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Arbitration of Nursing Home Disputes

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

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Senior Discount

Arbitration of Nursing Home Disputes

By Mark E. Steiner*

Introduction

This article uses the failure to regulate or prohibit the use of pre-dispute arbitration provisions in nursing home agreements as a means of understanding the current state of pre-dispute arbitration clauses in consumer contracts.[1] There is not a consistent policy on whether such provisions should be enforceable. The debate over arbitration generally is drawn along partisan lines, and the debate over nursing home arbitration follows the same lines. Republicans generally favor pre-dispute arbitration agreements while Democrats generally oppose such agreements.[2] There has been inaction in Congress, where several Fairness in Nursing Home Arbitration bills have languished. There was some executive action during the Obama administration, but these attempts are already being overturned under the Trump administration.[3] This was to be expected as Trump both shared Republican pro-business ideology and seemingly practiced consumer fraud as a business model before becoming president.[4] There also have been attempts to regulate arbitration agreements by state legislatures. However, these attempts have been regularly blocked with both state and federal courts finding that the Federal Arbitration Act preempts such efforts at regulation because most nursing home lawsuits involve interstate commerce. Additionally, and most importantly, the United States Supreme Court has been hostile to such attempts to regulate arbitration.

Lawsuits are often brought against nursing homes, either by nursing home residents for personal injuries or by their surviving children for wrongful death. Such lawsuits are essential as the enforcement mechanism for consumer protection in the United States relies upon *ex post* enforcement through private civil litigation (in contrast to the European *ex ante* regulatory approach).[5] However, defendant nursing homes invariably file motions to compel arbitration to avoid having their day in court. They use arbitration agreements to shield or immunize themselves by denying potential plaintiffs access to the courts. They also use them to mitigate their damages: the average indemnity payment associated with an arbitrated outcome is about $90,000, which, according to an American Health Care Association study, is "about 35% less than the average indemnity payment associated with a non-arbitrated outcome of about $138,000."[6] Arbitration clauses in nursing home contracts have become "the rule rather

than the exception."[7] A New York Times investigation found that between 2010 and 2014, "more than 100 cases against nursing homes for wrongful death, medical malpractice, and elder abuse were pushed into arbitration."[8]

Pre-dispute Arbitration Provisions in Consumer Contracts

A series of United States Supreme Court decisions have dramatically expanded the Federal Arbitration Act's scope. Section 2 of the FAA—described by the Supreme Court as "the primary substantive provision of the Act"—states that a written agreement to arbitrate "in any maritime transaction or a contract evidencing a transaction involving commerce. . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[9] The FAA's legislative history suggests that Congress intended the law to overcome resistance to arbitration by federal judges in order to permit private dispute resolution of commercial disputes.[10] Before the FAA, American courts followed the English rule that arbitration agreements were unenforceable because they "ousted" courts of their jurisdiction.[11] Imre Szalai has concluded that the FAA "was enacted to cover privately-negotiated arbitration agreements between merchants in order to facilitate the resolution of contractual disputes, through minimal procedures applicable solely in federal court."[12]

The Supreme Court's interpretation of the FAA no longer puts arbitration clauses on an "equal footing" with other contracts. According to Richard Frankel, the Court places them on a pedestal. Frankel argues that the Court has created special interpretive rules for arbitration clauses that do not apply to other contracts; arbitration clauses are now "super contracts." One example will suffice: courts interpret ambiguous arbitration contracts in favor of arbitration instead of using the traditional contract rule of interpreting ambiguities against the drafter.[13]

The Supreme Court in 1983 transformed the FAA from a procedural rule that applied only in federal court to a substantive rule that applies in both state and federal court. Justice William Brennan concluded that "section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act."[14] The Court subsequently decided that the FAA preempted state laws that regulated arbitration.[15] Justice O'Connor warned that the Court's "broad formulation" of the FAA would result in displacing "many state statutes carefully calibrated to protect consumers" and "state procedural requirements aimed at ensuring knowing and voluntary consent."[16] That's exactly what happened. Justice Ruth Ginsburg lamented in 2015 that the Court's decisions "have predictably resulted in the deprivation of consumers' rights to seek redress for losses, and, turning the coin, they have insulated powerful economic interests from liability for violations of consumer-protection laws."[17]

According to the logic of these Supreme Court opinions, few, if any, claims subject to an arbitration clause belong in court rather than arbitration. Federal statutory claims for age, sex, or racial discrimination have been shunted into the private world of arbitration.[18] Simple consumer transactions are subject to arbitration.[19] The Supreme Court has sanctioned the use of class-action waivers in arbitration clauses that permit corporations to avoid class-action lawsuits.[20] Even wrongful death claims have been held to be arbitrable.[21]

The transformative impact of the Supreme Court arbitration jurisprudence is sometimes overlooked. Jean R. Sternlight, the leading scholar on pre-dispute arbitration clauses, has written with great prescience about arbitration in America. She noted in 1996 that the Supreme Court was "itself leading the revolutionary transition from litigation to mandatory binding private arbitration" instead of protecting consumers.[22] With each pro-arbitration opinion issued by the Supreme Court in the 1970s and 1980s, businesses "jumped on the opportunity to compel arbitration in contexts where they previously thought arbitration agreements would not be enforced."[23] Pre-dispute arbitration clauses have become ubiquitous in consumer transactions and employment contracts.[24]

Nursing Home Litigation

If a party files a lawsuit against a nursing home and there is an underlying agreement that contains an arbitration clause, the nursing home can file a motion to compel arbitration. In cases governed by the Federal Arbitration Act, the party resisting enforcement of the arbitration clause has limited grounds. The FAA only allows challenges that "exist at law or in equity for the revocation of any such contract."[25] Common challenges to arbitration clauses in nursing home litigation include unconscionability and lack of capacity.[26] Most courts have been unreceptive of challenges to arbitration clauses based upon unconscionability.[27]

The common-law doctrine of unconscionability has two aspects: procedural unconscionability and substantive unconscionability. Procedural unconscionability refers to the circumstances surrounding the adoption of the arbitration clause. Substantive unconscionability refers to the fairness of the arbitration provision itself.[28] Substantive unconscionability exists when the arbitration clauses creates barriers to the consumers pursuing their claims in arbitration. In 2000, the United States Supreme Court addressed the issue of whether an arbitration agreement is unenforceable if it says nothing about the costs of arbitration, thus failing to provide protection for the consumer from "potentially substantial costs." The Court held that the mere "risk" of large arbitration costs "is too speculative to justify the invalidation of an arbitration agreement."[29] Courts have since routinely rejected challenges to arbitration based on speculative costs.[30] Occasionally, the party resisting arbitration is able to provide sufficient proof that "the cost of the proposed arbitration was so prohibitive as to render the arbitration agreement substantively unconscionable."[31]

Lack of capacity is another common defense to the enforceability of arbitration clauses often found in nursing home cases. At the time of the signing of the admission documents containing an arbitration agreement, the future nursing home resident is of advanced age and likely diminished capacity.[32] The Centers for Disease Control and Prevention recently estimated that over half of nursing home residents suffer from Alzheimer's disease or other dementias.[33] The consumer's ability to understand the significance of the contract generally or the arbitration clause specifically is almost invariably in question. But a threshold issue exists: does the court or does the arbitrator decide the lack of capacity issue? The United States Supreme Court has not addressed this

Lawsuits are often brought against nursing homes, either by nursing home residents for personal injuries or by their surviving children for wrongful death.

question, and there is a split in the federal courts of appeals.[34]

In 1967, the United States Supreme Court addressed whether the court or arbitrator should resolve a claim of fraud in the inducement of the contract. The Supreme Court held that the arbitrator, not the trial judge, should resolve a claim that the contract was induced by fraud. Section 4 of the FAA limits a court's review to those matters concerning "the making of the arbitration agreement."[35] The Court would decide on a claim that the arbitration clause itself was induced by fraud.[36] The arbitration clause is considered "separable" from the rest of the contract.

When faced with a challenge to the enforceability of an arbitration clause, courts would determine whether the party was challenging the validity of the contract as a whole, which would be decided by the arbitrator, or was challenging the validity of the arbitration clause itself, which would be decided by the court.[37] In 2006, the United States Supreme Court held that a challenge to a motion to compel arbitration that was based upon the illegality of the contract would be for the arbitrator to decide.[38] The Supreme Court reaffirmed the rule that "a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." However, in a footnote, the Court reserved the question of whether the trial court or the arbitrator would decide a challenge based upon whether any agreement was ever concluded in the first place. The Court gave three examples of contract formation issues: whether the obligor ever signed the contract; whether the signer lacked authority to bind the principal; and "whether the signer lacked the mental capacity to assent." As the Texas Supreme Court has noted, "Several courts have read *Buckeye* to add a third discrete category to the *Prima Paint* analysis." The third category includes "a challenge to whether any agreement was ever concluded."[39] The majority of courts have decided that this is a threshold issue for the court.[40]

A good example of a nursing home case involving lack of capacity is *Rowan v. Brookdale Senior Living Communities, Inc.* There, the plaintiff Rowan was injured when he wandered away from an assisted living facility. He sued the facility for gross negligence and fraud. The facility moved to compel arbitration, and Rowan's lawyers argued that he lacked capacity when he signed the residency agreement the day he moved into the facility. The court noted that, under Michigan law, contracts were presumed to be legal, valid, and enforceable and this presumption included "the assumption that the individuals signing a contract were mentally competent at the time of signing." Moreover, the party resisting enforcement of the contract bears the burden of proving he or she lacked the legal capacity to contract. The court ruled that Rowan was unable to show that he lacked capacity to enter into the contract.[41]

Other cases involve instances where the arbitration agreement eliminates remedies available to consumers or awards attorney fees to the prevailing parties (very few American laws allow such fee-shifting "loser pays" provisions).[42] These provisions would be considered substantively unconscionable. According to Article 2 of the Uniform Commercial Code, when any clause has been found to be unconscionable, the court "may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."[43] In the arbitration setting, the trend appears to be for courts to strike the offending provision and compel arbitration rather than hold that the arbitration agreement is wholly unenforceable.[44]

The Supreme Court held that the arbitrator, not the trial judge, should resolve a claim that the contract was induced by fraud.

In *Covenant Health Rehab of Picayune, L.P. v. Brown*, the Supreme Court of Mississippi reversed the trial court's determination that an arbitration provision was substantively unconscionable. The plaintiffs had filed a wrongful death lawsuit against a convalescent center. The defendants filed a motion to compel arbitration and then the plaintiffs filed a motion seeking a declaration that the admissions agreement was unconscionable and void. The trial court struck clauses that limited liability and punitive damages, waived liability for criminal acts of individuals, required that resident to forfeit all claims except for willful acts, and stipulated that the resident pay for all costs of enforcing the agreement if the resident challenged either the grievance resolution process or an award resulting from that process. The Mississippi Supreme Court affirmed the trial court's determination that these provisions were unconscionable; however, it reversed the trial court's finding that the arbitration provision was unenforceable because of these provisions, and instead chose to enforce "the remainder of the contract without the unconscionable clause." Under Mississippi law, if a court struck part of an agreement as void, the rest of the contract remained enforceable.[45]

Federal Preemption

With the proliferation of arbitration clauses in the 1980s, state legislatures took steps to regulate the use of arbitration clauses.[46] The states took two different approaches. Some states generally regulated arbitration clauses, typically by mandating notice requirements. Nebraska, for example, required certain language to appear in contracts with an arbitration clause:

> The following statement shall appear in capitalized, underlined type adjoining the signature block of any standardized agreement in which binding arbitration is the sole remedy for dispute resolution: THIS CONTRACT CONTAINS AN ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.[47]

Vermont required an "acknowledgment of arbitration" that each party must sign, acknowledging that the party will not be able to bring a lawsuit over any disputes covered by the arbitration provision.[48] Rhode Island required the arbitration provision be placed "immediately before the testimonium clause or the signature of the parties."[49] Montana similarly mandated "notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters on the first page of the contract; and unless such notice is displayed thereon, the contract may not be subject to arbitration."[50] Texas created a "consumer exception" that exempted consumers from arbitration agreements involving "the acquisition by one or more individuals of property, services, money, or credit in which the total consideration to be furnished by the individual is not more than $50,000," unless "the agreement is signed by each party and each party's attorney."[51] Tennessee required that the arbitration clause be "additionally signed or initialed by the parties" in contracts relating to farm property or residential property.[52]

The second approach was to proscribe arbitration in specific situations such as nursing home agreements. This approach was taken by state legislatures in California, Illinois, Oklahoma, and West Virginia. For example, a provision in the California Long-Term Care, Health, Safety, and Security Act provides, "An agreement by a resident or patient of a skilled nursing facility or intermediate care facility to waive his or her rights to sue pursuant to this subdivision shall be void as contrary to public policy."[53]

The United States Constitution declares that the Constitution and "the Laws of the United states" are "the Supreme Law of the Land."[54] In *Southland Corp. v. Keating*, the United States Supreme Court held that section 2 of the FAA applied to state courts.[55] The California Supreme Court had interpreted the California Franchise Investment Law to require courts, not arbitrators, to consider claims brought under that statute and refused to enforce the parties' pre-dispute arbitration agreement. The United States Supreme Court reversed the California Supreme Court, holding that the California law "so interpreted" directly conflicted with the FAA and violated the Supremacy Clause. This 1984 decision has had a far-reaching impact, causing a "seismic shift from the FAA as a simple procedural statute for enforcing arbitration agreements in federal court to a major intrusion upon the police powers of the states."[56] As Sarah Rudolph Cole has explained, the Supreme Court has "developed a preemption doctrine that effectively precludes states from regulating arbitration because the Court nullifies state laws or judicial decisions that are inconsistent with either the policy underlying or the language" of the FAA.[57] A number of state statutes are now subject to preemption if the FAA applies.[58] The FAA typically will apply when interstate commerce is involved, and nursing home litigation usually involves interstate commerce.[59] State legislature attempts to regulate arbitration clauses generally or nursing home arbitration clauses specifically have run afoul of the Supremacy Clause. Courts routinely strike down such laws under the preemption doctrine.[60]

The United States Supreme Court has held that the FAA preempted such state statutes. Montana law declared that arbitration clauses were unenforceable unless notice that the contract was subject to arbitration was "typed in underlined capital letters on the first page of the contract."[61] The Montana Supreme Court refused to enforce an arbitration clause in a franchise agreement because the agreement lacked the required notice.[62] The United State Supreme Court reversed. The Supreme Court held that arbitration agreements may not be invalidated "under state laws applicable only to arbitration provision." The court noted that section 2 of the FAA only permits "generally applicable contract defenses, such as fraud, duress, or unconscionability" to be applied to invalidate arbitration agreements.[63]

Lower federal courts and state appellate courts have also held that the FAA preempts state statutes. The Texas legislature has passed two statutes that regulate arbitration agreements; the Texas Supreme Court has held that the FAA preempts both statutes. The Texas Arbitration Act does not allow arbitration clauses to be enforceable in personal injury claims unless "the agreement is signed by each party and each party's attorney."[64] The Texas Supreme Court held that the FAA (when applicable) preempts the Texas law because it "interferes with the enforceability of the arbitration agreement by adding an additional requirement–the signature of a party's counsel–to arbitration agreements in personal injury cases."[65]

In a wrongful death lawsuit against a nursing home, the Texas Supreme Court held that the FAA preempted the Texas Medical Liability Act's provisions on arbitration. The TMLA requires an agreement to arbitrate a healthcare liability claim contain a written notice in bold-type, ten-point font that stated the agreement contains a waiver of important legal rights, including the right to a jury, and the patient should not sign the agreement without first consulting an attorney.[66] The Texas Supreme Court held that the FAA preempted this provision because the underlying patient-provider transaction involved interstate commerce.[67]

The Nebraska Supreme Court also held that the FAA preempted a Nebraska statute that required a notice about arbitration above the signature line in any agreement. The court concluded that it had "to yield to the precedent set by the Court's holding in *Doctor's Associates, Inc*." and in doing so "hold that the FAA preempts § 25-2602.02 for the contract."[68] The Illinois Supreme Court reached the same conclusion about the Illinois Nursing Home Care Act stating "the anti-waiver provisions of the Nursing Home Care Act relied upon by the plaintiff are legally indistinguishable from the provisions struck down by the [United States] Supreme Court."[69]

The United States Supreme Court also has struck down state common-law rules because of the FAA's preemptive effect. While the FAA provides for the revocation of arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract," the Supreme Court has nonetheless held that judge-made rules "that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate [are] at issue."[70] In *AT&T Mobility LLC v. Concepcion*, the Supreme Court addressed a California Supreme Court rule establishing an arbitration-specific framework for analyzing unconscionability. The "*Discover Bank* Rule" rendered class-action waivers in arbitration clauses unenforceable where a "consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money."[71] Justice Scalia, writing for the majority, held that the *Discover Bank* rule was displaced by the FAA because California courts were applying the rule "in a fashion that disfavors arbitration." While the FAA's saving clause "preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's obstacles."[72]

The United States Supreme Court also has rejected the West Virginia Supreme Court of Appeals' common-law rule that, as a matter of public policy, all pre-dispute arbitration agreements that apply to personal injury or wrongful death claims against nursing homes were unenforceable. Interestingly, the West Virginia high court held that the state statute that prohibited arbitration in nursing home agreements was indeed preempted.

However, the court asserted that its common-law rule was not affected by preemption because of the FAA's savings clause.[73] In a per curiam opinion, the United States Supreme Court vacated the West Virginia opinion. Relying upon *Concepcion*, the Supreme Court rejected the West Virginia court's "categorical rule prohibiting arbitration of a particular type of claim."[74]

More comprehensive reform of arbitration law has not been forthcoming.

This term, the United States Supreme Court again addressed whether a common-law rule is preempted by the FAA in an appeal involving nursing homes. The Kentucky Supreme Court held in 2012 that an agent appointed by a power of attorney cannot bind his or her principal to an arbitration agreement unless the power of attorney expressly authorized such authority. General provisions regarding management of property and financial affairs and decisions about health care do not encompass an agreement to arbitrate.[75] In 2015, the Kentucky high court reiterated its holding in three consolidated appeals involving wrongful death claims against nursing homes. The court held that a power of attorney required a "clear and convincing manifestation" of the principal's intent to delegate the authority to waive the right to trial by jury.[76]

The Supreme Court reversed because the Kentucky clear-statement rule violated the FAA by singling out arbitration agreements for "disfavored treatment."[77] Citing *Concepcion*, Justice Kagan noted that "a court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" The FAA preempts "any state rule discriminating on its face against arbitration." The Kentucky rule failed "to put arbitration agreements on an equal plane with other contracts." Instead, the Kentucky Supreme Court directed the clear-statement rule to safeguard the "divine God-given right" of trial by jury. The rule was "too tailor-made to arbitration agreements" to survive the proscription "against singling out those contracts for disfavored treatment."[78]

The court also rebuffed the respondents' attempt to create a distinction between contract formation and contract enforcement. The respondents argued, in vain, that states had free rein to decide whether contracts are validly created in the first place. The court concluded, "A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made."[79]

For one of the respondents, the matter was over: their power of attorney was sufficiently broad to cover executing an arbitration agreement. However, the Kentucky Supreme Court had said that the other respondent's power of attorney was insufficiently broad to execute an arbitration agreement. That left open the possibility that the arbitration clause wasn't enforceable, regardless of the Supreme Court's opinion. The Court reasoned that if the Kentucky court's ruling was "wholly independent of the court's clear-statement rule, then nothing we have said disturbs it."[80]

Nursing Home Arbitration Clauses and Congress

After the passage of the FAA in 1925, Congress paid relatively little attention to arbitration until 2002. That year, a special-interest group, the National Automobile Dealers Association, was responsible for the passage of a law that shielded car dealerships from arbitration agreements with automobile manufacturers. This "special-interest exemption" reflected the "considerable political clout of the motor vehicle lobby."[81]

Other federal laws belie a strong federal policy in favor of arbitration. The Talent-Nelson Military Lending Act (MLA), 10 U.S.C. § 987, enacted in 2006, prohibited arbitration clauses in "consumer credit" agreements extended to service members and their dependents.[82] In a final rule issued on July 22, 2015, the Defense Department broadened the range of applicable credit products that were prohibited from requiring arbitration or imposing "other onerous legal notice provisions in the case of a dispute."[83] The Defense Department in 2010 also prohibited military contractors from requiring its employees or independent contractors to arbitrate civil rights violations or "any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention."[84] The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 amended the Truth in Lending Act by prohibiting mandatory arbitration clauses from residential mortgage loans.[85]

More comprehensive reform of arbitration law has not been forthcoming. Although Democrats tend to oppose mandatory pre-dispute arbitration clauses in consumer or employment contracts, the failure of Democratic-controlled Congresses to pass arbitration legislation may indicate that Jean R. Sternlight accurately described how the American approach to arbitration "represents the unusual ability of United States corporate interests to control public policy in our country." [86]

In the 110th Congress, identical "arbitration fairness" bills were introduced by Democratic legislators in the House and Senate.[87] The purpose of the bills was to amend the Federal Arbitration Act because of the U. S. Supreme Court decisions that "changed the meaning of the act so that it now extends to disputes between parties of greatly disparate economic power, such as consumer disputes and employment disputes." The bills contained findings that explained the underlying rationale of the proposed legislation. Each bill stated:

> (1) The Federal Arbitration Act . . . was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.
>
> (2) A series of United States Supreme Court decisions have changed the meaning of the Act so that it now extends to disputes between parties of greatly disparate economic power, such as consumer disputes and employment disputes. As a result, a large and rapidly growing number of corporations are requiring millions of consumers and employees to give up their right to have disputes resolved by a judge or jury, and instead submit their claims to binding arbitration.
>
> (3) Most consumers and employees have little or no meaningful option whether to submit their claims to arbitration. Few people realize, or understand the importance of the deliberately fine print that strips them of rights; and because entire industries are adopting these clauses, people increasingly have no choice but to accept them. They must often give up their rights as a condition of having a job, getting necessary medical care, buying a car, opening a bank account, getting a credit card, and the like. Often times, they are not even aware that they have given up their rights.
>
> (4) Private arbitration companies are sometimes under great pressure to devise systems that favor the corporate repeat players who decide whether those companies will receive their lucrative business.

(5) Mandatory arbitration undermines the development of public law for civil rights and consumer rights, because there is no meaningful judicial review of arbitrators' decisions. With the knowledge that their rulings will not be seriously examined by a court applying current law, arbitrators enjoy near complete freedom to ignore the law and even their own rules.
(6) Mandatory arbitration is a poor system for protecting civil rights and consumer rights because it is not transparent. While the American civil justice system features publicly accountable decision makers who generally issue written decisions that are widely available to the public, arbitration offers none of these features.
(7) Many corporations add to their arbitration clauses unfair provisions that deliberately tilt the systems against individuals, including provisions that strip individuals of substantive statutory rights, ban class actions, and force people to arbitrate their claims hundreds of miles from their homes. While some courts have been protective of individuals, too many courts have upheld even egregiously unfair mandatory arbitration clauses in deference to a supposed Federal policy favoring arbitration over the constitutional rights of individuals.[88]

Despite Democrats having control of both the Senate and House the bills were unsuccessful.

When Barack Obama was elected president and Democrats gained seats in both houses after the 2008 election, many observers predicted changes that would reverse the Supreme Court's pro-business expansion of the FAA.[89] Those changes failed to come in the 110th Congress. "Arbitration Fairness" bills filed in the 111th Congress did not do any better. That was the last, best hope of amending the FAA as Democrats lost their majority in the House of Representative in the "Tea Party" wave of 2010. However, Democrats continued to file "Arbitration Fairness" bills in the 112th, 113th, 114th, and 115th Congresses.[90] In 2017, Democratic Senator Patrick J. Leahy introduced his bill "to restore statutory rights to the people of the United States from forced arbitration."[91] But none of these bills have yet to reach a vote in either the House or Senate, indeed the furthest any bill has reached was when Democratic Senator Al Franken held a hearing on his version of the "Arbitration Fairness" bill in the 112th Congress.[92]

The 110th Congress also saw the introduction of bills that specifically addressed nursing home arbitration clauses.[93] Representative Linda Sanchez, a Democrat from California, introduced the "Fairness in Nursing Home Arbitration Act" in the House of Representatives. The bill had 23 cosponsors, all but one were Democrats. The Senate version of the bill had bipartisan support–the bill was introduced by Mel Martinez, a Republican from Florida, and Herb Kohl, a Democrat from Wisconsin. Martinez represented a state with a large number of retirees. The only Republican cosponsor in the House was also from Florida.

Senators Martinez and Kohl gave statements on the floor of the Senate when they introduced the bill. Martinez noted an unsettling trend among nursing homes of "an unwarranted intrusion into a vulnerable population's right to access the civil justice system." Martinez wanted to prohibit any arbitration agreement that was made before the dispute arose. Senator Kohl pointed out how the proposed law was a "narrowly targeted measure that protects nursing home residents, one of our Nation's most vulnerable populations." Kohl stressed how the nursing home admissions process was a "stressful and emotional event" where "prospective residents and their families were given little choice other than to accept the terms of the admission agreement with no ability to negotiate."[94] Both House and Senate bills declared "pre-dispute arbitration agreements" in nursing home contracts to be invalid and unenforceable.

Hearings were held in both the House and Senate. The subsequent Senate and House reports echoed nearly identical themes. The Senate Report announced the purpose of the bill as protecting "vulnerable nursing home residents and their families from unwittingly agreeing to pre-dispute mandatory arbitration, thus signing away their right to go to court." The report also detailed the circumstances surrounding nursing home admissions:

> The nursing home admission process is emotional and traumatic for prospective residents and their families. The decision to enter a facility is made either immediately after a medical emergency, when an elderly person is no longer able to care for himself or herself, or when a family reluctantly acknowledges that they are no longer able to provide the level of care that their loved one needs. During the admissions process, residents or their caretakers face a blizzard of forms that must be signed in order to gain admission. Prospective residents that suffer from cognitive or physical impairments may have limited ability to read or understand arbitration agreements, much less the significant consequences that those agreements may have in the future. Family members admitting a loved one are focused solely on finding the best possible care, and not on the legal technicalities of arbitration.[95]

The report also contained "Minority Views" from Republican Senators Jon Kyl (Arizona), Jeff Sessions (Mississippi), and Tom Coburn (Oklahoma). These senators expressed standard Republican fare. They attacked the bill as coming "straight from the trial bar's legislative agenda", and stated that the proposed bill, if passed, would subject nursing homes "to a litigation environment of trial-lawyer-driven class actions and extreme jury awards."[96] (Republicans, despite their fealty to the Constitution, are very suspicious of jury trials, a right guaranteed in the Constitution.) The House Report expressed the same partisan points of view: the majority, composed of Democrats, extolled the virtues of the proposed legislation while the minority, composed of Republicans, warned of its dangers.[97] These minority views in the respective committees prevailed in Congress. Neither bill was even voted on in either chamber.

The bills were introduced again in the 111th Congress. They fared no better the second time around despite the gains made by the Democratic Party in the 2008 elections. Representative Sanchez's bill gained an additional eight cosponsors, but neither bill made it out of committee. In the following session of Congress, in which Tea Party Republicans gained control of the House by picking up 63 seats and also picked up six Senate seats, Representative Sanchez was joined by only three cosponsors after having 31 cosponsors two years before. No Senate bill was introduced.[98]

Nursing Home Arbitration Clauses and Administrative Regulation

The different approaches to arbitration by Democrats and Republicans are reflected in the executive orders and administrative regulations promulgated during the Obama Administration and the subsequent actions already taken by the Trump administration to undo those efforts. For example, President Obama issued an executive order in 2014 that, among other

things, declared that agreements to arbitrate civil rights or certain tort claims involving companies with procurement contracts exceeding $1,000,000 USD could "only be made with the voluntary consent of employees or independent contractors after such disputes arise."[99] The Department of Defense, General Services Administration, and NASA then issued new rules amending federal procurement regulations to implement the executive order in August 2016.[100] The 115th Congress, now aggressively using the Congressional Review Act, acted to overturn the new regulations.[101] The regulations that were disapproved by Congressional resolution addressed more than arbitration clauses. Interestingly, only Democrats mentioned how the resolution affected the regulations concerning arbitration. For example, Representative Suzanne Bonamici decried how the resolution "would also remove critical protections for workers that allow them to access our judicial system. . . . Workers deserve the opportunity to have their day in court to seek justice for their sexual assault and discrimination claims." Representative Hank Johnson argued, "[T]he Fair Pay and Safe Workplaces executive order required Federal contractors to give employees their day in court. By doing away with this order, the new administration is subjecting workers to forced arbitration, which is a private and fundamentally unfair process. . . . Equal access to justice for all should not be an aspiration but a guarantee for all Americans."[102] The Republicans in Congress prevailed, and President Trump issued an executive order that revoked President Obama's executive order on fair pay and safe workplaces.[103]

The Obama administration also issued regulations prompted by explicit delegation by Congress. The Department of Education issued a final rule in November 2016 that prohibited schools participating in the direct loan program from using pre-dispute arbitration agreements for claims by borrowers against the schools.[104] The effective date of that rule, along with others protecting borrowers, has been postponed by the new administration.[105] The only Obama administration regulation on arbitration that hasn't been upended or delayed by the Trump administration is the Department of Labor rule issued in April 2016 that prohibited financial advisors from using class-action waivers in arbitration clauses.[106]

The Obama administration also issued regulations prompted by explicit delegation by Congress. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 directed the newly-formed Consumer Financial Protection Bureau to study the arbitration clauses in agreements for financial products and gave the Bureau the authority to "prohibit or impose conditions or limitation" on the use of pre-dispute arbitration clauses.[107] The CFPB issued a preliminary report on arbitration three years later. It found that arbitration clauses are commonly used by large banks in credit card and checking account agreements. It also found that roughly 9 out 10 clauses allow banks to prevent consumers from participating in class actions.[108] The CFPB issued a final report in 2015.[109] In 2016, the CFPB issued a proposed rule that would prohibit arbitration clauses in covered agreements from containing class-action waivers. The proposed rule would require language that stated, "We agree that neither we nor anyone else will use this agreement to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action even if you do not file it."[110] On July 10, 2017, the CFPB issued its final rule prohibiting class-action waivers in arbitration clauses.[111] The next day, Republican Senator Tom Cotton announced his intention to use the Congressional Review Act to block implementation of the rule, claiming the CFPB had "gone rogue again."[112]

The failure of the various Fairness in Nursing Home Arbitration bills to advance in Congress led some advocates to urge an "executive branch solution."[113] The Obama Administration attempted such a solution in 2016. The Centers for Medicare & Medicaid Services in the Department of Health and Human Services promulgated a final rule on October 4, 2016 that included a prohibition on the use of pre-dispute arbitration agreements for any long-term care facility participating in Medicare and Medicaid programs.[114] The rule would have a far-reaching effect as 94% of American Nursing Homes are certified to participate in both Medicare and Medicaid programs.[115] In its proposed rule, CMS initially only required facilities to meet certain criteria when asking residents to resolve disputes by binding arbitration, including requiring the facility to inform the resident that the resident would be waiving his or her right to judicial relief for any potential cause of action. But CMS also solicited comments on whether binding pre-dispute arbitration agreements should be prohibited altogether.[116] When CMS promulgated its final rule, it banned the use of pre-dispute arbitration agreements for long-term care facilities, concluding, "it is unconscionable for LTC facilities to demand, as a condition of admission" that residents sign such agreements. CMS explained:

> [W]e are convinced that requiring residents to sign pre-dispute arbitration agreements is fundamentally unfair because, among other things, it is almost impossible for residents or their decision-makers to give fully informed and voluntary consent to arbitration before a dispute has arisen.[117]

The final rule stated that long-term facilities that participate in Medicare or Medicaid "must not enter into a pre-dispute agreement for binding arbitration with any resident or resident's representative not require that a resident sign an arbitration agreement as a condition of admission to the LTC facility."[118]

The final rule, which was to go into effect on November 28, 2016, was enjoined by a federal district court on November 7, 2016. The court appeared sympathetic to the purpose of the rule, noting that the case "places this court in the undesirable position of preliminary enjoining a rule which it believes to be based upon sound public policy."[119] The court, in fact, began its decision disagreeing with the plaintiff's argument that "nursing home arbitration is a fast and efficient process." The court described "the one intractable problem affecting nursing home arbitration, and no others form of arbitration, namely mental competency." In the court's experience, many nursing homes obtain signatures from residents "in spite of grave doubt about their mental competency."[120]

Despite the court's misgivings, it granted the preliminary injunction because CMS "will ultimately be held to have presented insufficient justification for banning nursing home arbitration," even assuming CMS had the authority to take its action. The court also had "considerable skepticism" of the action taken by CMS. While Congress had expressly granted certain federal

agencies the authority to regulate or prohibit the use of arbitration agreements, it had not done so here. The court noted that CMS's statement that it had received a letter from 34 Senators urging the agency act to prohibit pre-dispute arbitration agreements raised concerns that "they were attempting to accomplish by agency *fiat* what they could not accomplish through the legislative process."[121] In December, CMS instructed State Survey Agency Directors to not enforce the prohibition of pre-dispute arbitration clauses while the court-ordered injunction was in place.[122]

CMS made its priorities clear: "[A] ban on pre-dispute arbitration agreements would likely impose unnecessary or excessive costs *on providers*."

The outcome of this litigation became moot when CMS issued a proposed rule in June 2017 that would remove both the requirement precluding facilities from entering into pre-dispute arbitration agreements and the prohibition against facilities requiring residents to sign arbitration agreements as a condition of admission. CMS made its priorities clear: "[A] ban on pre-dispute arbitration agreements would likely impose unnecessary or excessive costs *on providers*."[123] CMS didn't leave the transaction between the facility and the resident entirely unregulated. The proposed regulation would require that the agreement be explained to the resident or representative in a manner whereby the resident understands the agreement. The proposed regulation also requires the arbitration provision be in "plain writing." Facilities also are required to post a notice that describes its policies on using agreements with binding arbitration "in an area that is visible to residents and visitors."[124]

Conclusion

Nursing home residents are a particularly vulnerable population. They aren't helped by the pervasive use of pre-dispute binding arbitration clauses in nursing home agreements. Efforts to either effectively regulate or completely prohibit such clauses in nursing home agreements are doomed to failure until Congress overturns the Supreme Court's erroneous arbitration jurisprudence and restores the Federal Arbitration Act to its originally intended scope, which wouldn't encompass such agreements. That isn't happening anytime soon.

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1 *See, e.g.,* Leslie A. Bailey et al., *Combating Abusive Arbitration Clauses in Nursing Home Contracts*, Trial Trends (Spring 2009), p. 18; Kelly Bagby & Samantha Souza, *Ending Unfair Arbitration: Fighting Against the Enforcement of Arbitration Agreements in Long-Term Care Contracts*, 29 J. Contemp. Health L. & Pol'y 183 (2013); Ann E. Krasuki, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*, 8 DePaul J. Health Care L. 263 (2004); Katherine Palm, *Arbitration Clauses in Nursing Home Admission Agreements: Framing the Debate*,14 Elder Law Journal 453 (2006); Jana Pavlic, *Reverse Pre-Empting the Federal Arbitration Act: Alleviating the Arbitration Crisis in Nursing Homes,* 22 J. Law & Health 375 (2009); Benjamin Pomerance, *Arbitration Over Accountability? The State of Mandatory Arbitration Clauses in Nursing Home Admission Contracts*, 16 Fla. Coastal L. Rev. 154 (2015); John R. Schleppenbach, *Something Old, Something New: Recent Developments in the Enforceability of Agreements to Arbitrate Disputes between Nursing Homes and their Residents*, 22 Elder L. J. 141 (2014); Lisa. A Tripp, *Senior Moment: The Executive Branch Solution to the Problem of Binding Arbitration Agreements in Nursing Home Admission Contracts*, 31 Campbell L. Rev. 157 (2009); Lisa Tripp, *Arbitration Agreements Used by Nursing Homes: An Empirical Study and Critique of* AT&T Mobility v. Concepcion, 35 Am. J. Trial Advoc. 87 (2011).

2 The Democratic Party Platform for 2016 states:

> The Democratic Party believes consumers, workers, students, retirees, and investors who have been mistreated should never be denied their right to fight for fair treatment under the law. That is why we will support efforts to limit the use of forced arbitration clauses in employment and service contracts, which unfairly strip consumers, workers, students, retirees, and investors of their right to their day in court.

2016 Democratic Party Platform (21 July 2016), *available at* http://www.presidency.ucsb.edu/

The 2008 Republican Platform criticized attempts by trial lawyers and their "Democratic donees" to "weaken lower-cost dispute resolution alternatives such as mediation and arbitration in order to put more cases into court." 2008 Republican Party Platform (1 Sept. 2008), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=78545

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10 *See generally* Christopher R. Leslie, *The Arbitration Bootstrap*, 94 Tex. L. Rev. 265, 300-320 (2015); *Margaret L.* Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 Fla. St. U. L. Rev. 99 (2006); Imre Szalai, Outsourcing Justice: The Rise of Modern Arbitration Laws in America (2013); Imre Szalai, *Exploring the Federal Arbitration Act through the Lens of History*, 2016 J. Disp. Resol. 115 (2016).

11 Christopher R. Leslie, *The Arbitration Bootstrap*, 94 Tex. L. Rev. 265, 300-301 (2015).

12 Szalai, *Exploring the Federal Arbitration Act through the Lens of His-*

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13 Richard Frankel, *The Arbitration Clause as Super Contract*, 91 Wash. U. L. Rev. 531, 532-534 (2014).
14 Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 at 24-25.
15 Southland Corp. v. Keating, 465 U.S. 1 (1984); *Perry v. Thomas*, 482 U.S. 483 (1987).
16 Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).
17 DirecTV, Inc. v. Imburgia, 136 S. Ct. 463, 477 (2015) (Ginsburg, J., dissenting).
18 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); *see also Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (Securities Act of 1933); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987) (Racketeer Influenced and Corrupt Organizations Act).
19 Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995).
20 AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).
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27 Amy Schmitz, *American Exceptionalism in Consumer Arbitration*, 10 Loyola U. Chicago Int'l L. Rev. at 93-94.
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38 Buckeye Check Cashing Inc. v. Cardegna, 546 U.S. 440 (2006).
39 In re Morgan Stanley & Co., Inc., 293 S.W.3d 182, 187 (Tex. 2009).
40 *See, e.g.,* In re Morgan Stanley & Co., Inc., 293 S.W.3d 182, 187 (Tex. 2009); *Spahr v. Secco*, 330 F.3d 1266 (10th Cir. 2003); Rowan v. Brookdale Lining Communities, Inc., No. 1:13-cv-1261 (W. D. Mich., June 1, 2015); Amirmotazedi v. Viacom, Inc., 768 F. Supp. 2d 256 (D. D. C. 20111); *but see* Primerica Life Ins. Co. v. Brown, 304 F.3d 469, 472 (5th Cir. 2002).
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43 Uniform Commercial Code §2-302.
44 *See, e.g.,* In re Poly-America, L.P., 262 S.W.3d 337 (Tex. 2008); Venture Cotton Coop. v. Freeman, 435 S.W. 3d 222 (Tex. 2014).
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47 Ne.. Rev. Stat. § 25-2602.02.
48 Vt. Stat. § 5652.
49 RI Stat. § 10-3-2.
50 Mt. Code Ann. § 27-5-114(4) (1995). This provision was repealed in 1997.
51 Tx. Civ. P. & Rem. Code § 171.002 (a), (c).
52 Tn. Code Ann. § 29-5-302.
53 Ca. Health. & Safety Code §1430.
54 U.S. Constitution art. VI, Cl. 2.
55 Southland Corp. v. Keating, 465 U.S. 1 (1984).
56 Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 Fla. St. U. L. Rev. 99, 132 (2006).
57 Sarah Rudolph Cole, *The Federalization of Consumer Arbitration: Possible Solutions*, 2013 U. Chicago Legal F. 271, 271 (2013).
58 Stephen J. Ware, *Arbitration and Unconscionability After* Doctor's Associates, Inc. v. Casarotto, 31 Wake Forest L. Rev. 1001, 1011 n. 72 (1996). Ware lists statutes from 22 states imperiled by the United States Supreme Court decisions on the FAA and preemption.
59 As the Kentucky Supreme Court has noted in a nursing home case:

> The Federal Act applies to arbitration provisions in contracts "evidencing a transaction involving [interstate] commerce," 9 U.S.C. § 2, and almost certainly applies here. Congress's commerce power is interpreted broadly, and "may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice ... subject to federal control." Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56-57 (2003) … The Supreme Court has held that health care is one such activity. Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991) (hospital's purchase of out-of-State medicines and acceptance of out-of-State insurance establish interstate commerce). Several courts, moreover, have applied the FAA to arbitration provisions in nursing home admission contracts. See, e.g., Cook v. GGNSC Ripley, LLC, 786 F.Supp.2d 1166 (N.D.Miss.2011); Carter v. SSC Odin Operating Company, LLC, 353 Ill. Dec. 422, 955 N.E.2d 1233 (2011); Barker v. Evangelical Lutheran Good Samaritan Society, 720 F.Supp.2d 1263 (D.N.M.2010); Estate of Eckstein v. Life Care Centers of America, Inc., 623 F.Supp.2d 1235 (E.D.Wash.2009); Triad Health Management of Ga., III, LLC v. Johnson, 298 Ga. App. 204, 679 S.E.2d 785 (2009).

Ping v. Beverly Enterprises, Inc., 376 S.W. 3d 581, 589-590 (Ky. 2012); *see also* In re Nexion Health at Humble, Inc., 173 S.W.3d 67, 69 (Tex.

2005) (Medicare funds crossing state lines constitute interstate commerce).

60 Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 Fla. St. U. L. Rev. at 132-138.

61 Mt. Code Ann. § 27-5-114(4) (1995).

62 Scott J. Burnham, *The War Against Arbitration in Montana*, 66 Mont. L. Rev. 139 (2005).

63 Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996).

64 Tex. Civ. Prac. & Rem. Code §171.002 (c).

65 In re Nexion Health at Humble, Inc., 173 S.W.3d 67 (Tex. 2005).

66 Tex. Civ. Prac. & Rem. Code § 74.451.

67 The Fredericksburg Care Co., L.P. v. Perez, 461 S.W.3d 513 (Tex. 2015).

68 Aramark Uniform & Career Apparel, Inc. v. Hunan, Inc., 757 N.W.2d 205, 212 (Neb. 2008); *see also* Affiliated Foods Midwest Coop., Inc. v. Integrated Distribution Solutions, 460 F. Supp. 2d 1068 (D. Neb. 2006).

69 Carter v. SSC Odin Operating Co., *LLC*, 927 N.E. 2d 1207, 1218 (Ill. 2010).

70 AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

71 Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005).

72 AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

73 Brown v. Genesis Healthcare Corp., 724 S.E. 2d 250, 282 (W. Va. 2011), *vacated sub nom.* Marmet Health Care Center, Inc. v. Brown, 565 U.S. 530 (2012).

74 Marmet Health Care Center, Inc. v. Brown, 565 U.S. 530 (2012).

75 Ping v. Beverly Enter., Inc., 376 S.W. 3d 581 (Ky. 2012).

76 Extendicare Homes, Inc. v. Whisman, 478 S.W. 3d 306 (Ky. 2015), *judgment rev'd in part, vacated in part sub nom.* Kindred Nursing Centers Ltd. P'ship v. Clark, 137 S.Ct. 1421 (2017).

77 Kindred Nursing Centers Ltd. P'ship v. Clark, 137 S.Ct. 1421 (2017).

78 *Id.* at. 1425, 1427 (2017).

79 *Id*. at 1428.

80 *Id*. at 1429.

81 Carl J. Chiappa & David Stoelting, *Tip of the Iceberg? New Law Exempts Car Dealers from Federal Arbitration Act*, 22 Franchise L. J. 219-221 (Spring 2003).

82 10 U.S.C. § 987 9(f)(4). The law provides, "Notwithstanding section 2 of title 9[FAA], or any other Federal or State law, rule, or regulation, no agreement to arbitrate any dispute involving the extension of consumer credit shall be enforceable against any covered member or dependent of such a member, or any person who was a covered member or dependent of that member when the agreement was made."

83 Defense Department, Limitations on Terms of Consumer Credit Extended to Service Members and Dependents: Final Rule, Fed. Reg. 43559, 43599, 43611 (22 July 2015).

84 48 C.F.R. 252.222-7006.

85 15 U.S.C. § 1639c(e).

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88 Arbitration Fairness Act of 2007, H.R. 3010, 110th Congress (2007); Arbitration Fairness Act of 2007, S. 1782, 110th Congress (2007).

89 *See, e.g.,* Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 San Diego L. Rev. 609, 618-619 (2009); Tripp, *A Senior Moment: The Executive Branch Solution to the Problem of Binding Arbitration Agreements in Nursing Home Admission Contracts*, 31 Campbell L. Rev. at 166-167.

90 Arbitration Fairness Act of 2017, H.R. 1374, 115th Congress (2017); Arbitration Fairness Act of 2017, S. 537, 115th Congress (2017); Arbitration Fairness Act of 2015, H.R. 2087, 114th Congress (2015); Arbitration Fairness Act of 2015, S. 1133, 114th Congress (2015); Arbitration Fairness Act of 2013, H.R. 1844, 113th Congress (2013); Arbitration Fairness Act of 2013, S. 878, 113th Congress (2013); Arbitration Fairness Act of 2011, H.R. 1873, 112th Congress (2011); Arbitration Fairness Act of 2011, S. 987, 112th Congress (2011).

91 Bill to restore statutory rights to the people of the United States from forced arbitration, S. 550, 115th Congress (2017).

92 The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers, and Small Businesses? Hearing Before the Committee on the Judiciary, United States Senate, 113th Congress (Dec. 17, 2013), Serial No. J–113–44.

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95 Senate Report 110-518, at 2-3, 110th Congress.

96 Senate Report 110-518, at 19-24, 110th Congress.

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Humbing Along to the Melody-Implied Warranties in the Purchase of Homes and Construction Services in Texas*

By Hector A. Chavana Jr.**

In *Humber v. Morton*, the Texas Supreme Court rejected the doctrine of caveat emptor and recognized two implied warranties in sales of certain new homes—good and workmanlike performance and habitality.

I. Introduction

In Texas, the doctrine of caveat emptor required that a homebuyer act diligently before making a purchase.[1] Under this doctrine, a consumer had no remedy for faulty workmanship in a home, if a home seller did not expressly provide a warranty.[2]

In *Humber v. Morton,* the Texas Supreme Court rejected the doctrine of caveat emptor and recognized two implied warranties in sales of certain new homes—good and workmanlike performance and habitality.[3] Several years later, in *Melody Home Mfg.*, the supreme court first recognized the implied warranty of good and workmanlike services in the repair and the modification of tangible goods.[4] The supreme court stated, "the implied warranty of good and workmanlike construction in *Humber* and the implied warranty of good and workmanlike repair services in *Melody Home* are very similar, and yet… diverge drastically on appropriate public policy in this area."[5]

From 2003 to 2009, the implied warranties were partially superseded by a statutory scheme enacted by the Texas Residential Construction Commission Act.[6] However, the legislature allowed the statute to expire due to the ineffectiveness of the commission.[7] As a result, courts must again apply the common law implied warranties created by *Humber* and *Melody Home*.

Courts, however, have had difficulty applying these warranties, sometimes erroneously merging the two *Humber* warranties into a single warranty.[8] Courts have struggled because one warranty provided by *Humber* shares a name with the warranty provided by *Melody Home*.[9] Even so, the warranties arguably have different limitation periods and different rules regarding disclaimers.[10] This paper aims to shed light on the limitation periods, accrual periods and disclaimers in Texas' implied warranty claims as applied to builder-vendors and construction contractors.

II. Background Concepts

A. Introduction

In both practice and study, the law of implied warranties incorporates statutes and other areas of common law. As a result, a few background concepts will aid in fully understanding implied warranties. The *Humber* implied warranties apply to "builder-vendors," builders in the business of constructing residential homes and selling the homes to consumers along with the land. For the purposes of this paper, "construction contractors" are construction service providers that are not builder-vendors and may include residential remodeling companies or commercial contractors. The implied warranties for construction contractors are covered by the *Melody Home* implied warranty.

B. Background on DTPA

In 1973, the Texas Legislature passed the Deceptive Trade Practices Act ("DTPA"),[11] codified in Chapter 41 of the Texas Business and Commerce Code.[12] The DTPA expressly covers implied warranties.[13] The DTPA benefits consumers who lease or buy goods or services, defined as "tangible chattels or real property."[14]

The DTPA provisions "are not exclusive. The remedies provided in [the DTPA] are in addition to any other procedures or remedies provided for in any other law."[15]

C. RCLA

The Residential Contractor's Liability Act was passed in 1987 and is codified in Chapter 27 of The Texas Property Code.[16] The act is not an independent cause of action, but is a set of pre-litigation procedures and remedy caps, used to encourage non-litigious resolutions of construction defect claims.[17] Most agree, the Act provides significant protections for residential contractors.

The act applies to "any person contracting with a purchaser for the sale of a new residence constructed by or on behalf of that person."[18] Therefore, a sale by a builder-vendor is subject to the RCLA.[19] The RCLA also applies to "[c]ontractors," further defined as "a builder, as defined by Section 401.003," who construct or repair a new home or that repairs, alters, or adds to a new or existing home.[20] This definition is broad enough to include construction contractors, however, Section 401.033 has expired[21] and a practitioner could argue that such an ambiguity forecloses the RCLA from applying to construction contractors. Consequently, the RCLA's applicability to *Melody Home* transactions is an open question.[22]

D. TRCCA

In 2005, The Texas Residential Construction Commission (the Commission), created pursuant to the Texas Residential Construction Commission Act (TRCCA), promulgated statutory minimum residential construction performance standards and warranties. These provisions preempted the implied warranties created by the Texas Supreme Court. In 2009, however, the Texas Residential Construction Commission Act and the Commission were sunset, and ceased to exist.[23] While it existed, the Commission, which was not a true regulatory agency, imposed restrictions on implied warranties and created a state inspection process.[24] The Act also required homebuyers to participate in this inspection process before they could file suit.[25] Because it has expired, the Act is still relevant only to the extent that RCLA cross-references non-existent portions of the TRCCA.

III. *Humber and Melody Home:* The Warranties

In *Humber*, the Texas Supreme Court struck down the common-law doctrine of caveat emptor in new homes sold by builder-vendors.[26] *Humber* held that builder-vendors imply two warranties in contracts with consumers.[27] Those warranties are: 1) the warranty that construction services be performed in a good and workmanlike manner; and 2) that the home is suitable for human habitation.[28]

"The implied warranty of good workmanship focuses on the builder's conduct, while the implied warranty of habitability focuses on the state of the completed structure."[29] Subsequent decisions, however, often had difficulty explaining the exact scope of the implied warranty of good and workmanlike performance. It can perhaps be most easily explained best by a court's inability to distinguish it from a negligence standard.[30]

On the other hand, the warranty of habitability was significantly more identifiable and limited. This warranty applies to a latent defect that renders the house "unsuitable for its intended use as a home."[31] The court further characterized latent defects as defects unknown to the buyer at the time of sale.[32] The *Humber* court defined a builder-vendor as one who sells land and constructs new homes for members of the public who rely entirely on the builder-vendor for architecture, design and inspection expertise.[33]

Humber was generally applied strictly to the court's definition of builder-vendors.[34] For example, one court refused to extend *Humber* to a tenant-landlord scenario, despite an interesting dissent.[35] Even so, the Texas Supreme Court held that *Humber* could apply to subsequent buyers of new homes when the limitation period had not expired.[36]

In *Young v. Deguerin,* the court raised the question of whether a contractor who built a new home but who did not sell land could also be held liable under *Humber*.[37] The defendant argued that he did not meet the definition of a builder-vendor because he did not convey real estate in the condo sale.[38] The court

held that the builder had in fact transferred real estate and did not specifically rule on the question.[39] However, the court provided dicta indicating that *Humber*'s warranties should apply even if a builder failed to convey real estate.[40] The court mentioned that the policy rationale in *Humber* should extend to protect buyers of construction services even if the builder-vendor did not convey real estate.[41]

In 1987, the Texas Supreme Court provided new warranty relief for consumers that extended beyond that provided by *Humber*. In *Melody Home Mfg. Co. v. Barnes,* consumers sued the manufacturers of the modular pre-fabricated home they had purchased.[42] Representatives from Melody Home attempted to correct a defect in the home.[43] Unfortunately, the Melody Home representatives failed to fix the defect and actually caused more damage.[44] The consumers sued under the DTPA.[45]

In *Melody Home*, the Texas Supreme Court recognized *sua sponte* that an "implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner is available to consumers suing under the DTPA," a phrase that would later create confusion as to whether a plaintiff was required to bring suit under DTPA. [46] The court defined "services" as "work, labor or service purchased."[47]

In 1987, the Texas Supreme Court provided new warranty relief for consumers that extended beyond that provided by *Humber*.

Subsequent courts clarified that the DTPA prohibits the breach of an express or implied warranty, but it does not create warranties.[48] Courts or statutes must recognize a warranty before a litigant may successfully bring action under the DTPA.[49]

In sum, *Humber* created the warranties of good and workmanlike services and the warranty of habitability in contracts between builder-vendors and home-buying consumers.[50] *Melody Home*, however, created only the warranty of good and workmanlike services in purchases of work, labor or services.[51] As a result, courts since *Melody Home* have generally applied the *Humber* warranties to cases involving builder-vendors, and they have applied the *Melody Home* warranties to construction contractors who do not meet the definition of a builder-vendor. [52]

IV. Limitation Periods

Courts generally apply a four-year limitations period to the *Humber* warranties.[53] The limitation period for the *Melody Homes* warranty, however, has a greater lack of uniformity.

Prior to 1979, the DTPA contained no statutory limitations provision, and courts applied varying limitation periods to DTPA claims brought before that date.[54] However, the legislature expressly modified the limitations period in the DTPA and supplied a two-year statute of limitation, which applies to claims arising after August 27, 1979.[55] The DTPA is significant to implied warranties because at least one court has stated that *Melody Home* requires litigants to bring implied warranty claims under the DTPA.[56] While this court issued the opinion based on a misunderstanding of language in *Melody Home*, a litigant must be aware of this holding.[57] Many construction contracts do not involve builder-vendors. Therefore, implied warranty claims must be brought under *Melody Home* and not *Humber*.[58]

In *Cocke v. White*, the plaintiffs sued alleging breach of implied warranties in the purchase of a new home.[59] According to the court, the case did not involve the statute of limitations. Instead, the case raised the question of which version of the DTPA applied.[60] The court held that the 1979 amendments did not apply because the earnest money contract was signed five days before the effective date of those amendments.[61] The court, therefore, applied the *Humber* warranties via the DTPA.[62]

More recently, in *Southwest Olshan Found. Repair Co., LLC v. Gonzales,* the San Antonio Court of Appeals reviewed an implied service warranty claim based on foundation work.[63] The consumer claimed a breach of implied warranty under the DTPA, but also claimed that a four-year limitation period applied because she had asserted a construction claim.[64] The court cited language in *Melody Home* and stated "that an implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner *is available to consumers suing under the DTPA*."[65] On appeal, the Texas Supreme Court characterized the appellate court's holding as a *requirement* that a consumer bring an implied warranty of service claim via the DTPA.[66]

The supreme court, however, ruled on other grounds, and did not reach the question of whether an implied workmanlike service warranty *must* be brought under the DTPA. The San Antonio court, however, does not appear to be on solid ground, and it appears to base its view on an incomplete reading of *Melody Home*.[67]

Other courts both before and since *Gonzales* have concluded that the DTPA's two-year limitation period applies to construction contractors.[68] A recent, unpublished case shows that at least one court has expressly followed *Gonzales* and applied the DTPA's two-year statute to a residential construction contract.[69] In *Design Tech Homes, Ltd. v. Maywald*, consumers contracted with a builder to construct a home.[70] While not expressly stated, it seems that the Maywalds contracted the defendant to build on their own lot.[71]

The consumers later complained of foundation problems and brought claims based on breach of express and breach of implied warranty.[72] The court cited and followed the *Gonzales* rationale and held that a two-year statute of limitation applied to the warranty claims.[73]

The significance of this case is that the contractor built an entire home from the outset. Still the court applied *Melody Home* without any discussion of *Humber*. Like many opinions regarding implied warranty claims, the rationale is ambiguous.

The court does not distinguish between *Melody Home* and *Humber*, and does not expressly discuss whether the contractor was a builder-vendor. One could surmise that the contractor

was not a builder-vendor for two reasons: (1) either he did not convey real estate; or (2) the buyer relied on other experts in addition to the contractor.

On the other hand, the opinion could suggest simply that Maywald simply did not argue for the four-year limitation period or that he rested his claim entirely on the DTPA. It is clear, however, that Maywald alleged an implied warranty claim in a ground up construction contract, and that the court followed *Gonzales*, applying the DTPA's two year limitation period. The opinion illustrates the vagueness and the lack of analysis offered by most courts that struggle with implied warranties. Litigants are left to wonder what rationale the court used to apply the two-year limitation period.

In sum, courts generally apply a four-year limitation period to *Humber* claims. On the other hand, some courts are recognizing a poorly reasoned trend that requires a two-year limitation period in *Melody Home*. Despite this trend, a four-year limitation period may still apply to *Melody Home* cases if the litigant does not invoke the DTPA or if the litigant brings the claim under the common law in addition to bringing it under DTPA; though the point is arguable.[74]

V. Limitation Period: Accrual

A breach of warranty generally accrues when delivery is made, if a defect exists at the time of delivery.[75] The legal injury rule states that limitations begin to run "when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred."[76]

The discovery rule is a narrow exception to the legal injury rule and applies when a defect is inherently undiscoverable.[77] The DTPA codified the discovery rule in DTPA claims, and allows for accrual to run when the consumer actually discovered or, in the exercise of reasonable due diligence, should have discovered the "false, misleading, or deceptive act or practice."[78] Since *Melody Home*, Courts have read the DTPA's discovery rule to run when "the plaintiff knew or should have known...of the *wrongful injury*."[79] For both DTPA and common-law causes of action, accrual occurs when the plaintiff knew or should have known of the wrongful injury.[80] Thus, accrual operates similarly in both *Humber* and *Melody Home* claims whether the plaintiff invokes the DTPA or not.

In *Gonzales*, accrual began when the defendant's employee pointed out that the work performed by defendant was "the worst job he had ever seen."[81] However, courts do not require such an unequivocal declaration in order for accrual to begin. Under the discovery rule, the limitations clock may run once a claimant knows of a wrongful injury "even if the claimant does not yet know the specific cause of the injury; the party responsible for it; the full extent of it; or the chances of avoiding it."[82]

In *Dean v. Frank W. Neal & Associates, Inc.,* for example, multiple parties participated in designing and constructing a house for the buyers.[83] The buyers saw cracks in the foundation during construction in 1996.[84] In 1996 and 1997, after moving in, the buyers began meeting with the multiple parties who had designed and constructed the home regarding alleged defects.[85] The court noted that the buyers could have hired an independent engineer when they began their meetings.[86] For that reason the court held that the limitations period began to run in 1997.[87] The court held that the plaintiff filed well outside the limitation period when he filed in 2002.[88] Diligence required that the Deans should have known of the injury some time in 1996 or 1997.[89]

A new rule is emerging with respect to the discovery rule in implied warranties, however. In *Baleares v. GE Engine Servs.-Dallas*, the court held that "the discovery rule ordinarily should not apply when the injury in question is actually discovered within the limitations period that would apply under the legal-injury rule."[90] The court reasoned that if a plaintiff actually discovers the injury during the normal limitation period, the defect is likely not inherently undiscoverable.[91] Consequently, the court held that the plaintiffs could not rely on the discovery rule when it leased an airplane in April of 2002 and when the airplane experienced catastrophic engine failure in October 2003.[92] As support for its' holding, the court cited one of its unpublished opinions from 1999.[93]

A Houston court has expressly followed the Baleares reasoning in an unpublished auto repair case.[94] Under this view, if a plaintiff actually discovers a defect during the normal limitation period, he should rely on the legal injury accrual rule, and not the discovery rule.

Cases regarding the discovery rule in implied warranties are scarce.[95] Consequently, it does not appear that courts have applied the *Baleares* reasoning to implied warranties in any construction defect claim. However, nothing seems to prevent a court from applying the *Baleares* rule to construction claims.

***Melody Home* expressly held that a construction contractor couldn't waive or disclaim the implied warranty of good and workmanlike performance in service contracts.**

VI. Disclaimers of Warranties

The Texas Supreme Court has noted it has "not always been careful to distinguish between" the implied warranty of habitability and the implied warranty of good and workmanlike performance.[96] *Robichaux* expressly involved a builder-vendor.[97] In that case, the court sloppily treated the two *Humber* warranties as a singular warranty, and held that a builder could disclaim "the Humber warranty" when the agreement contained sufficiently clear language.[98]

Subsequently, *Melody Home* expressly held that a construction contractor couldn't waive or disclaim the implied warranty of good and workmanlike performance in service contracts.[99] Furthermore, *Melody Home* expressly overruled *Robichaux* to the extent the opinions conflicted.[100] Naturally, many authorities concluded that *Melody Home* completely overruled *Robichaux* and that the *Humber* warranties could not be disclaimed after *Melody Home*.[101]

The court in *Beucher*, however, clarified that *Melody Home* did not completely overrule *Robichaux* with respect to *Humber* disclaimers.[102] This was because *Humber* provided two warranties and *Melody Home* provided only one.[103] As a result, good workmanship disclaimers by builder-vendors are effective if the builder-vendor provides a sufficient express warranty.[104] The *Buecher* court stated, "the implied warranty of good workmanship [provided by builder-vendors] may be disclaimed by the parties when their agreement provides for sufficient detail on the manner and quality of the desired construction."[105] The court also held that the *Humber* warranty of habitability may not generally be disclaimed.[106]

From its inception, *Melody Home* expressly stated its warranties could not be waived or disclaimed.[107] In *Gonzales*, however, the supreme court recognized that construction contractors could "supersede" the *Melody Home* warranty by expressly providing a warranty.[108] The court explained that the *Melody Home* warranty provides a gap-filler and that the parties may fill the gap if they expressly agree to a warranty that sufficiently describes the manner, performance or quality of the work.[109]

In sum, courts now recognize that implied warranty of good and workmanlike performance under *Melody Home* cannot be disclaimed or waived, but can be "superseded" if the parties express agreement sufficiently describes the manner, performance or quality of work.[110] On the other hand, builder-vendors may generally disclaim the implied *Humber* warranty of good workmanship if they 1) provide an express warranty and 2) if they expressly disclaim any implied warranty.[111] Despite the different nomenclature (disclaim versus supersede) related to the *Humber* and *Melody Home* line of cases, courts allow the implied warranty of good and workmanlike performance to be replaced with certain express warranties. Generally, however, builder-vendors generally may not disclaim or supersede the *Humber* warranty of habitability.[112]

VII. Summary

In sum, litigants and courts have had difficulty understanding what implied warranties are available, their limitation periods, how time accrues and whether a contractor may disclaim them.

Courts and litigants should take care to fully consider the factors in *Humber* in order to determine whether a contractor meets the definition of a builder-vendor. That determination impacts which implied warranties a consumer may claim, their limitation period and whether or not the contractor may disclaim some warranties.

Opinions discussing implied warranties are limited in number and are often ambiguous or vague. Nonetheless, it is possible for litigants to analyze their claims and to present clear arguments to the courts. In the interest of clarity, courts should take care to express whether a contractor qualifies as a builder-vendor, especially in cases where the question is close. Increased clarity and a deeper analysis by both litigants and courts will provide a clearer body of law.

VIII. A Brief Summation and Practical Framework for Analysis

The statutory warranties that TRCCA codified have expired.[113] As a result, courts will have to decide questions of implied warranties based on the existing common law framework. If courts adopt the following systematic analysis, the law of implied warranty in construction law will become clearer and more helpful. The conclusions in this section of the paper are supported by the research in the prior sections of this paper.

A. Identification of the defendant's status as a builder-vendor.

If litigation involves a construction defect, courts and litigants should take care to fully consider the factors in *Humber* to determine whether a contractor meets the definition of a builder-vendor.[114] Courts have not made clear which or how many *Humber* factors are required to classify a party as a builder-vendor. However, courts can clarify this issue by systematically considering the issue in appropriate cases.

An initial analysis regarding a builder's status as a builder-vendor will aid litigants and courts to properly understand sub-issues. If the defendant operates as a builder-vendor, *Humber* and its progeny control. If the defendant does not operate as a builder-vendor, then it likely offers services or labor, and the *Melody Home* line of cases controls.[115]

B. Available warranties

If *Humber* applies, the plaintiff has a cause of action for breach of implied warranty of habitability or breach of implied warranty of workmanlike performance or both. On the other hand, if *Melody Home* applies, the plaintiff only has a cause of action for breach of implied warranty of good and workmanlike performance.[116]

C. Pre-litigation and post-petition procedures

If *Humber* applies, RCLA likely governs pre-litigation procedures. However, if *Melody Home* applies, RCLA may or may not apply due to RCLA's definition of "contractor," which cross-references an expired statute. Courts can clarify this point if the legislature does not act to correct this inconsistency.[117]

D. DTPA and statute of limitations

If *Humber* applies, the plaintiff may, but need not to, use the DTPA to bring suit. The normal limitation period for *Humber* claims is four years, but if a litigant chooses to bring suit under the DTPA, the limitation period is two years for that claim. Parties commonly bring one claim under common law as well as another claim under the DTPA, in which case the common law limitation period applies to the common law claim and a two-year limitation period applies to the DTPA claim.[118]

If *Melody Home* applies, a litigant could mention the San Antonio opinion, in which the court holds that *Melody Home* warranties must be brought under the DTPA.[119] However, the court should refuse to follow that holding for the reasons previously listed in this paper.[120] Instead, the court should hold that, like *Humber*, or any other warranty claim, a plaintiff may choose or choose not to bring a claim under the DTPA.[121] If the plaintiff brings a claim under the DTPA, then the limitation period is clearly two years.[122] However, if the plaintiff brings a common law claim a four-year limitation period may apply.[123]

E. Accrual

Accrual analysis does not differ greatly between the *Humber* and *Melody Home* lines of cases. The general rule is that a breach of warranty accrues when delivery is made, if a defect exists at the time of delivery. However, the common law discovery rule and the DTPA discovery rule are important exceptions to the general rule and may toll accrual of the limitation period. Furthermore, some courts have said that if a claimant actually becomes aware of a defect during the limitation period, he may not avail himself of the discovery rule.[124]

F. Disclaimers

The *Melody Home* warranty of good and workmanlike performance cannot be disclaimed, but it can be superseded by certain express warranties. The *Humber* warranty of good and

workmanlike performance may be disclaimed if the agreement provides for sufficient detail on the manner and quality of the desired construction. On the other hand, the *Humber* warranty of habitability generally may not be disclaimed or superseded.[125]

G. Summation of the current framework

Courts and litigants can create clarity in the law by initially determining the status of the defendant as a builder vendor. Thereafter, many sub-issues arise, and the answers to these issues remain unclear. However, courts can clarify many questions if they commit to determining the builder status initially and following the analysis in points B-F of this section.

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1 Humber v. Morton, 426 S.W.2d 554, 557 (Tex. 1968). Texas had recognized implied warranties of *goods* earlier. *Humber* states that caveat emptor was on the wane with respect to goods as early as 1856. *Id.* at 558. *See generally* Walker v. Great Atl. & Pac. Tea Co., 112 S.W.2d 170 (Tex. 1938)(adopting Williston's position on no-fault liability imposed on grocers through implied warranties of canned goods).

2 *Humber,* 426 S.W.2d at 557.

3 *Id.*

4 Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 354 (Tex. 1987).

5 Centex Homes v. Buecher, 95 S.W.3d 266, 270 (Tex. 2002).

6 Sunset Advisory Comm'n, Sunset Hearing Material Tex. Residential Constr. Comm'n, at 4 (Tex. 2008).

7 *Id.*

8 *Id.*

9 *See Humber* 426 S.W.2d 554 *and Melody Home Mfg.* 741 S.W.2d 349.

10 *See* discussion *infra* Part IV, V.

11 Richard M. Alderman, The Texas Deceptive Trade Practices Act In Context: Not All That Bad 3 (October 23, 2009) (unpublished paper) (available at https://www.law.uh.edu/peopleslawyer/2009consumer-law-basics/presentations/RichardAlderman-paper.pdf) (Noting that the formal name of the act was Texas Deceptive Trade Practices—Consumer Protection Law).

12 The general consumer protections begin at Tex. Bus. & Com. Code §17.41 (West 1973). The sections beginning before §17.41 deal with specific commercial transaction types.

13 Tex. Bus. & Com. Code § 17.50(a)(2) (West 2005).

14 *See* Alderman *supra* note 11 at 8 (citing § 17.45 Tex. Bus. & Com. Code (West 2007)).

15 Tex. Bus. & Com. Code Ann. § 17.43 (West 1995).

16 Tex. Prop. Code tit. 4, Ch. 27.

17 *Id.*; Tex. Prop. Code § 27.005 (West 1999).

18 Tex. Prop. Code § 27.001(5)(A)(ii) (West 2007).

19 *See infra* note 33 for discussion of builder-vendor.

20 Tex. Prop. Code § 27.001(5)(A)(i) (West 2007).

21 *See infra* note 23.

22 David Funderburk, *Residential Construction Liability in Texas-Current State of the Law*; Tex. Legal Liab. Advisor 2 (Fall 2013); Mark Courtois and David Funderburk.

23 Richard M. Alderman, The Lawyer's Guide to the Texas Deceptive Trade Practices Act §8.062 (2ed. LexisNexis 2015).

24 Sunset Advisory Comm'n, Sunset Hearing Material Tex. Residential Constr. Comm'n, at 1 (Tex. 2008).

25 *Id.*

26 *Humber,* 426 S.W.2d at 561 ("If at one time in Texas the rule of caveat emptor had application to the sale of a new house by a vendor-builder, that time is now past.").

27 *Buecher*, 95 S.W.3d at 271.

28 *Id.*

29 *Id.* at 272.

30 *Coulson v. Lake L.B.J. Mun. Util. Dist.,* 734 S.W.2d 649, 651 (Tex. 1987)("We are unable to discern any real difference between the District's claim that Coulson's efforts were not good and workmanlike and did not meet the standards of reasonable engineering practice and its claim that Coulson was negligent in his performance of professional services."). Though not expressed, this case actually dealt with a *Melody Home* warranty. The difference between the *Melody Home* and the *Humber* warranty does not seem to have a great distinction in the courts, but at least one academic say that a simple negligence standard is inadequate to understand the substantive protection of the warranties. *See* Timothy Davis, *The Illusive Warranty of Workmanlike Performance: Constructing A Conceptual Framework*, 72 Neb. L. Rev. 981, 984 (1993). *See also* Mark L. Kincaid, *Recognizing an Implied Warranty That "Professional'" Services Will Be Performed in A Good and Workmanlike Manner*, 21 St. Mary's L.J. 685, 707 (1990)(arguing that the culpability standard in a Melody Home case can be lower than a standard negligence case if brought under the DTPA: "[T]he causation standard for recovery under the [Melody Home] implied warranty theory differs from that for negligence. Negligence requires a showing that the conduct was a *proximate* cause of the damages; *producing* cause is the standard for a warranty claim brought under the DTPA. The difference is that foreseeability is an element of the former but not the latter.").

31 *Buecher*, 95 S.W.3d at 272, 273.

32 *Id.*

33 *Humber*, 426 S.W.2d at 555 ("It conclusively appears that defendant Morton was a 'builder-vendor.' The summary judgment proofs disclose that he was in the business of building or assembling houses designed for dwelling purposes *upon land owned by him*. He would then sell the completed houses together with the tracts of land upon which they were situated to members of the house-buying *public*...When a vendee buys a development house *from an advertised model*…[h]e has no architect or other *professional adviser* of his own, he has no real competency to inspect on his own.") (emphasis added). *Accord* Richard Clough *et al.,* Construction Contracting: A Practical Guide to Company Management §1.62 (Wiley, ed. 7th edition 2005)("A builder-vendor is a business entity that designs, builds and finances the construction of structures for sale to the general public. The most common example of this is tract housing, where the builder-vendor acquires land builds housing units...[T]he builder-vendors act as their own prime contractors, build dwelling units on their own accounts and often employ sales forces to market their products...In much of this type of construction, the builder-vendor constructs for an unknown owner...The usual construction contract between owner and prime contractor is not present in such cases because the builder-vendor occupies both roles. The source of business for the builder-vendor is entirely self-generated, as opposed to the professional contractor, who obtains its work in the open construction marketplace."). *See also infra* notes 115 and 116 for a more complete list of factors used when deciding whether a party is a builder-vendor.

34 *See, e.g.*, G-W-L, Inc. v. Robichaux, 643 S.W.2d 392, 392 (Tex. 1982)(applying *Humber* to a new home constructed by a builder-vendor).

35 Johnson v. Highland Hills Drive Apartments, 552 S.W.2d 493, 496 (Tex. App.—Dallas 1977, writ ref'd).

36 Gupta v. Ritter Homes, Inc.*,* 646 S.W.2d 168, 168 (Tex. 1983).

37 Young v. DeGuerin, 591 S.W.2d 296, 299 (Tex. App.—Houston [1st Dist.] 1979, no writ).

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.*

42 *See generally* Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349 at 349 (Tex. 1987). *See supra* note 30 for a brief explanation of the scope of the warranty.

43 *Melody Home Mfg. Co.,* 741 S.W.2d at 351.

44 *Id.*

45 *Id.*

46 *Id.* at 356; s*ee infra* note 67 for further discussion of Melody Home and the DTPA.

47 *Melody Home*, 741 S.W.2d at 352.

48 Parkway Co. v. Woodruff, 901 S.W.2d 434, 438 (Tex. 1995)(citing Tex. Bus. & Com. Code § 17.50(a)(2) (West 2005))(other citations omitted).

49 *Id.*

50 Gonzales v. Sw. Olshan Found. Repair Co., LLC, 400 S.W.3d 52, 56 (Tex. 2013).

51 *Melody Home Mfg. Co.*, 741 S.W.2d at 351.

52 *See e.g.* Barnett v. Coppell N. Texas Court, Ltd., 123 S.W.3d 804, 822-823 (Tex. App.—Dallas 2003, pet. denied)(holding that the *Melody Home* implied service warranties apply to ground-up construction contracts in a commercial building); *see* also Design Tech Homes, Ltd. v. Maywald, 09-11-00589-CV, 2013 WL 2732068 (Tex. App.—Beaumont June 13, 2013, rev. denied)(applying DTPA limitation period to a ground-up construction contractor who built a residential home on the consumer's lot (not on builder's lot)).

53 *See e.g.,* Richman v. Watel, 565 S.W.2d 101, 102 (Tex. App. —Waco 1978, writ ref'd.); *see also* Certain-Teed Products Corp. v. Bell, 422 S.W.2d 719, 721 (Tex. 1968); *Walker*, 853 F.2d 355, at 363 (5th Cir 1988) (explaining further the holding in *Certain-Teed Products Corp.* and its modern relevance).

54 Tex. Bus. & Com. Code Ann. § 17.565 (West); *see also* Miller v. Dickenson, 677 S.W.2d 253, 257 (Tex. App.—Fort Worth 1984, writ ref'd.).

55 *Dickenson*, 677 S.W.2d at 257.

56 *Melody Home Mfg.,* 741 S.W.2d at 356; *see infra* note 67 for further discussion of *Melody Home* and the DTPA limitation period.

57 *See infra* note 67 for further discussion of Melody Home and the DTPA limitation period.

58 *See infra* note 68.

59 Cocke v. White, 697 S.W.2d 739, 741 (Tex. App.—Corpus Christi 1985, writ ref'd).

60 *Id.* at 745.

61 *Id.*

62 *Id.* at 743.

63 Sw. Olshan Found. Repair Co., LLC v. Gonzales, 345 S.W.3d 431 (Tex. App.—San Antonio 2011*, aff'd.* 400 S.W.3d 52 (Tex. 2013)).

64 *Id. at 436.*

65 *Id.* (emphasis added).

66 Gonzales v. Southwest Olshan Found. Repair Co., LLC, *400* S.W.3d 52 at 55 (Tex. 2013).

67 The court in *Melody Home* said, "an implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner is available to consumers suing under the DTPA." A court could reasonably read this phrase in isolation to understand that a litigant is required to bring such a claim via the DTPA. This is how the San Antonio court in *Gonzales* construed the phrase.

In support of its conclusion, *Gonzales* and other courts cite a phrase in *Melody Home* that says consumers of repair services "do not have the protection of a statutory or common law implied warranty scheme." The *Gonzales* court and other courts misconstrued these phrases and understood that no common law warranty of good workmanlike services existed or could exist, and that plaintiffs could bring such a claim only through the DTPA. Such a construction contravenes the principle that "[t]he DTPA prohibits the breach of an express or implied warranty...but it does not create warranties." *Parkway Co.*, 901 S.W.2d at 438.

More significantly, the court fails to fundamentally understand what occurred in *Melody Home*. When the *Melody Home* court correctly stated that litigants "do not have the protection of a statutory or common law implied warranty scheme," it was only to illustrate how, unless the court in *Melody Home* created the warranty, consumers would be unprotected. The phrase did not to suggest that the supreme court was restrained from creating the warranty, as the court in *Gonzales* suggests. The concurrence, in fact, lamentably admits that the *Melody Home* court created a new warranty. *Melody Home Mfg.*, 741 S.W.2d at 356, Gonzales, J., concurring. Furthermore, the statement that the warranty was "available… under the DTPA" did not mean that litigants were required to bring the claim under the DTPA.

A better construction of what occurred in Melody Home is that the court created a new, independent warranty, which a plaintiff could pursue through the DTPA, if he so chooses. A complete reading of the opinion and other authorities supports this position. *See, e.g.*, Walker v. Sears, Roebuck & Co., 853 F.2d 355, 363 (5th Cir. 1988) ("[W]e have found a number of cases in which plaintiffs have joined other causes of action with their DTPA claims and the Texas courts have, without comment, applied the DTPA's statute of limitations to the DTPA claims and non-DTPA statutes of limitations to those other claims.)(Citations omitted).

The court in *Melody Home* used the "under the DTPA" language to answer some very specific questions, not to say that the DTPA was obligatory. For example, the opinion first wrestles with the notion of whether or not the plaintiff was entitled to the discretionary damages in the DTPA. *Melody Home Mfg.*, 741 S.W.2d at 351. ("Melody Home appealed the award of DTPA discretionary damages."). Additionally, the defendant challenged the status of the plaintiffs as consumers, a challenge that, if successful, would make the DTPA inapplicable. *Id*. Furthermore, the case was mostly about the creation of this new warranty. *Id*. at 353 ("The issue presented in this case is whether the protection of Texas consumers requires the utilization of an implied warranty that repair services of existing tangible goods or property will be performed in a good and workmanlike manner as a matter of public policy.") The plaintiffs had sued under the *Humber* (without even pleading for the recognition of a new warranty) using the DTPA. Therefore, the question was whether the plaintiffs could maintain a cause of action under the DTPA, not whether the parties were required to bring suit under the DTPA. So the court was answering the former question when it created the new warranty of good and workmanlike services and clarified that the new warranty "is available… under the DTPA."

Further, a plain language reading reveals that the *Melody Home* court did not say the warranty is *only* available under the DTPA. Instead, the court says "*[a]llowing* consumers to sue under [DTPA] section 17.50(a) for breach of an implied warranty that repair services will be done in a good and workmanlike manner is a logical, consistent, and intended interpretation of the [DTPA]." *Id.* at 355-56 (emphasis added). In this portion of the opinion, the court's language is permissive. The San Antonio court in *Gonzales* did not seem to consider that *Melody Home* both created a common law warranty and simultaneously announced that a litigant could bring this new common law warranty claims through the DTPA if he so chooses.

Finally, the DTPA uses permissive language in many sections. Tex. Bus. and Com. Code § 17.50(a) (West 2005)("a consumer may maintain an action;" Tex. Bus. and Com. Code § 17.43 (West 1995) ("The provisions of this subchapter are not exclusive. The remedies provided in this subchapter are in addition to any other procedures or remedies provided for in any other law"). Thus, the San Antonio court's interpretation contravenes the express language of the DTPA, which should take precedent over any common law mandate.

The San Antonio court, while errant, is in good company. It lists five courts in its string cite which share its misunderstanding. Those cases, however, either do a poor job of analyzing the cases or follow the similarly flawed reasoning expressed by the San Antonio court.

See also Brief on the Merits at 4-5, Sw. Olshan Found. Repair Co., LLC v. Gonzales, 345 S.W.3d 431 (2011) (No. 11-0311) ("By holding that [Gonzales'] breach of its common law implied warranty claim can only be pursued under the DTPA, the court of appeals has effectively overruled over a quarter century of Texas Supreme Court precedent that holds that the DTPA does not create any warranties…Since an implied warranty must first exist at common law to be actionable under the DTPA, [Gonzales] was free to pursue her implied warranty claims at common law as well as under the DTPA. *(CR 360)* Under the reasoning of the [San Antonio] court of appeals, if the DTPA were repealed by the Texas legislature, these warranties would simply cease to exist.")(Citation omitted).

68 Barnett v. Coppell N. Texas Court, Ltd., 123 S.W.3d 804, 822-823 (Tex. App.—Dallas 2003, pet. denied) (holding that the *Melody Home* implied service warranties apply to ground-up construction contracts in a commercial building, and applying two-year DTPA limitation period); Cocke v. White, 697 S.W.2d 739, 745 (Tex. App.—Corpus Christi 1985, writ ref'd)(applying *Humber* via the DTPA and acknowledging difference in statute of limitation for DTPA claims that accrued before 1979). *But see* Ben Fitzgerald Realty Co. v. Muller, 846 S.W.2d 110, 119 (Tex. App.—Tyler 1993, writ denied)(ambiguously mentioning that a four year statute of limitation applies to new construction, but holding that the DTPA "necessarily include[s] actions such as this one under [DTPA] section 17.50(a)(2) for breach of warranty").

69 Design Tech Homes, Ltd. v. Maywald, No. 09-11-00589-CV, 2013 WL 2732068 (Tex. App.—Beaumont 2013, rev. denied).

70 *Id.* at 1.

71 *See Id.* at 1 ("the Maywalds and DTH signed a third contract: the "Residential Construction Contract (with Transfer of Lien to Lender).").

72 *Id.* at 1.

73 *Id.* at 4.

74 *See Walker*, 853 F.2d at 363 (explaining that the claim arises from a debt, for which a four year period is appropriate)*; accord* Timothy, *The Illusive Warranty of Workmanlike Performance: Constructing A Conceptual Framework*, 72 Neb. L. Rev. 981, 996 (1993)(explaining that warranty should theoretically sound in contract); *see also Certain-Teed Products Corp.* 422 S.W.2d at 721 (holding that warranties implied by *Humber* were subject to a four year limitation period if they arose from a written contract); Brief on the Merits at 4-5, Sw. Olshan Found. Repair Co., LLC v. Gonzales, 345 S.W.3d 431; Tex. Bus. & Com. Code § 2.725(West 1968)(express warranties subject to four-year limitation period).

There seems to be no published Texas case law expressly applying common law limitation periods in a *Melody Home* without referencing the DTPA. However, an argument can be made that a two-year limitation should apply, even without applying the DTPA. Mark S. Mcquality, CONSTRUCTION LITIGATION – LIVE AND WELL? 15-16 (June 19, 2015) (unpublished paper)(available at http://files.eventsential.org/ce342f66-b6b8-459b-a3cd-6f6c4b1040a3/event-390/73324771-ConsumerCommercial_Construction_McQuality.pdf)(implying the limitation period is two years because it sounds in negligence, and because of a statutory two year limitation period on negligence). Indeed, there exists support for analogizing the good and workmanlike warranty to *professional* negligence. *Coulson*, 734 S.W.2d at 651-52 (Tex. 1987)(analogizing the good and workmanlike warranty to a reasonably prudent professional standard). Furthermore, the supreme court has held that implied warranties sound in tort, not in contract. *Humber*, 426 S.W.2d at 556; *Beucher*, 95 S.W.3d at 271 (describing an "alternative tort remedy"); *Melody Home Mfg. Co*., 741 S.W.2d at 352 (Tex. 1987)("Implied warranties are created by operation of law and are grounded more in tort than in contract."). Courts have held that a two-year limitation period applies to professional malpractice claims, regardless of whether a party may label the cause of action as malpractice, fraud or breach of fiduciary duty. Murphy v. Gruber, 241 S.W.3d 689, 696-98 (Tex. App.—Dallas 2007, pet. denied).

Partly because courts have tended to rely on the faulty reasoning exhibited in *Gonzales (see infra* note 67), courts have seemingly not produced a definitive, well-reasoned answer to the question of the statute of limitations on a purely common law *Melody Home* claim. Even so, one court, without reasoning or supporting authority, has held that other implied warranties (fitness and suitability) are subject to a two-year limitation period, regardless of whether they were brought under the DTPA or the common law. Jeffery v. Walden, 899 S.W.2d 207, 213 (Tex. App.—Dallas 1993), *rev'd on other grounds* 907 S.W.2d 446 (Tex. 1995).

Thus, the question of the limitation period applicable to common law *Melody Home* claims seems to be susceptible to the reasoning in this footnote, and may be expressly answered at some time in the future.

75 *See* PPG Indus., Inc. v. JMB/Houston Centers Partners Ltd. P'ship, 146 S.W.3d 79, 92 (Tex. 2004)(citing Tex. Bus. & Com. Code § 2.725 (West 1967)).

76 Rivera v. Countrywide Home Loans, Inc*.,* 262 S.W.3d 834, 840 (Tex.App.—Dallas 2008, no pet.).

77 Computer Assocs. Int'l, Inc. v. Altai, Inc*.,* 918 S.W.2d 453, 457 (Tex. 1996).

78 Tex. Bus. & Com. Code § 17.565 (West 1987).

79 *Gonzales*, 345 S.W.3d at 437; *See also* KPMG Peat Marwick v. Harrison County Fin. Corp., 988 S.W.2d 746, 749 (Tex.1999).

80 *KPMG Peat Marwick*, 988 S.W.2d at 749-50.

81 *Gonzales*, 400 S.W. 3d at 54.

82 Dean v. Frank W. Neal & Associates, Inc*.,* 166 S.W.3d 352, 357 (Tex. App. —Ft. Worth 2005, no pet.).

83 *Id.* at 354.

84 *Id.*

85 *Id.* at 355.

86 *Id. at 357.*

87 *Id.*

88 *Id.* The court did not engage in a meaningful discussion about which limitation period applied.

89 *Id.*

90 Baleares Link Exp., S.L, v. GE Engine Servs.-Dallas, 335 S.W.3d 833, at 838 (Tex. App.—Dallas 2011).

91 *Id.* The court also mentioned that there exists little case law regarding inherently undiscoverable injuries in implied warranties, but distinguished an opinion from the Fourteenth Court of Appeals which held that damage to an undergrounds water line was inherently undiscoverable.

92 *Id.*

93 *Id.*

94 Kingsbury v. A.C. Auto., Inc*.,* No. 01-14-00205-CV, 2015 WL 1457538, at *6 (Tex. App.—Houston [1st Dist.] Mar. 26, 2015, no pet.).

95 Baleares Link Exp., S.L, v. GE Engine Servs.-Dallas, 335 S.W.3d 833, at 838 (Tex. App.—Dallas 2011).

96 *Buecher*, 95 S.W.3d at 272.

97 *Robichaux*, 643 S.W.2d at 392.

98 *Id.* at 393.

99 *Melody Home Mfg. Co.*, 741 S.W.2d at 355.

100 *Id.*

101 *Buecher*, 95 S.W.3d at 270 ("Some have concluded that after *Melody Home* the *Humber* warranties could no longer be waived or disclaimed"). Beucher cited the following sources which took that view: *Haney v. Purcell Co.,* 796 S.W.2d 782, 786 n. 3 (Tex.App.-Houston [1st Dist.] 1990, writ denied) (*Melody Home* overruled *Robichaux* "with regard to the issue of waiver of warranty"); William Dorsaneo III, Texas Litigation Guide 18 § 270.121[1][b], at 270–113 (2002) (*Humber* warranties may not be waived or disclaimed, citing *Melody Home*); Herbert S. Kendrick and John J. Kendrick, Jr., Texas Transaction Guide 20 § 83A:21[3] at 83A–18 (2002) (same).").

102 *Buecher*, 95 S.W.3d at 270.

103 *Id*.
104 *Id.* at 275.
105 *Id.*
106 *Buecher*, 95 S.W.3d at 274-275.
107 *Melody Home Mfg. Co.*, 741 S.W.2d at 355.
108 *Gonzales*, 400 S.W.3d 52, 53 (Tex. 2013).
109 *Id.*
110 *Id.* The warranty may be superseded if the parties manner, performance or quality of the service.
111 *See Buecher* at 275.
112 *Id.* at 274-275
113 *See* Alderman *supra* note 23 at § 8.062.
114 *See generally Humber*, 426 S.W.2d 554, at 561. The factors cited throughout the opinion are: whether the defendant is in "the business of building or assembling houses;" whether the house is for dwelling purposes; whether the house was built on land owned by the builder; whether the builder would "then sell the completed houses together with the tracts of land;" whether the buyer was a member of the house-buying public; whether the buyer bought a home from an advertised model; whether the buyer has no architect or other professional adviser or no real competency to inspect on his own or whether the buyer was "in a position" to discover a defect; whether the buyer could engage in meaningful negotiations regarding the conveyance documents.
115 *See supra* Section III.
116 *Id.*
117 *See supra* Section II C.
118 *Walker*, 853 F.2d 355, at 363 (5th Cir 1988) (citing Johnston v. Barnes*,* 717 S.W.2d 164, 165–66 (Tex.App.—Houston [14th Dist.] 1986, no writ); Xarin Real Estate, Inc. v. Gamboa*,* 715 S.W.2d 80, 85 (Tex.App.—Corpus Christi 1986, no writ)).
119 *See supra* note 67.
120 *Id.*
121 *Id.*
122 *Walker*, 853 F.2d 355, at 363 (5th Cir 1988)..
123 *See supra* note 74.
124 *See supra* Section V.
125 *See supra* section VI.

Consumer Financial Protection Bureau Issues Final Arbitration Rule

The Consumer Financial Protection Bureau on July 10th issued a final rule banning companies from using arbitration clauses to bar consumers from filing class action lawsuits, setting up a fight with banks, credit card and other companies and potentially the Trump administration. The CFPB's action comes more than one year after it issued a proposed arbitration rule in May 2016. More than 110,000 comments were submitted in response to the proposed rule. The final rule appears to be nearly identical to the proposed rule. The final rule also follows the CFPB's March 2015 study of consumer arbitration mandated by Section 1028 of the Dodd-Frank Act. Section 1028 provides that the CFPB, "by regulation, may prohibit or impose conditions or limitations on the use of" pre-dispute arbitration agreements concerning consumer financial products or services if it finds doing so "is in the public interest and for the protection of consumers."

Here are the remarks of Director Richard Cordray:

Thank you for joining us on this call. Today, we are announcing a final rule that prevents financial companies from using mandatory arbitration clauses to deny groups of consumers their day in court. A cherished tenet of our justice system is that no one, no matter how big or how powerful, should escape accountability if they break the law. But right now, many contracts for consumer financial products like bank accounts and credit cards come with a mandatory arbitration clause that makes it virtually impossible for people to sue the company as a group if things go wrong. On paper, these clauses simply say that either party can opt to have disputes resolved by private individuals known as arbitrators rather than by the court system. In practice, companies use these clauses to bar groups of consumers from joining together to seek justice by vindicating their legal rights.

Group lawsuits, also known as "class action" lawsuits, have long been recognized as a means to secure relief under federal and state law. A small number of consumers can take a company to court to seek justice on behalf of all who were harmed by the company's practices. By blocking group lawsuits, mandatory arbitration clauses force consumers either to give up or to go it alone – usually over relatively small amounts that may not be worth pursuing on one's own. Including these clauses in contracts allows companies to sidestep the judicial system, avoid big refunds, and continue to pursue profitable practices that may violate the law and harm large numbers of consumers.

The breadth and application of these clauses can be unexpected and severe. For example, when Wells Fargo opened millions of deposit and credit card accounts without the knowledge or consent of consumers, arbitration clauses in existing account contracts blocked their customers from bringing group lawsuits for the unauthorized account openings. Companies have argued that group lawsuits are unnecessary because the government can pursue enforcement actions to address the same problems. But consumers should be able to stand up for themselves and pursue their own legal rights without having to wait on the government. And the government has limited resources and authority to respond to every problem that arises in these financial markets.

Originally, arbitration was primarily used for disagreements between two businesses. But over the last quarter century or so, companies started adding arbitration clauses to their consumer contracts, specifically to block group lawsuits and avoid legal accountability. In the last decade, Congress has addressed mandatory arbitration in a few key areas. In 2007, Congress passed the Military Lending Act, which disallows mandatory arbitration clauses in connection with certain loans made to servicemembers. Three years later, in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress went further and banned mandatory arbitration clauses in most residential mortgage contracts.

The Dodd-Frank Act also required the Bureau to study the use of mandatory arbitration for other consumer financial products and services. Congress further authorized the Bureau to issue regulations to limit or prohibit the use of pre-dispute arbitration clauses for consumer financial products or services if such a rule is in the public interest, for the protection of consumers, and if the findings of such a rule are consistent with findings from our study. We conducted the most comprehensive study of mandatory arbitration clauses ever undertaken. We found that these clauses now exist in hundreds of millions of consumer finance contracts affecting tens of millions of consumers. For example, credit card issuers representing over half of all credit card debt have arbitration clauses in their contracts with consumers. Yet few consumers are aware of these clauses and even fewer know how they work. Three out of four consumers we surveyed did not even know whether their credit card agreement contained an arbitration clause.

Our research showed that these little-known clauses are bad for consumers. They may not be aware that they have been deceived or discriminated against or even when their contractual rights have been violated. Moreover, very few people have the time or the money to fight on their own over a small amount of money, which is commonly the stakes in consumer financial matters, even though they can involve the same harm to millions of consumers. In most situations, hiring a lawyer to handle the consumer's own individual case is not practicable. For example, when faced with the daunting prospect of expending all that effort to recoup a $35 fee or even a $100 overcharge, it is no surprise that few people bother to try. When we surveyed consumers with credit cards, only about 2 percent of them said they would consult an attorney or consider formal legal action to resolve a small-dollar dispute. By forcing people to go it alone, companies are less likely to face legal action from anyone who was wronged. As a result, consumers are hurt in two ways.

First, as compared to group lawsuits, individual arbitration means consumers are less likely to get relief for the harms they have suffered. According to the Bureau's study, group lawsuits succeed in bringing hundreds of millions of dollars in relief to millions of consumers each year, and at least 34 million members of group lawsuits received payments over the five-year study period. Those payments totaled $1 billion in cash direct to consumers, net of attorney's fees and expenses. Conversely, over the two years that we studied final results, in about one thousand arbitration cases, the arbitrators awarded a combined total of about $360,000 in relief to a total of 78 consumers. Therefore, by blocking group lawsuits, companies are able to avoid paying

Today's rule prohibits banks and other consumer financial companies from including mandatory arbitration clauses that block group lawsuits in any new contracts after the compliance date.

I am, of course, aware of those parties who have indicated they will seek to have the Congress nullify this new rule.

out significant amounts of money in private litigation when they wrong consumers.

Second, consumers are likely to continue facing ongoing harm that does not get corrected. Even if some consumers were to bring individual arbitration actions and recoup their own losses, that does not stop the same practices from happening again to them or to others. Resolving group lawsuits often requires companies not only to pay back everyone who was harmed, but also to change their conduct moving forward. This saves countless consumers the pain and expense of experiencing the same harms. The Bureau's study found that in 53 group settlements covering over 106 million consumers, companies agreed to change their business practices or implement new compliance programs. Without group lawsuits, private citizens have much less power, on their own, to stop companies from pursuing profitable practices that may violate the law.

Today's rule prohibits banks and other consumer financial companies from including mandatory arbitration clauses that block group lawsuits in any new contracts after the compliance date. The rule does not bar arbitration clauses outright. For these new contracts, however, these clauses have to say explicitly that they cannot be used to stop consumers from banding together to pursue relief as a group. The rule includes the specific language that financial companies must use. By restoring the ability of consumers to file or join group lawsuits, the rule gives companies more incentive to comply with the law. And the deterrent effect of such cases can more broadly influence the business practices of other companies as well.

Our new rule also requires companies to submit their claims, awards, and other information about the arbitration of individual disputes to the Bureau. This will help us better monitor arbitrations to make sure the process is fair for individual consumers. The companies are required to scrub these materials of personal information, and starting in July 2019, we will also post them on our website. This will promote transparency and give consumers, providers, and other regulators more insight into how arbitration works.

Our common-sense rule applies to the major markets for consumer financial products and services under the Bureau's jurisdiction, including those in which providers lend money, store money, and move or exchange money.

To get it right, our process has been thoughtful and thorough. Before launching our study, we issued a Request for Information to obtain stakeholder input about the scope of the study and the available data. In November 2013, we issued the preliminary results of our study and described the scope of the remaining work. The study itself was published in March 2015. For over two years since, we have worked to determine whether new rules were appropriate based on the study results and the Bureau's experience and expertise. We consulted with small providers that might be affected. Last May, the Bureau issued a request for public comment, and last August, we held a Tribal consultation. We ultimately considered more than 110,000 responses from consumers, consumer groups, industry, and other interested parties before finalizing the rulemaking. The text of the rule is direct and concise at only 12 double-spaced pages, with some further explanatory commentary.

I am, of course, aware of those parties who have indicated they will seek to have the Congress nullify this new rule. That is a process that I expect will be considered and determined on the merits. My obligation as the Director of the Consumer Bureau is to act for the protection of consumers and in the public interest. In deciding to issue this rule, that is what I believe I have done.

Over the past 50 years, Congress made the decision in many consumer financial statutes to allow individuals to sue to seek relief when they are harmed by violations of the law. Indeed, Congress frequently adopted special provisions to allow for class actions. Congress has acted selectively and carefully, sometimes authorizing such lawsuits so that individuals will not be dependent on the government to protect their rights, and sometimes disallowing them.

But in recent years, private companies have been able to override Congress's decisions and sidestep accountability under the law, and millions of consumers have found the courtroom doors locked through mandatory arbitration clauses. This rule throws open those doors and allows harmed consumers to band together and seek justice for themselves and all others affected in the same way where Congress has authorized such lawsuits. Based on the study Congress authorized the Bureau to perform, that is the right answer to protect consumers and serve the public interest. Thank you.

Law Professors Write in Support of CFPB Arbitration Rule

Much has been written about the pros and cons of the CFPB's Arbitration Rule that requires companies write arbitration clauses included in contracts in a manner that would not prevent consumers from joining class-action lawsuits. As expected, the Rule brought immediate opposition from business groups and the financial industry. Critics said it was an abuse of the CFPB's powers and claimed the rule limits consumer choices and makes it harder to collect from bad actors. The U.S. Chamber of Commerce and several major bank lobbying groups urged Congress to repeal the rule within hours of its release, and top Republicans in both chambers unified against the bill. The House quickly voted to repeal the new rule. As of the publishing of this issue of the *Journal*, the Senate has not voted on the new Rule.

One of the most comprehensive and concise documents written in support of the new Rule was a letter sent to the CFPB by 250 law professors and scholars. This letter appears on the next page. The list of signatories has been removed.

July 10, 2017

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1700 G Street, NW
Washington DC 205552

Re: CFPB-2016-0020, RIN 3170-AA51

Dear CFPB:

We write to strongly support proposed regulation CFPB-2016-0020, RIN 3170-AA51. We are 256 law professors and scholars who teach and write in such disciplines as civil procedure, contracts, consumer law, financial services law, and dispute resolution. This regulation would accomplish two important goals. First, it would bar companies that provide consumer financial products and services from imposing pre-dispute arbitration clauses combined with class action waivers. Second, the proposed regulation would require regulated parties to collect and transmit to the Consumer Financial Protection Bureau ("CFPB") information regarding use of arbitration in the consumer financial context.

As a group of experienced legal academics, we approach the issues of pre-dispute arbitration clauses and bans on class proceedings from a myriad of different perspectives and political sensibilities. Nonetheless, based on our varied scholarship and teaching backgrounds, we all agree (1) it is important to protect financial consumers' opportunity to participate in class proceedings; and (2) it is desirable for the CFPB to collect additional information regarding financial consumer arbitration.

The benefits and detriments of both forced arbitration and class actions have been debated vigorously for over twenty years in academia, as well as in litigated cases, Congressional hearings and among the general public. Although some good empirical work has been done on these issues, scholars have consistently asserted the need for more and better data-driven studies. Too often, heated discussions have been based on speculation, rather than data; this is especially problematic given the largely private world of confidential arbitration. Accordingly, we were very pleased when Congress, in enacting the Dodd-Frank Wall Street Reform and Consumer Protection Act, mandated in Section 1028(a) that the CFPB study "the use of agreements providing for arbitration of any future dispute . . . in connection with the offering or providing of consumer financial products or services. . . ." After soliciting suggestions on how to conduct such a study, receiving and incorporating ideas from many corners, and spending three years collecting and analyzing massive amounts of data, the CFPB produced a comprehensive

and impressive report in March 2015.[1] The results of this study support the proposed regulation, as discussed below.

CFPB's study clearly shows that pre-dispute arbitration clauses are extremely common in the consumer financial context, and, indeed, are becoming standard practice across a number of different industries. While the incidence of pre-dispute arbitration clauses varies substantially depending on the consumer product or service, CFPB found that mobile wireless and payday loan contracts virtually always compelled consumers to resolve future disputes through arbitration, and that checking account and credit card contracts mandated arbitration roughly half of the time.[2] The CFPB study also found that almost all of the studied arbitration clauses precluded affected consumers from participating in class actions.[3] Yet, despite the prevalence of these clauses, the CFPB found that the majority of financial consumers are not entering into these arbitration clauses knowingly. Based on a national telephonic survey of credit card holders, the CFPB determined, unsurprisingly, that most consumers simply did not focus on dispute resolution clauses when deciding on a credit card, and the vast majority did not understand the implications of forced arbitration.[4] Less than seven percent of consumers whose credit card agreements included arbitration provisions understood that they were precluded from suing the company in court should a dispute arise.[5]

As a group, we have varying perspectives on whether the CFPB regulation goes far enough. Some among us believe the agency should issue a broader regulation banning forced arbitration clauses altogether in consumer financial contracts, whether or not these clauses contain class action waivers. Others among us believe that using pre-dispute arbitration agreements in the consumer context may not be harmful, or may even be beneficial, apart from the class action prohibition. And, still others among us are not sure where they stand on the desirability of banning forced arbitration in this context. Nonetheless, these differences in our perspectives do not undercut our strong agreement that the CFPB is right to both prevent companies from using arbitration to take away financial consumers' opportunity to participate in class proceedings and require the submission of additional data and information that will allow the agency to further study this important area. We believe that the proposed regulations are critically important to protect consumers and serve the interests of the American public.[6]

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[1] *See* Consumer Financial Protection Bureau, Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act Section 1028(a) (March 2015) [hereinafter "CFPB Report"].
[2] *Id.* at Section 2.3. This finding is generally consistent with prior research.
[3] *Id.* at Section 2.5.5.
[4] *Id.* at Sections 3.4.1 & 3.4.3.
[5] These results are largely consistent with other studies, e.g., Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis, and Yuxiang Liu, *"Whimsy Little Contracts," With Unexpected Consequences: An Empirical Analysis of Respondent Understanding of Arbitration Agreements*, 75 MARYLAND L. REV. 1 (2015).
[6] See Dodd Frank Section 1028(b) (authorizing CFPB to issue regulations prohibiting use of arbitration or imposing conditions on its use, regarding consumer financial products or services, "if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers").

Protection of Financial Consumer Class Actions

As teachers and scholars in a variety of legal disciplines, we have been disturbed by recent court decisions that have allowed companies in a broad range of consumer finance areas (e.g., banks, credit card providers, pay-day lenders, automobile finance entities) to use pre-dispute arbitration clauses to avoid class claims and thereby elude federal and state consumer protection laws. In particular, the Supreme Court's decision in *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011), greatly diminished consumers' ability to attack class action waivers in arbitration clauses as unconscionable or otherwise invalid as a matter of traditional contract law; and the Court's decision in *American Express Co. v. Italian Colors*, 133 S. Ct. 2304 (2013), undercut consumers' argument that such clauses are unenforceable where they prevent claimants from vindicating their federal statutory rights. A number of lower courts have interpreted these decisions expansively, giving companies *carte blanche* to insulate themselves from consumer financial class actions.

In our view, the proposed regulation banning class action waivers in the consumer financial context is appropriate for three reasons: (1) class actions can serve as a powerful tool to help consumers of financial services and products vindicate their rights under federal and state law; (2) individual arbitrations are not and realistically will never be a sufficient substitute for consumer class actions; and (3) our legal system relies heavily on private enforcement of consumer rights through class actions, as public enforcement may face significant resource restraints. Below we set out our thinking on these points.

(1) Class actions are a powerful tool that can help financial consumers vindicate their rights under federal and state law

The CFPB Study clearly shows that class actions can be a powerful tool to help consumers vindicate their rights under federal and state law. After examining both federal and state court dockets, the CFPB found that millions of financial consumers participate in class actions, recovering billions of dollars in damages as well as important non-monetary relief in the form of changes to harmful business practices. Specifically, looking at consumer financial class action settlements in federal court from 2008-2012, the CFPB identified 419 consumer class action settlements in the financial sector, which together represented the interests of more than 160 million class members.[7] In these settlements, defendants agreed to pay roughly $2.0 billion in cash relief and $644 million in in-kind relief.[8] CFPB further found that, of the 251 settlements in which data were reported, defendants paid or were scheduled to pay $1.1 billion in either cash or debt forbearance.[9] Thus, on average, between 2008 and 2012, class action settlements in the studied cases committed to pay out more than $220 million annually to financial consumers. In addition, approximately fifteen percent of

[7] CFPB Report at Section 8.1. The Report explains that these numbers are actually undercounts, in that they include only the 329 of 419 settlements for which CFPB could obtain accurate figures or estimates of class size, and exclude a single giant settlement including 190 million class members.
[8] *Id.*
[9] *Id.*

the studied settlements directly mandated what the CFPB called "behavioral relief" – commitments by the company to "alter its behavior prospectively, for example by promising to change business practices in the future or implementing new compliance programs."[10] In sum, this data demonstrates that class actions against companies that market financial services and products bring substantial relief to millions of consumers. These class actions also help ensure that our financial consumer laws are enforced and thereby deter companies from engaging in future violations of these laws. Companies engage in risk management calculations and are less likely to risk violating consumer laws if they know they may be sued in class actions for such violations.

While we appreciate that some consumer class actions can legitimately be critiqued on a variety of grounds, we also believe that reforming class action procedure should continue to be handled legislatively or administratively, rather than by allowing companies to impose arbitration clauses to insulate themselves from the class device. It is clear that consumer class actions can greatly benefit both consumers and the public at large.

(2) Individual arbitrations are not a realistic substitute for consumer financial class actions

Proponents of class action waivers have suggested that financial consumers can vindicate their rights more quickly, cheaply and better in individual arbitrations than in litigated individual claims or class proceedings. Yet, the data gathered by the CFPB belies this claim: although millions of financial consumers are covered by pre-dispute arbitration clauses, the CFPB study found that just a few hundred such consumers file individual arbitration claims each year. Specifically, the CFPB found that between 2010 and 2012 only a few hundred financial consumers filed arbitration claims with the American Arbitration Association, even though the AAA handles more consumer arbitration claims than any other arbitration provider.[11] Moreover, of the arbitration claims that were brought by individual consumers, most involved claims of over $1,000. In other words, a minuscule number of consumers bring individual arbitrations to recover low-dollar claims.[12] Notably the CFPB also found that very few individual consumers bring lawsuits in court, particularly as compared to the millions of consumers who receive protection in class actions.[13]

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[10] *Id.* at Section 8.1 n. 7. Of course, additional defendants and other companies may also have changed their behavior as a result of these class actions.

[11] The CFPB Report at Sections 5.2.1 & 5.5.1 identified 1,847 AAA consumer arbitration disputes involving credit cards, checking accounts, payday loans, GPR prepaid cards, auto purchase loans, or private student loans, but also noted that a substantial number of these disputes were filed by the company rather than the consumer and/or involved claims of unpaid consumer debts rather than affirmative claims brought by consumers.

[12] The CFPB's study of six product markets found only approximately 25 claims per year brought by consumers seeking affirmative relief of $1,000 or less. CFPB Report at Section 5.2.1. Similarly, another study looking at a broader array of consumer arbitration claims found less than 4% of the claims were brought for $1,000 or less. *See* David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 117 (2015).

[13] *See* CFPB Report at 6.2.1 (finding 3,462 individual consumer cases filed in federal court during a three year period in six product markets).

It is easy to see why consumers are reluctant to bring claims individually. First, many individual claims against consumer financial services companies[14] are worth only small amounts of money. As Judge Posner put it, "The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." *Carnegie v. Household Int'l Inc.*, 376 F.3d 656, 661 (7th Cir. 2004). It simply is not worth a consumer's time or trouble, nor a lawyer's, to pursue a small claim. Second, it is difficult to obtain legal representation to bring low-value individual claims: consumers typically cannot afford to pay attorneys an hourly rate to represent them on such a claim and attorneys cannot afford to handle these claims on a contingent fee basis. Third, individual consumers may not be aware that a financial services company has harmed them, nor that the harm was unlawful. For example, a consumer might well not realize they were charged an improper interest rate or discriminated against on the basis of their race with respect to a loan rate. By contrast, class proceedings are well designed to deal with each of these problems – they allow many small claims to be grouped together, make it easier for financial consumers to obtain representation, and allow financial consumers who may not realize they have been wronged to participate in a class action where their rights can be adjudicated.

In other words, one of the harmful consequences of pre-dispute arbitration clauses containing class action waivers is that they suppress claims that consumers might otherwise bring. While it is true that fairly few consumers file individual claims to vindicate their legal rights, this is not necessarily because they lack valid claims; rather, most consumers are simply unaware that they have been harmed, unaware that the harm violates a law, or have decided that filing individual arbitration claims is not worth their time and expense.[15] Yet, from both an individual and societal standpoint it can be important to allow such claims to be brought.

Nor is there reason to believe, as some have suggested, that consumers would bring more individual arbitration claims against financial service providers if only they were better educated about the purported virtues of arbitration. Rather, a consumer who was truly well-informed about consumer arbitration would likely conclude that -- given the financial and other costs of arbitration and the limited likelihood of success -- it makes absolutely no sense to file an individual arbitration claim. Thus, if we want to ensure the enforcement of substantive laws protecting consumers we need to preserve consumer class actions.

The securities industry approach to aggregate claims also informs our perspective on the propriety of using arbitration clauses to eliminate class action claims. The

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[14] We are aware that the proposed regulation would govern companies that market both consumer financial services and also consumer financial products. However, in an effort to simplify, at times this comment uses the phrase "financial services" to also encompass financial products.

[15] When consumers *are* aware of being wronged they may raise complaints internally with companies, file with a government agency, or seek protection from a credit card company if appropriate, rather than engage in more difficult and expensive litigation or arbitration. *See* Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SOUTHWESTERN L. REV. 87, 101-102 (2012).

Securities and Exchange Commission (SEC) concluded that, to carry out its statutory mandate of ensuring investor protection, it must preserve the right of individual investors to pursue class claims in court. As a result, the securities self-regulatory organization FINRA bans broker-dealers from including class action waivers in their agreements with customers.[16] The SEC's view that class claims belong in court and that investors are not fully protected through individual arbitration claims further supports the CFPB's approach to class action waivers in the consumer financial context.

(3) The U.S. legal system depends on private enforcement of rights

Whereas some other countries have invested substantial resources in large government agencies in order to enforce their laws, the United States has chosen to rely substantially on private enforcement of rights.[17] Although state and federal agencies have authority to enforce consumer protection laws, they lack the resources to carry out that role in a comprehensive manner. Further, the CFPB study shows that, while there is some overlap between government enforcement actions and claims raised in consumer class actions, consumer class actions provide monetary recoveries and reform of financial services and products to many consumers whose injuries are not the focus of public enforcers.[18]

Nor do we believe, as some have suggested, that on-line claims systems or social media can currently take the place of consumer financial class actions. Such creative ideas are worth exploring, certainly, and may benefit some groups of consumers, particularly for simple and obvious claims. However, financial consumers who do not know they have been harmed, do not know the harm is illegal, and do not have the time or energy to be educated, will fail to take advantage of informal claims procedures; and on-line arbitration systems cannot help consumers or their advocates amass the expert testimony, legal research, or statistical studies sometimes necessary to prove financial harm.[19] Thus, to the extent we allow financial services companies to use arbitration to eradicate consumer class actions, we are allowing these companies to insulate themselves from enforcement of our laws. This harms not only individual consumers but also the public at large.

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[16] *See* Barbara Black & Jill I. Gross, *Investor Protection Meets the Federal Arbitration Act,* 1 STAN. J. COMPLEX LITIG. 1, 27-28 (2012) (detailing development of and SEC's support for FINRA rule that prohibits investors from bringing class claims in arbitration and preserves investors' right to bring those claims in court); *see also FINRA Dep't of Enforcement v. Charles Schwab & Co., Inc.* (FINRA OHO Feb. 21, 2013) (disciplining broker-dealer for inserting a class action waiver in its form customer agreement). The 2015 report from the FINRA Dispute Resolution Task Force recommended an even more explicit FINRA rule prohibiting such clauses. *See* Final Report and Recommendations of the FINRA Dispute Resolution Task Force Final Report, at http://www.finra.org/sites/default/files/Final-DR-task-force-report.pdf (Dec. 16, 2015).

[17] SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012).

[18] CFPB Report, Section 9.

[19] *See* Myriam Gilles & Anthony Sebok, *Crowd-Classing Individual Arbitrations in a Post-Class Action Era*, 63 DEPAUL L. REV. 447, 451-454 (2014) (explaining why internet and social media cannot adequately replace consumer class actions).

Required Reporting of Consumer Financial Arbitration Results

As legal scholars, we also heartily endorse the portion of the CFPB's proposed rule that would require regulated parties to submit initial arbitral filings, arbitral awards, and certain other correspondence regarding arbitration to the CFPB. Specifically, the draft rule would require regulated companies to provide to CFPB two categories of information: (a) claims, clauses, and judgments (if any) relating to consumer arbitration filings; and (b) any determinations by arbitrators or arbitration providers to the effect that a particular arbitration agreement does not comply with relevant fairness principles. The CFPB has stated an intent to publish redacted or aggregated versions of this information on its website. We believe that by implementing this portion of the rule CFPB will provide greater transparency regarding the nature of financial consumer arbitration, and that this will be helpful to the public, to attorneys, to regulators, and to academics.

Traditionally, arbitration has mostly been a private and confidential process, as neither parties nor arbitration providers have typically provided the public access to arbitration filings or awards. While this privacy is sometimes chosen knowingly and voluntarily by sophisticated parties as a positive feature of arbitration, this secrecy can be detrimental to the public-regarding values of law. If arbitration is entirely private, we cannot learn what kinds of claims are filed, what kinds of defenses are raised, the rate at which arbitral disputes are settled, the rate at which claimants prevail, what kinds of recoveries are typical, whether it is important to be represented by an attorney, whether frequent claimants or respondents have a "repeat player" advantage, or whether repeat arbitrators tend to rule more frequently for one side than the other. By contrast, while researching court processes can also be difficult, at least some aspects of federal and state processes are public. Researchers can more easily study litigation and word does tend to trickle out regarding the fairness and efficiency of the process.

Access to information about arbitration filings, awards, underlying clauses, and their compliance with fairness principles could be extremely useful to disputants, their attorneys (if represented), regulators, and academics. Disputants and their representatives would like more information in order to make more informed assessments of the likelihood of success.[20] Regulators such as the CFPB would like more information in order to determine the efficiency, access and fairness of arbitration, so that they can better determine whether any further regulation is necessary. And, of course, researchers and scholars would appreciate more access so that they might better inform those discussions.

While certain private arbitration providers have occasionally provided research access to their files, they generally have offered such access only to particular researchers and only to a subset of their files. Thus, even the few data-driven studies on arbitration have often been subject to challenge on the grounds that the researchers or their data were handpicked to support a particular perspective. Moreover, researchers

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[20] Such information is likely to be particularly important to consumers, as they usually are one-shot players who therefore lack information about arbitrators' practices.

cannot legitimately conclude that results obtained from one arbitration provider are necessarily predictive of what they might find in the files of another arbitration provider. For example, the CFPB had to base its arbitration research on data obtained from just one source—the American Arbitration Association.[21] The CFPB therefore explicitly recognized that its findings might have been different had it had the opportunity to review data from other arbitration providers.[22]

Some may worry that providing greater access to arbitration filings or awards would harm the arbitral process, but prior grants of access in certain arbitration contexts have convinced us that complete privacy is not needed. For example, securities arbitration awards are made public by FINRA;[23] arbitral awards regarding internet domain name disputes are published by the Internet Corporation for Assigned Names and Numbers,[24] and some labor arbitration awards are required to be made public.[25] Despite this publication, arbitration works reasonably well in each of these fora. Further, the CFPB has stated that it will use redaction or aggregation to protect personal information to the extent it publishes information on its website. Any deterrence to the use of arbitration that publication might bring is speculative, and greatly outweighed by the benefits of transparency in furthering fairness and justice in the arbitration context.

An arbitration true story illustrates the benefits of arbitration transparency. The National Arbitration Forum, an arbitration provider, formerly marketed itself to debt collection companies and law firms, asserting they could use arbitration to cheaply and efficiently collect debts supposedly owed by consumers. NAF largely kept its files private, except when it provided occasional access to particular researchers. Yet, the Minnesota Attorney General eventually obtained access to these files and accused NAF of grossly failing to maintain neutrality by consorting with the companies engaged in debt collection actions against consumers.[26] Once these charges were brought, NAF quickly settled the enforcement action by agreeing to discontinue administering consumer debt collection arbitrations.[27] Had NAF been required to open its files to researchers and the public from the outset, presumably regulators and others would have learned of NAF's practices much more quickly, and perhaps NAF would not have entered into questionable agreements with debt collection entities in the first place.

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[21] CFPB Report, Section 5.4. AAA provided this data pursuant to a non-disclosure agreement.
[22] *Id.* at Section 5.1.
[23] *See* http://www.finra.org/arbitration-and-mediation/arbitration-awards (providing a searchable online data base). To enhance transparency even more in the securities arbitration context, the FINRA DR Task Force recently recommended requiring arbitrators to write explained awards, unless the parties opt out. *See* FINRA DR Task Force Report, at 20-23.
[24] https://archive.icann.org/en/udrp/proceedings-list.htm.
[25] *See, e.g.*, State of Minnesota Bureau of Mediation services, Arbitration Awards http://mn.gov/admin/bms/arbitration/awards/index.jsp.
[26] *See generally* Nancy A. Welsh, *What is "(Im)partial Enough" in a World of Embedded Neutrals*, 52 ARIZ. L. REV. 396, 427-430 (2010) (telling story of NAF consumer debt arbitration).
[27] *Id.*

Conclusion

CFPB's proposed regulation is desirable because it will prevent companies from using consumer financial arbitration to eliminate consumers' access to class actions and because it will require greater transparency regarding the nature of consumer financial arbitration. Both aspects of this proposed regulation will serve the interests of justice. For all of the reasons stated above, we enthusiastically support the CFPB's proposed regulation.

Sincerely,

All signatores have been removed.

Consumer News Alert Recent Decisions

Since 2006, the Center for Consumer Law has published the "Consumer News Alert." This short consumer 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.

US SUPREME COURT

Supreme Court rules debt buyer is not a debt collector under FDCPA. In a major decision dealing with the Fair Debt Collection Practices Act, the United States Supreme Court held that debt buyers collecting the debt they purchase are not debt collectors under the Act. It appears that a debt buyer could still qualify as a debt collector under the FDCPA if debt collection is the "principal purpose" of its business, under 1692a(6), but if collection is not the principal purpose of its business it will not be subject to the FDCPA. *Henson v. Santander*, 137 S. Ct. 810 (2017). https://scholar.google.com/scholar_case?case=5719717633399999906&hl=en&as_sdt=6,32

Filing proof of claim in bankruptcy for a time-barred debt does not violate FDCPA. U.S. Supreme Court ruled that filing a bankruptcy proof of claim on time-barred debt does not violate the Fair Debt Collection Practices Act ("FDCPA"), thereby resolving a circuit split on the issue. The Court held that such a proof of claim is not false, deceptive, misleading, unfair, or unconscionable because a "claim" under the bankruptcy code includes any right to payment even if the right is unenforceable. The Court distinguished filing a civil case on time-barred debt, which lower courts have found violates the FDCPA, because bankruptcy court offers protections to consumers that are unavailable in civil cases. The Court found it "reasonably clear" that filing the proof of claim on time-barred debt in bankruptcy was not "false," "deceptive," or "misleading" under the FDCPA. This decision protects FDCPA defendants from claims arising out of conduct during a bankruptcy, but leaves unresolved the question of whether suing on such a claim outside of bankruptcy is actionable under the FDCPA. The Court noted, however, that a civil suit is very different from a bankruptcy proceeding where the debtor initiates the bankruptcy proceeding and a knowledgeable trustee is available. *Midland Funding, LLC, v. Johnson*, 137 S. Ct. 1407 (2017). https://scholar.google.com/scholar_case?case=2137225230111630749&hl=en&as_sdt=6&as_vis=1&oi=scholarr

Supreme Court holds state cannot say power of attorney must expressly state agent can consent to arbitration. The Kentucky Supreme Court had ruled that authority to bind a principal to arbitration must be explicitly stated in power of attorney. Because the Kentucky Constitution declares the rights of access to the courts and trial by jury to be "sacred," the court reasoned an agent could deprive her principal of such rights only if expressly provided in the power of attorney. The U.S. Supreme Court reversed. The Court found that the Kentucky Supreme Court's clear-statement rule violates the Federal Arbitration Act, 9 U.S.C. 2, by singling out arbitration agreements for disfavored treatment. The FAA preempts any state rule that discriminates on its face against arbitration or that covertly accomplishes the same objective by disfavoring contracts that have the defining features of arbitration agreements. The FAA is concerned with both the enforcement and initial validity of ar-

bitration agreements. *Kindred Nursing Centers, L. P. v. Clark*, 581 U.S. ____ (2017).
https://www.supremecourt.gov/opinions/16pdf/16-32_o7jp.pdf

Supreme Court decision widens class of potential plaintiffs in Fair Housing Act cases. The case was brought by the City of Miami, alleging several major banks engaged in predatory lending practices against minority borrowers that resulted in waves of foreclosures during the Great Recession. The city claimed that it suffered a variety of harm, including frustration of its fair housing goals, increases in foreclosures and vacancies, decreases in property values and reduction in tax collections. In a 5–3 decision, the Court endorsed a broad reading of the concept of an "aggrieved person" under the Fair Housing Act (FHA), saying that the city had sufficient economic injury to fall within the FHA's coverage. The Court, however, refused to consider the second question raised by the banks—whether the city had established that the banks' conduct was the proximate cause of the injury the city claimed. The fact that the injury alleged was foreseeable was not sufficient to show causation: "the housing market is interconnected with economic and social life," and "[n]othing in the [FHAct] suggests that Congress intended to provide a remedy wherever those ripples travel." The Court remanded and directed the lower court to examine these proximate cause issues in detail. *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296 (2017).
https://www.supremecourt.gov/opinions/16pdf/15-1111_5i36.pdf

FEDERAL CIRCUIT COURTS

Consumer cannot revoke consent to be called. Plaintiff filed suit alleging violations of the Telephone Consumer Protection Act (TCPA), 47 U.S.C. 227. The Second Circuit affirmed the district court's grant of summary judgment for Lincoln, holding that plaintiff did introduce sufficient evidence from which a jury could conclude that he revoked his consent, but that the TCPA does not permit a consumer to revoke its consent to be called when that consent forms part of a bargained for exchange. In this case, plaintiff's consent was not provided gratuitously, it was included as an express provision of a contract to lease an automobile from Lincoln. *Reyes v. Lincoln Auto. Fin. Servs.,* 861 F.3d 51 (2d Cir. 2017).
http://law.justia.com/cases/federal/appellate-courts/ca2/16-2104/16-2104-2017-06-22.html

The TCPA does not permit a consumer to revoke its consent to be called when that consent forms part of a bargained for exchange.

Uber arbitration clause enforceable. Plaintiff filed a putative class action alleging that Uber engaged in illegal price fixing. The district court denied Uber's motion to compel arbitration, holding that plaintiff did not have reasonably conspicuous notice of and did not unambiguously manifest assent to Uber's Terms of Service when he registered. The Second Circuit vacated the district court's judgment, holding that the Uber App provided reasonably conspicuous notice of the Terms of Service as a matter of California law, and plaintiff's assent to arbitration was unambiguous in light of the objectively reasonable notice of the terms. The court remanded to the district court to consider whether defendants have waived their rights to arbitration and for any further proceedings. Meyer v. Uber Technologies, Inc., 2017 U.S. App. LEXIS 15497 (2d Cir. Aug 17, 2017).
https://scholar.google.com/scholar_case?case=1592069100457715859&hl=en&as_sdt=6&as_vis=1&oi=scholarr

Single call may violate Telephone Consumer Protection Act. Plaintiff alleged that she received an unsolicited call on her cell phone from a fitness company called Work Out World (WOW). She did not answer the call, so WOW left a prerecorded promotional offer that lasted one minute on her voicemail. Plaintiff filed a complaint, claiming WOW's phone call and message violated the Telephone Consumer Protection Act (TCPA) prohibition of prerecorded calls to cellular telephones. The Third Circuit reversed the district court's dismissal, finding that the TCPA provides a cause of action and that the injury was concrete. The TCPA addresses itself directly to single prerecorded calls from cell phones, and states that its prohibition acts "in the interest of [ ] privacy rights." *Susinno v. Work Out World Inc.*, 862 F.3d 346 (3d Cir. 2017).
https://scholar.google.com/scholar_case?case=10307619139475278819&hl=en&as_sdt=6&as_vis=1&oi=scholarr

Arbitration agreement unenforceable because of choice of law provision. Borrower was required to sign an agreement containing a choice of law provision stating that tribal law would apply, and that "no other state or federal law or regulation shall apply." The agreement further provided that any dispute would be resolved by arbitration in accordance with tribal law. In finding the agreement unenforceable, the Fourth Circuit noted arbitration agreements that operate "as a prospective waiver of a party's right to pursue statutory remedies" are not enforceable because they are in violation of public policy. Under the "prospective waiver" doctrine, courts will not enforce an arbitration agreement if doing so would prevent a litigant from vindicating federal substantive statutory rights. The court also refused to sever the choice of law provision, "[b]ecause these choice of law provisions were essential to the purpose of the arbitration agreement, [the bank's] consent to application of federal law would defeat the purpose of the arbitration agreement in its entirety." *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330 (4th Cir. 2017).
http://law.justia.com/cases/federal/appellate-courts/ca4/16-1362/16-1362-2017-05-10.html

FCRA class action judgment reversed. Relying on *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), the Fourth Circuit vacated and remanded for dismissal a trial court's summary judgment ruling in favor of the plaintiff in an $11 million, 69,000 member class action under the federal Fair Credit Reporting Act (FCRA). The suit was based on the defendant credit reporting agency listing the name of a defunct credit card issuer instead of the name of the servicer as the source of information on the plaintiff's credit report. In its ruling, the Fourth Circuit held that the plaintiff had not suffered an injury-in-fact arising from alleged incomplete or incorrect credit report information, and thus had not satisfied the constitutional standing requirements to pursue a claim. *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337 (4th. Cir. 2017).
https://scholar.google.com/scholar_case?case=7211417717757661045&hl=en&as_sdt=6&as_vis=1&oi=scholarr

Fifth Circuit affirms judgment against debt collector. The Fifth Circuit held that the district court's grant of summary judgment to Appellee on grounds that debt collector violated § 807(8) of Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692e(8) was proper. Defendant conceded that it failed to communicate to credit bureaus that Sayles' "disputed debt [was] disputed." It con-

tends, however, that it did not have to report the dispute to credit bureaus, because § 807(8) incorporates § 809's debt dispute and validation requirements, and plaintiff did not satisfy those requirements. The court noted that:

> While ARS is correct that Sayles did not satisfy § 809's requirement that consumers must dispute their debts in writing within thirty days after receiving notice from a debt collector, that requirement does not carry over to § 807(8). In Brady v. Credit Recovery Co., Inc., 160 F.3d 64, 67 (1st Cir. 1998), the First Circuit correctly stated that, while § 809 gives requirements for when a debt collector must verify and cease collecting on disputed debts, § 807(8) "merely requires a debt collector who knows or should know that a given debt is disputed to disclose its disputed status to persons inquiring about a consumer's credit history."

S*ayles v. Advanced Recovery Sys., Inc.*, 865 F.3d 246 (5th Cir. 2017).
http://law.justia.com/cases/federal/appellate-courts/ca5/16-60640/16-60640-2017-07-06.html

Court enforces prohibition on employee class action waivers in arbitration agreements. Joining two other circuit courts, the Sixth Circuit held that employers couldn't take advantage of class action and collective action waivers as part of employment arbitration agreements. The divided court agreed with the National Labor Relations Board (NLRB) that prohibiting employees from pursuing class action litigation or collective action arbitration violated the National Labor Relations Act (NLRA). The Sixth Circuit agreed with the Seventh and Ninth Circuits, which are at odds with the Fifth and Eight Circuits on the class action waiver question. Based on this circuit split, the U.S. Supreme Court has agreed to take up the question and will ultimately decide whether class action and collective action waivers in employment arbitration agreements violate the NLRA. *National Labor Relations Board v. Alternative Entm't, Inc.*, 858 F.3d 393 (6th Cir. 2017).
http://caselaw.findlaw.com/us-6th-circuit/1862012.html

Title VII Prohibits Sexual Orientation Discrimination. In an en banc decision, the Court of Appeals for the Seventh Circuit ruled that Title VII prohibits discrimination on the basis of sexual orientation as a form of sex discrimination. Kimberly Hively sued Ivy Tech Community College after her contract was terminated in 2014, alleging the school denied her a full-time position because she is a lesbian. A district court tossed the suit, ruling that Title VII does not protect against sexual orientation discrimination and a panel of the Seventh Circuit affirmed. After agreeing to hear the case en banc, the Seventh Circuit reversed itself, describing the plaintiff's claim as "paradigmatic sex discrimination." "A policy that discriminates on the basis of sexual orientation does not affect every woman, or every man, but it is based on assumptions about the proper behavior for someone of a given sex," the majority wrote. "The discriminatory behavior does not exist without taking the victim's biological sex (either as observed at birth or as modified, in the case of transsexuals) into account." *Hively v. Ivy Tech Cmty. College of Ind.*, 853 F.3d 339 (7th Cir. 2017).
https://scholar.google.com/scholar_case?case=3783878574608367042&hl=en&as_sdt=6&as_vis=1&oi=scholarr

Consent to texting cannot be narrowly construed. Under the Telephone Consumer Protection Act (TCPA), an effective consent to automated calls is one that relates to the same subject matter covered by the challenged messages. The Seventh Circuit held that a consumer's agreement to receive texts "providing you with exclusive information or special offers" was broad enough to include "mass marketing texts." The court found the consumer's attempt to parse her consent to accept some promotional information while rejecting "mass marketing" texts construed "consent" too narrowly. *Blow v. Bijora, Inc.*, 855 F.3d 793 (7th Cir. 2017).
https://scholar.google.com/scholar_case?case=7863854789117618273&q=Blow+v.+Bijora,+Inc.&hl=en&as_sdt=6,32&as_vis=1

FDCPA defendant cannot avoid liability for a violation based on its reliance on circuit precedent or any other bona fide mistake of law. The Seventh Circuit held that its 2014 holding reversing a 1996 decision relied on by the Defendant was required by the 2010 Supreme Court decision in *Jerman v. Carlisle,* finding that the FDCPA's statutory safe harbor for bona fide mistakes does not apply to mistakes of law. The court stated defendant couldn't avoid liability for a violation based on its reliance on existing circuit precedent or any other bona fide mistake of law. *Oliva v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 864 F.3d 492 (7th Cir. 2017).
http://law.justia.com/cases/federal/appellate-courts/ca7/15-2516/15-2516-2017-07-24.html

Job applicant failed to demonstrate that he suffered injury to establish standing under the U.S. Supreme Court's Spokeo decision. The Seventh Circuit affirmed the lower court decision finding the plaintiff didn't have standing because he couldn't establish concrete informational or privacy injuries. Nor could he show an appreciable risk of harm based on statutory violation allegations as required under *Spokeo*. *Groshek v. Time Warner Cable Inc.*, 865 F.3d 884 (7th Cir. 2017).
http://caselaw.findlaw.com/us-7th-circuit/1869539.html

A report from an auto dealership that does not include the results of an inspection for the condition of individual car components to a buyer is not a "completed inspection report" under California law. Plaintiff bought a car from CarMax and shortly after the car had several problems. California law prohibits a car dealer from selling a used vehicle as "certified" if the dealer fails to provide the buyer with a completed report indicating all the components were inspected. Plaintiff contended that CarMax failed to provide a "completed inspection report" before selling him a "certified" vehicle. The Ninth Circuit reversed the lower courts, because an inspection report cannot just simply state that parts were inspected without including the results. *Gonzales v. CarMax*, 840 F.3d 644 (9th Cir. 2016).
https://cdn.ca9.uscourts.gov/datastore/opinions/2016/10/20/14-56842.pdf

Telemarketer was acting as independent contractor. Plaintiffs filed suit against Royal under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. 227, seeking to hold Royal vicariously liable for several telephone calls made by telemarketers employed by AAAP. The Ninth Circuit applied the ten non-exhaustive factors set forth in the Restatement (Second) of Agency 220(2) (1958), and found that AAAP's telemarketers were acting as independent contractors rather than as Royal's agents. Therefore, the court held that Royal was not vicariously liable for the telephone calls and the district court properly granted summary judgment in favor of Royal. *Jones v. Royal Adm'n Servs.*, 866 F.3d 1100 (9th Cir. 2017).
http://cdn.ca9.uscourts.gov/datastore/opinions/2017/08/09/15-17328.pdf

On remand, Robins has standing. On remand from the United States Supreme Court, Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016), the Ninth Circuit reversed the district court's dismissal of an action brought by Thomas Robins against Spokeo, Inc., alleg-

ing willful violations of the Fair Credit Reporting Act ("FCRA"). The Supreme Court held that to establish Article III standing, there must be an injury that is "real" and not "abstract" or merely "procedural." Robins alleged that Spokeo published an allegedly inaccurate report about him on its website, and further alleged that Spokeo willfully violated various procedural requirements under FCRA, including failing to follow reasonable procedures to assure the accuracy of the information in his consumer report.

The Ninth Circuit panel held that Robins' alleged injuries were sufficiently concrete for the purposes of Article III standing; and concluded that because the alleged injuries were also sufficiently particularized to Robins and caused by Spokeo's alleged FCRA violations that were redressable in court, Robins adequately alleged the elements necessary for Article III standing.

The panel rejected Spokeo's suggestion that Robins's allegations of harm were too speculative to establish a concrete injury. The panel held that both the challenged conduct and attendant injury had already occurred, where Spokeo published an inaccurate consumer report about Robins and the alleged intangible injury caused by the report had also occurred. The panel concluded that Robins had alleged injuries that were sufficiently concrete for purposes of Article III standing. *Robins v. Spokeo, Inc.*, 2017 U.S. App. LEXIS 15211 (9th Cir. 2017). http://cdn.ca9.uscourts.gov/datastore/opinions/2017/08/15/11-56843.pdf

Consumer may partially revoke consent to be called. The Telephone Consumer Protection Act (TCPA), 47 U.S.C. 227 et seq., permits a consumer to partially revoke her consent to be called by means of an automatic telephone dialing system. The Eleventh Circuit thought it logical that a consumer's power under the TCPA to completely withdraw consent and thereby stop all future automated calls encompasses the power to partially withdraw consent and stop calls during certain times. The court held that summary judgment was inappropriate because a reasonable jury could find that plaintiff partially revoked her consent to be called in "the morning" and "during the workday." Accordingly, the court reversed and remanded. *Schweitzer v. Comenity Bank*, 866 F.3d 1273 (11th Cir. 2017).
http://law.justia.com/cases/federal/appellate-courts/ca11/16-10498/16-10498-2017-08-10.html

Unsolicited fax did not violate the TCPA. The Eleventh Circuit held that under the TCPA, a plaintiff suffers a concrete injury because the plaintiff's fax machine is occupied while the unsolicited fax is being sent. The court found no violation of the Act, however, because the fax did not promote the sale of the sender's products and, therefore, was not an unsolicited advertisement. *Florence Endocrine Clinic v. Arriva Medical*, 858 F.3d 1362 (11th Cir. 2017).
http://law.justia.com/cases/federal/appellate-courts/ca11/16-17483/16-17483-2017-06-05.html

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

Data breach case holds up under "Spokeo." The D.C. Circuit revived a putative class action brought by policyholders against CareFirst BlueCross BlueShield over a 2014 data breach, finding that the alleged heightened risk of identity theft and medical fraud was enough to establish standing under the high court's landmark *Spokeo* decision. The court found plaintiffs had established concrete harm, stating, "an unauthorized party has already accessed personally identifying data on CareFirst's servers, and it is much less speculative — at the very least, it is plausible — to infer that this party has both the intent and the ability to use that data for ill." *Attias v. CareFirst Inc.*, 865 F.3d 620 (D.C. Cir. 2017).
https://www.cadc.uscourts.gov/internet/opinions.nsf/D38E2807B2E5DA5E8525816F0050E8C5/$file/16-7108.pdf

FEDERAL DISTRICT COURTS

No customer standing where receipts wrongfully printed too many credit card digits. A U.S. District Court in New York dismissed a class action accusing a retailer of violating the "FACTA," which requires that no more than the final five digits of credit cards be printed on receipts. The plaintiff allegedly received receipts exposing 10 digits. The court found that the Supreme Court's decision last year in *Spokeo. Inc. v. Robins*, 136 S. Ct. 1540 (2016) made clear that a statutory violation, without more, was insufficient to confer standing:

> [T]he substantive "truncation right" alleged by Plaintiff is irreconcilable with *Spokeo's* holding that not all statutory violations confer Article III standing. Moreover, there is no evidence that Congress, in enacting FACTA, intended to create for consumers a substantive right to receive a redacted copy of their credit card receipt; rather, the truncation requirement is a means to the end goal of identity theft prevention . . . . Plaintiff does not allege any facts showing that he experienced the Congressionally-proscribed harm: identity theft. He has not established a present injury in fact . . . .

Katz v. Donna Karan Int'l Inc., 2017 U.S. Dist. LEXIS 75299 (S.D. N.Y. May 17, 2017).
http://www.sdnyblog.com/files/2017/05/14-Civ.-00740-2017.05.17-Katz-v.-Donna-Karan.pdf

FACTA class action dismissed after New Jersey court finds no concrete injury. A federal court in New Jersey dismissed a putative class action against J. Crew for claims that the fashion retailer violated the Fair and Accurate Credit Transactions Act ("FACTA") amendment to the Fair Credit Reporting Act, 15 U.S.C. §1681, by printing too many digits on its customers' receipts. The court held that the Plaintiffs had not sufficiently alleged a concrete injury as required by the U.S. Supreme Court's decision in *Spokeo Inc. v. Robins*, 136 S. Ct. 1540 (2016). *Kamal v. J. Crew Group, Inc.*, (D.N.J June 6, 2017).
http://law.justia.com/cases/federal/district-courts/new-jersey/njdce/2:2015cv00190/313680/84/

STATE COURTS

Mortgagee assignee must also take assignment of the note. The Delaware Supreme Court considered whether an assignee foreclosing on a mortgage must also be entitled to enforce the note. The court held that a mortgage assignee must be entitled to enforce the underlying obligation that the mortgage secures in order to foreclose on the mortgage. *Shrewsbury v. Bank of N.Y. Mellon*, 160 A.3d 471 (Del. 2017).
https://scholar.google.com/scholar_case?case=122865283654321

21473&q=Shrewsbury+v.+The+Bank+of+New+York+Mellon&hl=en&as_sdt=6,44&as_vis=1

Five percent late fee on balloon payment is not enforceable. The Arizona Supreme Court invalidated a five percent late fee assessed against the unpaid principal balance when the loan matured, holding that it was an unenforceable penalty. The court recognized that "[p]arties to a contract can agree in advance to the amount of damages for any breach," but explained that parties "do not have free rein in setting liquidated damages." In order to determine whether a liquidated damages provision, such as a late fee, would be enforceable, the court adopted the test stated in *Restatement (Second) of Contracts*, §356(1), which provides that a liquidated damages provision is enforceable, "but only at an amount that is reasonable in light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss." The court held that the late fee "did not reasonably forecast anticipated damages likely to result from an untimely balloon payment" and also "did not reasonably approximate" the actual loss suffered by the Noteholder. Significantly, the court noted that the Noteholder was adequately compensated for its loss of use of the balloon payment as a result of the default interest rate that the borrower was required to pay. *Dobson Bay Club II DD v. La Sonrisa De Siena*, 393 P.3d 449 (Ariz. 2017).
http://law.justia.com/cases/arizona/supreme-court/2017/cv-16-0029-pr.html

Texas courts have interpreted contract language stating "in its present condition" to be an agreement to purchase the property "as is."

A Texas court of Appeals holds contract language stating property was accepted "in its present condition" precludes DTPA claims. First, the court noted that Texas courts have interpreted contract language stating "in its present condition" to be an agreement to purchase the property "as is." A valid "as is" agreement generally prevents a buyer from holding a seller liable if the thing sold turns out to be worth less than the price paid. The court found the sellers met their traditional summary judgment burden by presenting evidence that they had no knowledge of any alleged defects, that Naquin obtained and reviewed an inspection of the home before purchasing it, and that the sales contract contained an "as is" clause. That evidence conclusively proved the seller's entitlement to summary judgment on Naquin's fraudulent inducement and DTPA claims. *Naquin v. Cellio*, ___ S.W.3d ___ (Tex. App.—Ft. Worth, 2017).
http://law.justia.com/cases/texas/second-court-of-appeals/2017/02-16-00117-cv-0.html

Implied warranty claim may be brought only under the DTPA. The Texas Court of Appeals for the 1st District held that an implied warranty claim may not be brought outside of the DTPA. The court stated:

> Whether the DTPA's statute of limitations applies to Nghiem's implied-warranty claim is a question of law that we review de novo. In Foreman v. Pettit Unlimited, Inc., we held that a claim for breach of implied warranty of good and workmanlike repairs to existing tangible goods is actionable only under the DTPA and is therefore governed by the DTPA's two-year statute of limitations. 886 S.W.2d 409, 412 (Tex. App.—Houston [1st Dist.] 1994, no writ).
>
> We recognize that courts are split as to whether a claim for breach of the implied warranty of good and workmanlike repairs may be brought under only the DTPA, but four Texas intermediate appellate courts—including this one—favor this approach.

Daniel Nghiem v. Rupob Sajib, 2017 Tex. App. LEXIS 5998 (Tex. App.—Houston 1st Dist. June 29, 2017).
http://law.justia.com/cases/texas/first-court-of-appeals/2017/01-16-00585-cv.html

Arbitration clause unenforceable because it did not clearly notify customer she was waiving her right to pursue her claims in court. A New Jersey appellate court held that an arbitration provision, as with any contractual provision that provides for the surrendering of a constitutional or statutory right, must be sufficiently clear to a reasonable consumer and found that the provision at issue was not. Kernahan v. Home Warranty Adm'r of Fla. Inc., 2017 N.J. Super. Unpub. LEXIS 1527 (Super. Ct. App. Div. June 23, 2017).
http://law.justia.com/cases/new-jersey/appellate-division-unpublished/2017/a1355-16.html

Class action waivers unenforceable. A New York appellate court held that class action waivers are unenforceable as they interfere with employees' rights under the National Labor Relations Act to engage in protected concerted activity by depriving them of the ability to bring class or collective actions. *Gold v. New York Life Ins.*, 2017 NY Slip Op 05695 (App. Div.).
http://law.justia.com/cases/new-york/appellate-division-first-department/2017/653923-12-2430.html

DECEPTIVE TRADE PRACTICES AND WARRANTY

DTPA STATUTE OF LIMITATIONS RUNS FROM DATE CONSUMER SIGNED THE CLOSING DOCUMENTS

Christerson v. Speer, ____ S.W. 3d ____ (Tex. App.—Houston [1st Dist.] 2017).
http://caselaw.findlaw.com/tx-court-of-appeals/1858440.html

FACTS: Jerry and Myrtle Christerson ("Christersons") purchased a house from Gordon and Lenora Speer ("Speers"). The transaction included a loan agreement from the Speers for $250,000 to purchase the house. The Christersons agreed to make payments of monthly installments of $1,450. The Christersons made monthly payments on the house but had unpaid principal and interest on the loan. The Speers refused the payments and began foreclosure proceedings on the home. The Christersons in turn sold the house to pay back the unpaid principal and interest on the loan and brought suit against the Speers violations of the DTPA. The Speers moved for summary judgment and trial court granted the motion. The Christersons appealed.
HOLDING: Affirmed.
ANALYSIS: The Speers claimed that the Christerson's claims accrued after the parties closed the sale and financing. Christersons argued that their claims did not accrue until they received their first notice for a catch-up payment, which was at a later date. The closing documents noted that the monthly payments of $1,450 on the house were not enough to satisfy payments of the loan. The court concluded the Christersons should have discovered the discrepancy between the loan and closing documents at the time of signing the closing documents. "Because the law presumes that the Christersons read and understood the closing documents, as a matter of law, they knew or should have known when they executed those documents of any discrepancy between the terms of the loan as they understood them and the terms set forth in the closing documents."

The court concluded the Christersons should have discovered the discrepancy between the loan and closing documents at the time of signing the closing documents.

The Christersons additionally claimed that the demand for payment revived the accrual date. The court did not find this persuasive for purposes of public policy because allowing it would circumvent the statute of limitations and the accuracy and reliability of real property records. The court also did not find a continuation of a tort that would extend the accrual of the Christersons claim, because the claims sounded in contract.

Finally, Christersons argued for spoliation because they could not find the original promissory note. The court rejected this claim because spoliation could only occur where Speers destroyed material evidence. There was no indication of this and thus summary judgment should be affirmed.

INDEPENDENT INSPECTION AND REPORT NEGATE CAUSATION AND RELIANCE.

Mead v. Gray, ____ S.W.3d ____ (Tex. App—Ft. Worth 2017).
http://law.justia.com/cases/texas/second-court-of-appeals/2017/02-16-00177-cv.html

FACTS: Benjamin and Clair Mead ("Mead") brought suit against Paul and Linda Gray ("Gray") for fraud for nondisclosure under the DTPA. The Meads purchased a house from the Grays. Before the sale, the Meads retained an independent inspector. After moving in, the Meads discovered foundation problems in the house and subsequently filed suit against the Grays for failing to disclose the defects. The Grays filed a motion for summary judgment and argued that because the Grays retained an independent inspector, the elements of reliance and causation are negated. The trial court granted summary judgment for the Grays. The Meads appealed.
HOLDING: Affirmed.
REASONING: The court relied on the test of whether the buyer had the same knowledge as the seller at the time of the purchase. If the buyer does, then reliance and causation are negated in the claim. An inspection can preclude showing of reliance and causation if it reveals the same information that the seller fails to disclose. The independent inspection of the house noted multiple deficiencies within the house. The court concluded that because the Meads possessed the same information as the Grays that plaintiffs alleged was not disclosed, reliance and causation were negated.

HOUSE SALES CONTRACT'S ACCEPTED "IN ITS PRESENT CONDITION" LANGUAGE, COUPLED WITH BUYER'S INDEPENDENT INSPECTION OF THE HOME, SUPERSEDED ANY ALLEGED MISREPRESENTATIONS BY THE SELLER

Naquin v. Cellio, ___S.W.3d___ (Tex. App.–-Fort Worth 2017).
http://law.justia.com/cases/texas/second-court-of-appeals/2017/02-16-00117-cv-0.html

FACTS: Thomas and Vanessa Cellio ("Cellios") entered into a contract agreement with Amy Naquin for the sale of their home. Naquin hired Green Scene Home Inspections to conduct an inspection of the home and had the unrestricted right to terminate the contract during a seven-day period. Among other things identified, the inspection report identified deficiencies to the home's structural systems, including its grading and drainage. The report further stated the pool-side half bath contained a commode that appeared to be excessively loose at the floor mount and this condition should be further evaluated and corrected as necessary. Naquin filed suit and alleged that the Cellios concealed other conditions where the water supply to the pool house was taken from the swimming pool, as well as the sewer and gray water lines from the pool house, drained downhill on the property, and were not properly treated or disposed.

Naquin filed suit against the Cellios and alleged these misrepresentations constituted violations of the DTPA, statutory

fraud, and was entitled to exemplary damages and attorney's fees. The Cellios moved for summary judgment asserting Naquin contractually accepted the property "in its present condition" at the time of sale and waived the right to claim alleged damages. The Cellios also asserted that Naquin hired an independent inspector, whose report disclosed problems in the areas Naquin complained about in her petition, and relied on the inspector's professional judgment and not on the Cellios' representations when purchasing the home. The trial court granted both Cellios' no-evidence and traditional summary judgment motions. Naquin appealed.

HOLDING: Affirmed.

REASONING: Naquin argued the trial court erred by granting summary judgment predicated on the Cellios' argument that the sales contract's "as is" language, coupled with Naquin's independent inspection of the home, superseded any alleged misrepresentations made by the Cellios.

First, the court noted that "Texas courts, including this court, have interpreted contract language stating 'in its present condition' to be an agreement to purchase the property 'as is.'"

The court then analyzed the enforceability of an "as is" clause through factors such as (1) the sophistication of the parties; (2) the arms-length nature of the agreement; (3) bargaining power of the parties involved; and (4) whether the chosen language was important to the agreement rather than being a "boilerplate provision." The court concluded that the "as is" clause in the contract was enforceable as an arm's-length transaction between parties with equal bargaining strength because both parties were represented by real estate agents and that the language in the agreement represented deliberated terms.

"Texas courts, including this court, have interpreted contract language stating 'in its present condition' to be an agreement to purchase the property 'as is.'"

Second, Naquin's misrepresentation claim required proof of a producing cause of her injury. A producing cause, under the DTPA, required consumer reliance of an act or omission of a material fact which caused injury to the claimant. The court stated Naquin obtained and reviewed an inspection of the home before purchasing it. The court reasoned that if a new and independent basis for Naquin's cause of action existed, it negated that the Cellios' acts were the producing cause of her injury. The court held reliance on external assessments of land introduced a new and independent cause of Naquin's damages and negated the producing cause element of her DTPA claim.

SELLER CONCLUSIVELY ESTABLISHED IT DID NOT ENGAGE IN THE ALLEGED VIOLATIONS OF THE DTPA.

Washburn v. Sterling McCall Ford, No., 521 S.W.3d 871(Tex. App.—Houston [14th Dist.] 2017).
http://law.justia.com/cases/texas/fourteenth-court-of-appeals/2017/14-16-00459-cv.html

FACTS: Bradley Washburn purchased a used 2012 Dodge Ram truck from Sterling McCall Ford. The salesperson told Washburn that a "lift kit" and larger tires had been installed on the truck. Washburn received a "Buyers Guide," which indicated that "a manufacturer's warranty came with the vehicle" and the truck was still under the "manufacturer's warranty," and instructed the buyer to "consult the manufacturer's warranty booklet for details as to warranty coverage." After Washburn purchased the vehicle, the truck experienced mechanical difficulties. Washburn took the vehicle to a Dodge dealership for repairs and was informed the truck was not covered by the warranty because of a restriction on the truck. Washburn contacted Chrysler, the dealership that sold the truck to the original owner, and refused to cover the repairs under the warranty.

Washburn repaired the vehicle at his own expense and filed a lawsuit under the DTPA, breach of contract and negligence against Sterling McCall. The trial court rendered take-nothing summary judgment in favor of Sterling McCall. Washburn appealed.

HOLDING: Affirmed.

REASONING: Washburn challenged the trial court's grant of summary judgment as to his DTPA claims on the basis that Sterling McCall (1) made a misrepresentation to Washburn that was actionable under the DTPA, (2) failed to disclose material information regarding the restriction on the warranty, and (3) engaged in an unconscionable course of action. The Court identified the reasons why Washburn's claims failed under the DTPA.

The court noted that Washburn alleged misrepresentation regarding the price. Under the DTPA, false factual statements must have been made about the reasons for, existence of, or the amount of a price reduction. Washburn did not alleged that Sterling McCall made a false representation involving a price reduction, only that it failed to disclose a restriction on the warranty. The court reasoned Washburn had spoken with a salesperson about the condition of the truck, was told about the lift kit and was offered an extended warranty, which he declined to purchase.

Second, a DTPA violation for failure to disclose requires that Sterling McCall have known material information and failed to bring it to Washburn's attention. The court stated Sterling McCall, as a franchised Ford dealer, did not have access to the Chrysler Dodge Jeep Ram database to determine whether there were any restrictions on that manufacturer's warranty for a particular vehicle. The court concluded Sterling McCall had no notice from the manufacturer or from the seller of Washburn's truck that there were any restrictions on the warranty for the truck.

Finally, to prove an unconscionable action or course of action, Washburn was required to show Sterling McCall took advantage of his lack of knowledge, ability, experience, or capacity to a grossly unfair degree. This requires that the unfairness was glaringly noticeable, flagrant, complete and unmitigated. Sterling McCall presented conclusive evidence that (1) it informed Washburn about the alterations to the truck and instructed him to consult the manufacturer's warranty for information about coverage, and (2) the warranty stated it did not cover alterations or repairs related to alterations.

ECONOMIC LOSS RULE DOES NOT BAR DTPA CLAIM

In re GM LLC Ignition Switch Litig., ____F.Supp.3d____ (S.D.N.Y. 2017).

http://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2014mc02543/428683/277/

FACTS: Texas Plaintiffs Gareebah Al-ghamadi, Dawn Bacon, Michael Graciano, Keisha Hunter, Tajah Liddy, Lisa McClellan, and Cindy Wilson ("Plaintiffs") were owners and operators of General Motor vehicles.

Collectively Plaintiffs joined a class action suit against GM alleging that defects in different parts of the vehicles violated the Texas DPTA. In response, GM claimed that the Economic Loss Rule barred DTPA claims.

HOLDING: Affirmed.

REASONING: The court addressed the claim by GM that the economic loss rule barred DTPA claims. The court stated that a contract being the heart of a dispute does not preclude a DTPA claim. Further, Texas courts have allowed DTPA claims by consumers where there were advertised goods, or services with the intent to not sell the item or good as advertised. Texas courts have also allowed DTPA claims of contracts when plaintiffs allege "unconscionable actions" by defendants. In evaluating whether GM's actions were unconscionable, the court stated that Plaintiffs must prove that GM took advantage of the Plaintiffs' lack of knowledge, which resulted in glaringly noticeable unfairness which was complete and unmitigated.

The court stated that a contract being the heart of a dispute does not preclude a DTPA claim.

In determining the unconscionable actions of GM, the court concluded that the combination of the FCC sufficiently alleging that GM's promoting of safe and reliable vehicles, despite knowing it had defects, took advantage of the Plaintiffs' lack of knowledge and the admittance by Plaintiffs' that they would not have purchased the vehicles if they knew about the defects, led to the Plaintiffs' injuries and the conclusion that the DTPA claim is not barred by the Economic Loss Rule.

Further, GM claimed that three of the class members could not have a claim because their vehicles never manifested the defects at issue. The court accepted this argument by stating that the if the injury did not manifest itself then the Plaintiffs could not experience an injury and their claim must be dismissed.

In response to the fraudulent concealment claims, GM argued that because none of the Plaintiffs dealt with GM directly there was no duty to disclose. The court accepted this argument as there is not a duty to disclose in Texas when there is not a fiduciary or confidential relationship between the parties.

IMPLIED WARRANTY CLAIM MAY BE BROUGHT ONLY UNDER THE DTPA

Nghiem v. Sajib, ____S.W.3d____ (Tex. App.—Houston [1st Dist.] June 29, 2017).
http://caselaw.findlaw.com/tx-court-of-appeals/1866229.html

FACTS: Intervenor Appellant Daniel Nghiem was injured in an airplane crash. Another individual injured in the crash, Rupom Sajib, had filed a negligence claim against Global Aviation Services whose work was allegedly responsible for the crash. More than two years later, Nghiem petitioned to intervene as a plaintiff in Sajib's suit against Global, asserting a claim for breach of the implied warranty of good and workmanlike repairs to existing tangible goods and property.

Nghiem alleged that his petition was brought under the common law, and was not, therefore, barred by the two year statute of limitations imposed on claims brought under the DTPA. The trial court denied Nghiem petition to intervene. Nghiem appealed.

HOLDING: Affirmed.

REASONING: The court of appeals reviewed Nghiem's request in light of the acknowledged two-year statute of limitations for claims of breach of implied warranty under the DTPA. The court of appeals declined to modify or overturn prior existing precedent to permit this claim to be brought under common law, rather than under the DTPA. The court considered itself bound by a conservative reading of *Melody Home Manufacturing Co. v Barnes,* 741 S.W.2d 349 (Tex. 1987), in which the Texas Supreme Court stated that an implied warranty claim for repairs made to tangible goods and property could be brought under the DTPA. A subsequent ruling, Foreman v. Pettit, 886 S.W.2d 409, 412 (Tex. App.—Houston [1st Dist.] 1994, no writ), held this to be the only method of seeking redress for such warranty claims. The court of appeals noted that no other challenges to *Foreman* or *Melody Homes* have been made, and declined to revisit either case or to distinguish Nghiem's claims from those made in *Foreman* and *Melody Homes.*

DEBT COLLECTION

SUPREME COURT RULES DEBT BUYER IS NOT A DEBT COLLECTOR UNDER FDCPA

Henson v. Santander USA, Inc., 137 S.Ct. 1718 (2017).
www.supremecourt.gov/opinions/16pdf/16-349_c07d.pdf

FACTS: Petitioners, four Maryland consumers, commenced an action against Santander Consumer USA, Inc., alleging a violation of the Fair Debt Collection Practices Act ("FDCPA"). Petitioners' original loans were made by CitiFinancial Auto. However, CitiFinancial was unable to make the payments and sold the defaulted loans to Santander, who in turn contacted Petitioners to collect on the loans.

Petitioners alleged that Santander violated the FDCPA as a debt collector. The district court granted Santander's motion to dismiss, noting the FDCPA applies to debt collectors, but not to creditors. The Fourth Circuit affirmed the decision, holding that the company did not qualify as a debt collector because it did not regularly seek to collect debts "owed . . . another", but sought instead only to collect debts that it purchased and owned. The Supreme Court of the United States granted certiorari.

HOLDING: Affirmed.

REASONING: Both parties agreed it was important to look to statutory language defining the term "debt collector" as anyone who "regularly collects or attempts to collect . . . debts owed or due . . . another", or more simply, one who collects as an agent. Petitioners argued that the word "owed" was a past participle of the word "to owe". This interpretation of debt collector captures anyone who regularly seeks to collect debts previously "owed"… another." With this definition, petitioners asserted that debt buyer, Santander, acted as an agent, making him a debt collector on loans previously owed to CitiFinancial.

The Court relied on the Cambridge Guide to English to explain that a past participle is often used in the present tense. The Court reasoned that the proximity of the word "owed" to the present-tense word "due" suggests a present tense interpretation. The Court also relied on other uses of the word "owed" in the FDCPA, and confirmed that Congress routinely used the word "owed" to refer to present (not past) debt relationships. The Court concluded that, because the word "owed" should be interpreted in the present tense, Santander was not acting as an agent, but collecting on its own behalf.

Petitioners pointed to the fact that the statute excludes from the definition of "debt collector" certain persons who obtain debts before default. 15 U.S.C. §1692a(6)(F)(iii). Petitioners reasoned that Santander's purchase of debts after default excluded it from the definition of "debt collector". The Court explained how this line of reasoning is faulty; while the statute surely excludes from the debt collector definition certain persons who acquire a debt before default, it does not necessarily follow that the definition must include anyone who regularly collects debts acquired after default.

Lastly, petitioners argued that if Congress had known this new industry would blossom it would have judged defaulted debt purchasers more like independent debt collectors. The court, however, citing *Dodd v. United States*, 545 U. S. 353, 357 (2005), concluded that the legislature "says what it means, and means what it says".

FIVE PERCENT LATE FEE ON BALLOON PAYMENT IS NOT ENFORCEABLE

Dobson Bay Club II DD, LLC v. La Sonrisa de Siena, LLC, 393 P.3d 449 (Az. 2017).
http://law.justia.com/cases/arizona/supreme-court/2017/cv-16-0029-pr.html

FACTS: Canadian Imperial Bank of Commerce loaned Dobson Bay Club II DD, $28.6 million for commercial properties. Dobson Bay was to tender interest-only payments until the loan matured and the balloon payment would become due. In addition, Dobson Bay was required to pay default interest and collection costs, including reasonable attorney fees, and a 5% late fee assessed on the payment amount. The maturity date passed, and Dobson Bay failed to make the balloon payment. La Sonrisa de Siena, LLC bought the note and deed of trust, and promptly noticed a trustee's sale of the secured properties. La Sonrisa contended that Dobson Bay owed more than $30 million, including a nearly $1.4 million late fee.

A late fee of five percent of the $1.4 million principal on a final loan balloon payment constituted an unenforceable penalty.

The parties filed cross-motions for partial summary judgment on whether the late fee provision in the note was an enforceable liquidated damage provision or, an unenforceable penalty. The superior court granted partial summary judgment for La Sonrisa, ruling that the late fee was enforceable as liquidated damages. The court of appeals reversed, holding as a matter of law, that absent unusual circumstances the imposition of a flat 5% late-fee on a balloon payment for a conventional, fixed-interest rate loan is not enforceable as liquidated damages. La Sonrisa appealed.

HOLDING: Reversed and remanded.

REASONING: La Sonrisa argued the Second Restatement of Contacts § 356(1) test should not have been applied because the approach undermined the contracting parties' freedom to allocate risk and defeated the purpose of a liquidated damages provision by requiring the non-breaching party to have established actual damages. Section 356(1) provides that a liquidated damages provision is enforceable, "but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss."

The Arizona Supreme Court disagreed and held the Restatement test would be adopted. First, the court stated a liquidated damages contract provision that assessed a late fee of five percent of the $1.4 million principal on a final loan balloon payment constituted an unenforceable penalty. Second, the provision was not reasonably forecast anticipated damages likely to result from an untimely payment. Third, the provision either duplicated other fees triggered by a default or was grossly disproportionate to any remaining sums needed to compensate for anticipated losses. Fourth, the provision did not reasonably approximate the actual costs of processing the late payment or the loss of use of that payment. Lastly, the note holder would have had no difficulty proving its loss, if any.

SUCCESSORS BY MERGER MAY NOT BE DEBT COLLECTORS UNDER FDCPA

Jackson v. Bank of America, ____ F. Supp.3d ____ (M.D. La. 2017).
https://casetext.com/case/jackson-v-bank-of-am-na-4

FACTS: Kenneth Jackson brought suit against Bank of America ("BOA") for violations of the Fair Debt Collection Practices Act (FDCPA) based upon BOA's conduct of collecting a home mortgage loan from Jackson. BOA acquired Jackson's mortgage loan through a merger with Countrywide Bank, FSB. The mortgage was not acquired by transfer or assignment while in default. BOA moved to dismiss under Rule 12(b)(6) and 12(c).
HOLDING: Granted.
REASONING: The district court concluded that Jackson failed to allege an FDCPA claim because BOA does not constitute a "debt collector" under the statute. The court drew from legislative history of the FDPCA to exclude from the definition of debt collector the consumer's creditors, a mortgage servicing company, or an assignee of a debt, as long as the debt was not in default at the time it was assigned. The court also notes that debt collection does not include a debt that was not in default at the time it was obtained by the debt collector. Jackson alleged that BOA was a debt collector because his debt at Countrywide was previously in default. The court finds that because BOA acquired Jackson's loan by merger, it did not fall under within the definition of a debt collector under the FDCPA. Therefore, the motion to dismiss was granted.

BONA FIDE ERROR DEFENSE REQUIRES REASONABLE, NOT FOOLPROOF, POLICIES AND PROCEDURES

Gebhardt v. LJ Ross Assocs., ____F.Supp.3d____ (2017).
http://law.justia.com/cases/federal/district-courts/new-jersey/njdce/3:2015cv02154/316821/42/

FACTS: Defendant LJ Ross Associates, Inc., a debt collector, was referred to collect (an alleged unpaid debt) from Plaintiff Scott Gebhardt. Plaintiff hired an attorney who sent a certified letter to Defendant advising all communication should be directed to counsel. Defendant maintains a post office box for receipt of mail. A Defendant signed for Plaintiff's letter on September 11, 2014, at 9:58 a.m. Defendant placed a collection call to Plaintiff on the same day at 10:10 a.m. Defendant made no further contact with Plaintiff.

Plaintiff brought a suit under the Fair Debt Collection Practices Act (FDCPA), alleging defendant illegally communicated with a represented individual after receiving notice to cease all communications 15 U.S.C. §1692c(c). Defendant filed a motion for summary judgment, arguing its communication fell under the bona fide error affirmative defense, precluding liability under the FDCPA, 15 U.S.C. §1692k(c).
HOLDING: Motion Granted.
REASONING: Defendant argued that its bona fide error was reasonable because the lapse between the Defendant employee receiving the mail and the other Defendant employee calling the Plaintiff was only twelve minutes. The Defendant put forth their policies and procedures in processing the voluminous amounts of written correspondence. Plaintiff argued that the Defendant's policies and procedures were not reasonable, and asserted alternative and more efficient policies and procedures as evidence.

Defendant had demonstrated it had reasonably adapted procedures to prevent an error from occurring.

The court concluded Defendant had demonstrated it had reasonably adapted procedures to prevent an error from occurring. The court explained why it is inherently unreasonable to expect the Defendant to have the ability to instantaneously update its records upon receipt without having some time to process the request. The court conceded that the Defendant could have done more to prevent the communication, but concluded that under the FDCPA collectors are only required to adopt reasonable—not foolproof—procedures.

PARTY ASSERTING THAT A DEBT IS DUE TO IT BY VIRTUE OF AN ASSIGNMENT MUST PROVE THAT THE DEBT WAS IN FACT ASSIGNED.

Skipper v. Chase Manhattan Bank USA, N.A., ___S.W.3d___ (Tex.App—Beaumont 2006)
http://law.justia.com/cases/texas/ninth-court-of-appeals/2006/8307.html

FACTS: Plaintiff, Lurline L. Skipper, entered into a credit agreement with First Deposit National Bank where Skipper received cash advances. Chase Manhattan Bank USA, N.A. maintained that it was an assignee of Skipper's loan through Providian National Bank and that Providian was either a successor or assignee of First Deposit.

Chase sued Skipper for the non-payment of a debt issued under the credit agreement initiated with First Deposit. Chase, however, did not follow the appropriate procedures that applied to suits on sworn accounts and instead filed a complaint against Skipper under breach of contract. The parties attended a non-jury trial in 2005. Chase offered an affidavit by an employee from Chase, Kristen Wendt, which included Skipper's account records but did not include evidence of Chase acquiring Skipper's debt from Providian. The trial court ruled in favor of Chase. Skipper appealed.

HOLDING: Reversed.
REASONING: The court of appeals considered whether Chase established that it was an assignee of Skipper's debt. The court reasoned that this suit could not be upheld as a breach of contract because contractual rights did not arise through a contract between Chase and Skipper.

Further, the court placed the burden on Chase to prove that a prior lender assigned its right to collect Skipper's debt to Chase. The court noted that although Chase attached a copy of the assignment to its pleadings, Chase failed to introduce the evidence into trial. This failure to provide evidence in trial meant that Chase was precluded from recovering on its claim. The court of appeals reversed the trial court's holding and rendered a take nothing judgment against Chase.

CONSUMER CREDIT

SUPREME COURT DECISION WIDENS CLASS OF POTENTIAL PLAINTIFFS IN FAIR HOUSING ACT CASES

https://www.supremecourt.gov/opinions/16pdf/15-1111_5i36.pdf

FACTS: The City of Miami filed separate law suits against Bank of America and Wells Fargo under the FHA, alleging that the Banks intentionally issued riskier mortgages with less favorable terms to African-American and Latino borrowers than they issued to similarly situated nonminority borrowers. The City claims that these discriminatory practices caused it to suffer both economic and non-economic harms. The District court dismissed both complaints. The Court of Appeals reversed. SCOTUS granted certiorari.
HOLDING: Vacated and remanded on a separate issue.
REASONING: The Banks argued that the City was not an aggrieved party as defined in the FHA because the harms it claimed did not fall within the "zone of interests" that the statute seeks to protect. The statute defines an "aggrieved person" as someone who claims to have been injured by a discriminatory housing practice. The Court held that the City does fall within the definition of "aggrieved person" under the statute for three reasons. First, the Court noted that this definition, both in its original and amended forms, showed congressional intent to define the standing as broadly as is permitted by Article III. In *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540 (2016), the Supreme Court held that Article III required "injury in fact" that is "fairly traceable" to the defendant's conduct and likely to be redressed in court.

Second, the court noted that statutory or "prudential" standing required a plaintiff's interest to fall within the statute's zone of interests. It concluded that the City's claims of economic loss arguably fell within the FHA's zone of interest, meeting this requirement. Lastly, under the principle of *stare decisis*, the Court noted the similarity of the City's claims to those raised in *Gladstone* and reasoned that this furthered the argument that the City's alleged economic injuries fell within the FHS's zone of interests.

FACTA CLASS ACTION DISMISSED AFTER COURT FINDS NO CONCRETE INJURY

Kamal v. J. Crew Group, Inc., ____ F.3d ____ (D.N.J. 2017).
http://law.justia.com/cases/federal/district-courts/new-jersey/njdce/2:2015cv00190/313680/84/

FACTS: On three occasions, Plaintiff Ahmed Kamal made purchases with Defendants J. Crew Group, Inc., a conglomerate of department stores, and alleged that Defendants printed the first six and last four digits of his credit card number on the receipts. Plaintiff filed a class action suit against Defendant for violating a provision of the Fair and Accurate Credit Transactions Act ("FACTA") that prohibits any person transacting business from printing more than the last 5 digits of a cardholder's credit or debit card on any receipt provided at the point of sale.

Plaintiff filed a FACTA complaint and then an amended complaint seeking statutory damages. Following the Supreme Court ruling in *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540 (2016), the court dismissed Plaintiff's complaint alleging that FACTA's creation of a statutory right to sue for actual damages did not automatically satisfy the Article III injury in fact requirement. Plaintiff filed another amended complaint. Defendants moved for dismissal for lack of standing.
HOLDING: Dismissed.
REASONING: Plaintiff identified two distinct concrete injuries in fact. First, Plaintiff argued that disclosure of information considered intrinsically private was an injury in fact. The court reasoned that there was no connection between Defendants' conduct and Plaintiff's privacy interest because Defendant did not disclose his personal information, but handed a receipt with the information back to Plaintiff. The court held that this was a procedural violation that did not result in any concrete harm.

Even a future risk of material harm created by a statutory violation likely creates standing if adequately alleged.

Second, Plaintiff argued that the increased risk of identity theft or credit card fraud in the future was an injury in fact. The court noted that even a future risk of material harm created by a statutory violation likely creates standing if adequately alleged. However, because the first six digits of a credit card number are indicative of the bank or card issuer, the court reasoned that printing the first six and last four digits of Plaintiff's credit card number did not reasonably increase the risk of future identity theft or credit card fraud. It noted that doing so would not give an identity thief access to any more personal information than is already permitted to be printed on a consumer's receipt.

FCRA CLASS ACTION JUDGMENT REVERSED

Dreher v. Experian Info. Sol., Inc., 856 F.3d 337 (4th Cir. 2017).
http://www.ca4.uscourts.gov/Opinions/Published/152119.P.pdf

FACTS: Michael Dreher discovered he was associated with a delinquent credit card account and requested credit reports from Experian. The Experian credit reports received by Dreher listed a delinquent account under the names "Advanta Bank" or "Advanta Credit Cards" (collectively, "Advanta"). Unbeknownst to Dreher, banking regulators had closed Advanta a year earlier. CardWorks, Inc. and CardWorks Servicing LLC (collectively, "CardWorks") were appointed as servicers of Advanta's portfolio. CardWorks decided to do business using the Advanta name, including listing Advanta tradelines on Experian credit reports under the Advanta name. Dreher individually sued Experian and CardWorks, and later amended his complaint to assert three class claims and seven individual claims on the basis that Experian willfully violated the Fair Credit Reporting Act ("FCRA") by failing to include the name "CardWorks" in the Advanta tradelines on its credit reports.

The district court severed the class claim from the individual claims for separate jury trials. Rather than hold a jury trial on statutory and punitive damages on the class claim, the parties stipulated to an award of $170 in statutory damages for each class member and no punitive damages. The district court entered final judgment on behalf of Dreher and the class in the amount of $170 per class member, totaling over $11.7 million. Experian appealed.

HOLDING: Vacated and remanded.

REASONING: To determine whether Dreher, the named plaintiff of the class, had standing, the appellate court used the three-part test from *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Dreher must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. Dreher failed on the first requirement because a procedural violation of the FCRA does not automatically rise to the level of an injury in fact for constitutional purposes.

Dreher argued that Experian violated the FCRA because it failed to clearly and accurately disclose the source of the Advanta tradeline. The court rejected that argument by noting that Dreher's complaint failed to demonstrate a concrete injury. A statutory violation alone does not create a concrete informational injury sufficient to support standing. The court followed the reasoning of the District of Columbia Court of Appeals that a plaintiff suffers a concrete informational injury where he is denied access to information required to be disclosed by statute, and he suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure. Dreher was not adversely affected by the alleged error on his credit report. The harm Dreher alleged that he suffered was not the type of harm Congress sought to prevent when it enacted the FCRA. Thus, Dreher failed to demonstrate he suffered a concrete injury sufficient to satisfy Article III standing.

NO CUSTOMER STANDING WHERE RECEIPTS WRONGFULLY PRINTED TOO MANY CREDIT CARD NUMBERS

Katz v. Donna Karan Int'l, Inc., , ___ F. Supp.3d ___ (S.D.N.Y. 2017).
http://www.sdnyblog.com/files/2017/05/14-Civ.-00740-2017.05.17-Katz-v.-Donna-Karan.pdf

FACTS: Plaintiff Yehuda Katz made two purchases in Donna Karan stores using a credit card. In both purchases, Defendants issued Plaintiff electronically-printed receipts that disclosed the first six and last four digits of Plaintiff's credit card number, in apparent violation of the truncation requirement of the Fair and Accurate Credit Reporting Act ("FACTA"), which mandates that no more than the final five digits of credit cards be printed on receipts. Plaintiff brought a class action lawsuit against Defendants Donna Karan International, Inc., The Donna Karan Company, LLC, and The Donna Karan Store, LLC (collectively, "Defendants"), seeking statutory damages for alleged willful violations of FACTA.

The district court granted Defendants' motion to dismiss Plaintiff's First Amended Complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Plaintiff appealed. Before the appellate court reached a decision, the Supreme Court decided *Spokeo v. Robins*, 136 S. Ct. 1540 (2016), which addressed the issue of what plaintiffs must plead to adequately allege a concrete injury for purposes of Article III standing. The appellate court remanded the case to allow Plaintiff an opportunity to replead his claims to comport with the pleading standards set forth in *Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016),* and to allow the district court to address any standing questions in the first instance. Defendants moved to dismiss Plaintiff's Second Amended Complaint for lack of subject matter jurisdiction.

HOLDING: Dismissed.

REASONING: Plaintiff articulated four theories that purportedly confer standing: (1) FACTA's truncation requirement is a substantive right, the violation of which, by itself, automatically creates a concrete Article III injury; (2) the disclosure created an increased risk of identity theft, constituting a present intangible harm; (3) the disclosure violated Plaintiff's privacy interests, constituting a concrete injury; and (4) the availability of statutory damages confirms Plaintiff's Article III standing. The court rejected all four arguments as insufficient to establish standing.

The court rejected Plaintiff's first argument by noting that the substantive "truncation right" alleged by Plaintiff is irreconcilable with *Spokeo's* holding that not all statutory violations confer Article III standing. The court also explained that there is no evidence that Congress, in enacting FACTA, intended to create for consumers a substantive right to receive a redacted copy of their credit card receipt; rather, the truncation requirement is a means to the end goal of identity theft prevention. The court rejected Plaintiff's second argument by noting that Plaintiff failed to allege that anyone aside from the store employees, Plaintiff, and his lawyer ever saw either receipt; or that his identity or other financial information was stolen or lost; or even that the risk of such events was imminent. In addition, the additional credit card digits identified the card issuer and did not disclose any information pertaining to Plaintiff.

The court rejected Plaintiff's third argument by explaining that Plaintiff did not establish that Congress intended to create for credit card holders a privacy right in their information required to be redacted or truncated from receipts. Finally, the court rejected Plaintiff's fourth argument by noting that the availability of statutory damages, without any injury, does not automatically confer standing.

ARBITRATION

ARBITRATION AGREEMENT UNENFORCEABLE BECAUSE OF CHOICE OF LAW PROVISION

Dillon v. BMO Harris Bank, N.A., 856 F.3d 330 (4th Cir. 2017). http://law.justia.com/cases/federal/appellate-courts/ca4/16-1362/16-1362-2017-05-10.html

FACTS: James Dillon ("Plaintiff") applied for a payday loan through Great Plains Lending, LLC ("Great Plains"). The loan agreement contained an arbitration clause and a choice of law clause that applied the laws of the Otoe-Missouri Tribe of Indians. Plaintiff filed a putative class action complaint in the district court, claiming that Great Plains and other tribal payday lenders had issued numerous unlawful loans. Instead of directly suing the tribal payday lenders, including Great Plains, for violating state usury laws, Dillon sued the financial institutions that facilitated these payday lending transactions over the ACH Network. Dillon alleged that the ACH Network was an "enterprise," and that several of its members, including BMO Harris, conducted and participated in the "collection of unlawful debts" in violation of the federal RICO Act. BMO Harris sought to compel arbitration. The district court denied defendants motion to compel arbitration. Defendant appealed.

HOLDING: Affirmed.

REASONING: The court of appeals rejected defendant's motion to compel arbitration for public policy reasons. The court noted that arbitration clauses should be upheld on equal footing with other contracts unless the arbitration clause acts as a prospective waiver of a party's right to pursue statutory remedies. Choice of law provisions may act as a prospective waiver when factored in with the arbitration clause. The choice of law provisions in the instant case required the application of Otoe-Missouria tribal law and disclaimed the application of state or federal law. The Great Plains Agreement by its terms was "subject solely to the exclusive laws and jurisdiction of the Otoe-Missouria Tribe of Indians, a federally recognized Indian Tribe," and provided that "no other state or federal law or regulation shall apply to this Agreement, its enforcement or interpretation." The court found that the arbitration and choice of law clause in the loan agreement did not allow for application law other than tribal law, and that this functioned as a prospective waiver of federal statutory rights.

The arbitration and choice of law clause in the loan agreement did not allow for application law other than tribal law, and that this functioned as a prospective waiver of federal statutory rights.

The court of appeals refused to sever the choice of law provision because it went to the core of the arbitration clause. Additionally, the court found that because the defendant used its superior bargaining position to induce the plaintiff into the agreement, the court would not redraft the contract. The arbitration agreement was thus unenforceable.

COURT ENFORCES NLRB PROHIBITION ON EMPLOYEE CLASS ACTION WAIVERS IN ARBITRATION AGREEMENTS

NLRB v. Alternative Entertainment, Inc., ___F.Supp.3d___ (6th Cir. 2017).
http://www.opn.ca6.uscourts.gov/opinions.pdf/17a0113p-06.pdf

FACTS: Respondent, Alternative Entertainment, Inc. ("AEI") required its employees to sign an agreement that stated all disputes between AEI and its employees would be resolved solely through arbitration. AEI's agreement also stated a claim could not be arbitrated as a class action and could not be consolidated or joined by the claims of others.

James DeCommer was a field technician at AEI when a conflict arose after changes in compensation were made for field technicians. DeCommer was later fired after discussing these changes with other employees. DeCommer, filed charges against AEI through the National Labor Relations Board ("NLRB"). The NLRB maintained that it is unlawful to waive a right of class action. The Administrative law judge held that AEI violated the National Relations Labor Act ("NLRA") by compelling employees to sign arbitration waivers and prohibiting other protected activities. Petitioner, NLRB, sought enforcement of the ALJ order.

HOLDING: Granted.

REASONING: The Sixth Circuit reasoned that the enforceability of the arbitration provision is rooted in two federal laws: the Federal Arbitration Act ("FAA") and the NLRA. The FAA allows for a liberal policy favoring arbitration agreements but contains a saving clause that prioritizes it equally among other contracts. The NLRA states that employees have the right to engage in concerted activities and collective bargaining and, abridging these rights is unfair labor practice.

The court resolved the application of the two statutes "de novo" by asking whether both laws are compatible. The court noted that it is wrong to start with the question of which statute trumps the other. The FAA's saving clause addresses the issue of primacy. The court regarded the NLRA's protection of class action rights to be a provision that is applied to all contracts. Through permissible construction, the court concluded that Section 7 is the NLRA's only substantive section that expresses Congressional intent to protect concerted activity. The court does not address the issue that this holding would prohibit collective arbitration in some forums, but rather if it should prohibit concerted activity in any forum.

The court deferred to the ALJ, finding that DeCommer discussed compensation issues with other employees on several occasions and told other employees about his conversations with management. The court considered this as a protected concerted activity almost inseparable to the original question. The circuit court ordered a summary enforcement in favor of the NLRB.

SUPREME COURT HOLDS STATE CANNOT SAY POWER OF ATTORNEY MUST EXPRESSLY SAY AGENT CAN CONSENT TO ARBITRATION

Kindred Nursing Ctrs, L.P. v. Clark, 137 S. Ct. 1421 (2017).
https://supreme.justia.com/cases/federal/us/581/16-32/

FACTS: Respondents Beverly Wellner and Janis Clark each held a power of attorney to manage the respective affairs of their two now deceased relatives, who were residents of a nursing home operated by Kindred Nursing Centers LP. As part of the process of moving the two relatives into the home, Beverly and Janis each used their power of attorney to sign an arbitration agreement with Kindred on behalf of her relative. Each agreement provided that "[a]ny and all claims or controversies arising out of or in any way relating to . . . the Resident's stay" would be resolved through "binding arbitration".

After the two relatives died in the nursing home, Beverly and Janis filed separate wrongful death suits against Kindred. Kindred moved for dismissal of both claims arguing that the arbitration agreements barred the suits. The trial court denied Kindred's motions. The appellate court and the state supreme court affirmed. The United States Supreme Court granted certiorari.
HOLDING: Reversed in part, vacated in part, and remanded.
REASONING: The state courts reasoned that to protect the rights of access to trial by jury, a power of attorney could not entitle a representative to enter into an arbitration agreement without specifically saying so. The Supreme Court rejected this argument, noting that by the FAA's equal-treatment principal, arbitration agreements may not be invalidated by legal rules that single out or apply only to arbitration agreements; they must be put on an equal plane with other contracts.

Respondents argued that the state court's clear-statement rule only affects the formation of an arbitration agreement to which the FAA does not apply. The Supreme Court rejected this argument, explaining that the FAA not only applies to the enforceability of an arbitration agreement, but also its validity, an element concerning the formation of the agreement.

ARBITRATION AGREEMENT DOES NOT HAVE TO BE SIGNED BY CONSUMER

Ladymon v. Lewis, ____S.W.3d____ (Tex. App.—Dallas 2017).
https://scholar.google.com/scholar_case?case=935301257754036 8559&q=Ladymon+v.+Lewis&hl=en&as_sdt=6,44&as_vis=1

FACTS: Appellants Blane Ladymon, Metro Townhomes Limited Partnership, Metro Townhomes and Homes, Inc. (Metro), and Ladymon & Associates, were contracted as builder and architect by appellees, Jack Lewis and Alan Colvin, to design and construct a home. After construction was complete, appellees believed that the home was not designed nor constructed in a good and workmanlike manner. The appellees sued, asserting several claims against appellants including negligence and breach of warranty. Appellants filed a motion to compel binding arbitration pursuant to the contracts between the parties. However, due to the passage of time, appellants were unable to produce copies of the design contract or the builder construction contract. Appellees then filed affidavits stating "I do not recall signing any documents with [Appellants] prior to construction of my home other than documents relating to construction financing" and "I do not recall signing any documents with [Appellants] requiring Arbitration." Based on the lack of the original documentation, and the production of appellees' affidavits, the trial court denied appellants' motion to compel arbitration. In response, the Appellants appealed.
HOLDING: Reversed.
REASONING: Appellants argued that the trial court erred in denying their motion to compel arbitration. Specifically, they argued they conclusively established a valid arbitration agreement governed by the Federal Arbitration Act, and they conclusively established appellees' claims are within the scope of the arbitration agreement. The Court responded to this assertion by holding that a person seeking to compel arbitration must first establish the existence of an arbitration agreement subject to the FAA and show that the claims raised fall within the scope of that agreement. Standard contract elements of (1) offer, (2) acceptance, (3) meeting of the minds, (4) consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding must also be met—as they were here.

The absence of a party's signature did not necessarily destroy an otherwise valid contract.

The court ruled that the absence of a party's signature did not necessarily destroy an otherwise valid contract and was not dispositive of the question of whether the parties intended to be bound by the terms of a contract. The court reasoned that while appellants could not produce the fully executed contracts, they provided identical—albeit unsigned—examples instead. The court believed this to be sufficient and reversed the trial court's holding.

COURT, NOT ARBITRATOR, DECIDES IF ARBITRATION AGREEMENT PERMITS CLASS ARBITRATION

Catamaran Corp. v. Towncrest Pharmacy, 864 F.3d 966 (8th Cir. 2017).
http://media.ca8.uscourts.gov/opndir/17/07/163275P.pdf

FACTS: Catamaran Corporation, a pharmacy benefit manager, contracted with four pharmacies to provide prescription drug reimbursements. The respective contracts contained an arbitration provision that was silent on class arbitration. Eventually, a dispute arose between Catamaran and the four pharmacies. The pharmacies filed a demand for class arbitration with the American Arbitration Association ("AAA"), asserting claims on behalf of themselves and similarly situated independent pharmacies – a class of over 85 pharmacies. Catamaran responded by filing a declaratory judgment action under 28 U.S.C. §2201 and the Federal Arbitration Act in the district court.

Catamaran sought declaratory relief and an injunction preventing the pharmacies from proceeding with class arbitration. Catamaran then moved for summary judgment, arguing that the relevant agreements did not permit the pharmacies to proceed to arbitration as a class. Rather, Catamaran contended that each pharmacy needed to engage Catamaran in bilateral arbitration proceedings. The district court denied Catamaran's motion

for summary judgment, holding that the agreements' reference to the AAA rules was a clear and unmistakable commitment for an arbitrator to decide whether the agreements contemplated class arbitration. Catamaran appealed.

HOLDING: Reversed and remanded.

REASONING: The appellate court first determined whether the question of class arbitration is substantive in nature, and hence one for the court to decide absent clear and unmistakable language to the contrary, or procedural in nature and presumably for an arbitrator to decide. The court considered four fundamental differences between bilateral and class arbitration and held that the question of whether an agreement permits class arbitration belongs with the courts as a substantive question of arbitrability because the answer to this question will change the very nature of the underlying controversy. To overcome the presumption that the question of class arbitration lies with the courts, the parties must clearly and unmistakably delegate the question to an arbitrator. In this case, the relevant agreements had no mention of class arbitration.

To overcome the presumption that the question of class arbitration lies with the courts, the parties must clearly and unmistakably delegate the question to an arbitrator.

The pharmacies argued that the agreements' incorporation of AAA rules committed the question to an arbitrator and not a court. They directed the appellate court to three of its prior opinions, each holding that incorporation by reference of AAA rules constitutes a clear and unmistakable indication that the parties intended for an arbitrator to decide substantive questions of arbitrability, such as the question of class arbitration. The appellate court rejected that argument by noting that its three prior opinions each dealt with bilateral arbitration agreements and thus never grappled with the fundamental changes in the underlying controversy that arise when dealing with class arbitration. The court held that incorporation of AAA rules by reference is insufficient evidence that the parties intended for an arbitrator to decide the substantive question of class arbitration. It was necessary to have clear and unmistakable evidence of an agreement to arbitrate the particular question of class arbitration.

MISCELLANEOUS

ON REMAND IN *SPOKEO*, ROBINS HAS STANDING

Robins v. Spokeo, Inc., 867 F. 3d 1108 (9th Cir. 2017).
http://caselaw.findlaw.com/us-9th-circuit/1870825.html

FACTS: Plaintiff Robins alleged that defendant Spokeo published an allegedly inaccurate report about him on its website, and willfully violated various procedural requirements under FCRA, including failing to follow reasonable procedures to assure the accuracy of the information in his consumer report, thereby harming plaintiff's interests.

On remand from the United States Supreme Court, which held that to establish Article III standing, there must be an injury that is "real" and not "abstract" or "merely procedural," *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540 (2016), the Ninth Circuit addressed the district court's dismissal of an action brought by Robins against Spokeo, Inc., alleging willful violations of the FCRA.

HOLDING: Reversed.

REASONING: The panel rejected Spokeo's suggestion that Robins's allegations of harm were too speculative to establish a concrete injury. The panel held both the challenged conduct and attendant injury had already occurred, where Spokeo published an inaccurate consumer report about Robins and the alleged intangible injury caused by the report had also occurred.

The Ninth Circuit panel held that Robins' alleged injuries were sufficiently concrete for the purposes of Article III standing.

The Ninth Circuit panel held that Robins' alleged injuries were sufficiently concrete for the purposes of Article III standing. The court concluded that because the alleged injuries were also sufficiently particularized to Robins and caused by Spokeo's alleged FCRA violations that they were redressable in court, Robins adequately alleged the elements necessary for Article III standing under the *Spokeo* decision.

PLAINTIFF SUFFERS A CONCRETE INJURY UNDER THE TCPA BECAUSE THE FAX MACHINE IS OCCUPIED WHILE THE UNSOLICITED FAX IS BEING SENT.

FAX DID NOT PROMOTE THE SALE OF THE SENDER'S PRODUCTS AND, THEREFORE, WAS NOT AN UNSOLICITED ADVERTISEMENT

Florence Endocrine Clinic, PLLC v. Arriva Medical, LLC, 858 F.3d 1362 (11th Cir. 2017).
http://law.justia.com/cases/federal/appellate-courts/ca11/16-17483/16-17483-2017-06-05.html

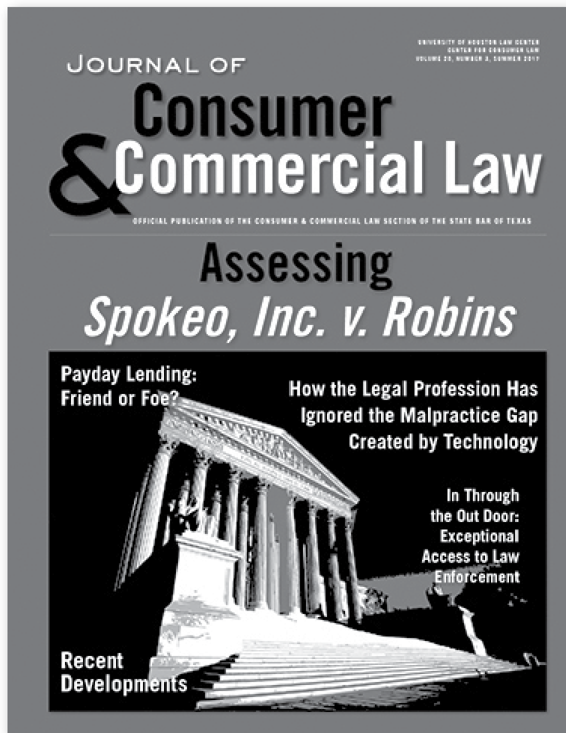
FACTS: Defendant, Arriva Medical, LLC, ("Arriva"), supplies medical products to individuals by mail. To facilitate patient insurance reimbursement, Arriva submits an order form to the patient's clinic or physician and requests the physician to confirm, via the form, that the requested medical products are necessary for individual's treatment. The order form contains a description of the product and instructions on how to fill out and return the form. Plaintiff, Florence Endocrine Clinic PLLC, received four such order forms via fax machine from Arriva.

Florence filed suit and alleged Arriva violated the Telephone Consumer Protection Act ("TCPA") by submitting an unsolicited advertisement via fax. Arriva moved to dismiss the suit on the grounds that Florence lacked standing, and for a failure to state a claim because Florence did not allege a concrete injury. The district court recognized Florence's standing but granted Arriva's motion to dismiss for failure to state a claim. Florence appealed.

HOLDING: Affirmed.

REASONING: The circuit court resolved the issue of standing, as required by *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, 1547 (2016), by analyzing the presence of a concrete injury suffered by the plaintiff. In order to suffer a concrete injury the plaintiff must (1) suffer an injury in fact (2) that is fairly traceable to the challenged conduct of the defendant and (3) is likely to be redressed by a favorable judicial decision. The circuit court drew from precedent to establish that the TCPA created rights for plaintiffs to sue if those rights are violated. The court reasoned that because Florence received unsolicited faxes from Arriva, Florence must shoulder the costs associated with printing and the time it takes away from legitimate business when the fax machine is occupied. The court concluded that Florence suffered a concrete injury.

The court then handled the issue of whether the faxes constituted advertising within the TCPA. The court defined advertisements as "any material advertising the commercial availability or quality of any property." The court found that the faxes sent by Arriva to the clinic were not advertisements within the meaning of the act because each fax related to a specific order already placed by a patient and merely requires that the physician complete the faxed forms. The forms never asked the physicians to purchase anything. Because the faxes were not considered advertisements under the TCPA, the court affirmed dismissal of Florence's claim.



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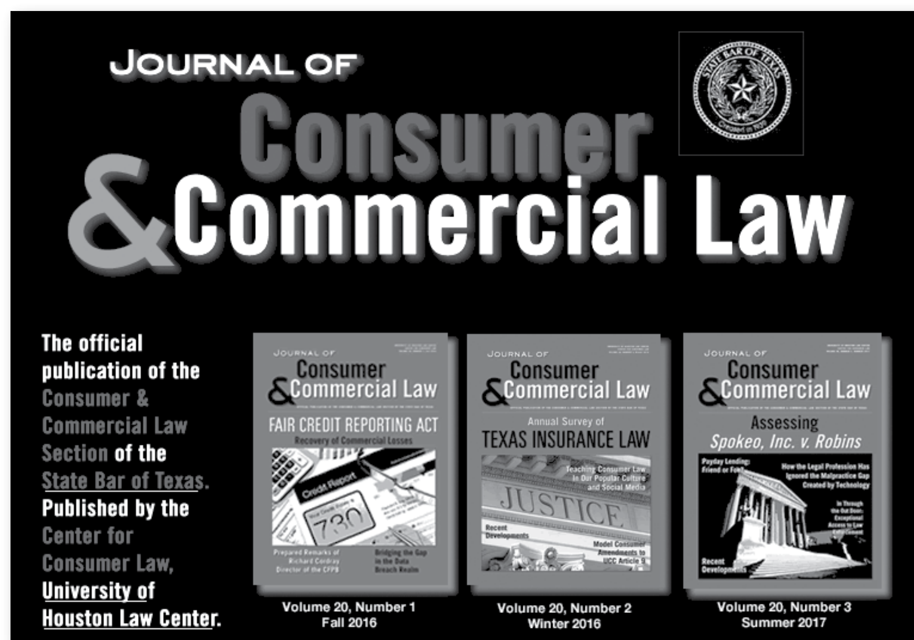

For back issues of the *Journal*, visit the *Journal's* website at: www.jtexconsumerlaw.com

THE LAST WORD

With Volume 21 of the *Journal* comes a new student editorial board. I want to thank the out-going Student Editor-in-Chief, David Kobilka, and his staff for their excellent work, and welcome the new Student Editor-in-Chief Corbett Enright. I look forward to working with Corbett and his staff and know they will continue to make the *Journal* an outstanding publication.

As usual, this issue covers a variety of subjects. It contains articles dealing with the arbitration of nursing home disputes, implied warranties in the construction and repair of a home, and the CFPB's arbitration rule banning class action waivers. And, of course, there is the *Recent Developments* section, digesting twenty-five recent decisions, and the *Consumer New Alert*, highlighting more than thirty 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 this issue.

Richard M. Alderman
Editor-in-Chief

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