to the client; and (4) the client sustained actual damage."[11] The duty element is created as a matter of law through the attorney client relationship.[12]

Attorneys need not form a traditional attorney client relationship to be liable for malpractice.[13] The Attorney client relationship is contractual in nature, and can therefore be express or implied.[14] Practitioners can be liable to prospective clients whom they never even formally agreed to represent.[15] For example, in Minnesota attorneys can be held liable for legal malpractice as long as the non-client was the intended beneficiary of the legal service. Law firms can be vicariously liable for the actions of their partners.[16]

The standard for legal malpractice is whether the behavior of the attorney in question demonstrated a degree of skill, care and knowledge exercised by attorneys in similar circumstances.[17] This standard is modified by the localities in which the lawyer practices in.[18] The high incidence of malpractice lawsuits has led most lawyers to acquire malpractice insurance, with Oregon going as far as requiring lawyers to obtain it.[19] Clearly, many separate parties can be held liable for the same instance of malpractice. This has been made especially clear with the codification of comparative fault statutes in the majority of jurisdictions.[20] Further, it is clear that the incidence and costs of alleged malpractice is high.[21] In some cases, third parties in privity with clients also can hold lawyers liable for malpractice.[22] All of these factors combined to create a legal market in which human lawyers must be extremely wary of malpractice liability or risk extensive damages.

C. The Intersection of Technology and Law

The legal field has been inundated in many ways by technology. Although courtrooms have not changed physically in hundreds of years, technology has influenced research, evidence, and the way records are kept. PowerPoint presentations, computer animation and graphics are regularly employed by litigators to serve as demonstrative evidence. Stenographers employ a keyboard, and most judges have computers on their benches. Westlaw and Lexis have revolutionized the way legal professionals do research, and computers have likewise revolutionized the way legal records are kept and documents are created, making sorting through heaps of data much more efficient.

Unlike those who hold themselves out as providing legal services, the general standard of care traditionally associated with providers of tech-based legal services is the behavior of the reasonable prudent technology company in the same or similar circumstances.[23] This standard falls short of the standard observed by legal professionals – that of a reasonable prudent attorney in the same or similar circumstances – for a number of reasons, most stemming from the lawyer's fiduciary duty to their client, which the technology companies do not share.[24] In order to understand how the technology malpractice gap will widen, it is necessary to first understand what the technological malpractice gap looks like today.

The advent of the Internet changed nearly every type of business, and the law firm is no exception. The growth of what is known as "the virtual law firm" has brought significant advantages to consumers, most importantly, this innovation has enhanced accessibility to legal counsel.[25] A virtual law firm is one where as much of the contact as possible takes place through "confidential" portals on the Internet.[26] Lawyers and clients allegedly have the ability to discuss legal matters securely, download and upload documents for review, create legal documents and handle other business transactions without coming face to face with a lawyer.[27]

There are advantages for lawyers who chose to follow the virtual path as well. Practitioners of virtual law firms have the ability to reach many more clients across jurisdictions without spending money on advertising or overhead. These savings can be passed onto clients in the form of enhanced legal support staff or by simply charging less for their legal services. Alternatively, these savings can be translated into higher profits for the law firm, making smaller firms more competitive with the older more established law firms. The virtual law firm has the has the potential to be the great equalizer between big law and the smaller boutique law firms.

There are also significant risks associated with the virtual law firm. First and foremost, the threat of data breach via hacking threatens the bedrock of the attorney client relationship: confidentiality. Additionally, legal consumer's financial data could be threatened as a result of a data breach that could occur in the virtual law firm. One need only watch the news over the past few years to see that data breach and loss of consumers' personal information via hacking is a serious issue facing some of the world's largest corporations.[28] Additionally, a risk of malpractice is created in the virtual law firm when lawyers do not realize they have fallen into a prospective client trap. A prototypical example of this trap is not informing the prospective client of an upcoming statute of limitations, even though they

have made clear they do not wish to represent the client.[29]

The dangers of the virtual law firm are clear, and should be weighed against the advantages in a reasonable manner. It is unwise to abandon the virtual law firm altogether simply because it creates fertile ground for legal malpractice, because of its ability to close the "justice gap." The justice gap is the number of American's who are in need of legal services, but cannot access an attorney for various reasons.[30] With strong malpractice regulations and legal ethics board oversight, the virtual law firm could contribute to the future legal community in a responsible way. The virtual law firm has the ability to make legal services more competitive, and gives the legal system a fantastic tool to close the so called justice gap,[31] by delivering legal services directly to someone's personal computer, although more advanced tools already exist.[32]

However, the line between the virtual law firm and a technology company is blurred when firms claim only to be providing documents for legal self-help, rather than legal services. One such company that is well known is Robert Shapiro's LegalZoom. LegalZoom is careful to make the disclaimer that they are not a substitute for a lawyer.[33] However, because the required disclaimer is made does not mean they are not engaged in the practice of law. Further, LegalZoom has settled numerous cases out of court, successfully avoiding being declared as practicing law. All this, despite the fact that their Google advertisement states that they provide "legal advice."[34] In order to create a legal document, LegalZoom makes the consumer answer a series of watered down, easy to understand questions and uses the answers to generate a "functioning" legal document.[35] Facially it seems as though LegalZoom is engaged in the practice of law.

As part of its agreement, LegalZoom requires the consumer agree to arbitrate any claims in accordance with LegalZoom's terms of service.[36] This may explain why there have not been many cases that have made it into court rooms alleging LegalZoom committed UPL or malpractice. (Although it is worth noting that states could still bring UPL suits and would not be compelled to arbitrate.) Simply because LegalZoom has found a way to keep its legal issues off the record, however, does not mean it should avoid malpractice liability.[37] As it stands, it is held to the standard of a reasonable prudent technology company, imputing a less stringent standard to govern their activity in the legal market.[38] The consequences of this double standard are explored further below. The reality of the situation is that LegalZoom and similar companies that provide more than just fill-in-the-blank legal documents, but are not held to the same standard of a practitioner of law, create a risk of unrecoverable damages for consumers who seek such services. They escape state legal ethics board oversight. Further, the class of consumers that would seek this type of legal service are likely the most vulnerable to be the subjects of malpractice.[39]

These malpractice damages are not merely hypothetical. Additionally, it appears that LegalZoom and similar companies recognize the damage their defective, one size fits all approach to legal services can cause.[40] Why else, for instance, would they employ lawyers to "review your documents for errors" if they weren't aware that errors could occur?[41] Moreover, in LegalZoom's business prospectus, they tell investors that "complex, changing laws" and the risk of "unauthorized practice of law" are amongst its chief concerns.[42] Also, one California plaintiff claimed that defective incorporation documents had caused him significant issues with his café.[43] Several other plaintiffs had issues with defective wills.[44] However, in each case, LegalZoom settled with the class rather than litigate on the merits.[45] LegalZoom's advertisements do little to alleviate the ambiguity their service creates. "Just answer a few simple questions and LegalZoom takes over. You get a quality legal document filed for you by real helpful people."[46] Another advertisement stated "You can complete our online questions in minutes. Then we'll prepare your legal documents and deliver them to you directly."[47] Although LeaglZoom goes on in every advertisement to disclaim that they are not a law firm, the average legal consumer would probably not see that disclaimer as significant, much less that they were waiving any claims to legal malpractice if LegalZoom's document preparation is negligent.[48] It is likely that many users of LegalZoom would understand this disclaimer to mean simply that LegalZoom was a machine, and no humans would be involved. A lawyer cannot under any circumstances contract his or her way out of competently representing someone,[49] but a technology company can contract its way out of nearly anything,[50] save the DTPA and warranties in certain cases. It is also worthy to note, that such a disclaimer may not be effective if the disclaiming party subsequently creates an implied attorney client relationship by performing legal services.[51]

What's more, LegalZoom has now taken to aggressively advertising legal advice packages to consumers.[52] If the treatment of LegalZoom was imputed on lawyers, an attorney wouldn't be liable for giving legal advice, as long as he claimed that he was not actually giving legal advice. This is illustrative of the discrepancy that is created by the false classification of LegalZoom and other quasi legal service providers. LegalZoom has argued if they are practicing law then so also is every form book in every library that provides legal consumers with self-help forms. [53] However, the line is crossed into practicing law when LegalZoom creates the legal forms or helps consumers fill them in.[54] In the same way the paralegals were practicing law when they helped the debtors fill out their bankruptcy forms,[55] LegalZoom is practicing law by nearly every states' definition.[56] A few cases have made it out of the woodwork to challenge LegalZoom's practices and their arbitration clause, including cases in Missouri, [57] California,[58] and North Carolina,[59] and Arkansas.[60] While most courts have been dismissed, sent to arbitration or settled, at least one court has found that LegalZoom is engaged in the unauthorized practicing law.[61]

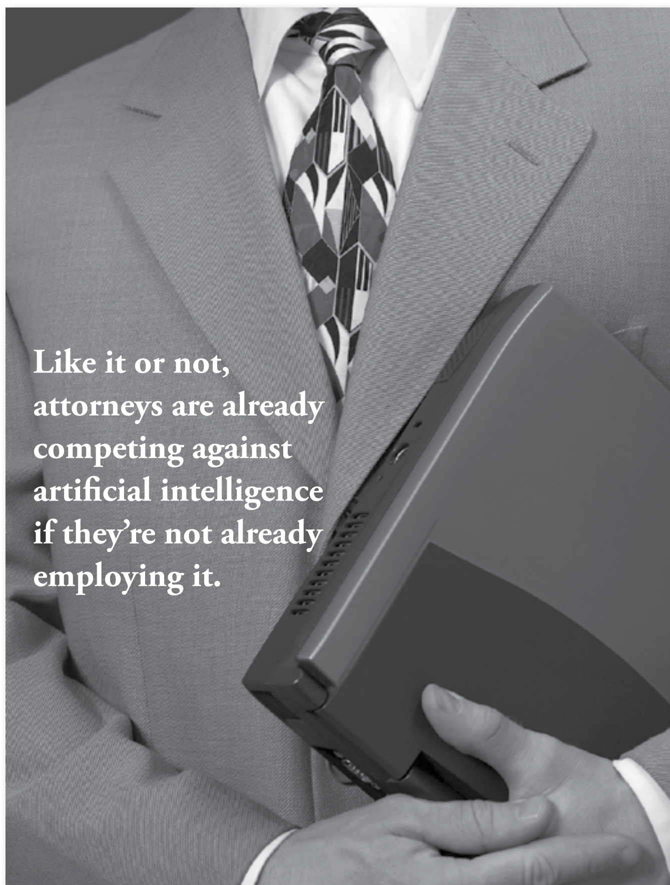
Regardless of the disposition, the cases do exist. However, it is only fair to note that the vast majority of LegalZoom consumers seem to be satisfied. What's more, LegalZoom provides affordable, efficient legal services at a level that is comparable to no other virtual law firm. However, it is of the utmost importance that they are treated like just that; a law firm. They are, for lack of a better metaphor, the Wal-Mart of virtual law firms. But, like Wal-Mart, they appear to be regulated differently than the average mom and pop shop.[62]

A contributing factor to the discrepancy in regulation that can be described as the malpractice gap, is the rapidity of the changes that occur in the technological realm, compared to the methodical changes of the laws that regulate legal technological actors. Richard Susskind, IT adviser to the Lord Chief Justice of England and Wales and emeritus professor of law at London's Gresham College was among the first to see the technological tidal wave that is on the legal horizon.[63] In 2009, Susskind predicted that law firms would be forced by internet savvy clients to replace many of their high profit, individualized services with standardized, commoditized legal work products.[64] LegalZoom was amongst the first to fulfill his prediction, but LegalZoom is only the tip of the iceberg. "Already, algorithms that can break down legal experts' knowledge into automated decision trees are being employed in high-volume tasks in debt collection, residential conveyancing, and some routine personal injury cases,"[65] Susskind wrote in 1998. The only difference in the reality in 2017 and Susskind's 2009 prediction is that LegalZoom is not held to the legal standard of a "law firm" per their disclaimer of any attorney client relationship.[66]

Advances in computing over the past twenty years have made those algorithms more important to the legal world than perhaps even Susskind could have imagined. They were brought to the attention of the mainstream public in 2011 when IBM's Watson, a supercomputer that responds in plain English to plain English inquiries, won the first place million dollar prize on *Jeopardy!*[67] Even more impressive, Watson won while it was not connected to the Internet, simply relying on what its creators had already programmed into its four terabytes of data storage.[68] Today, Watson works on a variety of topics important to humanity, including diagnosing and helping create treatment plans for lung cancer patients,[69] and working for H&R Block preparing taxes.[70]

i. Research Behind the Curtain

Several spin-offs of Watson have been created using the same codes and algorithms. Chief amongst this class of Watson spin-offs is ROSS, Watson's brother who is totally devoted to pursuing solutions to legal issues.[71] Like Watson, ROSS answers plain English inquiries in plain English, essentially doing a lawyers research for them.[72] Like LegalZoom, ROSS has crossed over the line into practicing law. It is capable of replacing a practicing lawyer because it autonomously performs legal research.[73] As one Ethics committee stated in the 1960s, while responding to an inquiry about computer retrieval of legal data that "legal research and brief writing are the very foundation of the practice of law."[74] If ROSS makes a mistake, it is ultimately the client who will suffer. The possibility of ROSS making a mistake is not a hypothetical. Artificially intelligent machines learn from mistakes, similar to humans. For instance, when Watson first tried to play *Jeopardy!* it was a terrible player.[75] It took countless hours of hard work for Watson and its programmers to learn how to associate the words in the question with their cultural connotation,[76] and even after, Watson was capable of answering a question incorrectly. Surely then, as its little brother ROSS navigates its way through the infinitely unique challenges of the American legal waters, it will likely make similar mistakes along the way. To phrase this idea differently, it is likely that ROSS will have growing pains similar to Watson's experience learning to play *Jeopardy!*[77]


Like it or not, attorneys are already competing against artificial intelligence if they're not already employing it.

However, the client's standard to impute negligence on ROSS and LegalZoom remains lower than the standard required to impute negligence on the lawyer's employ ROSS's services. This discrepancy exists because LegalZoom and ROSS are both allegedly providing products, not legal services at all. Also similar to LegalZoom, injury to clients caused by ROSS is not farfetched. The work of many lawyers is quickly being relegated into mechanical claws of technology. Already, many law students and young associates have been trained almost exclusively to research on the Internet. The art of library research has all but gone extinct. What's more, many students detest Boolean search engines, preferring instead to phrase their queries in plain English.[78] ROSS takes the next logical step, allowing for a plain English inquiry, and instead of a page with a list of cases and statutory sources appearing for the researcher to sift through, the response is given quickly, and in plain English.[79] ROSS, like Watson does this based on algorithms, which are in this context a set of rules the machine will follow with a given set of facts.[80] Basic algorithms are what Netflix uses to predict what shows a consumer might like but have not watched.[81] These algorithms play a crucial role in natural language search engines, and ROSS is no different.[82] Algorithms shape how ROSS interprets the information it is receiving, putting emphasis on certain words or perhaps adding certain words to produce a search with the desired results.[83] How the algorithm and the machine behave and learns is left to the devices of the programmer.[84] This research behind the curtain creates an environment that not only encourages lazy lawyering by outsourcing research completely, it creates an environment where an autonomous research system may make a mistake, and the lawyer and client may not realize until it is too late, and damage to the client has already occurred.

ii. The Commodification of Legal Services

Technology that mirrors the efficiency of ROSS has been around for much longer than the average observer of the legal market probably realizes. In the late 1980s, Richard Susskind and a team of scientists developed what they deemed an "Expert System," to track when statutes of limitations had run on cases.[85] While this facially seems like a very mundane task, it involves the interplay of obscure statutes and common law, and can be very nuanced depending on the fact pattern presented. After years of testing, the lawyers who had been using Susskind's first Expert System reported that the floppy disks were outperforming them unambiguously on a daily basis.[86] Further, they're average research time was reduced from 10 hours to 10 minutes.[87] With ROSS, the research of applicable points of law, a critical component in the practice of any field of law has effectively been outsourced to a machine. Cofounder and CEO of ROSS Technologies Andrew Arruda made clear in his whitepaper "Artificial Intelligence Systems in the Law" that Artificially Intelligent practice of law is already prevalent in every major American jurisdiction, and he believes the technological share of the legal market will only grow in the future.[88] Andrew Arruda is a former Canadian litigator who later worked in the Canadian Department of Foreign Affairs.[89] Like it or not, attorneys are already competing against artificial intelligence if they're not already employing it.

ROSS Technologies was inspired by a University of Texas computer science student who witnessed his parents' divorce, and his moms struggles to pay for a lawyer.[90] This former computer science student, named Jimoh Ovbiagele, saw legal research as the biggest driver of cost and impediment to efficiency in the

practice of law.[91] "Lawyers are drowning in this sea of data that they can't necessarily use," says Andrew Arruda, CEO of ROSS Intelligence, "and [they have questions] they desperately need to find answers to."[92] However, what Arruda and Ovbiagele have created is a machine that practices legal research entirely autonomously. All the human being has to do is input the facts at issue.[93] Because the actor itself cannot be held liable in the legal market, it is most equitable to hold the people and legal persons who created it responsible. Those people and legal persons, in the case of ROSS, is its corporate form itself.

These technological advances have provided such significant advantages to legal consumers that they cannot be simply dismissed altogether as a negative actor in the legal community. Legal services are becoming significantly cheaper, faster, and more accessible but the justice gap still exists.[94] In short, for the average consumer the legal market is becoming exponentially more efficient, but there is still work to be done. The disadvantage consumers face in the rapidly changing legal market stems from what Susskind refers to as "the commodification of legal services."[95] Susskind frames this commodification on a spectrum starting with "tailor-made services," i.e. highly customized legal services, moving towards total commodification through phases he calls "standardized," "systemized," and "packaged,"[96] each subsequent section presenting a greater potential for malpractice because of the lack of customization for each client.

However, there are a few things to note about Susskind's theory, namely, that some legal services cannot be commoditized under his spectrum. For example, the skill of a trial lawyer is unique, and will likely never move out of Susskind's tailor made level. However, many other legal services such as tax preparation, document creation and simple business organization have already become completely commoditized as Susskind suggested, and many of the services are offered on LegalZoom.[97] Most if not all form driven areas of law are available via LegalZoom's online services. ROSS, a fully integrated research system, fits well into Susskind's systemized category, pulling legal research done mainly on Lexis, Westlaw or Bloomberg out of the standardized category.

As discussed below, the commodification of legal services through technology creates a significant risk of malpractice. At the present time, this is a risk that if materializes into injury, plaintiffs lack a rightful course of redress.

III. Analysis

A. The Malpractice Gap

The year is 2016. Betty Bracket is a young tax lawyer and the youngest of three siblings, all of whom recently lost their parents in a car accident caused by an autonomously driven Tesla.[98] Her parents owned a large parcel of land in Southern California called Crackacre, that Betty assumed would have appreciated in value significantly since their parents acquired it in the early1960s. All of the children knew it was their parents' intent to divide all of their inheritance equally amongst the four children, and to the extent that the assets couldn't be divided in kind, to divide the rest equally by sale. Betty was the youngest, but she believed she was the closet of all of her siblings with her mother, who had informed her before their untimely death that they kept their will in the safe.

A few weeks after the funeral, the siblings headed to Crackacre with a probate lawyer that Betty hired to help administer the estate named Carlos Corpus. Betty led the siblings to the safe where she knew she would find the will. She input her father's password for everything, his birthday, opened the safe and pulled out the envelope. Her heart thumped in her chest as she opened it. Her eyes welled with tears, and for a second she could not look at the page that was in her hand as she remembered her mother's voice. After a hard swallow, a few deep breaths, and some encouragement from her siblings she pulled the will away from her chest and began to scan over it. It read in part:

> "Upon the death of the last remaining spouse, 100% of our estate shall be left to our son Vincent. Vincent will be the executor, in charge of administering any gifts of the estate."

Again, Betty's heart began thumping in her chest, this time accompanied by a terrible sinking feeling. It had been a few years since she took Trusts and Wills, but she knew that this wording would not function to serve what she and her siblings understood as their parents' wishes. She knew immediately something must have gone wrong when the lawyer was drafting it, so she scanned the papers for that attorney's name, hoping that somehow she could reach him to clear up this matter. There must have been a more recent will, she hoped. To her dismay, all that she found was a logo in the top right corner of the document for an online legal service provider, LegalBoom. She reluctantly handed the will to Carlos, who informed the siblings of the nature of the wording, and what it meant for all of them.

"It appears, as worded, that your parents have given Vincent everything, and made him the executor in charge of administering any gifts of the estate." Carlos said.

Caroline and David could not believe the situation that had transpired, and both immediately said they were willing to testify under oath that they believed their parents' intent had been misrepresented. Vincent was not so sure. "Maybe this is what they wanted after all" He said. "I'll have to think about it." As the siblings left Crackacre later that evening, Betty could not help but think that she had been wronged by whoever had prepared that will. If Vincent would not agree to divide Crackacre as the siblings had expected, maybe there was another path to recover for her loss.

Betty decided to do some research of her own, so she decided to make a last will and testament with LegalBoom to see if there was any way her parents could have made a mistake. The first question the system asked Betty was to "list her children," and then if she "wanted to divide her assets equally amongst her children." Betty knew her parents wanted to divide Crackacre equally, but that they wanted to leave her sister Caroline all seven of their cars because she was often getting in accidents. Betty could easily see how her parents answered "No" to this question, so she did too. As she continued, her confusion continued to grow. The next section, titled "General Gift #1" stated instructions to "choose people you want to receive a percentage of everything you own," followed by instructions stating "When creating general gifts, make percentages of all gifts add up to 100%." These instructions were confusing to Betty, a J.D. herself. It was very plausible that her parents answered 100% because of the second line of instructions, in order to make the "gift" what they believed would be a 100% share of his equally divided portion of their estate. This was even more plausible if they simply skimmed over the word "all." Betty moved on to the next section, as she believed her parents would have done. They did not like to waste time on things they thought were trivial, and the website advertised that "most users finish in 15 minutes." As Betty had already spent 5 trying to figure out the first section she moved on. The next section was titled "Optional charitable, specific, and digital gifts." Betty knew her parents did not intend to give anymore to charity than they already had, so she left all of the answers as "No, not at this time" and moved on. The subsequent section was titled "Name your personal representative." The instructions below read "The person you choose here will have legal authority to distribute all the gifts included in your will." Betty assumed this section

was to name an executor, although the word "executor" was never used. Was it possible her parents thought that by giving Vincent everything and naming him executor, that he was somehow still bound to divide the estate equally? Did her parents even know they were naming Vincent the executor? Betty filled in Vincent as the first choice, and herself as the second choice for "personal representative" and moved on to the next section. The next page was headlined "Optional provisions in your will." Options included creating a trust, disinheriting a child, and final burial wishes. She knew her parents both often said "What do we care what happens to our bodies after we die? We will be dead." They would not have filled any of these options. She moved to the next section, titled "Final wishes in your will." This section was to again, indicate burial instructions. She filled in the blank "feed my body to a flock of turkey vultures" and moved on. The following section was a section for "pet protection," and the section that followed was for Betty to pick her payment and warranty protection plan. That was it. She had allegedly created a functioning will.

A few weeks later Vincent had proclaimed he was going to keep Crackacre for himself, and changed the locks on all of the doors and gates to exclude his siblings. Betty met with Carlos Corpus later that week to discuss her idea to recover damages against LegalBoom. After all, they were the ones who claimed to review all of the documents for errors, and surely this was an error they would review for. Betty knew from her research about LegalBoom that all her parents did was "answer a few simple questions" and LegalBoom prepared the document and sent it to them. Surely then, according to Betty, the document was prepared incorrectly or the questions were misleading, and either way LegalBoom is to blame. Carlos, unfortunately, did not share her enthusiasm.

"LegalBoom disclaims all liability as a lawyer Betty. Although under normal circumstances you could sue the lawyer who prepared the estate because you are a beneficiary, you can't sue LegalBoom for malpractice because they technically aren't practicing law. The can contract out of representing and preparing documents competently, unlike actual attorneys, and they do. Even though an attorney would likely be liable if he gave you the same handout, reviewed it in the same way and didn't catch these miscommunications, LegalBoom is off the hook."[99] Carlos said glumly.

There is no way that could be the case, Betty thought, as she rushed back to her office to research for herself. This one-size fits all approach to legal counseling had to have repercussions. But Carlos was right, there was no precedent for holding corporations like LegalBoom liable for legal malpractice, and only one case holding them liable for unauthorized practice of law.[100] There truly was no way to recover damages from LegalBoom's negligence regarding the legal document they prepared for her parents. The sinking feeling returned in Betty's stomach, indicating that she had fallen into the malpractice gap created by technology.[101]

The malpractice gap is real, and is created when technology companies practice law without being held to the same standard of care as the rest of the practicing legal community.

Although the preceding scenario is obviously a hypothetical situation, what it illustrates is not. The malpractice gap is real, and is created when technology companies practice law without being held to the same standard of care as the rest of the practicing legal community. Not only does this create an unfair advantage for technology over its practicing human counterparts, it creates a precarious situation for legal consumers as well. Emerging technology in the legal market focuses mainly on two areas of legal practice: research and document preparation. This article focuses on one service provider per task, ROSS and LegalZoom respectively to illustrate why extending malpractice liability to cover the gap is necessary. This is not to say, however, they are the only tech companies providing services in the legal market. There are countless other tech companies that contribute to the malpractice gap. When the legal technology inevitably fails both the attorney and consumer, comparative fault theory dictates any party at fault must be held liable if possible.[102] That party is the technology company that created the machine, that subsequently performed the legal work. As the creators of the technology, they are most at fault when the technology itself makes a legal error. The standard that should be applied is a simple one: If the technology employed is practicing law, the person or corporation that created it should be held to the same negligence standard as an attorney practicing in the same jurisdiction.

B. Backs to the Future: How Technology Could Fail the Legal Community

It is hard to say how many clients LegalZoom is failing today.[103] Cases have often either been settled before litigation on the merits,[104] decided in arbitration, or have not been brought at all. However, a lack of precedent does not mean that malpractice is not regularly being perpetrated by these technology companies, acting as practicing attorneys with a one size fits all approach to law. There could be a number of reasons why there is a general lack of case law on the subject, chief amongst them the novelty of the issue. Some wills and business documents may take years to prove themselves to be faulty,

and LegalZoom and other virtual law firms operating in the malpractice gap have only been existence since 2001. Another factor that protects LegalZoom is its broad arbitration clause in its terms of service. This extensive arbitration clause requires consumers to arbitrate all disputes, even UPL issues.[105] The terms of service also purport to grant LegalZoom the power to change the terms at any point without notice, making the contract itself arguably illusory.[106] Additionally, the average legal sophistication of the LegalZoom client is likely lower than the consumer of traditional human legal services. The consumer may not know they have a case, and if they do they may not be able to afford a traditional attorney and have turned to LegalZoom as a cheaper alternative. Those who use LegalZoom are unlikely to be sophisticated parties with access to a lawyer to inform them that they have been the victims of malpractice.

As for ROSS, the clients are likely altogether unaware that a portion of their legal work is being done by an artificially intelligent research system that could possibly make a mistake. The attorneys who employ ROSS certainly would have no interest in informing the clients they had been a victim of malpractice even if it was perpetrated almost solely by ROSS, because under most comparative fault statues they would likely bear some measure of liability along with ROSS.[107] Although the risks are markedly different, both ROSS and LegalZoom present continuing issues that the legal community must confront.

i. Interface Confusion

First, we will examine the common sources of legal malpractice that LegalZoom is able to avoid. LegalZoom prepares documents based on a series of questions that clients answer via their website.[108] "Interface Confusion" occurs when the client does not understand the form the questions are presented in on the website, and how to properly navigate the cite and submit their answers. Any assistance of clients on how to operate the website would constitute the practice of law creating an attorney client relationship. Said differently, any assistance preparing the form would constitute the practice of law. Interface Confusion is similar to Florida's famous "hanging chad" of the 2000 presidential election,[109] but translated into the present legal market. There, a certain percentage of the Florida population intended to vote for Al Gore but were either not able to fully puncture the voting tab, or because of the formatting on the ballot voted for George Bush by mistake.[110] A certain percentage of LegalZoom's clients will inevitably misunderstand the form of the website interface, and enter information in the improper place or not at all. Further, a certain percentage of clients will not understand the interface instructions at all.

In either case, an unsatisfactory document may be produced for the client. Not only is it unlikely that such an oversight would happen if a human attorney attempted to undertake the same task, but a human lawyer likely would be held liable for legal malpractice if the same mistakes were made in the interaction with the clients and the production of the document.[111]

ii. The Lack of Specificity Problem

The second identifiable issue with LegalZoom is the "Lack of Specificity Problem." This is broadly framed as the finite amount of questions available to place on a website interface cannot match the nearly infinite amount of possible intricacies of varying legal issues. It is unavoidable that, at some point, the finite number of legal situations that LegalZoom is capable of covering will not be able to competently meet the standard of prudent representation for the infinite variations of legal situations that could present themselves. Consider the following scenario.

Betty Bracket is the mother of three triplets, who recently found her husband cheating on her with their nanny, and subsequently filed for divorce. Although it had only been two months since their divorce, Betty's husband had already remarried and moved to another jurisdiction. Luckily for Betty, she thought she had created a child support order on LegalBoom along with the rest of their divorce proceedings. Unfortunately, Betty's former husband hadn't paid the first or second month's child support. Instead of calling him and starting a fight, she visited a respected family lawyer she knew personally, Lee Scotley. She felt confident going in, but when she showed Mr. Scotley her support order, his brow furrowed. The order read: THIS ORDER SHALL AFFIRM THAT THE PROPER AMOUNT OF CHILD SUPPORT IS $1,700 A MONTH. It was signed by both Betty and her former husband. "Betty," Lee grumbled, "this order never orders your ex-husband to actually pay you…at all. It is completely ineffective in this jurisdiction, unless we had a court approve it based on intent." Again, Betty has fallen into the malpractice gap created by technology. Although such a situation may seem outlandish at first glance, a very similar situation occurred in the early 2000s, where a prominent Dallas family lawyer was left to pick up the pieces.[112]

iii. Differentiating ROSS

It is worth noting, before discussing the ways that ROSS is most likely to commit legal malpractice, that the risk for malpractice associated with ROSS is much lower than the risk associated with LegalZoom because of the consistent involvement of actual lawyers.[113] That being said, artificially intelligent research systems like ROSS have the ability to do wonderful things in the legal community, such as making the practice of law more client focused, lowering the cost and burden of doing legal research therefore evening the playing field between the quality of representation between rich and poor law firms. Last, but far from least, by offering these benefits ROSS and similar systems offer the world its best hope of closing the justice gap if they continue to keep lawyers closely involved in every aspect of their robot's practice of law. Closing the justice gap would mean little, however, unless the malpractice gap is was also closed. Otherwise, legal consumers will continue to be exposed to a risk of suffering injuries for which they will have no redress.

Some of the risks that face the legal consumers whose research is done by ROSS are familiar to the technology industry, but much more novel to the legal industry. One need not look further than the 2016 Presidential Election to understand the risks associated with data breach and release of information that was intended to be confidential in nature.[114] Legal Data Breach scholar Amy Grewal Dunn cites and Identity Theft Resource Study in her article "Bridging the Gap," that shows between 2005 and 2015, nearly 840 million records were compromised as a result of 5,810 successful data breaches.[115] Even the highest ranking members of the Democratic party were not immune from similar data breaches.[116] It is undeniable that the risk of data breach and actual data breach were the central issues that lost Hillary Clinton her presidential bid. So what would make ROSS, and artificially intelligent system that runs through the cloud,[117] one of the most insecure areas of cyberspace,[118] any different? It is clear that ROSS takes the security of the information transmitted through their technology very seriously. However, as competent as the employees of ROSS may be, the risk of malpractice still exists from what they have created. It could plausibly be argued that ROSS could not function without the attorney's information input, and therefore any malpractice is solely the fault of the attorney. However, this argument falls short when the fact that ROSS is no different than a junior associate, under the supervision of a higher ranked lawyer is realized. This article has made abundantly clear that again, emerging technology

avoids malpractice liability where the human lawyer would be on the hook.[119]

If an attorney were to breach confidentiality in such a manner, they would violate a litany of professional and ethical rules,[120] and could be held liable for legal malpractice.[121] If ROSS were to be the victim of data breach, revealing the same confidential information, they would be held to the data breach standard stated in *In re Sci. Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litig.*[122] In *In re Sci. Applications Int'l Corp. (SAIC)*, the D.C. Circuit determined that in order for a data breach victim to have standing in federal court, the injury suffered must go beyond the loss of privacy. The risk of the private data being misused must be substantial and probable.[123] Risk alone of an injury form loss of data confidentiality is not enough.[124] If confidential data was recovered from a practicing human lawyer, there would be no need to meet such a stringent standard to show injury.[125] The mere fact that the confidential relationship had been breached would be enough to satisfy the "actual injury" element hold the attorney liable for his or her negligence.[126] If Betty Bracket were to leave her laptop computer accessible in a public area, revealing a client's confidential financial information, there is little doubt that she would have breached the attorneys professional standard of care. However, if ROSS were to be the victim of a data breach, the clients who suffered injuries would have to show, unlike Betty's clients, that their risk of injuries were both substantial and probable.[127]

Another risk that ROSS runs is being affected by a computer virus, altering the results of the research method that lawyers will overtime rely on more heavily. A computer virus is a piece of code that infiltrates a program, and corrupts the function of the program entirely.[128] A computer virus could potentially present a number of problems for the function of ROSS for all of its users at once, because it is a subscription services based in the cloud.[129] A virus could cause ROSS to fall below the legal malpractice standard in its performance, and depending on the circumstances ROSS Technologies could be found not to be at fault. However, if a human lawyer became sick and unable perform competently it is likely that lawyer could be held liable for legal malpractice. Additionally, if Westlaw or similar search engine style research systems were compromised, the lawyer would have a much easier time recognizing that fact.

iv. How ROSS Decides What the Law is for You

Perhaps the murkiest and most perplexing issue presented by ROSS and similar Artificial Intelligences practicing law is their lack of human intuition. Consider the following scenario. The year is 2017, and Betty Bracket is having a drink at a local beverage establishment with a few friends. Betty blacks out, and wakes up the next morning under a bridge unable to remember anything. Feeling groggy and nauseous, she hobbles up to the street and orders an Uber home.

Later that day, after a long nap she hears a knock on her door. It is the police, and soon after Betty is arrested and detained for the murder of a woman she has never seen or heard of. When she arrives at the police station, the police show Betty a video of a woman, wearing the same dress she wore the night before, at the same establishment she had visited, mercilessly beating another woman to death. Betty's blood is tested for illegal substances by authorities, and they inform her she has tested positive for a new street drug, often being used for "date rape," known as "disco biscuits." Betty insists to the authorities that she did not take the disco biscuits for recreational purposes, and that someone must have drugged her drink in an attempt to roofie her. Unfortunately, there is no video of anyone drugging Betty's drink.

Betty is released on bond later that day, and immediately visits her friend Preston Pleabargain, who is a defense lawyer at a large law firm, Faker Costhetler. Faker Costhetler owns a cognitive legal research system, RONN, that answers plain English inquiries about legal research and strategy with plain English answers. After consulting for several hours with Betty, Preston and his team leave the conference room to consult RONN about strategy, including telling RONN that Betty had ingested disco biscuits. They tell RONN the facts of Betty's case, and inform it of the existence of the evidence against her. RONN replies that the best defense strategy to pursue is one of self-defense, in an attempt at least to lower the charges to manslaughter. Betty disagreed, insisting that the team pursue a temporary insanity defense because it had worked before in similar cases, albeit with different drugs. Unfortunately, because disco biscuits were so new to culture at large, RONN had not yet picked up on its existence, much less that the drugs, street name was disco biscuits. Because RONN did not understand the cultural connotation of the words "disco biscuits" associated with one another, he overlooked a key piece of evidence and developed a losing case strategy. Further, it is normally the province of the lawyer to determine overall case strategy, so Betty was forced to defer to the wisdom of her attorneys and RONN.

At trial, Betty is convicted of murder and sentenced to life in prison where she stays for seven years, when advances in forensic science prove that the victim had also ingested disco biscuits, and had died from an overdose rather than Betty's attack. Eventually, Betty is released from prison. During Betty's seven years in jail, she had plenty of time to research case law, which only served to reinforce her belief that her legal team had pursued the wrong strategy, and that any halfway competent legal team would have argued a temporary insanity defense. However, because RONN did not believe it was the best strategy, it was not mentioned to the team of attorneys, who trusted RONN to provide comprehensive answers. Clearly, Betty believes she has been damaged by the negligence of RONN. Then she remembers her experience with her parents will and LegalBoom years before and she feels a sinking feeling in her stomach. She knows that even though she has suffered an actual injury and can prove actual innocence in the underlying case, she has unfortunately fallen into the malpractice gap created by technology practicing law. While a diligent attorney would have watched the security video and determined that a self-defense argument would not hold water, RONN does not share human intuition.

Preparation of legal documents, as we have seen in above mentioned cases, constitutes the practice of law.

Although it could plausibly be argued that the other attorneys at Faker Costhetler, including Preston Pleabargin bear some responsibility associated with the faulty case strategy this article is about the legal liability of technology companies, and comparative fault theories would show that the makers or RONN were liable as well.[130] In this situation, it is impossible for the technology company to avoid some measure of liability because it was their machines, practice of law that created the flawed case strategy. Faker Costhetler was sold RONN by its creators as a cognitive research tool that was more effective than their humans lawyers. Therefore, when RONN tells them that self-defense is the best argument, are they wrong to trust it?

This hypothetical illustrates one way cognitive based legal research programs not only practice law, but are capable of

practicing negligently. However, as has been illustrated this is not the only scenario under which program's like ROSS could potentially damage legal consumers. The foundation of the attorney client relationship is attorney confidentiality. As mentioned above, ROSS threatens this confidentiality in ways that more primitive research systems do not, because of the implicit strategic decisions it makes in presenting its findings to its users.[131] If a hacker gained access to ROSS's system, there is a much higher likelihood that the hacker would gain access to a client's confidential information and case strategy, opposed to the likelihood of the same information falling into the wrong hands if say, Westlaw, was hacked. This conclusion can be drawn from the specificity available for information input, and the specificity of information given back from ROSS as it pertains to case strategy.[132] Even here, we find that there is a lower standard of care for a technology company who is responsible for a client's confidential information being revealed versus a practicing lawyer.[133] Bringing a cause of action for the loss of confidentiality against ROSS would likely require Plaintiffs to show both a substantial and probable injury according to the Court in *In re Sci. Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litig.*[134]

C. Imitation and Flattery, But LegalZoom Must Play by the Same Rules

LegalZoom, similar to Quickens Family Lawyer '99, is practicing law within a statutory exception, or alternatively depending on the jurisdiction, operating in a gray area of the law.[135] Preparation of legal documents, as we have seen in above mentioned cases, constitutes the practice of law. If one wanted proof that LegalZoom was preparing legal documents, one need only obtain bill from the company, which cites document "preparation" as one of the driving costs.[136] Additionally, one could argue that they are capable of meeting all of the elements of malpractice. To review, for legal malpractice the plaintiff must show prima facie (1) duty from attorney client relationship; (2) a breach of that duty; (3) the breach proximately caused damage; and (4) the client sustained actual damage.

The first issue that arises when the legal malpractice of LegalZoom is whether or not an attorney client relationship is created, even though LegalZoom includes the disclaimer that they're services are not the substitute for the advice of an attorney.[137] Undoubtedly, LegalZoom would argue that this disclaimer keeps them out of the creation of a duty arising from an attorney client relationship. Texas courts have spoken directly to the issue of the creation of an attorney client relationship. In *Hill v. Bartlette*, the court stated:

> "The attorney-client relationship is purely contractual. It arises from the clear and express agreement of the parties about the nature of the work to be done and the compensation to be paid. This contract may be implied by the conduct of the two parties. It is necessary that the parties either explicitly or implicitly manifest an intention to create an attorney-client relationship."[138]

Given the allowance for an attorney client relationship to be implied by the parties, the *Hill* court emphasized that none could be implied because no legal services had been rendered and no fees had been paid in return.[139] Since the attorney client relationship is purely contractual and can be implied as the *Hill* court stated,[140] then LegalZoom's disclaimer should be rendered ineffective as soon as they begin to create a legal document or give any legal advice to a consumer.

However, if the same analysis for an implied attorney client relationship is applied to humans, we suffer a different fate. Even though LegalZoom claims that their services are not meant to replace the advice of an attorney, they subsequently provide legal services in exchange for consideration, yet the operate under a lower or arguably nonexistent standard of professional malpractice.

Consider the following scenario: Betty Bracket approaches attorney Carlos Corpus to prepare a contract to sell her interest in Crackacre. Carlos first tells Betty that the services he will be providing are not intended by him to replace the advice of an attorney. Without saying anything else, he begins asking the questions necessary to gather the information to create the contract. A few days later he informs Betty that the contract is finished. Betty pays him for his services, but as she is reviewing the contract she discovers that Carlos forgot a zero when entering the price, and that she is accidentally selling her interest in Crackacre for significantly less than she anticipated. Any competent attorney in the same circumstances would have reviewed the price, first and foremost, to make sure it was correct. Betty was irate, and called Carlos to inform him that she would be suing him for malpractice. She grew even more irate when Carlos heartily chuckled at her threat.

"We never had an attorney client relationship Betty! I told you before I prepared your contract that my services were not intended to replace the advice of an attorney! I prepared that contract with a lower standard of negligence. You can't sue me for legal malpractice." He said, laughing manically.

"That's outlandish, Carlos. You're an idiot." Betty replied. "I'll see you in court." Betty is correct. What Carlos attempted to do was outlandish and idiotic. Lawyers cannot contract out of competent representation of a client. But LegalZoom can. What the legal community is allowing LegalZoom to perpetrate on legal consumers is equally outlandish and idiotic. If the heart of legal malpractice is to compensate the legal consumer for an injury that resulted from negligent legal services,[141] Betty Bracket should not be protected to a higher degree than a consumer who chooses to use LegalZoom, simply because she had the means to visit a lawyer in person. Surely then, logical minds can agree that by providing a legal service in exchange for any consideration, LegalZoom creates an attorney client relationship by implication. The implication is an objective one, judged without regard to the parties own understanding of the relationship.[142] This relationship is created, despite any disclaimers LegalZoom may make.

The next of element of a legal malpractice cause of action is breach of an attorney's duty, created by the attorney client relationship. A number of causes alleged have already been mentioned,[143] and in each case there is no doubt that if an attorney client relationship was recognized, then LegalZoom would have failed the legal malpractice negligence standard.[144] Additionally this article has hypothetically illustrated three scenarios where corporations similar to LegalZoom could potentially breach this duty, if it was imputed on them. After these two elements had been proven, if plaintiffs could show that LegalZoom was the proximate and but for cause of an actual injury, LegalZoom would meet the prima facie standard for a legal malpractice case. These elements should be easy to meet, because LegalZoom alone created the document.

i. The Same Rules for ROSS

Similarly, depending on the facts, ROSS can meet the prima facie standard for legal malpractice. ROSS, under simplest of direction from an attorney who met directly with the client, performs research for the attorney on behalf of the client, very similar to a junior associate.[145] Although ROSS itself did not receive consideration for the service it provides, ROSS Intelligence, the corporation most certainly did, and at the end of the day that is who needs to be held liable for ROSS's legal malpractice should it occur. Therefore, it can be said that an implied attorney client

relationship exists not between the client and ROSS, but between the client and the programmers of ROSS; the ones who taught and continue to teach ROSS to "think" like a lawyer.

Perhaps a more compelling question is exactly how the actions of ROSS, a legal research service provider, could cause damages to a client. ROSS responds to plain English inquires in plain English.[146] This is significantly different from the service provided by traditional legal search engines, such as Westlaw, because by responding in plain English instead of producing a list of possibly applicable material, ROSS makes implicit decisions about the overall stratagem of the client's case. This is a province that is traditionally reserved for the lawyer, [147] being effectively outsourced to a machine. The breadth of allowable input information for ROSS to function combined with the possible sources of malpractice breach mentioned above; data breach, computer virus, and lack of human intuition, combined to create a very real risk of client injury.

D. Why Arguments Against Extending Malpractice Liability Fall Short

Arguments for extending malpractice liability are few and far between other than this article, therefore arguments against extending liability have not had a chance to properly form by their opposition. Because there is no clear voice of opposition, this article will attempt at this point to be the voice of opposition to malpractice liability, then rebut the hypothetical critics.

First, it is likely critics of extending malpractice liability will cite the enormous cost of insuring against malpractice per legal consumer, across the enormous number of jurisdictions their products touch. The cost of insuring one human lawyer for malpractice is on average between $5,000 and $15,000.[148] This cost of insuring this new burden, they will argue, will do one of two things. It will at best push the powerful legal technology into the hands of the most powerful legal actors: the only people who will be able to afford it. This will likely be only the oldest, richest and most established law firms. Avoiding malpractice liability would create a market where these services are relatively affordable, serving to provide legal services at cheaper costs to consumer and practitioners alike. This would serve to close the justice gap and help even the playing field between large and small law firms.

It is likely that the cost argument in its entirety is a red herring, and the technology companies would charge the price that would generate them the most profit regardless of any altruistic motivations. Instead, for arguments sake, let's take both LegalZoom and ROSS at their word; they want to provide clients of legal services with a more affordable and efficient legal product.[149] If that truly is the case the legal community must decide if it is willing to trade the risk of legal malpractice perpetrated on clients with no equitable remedy and with no legal ethics board oversight.

To fully close the justice gap, the malpractice gap created by the technologies employed to do so must be closed as well.

Another possibility that has been put forward by critics of extending malpractice liability is that simple form provider negligence would allow clients the same recovery. This line of reasoning is misguided, and shows a lack of appreciation for what malpractice really is, and even its basic definition.[150] Malpractice is the negligent rendering of some professional service, or practice, and it is difficult to envision a scenario where a mere form provider could be negligent during the transaction of providing a form.[151] Because form providers essentially provide a product, the legal form, with the only service being the actual deliverance of the product there is little room for negligence. Also, there is more to legal malpractice than simple damages. Legal malpractice may come with legal ethics board oversight and even punishment. Instead, LegalZoom, ROSS and similar technological legal actors avoid this check on their behavior by classifying themselves as something below a legal service, but providing services above a legal form provider.

E. Externalities: Tied to the Tracks Watching the Train Roll In

As Obama recently noted in an interview with tech magazine Wired, people who aren't worried about A.I. taking over the world because of its potential ability to outpace humanities ability to understand it[152] are worried about A.I. taking their job. As Director of MIT's Media Lab Joi Ito[153] stated in the same joint interview on A.I. "It's actually nonintuitive which jobs get displaced," he continued, "there are actually very high-level jobs, things like lawyers or auditors, that may disappear."[154] Assuming Ito is correct, what legal jobs are safe? Only the ones that never make it out of Richard Susskind's customized section of his spectrum on the commodification of law; litigators, mediators, arbitrators and judges.

IV. Conclusion

The year is 2045. Ten years have passed since Betty Bracket's attempt at retirement, before her fortune was stolen from her by the famous con artist Ernie Nadoff. Since then, she went back to work as a tax lawyer at the mid-size law firm where she had spent her whole legal career working as an associate, Shabby, Shagg and Rugg. Betty hoped in five more years she would have enough money to be able to finally, actually retire.

This afternoon, as Betty toiled away seeking out the maximum amount of deductions should could take for a uranium mining corporation, the newest partner at the firm knocked on her already open door.

"Follow me to my office, Betty. I've got something to show you." He said, grinning from ear to ear. Shelby Shabby, Jr. was the son of one of the founding partners of the firm, Shelby Shabby, Sr. Shelby Jr. had recently been given the responsibility of heading up the tax department at the firm. He was Betty's least favorite lawyer because he was always looking down at his tablet-phone, and she believed he did not have the same level of tact or communication skills that the older lawyer's had developed. She sat down in Shelby's corner office, across his desk from him.

"Well," Betty said impatiently, "What is it you had to show me?" Her voice had grown raspy with age. Shelby stood up quickly, and smiled. He walked over to the corner of his corner office, where a classic red and white checkered table cloth was

covering what appeared to be a large, rectangular object.

"This is ROYY." he said, as he whipped off the table cloth. "ROYY is an automated tax legal service provider. He can seek out the maximum deductions and fulfill client's exact specifications for savings in both the long run and short run. Hell, it even prepares and files the documents for us! He will be replacing our entire tax department. These will be your last two weeks of work at Shabby, Shagg and Rugg." Stunned, Betty stared through tearful eyes at ROYY. "Sorry Betty," he said, "You know it's about saving money. At the end of the day, it's just business." It was only a blank black screen. How could it replace an entire tax department? Betty stumbled back to her office where she spent the rest of the day alone, weeping softly with the lights off.

Although it may seem outlandish in 2017, for many observers of the advances of technology in the legal realm the above hypothetical is a situation that has a high probability of materializing. Although there are many prominent figures who point to the dangers associated with A.I.; Stephen Hawking,[155] Bill Gates[156] and Elon Musk[157] to name a few, there are also substantial benefits that technology will bring to legal consumers and the legal professionals who are able to adapt their services to the changing market. ROSS would greatly even the discrepancy of services provided between big firms and smaller firms: if everyone has ROSS or something similar, than any one lawyer will not be simply outmanned by several opposing researchers on a case. ROSS, because of the necessity of some involvement of a human lawyer provides the American legal system with the best tool to close the justice gap because of the savings and efficiency it provides. However, this is only true if ROSS and similar systems are closely monitored by lawyers and state legal ethics boards, always.

These systems also present new, important issues we must confront as a legal community. How far will we let the attorney become merely the operator of a machine? How dependent will we as a society become on these machines to practice and determine what our laws are? And what happens when something goes wrong? To fully close the justice gap, the malpractice gap created by the technologies employed to do so must be closed as well. LegalZoom, ROSS and all other technological actors practicing law must be held to the standard of a reasonable, prudent, diligent attorney in the same area in the same or similar circumstances. If ROSS, LegalZoom and other technology companies want to drink from the legal milkshake, the legal community should ensure at least that they drink with the same sized straw, and that consumers aren't getting hurt in the process.

** JD Candidate, University of Houston Law Center 2017.* *I would like to thank Professor Meredith J. Duncan for her invaluable guidance and knowledge in the areas of malpractice and professional ethics, and Yvette Golan for equipping me the skills to write this article. Last but not least, thanks to Professor Richard Alderman for all of his hard work and dedication.*

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1 *See Generally,* Matter of Bright, 171 B.R. 799 (Bankr. E.D. Mich. 1994); In re Guttierez, 248 B.R. 287 (Bankr. W.D. Tex. 2000) (holding paralegals liable for the unauthorized practice of law for helping debtors fill out bankruptcy forms).

2 Matter of Bright, 171 B.R. 799 (Bankr. E.D. Mich. 1994); In re Guttierez, 248 B.R. 287 (Bankr. W.D. Tex. 2000) (holding paralegals liable for the unauthorized practice of law for helping debtors fill out bankruptcy forms); Dayton Bar Assn. v. Addison, 2005-Ohio-6044, 107 Ohio St. 3d 153, 837 N.E.2d 367 (holding non-lawyer's preparation of estate planning documents for dozens of customers amounted to unauthorized practice of law); The Florida Bar v. Brower, 402 So. 2d 1171 (Fla. 1981) (holding that non-attorney's preparation of marriage documents for a fee was the UPL); State ex rel. Indiana State Bar Ass'n v. Northouse, 848 N.E.2d 668, 669 (Ind. 2006) (enjoining nonlawyer insurance agent and nonlawyer preparer of estate planning documents from engaging in unauthorized practice of law); Kentucky Bar Ass'n v. Legal Alternatives, Inc., 792 S.W.2d 368, 371 (Ky. 1990) (holding Oregon company advertising Bankruptcy form preparation in Kentucky to be engaged in the UPL); Iowa Supreme Court Comm'n on Unauthorized Practice of Law v. Sturgeon, 635 N.W.2d 679, 687 (Iowa 2001), as revised on denial of reh'g (Nov. 28, 2001) (holding preparer's assistance in the preparation of bankruptcy documents went far beyond the role of a scrivener and constituted the unauthorized practice of law); In re Mid-Am. Living Trust Assocs., Inc., 927 S.W.2d 855, 857 (Mo. 1996)(holding that trust marketing corporation engaged in unauthorized practice of law by rendering legal advice concerning need for living trusts, gathering information used to determine type of appropriate trust and preparing trust documents); N. Carolina State Bar v. Lienguard, Inc., No. 11 CVS 7288, 2014 WL 1365418 (N.C. Super. Apr. 4, 2014) (holding lien filing service violated UPL by helping prepare liens to file); Crain v. Unauthorized Practice of Law Comm. of Supreme Court of Texas, 11 S.W.3d 328, 329 (Tex. App. 1999) (holding that the assistance in preparation of mechanic's liens constituted the UPL); In re Broussard, 2005-0475 (La. 4/22/05), 900 So. 2d 814 (holding nonlawyer liable for the UPL for preparing, notarizing and filing or processing divorce proceedings in eight cases); Real Estate Bar Ass'n for Massachusetts, Inc. v. ANADeeds, Inc., No. SUCV201204230C, 2012 WL 7151297, at *1 (Mass. Super. Dec. 19, 2012) (holding nonlawyers had engaged in the unauthorized practice of law in the Commonwealth by preparing deeds and other legal instruments for the conveyance of Massachusetts property); People ex rel. Atty. Gen. of Colo. v. Woodall, 128 Colo. 563, 564, 265 P.2d 232, 233 (1954) (bank teller who helped draft a will for a third person engaged in the UPL); York Cty. Bar Ass'n v. Kirk, 59 Pa. D. & C.4th 368, 370 (Com. Pl. 2002) (holding defendant engaged in the UPL by preparing and filing articles of incorporation, advertising notices of incorporation in general and legal newspapers, and holding himself out as being able to provide such services); Statewide Grievance Comm. v. Patton, 239 Conn. 251, 253–54, 683 A.2d 1359, 1360 (1996) (holding document preparation company guilty of the UPL for providing questionnaires as to requested preparation services and preparing legal documents); In re Gabrielson, 217 B.R. 819, 828 (Bankr. D. Ariz. 1998) (holding defendant liable for the UPL by advising, consulting, or directing any entity, person, or individual as to how to prepare bankruptcy documents or as to how to engage in the practice of law).

3 Tex. Gov't Code Ann. § 81.101(a) (West).

4 Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., 179 F.3d 956, 959 (5th Cir. 1999).

5 *Id.*

6 Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., No. CIV.A. 3:97CV-2859H, 1999 WL 47235, at *1 (N.D. Tex. Jan. 22, 1999), vacated and remanded, 179 F.3d 956 (5th Cir. 1999)

7 Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., 179 F.3d 956, 957 (5th Cir. 1999)

8 *Id.*

9 *Cf.* Duerr v. Brown, 262 S.W.3d 63 (Tex. App.—Houston [14th] 2008, pet. denied) (holding that plaintiff had not stated a breach of fiduciary duty claim that was distinct from his legal malpractice claim).

10 *E.g.*, *Generally* Hill v. Bartlette, 181 S.W.3d 541, 547 (Tex. App.--Texarkana 2005, no pet.), (illustrating an attorney client relationship is contractual in nature).

11 Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C., 284 S.W.3d 416, 426 (Tex. App.-- Austin 2009, no pet.).

12 *See* Greene's Pressure Treating & Rentals, Inc. v. Fulbright & Jaworski, L.L.P., 178 S.W.3d 40, 43 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (holding that attorney-client relationship was not created by client purchasing patent from inventor that attorney previously represented).

13 *See* Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d

780 (Tex. 2006, no pet.) history. (holding benefactors of decedents estate may sue the attorney retained by decedent to plan it).

14 *See E.g.*, Hill v. Bartlette, 181 S.W.3d 541, 547 (Tex. App.-- Texarkana 2005, pet. denied) (holding there was no attorney client relationship created because none of the attorney's conduct could create an inference that a relationship existed. The attorney never accepted any fees or rendered any services, and the court believed that these were dispositive issues).

15 *E.g.*, Anoka Orthopedic Associates, P.A. v. Mutschler, 773 F. Supp. 158, 161 (D. Minn. 1991) (holding accountants and lawyers in charge of ERISA retirement plans were liable to the third party holders of those plans as trustees of those plans, but not as a class or as individuals).

16 *See* Owens v. McLeroy, Litzler, Rutherford, Bauer & Friday, P.C., 235 S.W.3d 388, 390 (Tex. App.-- Texarkana 2007, pet. denied) (holding that law firm was not vicariously liable for attorney who obtained take nothing judgment against them).

17 McDonald & Carlson Tex. Civ. Prac. § 2:85 (2d. ed.).

18 Restatement § 52 Comment (b)

19 *E.g.*, Hass v. Oregon State Bar, 883 F.2d 1453, 1456 (9th Cir. 1989) (holding that the mandate that all practicing attorneys obtain malpractice insurance was immune from Sherman antitrust lawsuit based on state action exemption).

20 *See Generally* Alaska Stat. § 9.17.080; Ariz. Rev. Stat. Ann. § 12-2506 (West 1994); Cal. Civ. Code §§ 1431-1431.5 (West Supp.1995); Colo. Rev. Stat. § 13-21-111.5 (West 1989 & Supp.1994); Conn. Gen. Stat. Ann. § 52-572h (West 1991 & Supp.1994); Fla. Stat. Ann. § 768.81 (3)- (5) (West Supp.1995); Ga. Code Ann. § 51-12-33 (Michie Supp.1994); Hawaii Rev. Stat. § 663-10.9 (1988 & Supp.1994); Idaho Code § 6-803 (1990 & Supp.1994); Ill. Ann. Stat. §§ 5/2-1117 to -1118 (Smith-Hurd 1992); Ind. Code Ann. § 34-4-33-5 (West 1986); Iowa Code Ann. § 668.4 (West 1987); Kan. Stat. Ann. § 60-258a (1983); La. Civ. Code Ann. § 2324 (West Supp.1995); Mich. Comp. Laws Ann. § 600.6304 (West 1987 & Supp.1994); Minn. Stat. Ann. § 604.02 (West 1988 & Supp.1995); Mo. Ann. Stat. § 537.067 (Vernon 1988); Mont. Code Ann. § 27-1-703 (1993); Nev. Rev. Stat. § 41.141 (1986 & Supp.1993); N.H. Rev. Stat. Ann. § 507:7-e (Equity Supp.1994); N.J. Stat. Ann. §§ 2A:15-5.2 to -5.4 (West Supp.1994); N.M. Stat. Ann. § 41-3A-1 (1989); N.Y. Civ. Prac. L. & R. Law 1601-1602 (Mckinney Supp.1995); N.D. Cent. Code § 32-03.2-02 (Supp.1993); Ohio Rev. Code Ann. § 2307.31-.32 (Baldwin 1993); Or. Rev. Stat. § 18.485 (1988); S.D. Cod. Laws § 15-8-15.1 (Supp.1994); Tex. Civ. Prac. & Rem. Code Ann. § 33.013 (Vernon Supp.1995); Utah Code Ann. § 78-27-40 (1992 & Supp.1994); 12 Vt. Stat. Ann. § 1036 (Equity Supp.1994); Wash. Rev. Code Ann. § 4.22.070 (West 1988 & Supp.1995); Wyo. Stat. § 1-1-109(d) (1988 & Supp.1994). Two other jurisdictions accomplished the same result by judicial decision. *See* Boyles v. Oklahoma Natural Gas Co., 619 P.2d 613 (Okl. 1980); McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992) (citing broad acceptance of comparative fault concepts across jurisdictions in the United States, court adopts comparative fault).

See also, Bruce D. Jones, *Unfair and Harsh Results of Contributory Negligence Lives in Indiana: The Indiana Medical Malpractice System and the Indiana Comparative Fault Act*, 6 Ind. Health L. Rev. 107, 120 (2009).

21 Coyt Randal Johnston & Robert L. Tobey, *Legal Malpractice Update*, 50 The Advoc. (Texas) 1 (2010).

22 *Id.*

23 Alm v. Aluminum Co. of Am., 717 S.W.2d 588, 594 (Tex. 1986, pet. denied.) (holding bottle cap company had duty to warn consumers about dangers associated with bottle caps).

24 *See Generally* Alm v. Aluminum Co. of Am., 717 S.W.2d 588 (Tex. 1986, pet. denied.)(holding bottle cap company had duty to warn consumers about dangers associated with bottle caps). This concept will be thoroughly explored deeper in the article.

25 Stephanie L. Kimbro, *Regulatory Barriers to the Growth of Multi-jurisdictional Virtual Law Firms and Potential First Steps to Their Removal*, 13 N.C.J.L. & Tech. On. 165 (2012).

26 Val D. Hornstein, *Commuting to the Law Office on the Information Superhighway: Virtually There*, 6 Stan. L. & Pol'y Rev. 99 (1994).

27 Stephanie L. Kimbro, *Regulatory Barriers to the Growth of Multi-jurisdictional Virtual Law Firms and Potential First Steps to Their Removal*, 13 N.C.J.L. & Tech. On. 165 (2012).

28 Amy Grewal Dunn, *Bridging the Gap: How the Injury Requirement in Ftc Enforcement Actions and Article III Standing Are Merging in the Data Breach Realm*, 20 J. Consumer & Com. L. 9 (2016).

29 Coyt Randal Johnston & Robert L. Tobey, *Legal Malpractice Update*, 50 The Advoc. (Texas) 1 (2010).

30 The Justice Gap is the number of Americans who are in need of some form of legal service, and they are either unaware that legal services could provide relief or do not have access to legal services. For more on the Justice Gap, *see* Mary E. Kelly*, Proposals for Bridging the Justice Gap Across the Nation,* L.A. Law.*,* (June, 2016).

31 Alice Woolley & Trevor Farrow, *Addressing Access to Justice Through New Legal Service Providers: Opportunities and Challenges*, 3 Tex. A&M L. Rev. 549 (2016).

32 *E.g.*, ROSS, while only sold to lawyers presently, there is nothing to stop the sale of ROSS to layman.

33 Janson v. LegalZoom.com, Inc., 802 F. Supp. 2d 1053, 1055 (W.D. Mo. 2011).

34 *Legal Plans*, LegalZoom, http://perma.cc/65LL-5333.

35 *Creating Your Last Will,* LegalZoom, https://www.legalzoom.com/brainnet/huge.aspx?TIMESTRING=hm%2brlDeL8Q%2fTWVjheBrZ5w%3d%3d&iP=23

36 Lowry v. LegalZoom.com, Inc., No. 4:11CV02259, 2012 WL 2953109, at *1 (N.D. Ohio July 19, 2012); LegalZoom.com, Inc. v. McIllwain, 2013 Ark. 370, 429 S.W.3d 261 (2013) (holding whether or not LegalZoom was involved in the UPL had to be submitted to arbitrator).

37 *See Generally* Janson v. LegalZoom.com, Inc., 802 F. Supp. 2d 1053, 1056 (W.D. Mo. 2011) (holding that LegalZoom was engaged in the unauthorized practice of law in Missouri).

38 Alm v. Aluminum Co. of Am., 717 S.W.2d 588, 594 (Tex. 1986, pet. denied.).

39 The logic here being that if a person at one point had a strained ability to seek legal services, they would have an equally difficult time seeking legal services related to the malpractice of the only product they are aware of or could afford to lift them out of the justice gap. This assumes that the client is not concurrently employing a lawyer for the matter.

40 *See* Nathan Koppel, *Seller of Online Legal Forms Settles Unauthorized Practice of Law Suit*, Wall St. J. L. Blog (Aug. 23, 2011, 11:47 AM), http:// blogs.wsj.com/law/2011/08/23/seller-of-online-legal-forms-settles-unauthorized-practiced-of-law-suit (noting that LegalZoom agreed to change its business practice in Missouri as a result of the litigation and subsequent settlement).

41 Tenat Haric, *Last Will Vargos Family, LegalZoom* (Oct. 10, 2015). https://www.youtube.com/watch?v=_jnUoDV4aq4

42 *Id.*

43 Janson v. LegalZoom.com, Inc., 802 F. Supp. 2d 1053, 1055 (W.D. Mo. 2011); *See also* Bergenstock v. LegalZoom.com, Inc., No. 13 CVS 15686, 2015 WL 2345453 (N.C. Super. May 15, 2015) (dismissing all Plaintiffs claims against LegalZoom); Webster v. LegalZoom.com, Inc., No. B240129, 2014 WL 4908639, at *1 (Cal. Ct. App. Oct. 1, 2014), review filed (Nov. 12, 2014) (allowing out of court settlement to dismiss the case).

44 *Id.*

45 *Id.*

46 Catherine J. Lanctot, *Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law*, 30 Hofstra L. Rev. 811 (2002).

47 *Id.*

48 Janson v. LegalZoom.com, Inc., 802 F. Supp. 2d 1053, 1055 (W.D. Mo. 2011).

49 61 A.L.R.4th 615 (Originally published in 1988).

50 Catherine J. Lanctot, *Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law*, 30 Hofstra L. Rev. 811 (2002).

51 *Cf.* Hill v. Bartlette, 181 S.W.3d 541, 547 (Tex. App.-- Texarkana 2005, no pet.) (holding there was no attorney client relationship created because none of the attorney's conduct could create an inference that a relationship existed. The attorney never accepted any fees or rendered any services, and the court believed that these were dispositive issues).

52 Lauren Moxley, *Zooming Past the Monopoly: A Consumer Rights Approach to Reforming the Lawyer's Monopoly and Improving Access to Justice*, 9 Harv. L. & Pol'y Rev. 553, 555 (2015).

53 Isaac Figueras, *The Legalzoom Identity Crisis: Legal Form Provider or Lawyer in Sheep's Clothing?,* 63 Case W. Res. L. Rev. 1419 (2013).

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99 Here, it is important to note that there are alternative legal theories the client could use to recover that could possibly be more efficient and easier to prove depending on the facts: In Texas the DTPA, negligence, or breach of contract are possible alternatives, none of which would have the case within a case burden of proof requirement.

100 *See Generally,* Janson v. LegalZoom.com, Inc., 802 F. Supp. 2d 1053 (W.D. Mo. 2011) (holding that LegalZoom was guilty of the unauthorized practice of law in Missouri).

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102 *See Generally* Alaska Stat. § 9.17.080; Ariz. Rev. Stat. Ann. § 12-2506 (West 1994); Cal. Civ. Code §§ 1431-1431.5 (West Supp.1995); Colo. Rev. Stat. § 13-21-111.5 (West 1989 & Supp.1994); Conn. Gen. Stat. Ann. § 52-572h (West 1991 & Supp.1994); Fla. Stat. Ann. § 768.81 (3)- (5) (West Supp.1995); Ga. Code Ann. § 51-12-33 (Michie Supp.1994); Hawaii Rev. Stat. § 663-10.9 (1988 & Supp.1994); Idaho Code § 6-803 (1990 & Supp.1994); Ill. Ann. Stat. § 5/2-1117 to -1118 (Smith-Hurd 1992); Ind. Code Ann. § 34-4-33-5 (West 1986); Iowa Code Ann. § 668.4 (West 1987); Kan. Stat. Ann. § 60-258a (1983); La. Civ. Code Ann. § 2324 (West Supp.1995); Mich. Comp. Laws Ann. § 600.6304 (West 1987 & Supp.1994); Minn. Stat. Ann. § 604.02 (West 1988 & Supp.1995); Mo. Ann. Stat. § 537.067 (Vernon 1988); Mont. Code Ann. § 27-1-703 (1993); Nev. Rev. Stat. § 41.141 (1986 & Supp.1993); N.H. Rev. Stat. Ann. § 507:7-e (Equity Supp.1994); N.J. Stat. Ann. §§ 2A:15-5.2 to -5.4 (West Supp.1994); N.M. Stat. Ann. § 41-3A-1 (1989); N.Y. Civ. Prac. L. & R. Law 1601-1602 (Mckinney Supp.1995); N.D. Cent. Code § 32-03.2-02 (Supp.1993); Ohio Rev. Code Ann. § 2307.31-.32 (Baldwin 1993); Or. Rev. Stat. § 18.485 (1988); S.D. Cod. Laws § 15-8-15.1 (Supp.1994); Tex. Civ. Prac. & Rem. Code Ann. § 33.013 (Vernon Supp.1995); Utah Code Ann. § 78-27-40 (1992 & Supp.1994); 12 Vt. Stat. Ann. § 1036 (Equity Supp.1994); Wash. Rev. Code Ann. § 4.22.070 (West 1988 & Supp.1995); Wyo. Stat. § 1-1-109(d) (1988 & Supp.1994). Two other jurisdictions accomplished the same result by judicial decision. *See* Boyles v. Oklahoma Natural Gas Co., 619 P.2d 613 (Okl. 1980); McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992) (citing broad acceptance of comparative fault concepts across jurisdictions in the United States, court adopts comparative fault).

103 Janson v. LegalZoom.com, Inc., 802 F. Supp. 2d 1053 (W.D. Mo. 2011); *See also* Bergenstock v. LegalZoom.com, Inc., No. 13 CVS 15686, 2015 WL 2345453 (N.C. Super. May 15, 2015) (dismissing all Plaintiffs claims against LegalZoom); Webster v. LegalZoom.com, Inc., No. B240129, 2014 WL 4908639, at *1 (Cal. Ct. App. Oct. 1, 2014), review filed (Nov. 12, 2014) (allowing out of court settlement to dismiss the case).

104 *Id.*

105 LegalZoom.com, Inc. v. McIllwain, 2013 Ark. 370, 429 S.W.3d 261 (2013) (holding whether or not LegalZoom was involved in the UPL had to be submitted to arbitrator); *See also*, Terms of Use, *LegalZoom*, https://www.legalzoom.com/legal/general-terms/terms-of-use

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121 *See* Marathon Oil Co. v. Moye, 893 S.W.2d 585 (Tex. App. –Dallas 1994), pet filed. (holding lower court abused its discretion allowing all but 10 documents to be discoverable).
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123 *Id.*
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136 *See* Solotko v. LegalZoom.com, Inc., No. 03-10-00755-CV, 2013 WL 3724770, at *1 (Tex. App.—Austin, July 11, 2013), pet. denied. (holding that questions of law did not predominate the class of plaintiffs, the plaintiff could not allege a injury in fact sufficient to establish standing).
137 Hill v. Bartlette, 181 S.W.3d 541, 547 (Tex. App.--Texarkana 2005, no pet.).
138 *See* Hill v. Bartlette, 181 S.W.3d 541, 547 (Tex. App. 2005, no pet.) (holding there was no attorney client relationship created because none of the attorney's conduct could create an inference that a relationship existed. The attorney never accepted any fees or rendered any services, and the court believed that these were dispositive issues).
139 *Id.*
140 *Id.*
141 *See Generally,* Vinson & Elkins v. Moran, 946 S.W.2d 381 (Tex. App.—Houston [1st] 1997), writ dismissed by agreement (Mar. 26, 1998) (holding for public policy reasons malpractice claims are not assignable because the purpose is to compensate injury resulting from attorney negligence).
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143 Janson v. LegalZoom.com, Inc., 802 F. Supp. 2d 1053, 1055 (W.D. Mo. 2011); Webster v. LegalZoom.com, Inc., No. B240129, 2014 WL 4908639, at *1 (Cal. Ct. App. Oct. 1, 2014), review filed (Nov. 12, 2014) (allowing out of court settlement to dismiss the case); LegalZoom.com, Inc. v. McIllwain, 2013 Ark. 370, 429 S.W.3d 261 (2013) (holding whether or not LegalZoom was involved in the UPL had to be submitted to arbitrator).
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Payday Lending: Friend or Foe?

An Analysis of the CFPB's 2016 Proposed Rules

By Lowell Ritter*

Introduction

While working as a security guard in Kansas City, MO, Elliot Clark received a phone call from his daughter telling him his wife had fallen in the backyard of their house.[1] She had broken her ankle in two places, requiring two pins and a metal plate. Mrs. Clark was working for JC Penney and fell three days before becoming eligible to receive full health benefits. She ended up being out of work for almost eight months. Mr. Clark, a Vietnam veteran and father of two, quickly found himself responsible for all of the day-to-day expenses, as well as a $25,000 hospital bill. When, at the end of the month, he could not make ends meet, he went to the bank to get a loan, but was told he did not qualify.

Feeling as though he was out of options, Mr. Clark approached a payday lender to borrow $500. He still struggled to keep up with it all. He recalls "taking one step forward, then two steps back." Mr. Clark ended up borrowing five payday loans for a total of $2500. It took Mr. Clark over five and a half years to pay the loans off. In the end, he ended up paying more than *$55,000 in interest and fees* – twenty-two times the original principal of the loan.

When Trudy Robideau faced an $800 car repair and had no way to pay for it, she, like Mr. Clark, turned desperately to a payday loan.[2] When the loan came due, Robideau could not afford to repay it; the lender offered to renew it, but only if Robideau was willing to pay a fee on top of the fee she already paid to receive the loan in the first place. She decided to "renew" the loan, meaning she paid the fee instead of repaying the principal balance of the loan. Robideau continued doing this until she was eventually borrowing from other payday lenders to repay the $800. That car repair ultimately cost Robideau thousands of dollars.

Raymond Chaney's story is similar. He borrowed $400 for car repairs, and when he could not afford to pay it back, he renewed his loan several times, not much different from Robideau.[3] Caught in the cycle, Chaney borrowed $3000, but owed close to $12,000 with fees and interest.

Mr. Clark, Ms. Robideau, and Mr. Chaney all found themselves trapped by payday loans.

There are many advertisements for these loans such as: "Get up to $1000 as soon as tomorrow!;" "$100-$1000 approved in two minutes!;" "bad credit OK." The loans can seem like an optimal idea in a desperate situation and can quickly resolve necessary and unexpected expenses. However, the loans can also have unintended consequences, even for the most well-intentioned borrowers. For that reason, the loans are not without controversy, as consumer watchdog groups and federal agencies view the potential negative consequences as far outweighing the potential positive aspects. This led the Consumer Financial Protection Bureau (CFPB) to issue proposed regulations in June 2016 as a way of combatting harmful practices related to the payday lending industry.

This article analyzes the CFPB's proposed regulations in the context of the historical background of the industry, applicable federal and state legislation, and other relevant legal authority. The first section provides background on the payday lending industry and today's prevalence of payday lending. The second section analyzes the CFPB's 2016 proposed regulations, including its authority to promulgate the rules and the central components of the rules. The third section examines the arguments for and against payday lending, including reaction to the proposed regulations and an evaluation of whether national regulation is appropriate.

Background

What is a payday loan?

Payday loans are small amounts of money lent to borrowers for a short period of time with high interest rates and fees, not secured by any collateral.[4] The amount of the loan is typically small, ranging from as little as $100, with some lenders lending up to $1000. The average loan is $375.[5]

The fee ranges from $10 to $30 for each $100 borrowed, according to the CFPB. While some describe the fee as an interest rate, it is typically a fee charged on the loan. Under federal law, lenders must calculate the fee as an Annual Percentage Rate, which gives more meaning to the number. In other words, a fee of $50, for example, turns into an annual percentage rate.[6] Based on the CFPB's fee estimates, consumers are charged an effective APR of close to 400 percent on a $15 fee for each $100 borrowed.[7] Other financial products, such as credit cards, typically carry an annual interest rate of twelve to thirty percent.[8] Many payday lenders give consumers the option to extend the loan for an additional fee.

This led the Consumer Financial Protection Bureau (CFPB) to issue proposed regulations in June 2016 as a way of combatting harmful practices related to the payday lending industry.

The loans are called "payday" loans because borrowers write a check in the amount of the loan plus any fee or provide their bank account information to the lender at the time the funds are distributed. The check is then cashed (or funds withdrawn, if bank account information was provided) on an agreed upon later date, typically the consumer's next payday. In theory, the small-dollar loan is one the borrower will use for an emergency expense and pay back within the two weeks. However, as mentioned above, consumers have the option of extending the initial loan period for an additional fee.[9]

Payday loans are often criticized for several reasons. Critics point to large fees, as in Mr. Clark's case, which stem from initial fees charged and the ability to renew loans. Indeed, one author writes that "the debt trap is the business plan."[10] In fact, "[t]he average payday borrower is in debt for nearly 200 days – more than half a year and one-in-four borrowers spends at least eighty-three percent of their year owing money to payday lenders."[11] Others refute the idea that payday loans trap borrowers in debt[12] and point to the fact that low-income consumers have no other option in an emergency. These ideas are discussed more extensively later in this paper.

The Prevalence of Payday Lending

"Literally, do anything else." This was Sarah Silverman's advice on what to do instead of taking out a payday loan when she appeared on John Oliver's *Last Week Tonight.*[13] Payday lending has grown significantly and is now a $46 billion industry.[14] The number of payday lenders now exceeds the number of McDonalds in the United States.[15] Former President Obama has even commented that "[i]n Alabama…there are four times as many payday lending stores as there are McDonald's."[16]

Growth in the industry is unprecedented, indicated by the fact that "payday and other short-term loan outlets nearly tripled in number between 1999 and 2006."[17] Today, there are more than 20,000 payday loan locations in the United States.[18] Even Google joined the debate when they banned all payday loan ads by prohibiting ads for loans in which the due date is within 60 days of the issue date.[19]

Who Uses Payday Loans?

5.5 percent of adults in the United States have used a payday loan.[20] This figure rises among certain income brackets. For example, about eleven percent of those earning between $15,000 and $25,000 per year have used a payday loan.[21] The rate similarly rises for other categories of individuals. "Thirteen percent of those who are separated or divorced have used a payday loan" and "Twelve percent of those who are disabled have used a payday loan."[22]

The typical payday borrower is often a female.[23] In addition, a significant proportion of borrowers are single mothers.[24] The reasons for female prevalence in payday loan borrowing are not clear, but one author notes that it may be because of "persisting wage gaps between women and men."[25] The Pew study further identified five unique categories of individuals, combining various characteristics, most likely to use payday lending services: (1) individuals who do not have a four-year college degree; (2) home renters; (3) African Americans; (4) individuals earning less than $40,000 per year; (5) individuals who are separated or divorced.[26]

The Pew study found that most borrowers (sixty-nine percent) use their very first loan for recurring expenses, including

utility bills, credit card payments, rent, and food.[27] This finding is significant because it means that most borrowers are *not* using the funds for emergency expenses, as many argue to be the purpose of the loans. The borrower is over-extended and is not earning enough to meet his or her expenses. Thus, when the bill comes due, even if that due date is extended into the future, some expense will likely go unpaid.

Interestingly, "[i]n the past five years, forty-two percent of Millennials used an Alternative Financial Services product, such as payday loans, pawnshops, auto title loans, tax refund advances, and rent-to-own products."[28] This suggests that payday lending is becoming more prevalent as millennials are exploring it as an option.

The CFPB and Its June 2016 Regulations

When the Dodd-Frank Wall Street Reform Act was enacted in 2010, it created the Consumer Financial Protection Bureau (CFPB). The CFPB is an agency of the United States government and one of its roles is to "supervise banks, credit unions, and other financial companies, and enforce federal consumer financial laws."[29] The CFPB has been heavily involved in payday lending, possessing "the [clear] authority to regulate payday and title loans."[30] Importantly, however, the CFPB does not have the power to set interest rate caps.[31] The agency has enforcement authority to ensure "consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination."[32] This includes the authority to investigate and issue subpoenas, hold hearings, and pursue litigation.[33]

The Dodd Frank Act also explicitly authorizes the CFPB's broad rulemaking authority.[34] As of January 2015, it was widely known that "[f]or the first time, the [CFPB] has started to examine payday loans to consider regulating them."[35] In early June 2016, the CFPB released its long awaited proposed rules regulating payday loans and lenders.[36] The CFPB expressly utilized its authority under the Dodd Frank Act to do so.[37] The agency's motivations in issuing the proposed regulations are clear. The proposal states that typical users of loans are those who live paycheck to paycheck, that lenders engage in "harmful practices," and that there is a "high likelihood" of harm to consumers who cannot repay their loans.

Coverage of the Regulations

The proposed regulations would apply to short-term payday loans of forty-five days or less and short-term vehicle title loans. They would also apply to longer-term loans when two conditions are met: the loan has "(1) a total cost of credit that exceeds thirty-six percent; and (2) either a lien or other security interest in the consumer's vehicle or a form of 'leveraged payment mechanism' that gives the lender a right to initiate transfers from the consumer's account or to obtain payment through a payroll deduction or other direct access to the consumer's paycheck."[38] Thus, both short-term and long-term payday loans are likely covered if the money can be withdrawn from the consumer's checking account.

The proposed regulations define a lender as "a person who regularly makes loans to consumers primarily for personal, family, or household purposes."[39] The rest of the regulations are tied to this definition. Many different types of lenders could be included under this broad language, thus importantly expanding the scope of the proposed regulations even further than the Truth in Lending Act.[40]

In early June 2016, the CFPB released its long awaited proposed rules regulating payday loans and lenders.

Purported Problems with Payday Lending and Their Associated Proposed Regulation

This section of the paper will follow a problem and solution approach by: (1) identifying a major criticism of payday loans; (2) identifying a key proposed regulation designed to address that problem; and (3) analyzing the potential implications of the proposed regulation in practice.

Problem: Payday lenders perform inadequate checks of credit worthiness. The CFPB indicates one of its primary concerns is "...that consumers are being set up to fail with loan payments that they are unable to repay."[41] Currently, as Ronald Mann and Jim Hawkins point out, "[t]o assess the creditworthiness of the borrower, the typical lender...will collect a few pieces of information about the borrower, including proof of identification, evidence of income, and a current bank statement."[42] The information is typically input into a software program that will then either indicate a borrower is approved or denied.[43]

Unfortunately, little information is available about what goes into the current scoring systems because they are often proprietary. For example, ACE Cash Express notes on its website that its method is a "proprietary loan scoring system"[44] Thus, there is no way to know what (if any) restrictions are placed on potential borrowers, such as minimum income requirements, or a meaningful comparison of income and expenses. Nonetheless, many argue that the checks that are performed do not truly assess a borrower's ability to repay, issuing loans to those who will not have the means to repay them (and sometimes knowingly doing this).

Associated Proposed Regulation: Dubbed the "Full Payment Test,"[45] Proposed §1041 would require lenders to better assess a borrower's ability to repay the full loan on time. §1041.4 would make it "an abusive and an unfair act or practice for a lender to make a covered short-term loan without reasonably determining that the consumer has the ability to repay the loan."[46] "Ability to repay" is further defined by the proposed regulation to mean "that the consumer has the ability to repay the loan without reborrowing and while meeting the consumer's major financial obligations and basic living expenses."[47]

Proposed §1041.5 would require a prescribed minimum methodology "using a residual income analysis and an assessment of the consumer's prior borrowing history."[48] Specifically, the minimum methodology would take into account "...projections of the consumer's net income, major financial obligations, and basic living expenses..."[49]

Implications: The "Full Payment Test" could result in fewer defaults on loans and a higher on-time repayment rate. This would be accomplished through the enhanced up-front screening of borrowers. Specifically, it would be ensured that borrowers have enough money to not only repay the loan, but also to pay for basic living expenses. However, this would also have the effect of screening out potential borrowers who truly need the loans. As described later in this paper, the borrower who *does not* have the funds to pay for basic living expenses is the one who needs these loans. That borrower could be screened out under these proposed regulations. While that may be the intent (not loaning to that customer to prevent default or renewals on the loan), that person is left without options in the case of a financial emergency.

***Problem*:** The structure of payday lending provides an incentive for payday lenders to target people with an inability to repay on time because those borrowers will ultimately pay more by renewing their loan. The CFPB explicitly recognizes this, writing in the proposal that "[t]he business model of lenders who make payday and single-payment

vehicle title loans is predicated on the lenders' ability to secure extensive reborrowing."[50] The choice essentially comes down to "paying $30 to keep the loan for another two weeks or paying $230 to repay the loan all at once."[51] Borrowers often only see the short term benefits in paying the smaller amount while failing to realize the long term drawbacks of paying the $30. Indeed, a limit on the amount of times a loan may be rolled over is often the "response of choice among states."[52]

Associated Proposed Regulation: The proposed regulations specifically address these concerns. A "presumption of unaffordability" would apply "when a consumer seeks a covered short-term loan during the term of a covered short-term loan made under proposed § 1041.5."[53] Thus, a lender would be prohibited from making a loan to a consumer when that consumer already has an outstanding loan. That presumption, however, can be overcome if the lender satisfies specific, narrow requirements set out in the rules. For example, one way to rebut the presumption is to show that the consumer "paid the prior covered short-term loan in full and the amount that would be owed by the consumer for the new covered short-term loan could not exceed fifty percent of the amount that the consumer paid on the prior loan."[54] The point here is, again, to ensure a borrower's ability to repay. In no case would a fourth loan in a row be allowed.

There is a further "presumption of unaffordability" for 30 days after an initial loan is received ("cooling off period"). This presumption can be overcome in the same way stated above. However, if the new loan would be the fourth loan in a row, the "cooling off period" is *mandatory* and cannot be overcome by the lender.[55] The CFPB's intent seems to be to allow a certain amount of successive borrowing, but to place limits on that number of loans that can consecutively be borrowed within a certain time period.

The CFPB provides a "way out" (or an "alternative") of the above restrictions *and* the ability to repay determination if the lender voluntarily chooses instead to comply with the "conditional exemption" of §1041.7. This section would allow consecutive loans, but provides additional protections to borrowers (and puts additional restrictions on lenders). §1041.7 would require the first loan to be no greater than $500, the second to be no greater than two-thirds of the first (no more than about $333), and the third loan to be no greater than one-third of the first (no more than about $167). Importantly, this would apply regardless of whether the loan was made by "the same lender, an affiliate, or unaffiliated lenders."

Thus, the lender can choose to comply with Section 7 or face seemingly stricter requirements, needing to overcome a presumption of unaffordability to loan consecutive loans. The CFPB highlights this as an option for consumers to "take out a short-term loan up to $500 without the full payment test as part of the principal payoff option that is directly structured to keep consumers from being trapped in debt."[56]

Implications: These loans (which I am calling "Section 7 loans") encourage voluntary compliance with the rules by focusing on the number of loans allowed to be taken out. Thus, by following Section 7's rules, a borrower need not meet the full payment test or other requirements. This helps get lenders on board with the rules by having them comply with what the CFPB really wants to crack down on and still aims to protect consumers. By giving lenders the choice, lenders may feel more inclined to comply.

Moreover, the general proposition of limiting loans is positive for consumers, but will certainly not be looked upon favorably by the lending industry. The industry seems to feed off of repeat business and, in particular, borrowers taking out more than one loan at once. The cooling off period would further cut down on the number of loans a borrower carries at any one time. While the industry may not be behind this rule, it would go a far way to achieve a compromise in the sense that loans are not prohibited, but are regulated in a way to protect consumers.

One potential drawback for consumers is the limit on the amount of loans. The amounts could be seen as small by some borrowers and may not fully address a borrower's needs. For example, the borrowers introduced at the beginning of this paper would need more than $500 (consider the $800 car repair).

Problem: Lack of disclosure to consumers. The Truth in Lending Act requires certain disclosures primarily related to APR and finance charges (discussed *infra*). The proposed regulations go further to mandate disclosures more specifically tailored to payday lending. In the spirit of the relative acts, "[t]he Bureau believes that the proposed disclosures would, consistent with Dodd-Frank section 1032(a), ensure that these costs, benefits, and risks are fully, accurately, and effectively disclosed to consumers."[57]

Associated Proposed Regulation: The proposed regulations require disclosures in conjunction with the Section 7 loans. These loans are specifically meant to protect consumers, but also add additional requirements, including the disclosure piece. First, the disclosures must be "clear and conspicuous."[58] They would further be required to be "segregated from all other written materials" without any additional content.[59] Second, the disclosures would be required to be disclosed in writing or electronically, viewable either on paper or on a screen, but not "orally or through a recorded message."[60] While those disclosures are already required by the TILA, these new rules would go further.

The new rules go further by requiring detailed forms be sent to borrowers; the CFPB has provided model forms similar to those required by Proposed §1041.7(e)(3).[61] The first required notice clearly communicates to the consumer that any loan taken out after the first loan must be smaller. The notice must be issued before distributing the first funds to the consumer. In addition, the form has a chart which sets out the maximum loans after the first loan and indicates a fourth loan would not be permitted until the cooling off period lapses. An additional notice would be required before making the third loan in a sequence, telling the consumer that "the new Section 7 loan must be smaller than the consumer's prior two loans and that the consumer cannot take another similar loan for at least another 30 days after repaying the new loan."[62]

The proposed regulations would also require "two new disclosures to help consumers better understand and mitigate the costs and risks relating to payment presentment practices in connection with covered loans."[63] These disclosures were not ever required by the TILA. The first requires a notice that the lender will be withdrawing funds for a payment.[64] This would similarly have to be conspicuous and in writing. It would also have to be "substantially similar" to the model forms provided. The notice informs the consumer a payment is upcoming, the method for the payment, the date, and the amount. The model form uses as an example the language: "On November 12, 2016, Willow Lending will attempt to withdraw a payment of $80 from your account ending in 0022. The payment will be withdrawn by check, using check #999." This is significant because the notice is required before *each* payment transfer, not only those that are unique or have changed in some way. In addition, these disclosures apply to *all* covered loans, not just the Section 7 loans. The second would require lenders "to provide a consumer rights notice after a lender has triggered the limitations" in Proposed §1041.14 (discussed *infra*).

Interestingly, most of the disclosures "may" be provided in a language other than English and the lender *must* provide the notice in English if the consumer requests it.[65] However, there does not appear to be a requirement to provide notices in a borrower's primary spoken language (compare California's law, *infra*).

Implications: First, it is important to note that some disclosures would only apply to the Section 7 loans (notated above). Again, the point is to have lenders voluntarily comply with these additional rules, incentivized by the ability to make consecutive loans without further ability to repay determinations.

The latter disclosures (which apply to all loans) are highly positive for consumers because they focus on the idea that alerting consumers to imminent withdrawals will help avoid penalties, such as overdraft fees. Specifically, by telling a borrower that money is about to be withdrawn, the borrower can ensure that money is available to avoid overdraft fees. One area of potential improvement would be to provide notices in languages other than English, particularly when requested. While these additional disclosures will undoubtedly result in an increased cost to lenders (either through mailing costs or labor costs), the benefits certainly outweigh the drawbacks. In addition, disclosures may be made through electronic means, saving lenders mailing costs.

***Problem*:** When a lender attempts to withdraw funds from a consumer's account and the consumer does not have sufficient funds for the transaction to be successfully completed, the bank will often charge an insufficient funds fee. Thus, if the lender makes multiple attempts, the consumer could incur several charges, putting his or her bank account far in the red.

Associated Proposed Regulation: First, Proposed §1041.13 would make it an unfair and abusive act or practice for a lender "to attempt to withdraw payment from a consumer's account in connection with a covered loan after the lender's second consecutive attempt to withdraw payment from the account has failed due to a lack of sufficient funds."[66] Second, Proposed §1041.14 specifically prohibits more than two consecutive unsuccessful transfers unless new authorization is obtained from the consumer.[67]

Proposed §1041.15 requires a notice (as mentioned above) to alert consumers "to the fact that two consecutive payment withdrawal attempts to their accounts have failed."[68] This addresses the fact that consumers may not even know multiple attempts have been made to withdraw funds from their bank account.

Implications: This regulation could help borrowers in two ways. First, it could directly help them by ensuring accounts are not overdrawn, resulting in less fees to consumers. Second, it could indirectly benefit consumers by pressuring lenders to not make loans to consumers when they know that the loan cannot be repaid. It would not be wise for a lender to make a loan knowing that it cannot be repaid and knowing they may never receive their money after two unsuccessful attempts. At the same time, this rule seems a bit strict since it could potentially result in a lender never receiving money that is rightfully theirs. One way to improve the rule may be to increase the number of allowed attempts before requiring new authorization (to 4, instead of 2, for example).

The Case for and Against Small Dollar Lending

Reaction to the CFPB's Proposed Regulations – Differing Views on Payday Lending

As was widely expected, reviews of the regulations are mixed and much of the criticism seems to hinge on the Full Payment Test. Advocates for low income populations argue the proposed regulations do not go far enough. For example, Nick Bourke, Director of the small-dollar loans project at The Pew Charitable Trusts wrote that the proposed rules "miss[] the mark."[69] He suggested that the rules should include a limit on required payments and longer repayment periods.[70] Alex Horowitz, Senior Officer of the same project, said the regulations should focus on "lower prices and fees, smaller installment payments, and quicker application processing."[71] He criticized the current proposed regulations as "provid[ing] more paperwork for the same 400 percent APR loan…[t]hat's not consumer protection."[72]

Payday loan industry advocates, on the other hand, argue the regulations go too far. The Chief Executive Officer of Community Financial Services Association of America (CFSA), Dennis Shaul, said in a statement that the rule "presents a staggering blow to consumers as it will cut off access to credit for millions of Americans who use small-dollar loans to manage a budget shortfall or unexpected expense."[73] He further warns of "financial havoc" across the United States.[74] It is interesting to note that advocates for consumers *and* industry spokespeople both cite *consumers* to support their propositions.

Mr. Shaul's comments are common among those who advocate for payday loans, despite some of their obvious flaws. The most often cited argument is that consumers are in need of these loans that fill an otherwise unmet critical need. Without them, the argument goes, consumers would have no way of paying necessary and often unexpected expenses. The Full Payment Test may exclude borrowers who need these loans the most. It is the borrowers who *do not* have the ability to repay the loans that likely need them the most. Therefore, these loans may simply be good public policy, as they help ensure would-be borrowers do not instead turn to unlawful means of obtaining money.

Another argument is that payday loans are not as expensive as some unfortunate, albeit unintended, alternatives. For example, Aimee Minnich points out that payday loans are often cheaper than over-drafting a checking account or missing a credit card payment.[75] Wells Fargo, for example, charges $35 per overdraft.[76] Wells Fargo further notes that up to four *per day* may be charged, totaling $140. Thus, if a customer made four $5 purchases that over-drafted his or her account unintentionally, he or she could be charged $140 on a $20 "loan." Similarly, banks charge credit card holders late fees of $25-$35, depending on the customer's payment history.[77]

Others point to the fact that consumers use these products voluntarily with awareness of the associated risks.[78] The exceedingly high interest rates can cause some to have a knee-jerk reaction of wanting to regulate without first considering alternatives. However, Thaya Brook Knight points out that these consumers need the loans (and many do repay them on time), the fee charged is no different than other financial services fees, and that rolling over loans only points to slim margins for lenders.[79] As two other authors put it: "Scholars calling for intrusive regulation or outright prohibition of payday lending have skipped over the necessary step of explaining precisely what it is about this market that is so offensive as to justify prohibition or regulation."[80]

On the one hand, many consumers do need these loans

and, as Ms. Knight mentions, do in fact repay the loans on time. However, critics calling for an outright prohibition may be leaving these consumers out in the cold. This is one justification for regulating, rather than prohibiting, payday loans. This is, in essence, what the CFPB's proposed regulations do. While some may argue the proposed regulations go too far, they do not prohibit all payday loans and they leave the loans available to those who need them. It also seems as though CFPB has gone to great lengths to describe what is wrong with payday loans, including extensive research, which seems to contradict the point made by Mann and Hawkins.

Additional Concerns

One item that the proposed rules do not cover is collection practices of payday loans. This is most likely because the Fair Debt Collection Practices Act[81] already covers these practices. For example, the Act prohibits "conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt."[82]

Nonetheless, consumers still face prohibited debt collection practices. The CFPB found that the most common consumer complaints were "continued attempts to collect debt not owed" and unlawful "communication tactics."[83] Some representative examples include: "companies threatening to take legal action (thirty percent), using obscene, profane, or abusive language (seven percent), calling after being sent written cease communication notices (six percent), or calling outside of 8 a.m. to 9 p.m. (three percent)."[84]

ACE Cash Express recently reached a settlement of $10 million with the Consumer Financial Protection Bureau.[85] Some of the claims included that ACE Cash Express "repeatedly called the consumers' employers and relatives and shared the details of the debt."[86] In addition, the company encouraged borrowers to take out a *new* loan to pay back the one they currently owed.[87] The company also threatened the consumers with jail time.[88]

There's Already a Law for That…Right? – Existing Laws Affecting Payday Lending

One argument against national agency created regulations is that there is already sufficient regulation on the federal and state levels. The federal Truth in Lending Act is one the most applicable pieces of federal legislation. In addition, various state laws address the issue and many think this is an issue best left to the states to regulate.

Federal Law

Truth in Lending Act

The Truth in Lending Act[89] (TILA) was enacted in 1968 to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices."[90]

Courts have consistently held that these regulations are applicable to payday lenders. Under the act, an entity is a "creditor" subject to the statutory requirements if that business "regularly extends credit" and "is the person to whom the debt arising from the consumer credit transaction is initially payable…" The regulations further state that an individual or business is a "creditor" when four conditions are met: (1) "the credit is offered or extended to consumers;" (2) such offering is done on a regular basis; (3) the credit has an associated finance charge or is payable in more than four installments pursuant to a written agreement; and (4) "the credit is primarily for personal, family, or household purposes."[91] In 2000, the Board of Governors of the Federal Reserve System updated the official commentary to the regulations to explicitly state payday loans are "credit" for purposes of TILA.[92]

One argument against national agency created regulations is that there is already sufficient regulation on the federal and state levels.

Thus, payday lenders must comply with the TILA, which focuses primarily on disclosure. Indeed "providing proper disclosures is at TILA's very core."[93] Some of the central required disclosures include: the identity of the creditor,[94] the amount financed,[95] the finance charge,[96] the APR[97], and the payment schedule.[98] The regulations also prescribe *how* the items must be disclosed. The disclosures must be made "clearly and conspicuously in writing, in a form that the consumer may keep."[99] The required disclosures must be grouped together by themselves, without any extraneous information. This grouping together, often within bordered lines on a page, has come to be known as the "federal box" or the "TILA box." The box concept was introduced to "provide consumers with simpler, more understandable information" and requires "all TILA disclosures to be segregated from the contract terms, with the APR and finance charge disclosures receiving the most prominence."[100] Some guidance even recommends enclosing the required disclosures in a box to comply with the statute.[101]

The CFPB's proposed regulations are necessary if more substantive aspects of payday lending, other than simply disclosure, will be addressed. For example, the TILA has nothing to do with a consumer's ability to repay or the number of loans a consumer may borrow at a given time. The TILA is a generally applicable law and is not narrowly tailored to payday lending. For that reason, many see the need for the proposed regulations even with TILA already in existence.[102]

State Law

Because federal legislation, such as the Truth in Lending Act, is limited in its scope and applicability to payday loans, many states have enacted their own legislation to further curb payday lenders or even outlaw payday loans altogether. In the absence of national reform prior to the proposed regulations, states began taking on the task themselves. The approaches vary widely among states: some have a complete ban on the loans, whereas other states effectively prohibit payday loans by prescribing an interest rate so low that no payday lender would operate in the state. Others allow payday lending, but regulate it in an effort to protect consumers. Still others allow payday lending with minimal restrictions. The following is a look at a few approaches.

Arizona: In July 2010, Arizona effectively outlawed payday loans.[103] More accurately, Arizona had previously enacted an exception to a cap on interest rates and that provision expired in July of 2010 (the "sunset provision").[104] Attempts to extend this exception failed, both through a ballot initiative and proposed legislation in Arizona's House and Senate. Arizona's Attorney General has vowed to "aggressively pursue payday lenders who attempt to evade the ban on payday loans."[105]

The payday lending industry reacted by initiating Proposition 200 or the "Payday Loan Reform Act" in 2008.[106] While that proposition contained some positive changes for consumers, including a decreased fee and interest rate cap, it would also, of course, allow payday lending in the state by removing the "sunset provision."[107] Voters rejected the initiative with approximately sixty percent of voters against it.[108]

When the ballot initiative was re-

jected, payday lenders turned to car title loans.[109] According to the New York Times, state records show that ACE Cash Express registered its locations in Arizona as car title lenders, skirting the requirements of the law.[110] A car title loan is different than a payday loan in that the borrower gives his or her title to the lender; it is returned upon full payment of the loan.[111] The vehicle is used as collateral and the lender has the right to seize the vehicle if the loan is not repaid on time. Indeed, the CFPB recently found that one in five borrowers has their car seized as a result of defaulting on one of these loans.[112] The CFPB's new proposed regulations would also cover these loans.

California: While California has not entirely banned payday loans, they have enacted legislation aimed at protecting consumers from some of the perceived harmful aspects of payday loans. Many of the most common criticisms are addressed in California's law. For example, a payday lender may only make one loan to an individual at a time and the loan cannot exceed $300.[113] Further, lenders may only charge a maximum fee of fifteen percent of the total amount of the check (up to $45).[114] The law further specifically prohibits a lender allowing a customer to pay off one loan with another loan.[115] This, therefore, is aimed at avoiding the cycle of debt borrowers can get trapped in.

To address issues of disclosure to consumers, the law requires that payday lenders post a fee schedule at every location.[116] Similar to the CFPB's limit on attempted withdrawals, California allows only one bounced check fee up to $15 in the event a borrower's check bounces.[117] Required notices must be given to the borrower "in the same language principally used in any oral discussions or negotiations leading to execution of the deferred deposit agreement and shall be in at least 10-point type."[118] Finally, payday lenders must *specifically notify* consumers that a consumer cannot be criminally prosecuted or threatened with prosecution for insufficient funds or a returned check.[119]

While the above points are some highlights, California has many additional regulations which protect consumers. The state also has an extensive enforcement provision of the law, including a private cause of action and other penalties for misconduct.[120]

Massachusetts: The state of Massachusetts effectively prohibits payday loans by having a small loan rate cap of twenty three percent.[121] In fact, the Massachusetts government website even states that "[p]ayday lending is not specifically prohibited in Massachusetts but what is generally referred to as a 'payday loan' is illegal due to the high annual percentage rate charged."[122] At this rate, a lender would not be able to be profitable. Nonetheless, those who still wish to lend in Massachusetts must obtain a license to do so.

New York: New York prohibits payday lending and has a usury cap in place for other loans, set at sixteen percent. However, online lenders were still lending in the state and attempting to collect debt after this prohibition went into effect. The state "has managed to exclude payday lenders only through conspicuously aggressive enforcement."[123] The Attorney General's office has aggressively pursued online payday lenders in the state.[124]

State laws have created a patchwork of legislation across the United States. The CFPB rules would at least bring uniformity across the United States. However, in instances where the state had *more* stringent requirements in place, lenders would be required to abide by those. Nonetheless, the proposed rules would set a floor, with states having the ability to enact further protections for consumers.

President Donald Trump's stunning victory in the 2016 election could have a lasting impact on Dodd Frank, the CFPB, and payday lending.

Payday Loans and Native American Tribes[125]

As state consumer protection laws have been becoming more robust, as discussed above, the federal government has consistently "protected the….right of Native American tribes to govern their own affairs."[126] Indeed, "The Supreme Court has long viewed sovereign immunity as a basic feature of tribal sovereignty."[127] The Supreme Court has declared the general principle: "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."[128] This is true even if the commercial activity or contract at issue was made off-reservation.[129]

Generally speaking, tribes themselves and "arms of the tribe" are immune from suit.[130] Litigation has focused on determining exactly what an "arm of the tribe" is. As scholars Nathalie Martin and Joshua Schwartz point out, the Supreme Court has not directly addressed this question.[131] However, the Supreme Court in *Inyo County, Cal. v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony* wrote in a footnote that "The United States maintains, and the County does not dispute, that the Corporation is an 'arm' of the Tribe for sovereign immunity purposes."[132] As Schwartz and Martin conclude, "a corporation can be an 'arm of the tribe' for sovereign immunity purposes."[133] Thus, payday lenders see an opportunity in associating with a tribe to take advantage of tribal immunity. Ellen Harnick of the Center for Responsible Lending recently told the Huffington Post that "[t]he very purpose of an online lender affiliating with a tribe is specifically and expressly so that they can lend in violation of state laws."[134]

What is important for the purposes of this paper is whether the CFPB has the power to regulate Indian tribes, in light of the new proposed regulations. This is still a relatively open question.[135] However, a recent case demonstrates what may happen, on at least one set of facts.

A California district court recently sided with the CFPB in a lawsuit against a payday lender associated with an Indian tribe.[136] According to the opinion, Western Sky Loans was located on the Cheyenne River Sioux Tribe Reservation and included a call center and office. Everything prior to and during the application period would include the Western Sky Loans logo and be on its website. However, once Western Sky made the loan, it would immediately sell each loan to CashCall. The consumer "would receive a notice that the loan had been assigned to WS Funding," with consumers making all payments to CashCall.[137] In exchange for a fee paid by CashCall to Western Sky, "all economic risks and benefits of the transaction passed to CashCall."[138]

The CFPB invoked its authority to regulate "unfair, deceptive, and abusive acts and practices" (discussed *supra*) by bringing an enforcement action in federal court against the lender. The agency alleged the practices were "unfair, deceptive, and abusive" because state law outlawed them. Specifically, the CFPB alleged that "by servicing and collecting full payment on loans that state-licensing and usury laws had rendered wholly or partially void or uncollectible," CashCall violated federal law.[139]

The court held that the choice of law provision, mandating that the laws of the Cheyenne River Sioux Tribe Reservation would govern, was invalid. Instead, the court held the appropriate law that applied was that of the state of the individual borrowers.[140] Thus, the usury caps and other state laws applied and the loans were, the court wrote, "void or uncollectible under the laws of most of the Subject States."[141] Part of the holding relied on that fact that the *"true"* lender was not Western Sky Loans, but was CashCall. The court concluded this after "consider[ing] the totality of the circumstances and apply[ing] a 'predominant economic interest'" test.[142]

This case demonstrates that the CFPB is aware of lending practices that attempt to skirt state laws by associating with Indian tribes and that the CFPB is prepared to utilize its enforcement powers in that instance. This will be one of the key areas to watch in the coming years once the final regulations go into effect and the CFPB attempts to enforce them against a tribe, with initial guidance coming from a lower court and any finality only likely to come from the Supreme Court.

Payday Lending Under The Trump Administration

President Donald Trump's stunning victory in the 2016 election could have a lasting impact on Dodd Frank, the CFPB, and payday lending. The future of the CFPB and payday lending is now much more uncertain than it would have been under a Clinton administration, President Trump has stated his plan is to "dismantle the Dodd-Frank Act."[143] The new administration may entirely revoke the proposed rule, as an administrative agency has the power to "terminate the rulemaking" or may make substantial changes to the proposed rules.[144] While President Trump has invoked executive authority to begin the "dismantling," nothing definitive has occurred as of this writing.[145]

Conclusion

Some argue payday loans are a necessary evil, while others demand their total prohibition. Somewhere in the middle lies a sweet spot where consumers can get the short term credit they need while lenders act fairly in their lending and collection practices.

This paper analyzed the CFPB's comprehensive regulations in the historical context while also considering the current regulatory environment. The regulations are aimed at increased disclosure to consumers while also ensuring they have the ability to repay their loans. The analysis revealed how regulations on a national level can protect individuals like Elliott Clark, Trudy Robideau, and Raymond Chaney from a cycle of debt that eventually becomes insurmountable for many.

** Candidate for Juris Doctor, University of Notre Dame Law School, 2017.* *Thank you to Professor Judith Fox, Clinical Professor of Law at the University of Notre Dame Law School, for her invaluable feedback and suggestions.*

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In Through the Out Door

Exceptional Access to Law Enforcement Agencies

By Michele G. Curtis*

Introduction

Shortly after the attacks in San Bernadino, California, the US government demanded Apple provide access to the computer code used in Apple iPhones because without that code, the FBI and other agencies were unable to "crack" the devices and gather the information they contain. It is this "impenetrability" that private lives, businesses, and all forms of governments rely upon to ensure secure communications. Cyber-attacks on these communication systems have increased exponentially, resulting in the development and use of app based encryption systems with heightened security features, like those used by the couple responsible for the San Bernadino shootings in 2015. This makes communications and data transfers more impenetrable, which benefits law abiding citizens, but may also provide collateral benefit to criminals and terrorists as these same systems make the job of law enforcement agencies (LEAs) much more difficult.

In response to increasingly sophisticated encryption programs utilizing software based technologies, and often following terrorist attacks like San Bernadino in 2015 or Paris in 2016, there are calls to find a way to allow governments to read encrypted communications. These proposals often call for one or two primary approaches: software designers and companies must provide governmental and law enforcement agencies the keys or code to de-encrypt information sent using their software, or encrypted software codes must be written to contain a secret "back door" that would allow government and law enforcement agencies access to the encrypted information. Upon request, or on a compulsory basis, companies would be required to provide the keys to get in through the back door. It is understandable that following a horrific attack, there is a strong desire to ensure that law enforcement agencies are as equipped as possible to find the perpetrators quickly and easily. But back door access to information also raises significant concerns about individual privacy, as well as the overall security of the digital information sectors. It is this tension between the public policy of helping LEAs investigate and prosecute crimes, within the rule of law, and the public policy of ensuring that individuals' liberties and privacy are protected that lie at the heart of exceptional access proposals. There currently are proposals that encourage or mandate that the US government have access to de-encryption

codes used in commercially available technological devices and software programs.

This is not the first time proposals for easier access to communications systems by LEAs have been proposed, nor is it likely to be the last. Each new proposed approach raises both old and new concerns about technological feasibility and practicability, regulatory and statutory issues (both domestically and abroad), Constitutional implications, and its economic impact. This paper discusses exceptional access in light of these concerns and concludes that as with past efforts, this approach would not be effective or efficient, and carries more potential harms than benefits.

Shortly after the attacks in San Bernadino, California, the US government demanded Apple provide access to the computer code used in Apple iPhones.

The Past is Present . . . Again

Encryption is an age-old tool that encodes communications so they are unintelligible to all but the intended recipients. Current encryption systems create numbers based on sophisticated digital algorithms for encoding the communication. Currently, there are two commonly used types of encryption keys: public and private. With the private or symmetric system, the key both encrypts and decrypts the message, so both parties must have the key. Success of the system depends on the ability of both parties to generate and share the key securely. The more common public or asymmetric key system is based on a general code everyone uses to encrypt the message but each receiver has a specific key to decrypt it. It is not possible to deduce the private key from the public key. Any encryptions system then is largely only as secure as the secrecy of its key.

Encryption keys are measured in bit numbers, where each bit or digit is a 1 or 0. A 10 bit key has 2 to 10th combinations, or 1024 possible key combinations. Adding to key length exponentially increases the number of possible key combinations. Mathematically then, a 1024-bit key length has 2^{984} more combinations than a 40-bit key length. Long keys are necessary for secure crypto-systems but alone are not sufficient to ensure impenetrability. There is no known way of immediately testing a system to evaluate its level of security; it must be publicly used and tested, and some deficiencies may not be uncovered for years.[1]

Proposals to make it easier for LEAs to access data started in the early 1990s, an era called the Crypto Wars; most recently, the concept of “exceptional access” has been developed. In 1991, then Senator Joe Biden put language into the Comprehensive Counter-Terrorism Act (CCTA) mandating government access to encrypted communications carried by electronic service providers.[2] Ultimately, the bill was not signed into law.[3] In 1993, the Clinton administration proposed a new, non-peer reviewed or tested government encryption code. The new code was named Skipjack, and was to be included in another new product, the Clipper Chip. The Clipper Chip was to be placed into all new voice communication systems.[4] With the Clipper Chip system, the government would be the escrow agent for all encryption keys, allowing them access to all encrypted private communications.[5] It would take a court order to use the keys in surveillance, and unrelated communications would remain encrypted and unavailable. Resounding opposition ensued and ultimately the Clipper Chip proposal was abandoned.

A subsequent bill, the Communications Assistance for Law Enforcement Act (CALEA) enacted in 1994, requires telecommunications service providers to have the necessary technical capabilities available that would allow for easy compliance with LEA surveillance requests.[6] CALEA is applicable to traditional telephony and mobile telephone services, but not Internet based communication services. Efforts to include Internet communication systems so far have failed.[7]

By the mid-1990s tight U.S. export controls were in place for encryption products or goods with encryption systems; these export regulations created ongoing issues between industry and the U.S. Department of Commerce and other agencies.[8] Further complicating this was that any non-U.S. made imports of encrypted goods was not subject to any restrictions. In 1999, in recognition of increasing industry pressures, legal decisions declaring many of the regulations unlawful, a loosening of export controls on encrypted products by the EU, and a growing dependence on electronics for commerce and communications, the Clinton administration lifted most of the export controls on encryption programs and products.[9]

Duct Tape Won’t Fix That

Exceptional access would purposefully create an intentional vulnerability or backdoor in technological information and communication security systems, and is broadly opposed by technological and software designers and manufacturers, including Tim Cook, the CEO of Apple.[10] Backdoors are unable to discriminate between a “good guy” coming in from a “bad guy.” For example, Vodafone Greece bought a telephone switch and later added interception capabilities to the system. These interception features were detected and used for 10 months to tap into the cell phones of 100 senior members of the government, including the Prime Minister. In 2007 the “hack” was detected and the backdoor was closed, but the perpetrator(s) were never caught.[11] Identified access points do not just allow for access to data alone. In a controlled experiment in Missouri in July 2015, hackers used software vulnerabilities they identified to send commands through a Chrysler Jeep’s entertainment system to its dashboard functions, steering, brakes, and transmission, from a remote laptop as the car was being driven at 70 mph down a remote highway.[12]

Different security systems have been developed that are not compatible with exceptional access. Many providers are moving towards the use of forward secrecy programs. Under this approach, keys are made and then discarded immediately after use, so even if a key is accessed, the only data accessible is that included in the instant transmission. Therefore, attackers must intercept the transmission in real time. Consumers, and even businesses, are moving to programs where messages vanish after reading, e.g., Snapchat. Flaws in using centralized service providers have led to new avenues for acquiring communication applications. Applications such as ChatSecure are designed to add end-to-end encryption to any provider’s unencrypted chat services. End-to-end encryption programs are not compatible with approaches such as exceptional access; service providers do not have access to the key(s) to de-encrypt them. Newer smartphones come with a unique digital key that only the owner may use; there is no mechanism by which the company or manufacturer can unlock or access the device or its data.[13] Alternatively, smartphones may be equipped with end-to-end encryption systems (e.g., Signal or Off-the-Record) and these developments are not compatible with

exceptional access. Furthermore, emerging privacy enhancing technologies (PETs) make the entire concept of exceptional access moot.[14] PETs include programs that prevent access of service providers to the actual data of their users.

Another profound barrier to exceptional access use is that it increases system complexity exponentially. NSA's former head of research testified, "When it comes to security, complexity is not your friend…complexity is the enemy of security… The basic idea is simple: as software systems grow more complex, they will contain more flaws and these flaws will be exploited by cyber adversaries."[15] Every new feature or change in a software system potentially interacts with other existing platforms and software, and each interaction carries with it the potential of creating vulnerabilities. Creating and deploying exceptional access would require testing for vulnerabilities, as well as creating fixes for the vulnerabilities, and further testing of the fixes themselves. Hardware is not amenable to easy fixes. Additionally, because the only way to determine the degree of security in a system is to deploy it and test it over a period of many years, many inherent vulnerabilities or those created by "fixes" may not be identified for decades.

Apart from the technological barriers, there are questions of how exceptional access would impact the US business sector and even government internationally. Currently, both are reeling due to the revelations by Edward Snowden. International trust has been severely eroded and estimates of the economic losses post-Snowden range from $21.5 billion USD to $180 billion USD.[16] It is reasonable to assume putting an intentional weakness into security systems, and advertising which systems have it, will only drive consumers (domestic and international, individual and institutional) away from compromised products either based on principle or the higher cost that will inevitably be associated with the compromised products.

While increases in regulatory controls related to encrypted technologies by foreign governments were already in play prior to Snowden, it is clear that new regulations and further controls are being considered and enacted because of him.[17] Currently, the Chinese government heavily regulates the import and export of encryption technology, and requires that any hardware and software made or used in China use encryption systems developed in China. In the finance sector, suppliers of non-Chinese products are asked to submit the source code of their technologies to the China Banking Regulatory Commission. Given the request for exceptional access then, it is ironic that in response to Chinese encryption regulations, the U.S. has made it virtually impossible for Huawei, a major Chinese maker of computer servers and cellphones, to sell its products in the United States, arguing that its equipment could have "back doors" for the Chinese government.[18]

We the People . . . Object

Proposed regulations like exceptional access clearly seek to increase, facilitate, or improve government surveillance activities. As a result, Constitutional concerns will be raised, specifically with regards to free speech (the First Amendment), search and seizure (the Fourth Amendment) and self-incrimination, particularly through compelled decryption (the Fifth Amendment).

Some legal scholars argue that creating exceptional access mechanisms is not a search and seizure because these activities alone have no inherent value.[19] It is the interception and/or decryption of the communication that constitutes a search and seizure and so long as due process is followed, e.g. a warrant or subpoena is obtained, there is no violation of the Fourth Amendment.[20] However, given that exceptional access is a permissive, "forward looking activity" that may be undertaken, how would considerations of due process even apply? What would they entail? In the meantime, for companies (and consumers) who do not use systems with exceptional access, the protection of current due process mechanisms would still be in place. It seems unlikely that a statute or regulation may strip one segment of the population of protections while leaving them intact for another.

There is some case law involving the Fifth Amendment right to not self-incriminate and decryption, although the verdicts have been mixed.[21] In 2006 the laptop of Sebastian Boucher was found to have child pornography on it during a border check and he was arrested.[22] In handling the computer, agents activated an encryption program; Boucher was subpoenaed for the code to access the program and citing the Fifth Amendment, he refused. In *In re Boucher* the District Court of Vermont denied Boucher's motion to quash. However, this decision was subsequently reversed. [23]

In *U.S. v Kirschner*, the court concluded compelling production of encryption passwords is akin to compelling testimony "that communicates information that may lead to incriminating evidence is privileged even if the information itself is not inculpatory."[24] However, in a later case, *U.S. v Fricosu*, the court held the fact that the government "does not know specific contents of any specific documents, is not a barrier to production."[25] That same year, however, in *U.S. v Doe*, the Court held that "even if the decryption and production of the contents of the hard drives themselves are not incriminatory, they are a link in the chain of evidence that is designed to lead to incriminating evidence; this is sufficient to invoke the Fifth Amendment privilege."[26]

It is arguably the relationship between the First Amendment and mandated data access that is most controversial. The fundamental question is: Is an algorithm (which comprise encryption codes) speech? Opponents of calling code speech argue that an algorithm is nothing but a mathematical equation; it does not convey any sort of thoughts, emotions, or ideas, so it is not speech.[27] From this perspective, an algorithm no more expresses an idea than a word processor or a typewriter. But this is akin to asserting that as an algorithm, E=mc2 is also only a conglomeration of letters and a number. Given the magnitude of ideas and thoughts that underlay this algorithm and the formation of an entire field of physics centered on this mathematical concept, the absurdity of deeming algorithms devoid of ideas or thoughts is clear.

In *Sorrell v IMS Health*, the Supreme Court came close to determining if data was protected speech.[28] A data aggregator contested a Vermont state law prohibiting pharmaceutical companies from receiving and using prescription data to be used for customizing advertising to doctors. The majority found the law unconstitutional and the opinion suggested that restrictions of data between willing participants constituted an automatic restriction of free speech.[29]

More recently, a Second Circuit court case raised the issue of whether computer code is speech.[30] The Digital Millennium Copyright Act prohibits the distribution of technologies that enable the circumvention of encryption used to limit access to copyrighted files.[31] In *Universal*

City Studios, Inc. v. Corley the defendant published the source code of the encryption program on a website known to hackers. The court started its analysis by noting that "[c]communication does not lose constitutional protection as 'speech' simply because it is expressed in the language of computer code."[32] In subsequent decisions, the court made it clear that the status of the code as either speech or conduct depends on the manner and purpose for which it is posted.[33]

It also is possible that demands for exceptional access would constitute a prior restraint.[34] Traditionally, requirements for allowing prior restraint include (1) it is necessary to prevent harm to a governmental interest of the highest order; and (2) without it, irreparable harm will definitely occur; (3) no alternative exists; and (4) use of prior restraint will actually prevent the harm.[35] A mandate such as exceptional access would have to include currently developed or future programs, systems, and apps that offer end-to-end encryption as it is clear these are incompatible with approaches like exceptional access. Programs such as Axolotl cryptographic ratchet that implement forward secrecy, as well as future secrecy would not be allowed to either continue or be further developed.[36] Given the free availability of these incompatible exceptional programs on the Internet, as well as alternatives, it is hard to see how prior restraint would be justified.

Any mandates to ensure exceptional access to LEAs will either fail on a constitutional basis or be completely ineffective.

So Now What?

Requiring the IT industry to operate within governmentally determined regulatory parameters will stifle innovation, have a negative impact on the functionality of the Internet due to changes in the architecture of the system, and will act as an additional trade barrier. And ultimately, hackers, tech-savvy engineers, and the NSA will find a way around the programs.[37] Simply put, the likely result with exceptional access will be that "legitimate actors will be making somewhat less secure communications and the bad guys will still not be able to be decrypted."[38]

At the height of the Crypto Wars, a group of computer science experts analyzed the impact of proposed mandatory key escrow systems on the developing Internet and found the proposal practicably impossible and fraught with potential concerns for security. Similarly, in 2013, many of those same experts reconvened to discuss exceptional access proposals and their findings were much the same: "These proposals are unworkable in practice, raise enormous legal and ethical questions, and would undo progress on security at a time when Internet vulnerabilities are causing extreme economic harm."[39] Any mandates to ensure exceptional access to LEAs will either fail on a constitutional basis (most likely, prior restraint) or be completely ineffective.

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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 that highlights 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.

UNITED STATES SUPREME COURT

New York law prohibiting credit card surcharge regulates speech. Merchants challenged a New York law that requires single pricing and prohibits imposing a credit card surcharge. The District Court ruled in favor of the merchants. It read the statute as "draw[ing a] line between prohibited 'surcharges' and permissible 'discounts' based on words and labels, rather than economic realities." The Court of Appeals for the Second Circuit vacated the judgment of the District Court with instructions to dismiss the merchants' claims. The court held that price regulation alone regulates conduct, not speech, the Court of Appeals concluded that the law did not violate the First Amendment. The Supreme Court found that the statute in fact regulated speech. The Court held that because the Court of Appeals concluded otherwise, it did not determine whether the law survives First Amendment scrutiny. The Supreme Court noted that on remand the Court of Appeals should analyze the law as a speech regulation. *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017). https://www.supremecourt.gov/opinions/16pdf/15-1391_g31i.pdf

FEDERAL CIRCUIT COURTS

Sending 1099-A form does not violate Bankruptcy Discharge injunction. The First Circuit recently affirmed a bankruptcy court's ruling that a mortgagee did not violate the discharge injunction in 11 U.S.C. § 524(a) by sending IRS 1099-A forms to borrowers after their discharge. The court found that the IRS forms were not objectively coercive attempts to collect a debt. *Bates v. CitiMortgage, Inc.*, 844 F.3d 300 (1st Cir. 2016). https://scholar.google.com/scholar_case?q=Bates+v.+CitiMortgage,+Inc&hl=en&as_sdt=6,44&case=11174961397451258094&scilh=0

Fax invitation offering a free dinner sufficient to violate Telephone Consumer Protection Act. Physicians filed suit alleging violations of the TCPA. They alleged that defendant sent an unsolicited advertisement in violation in violation of the Act-- a fax invitation for a free dinner meeting to discuss ailments relating to Physicians' business. The district court dismissed for failure to state a claim, holding that no facts were pled that plausibly showed that the fax had a commercial purpose. The Second Circuit held that, while a fax must have a commercial purpose to be an "unsolicited advertisement," the district court improperly dismissed Physicians' complaint where Physicians' allegation is sufficient to state a claim. The court vacated and remanded, noting, "While we agree that a fax must have a commercial purpose to be an 'unsolicited advertisement,' we hold that the district court improperly dismissed appellant's complaint. Where it is alleged that a firm sent an unsolicited fax promoting a free event discussing a subject related to the firm's business, the complaint is sufficient to state a claim." *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharms., Inc.*, 847 F.3d 92 (2nd Cir. 2017). http://law.justia.com/cases/federal/appellate-courts/ca2/15-288/15-288-2017-02-03.html

An unaccepted Rule 68 offer of judgment is, regardless of its terms, a legal nullity. Plaintiff filed an action under the TCPA, requesting damages, an injunction, and requesting the case be treated as a class action. Defendant made a Rule 68 offer of judgment in satisfaction of Plaintiff's individual claims. After Plaintiff rejected the offer, defendant deposited the amount of the offer with the court and moved to dismiss. The district court entered judgment under the terms of the rejected settlement offer and dismissed the action as moot because, following the settlement offer and entry of judgment, "there remain[ed] no case or controversy." The Second Circuit reversed. The court found that the Supreme Court's decision in *Gomez v. Campbell-Ewald Co.,* 136 S. Ct. 663 (2016) makes it clear an unaccepted offer of settlement is a legal nullity. *Geismann v. ZocDoc, Inc.*, 850 F.3d 507 (2d Cir. 2017). http://caselaw.findlaw.com/us-2nd-circuit/1851840.html

Debt collection letter did not adequately disclose the "amount of the debt." The Second Circuit held that a Payoff Statement violates the Fair Debt Collection Practices Act because it did not adequately state the amount of the debt. The court noted the Payoff Statement included a "Total Amount Due," but that amount may have included unspecified "fees, costs, additional payments, and/or escrow disbursements" that were not yet due at the time the statement was issued. The court explained that a statement is incomplete where, as here, it omits information allowing the least sophisticated consumer to determine the minimum amount she owes at the time of the notice, what she will need to pay to resolve the debt at any given moment in the future, and an explanation of any fees and interest that will cause the balance to increase. *Carlin v. Davidson Fink LLP*, No. 15-3105-cv, 2017 U.S. App. LEXIS 5438 (2nd Cir. Mar. 29, 2017).
http://law.justia.com/cases/federal/appellate-courts/ca2/15-3105/15-3105-2017-03-29.html

A statement is incomplete where, as here, it omits information allowing the least sophisticated consumer to determine the minimum amount she owes at the time of the notice.

Standing under the Fair Credit Reporting Act. The Third Circuit held that a violation of the FCRA gives rise to an injury sufficient for Article III standing purposes. The case involved plaintiffs who sued after two laptops, containing sensitive personal information about them and others, were stolen from health insurer Horizon Healthcare Services, Inc. The plaintiffs alleged willful and negligent violations of the Fair Credit Reporting Act, as well as violations of state law, premised on the claim that Horizon inadequately protected their personal information. The district court dismissed the suit for lack of Article III standing. The district court reasoned that none of the plaintiffs claimed a cognizable injury because, although their personal information had been stolen, none of them had adequately alleged that the information was actually used to their detriment. The Third Circuit Court of Appeals vacated and remanded the case back to the district court. It explained: "In light of the congressional decision to create a remedy for the unauthorized transfer of personal information, a violation of FCRA gives rise to an injury sufficient for Article III standing purposes. Even without evidence that the Plaintiffs' information was in fact used improperly, the alleged disclosure of their personal information created a de facto injury. Accordingly, all of the Plaintiffs suffered a cognizable injury, and the Complaint should not have been dismissed." *In re Horizon Healthcare Servs. Data Breach Litig.,* 846 F.3d 625 (3rd Cir. 2017). http://law.justia.com/cases/federal/appellate-courts/ca3/15-2309/15-2309-2017-01-20.html

"Hidden" arbitration clause not enforceable. The Third Circuit held that an arbitration clause and class action waiver on the 97th page of a 143 page "Health and Safety Warranty Guide" was not enforceable. Applying basic principles of contract law, the court found no "meeting of the minds" because Samsung failed to provide "reasonable notice" to the consumer that the Guide included bilateral contractual terms at all or contained an arbitration clause and class action waiver. The court was troubled by the lack of any indication on the outside of the Guide that it was a bilateral contract or included any terms or conditions. Rather, the cover of the Guide referred to itself as a "manual." Nor did the table of contents or index list an arbitration clause. *Noble v. Samsung Elecs. Am., Inc.*, No. 16-1903, 2017 U.S. App. LEXIS 3841 (3d Cir. Mar. 3, 2017).
http://www2.ca3.uscourts.gov/opinarch/161903np.pdf

Arbitration agreement imposed over the phone not enforceable. A putative class of New Jersey inmates sued and the Defendant moved to compel individual arbitration. The class representative who created her account through the website and actively clicked a button accepting the terms and services was dismissed. But, the Third Circuit ruled differently with respect to class representatives who had created accounts by telephone. They received an audio notice that "your account…[is] governed by the terms of use at [defendant's website]." Telephone users were not required to take any affirmative step to indicate consent to the terms. The district court refused to compel those telephone members of the class to arbitration and the Third Circuit affirmed. The court distinguished this situation from those involving on-line services, where a link is easily accessible to terms, and from shrinkwrap cases, where consumer received physical copies of the terms when they open the product. It suggested the telephone situation may be closer to "browsewrap" agreements that do not require a manifestation of express consent, and which courts have refused to enforce if the terms are obscured. The court stated the telephone users "neither received GTL's terms of use, nor were they informed that merely using GTL's telephone service would constitute assent to those terms" and therefore there was no arbitration agreement to enforce. *James v. Global Tel*Link Corp.*, No. 16-1555, 2017 U.S. App. LEXIS 5448 (3d Cir. Mar. 29, 2017).
http://caselaw.findlaw.com/us-3rd-circuit/1854620.html

Luring consumers into switching to its service by offering teaser rates that are much lower than its regular rates is a claim under Illinois Consumer Fraud and Deceptive Business Practices Act. The Seventh Circuit held that the consumer sufficiently alleged that an electric power company breached a contract and engaged in deceptive business practices since the consumer alleged that the company failed to comply with an offer to provide new customers lower rates and instead charged the consumer its prevailing rate for service. The Court further held that a district court had jurisdiction to consider a claim that an electric power company charged improper rates since a state agency did not have exclusive jurisdiction over such claim and the district court had jurisdiction to apply state law available to the state courts to address the claim. *Zahn v. N. Am. Power & Gas, LLC*, 815 F.3d 1082 (7th Cir. 2017).
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2017/D02-08/C:15-2332:J:Kanne:aut:T:fnOp:N:1909272:S:0

Spokeo requires more than technical violation of Fair and Accurate Transactions Act. The Seventh Circuit narrowed standing to bring lawsuits under the Fair and Accurate Credit Transactions Act (FACTA), holding that plaintiff's allegation that defendant failed to truncate credit card expiration dates properly on its receipts in violation of FACTA was, on its own, insufficient to establish Article III standing. Plaintiff's allegation of a statutory violation without alleging how that violation injured him failed to establish the concrete injury or harm required by *Spokeo v. Robbins*. *Myers v. Nicolet Rest. of de Pere, LLC*, 843 F.3d 724 (7th Cir. 2016) https://scholar.google.com/scholar_case?q=Myers+v.+Nicolet+Rest.+of+de+Pere,+LLC&hl=en&as_sdt=6,44&case=7928971149869956945&scilh=0

Debt collectors letter not disclosing debt was time barred violates Fair Debt Collection Practices Act. Assignee debt collector alleges that in 1993, consumer incurred a debt for annual fees, an activation fee, and late fees for a credit card that he applied for but never actually used. In 2013, long after the statute of limitations had run, collector sent a dunning letter trying to collect. The letter claimed that Patoja owed $1903 and offered several "settlement options." The Fair Debt Collection Practices Act, 15 U.S.C. 1692e, prohibits collectors of consumer debts from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." The Seventh Circuit affirmed the district court judgment for the consumer, agreeing that the dunning letter was deceptive or misleading because it did not tell the consumer that collector could not sue on the time-barred debt and it did not tell the consumer that if he made, or even just agreed to make, a partial payment on the debt, he could restart the clock on the long-expired statute of limitations, bringing a long-dead debt back to life. *Pantoja v. Portfolio Recovery Assocs.*, No. 15-1567, 2017 U.S. App. LEXIS 5432 (7th. Cir. Mar. 29, 2017).
http://law.justia.com/cases/federal/appellate-courts/ca7/15-1567/15-1567-2017-03-29.html

Punitive damage award in wrongful debt collection case upheld. The Eight Circuit upheld a punitive damage award based on an invasion of privacy arising from wrongful debt collection practices. The court concluded that the $400,000 punitive damages award was not unconstitutionally excessive because of the reprehensible nature of Nationstar's conduct; the 8-to-1 ratio of the award was not unconstitutionally excessive; and the award did not violate due process. *May v. Nationstar Mortg.*, Nos. 16-1285, 16-1307, 2017 U.S. App. LEXIS 5436 (8th Cir. Mar. 29, 2017).
http://law.justia.com/cases/federal/appellate-courts/ca8/16-1307/16-1307-2017-03-29.html

An "administratively feasible" way of identifying individual class members is not a prerequisite to certifying a class. The Ninth Circuit held that the language of Federal Rule of Civil Procedure 23 neither provides nor implies that demonstrating an administratively feasible way to identify class members is a prerequisite to class certification. The Ninth Circuit joined the Sixth, Seventh, and Eighth Circuits in declining to adopt an administrative feasibility requirement. *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017). https://scholar.google.com/scholar_case?q=Briseno+v.+ConAgra&hl=en&as_sdt=6,44&case=17618339736871036565&scilh=0

Law firm collecting a debt and enforcing a security interest is subject to FDCPA. The Ninth Circuit reversed the district court's dismissal for failure to state a cause of action under the Fair Debt Collection Practices Act. On appeal, the defendants argued for the first time it was merely enforcing a security interest and subject to only § 1692f(6). The rejected the defendants' argument it was enforcing a security interest. The court stated, "Rather than seeking to enforce an existing security interest or lien, the May Notice sought to collect Mashiri's overdue assessment fee and to make necessary disclosures that would perfect the HOA's security interest and permit it to record a lien at a later date." The court also found the defendants' interpretation of §1692a(6) incorrect. "As we recently observed "[i]f entities that enforce security interests engage in activities that constitute debt collection, they are debt collectors." *Mashiri v. Epsten Grinnell & Howell*, 845 F.3d 984 (9th Cir. 2017).
https://cdn.ca9.uscourts.gov/datastore/opinions/2017/01/13/14-56927.pdf

Arbitration provision contained in a warranty brochure included in the box is not enforceable. Plaintiff filed a class action against Samsung, alleging that it made misrepresentations as to the performance of the Galaxy S4 phone. Samsung moved to compel arbitration based on a warranty brochure contained in the phone's box. Determining that its analysis is governed by California contract, rather than warranty, law, the Ninth Circuit concluded plaintiff did not assent to any agreement in the brochure, nor did he sign or otherwise act in a manner that showed he accepted the arbitration agreement. The court concluded that Samsung failed to demonstrate the applicability of any exception to the general California rule that an offeree's silence does not constitute consent. The court also found that Samsung's argument that plaintiff agreed to arbitrate his claims by signing the Customer Agreement with Verizon Wireless was meritless. The court explained that Samsung is not a signatory or third party beneficiary to the Customer Agreement between Verizon Wireless and its customer. *Norcia v. Samsung Telecoms. Am., LLC,* 845 F.3d 1279 (9th Cir. 2017).
http://law.justia.com/cases/federal/appellate-courts/ca9/14-16994/14-16994-2017-01-19.html

Fair Credit Reporting Act disclosure must contain "solely" the disclosure. Plaintiff filed a putative class action against M-I, alleging violation of the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681b(b)(2)(A). Addressing an issue of first impression, the Ninth held that a prospective employer violates Section 1681b(b)(2)(A) when it procures a job applicant's consumer report after including a liability waiver in the same document as the statutorily mandated disclosure. The court held that, in light of the clear statutory language that the disclosure document must consist "solely" of the disclosure, a prospective employer's violation of the FCRA is "willful" when the employer includes terms in addition to the disclosure, such as the liability waiver in this case, before procuring a consumer report or causing one to be procured. *Syed v. M-I, LLC*, 846 F.3d 1034 (9th Cir. 2017).
http://hr.cch.com/ELD/SyedMI012017.pdf

Tribal entity not immune from CFPB's investigative demand. Tribal Lending Entities challenged the district court's decision compelling them to comply with the Consumer Financial Protection Bureau's civil investigative demands. The Tribes argued that because the Consumer Financial Protection Act of 2010, defines the term "State" as including Native American tribes, the Tribal Lending Entities, as arms of sovereign tribes, are not required to comply with the investigative demands. The Ninth Circuit concluded that, in the Act, which is a generally applicable law, Congress did not expressly exclude tribes from the Bureau's enforcement authority. The court explained that, although the Act defines "State" to include Native American tribes, with States occupying limited co-regulatory roles, this wording falls far short of demonstrating

that the Bureau plainly lacks jurisdiction to issue the investigative demands challenged in this case. *CFPB v. Great Plains Lending, LLC*, 846 F.3d 1049 (9th Cir. 2017). http://law.justia.com/cases/federal/appellate-courts/ca9/14-55900/14-55900-2017-01-20.html

Arbitration agreement containing conflicting provisions not enforceable. The Tenth Circuit consider whether an arbitration agreement containing numerous conflicting provisions was enforceable. The conflicts involve (1) which rules will govern, (2) how the arbitrator will be selected, (3) the notice required to arbitrate, and (4) who would be entitled to attorneys' fees and on what showing. The court found no agreement to arbitrate because the conflicting details in the multiple arbitration provisions indicate that there was no meeting of the minds with respect to arbitration. *Ragab v. Howard*, 841 F.3d 1134 (10th Cir. 2016). https://scholar.google.com/scholar_case?q=Ragab+v.+Howard&hl=en&as_sdt=6,33&case=3035134484842385203&scilh=0

The court found no agreement to arbitrate because the conflicting details in the multiple arbitration provisions indicate that there was no meeting of the minds.

No enforceable arbitration agreement when six different arbitration agreements exist. The parties had six agreements that governed their business relationship. Each agreement had an arbitration agreement. But, those arbitration agreements did not provide for the same set of rules to govern the arbitration, or the same method of choosing an arbitrator, or the same notice period before arbitration, or the same opportunity to recover attorneys' fees. The Tenth Circuit noted that "whether parties can be compelled to arbitrate given conflicting arbitration provisions" was a novel question under Colorado law, but that New Jersey, Florida, and California courts had already concluded that "irreconcilable" differences across arbitration provisions made them unenforceable. The court reasoned that the courts that have granted motions to compel in similar circumstances found "the contracts themselves provided the solution," via a merger clause. Because the six agreements at issue did not allow one to override the others, the court found it could not "arbitrarily pick one to enforce because doing so could violate the other five." Therefore, it concluded "there was no meeting of the minds" on arbitration, and affirmed the district court's decision to not compel arbitration. *Ragab v. Howard*, 841 F.3d 1134 (10th Cir. 2016).
https://www.ca10.uscourts.gov/opinions/15/15-1444.pdf

District court retains original jurisdiction over state law claims following the dismissal of class action claims brought under the U.S. Class Action Fairness Act of 2005 (CAFA), codified at 28 U.S.C. §1332(d). CAFA conveys original subject matter jurisdiction to federal courts when the aggregated claims of the class members exceed $5 million, the proposed class has at least 100 members and at least one class member is a citizen of a state different from any defendant. Plaintiff initially filed all of its claims – state and federal – in federal court, alleging that jurisdiction existed under CAFA. After its class claims were dismissed, Plaintiff sought to dismiss and refile its state law claims in Alabama state court. Defendants argued that, under CAFA, the federal district court could not divest itself of original jurisdiction over the remaining claims. The Eleventh Circuit agreed. *Wright Transp., Inc. v. Pilot Corp.*, 841 F.3d 1266 (11th Cir. 2016). https://scholar.google.com/scholar_case?q=Wright+Transportation,+Inc.+v.+Pilot+Corporation,+et+al.&hl=en&as_sdt=6,44&case=18386200688762329039&scilh=0

Bank may owe a duty of care to a noncustomer and thus be liable under a negligence theory. Chang brought suit against Chase Bank when a third-party stole $750,000 from him through a wire under fraudulent pretenses that it would be held in escrow in a Chase account. Chang sued Chase to recover the money under claims that a Chase employee had assisted the third-party in the fraud. The court found that the third-party had a fiduciary duty to Chang. Thus, the Eleventh Circuit reversed the district court's dismissal of Chang's claims, because a bank may be liable to a noncustomer for its customer's misappropriation when a fiduciary relationship exists between the customer and noncustomer. *Chang v. JP Morgan Chase Bank, N.A.*, 841 F.3d 914 (11th Cir. 2016). http://media.ca11.uscourts.gov/opinions/pub/files/201513636.pdf

Non-signatory cannot rely on equitable estoppel to compel arbitration. In a case involving the sisters Kim, Kourtney and Khloé Kardashian the Eleventh Circuit held that they could not rely on the doctrine of equitable estoppel to force Kroma Makeup, EU to arbitrate its cosmetics trademark infringement claims. In a straightforward opinion, the court found that it would be inequitable to compel a party to arbitrate its claims against a non-party to the arbitration agreement when the agreement specifically limited arbitration to disputes arising between the parties. *Kroma Makeup EU, LLC v. Boldface Licensing + Branding, Inc.*, 845 F.3d 1351 (11th Cir. 2017). http://media.ca11.uscourts.gov/opinions/pub/files/201515060.pdf

FEDERAL DISTRICT COURTS

Purchaser of EFT card is not a consumer under the Texas Deceptive Trade Practices Act. A federal district court in Texas considered whether Plaintiff, who did not borrow money, but rather paid a small fee in order to use her money in a different format — namely on a plastic EFT card as opposed to a direct cash transaction — has acquired a good or service, as defined in the DTPA. The court held that, "When viewed through this lens, it is clear that Hopkins' goal in purchasing the MoneyPak cards was not to acquire a particular service, but merely to convert her money to a different format." Therefore, the Plaintiff was no a consumer as defined by the DTPA. *Hopkins v. Green Dot Corp.*, No. 5:16-CV-365-DAE, 2016 U.S. Dist. LEXIS 112799 (W.D. Tex. Aug. 24, 2016).
https://scholar.google.com/scholar_case?q=Hopkins+v.+Green+Dot+Corporation&hl=en&as_sdt=6,44&case=17057189271985011499&scilh=0

Eighteen phone calls did not violated Fair Debt Collection Practices Act. The U.S. District Court for the District of New Jersey ruled that 18 telephone calls to a consumer over a two-week period – of which 17 were unanswered, and the last where the consumer hung up – did not violate the federal Fair Debt Collection Practices Act (FDCPA). The Court found that the debt collector's calls were neither excessive nor harassing, as the calls were limited to no more than three times in one day, between regular business hours, only one call resulted in actual contact, the representative was polite, and the debt collector immediately ceased communications once requested. *Chisholm v. AFNI, Inc.*, Civil Action No. 15-3625(JBS/JS), 2016 U.S. Dist. LEXIS 162303 (D.N.J. Nov. 22, 2016).
https://scholar.google.com/scholar_case?q=Chisholm+v.+AFNI,+Inc.&hl=en&as_sdt=6,44&case=16474752212925451543&scilh=0

Non-party can enforce an arbitration clause in a TCPA case. The U.S. District Court for the Western District of Washington allowed a defendant to enforce the arbitration provision in a TCPA plaintiff's wireless agreements even though the defendant was not a party to the wireless agreements. Plaintiff filed suit against subway and its wireless carrier. The court concluded that equitable estoppel required enforcement of the arbitration agreement against the plaintiff where (1) the claims against Subway were intertwined with the wireless agreement, and (2) the plaintiff alleged interdependent conduct by the carrier and Subway. *Rahmany v. T-Mobile USA, Inc.*, Case No. C16-1416 JCC, 2017 U.S. Dist. LEXIS 9638 (W.D. Wash. Jan. 5, 2017).

Inaccurate Truth in Lending Act disclosures not sufficient to create standing. A New York district held that even assuming a creditor's initial TILA disclosures fell short under the statutory requirements, the plaintiff must show an injury in fact in order to have standing under Article III. The plaintiff alleged that the initial disclosures failed to accurately disclose the fees for returned payments and the complete method for the late payment fee including limitations on the maximum fee. While the plaintiff did not allege that she had actually been charged for a return check or a late fee, she contended that the retailer's deficient disclosure constituted a concrete harm and created a material risk of concrete harm. *Kelen v. Nordstrom, Inc.*, 2016 U.S. Dist. LEXIS 175028 (S.D.NY. Dec. 16, 2016). https://scholar.google.com/scholar_case?case=5687608317517113529&q=Kelen+v.+Nordstrom,+Inc.,&hl=en&as_sdt=6,44&as_vis=1

Consumer had standing to bring claim for violation of Fair Debt Collection Practices Act. The United States District Court for the Eastern District of New York denied defendant debt collector's motion to dismiss plaintiff's putative class action alleging violation of the Fair Debt Collection Practices Act, 15 U.S.C. 1692 et seq. ("FDCPA"). The court found that plaintiff sufficiently alleged a substantive violation of the FDCPA that demonstrates a concrete and particularized injury-in-fact, or, alternatively, a procedural violation of the FDCPA that poses a risk of real harm to plaintiff's statutory interests. In denying defendant's motion to dismiss, the District Court determined that *Spokeo* addressed standing for procedural violation of statutes, not substantive violations. *Bautz v. ARS Nat'l Servs.*, No. 16-CV-768 (JFB) (SIL), 2016 U.S. Dist. LEXIS 178208 (E.D.N.Y. Dec. 23, 2016).
http://law.justia.com/cases/federal/district-courts/new-york/nyedce/2:2016cv00768/381478/27/

Communications regarding hazard insurance were not an attempt to collect a debt. Consumer alleged defendant violated the FDCPA via certain letters in which defendant stated that "because we did not have evidence that you had hazard insurance on your property, we bought hazard insurance on the property and added the cost to your mortgage loan account." Defendant filed a motion to dismiss, arguing that its hazard insurance notices were not attempts to collect a debt and, therefore, "are not subject to the FDCPA." The Court agreed holding that the context of the notices, which failed to include any statement of by when, how, and to whom the alleged debt must be paid, demonstrated that they were not sent in connection with the collection of any debt. Indeed, although the letter stated that defendant "is attempting to collect a debt," it then stated, "if you are in bankruptcy or received a bankruptcy discharge of this debt, this letter is not an attempt to collect the debt." Accordingly, the court dismissed plaintiff's cause of action alleging violations of the FDCPA. *Burns v. Seterus, Inc.*, No. 16-CV-06638, 2017 U.S. Dist. LEXIS 4106 (W.D.N.Y. Jan. 11, 2017).
https://casetext.com/case/burns-v-seterus-inc

Non-signatory bound by arbitration agreement. JRC executed a written sales contract ("Contract") with Trina to purchase the solar panels. Jasmin was not a signatory to the contract. Nonetheless, as the Contract's performance period began, Jasmin acted as though it was a party to the Contract. Jasmin asserted that as a non-signatory it was not bound by the agreement. The Southern District of New York rejected this argument, recognizing that a non-signatory may be bound to arbitrate pursuant to several different common law principles arising under contract and agency law, including agency and estoppel. In applying this principle, the court found that an agency relationship existed between Jasmin and JRC. JRC had actual authority to bind Jasmin, as evidenced by the parties' conduct during negotiations, and following execution of the Contract. JRC also had apparent authority to bind Jasmin, as Jasmin's conduct and statements reasonably interpreted would lead a third party in Trina's position to believe that Jasmin had consented to JRC executing the Contract on its behalf. *Trina Solar US, Inc. v. JRC-Servs. LLC*, No. 16-CV-2869 (VEC), 2017 U.S. Dist. LEXIS 6134 (S.D.N.Y. Jan. 17, 2017).
http://usarbitration.shearman.com/siteFiles/15500/Trina%20Solar%20US,%20Inc.%20v.%20JRC-Services%20LLC%20et%20al,%20116-cv-02869%20(S.D.N.Y.%20J....pdf

A conjunctive DTPA award is not preclusive in bankruptcy court as to any independent basis for the award standing alone. A U.S. District court in Texas reversed a bankruptcy court's summary judgment that a state court judgment was preclusive and the debt was non-dischargeable. The court noted, "When a state-court judgment does not contain sufficiently detailed findings to meet the federal nondischargeability test, the court should look beyond the judgment and examine the jury instructions and evidence produced in the state-court proceedings that support the judgment. Disjunctive jury instructions in state-court judgments make it difficult for a bankruptcy court to give preclusive effect to that judgment in deciding whether the judgment debt is nondischargable. *In re Dang*, 560 B.R. 287 (Bankr. S.D. Tex. 2016). https://scholar.google.com/scholar_case?case=17097564237497114622&q=In+re+Dang&hl=en&as_sdt=6,44

Changes in debtor's financial condition allow modification of confirmed plan. The United States Bankruptcy Court for the Eastern District of Michigan allowed a debtor to modify his confirmed Chapter 13 plan based on a mistake by the debtor's attorney. The result of the modification was to reduce the plan to 36 months from 60 and reduce the payment to unsecured creditors by 80 percent. *In re Luman*, 2017 WL 521518 (Bankr. E.D. Mich. Feb. 2, 2017). http://www.leagle.com/decision/In%20BCO%2020170206857/IN%20RE%20LUMAN

STATE COURTS

Defendants' failure to pay arbitration fees constitutes a material breach of the parties' dispute, precluding enforcement of the agreement to arbitrate. Plaintiffs filed arbitration claims pursuant to an agreement that required resolution of disputes through an arbitration in accordance with the rules of the AAA. Despite repeated requests by the AAA, Defendant did not advance the filing fees the agreement required. Plaintiffs then filed an action in court. Defendants moved to dismiss in favor of arbitration. The trial court ordered the parties to attempt to reinstate the Plaintiffs claims with the AAA. The Appellate Division affirmed. The New Jersey Supreme Court reversed, noting, "Defendants' knowing refusal to cooperate with plaintiffs' arbitration demands, filed in reasonable com-

pliance with the parties' agreement, constitutes a material breach of the DRA and bars defendants from compelling arbitration under the agreement." *Roach v. BM Motoring, LLC*, Nos. A-69, 077125, 2017 N.J. LEXIS 239 (Mar. 9, 2017).
http://law.justia.com/cases/new-jersey/supreme-court/2017/a-69-15.html

Bank did not waive its right to demand arbitration of the subsequent consumer statute claims by litigating the debt-collection claims. After credit card holders defaulted on their accounts, the issuing bank elected to litigate debt-collection actions. After courts entered default judgments against both card holders, the card holders filed new and separate suits alleging that the bank violated the Uniform Trade Practices and Consumer Protection Act (UTPA). The bank moved in each case to arbitrate the UTPA claims, and the superior court stayed the UTPA litigation and ordered arbitration. The South Dakota Supreme Court held the two claims were not sufficiently closely related, and the bank did not waive its right to demand arbitration of the separate UTPA claims. *Hudson v. Citibank (South Dakota) NA*, 387 P.3d 42 (Ala. 2016). https://scholar.google.com/scholar_case?q=Hudson+v.+Citibank&hl=en&as_sdt=6,44&as_ylo=2016&case=10885414598293448485&scilh=0

California Supreme Courts sets out standard for establishing immunity for Indian tribes. In a case involving claims against two lenders for violating state law in connection with payday loans, the lenders alleged they were tribally affiliated business entities. The Supreme Court of California noted that, "the rule that Indian tribes are immune from suit is now firmly established as a matter of federal law — and is not subject to diminution by the States." The main legal question in this case, however, was how to determine whether a tribally affiliated entity shares in a tribe's immunity from suit. The court stated:

> We conclude that an entity asserting immunity bears the burden of showing by a preponderance of the evidence that it is an — arm of the tribe entitled to tribal immunity. In making that determination, courts should apply a five-factor test that considers (1) the entity's method of creation, (2) whether the tribe intended the entity to share in its immunity, (3) the entity's purpose, (4) the tribe's control over the entity, and (5) the financial relationship between the tribe and the entity.

The court found held that the entities in this case "failed to show by a preponderance of the evidence that they were entitled to tribal immunity as an arm of its affiliated tribe." It then remanded for the trial court to address the issue of whether the parties had the opportunity to fully litigate their claims under that standard. *People v. Miami Nation Enters.*, 386 P.3d 357 (Cal. 2016).
https://scholar.google.com/scholar_case?q=People+ex+rel.+Owen+v.+Miami+Nation+Enterprises.&hl=en&as_sdt=6,44&case=18107828471483461446&scilh=0

California Supreme Court limits scope of arbitration clause. The California Supreme Court has unanimously held that arbitration agreements can't block consumers from seeking injunctive relief that benefits the general public under California's Consumers Legal Remedies Act (CLRA) and Unfair Competition Law (UCL*). McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017).
http://law.justia.com/cases/california/supreme-court/2017/s224086.html

Arbitration must be held in venue designated by agreement. In conjunction with their purchases of new vehicles consumers purchased service contracts entitling them to no-cost oil changes for as long as they owned their respective vehicles. After the dealerships were sold they eventually stopped providing no-cost oil changes to customers who held those contracts. Consumers filed a demand for arbitration with the BBB, the dispute-resolution entity identified in their arbitration agreements on behalf of themselves and all similarly situated individuals. After the BBB informed consumers that it did not conduct class-action arbitration proceedings, they accordingly withdrew their arbitration demand and filed with the American Arbitration Association. Dealerships appealed a circuit court order allowing consumers to pursue their claims against the University dealerships in arbitration proceedings, conducted by the American Arbitration Association. Because a trial court can compel arbitration only in a manner consistent with the terms of the applicable arbitration agreement, the Alabama Supreme Court reversed the trial court's order compelling arbitration and remanded the case for the entry of a new order compelling consumers to arbitrate their individual claims against the dealerships before the BBB. *University Toyota v. Hardeman*, No. 1151204, 2017 Ala. LEXIS 5 (Jan. 27, 2017).
http://law.justia.com/cases/alabama/supreme-court/2017/1151204.html

Automobile PIP insurance does not cover transportation costs. The Oregon Supreme Court considered whether the PIP medical benefits included the insured plaintiff's transportation costs to receive medical care. The court held that PIP benefits for the "expenses of medical * * * services" do not include an insured's transportation costs for traveling to receive medical care. *Dowell v. Oregon Mutual Ins.*, 388 P.3d 1050 (Or. 2017).
http://law.justia.com/cases/oregon/supreme-court/2017/s063079.html

Washington law prohibits discrimination against legal same sex couples. After their florist refused to provide flower for their same sex wedding the couple and the state sued. Each alleging violations of the Washington Law Against Discrimination and the Consumer Protection Act (CPA). The florist defended on the grounds that the WLAD and CPA did not apply to her conduct and that, if they did, those statutes violated her state and federal constitutional rights to free speech, free exercise, and free association. The superior court granted summary judgment to the State and the couple, rejecting all of the florist's claims. Finding no reversible error in that judgment, the Oregon Supreme Court affirmed. *State v. Arlene's Flowers*, 389 P.3d 543 (Wash. 2017).
http://www.au.org/files/Arlene%27s%20Flowers.pdf

Arbitration provision in contract is not enforceable when buyer shows he did not agree to that provision. Buyer signed or initialed the bill of sale in two places — he initialed a box indicating that the boat was being sold "as is," and he signed on a line at the bottom of the document regarding his receipt of the boat and the acknowledgment of the boat's condition. He did not, however, initial the box under the arbitration provision, Buyer argued that because he did not initial the box directly below the arbitration provision, he did not agree to that provision. The Alabama Supreme Court agreed and held that that the arbitration provision that was not initialed had not become part of the contract between the parties. *Bevel v. Marine Grp, LLC*, No. 1150941, 2017 Ala. LEXIS 21 (Mar. 3, 2017).
http://law.justia.com/cases/alabama/supreme-court/2017/1150941.html

The arbitration provision that was not initialed had not become part of the contract.

Waiver signed by triathlete defeats wife's wrongful death claim. The Pennsylvania Superior Court held that although a liability waiver did not bar Mrs. Valentino from bringing the wrongful death action, such a claim was still subject to substantive defenses, such as the decedent's signing of the waiver that might prove that the Triathlon owed no duty or was not negligent. The court ruled that even non-signatory wrongful death claimants remain subject to the legal consequences of a valid liability waiver. A majority of the court held that the liability waiver executed by Mr. Valentino supports the Triathlon's argument that Mr. Valentino "knowingly and voluntarily assumed the risk of taking part in the competition" and, therefore, the Triathlon's actions were not tortious. *Valentino v. Philadelphia Triathlon, LLC*, 150 A.3d 483 (Pa. Super. Ct. 2016). https://scholar.google.com/scholar_case?q=Valentino+v.+Philadelphia+Triathlon&hl=en&as_sdt=6,44&case=15186407309266198177&scilh=0

Non-English speaker held to terms of contract written in English. A Florida appellate court reversed a trial court's denial of a car dealership's motion to compel arbitration, holding that because there was no evidence that the buyers, who did not read or speak English, attempted to learn or have explained to them what they were signing, or that the dealer's representatives prevented them from doing so or misrepresented the terms, the trial court erred by finding there was no valid agreement to arbitrate. *Kendall Imports, LLC v. Diaz*, 42 Fla. App. LEXIS 1117 (Dist. Ct. App. 2017). http://law.justia.com/cases/florida/third-district-court-of-appeal/2017/3d15-1985.html

Litigation of collection action waives arbitration clause. The Maryland Court of Appeals held that an assignee's collection action was related to debtor's claims and therefore assignee waived its contractual right to arbitrate Debtor's claims when it chose to litigate the collection action. *Cain v. Midland Funding, LLC*, No. 45, 2017 Md. LEXIS 141 (Mar. 24, 2017).
http://law.justia.com/cases/maryland/court-of-appeals/2017/45-16.html

DECEPTIVE TRADE PRACTICES AND WARRANTY

PURCHASER OF EFT CARD FOR A FEE IS NOT A CONSUMER UNDER THE DTPA

Hopkins v. Green Dot Corporation, ____ F.Supp.3d ____ (W.D. Tex. 2016).
https://scholar.google.com/scholar_case?case=17057189271985011499&q=hopkins+v.+green+dot+corporation&hl=en&as_sdt=6,44&as_vis=1

FACTS: Plaintiff Margaret Hopkins purchased electronic funds transfer cards ("EFT card") sold by Green Dot Bank and several retail stores ("Defendants") after receiving a phone call from an individual pretending to be her grandson, claiming to be wrongfully incarcerated. She provided the caller with the serial number of each EFT card she purchased and the caller used the serial numbers to transfer the money from the cards.

Hopkins brought suit against Defendants, alleging a cause of action under the DTPA. Defendants filed a motion to dismiss for failure to state a claim.

HOLDING: Granted.

REASONING: Defendants argued that Hopkins failed to establish that she was a "consumer" under the DTPA because she did not seek or acquire by purchase or lease, any goods or services. In order to state a claim under the DTPA, a plaintiff must allege that (1) she is a consumer under the DTPA; (2) the defendant committed a false, misleading, or deceptive act under section 17.46(b) of the DTPA, breached an express or implied warranty, or engaged in an unconscionable action or course of action; and (3) that this act was the producing cause of plaintiff's actual damages.

The Texas legislature has specifically declined to include money as a good and the use of money as a service within the DTPA.

The court accepted Defendants' argument and identified two reasons why Hopkins was not a consumer for purposes of the DTPA. First, the Texas legislature has specifically declined to include money as a good and the use of money as a service within the DTPA. Second, Hopkins' goal in purchasing the EFT cards was not to acquire a particular service, but merely to convert her money to a different format.

A CONJUNCTIVE DTPA AWARD IS NOT PRECLUSIVE IN BANKRUPTCY COURT AS TO ANY INDEPENDENT BASIS FOR THE AWARD STANDING ALONE

In re Dang, ____ F.Supp.3d ____ (S.D. Tex. 2016).
https://casetext.com/case/chau-v-gilbert-in-re-van-dang

FACTS: Trevor and Jorja Gilbert bought a home from Anh Van Dang and Hong Bich Chau ("Defendants"). The Gilberts sued Defendants in state court for fraud and unconscionability, alleging they failed to disclose significant water and mold damage to the home. The jury was asked to determine the damages owed, if any, to compensate the Gilberts for the alleged DTPA violation, unconscionable action, common law fraud, and statutory fraud. The jury delivered a conjunctive award of more than $1.5 million. Defendants filed bankruptcy and the Gilberts brought adversary actions to declare the state court judgment non-dischargeable under 11 U.S.C. §523(a)(2)(A) and (a)(6).

The bankruptcy court granted the Gilberts' summary judgment holding the state court's damages award had preclusive effective. The bankruptcy court relied upon the state court's final judgment that Defendants committed "knowing and intentional violations of the Texas Deceptive Trade Practices Act" to determine that the entire judgment debt was non-dischargeable under §523(a)(2)(A). Defendants appealed.

HOLDING: Reversed and remanded.

REASONING: The Gilberts argued the state court conjunctive jury damages award had preclusive effect regarding non-dischargeability of debt in bankruptcy court. The court rejected that argument, noting that under Texas law if a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone. The court held that the state court's jury instructions and judgment did not contain sufficiently detailed findings to meet the federal non-dischargeability test.

DEBT COLLECTION

COMMUNICATIONS REGARDING HAZARD INSURANCE WERE NOT AN "ATTEMPT TO COLLECT A DEBT"

Burns v. Seterus, Inc., ____F .Supp.3d ____ (W.D.N.Y 2017).
https://casetext.com/case/burns-v-seterus-inc

FACTS: Seterus, Inc. ("Defendant") acquired the servicing rights to Laurie A. Burns's ("Plaintiff") mortgage debt that was discharged in bankruptcy. Defendant initiated several phone calls to Plaintiff regarding her lapsed hazard insurance after Plaintiff requested all communications to cease. Defendant subsequently sent Plaintiff several letters demanding proof of insurance and informed Plaintiff she was "solely responsible for repayment of the cost" of the insurance policy if Defendant had to obtain it. The letters also advised Plaintiff that as a result of a bankruptcy discharge she was not personally liable on the debt.

Plaintiff filed suit alleging Defendant's debt collection practices violated the FDCPA, including the communications by letter and an automated telephone dialing system. Defendant moved for a 12(b)(6) dismissal on grounds that its communications with Plaintiff did not constitute attempts to collect a debt.
HOLDING: Granted.
REASONING: Defendant argued the letters were sent to satisfy its obligations as a mortgage servicer under federal law rather than to collect a debt. RESPA requires a servicer of a federally-related mortgage to obtain force-placed hazard insurance if there is a reasonable basis to believe the borrower has failed to comply with the loan contracts requirements to maintain property insurance. The court accepted Defendant's argument in noting that the letters contained no demand for payment, discussion of a payment deadline, threats in the event of nonpayment, or mention of Plaintiff's underlying mortgage debt. The court held the bankruptcy disclaimer within the letters was sufficiently prominent and unambiguous to put Plaintiff on notice thgat she would not be personally responsible for the debt. The court further held there were insufficient facts regarding the unspecified number of harassing telephone calls allegedly made by Defendant to demonstrate a legitimate FDCPA claim.

HOA FINE IS DEBT FOR PURPOSES OF FAIR DEBT COLLECTION PRACTICES ACT

Agrelo v. Affinity Mgmt. Servs., LLC, 841 F.3d 944 (11th Cir. 2016).
http://www.leagle.com/decision/In%20FCO%2020161109064/AGRELO%20v.%20AFFINITY%20MANAGEMENT%20SERVICES,%20LLC

FACTS: Agrelo and Fernandez ("Plaintiffs"), a married couple, resided in a community know as Marbella. As members of Marbella, the homeowners association, Plaintiffs were bound by Marbella's governing documents. Although Marbella identified no specific provision of the governing documents the Plaintiffs had violated, Marbella contended they improperly performed unapproved construction, relocated a fence, and removed plants. Marbella gave the Plaintiffs three weeks to correct the purported violation, but they took no action. After a hearing on the violation before Marbella's Grievance Committee, the Committee recommended Marbella's Board of Directors fine the homeowners $100 for each day the violation went uncorrected. Marbella set the total fine at $1,000, the maximum Florida law allows for a single, continuing violation. Plaintiffs refused to pay the fine and maintained that they had not violated any Marbella rule and had not been given due process. Meloni, the debt collector employed by Marbella, and Affinity, sent payment demand letters demanding a total of total of $1,115.00, which the Plaintiffs disputed. Plaintiffs also demanded evidence that Meloni was a licensed debt collector.

Plaintiffs brought suit against their Marbella, Affinity and Meloni ("Defendants"), seeking to recover for alleged violations of the Fair Debt Collection Practices Act (FDCPA) and the Florida Consumer Collection Practices Act (FCCPA). Plaintiff alleged that Marbella was vicariously liable for its agents' violations. The United States District Court for the Southern District of Florida granted Defendants' motion for summary judgment, finding the assessments were not a debt under the FDCPA. Plaintiffs appealed.
HOLDING: Reversed in Part, Vacated in Part and Remanded.
REASONING: Marbella and Affinity argued the obligation to pay does not constitute a debt, so they are not subject to the FDCPA. The circuit court disagreed. Because consumer protection statutes are construed broadly in favor of consumers, as long as the transaction creates an obligation to pay, a debt is created. By contrast, when the obligation to pay arises solely by operation of law, rather than contractual dealing, it is not a debt under the FDCPA. The homeowners' obligation arises from the documents that explicitly treat HOA fines as assessments. HOA assessments stem directly from the consensual home-purchase transaction. When a homebuyer must contractually agree to pay homeowners' assessments in order to purchase a home, that homebuyer takes on "debts" for those assessments under the FCCPA. By agreeing to the terms of the governing documents, the homeowners acknowledged that a failure to comply with HOA requirements could result in a fine that would be treated as an individual assessment. Thus, their obligation to pay for a claimed breach of the governing documents arose.

When the obligation to pay arises solely by operation of law, rather than contractual dealing, it is not a debt under the FDCPA.

EIGHTEEN PHONE CALLS DID NOT VIOLATE FAIR DEBT COLLECTION PRACTICES ACT

Chisholm v. AFNI, Inc., ____ F.Supp.3d ____ (D.N.J. 2016).
http://law.justia.com/cases/federal/district-courts/new-jersey/njdce/1:2015cv03625/319572/30/

FACTS: Plaintiff, Samuel Chisholm, had an account with DirecTV that became delinquent and was subsequently referred to

Defendant, AFNI, Inc., for collection. Defendant attempted to contact Plaintiff. According to both AFNI's recording system and plaintiff's phone records, Defendant placed eighteen phone calls to Plaintiff's cell phone over the course of two weeks. Defendant reached Plaintiff one time and, after the representative identified himself, Plaintiff hung up. The other seventeen call attempts were unanswered.

Plaintiff filed suit alleging that the phone calls violated several sections of the FDCPA. Defendant responded with a motion for summary judgment.

HOLDING: Summary Judgment Granted

The court highlighted that Defendant never called more than three times a day, there was at least three hours between the attempts, all of the calls came during normal business hours, and the Defendant's representative acted professionally when contact was successful.

ANALYSIS: Plaintiff claimed the calls demonstrated conduct, the natural consequence of which was to harass, oppress, or abuse the Plaintiff under the FDCPA. The court rejected this argument and noted that courts around the country have held that the number of calls alone cannot violate the FDCPA. The court pointed to the case of *Turner v. Professional Recovery Servs., Inc.,* 956 F.Supp.2d 580 (D.N.J. 2013) and stated that "plaintiff must also show some other egregious or outrageous conduct in order for a high number of calls to have the "natural consequence" of harassing a debtor". The court highlighted that Defendant never called more than three times a day, there was at least three hours between the attempts, all of the calls came during normal business hours, and the Defendant's representative acted professionally when contact was successful. Further, the court reiterated that the FDCPA was not intended to prevent debt collectors from contacting debtors at all, nor to impose unnecessary restrictions on ethical collectors. As such, the court held t no reasonable jury could find that the quantity, frequency, and proximity of the telephone calls demonstrated conduct, the natural consequence of which was to harass, oppress, or abuse the plaintiff under the FDCPA.

LAW FIRM COLLECTING A DEBT AND ENFORCING A SECURITY INTEREST IS SUBJECT TO FDCPA

Mashiri v. Epsten Grinnell & Howell, 845 F.3d 984 (9th Cir. 2017).
https://cdn.ca9.uscourts.gov/datastore/opinions/2017/01/13/14-56927.pdf

FACTS: Defendant Epsten, Grinnell & Howell ("Epsten") sent a collection letter ("May Notice") to Plaintiff Zakia Mashiri ("Mashiri"), seeking to collect Mashiri's overdue assessment fees for the homeowner's association ("HOA"). The May Notice also included a warning that failure to pay the assessment fee would result in the HOA recording a lien against Mashiri's property. Mashiri sued Espten for violation of the FDCPA. The district court held Mashiri failed to state a claim and dismissed the case. Mashiri appealed.

HOLDING: Reversed and remanded.

REASONING: Epsten argued it was not subject to the full scope of the FDCPA because it was not attempting to collect a debt and was only seeking to enforce an existing security interest or lien. The court of appeals rejected Epsten's argument and held Epsten was subject to the full scope of the FDCPA, irrespective of whether it sought to perfect HOA's security interest, because it sent the May Notice as a debt collector attempting to collect debt payment.

The FDCPA imposes liability only when a proper entity is attempting to collect debt. The court held: (1) the overdue assessment fee was a debt; and (2) Epsten was a debt collector under the FDCPA. First, FDCPA defines debt as any obligation of a consumer to pay money arising out of a transaction that is primarily for personal, family or household purposes. The court reasoned the overdue assessment fee was a debt because Mashiri's obligation to pay the assessment fee related to her household and arose from her HOA membership.

Second, if the entity seeking to enforce a security interest engages in debt collection activities, it is a debt collector under the FDCPA. Epsten's May Notice requested payment of the assessment fee and warned of the consequence for failure of payment. There was no existing security interest for Epsten to enforce at the time it sent the May Notice. The court concluded that the May Notice sought to collect debt, Mashiri's overdue assessment fee and make necessary disclosure that would perfect the HOA's security interest and permit it to record a lien at a later date.

CONSUMER CREDIT

SPOKEO REQUIRES MORE THAN TECHNICAL VIOLATION OF FAIR AND ACCURATE TRANSACTIONS ACT

Meyers v. Nicolet Rest. of De Pere, LLC, 843 F.3d 724 (7th Cir. 2016).
http://caselaw.findlaw.com/us-7th-circuit/1757368.html

FACTS: Appellant Jeremy Meyers ("Meyers") alleged Appellee Nicolet Restaurant of de Pere ("Nicolet"), violated the Fair and Accurate Credit Transactions Act ("FACTA") by not truncating the expiration date of his credit card on a receipt. Meyers filed a putative class action complaint on behalf of others who had been provided a non-compliant receipt at Nicolet, seeking statutory damages.

The district court denied Meyers' motion for class certification, finding that Meyers failed to establish a class certification requirement, that requires class-wide issues predominate over issues affecting only individual potential class members. Meyers appealed.

HOLDING: Vacated and remanded.

REASONING: Meyers argued that he did have standing because FACTA granted him the legal right to receive a receipt that truncated the expiration date on his credit card. The court of appeals rejected Meyer's argument reasoning that *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) required a concrete injury even when there is a statutory violation. The court of appeals further found that just because there should be a legal remedy for a statutory violation does not mean each statutory violation creates an injury that satisfies the standing requirement. The court held a violation of a statute does not create standing if there is not any potential real-world harm. Because Meyers did not suffer actual harm from non-compliant receipt, the court concluded that he did not have standing.

STATUTORY VIOLATIONS OF THE FDCPA DO NOT ABSOLVE A PLAINTIFF FROM THE NEED TO SHOW A CONCRETE INJURY IN ORDER TO ESTABLISH ARTICLE III STANDING

Johnston v. Midland Credit Mgmt., ____F.Supp.3d____ (W.D. Mich. 2017). http://law.justia.com/cases/federal/district-courts/michigan/miwdce/1:2016cv00437/84096/42/

FACTS: Plaintiff Chris Johnston ("Johnston") brought an action under the Fair Debt Collection Practices Act ("Act") alleging false, deceptive, and misleading statements in violation of 15 U.S.C. section 1692e against Midland Credit Management ("MCM"), his debt servicer, Midland Funding, his debt owner, and Encore Capital Group, their parent company ("Defendants"). Plaintiff incurred credit card debt, failed to make monthly payments and defaulted. MCM sent a letter to Plaintiff, which stated he had been pre-approved for a discount program to pay off his debt and provided him with three repayment options. Johnston chose the second option and was subsequently informed that there was an error in the letter he received regarding this option and was no longer available.

Plaintiff brought action against the Defendants under the FDCPA alleging that the second option in the letter contained false, deceptive, and misleading statements. The Defendants filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

HOLDING: Granted.

REASONING: The Defendants argued the Plaintiff's amended complaint failed to allege a concrete injury in that a plaintiff cannot allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III. Defendants contend that the mistaken language of the letter does not change the fact that Plaintiff owed the full amount of the debt. Furthermore, Johnston did not sufficiently allege a materially false, deceptive or misleading statement under the Act. To determine whether the conduct falls within the scope of the Act, the conduct is viewed through eyes of the least sophisticated consumer. The court found that the least sophisticated consumer would realize that the $0 payment option was an error. A first payment due date was shown with the option of making multiple payments, but the least sophisticated consumer would understand that giving nothing for satisfaction of a debt is not payment. Johnston failed to prove that this second option was materially false and that he was materially misled by the statement.

The court accepted Defendants' argument and granted its' motion to dismiss by holding that a plaintiff is not absolved from showing that the element of Article III are met for claims arising under a federal statute. A plaintiff does not automatically satisfy the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Thus, even if the court assumes that Plaintiff's alleged injury is sufficiently particularized, Plaintiff must still show that the deprivation of a right created by statute is accompanied by some concrete interest that is affected by the deprivation.

COURT REJECTS *SPOKEO* ARGUMENT AND CERTIFIES CLASS

De Torre v. Cashcall, Inc., ____F.Supp.3d____ (N.D. Cal. 2016) https://www.leagle.com/decision/In%20FDCO%2020161128893/De%20La%20Torre%20v.%20Cashcall,%20Inc.

FACTS: In a certified class action, the court found at summary judgment that Defendant CashCall, Inc. ("CashCall") violated the Electronic Fund Transfer Act [EFTA] when it conditioned its extension of credit on borrowers' repayment by means of preauthorized electronic funds transfers ("EFTs"). The court then held a bench trial to determine damages under the EFTA claim and the court ordered CashCall to pay a statutory penalty for its EFTA violation, but found plaintiffs and the Class otherwise failed to show they were entitled to actual damages under the EFTA. The court ordered the parties to submit proposed judgments and a notice plan to inform class members about the results of the trial.

CashCall moved to amend the FFCL and enter judgment in favor pursuant to Rule 59(a)(2), on the ground that the controlling law has changed since the court issued the FCCL.

CashCall claimed the recent Supreme Court decision *Spokeo, Inc. v. Robinson* compels the finding that the Class Representative lacks standing under the EFTA.

HOLDING: Affirmed.

REASONING: CashCall argues *Spokeo* establishes that the Class Representative and Class lacked a concrete injury-in-fact and, therefore, lacked Article III standing. The court rejected this argument because a congressionally-defined intangible injury is concrete and sufficient to establish Article III standing under *Spokeo*. The court began by noting that under *Spokeo,* a plaintiff need not show a statutory violation resulted in actual harm to meet the concreteness requirement; rather a plaintiff must show the procedural violations entail a sufficient risk of harm. The court further stated that *Spokeo* provided examples of congressionally-defined injuries that suffice to establish Article III standing.

The court reasoned that through the EFTA, Congress defined a specific right, which was based on the risk of real harm, and thereby elevated a violation of that right to legally cognizable, concrete injury.

The court reasoned that through the EFTA, Congress defined a specific right, which was based on the risk of real harm, and thereby elevated a violation of that right to legally cognizable, concrete injury. Because EFTA guaranteed the Class Representative the right to choose her method of repayment when she sought credit from CashCall, the court held CashCall violated that right and caused her to confront the very harms Congress sought to avoid: the lack of choice in using EFT payments and the risk associated with those methods of payment.

FAIR CREDIT REPORTING ACT DISCLOSURE MUST CONTAIN "SOLELY" THE DISCLOSURE

Syed v. M-I, LLC, 846 F.3d 1034 (9th Cir. 2017).
http://caselaw.findlaw.com/us-9th-circuit/1766409.html

FACTS: Syed applied for a job with M-I and was provided a document labeled "Pre-employment Disclosure Release." The Disclosure Release informed Syed that his credit history and other information could be collected and used as a basis for employment decision and stipulated by signing the document, Syed waived his right to sue M-I for violations of the FCRA. Syed alleges that M-I's inclusion of the liability wavier violated the statutory requirement that the disclosure document consist "solely" of the disclosure.

Syed brought action against employer, within two years of discovering the violation, alleging the employer violated the Fair Credit Reporting Act's (FCRA) disclosure requirements when it procured applicant's consumer report after including liability waiver in same document as the statutorily mandated disclosure. The district court dismissed Syed's complaint. Syed appealed.

HOLDING: Reversed and Remanded.

REASONING: The court held a prospective employer violates FCRA when it procures a job applicant's consumer report after including a liability waiver in a Disclosure Release. The statute does not authorize the inclusion of a liability waiver in a disclosure document and the statute's explicit language cannot be viewed as permitting the inclusion of a liability waiver. Therefore, the disclosure document must contain "solely" of the disclosure under FCRA.

SECURED PARTY ENTITLED TO A PRELIMINARY INJUNCTION ORDERING THE DEBTOR TO SURRENDER POSSESSION OF THE CAR SERVING AS COLLATERAL BECAUSE THE DEBTOR HAD EXHIBITED AN UNWILLINGNESS TO PAY THE SECURED OBLIGATION

Watts v. Wells Fargo Dealer Servs., Inc., ____F.Supp.3d____ (N.D. Ala. 2016).
http://www.leagle.com/decision/In%20FDCO%2020161027A52/Watts%20v.%20Wells%20Fargo%20Dealer%20Services,%20Inc

FACTS: Plaintiff Roger Watts entered into a financing contract with CarMax for the purchase of a car. CarMax later sold the contract to Defendant Wells Fargo Dealer Services, Inc. Watts defaulted under the financing contract, and Wells Fargo requested an injunction allowing for the repossession of the car, that secured the contract.

Prior to the hearing on the Wells Fargo's injunction request, Watts tendered a settlement offer based on a fraudulent check and thus no settlement was reached. Wells Fargo's injunction hearing was later held on October 26, 2016.

HOLDING: Injunction Granted.

REASONING: Wells Fargo argued it should be allowed to repossess the car because Watts is in default under the financing contract, and Wells Fargo has a security interest in the car. The court agreed. To receive a preliminary injunction, the party seeking the injunction carries the burden of persuasion and must show four prerequisites: "(1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered if the relief is not granted; (3) that the threatened injury outweighs the harm the relief would inflict on the non-movant; and (4) that entry of the relief would serve the public interest."

Here, the court only found potential issue with the "irreparable harm" factor. Normally, a claim based solely on monetary loss is insufficient to show irreparable harm, and a monetary award will suffice to make an aggrieved party whole. However, the court noted that there are very limited circumstances in which monetary injuries can rise to the level of irreparable harm in which monetary damages will not suffice. The court held it was clear from his actions that Watts was not willing to pay Wells Fargo because he was in default under the contract and tendered a fraudulent check as a settlement offer. The court found it unlikely Wells Fargo would be compensated in the future. Therefore, as long as Watts possessed the car, Wells Fargo would be irreparably harmed due to depreciation in the value of the car.

ARBITRATION

COURT ENJOINS RULE PROHIBITING NURSING HOME'S PRE-DISPUTE ARBITRATION AGREEMENTS

Am. Health Care Ass'n v. Burwell, ____ F. Supp. 3d ____ (N.D. Miss. 2016).
https://www.cadc.uscourts.gov/internet/opinions.nsf/CDFE9734F0D36C2185257F540052A39D/$file/15-5015-1597907.pdf

FACTS: The American Health Care Association ("Plaintiff") brought action under the Administrative Procedure Act against the Secretary of Health and Human Services and the Center for Medicaid Services ("Defendants") seeking declaration that a rule they enacted, which effectively barred nursing homes receiving federal funds from entering into new pre-dispute arbitration agreements with their residents, was unlawful.

Plaintiff moved for a preliminary injunction enjoining Defendants from enforcing this rule. Defendants responded in opposition to the motion.

HOLDING: Granted.

REASONING: Defendants argued the enacted rule did not bar arbitration agreements already in existence, but provided strong financial disincentives, by withholding federal funding, for nursing home to enter into new arbitration contracts, thus allowing the rule to withstand FAA scrutiny.

The court rejected this argument and determined the preliminary injunction was warranted, because the Plaintiff was likely to meet more than one of the preliminary injunction factors, as outlined by the Fifth Circuit. Specifically, the court found that the rule was barred by the FAA and the Defendants exceeded its statutory authority. Further, the change in Plaintiff's nursing home business practices would cause substantial administrative expenses. Moreover, the Defendants declined to oppose arbitration as a matter of agency policy prior to rule, and the rule raised separation of powers concerns.

ARBITRATION PROVISION IN CONTRACT IS NOT ENFORCEABLE WHEN BUYER SHOWS HE DID NOT AGREE TO THAT PROVISION

Bevel v. Marine Grp., LLC, ____So.3d____ (Ala. 2017).
http://law.justia.com/cases/alabama/supreme-court/2017/1150941.html

FACTS: Plaintiff-Appellant Timothy Bevel financed the purchase of a used boat and boat motor, and rented a boat slip to dock the boat from Guntersville Boat Mart, a related entity of Marine Group. The sale and boat-slip rental were documented by a bill of sale, which contained an arbitration provision. The boat was seized several months after the transaction for alleged defaults on payments.

Bevel disputed that he owed the payments and sued Marine Group for breach of contract. Marine Group filed a motion to compel arbitration, citing the arbitration provision in the bill of sale. The trial court granted the motion to compel arbitration. Bevel appealed.

HOLDING: Reversed and Remanded.

REASONING: Bevel argued he did not agree to the arbitration provision in the bill of sale because he did not initial the box directly below it, although he had signed or initialed the document in other places. Thus, Bevel argued the arbitration provision was not part of the contract and he could not be bound by it. When some other contract provisions are signed, the failure to sign the signature line corresponding to an arbitration provision is a compelling indication of failure to assent to that provision.

The court agreed with Bevel's, reasoning. Bevel did not initial the box corresponding to the arbitration provision despite initialing and signing the bill of sale in other places is a compelling indication that Bevel did not assent to the arbitration provision.

INITIATING A LAWSUIT FIVE YEARS BEFORE REQUESTING ARBITRATION DOES NOT CONSTITUTE A WAIVER

Citibank, N.A. v. Perry, ____ S.E.2d ____ (2016).
http://law.justia.com/cases/west-virginia/supreme-court/2016/15-1121.html

FACTS: Mr. Robert S. Perry was issued a Citibank Mastercard account governed by terms and conditions including an arbitration agreement. The arbitration agreement allowed either party "to compel arbitration of Claims, or to stay the litigation of Claims pending arbitration, even if such Claims are part of a lawsuit, unless a trial has begun or a final judgment has been entered." The arbitration agreement also provided either party could delay arbitration without waiving its right to arbitrate. Citibank filed a debt collection lawsuit to recover an outstanding balance on Mr. Perry's account. Mr. Perry filed a pro-se answer followed six months later by Citibank's motion for judgment on the pleadings that was not ruled on by the circuit court. After three and one-half years of inactivity, the parties entered an agreed scheduling order and Mr. Perry filed a class counterclaim alleging that Citibank violated the West Virginia Consumer Credit and Protection Act. Citibank then filed a motion to compel arbitration and stay the action pending the outcome of the arbitration.

> **The agreement allowed a demand for arbitration until the trial has not started, and final judgment has not been entered.**

The circuit court denied Citibank's motion to compel arbitration holding that Citibank had waived its right to arbitration by initiating its claim in circuit court nearly five years prior to seeking arbitration of the matter, and by taking certain actions to further the case. Citibank appealed.

HOLDING: Reversed and remanded.

REASONING: The circuit court based its denial upon the finding that Citibank waived its right to arbitration by initiating its claim nearly five years prior to seeking arbitration of the matter and taking certain actions to further the case. Citibank claimed it did not waive its right to arbitration pursuant to provisions

contained in the arbitration agreement allowing either party to seek arbitration after filing a lawsuit in court. The agreement allowed a demand for arbitration until the trial has not started, and final judgment has not been entered. Citibank argued that the circuit court erred in finding that Citibank waived its right to arbitrate because under traditional rules of contract application, Citibank's clear contractual right to seek arbitration at any time prior to judgment or trial must be recognized.

The Supreme Court of West Virginia applied West Virginia law, which requires that there must be evidence that demonstrates that a party has intentionally relinquished a known right for a waiver to take effect. Waiver may be express or inferred from actions or conduct. Mr. Perry's counterclaim asserted a putative class action claiming violations of the West Virginia Consumer Credit and Protection Act, changing the action from debt collection to a potential class action lawsuit. Citibank still filed its motion to compel arbitration and stay the court action less than two months later, which the court recognized as a reasonable time period.

FIFTH CIRCUIT REVERSES AN NLRB DECISION ORDERING CITIGROUP TO REMOVE CLASS ACTION WAIVERS FROM ITS EMPLOYMENT ARBITRATION AGREEMENTS

Citigroup Tech., Inc. v. NLRB, ____ F.3d ____ (5th Cir. 2016). http://reinsurancefocus.com/data/20/1/142/136/1957625/user/2137514/htdocs/blog/wp-content/uploads/2017/01/Citigroup-Technology-5th-Cir-12.8.16.pdf

FACTS: Citigroup Technology, Inc. and the National Labor Relations Board ["NLRB"] petitioned to the Fifth Circuit Court of Appeals for review and cross-applications for enforcement of an NLRB order. The NLRB order declared an employer violates the National Labor Relations Act when the employer requires employees to sign an arbitration agreement containing class action waivers.
HOLDING: Reversed.
REASONING: The court of appeals reversed the NLRB order and accepted the concessions from the NLRB that: (1) the NLRB's order failed to afford proper deference to the policies favoring arbitration pursuant to the Federal Arbitration Act ("FAA"); (2) the Supreme Court mandated that arbitration agreements be enforced according to their terms and rejected application of other state and federal statutes to arbitration agreements in the absence of express congressional override of the FAA; and (3) the NLRB is bound by the prior Fifth Circuit's decisions precluding enforcement of the NRLB order.

BANK DID NOT WAIVE ITS RIGHT TO DEMAND ARBITRATION OF SUBSEQUENT CONSUMER STATUTE CLAIMS BY LITIGATING THE DEBT-COLLECTION CLAIMS

Hudson v. Citibank (South Dakota), ____ P.3d ____ (Alaska 2016).
http://caselaw.findlaw.com/ak-supreme-court/1757951.html

FACTS: Appellant, Janet Hudson, maintained a credit card account with Appellee, Citibank. Two years after Hudson opened the account, Citibank presented Hudson with a Change-in-Terms form. The form included an arbitration clause stating "All claims are subject to arbitration…no matter what legal theory they are based on or what remedy…they seek. A party who initiates a proceeding in court may elect arbitration with respect to any claim advanced in that proceeding by any other party." The clause further stated that "any questions about whether claims are subject to arbitration shall be resolved by interpreting this arbitration provision in the broadest way the law will allow it to be enforced." Hudson was given the opportunity to opt out of the change in terms but did not. Hudson then fell behind on payments and Citibank filed a collection action.

It is well accepted that the law favors arbitration, and any doubts related to waiver should be resolved in favor of arbitration.

Hudson did not appear to the action and the court entered a default judgment in favor of Citibank and awarded Citibank attorney's fees. Hudson then filed a class action complaint alleging Citibank violated the Uniform Trade Practices and Consumer Protection Act [UTPA], and sought damages and a prospective injunction. Citibank moved to stay the action and compel arbitration. The superior court granted Citibank's motion. Hudson appealed.
HOLDING: Affirmed
REASONING: Hudson contended Citibank waived its right to arbitrate the UTPA claims by litigating the debt collection actions. The court disagreed and provided three core reasons for doing so. First, the court stated it is well accepted that the law favors arbitration, and any doubts related to waiver should be resolved in favor of arbitration. Next, it referenced the language of the arbitration agreement and noted the text clearly provided that Citibank was authorized under the contract to seek arbitration on claims distinct from the original debt collection action. Finally, the court stated a party may waive its right to arbitrate separate claims, but the claims must be "so closely related as to form what is really a single controversy." The court determined Citibank's collection action centered on the language of the contract and breach of Hudson's duty to pay, while Hudson's UTPA claim arose from the bank's fee agreement with its lawyers. Further, the court reasoned that the UTPA claim "broaden[ed] the scope of the proceeding by such a magnitude that it fundamentally transform[ed] the litigation".

These three reasons led the court to conclude Citibank did not waive its right to arbitrate Hudson's UTPA attorney's fees claim.

ARBITRATION AGREEMENT WAS UNENFORCEABLE BASED ON BREACH OF FIDUCIARY DUTY

King v. Bryant, 795 S.E.2d 340 (N.C. 2016).
http://law.justia.com/cases/north-carolina/supreme-court/2017/294pa14.html

FACTS: Plaintiffs, Robert E. King and his wife, Jo Ann O'Neal, brought a medical malpractice suit against Defendants Michael S. Bryant, M.D. and Village Surgical Associates, P.A. King was

scheduled to undergo a medical procedure on his hernia performed by Dr. Bryant. During King's initial consultation with Dr. Bryant, he was presented with an arbitration agreement along with a series of other documents that he was expected to complete. King signed the documents presented to him but did not read any of them as he believed them to be mere formalities. During the procedure, Bryant injured King's distal abdominal aorta. Although Dr. Bryant was able to mend the injuries caused during surgery, King incurred unexpected medical expenses, lost wages, had numbness and physical impairments.

Plaintiffs filed a complaint against Defendants for medical malpractice. Defendants filed a motion to stay and enforce the arbitration agreement. The trial court denied Defendants' motion to enforce the arbitration agreement. The court of appeals reversed. On remand, the trial court again declined to enforce the arbitration agreement, concluding that it was unconscionable and, therefore, unenforceable. The court of appeals affirmed on unconscionability grounds.

HOLDING: Modified and Affirmed

REASONING: Plaintiffs argued Dr. Bryant breached a fiduciary duty and as a result, the arbitration agreement was rendered unenforceable. Defendants countered Plaintiffs' argument by contending that a fiduciary relationship did not exist at the time that King signed the arbitration agreement because Dr. Bryant had not yet accepted King as a patient.

The Supreme Court of North Carolina agreed with Plaintiffs' argument that the arbitration agreement was unenforceable because Dr. Bryant breached a fiduciary duty to King. The court opined that a fiduciary relationship exists whenever "confidence on one side results in superiority and influence on the other side" regardless of whether a patient-client relationship existed. King's family physician referred him to Dr. Bryant. The two physicians consulted each other about King's particular needs. The court held because of these facts, there was an obvious confidential relationship between King and Dr. Bryant when King was prompted to sign medical documents outlining very private information needed to perform the surgery. The confidential relationship established a fiduciary duty of Dr. Bryant. The court further opined that inherent in such a fiduciary relationship is the responsibility to disclose all material facts. The court ruled Defendant breached his fiduciary duty by failing to make full disclosure of the nature and importance of the arbitration agreement when Defendant was asked to sign it amongst a variety of similar documents. Due to this breach of fiduciary duty, which unfairly benefited Defendant at the expense of Plaintiff in regard to the arbitration agreement, the court held the arbitration agreement was unenforceable and upheld the lower court's denial of Defendant's motion to compel arbitration.

ARBITRATOR MAY EXCEED HIS AUTHORITY BY GIVING AN INTERPRETATION THAT FAILS TO DRAW ITS ESSENCE FROM THE PARTIES' AGREEMENT, IS NOT PASSABLY PLAUSIBLE, REACHES AN IRRATIONAL RESULT, OR MANIFESTLY DISREGARDS A PROVISION OF THE AGREEMENT

Nappa Constr. Mgmt., LLC v. Flynn, 152 A.3d 1128 (R.I. 2017).
http://law.justia.com/cases/rhode-island/supreme-court/2017/15-211.html

FACTS: Appellants, Caroline and Vincent Flynn, entered into an American Institute of Architects form of contract for a commercial construction project with Appellee, Nappa Construction Management. The contract provided the Flynns could terminate the contract for cause and could also order Nappa to suspend, delay, or interrupt work without cause for as long as the Flynns determined. A year later the Flynns directed Nappa to cease all construction, stating Nappa was neither following the building plans nor adhering to industry standards. Nappa submitted an application for payment that the Flynns refused to honor, and Nappa declared the Flynns to be in breach of the contract. Nappa then notified the Flynns that they were terminating the contract due to non-payment.

The Flynns filed an action alleging Nappa wrongfully terminated the contract, leading to an arbitration proceeding. The arbitrator determined neither party was in breach of the contract and ordered the Flynns to provide full payment. The Flynns filed a motion in Superior Court to vacate the arbitrator's award, asserting the arbitrator exceeded the scope of his powers by manifestly disregarding a contractual provision and finding the contract was terminated for convenience. The motion was denied and the arbitrator's award was affirmed. The Flynns appealed.

HOLDING: Reversed and Remanded

REASONING: The Flynns argued the arbitrator exceeded his authority by manifestly disregarding the contractual terms, and the court agreed. The court noted the strong public policy in favor of the finality of arbitration awards, but held that instances where an arbitrator exceeds his authority by manifestly disregarding a contractual term mandates the award be vacated. The court noted that the arbitrator reached an irrational result that contradicted the arbitrator's factual findings. Therefore, the court held that the arbitrator's award was to be vacated and the record remanded to the Superior court for further proceedings.

"HIDDEN" ARBITRATION CLAUSE NOT ENFORCEABLE

Noble v. Samsung Elecs. Am., Inc., ____ Fed.Appx. ____ (3d Cir. 2017).
http://law.justia.com/cases/federal/district-courts/new-jersey/njdce/2:2015cv03713/320001/19/

FACTS: Appellee David Noble purchased a Smartwatch from Appellant Samsung Electronics America after seeing advertisements saying the device's battery lasted 24 to 48 hours with typical use. However, Noble's Smartwatch suffered battery problems, and lasted only about four hours. Inside each of the Smartwatch boxes was a document titled "Health and Safety and Warranty Guide" with an arbitration clause on page ninety-seven. On page ninety-seven of the Guide, there is a question in bold face type that reads "What is the procedure for resolving disputes?" Below, the text reads all disputes with Samsung are resolved exclusively through final and binding arbitration.

Noble filed a complaint alleging six causes of action for Samsung's fraudulent and deceptive marketing and pricing related to the battery life of a Smartwatch. Samsung moved to compel arbitration on all of Noble's individual claims and to dismiss his class claims, citing the clause. The district court held the arbitration clause was unreasonably hidden and Samsung's

motion thus had to be denied. Samsung appealed.
HOLDING: Affirmed.
REASONING: Samsung argued a reference to arbitration located on the ninety-seventh page of the "Health and Safety and Warranty Guide" contained within the Smartwatch package was a binding contract under New Jersey law and, therefore, entitled it to have Noble's claims decided by an arbitrator. The court analyzed the validity of the arbitration agreement under ordinary principles of contract law in the state of New Jersey, which requires offer and acceptance, consideration, a meeting of the minds, and sufficiently definite terms.

The court rejected Samsung's argument and held the document in which the arbitration clause was included did not appear to be a bilateral contract, and the terms were buried in a manner that gave no hint to a consumer that an arbitration provision was within. The outside of the "Health and Safety and Warranty Guide" did not include any language indicating that bilateral contractual terms or conditions were inside. The court concluded that Noble lacked reasonable notice of the arbitration provision because there were inconspicuous contractual terms that he was unaware of, and therefore, the arbitration clause in the Guide was not valid

ARBITRATION PROVISION CONTAINED IN A WARRANTY BROCHURE INCLUDED IN THE PRODUCT'S BOX IS NOT ENFORCEABLE

Norcia v. Samsung Telecoms. Am., LLC, 845 F.3d 1279 (9th Cir. 2017).
http://caselaw.findlaw.com/us-9th-circuit/1766128.html

FACTS: Daniel Norcia ("Plaintiff") purchased a Samsung Galaxy S4 phone and was provided a receipt entitled "Customer Agreement" by a Verizon Wireless employee. The receipt stated in all capital letters that the holder of the receipt was agreeing to settlement of disputes by arbitration. Plaintiff signed the copy and left the store with his new phone but did not take the box. However, the "Product Safety & Warranty Information" brochure in the box contained an arbitration clause and listed steps for the customers to opt out of arbitration.

Plaintiff filed a class action against Samsung Telecommunications America, LLC and Samsung Electronics America, Inc., ("Defendant") alleging Defendant had made misrepresentations regarding the performance of the phone. Defendant moved to compel arbitration based on the arbitration provision in the warranty brochure in the Galaxy S4 box. The district court denied Defendant's motion. Defendant appealed.
HOLDING: Affirmed.
REASONING: Defendant argued the inclusion of the arbitration provision in the Galaxy S4 box created a valid contract between Defendant and Plaintiff to arbitrate all claims related to the purchased phone. Secondly, Defendant argued the Customer Agreement signed by Plaintiff incorporated the terms of its Product Safety & Warranty Information brochure.

The court rejected Defendant's arguments by applying general California law principles that silence does not constitute assent. The court acknowledged Plaintiff did not give any manifestations of consent to the agreement in the brochure nor act in a manner as to accept the arbitration agreement. Therefore, no contract was formed between Plaintiff and Defendant. Arbitration provision contained in a warranty brochure included in the product's box is not enforceable.

ARBITRATION PROVISION WITH CONFLICTING PROVISIONS NOT ENFORCEABLE

Ragab v. Howard, 841 F.3d 1134 (10th Cir. 2016).
http://library.law.virginia.edu/gorsuchproject/ragab-v-howard/

FACTS: Plaintiff-Appellee Ragab entered into a business relationship with Defendants-Appellants Ultegra. The parties had six agreements that contained conflicting arbitration provisions.

Ragab filed suit against the Ultegra for misrepresentation and violation of several consumer credit repair statutes. Ultegra moved to compel arbitration. The district court denied the motion to compel, concluding that there was no actual agreement to arbitrate as there was no meeting of the minds as to how claims that implicated the numerous agreements would be arbitrated. Ultegra appealed.
HOLDING: Affirmed.
REASONING: Ultegra argued the court should compel arbitration because prior courts have compelled arbitration based on a single provision that required arbitration.

The court rejected this argument, holding Ultegra's motion was properly denied because there was no actual agreement to arbitrate under the FAA, because there was no meeting of the minds as to how claims that implicated the numerous agreements would be arbitrated. In particular, the court applied state law contract formation principles and held there was no agreement to arbitrate, because there was no language in the six agreements suggesting one contract should override the others The court could not arbitrarily pick on arbitration clause to enforce since doing so could violate the other five arbitration provisions.

There was no actual agreement to arbitrate under the FAA, because there was no meeting of the minds as to how claims that implicated the numerous agreements would be arbitrated.

DEFENDANT'S FAILURE TO PAY ARBITRATION FEES CONSTITUTES A MATERIAL BREACH OF THE PARTIES' DISPUTE, PRECLUDING ENFORCEMENT OF THE AGREEMENT TO ARBITRATE

Roach v. BM Motoring, LLC, 2017 WL 931430 (N.J. Mar. 9, 2017).
https://casetext.com/case/roach-v-bm-motoring-llc

FACTS: Emelia Jackson and Tahisha Roach ("Plaintiffs") purchased used cars from BM Motoring Cars ("Defendants"). Each plaintiff signed a Dispute Resolution Agreement (DRA), which provided for arbitration "in accordance with the rules" of the

American Arbitration Association (AAA).

Plaintiffs filed arbitration demands against Defendants with the AAA.

Despite repeated requests by the AAA, Defendants did not advance the filing fees the DRA obligated them to pay, or otherwise respond to the claim. The AAA dismissed the claim. Plaintiffs then filed an action against Defendants, who moved to dismiss the complaint in favor of arbitration. In opposition to the motion, Plaintiffs asserted that defendants materially breached the DRA by failing to advance filing and arbitration fees, and waived their right to arbitration. The trial court found the parties intended to resolve disputes by arbitration, and the matter should therefore proceed in arbitration. The AAA reinstated the arbitration, and the court dismissed the complaint. The Appellate Division affirmed the dismissal of the complaint, holding there was sufficient factual dispute as to the proper forum for arbitration and that Defendants' conduct did not constitute a material breach of the DRA. The Court granted Plaintiff's petition for certification.

HOLDING: Reversed and Remanded.

REASONING: Under the Federal Arbitration Act and the New Jersey Arbitration Act, arbitration agreements rest on equal footing with other contracts. Therefore, arbitration agreements are governed by principles of contract law and generally applicable contract defenses, which may be applied to invalidate arbitration agreements. To determine whether there was a material breach, the court determined whether or not the breach "goes to the essence of the contract. This includes how the injury deprived the plaintiffs, how the defendants can cure the injury, and whether the defendant acted in good faith and fair dealing. Defendants argued that the plaintiffs, in initiating arbitration with the AAA, failed to adhere to the DRA. Defendants asserted they were not obligated to advance any fees or comply with the AAA's demands, and their failure to do so was not in bad faith. The Tenth Circuit has held that a party's failure to pay required fees constitutes a material breach of an arbitration agreement. Plaintiffs chose to arbitrate with the AAA, and a "plaintiff's choice of forum is entitled to preferential consideration." By requiring that arbitration be conducted pursuant to the AAA's rules, defendants reasonably should have expected customers would file claims directly with the AAA. The court concluded Plaintiffs satisfied their obligations under the DRA. The court reasoned Defendants' knowing refusal to cooperate with Plaintiffs' arbitration demands, filed in reasonable compliance with the parties' agreement, amounted to a material breach of the DRA and, as such, barred the breaching party from later compelling arbitration.

BANKRUPTCY

SENDING 1099-A FORM DOES NOT VIOLATE BANKRUPTCY DISCHARGE INJUNCTION

Bates v. CitiMortgage, Inc., 844 F.3d 300 (1st Cir. 2016).
http://media.ca1.uscourts.gov/pdf.opinions/16-1228P-01A.pdf

FACTS: Mr. and Mrs. Bates obtained a loan from CitiMortgage, Inc. secured by a mortgage on their home. They filed for Chapter 7 bankruptcy and their mortgage debt was discharged. The Bates then entered into a Loan Modification Agreement with CitiMortgage whereby the Bates did not reaffirm personal liability for the mortgage. However, they could avoid foreclosure and stay in their home if they continued to make payments to CitiMortgage. Eventually, the Bates stopped making payments and CitiMortgage foreclosed. The Bates each received an IRS Form 1099-A in the mail. Both forms listed the lender as Freddie Mac and indicated that Bates's were personally liable for the repayment of the debt. Mr. Bates was told by CitiMortgage and Freddie Mac that the debt had not been discharged, because it was a secured debt. The Bates' attorney sent a letter to Freddie Mac demanding revocation of the 1099-A forms, but Freddie refused to revoke. The Bates filed a motion to reopen their bankruptcy proceedings, then sued CitiMortgage and Freddie Mac ("Appellees") for attempting to collect on the discharged mortgage debt in violation of the discharge injunction provisions of 11 U.S.C. §524(a).

The bankruptcy court granted summary judgment for Appellees, and the district court affirmed. The Bates appealed.

HOLDING: Affirmed.

REASONING: The Bates argued the 1099-A forms were coercive, especially because the forms contained false information. The court rejected this argument because under the objective standard, a creditor violates the discharge injunction only if it acts to collect or enforce a prepetition debt. The Bates subjective feeling of coercion was not enough to prove a violation of the discharge injunction, and the Bates did not present evidence that the forms were objectively coercive. The court held that the 1099-A forms were not a collection attempt. The forms provided tax information, but they did not demand payment or threaten any action. Therefore, sending 1099-A form does not violate bankruptcy discharge injunction.

The court rejected this argument because under the objective standard, a creditor violates the discharge injunction only if it acts to collect or enforce a prepetition debt.

MISCELLANEOUS

BANK'S ONE-YEAR LIMITATIONS PERIOD ON CUSTOMER'S CLAIMS IS ENFORCEABLE

Wechsler v. HSBC Bank USA, ____ Fed.Appx. ____ (2d Cir. 2017).
https://casetext.com/case/wechsler-v-hsbc-bank-united-states-na

FACTS: Wechsler claimed HSBC improperly charged maintenance fees on his savings account. The parties agreed the "Limitation Clause" applied to Wechsler's account. The "Limitation Clause" stated Wechsler agreed to make any claim relating to the Bank's handling of his account within one year of the date occurred. He further agreed if a problem involving a series of events, the limitations period began on the date the first event occurred.

Wechsler's first overcharge occurred on January 31, 2014, but he did not file lawsuit until July 28, 2015. In December 2014, Wechsler called HSBC to complain about the more recent maintenance fees. Wechsler filed his lawsuit for breach of contract and violations of the New York Deceptive Practices Act ("NYDPA").

The District Court dismissed Wechsler's complaint as untimely under the limitations period of his account. Wechsler appealed.

HOLDING: Affirmed.

REASONING: Wechsler argued it was unreasonable to apply his account's one-year limitations period to his claim due to the circumstances of his case. The court rejected that argument, noting the limitation on suit to which Wechsler agreed is not unreasonable. The court reasoned that an agreement that modifies the Statute of Limitations by specifying a shorter, but reasonable, period within which to commence an action is enforceable. New York courts have found one-year limitations clauses to be reasonable. Moreover, nothing prevented Wechsler from filing his lawsuit within a year of the first maintenance fee.

Furthermore, Wechsler argued the limitations period should not have started on the date of the first maintenance fee, because months went by before the next maintenance fee charge, thus the gap made it unclear whether the maintenance fees were a series of events. The court rejected this argument by explaining no ambiguity in the events or the statute. Therefore, bank's one-year limitation period on consumer claim is enforceable.

FAX INVITATION OFFERING A FREE DINNER SUFFICIENT TO VIOLATE TELEPHONE CONSUMER PROTECTION ACT

Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc., 847 F.3d 92 (2d Cir. 2017).
http://www.ca2.uscourts.gov/decisions/isysquery/ce51f3a1-30ac-4b89-a595-1cdb49e0026a/1/doc/15-288_complete_opn.pdf

FACTS: Boehringer Ingelheim Pharmaceuticals, Inc., a pharmaceutical company, sent an unsolicited fax to Physicians Healthsource, Inc., inviting one of its doctors to a free dinner meeting and discussion about recognizing female sexual dysfunction ("FSD") and diagnosing hypoactive sexual desire disorder ("HSDD"). Physicians Healthsource filed a class action lawsuit on behalf of more than forty individuals against Boehringer, alleging the fax violated the Telephone Consumer Protection Act ("TCPA") as an unsolicited advertisement that promoted the goods and services of Boehringer without a proper opt-out notice.

Boehringer moved to dismiss, arguing that Physicians Healthsource failed to state a claim under the TCPA because the unsolicited fax was not an advertisement. The district court dismissed the complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). The court interpreted Federal Communications Commission ("FCC") regulations as requiring Physicians Healthsource to show an unsolicited fax had a commercial pretext for it to violate the TCPA. The court determined that nothing in the fax indicated the dinner was a pretext for advertising a Boehringer product or service. Physicians Healthsource appealed.

HOLDING: Vacated and remanded.

REASONING: The court of appeals did not disagree with the district court's interpretation of FCC regulations. However, the court of appeals held that at the pleading stage, where it is alleged that a firm sent an unsolicited fax promoting a free seminar discussing a subject that relates to the firm's products or services, there is a plausible conclusion that the fax had the commercial purpose of promoting those products or services. This interpretation comports with the 2006 FCC rule stating it is reasonable to presume messages advertising free seminars describe the quality of any property, goods, or services, potentially violating the TCPA.

Unless a plaintiff attended the free seminar, in many cases it would be difficult for a plaintiff to know whether the seminar was in fact used to advertise a defendant's products or services.

The court of appeals stated that requiring a plaintiff to plead specific facts alleging specific products or services would be, or were, promoted at a free seminar would impede the purposes of the TCPA. Unless a plaintiff attended the free seminar, in many cases it would be difficult for a plaintiff to know whether the seminar was in fact used to advertise a defendant's products or services. The court held Physicians Healthsource alleged facts that Boehringer's fax advertised a free seminar relating to its business. The fax advertised a dinner meeting to discuss FSD and HSDD. As a pharmaceutical company, Boehringer was generally in the business of treating diseases and medical conditions such as FSD and HSDD. The fax also made it clear to the invitee that the dinner meeting was sponsored by Boehringer. In addition, the fax invitation was sent to a doctor, whom Boehringer would presumably hope to persuade to prescribe its drugs to patients.

CALIFORNIA SUPREME COURTS SETS OUT STANDARD FOR ESTABLISHING IMMUNITY FOR INDIAN TRIBES

People ex rel. Owen v. Miami Nation Enterprises, 386 P.3d 357 (Ca. 2016).
http://law.justia.com/cases/california/supreme-court/2016/s216878.html

FACTS: Two federally recognized Indian Tribes created affiliated business entities that provided deferred deposit loans through the Internet to borrowers in California under terms that allegedly violated the California Deferred Deposit Transaction Law. Two brothers, Scott and Baine Tucker, were hired to manage the tribal entities' lending activities. Neither was a tribe member. The Commissioner of the Department of Corporations filed a complaint against the entities, seeking injunctive relief, restitution, and civil penalties.

The trial court granted the entities' motion to quash and dismissed the case on the basis of tribal immunity. The court of appeals affirmed, concluding that the entities were immune from suit as arms of the tribes. The Commissioner appealed.
HOLDING: Reversed and Remanded.
REASONING: The court concluded an entity asserting immunity bears the burden of showing by a preponderance of the evidence that it is an arm of the tribe entitled to tribal immunity. In making that determination, courts should apply a five-factor test that considers (1) the entity's method of creation, (2) whether the tribe intended the entity to share in its immunity, (3) the entity's purpose, (4) the tribe's control over the entity, and (5) the financial relationship[between the tribe and the entity. The test applied takes into account both formal and functional considerations. These considerations include not only the legal or organizational relationships between the tribe and the entity, but also the practical operation of the entity in relations to the tribe.

The record contained scant evidence that either tribe actually controlled, oversaw, or significantly benefited from the underlying business operations of the online lenders. A tribal entity engaged in a commercial enterprise does not lose tribal immunity simply by contracting with nontribal members to operate the business. However, the evidence presented suggested the two brothers who were hired to manage the entities' lending activities exercised a high degree of practical control over the online lenders. Further, the tribes were not enmeshed in the direction and control of the businesses.

CONSUMER'S COMPLAINT DISMISSED BASED ON VALID FORUM SELECTION CLAUSE REQUIRING CLAIM BE FILED IN THE BAHAMAS

Feggestad v. Kerzner International Bahamas Limited, ____ F. Supp.3d ____ (S.D. Fla. 2017).
https://casetext.com/case/feggestad-v-kerzner-intl-bahamas-ltd

FACTS: Plaintiffs-Appellants James and Karen Feggestad stayed at Defendants-Appellee Kerzner's hotel, the Atlantis Resort on Paradise Island, Bahamas. The reservation confirmation included a hyperlink providing advance notification that any dispute between the guest and the hotel must be litigated exclusively in the Bahamas. The Feggestads checked into the Atlantis and signed a registration form that included a Bahamian forum selection clause. Mr. Feggestad slipped and fell on a wet sidewalk and sustained severe personal injuries.

The Feggestads filed a complaint in the U.S. District Court for the Southern District of Florida, alleging negligence against the owners and operators of the Atlantis. Kerzner filed a motion to dismiss based on the forum selection clause contained in the registration agreement. The district court granted Kerzner's motion on the basis of the valid forum selection clause. The Feggestads appealed.
HOLDING: Affirmed.
REASONING: The Feggestads argued they were prevented from meaningfully reviewing and understanding the agreement they signed upon check-in by the misrepresentation of the resort personnel. When the parties do not negotiate the forum selection clause, the court determines whether there was fraud or overreaching in its formation by looking to whether the clause was reasonably communicated to the consumer.

The court rejected the Feggestads' argument and identified two reasons why the forum selection clause was valid and enforceable. First, the Feggestads received sufficient notice of the forum selection clause via the email confirmation of their reservation. There was nothing that prevented them from clicking on the link to read the terms and conditions.

Second, the Feggestads received sufficient notice when they registered at the Atlantis. There was no evidence that the resort personnel impeded or prevented them from reading the agreement.

WAIVER SIGNED BY TRIATHLETE DEFEATS WIFE'S WRONGFUL DEATH CLAIM

Valentino v. Philadelphia Triathlon, LLC, 150 A.3d 483 (Pa. Super. Ct. 2016).
https://casetext.com/case/valentino-v-phila-triathlon-llc-1

FACTS: Derek Valentino registered to participate in a triathlon hosted by Appellee Philadelphia Triathlon ("Appellee") and executed a liability waiver. Mr. Valentino died during the triathlon and Appellant Michele Valentino ("Appellant"), wife of Mr. Valentino, asserted wrongful death and survival claims against Appellee.

The trial court granted Appellee's motion for summary judgment relying on the liability waiver executed by Mr. Valentino. Appellant appealed.
HOLDING: Affirmed.
REASONING: Appellant argued the contractual liability waiver signed by her husband cannot bar her wrongful death claims because she did not sign the liability waiver. The court disagreed with Appellant and held Appellant's wrongful death claim was defeated by the liability waiver signed by the decedent.

Even non-signatory wrongful death claimants remain subject to a valid liability waiver.

The court reasoned that even non-signatory wrongful death claimants remain subject to a valid liability waiver. By executing a liability waiver, the decedent signatory assumes identi-

fied risks and pledges that the defendant will not be held ability for resulting harms. The valid waiver transfers the risk of harm from a defendant to the decedent, effectively transforming the defendant's conduct from tortious to non-tortious. Because the right of recovery from the wrongful death claim presupposes defendant's tortious conduct, the wrongful death claimant's signature is unnecessary for liability waiver to be effective. Here, the liability waiver was valid and constituted express assumption of risk by Mr. Valentino. Therefore, the waiver defeated Appellant's wrongful death action.

TRIBAL ENTITY NOT IMMUNE FROM CFPB'S INVESTIGATIVE DEMAND

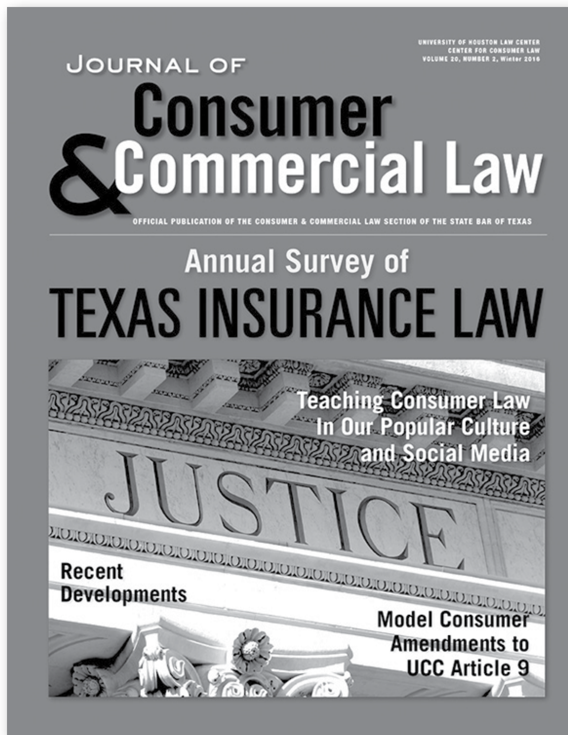
Consumer Fin. Prot. Bureau v. Great Plains Lending, LLC, 846 F.3d 1049 (9th Cir. 2017).
http://caselaw.findlaw.com/us-9th-circuit/1767666.html

FACTS: Appellants, Tribal Lending Entities, were for-profit lending companies created by several Native American tribes (the "Tribes"). The Consumer Financial Protection Bureau ("Bureau") initiated an investigation into the Tribal Lending Entities to determine whether the lenders violated federal consumer financial laws. The Tribes directed the Tribal Lending Entities not to respond to the investigative demands and informed the Bureau that it lacked jurisdiction to investigate entities created and operated by the Tribes. The Tribes offered to cooperate with the Bureau as co-regulators of consumer lending services.

Bureau sought enforcement of the investigative demands in federal court. The district court concluded the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Act") was enforceable against the Tribal Lending Entities and they must comply with the Bureau's investigative demands. The Tribal Lending Entities appealed.

HOLDING: Affirmed.

REASONING: The Tribal Lending Entities argued because the Act defined the term "State" as including Native American tribes, the Tribal Lending Entities, as arms of sovereign tribes, were not required to comply with the investigative demands because the Act limits the Bureau's authority to "persons." The court held although the Act defined "State" to include Native American tribes, with States occupying limited co-regulatory roles, this wording falls far short of demonstrating that the Bureau plainly lacked jurisdiction to issue the investigative demands challenged in this case. Further, the Tribes failed to prove Congress intended to exclude Native American tribes from the Act's enforcement provisions.



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THE LAST WORD

As I have mentioned many times before, the editors of the *Journal* strive to provide our readers with a wide variety of information related to consumer and commercial law. This issue may be more varied than any we have published. It contains articles dealing with the liability of online providers of legal services, the CFPB's proposed rule dealing with payday lenders, an empirical analysis of the effect of the Supreme Court's decision in *Spokeo, Inc. v. Robins*, and a review of the current state of the law regarding law enforcement access to encrypted data.

And, of course, there is the *Recent Developments* section, digesting thirty recent decisions, and the *Consumer New Alert*, highlighting more than forty consumer law decisions.

No matter what aspect of consumer and commercial law you are interested in, or which side of the docket you practice, I know you find something of interest in the issue.

Richard M. Alderman
Editor-in-Chief

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