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Articles

Recent Developments

The most significant and often-cited case was the Texas Supreme Court decision in *USAA Tex. Lloyds Co. v. Menchaca*.

Annual Survey of TEXAS Insurance Law

By Suzette E. Selden,* Jonathan D. Selden, ** and Dennis L. Grebe***

I. INTRODUCTION

As usual, 2017-18 was a busy time for courts ruling on Texas insurance law cases. The most significant and often-cited case was the Texas Supreme Court decision in *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018). The original opinion was issued on April 7, 2017, but the court withdrew its original opinion, and re-issued a new opinion and judgment on April 13, 2018. The court stated its reasoning for the new opinion was to "fulfill our duty to eliminate confusion regarding the court's previous decisions addressing insureds' claims against their insurance companies." Following the new *Menchaca* decision, there was a flurry of cases reanalyzing holdings in light of *Menchaca* and remanding to the lower courts to revisit the relevant issues given the new case law.[1]

In addition to *Menchaca,* a federal district court analyzed the new pre-suit notice laws outlined in Texas Insurance Code section 542A.003, and gave attorneys significant guidance as to how these statutory requirements will be enforced.[2] While another court ruled that an insurer did have a duty to defend an insured against allegations she negligently operated a car, even though her husband, who was excluded from the policy, was actually driving the car.[3]

The Texas Supreme Court held an insurance carrier cannot indirectly recover from an injured party the proceeds which it contractually agreed not to pursue directly from a third party.[4] And in an underinsured motorist case, the trial court severed the contractual and extra-contractual claims, but refused to abate the extra-contractual claims. On appeal, the insured argued that under the new ruling in *Menchaca*[5] abatement of extra-contractual claims is no longer required in a UIM case where the UIM claim is disputed. The appellate court disagreed, and directed the trial court to abate the extra-contractual claims.[6]

These and many other decisions are discussed below.

II. FIRST PARTY INSURANCE POLICIES & PROVISIONS

A. Automobile

Insured sued automobile liability insurer for settling a collision claim against him without his permission. Insured, pro se, filed suit in justice court alleging fraud, violations of the Texas Deceptive Trade Practices Consumer Protection Act, and violations of Chapter 541 of the Insurance Code. Insurer responded with traditional and no-evidence motions for summary judgment asserting the terms of its insurance policy allowed it to settle claims it deemed appropriate and there was no evidence it committed fraud, violated the DTPA, or Chapter 541. The justice court granted insurer's motion and insured appealed to the county court at law. Insurer again filed its motions for summary judgment and insured responded, alleging, among other things, that the insurer was relying on the wrong policy because it differed from the "approved" policy he obtained from the Commissioner of Insurance. The county court granted summary judgment in favor of insurer without specifying whether it was on traditional or no-evidence grounds. Insured appealed, arguing the insurer's summary judgment motion was based on a "fabricated" policy and that created a genuine issue of material fact. Insurer responded, acknowledging there was a dispute about which policy was in force at the time of the collision, but argued it was nonetheless entitled to summary judgment.

The court held "although the structure of the language of the policies differed slightly, the language of the relevant portions of the two policies setting out [insurer]'s obligations is nearly identically worded." Both policies, it held, "seem to impose the same requirements and obligations on [insurer]" and did not create a fact issue whether insurer was authorized to settle the claim. Nevertheless, "for the sake of argument," it reviewed the remaining issues as though the insured's version of the policy was correct. Insured argued policy language that insurer would pay for damages for which an insured "is legally liable" required it to determine if insured was legally responsible for damages and prohibited it from paying if insured was not. Insurer disagreed, arguing the "legally liable" language required it to pay damages after a court or other adjudicative body determined its insured was responsible for damages, but that its authority to settle claims was completely separate and allowed it to settle claims "without the need for a legal determination of responsibility to avoid the expense of litigation when it determines that settling is 'appropriate.'" The court held the insurer's "construction is consistent with the plain meaning of the provisions requiring [it] to pay when an insured is legally liable for damages and empowering [it] with the discretion to settle suits or claims where appropriate." After reviewing applicable appellate law and finding insurer's interpretation consistent, the court found the terms of its policy were not ambiguous and gave the insurer discretion to settle claims without its insured's consent and without the need for a judicial determination. *Martin-De-Nicolas v. AAA Tex. Cnty. Mut. Ins. Co.*, No. 03-17-00054-CV, 2018 Tex. App. LEXIS 2747 (Tex. App.–Austin Apr. 19, 2018, no pet. h.) (mem. op.).

Insured sued underinsured motorist ("UIM") insurer and its claims handler for breach of contract and violations of the Texas Insurance Code, including failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement; failing to promptly provide a reasonable explanation of the basis for the insurer's denial of a claim or offer of a compromise settlement; failing within a reasonable time to affirm or deny coverage of a claim; refusing to pay a claim without conducting a reasonable investigation; and requiring the insured to file a lawsuit to have the insurer comply with its contractual duties. Insurer filed special exceptions, alleging insured's claim of the "exhaustion doctrine" was not recognized in Texas and her breach of contract claims were premature under the Supreme Court's decision in *Brainard v. Trinity Universal Insurance Co.*, 216 S.W.3d 809 (Tex. 2006) (insurer under no obligation to pay UIM claim until insured obtains judgment establishing the liability and underinsured status of the other driver). Insured moved to strike. After allowing the insured a chance to amend her petition (which she refused), the trial court sustained the insurer's special exceptions, denied insured's motion to strike, and dismissed her claims with prejudice.

The court of appeals affirmed the trial court's order and holding that, because the insured's petition did not say she got a judgment against the other driver, "she failed to establish the existence of a duty or obligation" on the insurer and her breach of contract claims were premature. The court held the insured's "exhaustion doctrine" claim—that she was legally entitled to her UIM policy benefits because her settlement exhausted all policy limits—was in direct conflict with *Brainard's* holding that a settlement did not trigger insurer's contractual duty to pay. "Whatever the virtues of a contrary rule might be, as an intermediate court, we are bound to follow the rule laid down in *Brainard* unless and until the supreme court reconsiders or revises it." *Weber v. Progressive Cnty. Mut. Ins. Co.*, No. 05-17-00163-CV, 2018 Tex. App. LEXIS

The court found the terms of its policy were not ambiguous and gave the insurer discretion to settle claims without its insured's consent and without the need for a judicial determination.

784 (Tex. App.–Dallas Jan. 26, 2018, pet. filed) (mem. op.).

Insured sued his underinsured motorist (UIM) insurer after his minor next friend was injured in an automobile collision while riding as a passenger in a stolen vehicle. Insurer denied the claim based on an exclusion in its policy that "coverage…will not apply…[t]o bodily injury sustained by you or a relative while using any vehicle, other than a covered auto, without the permission of the owner." Insured filed declaratory action asking the court to disregard the exclusion because his next friend, as passenger, was not "using" the vehicle. Insurer sought and obtained summary judgment and insured appealed.

The court of appeals held the insured's next friend was "using" the vehicle as that term is understood within the context of auto insurance policies and that his "status as a passenger, alone, constitutes 'use' of the vehicle."

The court of appeals held the insured's next friend was "using" the vehicle as that term is understood within the context of auto insurance policies and that his "status as a passenger, alone, constitutes 'use' of the vehicle." It relied on a three-part test outlined in *Mid-Century Ins. Co. of Tex. v. Lindsey*, 997 S.W.2d 153 (Tex. 1999): (1) the collision must have arisen out of the inherent nature of the automobile; (2) it must have arisen within the "territorial limits" of an automobile, and the actual use must not have terminated; and (3) the automobile must produce the injury and not "merely contribute" to it. Having found the insured's next friend satisfied those elements for use of the vehicle, the court affirmed the judgment of the trial court. *Salinas v. Progressive Cnty. Mut. Ins. Co.*, No. 07-16-00361, 2017 Tex. App. LEXIS 9334 (Tex. App.–Amarillo Oct. 4, 2017, no. pet. h.) (mem. op.).

B. Homeowners

Insureds made a claim under their homeowners insurance policy for damage to their roof, which was causing water to leak inside. Their insurance agent testified that he looked at the roof when the insureds applied for insurance and did not see any previous hail damage. The insurance adjuster reported to the insurer that some of the damage was caused by a hailstorm that occurred prior to the policy being purchased, and that there was minor wind damage. At trial, the insureds won, and the insurer appealed. The court affirmed the trial court's award finding that the insurer was liable for the damage to the home, as well as for extra-contractual damages, as the jury could have reasonably inferred that the damages were caused by the insurer who failed to effectuate a prompt, fair and equitable settlement of the claim when its liability had become reasonably clear. *State Farm Lloyds v. Vega*, No. 13-16-00090-CV, 2018 Tex. App. LEXIS 2592 (Tex. App.–Corpus Christi April 12, 2018, pet. filed).

Insureds sued their insurer for failing to pay claim for water damage to their home caused by a hurricane, after water entered their home through the doors. Insurer argued that an exclusion applied for a loss caused by a hurricane to the interior of a building unless direct force of "wind or hail makes an opening in a roof or wall and rain enters through this opening and causes damage." The insureds argued that a doorway is an opening in the wall, and therefore, since the water leaked in through the door, i.e. opening in a wall, it should be covered. The trial court found the exclusion in the policy was not ambiguous, and that any conflict in the evidence was for the jury to decide. The jury found that the insurer did not fail to comply with the policy, and the insureds appealed arguing the trial court "improperly submitted a question of law — what the exclusionary language of an insurance policy means — to the jury." The question submitted to the jury at issue in this case was, "Did [the insurer] fail to comply with the insurance policy with respect to [the insureds'] claims arising from Hurricane Ike?" The insureds also argued a jury instruction should have been given with the question that basically said an opening in a door created by wind through which rain enters and causes damage is covered under the policy.

The appellate court affirmed the trial court's ruling in favor of the insurer, holding that the exclusion was not ambiguous, there was not any conflict in the law, and that any conflict in the evidence was for the jury to decide. Additionally, the requested jury instruction was properly refused by the trial court, as the relevant words in the insurance policy were to be given their ordinary meaning, rather than telling the jury in an instruction how to construe the relevant contract terms. *Iler v. RVOS Farm Mut. Ins. Co.*, No. 09-16-00011-CV, 2018 Tex. App. LEXIS 10783 (Tex. App.–Beaumont Nov. 16, 2017, pet. denied).

C. Health Insurance

Hospital (insureds' beneficiary) sued health insurer alleging underpayment of out-of-network claims under the Employee Retirement Income Security Act (ERISA) and Texas law. Insurer sued back, alleging fraud, negligent misrepresentation, and unjust enrichment in the hospital's billing practices. Trial court dismissed the hospital's ERISA claim in a bifurcated bench trial and then tried the remaining state law claims to a jury. The hospital moved for judgment as a matter of law on the insurer's fraud and negligent misrepresentation counterclaims, which the court granted. The jury rejected the hospital's remaining state law claim and the court entered judgment denying relief to both parties. The hospital moved for attorneys' fees, but the court denied those as well. Both sides appealed.

The court of appeals largely upheld the rulings of the trial court. It found there was no way the insurer could have "justifiably relied" on any alleged misrepresentation by the hospital because of the insurer's sophistication, "red flags," and the insurer's own thorough investigation found no fraud. The court affirmed the trial court's judgment on the hospital's ERISA claim because the hospital "did not identify specific claims for which it sought recovery" and "there was no evidence [insurer] failed to make determinations under the terms of its plans." It noted the insurer "processed claims by applying the coverage formula under its health care plan terms," it never denied the claims, and paid them "according to the 'reasonable and customary amount' as defined under the plan language." *N. Cypress Med. Ctr. Operating Co., Ltd. v. Aetna Life Ins. Co.*, 898 F.3d 461 (5th Cir. 2018).

D. Other Policies

A company sought to recover under its commercial-crime insurance policies upon realizing it had invested a portion of its pension-plan assets in a Ponzi scheme. Through the receiver process, the company was able to recover its principal invested, as well as some earnings. Coverage in the policy was limited to property the company "owned" and the parties disagreed whether the company owned the lost principal and interest. The court ultimately declined to read "own" to cover the lost profits. They applied the plain meaning of the word and concluded the company did not own funds which it was fraudulently induced to loan to someone else. Further, the court determined the company did not sustain a loss. Although the company earned less on its investment than it would have had it invested with honest money managers, the loss was categorized as "purely theoretical" and would not be covered by the policy. *Cooper Indus., Ltd. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 876 F.3d 119 (5th Cir. 2017).

III. FIRST PARTY THEORIES OF LIABILITY

A. Breach of Contract

The much anticipated ruling by the Texas Supreme Court in *USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018), clarified questions that had arisen about language used in the prior case ruling. The insured contacted her homeowners' insurance company after Hurricane Ike to report storm damage to her home. The adjuster sent out to evaluate the home damage found minimal damage, resulting in the insurer declining to pay the insured because the damages did not exceed the deductible. At the insured's request, a second adjuster was sent out to evaluate the damage, and he reached the same conclusion as the first adjuster. The insured then sued the insurer for breach of the insurance policy and for unfair settlement practices in violation of the Texas Insurance Code.

At the jury trial, when asked in Question 1 of the jury charge whether the insurer failed "to comply with the terms of the insurance policy with respect to the claim for damages," the jury answered "No." Question 2 asked whether the insurer engaged in various unfair or deceptive practices, including whether the insurer refused "to pay a claim without conducting a reasonable investigation with respect to" that claim. The jury answered "Yes." Then in Question 3, the jury was asked to determine the amount of the insured's damages that resulted from either the insurer's failure to comply with the policy or its statutory violations, calculated as "the difference, if any, between the amount the insurer should have paid to the insured for her storm damages and the amount that was actually paid. The jury answered "$11,350."

Both parties asked for judgment in their favor. The insurer argued that because the jury did not find that the insurer failed to comply with the policy in Question 1, the insured could not recover for bad faith or extra-contractual damages as a matter of law. The insured argued the court should find in her favor based on the jury's answers to Questions 2 and 3, neither of which required a "Yes" to Question 1. The trial court found in favor of the insured, with the court of appeals affirming. The Texas Supreme Court granted the insurer's petition for review.

The insurer relied on *Provident American Insurance Co. v. Castañeda*, 988 S.W.2d 189 (Tex. 1998), to argue that an insurance company's "failure to properly investigate a claim is not a basis for obtaining policy benefits." The insured relied on *Vail v. Texas Farm Bureau Mutual Ins. Co.*, 754 S.W.2d 129 (Tex. 1988), where the Texas Supreme Court stated that an insurer's "unfair refusal to pay the insured's claim causes damages as a matter of law in at least the amount of the policy benefits wrongfully withheld." The Texas Supreme Court admitted in *Menchaca* that the precedent in this area is confusing, and noted that this case presented an opportunity to "provide clarity regarding the relationship between claims for an insurance-policy breach and Insurance Code violations."

The much anticipated ruling by the Texas Supreme Court in *USAA Texas Lloyds Co. v. Menchaca*, clarified questions that had arisen about language used in the prior case ruling.

The primary issue in *Menchaca* is whether an insured can recover policy benefits as "actual damages" caused by an insurer's statutory violation without a finding that the insured had a contractual right to the benefits under the insurance policy. The court noted that generally the answer to this question is no. However, it outlined five distinct but interrelated rules that govern the relationship between contractual and extra-contractual claims in the insurance context:

First, as a general rule, an insured cannot recover policy benefits as damages for an insurer's statutory violation if the policy does not provide the insured a right to receive those benefits.

Second, an insured who establishes a right to receive benefits under the insurance policy can recover those benefits as actual damages under the Insurance Code if the insurer's statutory violation causes the loss of the benefits.

Third, even if the insured cannot establish a present contractual right to policy benefits, the insured can recover benefits as actual damages under the Insurance Code if the insurer's statutory violation caused the insured to lose that contractual right.

Fourth, if an insurer's statutory violation causes an injury independent of the loss of policy benefits, the insured may recover damages for that injury even in the policy does not grant the insured a right to benefits.

And, fifth, an insured cannot recover *any* damages based on an insurer's statutory violation if the insured had no right to receive benefits under the policy and sustained no injury independent of a right to benefits.

The General Rule

The insured in *Menchaca* argued that she could recover policy benefits as damages resulting from the insurer's statutory violation because that claim was independent from her claim for policy breach. The court rejected this independent-claims argument holding that the Insurance Code only allows an insured to recover actual damages "caused by" the insurer's statutory violation. The court stated, "[i]f the insurer violates a statutory provision, that violation – at least generally – cannot cause damages in the form of policy benefits that the insured has no right to receive under the policy."

The insurer then tried to argue that an insured can only recover policy benefits as damages on a breach-of-contract claim and can never recover policy benefits as damages on a statutory-violation claim. However, the court disagreed, stating, "[w]hile an insured cannot recover policy benefits for a statutory violation unless the jury finds that the insured had a right to the benefits under the policy, the insured does not *also* have to prevail on a separate breach-of-contract claim based on the insurer's failure to pay those benefits."

The Entitled-to-Benefits Rule

The court noted that it did not reject the *Vail* rule in *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338 (Tex. 1995) or in *Castañeda.* The *Vail* rule is "an insured who establishes a right to benefits under the policy can recover those benefits as actual damages resulting from a statutory violation." *Stoker* and *Castañeda* stand for the rule that "an insured cannot recover policy benefits as damages for an insurer's extra-contractual violation if the policy does not provide the insured a right to those benefits." The difference in the two rules is whether there is a right to benefits under the policy.

The Benefits Lost Rule

In this context, the court stated it has recognized that an insurer that "violates the statute by misrepresenting that its policy provides coverage that it does not in fact provide can be liable under the statute for such benefits if the insured is 'adversely affected' or injured by its reliance on the misrepresentation." Additionally, when an insurer's statutory violations prejudice the insured, the insurer may be estopped from denying the benefits that would have been owed under the policy as if the risk had been covered. In this situation, the insured can recover "any damages it sustains because of the insurer's actions," even though the loss is not covered under the policy. The benefits lost rule can also be applied when the insurer's statutory violation caused the policy not to cover losses that it otherwise would have covered.

The Independent Injury Rule

The court further described this rule by stating, "an insured can recover actual damages caused by the insurer's bad-faith conduct if the damages 'are separate from and … differ from benefits under the contract.'" An example of this might be mental anguish. This rule does not apply if the insured's statutory or extra-contractual claims "are predicated on," "flow from," or "stem from" policy benefits. The second part of the independent-injury rule states there is no recovery for *any* damages beyond the policy benefits for an insurer's statutory violation unless the violation causes an injury independent from the loss of benefits. The court noted that this type of claim would be rare, and that the court has yet to encounter one.

The No-Recovery Rule

The last rule basically follows from the first four rules. There can be no recovery based on an insurer's statutory violation for *any* damages unless the insured proves a right to receive benefits under the policy or an injury independent of a right to benefits.

The insurer asked the court to outline how parties should submit claims for policy benefits to a jury, where the insured has asserted both a breach of contract claim and a statutory violation claim, and policy benefits are sought as damages for both. The court noted that it generally agrees with the charges outlined in the Pattern Jury Charge, but that their holding today clarifies that to establish "causation of policy benefits as damages" on a statutory-violation claim, the jury "must find that the violation caused the insured to lose benefits she was otherwise entitled to receive under the policy." A proper jury charge must include an appropriate instruction or question to prove that element. To avoid any conflict, the court should confirm that the jury answers the entitlement-to-benefits question only once. In this case, the court said that the trial court may have done better to just submit Question 2 (to show that the insurer violated the statute) and Question 3 (to establish both the statutory violation caused by the insured's actual damages in the form of policy benefits and that the insurer breached the contract by failing to pay the benefits the insured was entitled to under the policy), and omitting Question 1.

The court held that the jury's answer to Question 1 as "No," was not fatal to the insured's case. As these rules above outline, an insured does not have to prevail on a separate breach of contract claim to recover policy benefits for a statutory violation. The court held that the lower courts erred in disregarding the jury's answer to Question 1, as it was not immaterial.

The insurer argued that because the court found the trial court erred in disregarding Question 1, that the Texas Supreme Court should reverse and render in the insurer's favor. However, the court disagreed, stating the answers to Questions 2 and 3, constitute a finding that the insured was entitled to receive benefits under the policy, in the amount of $11,350. The jury's answer to Question 3 constituted a finding that the insurer's statutory violation caused the insured to lose policy benefits that the insurer should have paid.

The court held the jury's answers to Questions 1, 2 and 3 created a fatal conflict. The court looked to whether there was a preservation of that error. The only exception to the preservation of error requirement is a fundamental error, which did not occur in this case. Moreover, to preserve error on fatally conflicting jury answers, the parties must raise the objection before the trial court discharges the jury. In this case, neither party timely objected. The insured in this case obtained all the findings necessary to recover on her statutory-violation claim. The insurer is the one who must rely on the conflicting answer in Question 1 to prevent the insured from recovering based on the answers to Questions 2 and 3. Therefore, the court held that the insurer bore the burden to object, as it was the party who must rely on the conflicting answer to avoid the effect of answers that established liability. Because neither party preserved the error, the court could not consider the conflicting jury answers as a basis for reversing the trial court's judgment.

The Texas Supreme Court reversed and remanded the case for a new trial because of the parties' confusion over the court's relevant precedent, as well as the court's clarification of the requirements to preserve error based on conflicting jury answers.

Justice Hecht concurred in the judgment, but for different reasons than the plurality opinion. He disagreed that an objection before the trial court dismissed the jury was necessary to preserve error. He stated the case must be retried because each party insisted on a favorable judgment, which could not be rendered based on the conflicting answers in the jury verdict.

The dissent, written by Justice Green, held that under the five rules outlined, the insurer was entitled to judgment in its favor because the insured failed to prove that the insurer was contractually obligated to pay benefits under the homeowners policy, which is required to recover policy benefits for a violation of the Tex. Ins. Code. Because the jury's answer to question 3 was less than the policy deductible, the dissent said the insured failed to establish a right to receive policy benefits, and she is not entitled to recover any damages for the insurer's Insurance Code violation under the court's no recovery rule. Moreover, the jury's answer to Question 1 rejected the insured's claim that she had a right to unpaid benefits under the policy, and therefore, she is not entitled to recover policy damages for the insurer's Insurance Code violation. Because the insured is not entitled to damages, there is no reason to remand her case. Additionally, the dissent held that the insurer's post-verdict motions were sufficient "to bring this question [of conflicting answers] to the trial court's attention," and thus, error was preserved. The dissent would render judgment that the insured taking nothing, and held that, under the no-recovery rule, the court should enter judgment in the insurer's favor since the answers establish the insured did not satisfy her burden of proof and is not entitled to any recovery. *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018).

Insureds made a claim on their homeowners insurance policy for interior and exterior damage after Hurricane Ike. Insurer paid almost $5,000 for exterior damage, but denied the interior damage was caused by the hurricane. Insured sued for breach of contract, breach of duty of good faith and fair dealing, fraud, and Insurance Code violations and sent a demand for almost $400,000. Insurer pled excessive-demand defense ("a creditor who makes an excessive demand upon a debtor is not entitled to attorneys fees for subsequent litigation required to recover the debt"), but the trial court excluded all evidence of the demand and did not allow insurer to submit a jury question on it. Jury found both parties breached the insurance contract, but the insured breached it first. It also found the insurer was liable for Insurance Code violations, breach of its duty of good faith and fair dealing, and fraud. Insurer moved for a take-nothing judgment, arguing the insured's prior breach of contract excused it from honoring the policy. The trial court denied the motion, disregarding the jury's findings about the insured's breach of contract, and rendered judgment for the insureds for contractual and extra-contractual damages. The court of appeals affirmed. The Supreme Court affirmed the appellate court's judgment in part—allowing its judgment on the demand defense, but remanded to the appellate court for further proceedings on the issue of whether the trial court improperly disregarded the jury's findings "in light of" its recent decision in *Menchaca*.[7] The court noted it had never addressed the issue of whether the excessive-demand defense applies to an insured's demand on an insurer. But, "[e]ven if it does," the court said, the insurer offered no evidence it tendered and the insured refused the amount actually due under the policy. On that issue, the court said, "[w]e find no fault in the court of appeals' analysis." However, the court remanded the issue of whether the insurer waived its extra-contractual arguments because it only addressed the breach of contract claim in its briefing and advised the court to look to the new *Menchaca* ruling for guidance on this issue. *State Farm Lloyds v. Fuentes*, 549 S.W.3d 585 (Tex. 2018).

Perrett v. Allstate Ins. Co. is the first case decided that analyzes whether or not a pre-suit notice properly complies with the new requirements of Texas Insurance Code section 542A.003.

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

Due to clarification of the law by the Texas Supreme Court in *Menchaca*,[8] the Fifth Circuit in *Aldous v. Darwin Nat'l Assurance Co.*, 889 F.3d 798 (5th Cir. 2018) granted the insured's petition for panel rehearing and vacated the district court's dismissal of the insured's claims under Chapter 541 of the Texas Insurance Code. Because *Menchaca* repudiated the independent-injury rule, clarifying instead that "an insured who establishes a right to receive benefits under an insurance policy can recover those benefits as 'actual damages' under the statute if the insurer's statutory violation causes the loss of benefits." The insurer did not contest that *Menchaca* cast aside the independent-injury rule, but instead offered several other grounds on which the court should affirm the denial of the insured's extra-contractual claims. The Fifth Circuit found those alternative arguments would best be addressed by the district court for the first time on remand.

Perrett v. Allstate Ins. Co., No. 4:18-CV-01386, 2018 U.S. Dist. LEXIS 97405 (S.D. Tex. June 11, 2018) is the first case decided that analyzes whether or not a pre-suit notice properly complies with the new requirements of Texas Insurance Code section 542A.003. An insured sued its insurer for claims relating to damage arising out of Hurricane Harvey, alleging violations of the DTPA, the Tex. Ins. Code, and breach of contract. The insured's attorney sent the insurer a notice letter alleging the insurer violated the Tex. Ins. Code and DTPA. The insurer moved to abate under Tex. Ins. Code section 542A.003, which requires the plaintiff seeking damages to give prior written notice of the complaint and the damages, including fees, "not later than the 61st day before the date a claimant files an action." The insurer argued that the notice did not include, "a statement of the acts or omissions giving rise to the claims and the amount of reasonable and necessary attorney's fees incurred by the claimant" or a statement that a copy of the notice was provided to the claimant. Counsel for the insured argued the notice letter satisfied section 542A.003(a)'s requirements.

Section 542A.003 of the Tex. Ins. Code states, "not later than the 61st day before the date a claimant files an action to which this chapter applies in which the claimant seeks damages from any person, the claimant must give written notice to the person in accordance with this section as a prerequisite to filing the action." The notice must include, "(1) a statement of the acts or omissions giving rise to the claim; (2) the specific amount alleged to be owed by the insurer on the claim for damage to or loss of covered property; and (3) the amount of reasonable and necessary attorney's fees incurred by the claimant, calculated by multiplying the number of hours actually worked by the claimant's attorney, as of the date the notice is given and as reflected in contemporaneously kept time records, by an hourly rate that is customary for similar legal services." If an attorney provides notice on behalf of a client, the written notice must include that a copy of the notice was given to the claimant. The court shall abate the action for 60 days if it finds that the person filing the abatement did not, for any reason, receive a presuit notice complying with Section 542A.003, and the defendant timely requested the abatement.

The notice in this case was sent 60 days prior to suit being filed. The issue is whether the letter satisfied the pre-statutory requirements. First, the insurer argued the notice letter did not provide "a statement of the acts or omissions giving rise to the claims." The court noted this letter contained several paragraphs explaining how the insurer breached the insurance contract and duty of good faith by conducting a poor examination of the damage and by failing to pay the claims. The letter specified the provisions of the DTPA and Tex. Ins. Code allegedly violated. It also listed the damages sought, and included appraisal reports for the damage calculations. Therefore, the court held the letter sufficiently stated the acts or omissions giving rise to the claims.

The insurer also argued the letter did not include the reasonable and necessary attorney's fees incurred by the claimant. The court noted that although the Tex. Ins. Code requires the attorney fees be "calculated by multiplying the number of hours actually worked by the claimant's attorney, as of the date the notice is given and as reflected contemporaneously kept time records, by an hourly rate that is customary for similar legal services," Tex. Ins. Code section 542A.003(b)(3), does not require that those calculations be in the presuit notice. Since the attorney's fees were stated in the presuit notice, the court held this requirement was met.

However, the claimant's attorneys failed to meet the requirement under section 542A.003(c), that "[i]f an attorney or other representative gives the notice required under this section on behalf of a claimant, the attorney or representative shall: (1) provide a copy of the notice to the claimant; and (2) include in the notice a statement that a copy of the notice was provided to the claimant." The attorney's response to the motion to abate did not dispute or respond to the insurer's argument that the notice letter did not contain a statement that the letter was provided to the claimant. An email showing that the claimant was aware of the demand was not enough to meet the requirement. The court held that because the letter did not contain a statement that it was provided to the claimant, the case was abated until 60 days after the insured received proper written notice.

The court in *Perrett* gives attorneys significant instruction as to how Tex. Ins. Code section 542A.003 will be enforced. The court was satisfied with a description of the acts giving rise to the claim and with only listing the amount of the attorney's fees, rather than specifically showing the method for calculating the fees. However, the court strictly enforced the rule that the notice letter must be provided to the claimant and state that it was provided to the claimant. Even if the client is informed of the demand, the court held that was not enough. *Perrett v. Allstate Ins. Co.*, No. 4:18-CV-01386, 2018 U.S. Dist. LEXIS 97405 (S.D. Tex. June 11, 2018).

C. ERISA

An insured while traveling for work, contracted coccidioidomycosis, a fungal infection, by inhaling fungal spores, that ultimately resulted in the removal of one of his eyes. He was insured by an employee benefits insurance plan, which was subject to ERISA, and the plan included an "Accidental Death and Dismemberment and Life Insurance Policy." The insured submitted a claim for his eye, which the insurer denied stating in part that "the loss of sight was not due to an Accident as defined by the policy independent of Sickness and all other causes." The insured filed an administrative appeal, but the insurer upheld the claim denial. The insured then filed this suit. Courts construing ERISA plan provisions "are to give the language of the insurance contract its ordinary and generally accepted meaning if such a meaning exists." After applying the ordinary principles of contract interpretation, if the plan terms remain ambiguous, then the court can construe the terms strictly in favor of the insured. The court noted that (1) the policy states that "Accident" does not include "Sickness;" (2) the policy requires an "Accident" be "independent of Sickness;" and (3) the policy requires that an "Injury" "result in loss independently of Sickness." Accident was defined in the policy as "a sudden, unexpected, unforeseeable and unintended event, independent of Sickness and all other causes." The court said the definition of "Accident" states that the term does not include "disease, bodily or mental infirmity or medical treatment thereof." The Fifth Circuit held that a fungal infection falls under a Sickness, and that the loss of an eye from a fungal infection is not an "Accident" within the meaning of the policy. Both parties cited the Centers for Disease Control which describes coccidioidomycosis as a "type of fungal disease" that can make people "sick." The court noted that the loss of sight from this fungal infection was not "independent of Sickness," and therefore, was not covered under the policy. The insured argued that his fungal infection did fall under "Accident," because the definition of "Accident" did not expressly mention fungal infection but did specifically provide that a bacterial or viral infection could not constitute an "Accident." The court disagreed, saying that other terms in the policy, such as "bodily or mental infirmity" and "Sickness," do cover fungal infection, and therefore, the clause regarding bacterial and viral infections cannot be read to remove fungal infections by implication. Food poisoning is covered under "Accident," as defined in the policy, and the insured also tried to argue that a fungal infection was similar to food poisoning as it also is unpredictable in contraction. The court disagreed, stating the policy provided no support for including fungal infection in the provision that included accidental food poisoning within the definition of "Accident." Therefore, the court affirmed the judgment of the district court in favor of the insurer. *Ramirez v. United of Omaha Life Ins. Co.*, 872 F.3d 721 (5th Cir. 2017).

IV. AGENTS, AGENCY, AND VICARIOUS LIABILITY

A. Individual Liability of Agents, Adjusters, and Others

An insured's home roof was damaged in a hailstorm. The insurer assessed the damage and paid the insured who hired a roofer to repair the roof. The insured sued the roofer alleging that he falsely represented himself to be a public adjuster in violation of Tex. Ins. Code section 4102.051 and that he made misrepresentations about his services. The court held the roofer falsely upheld himself to be a public adjuster. Under Tex. Ins. Code section 4102.207:

(a) Any contract for services … that is entered into by an insured with a person in violation of Section 4102.051 may be voided at the option of the insured.

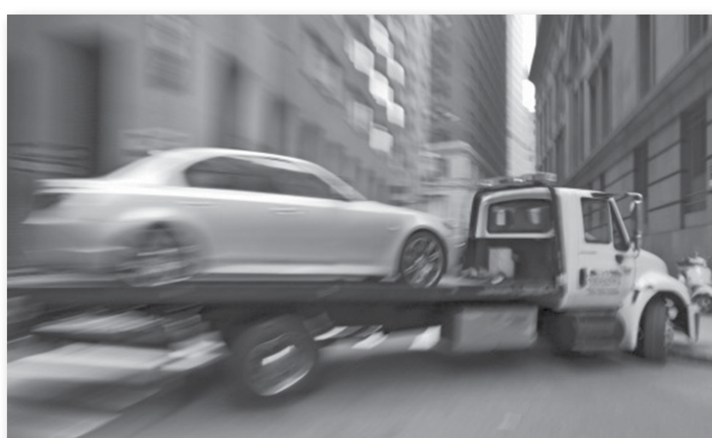
(b) If a contract is voided under this section, the insured is not liable for payment of any past services rendered, or future services to be rendered, by the violating person under that contract.

Therefore, the agreement with the roofer was void, and the insured was not liable for any past or future services rendered by the roofer. Moreover, the court enforced the death penalty sanction against the roofer because he refused to produce material evidence even when lesser sanctions were imposed. The court held this conduct provided an independent basis for a knowing and intentional violation of the DTPA, and upheld judgment for insured against roofer because by contracting to pursue insured's best interest and to reach settlement with insurer, the roofer agreed to advocate on the insured's behalf, which is not allowed under Tex. Ins. Code section 4102.051 as he cannot hold himself out to be a public adjuster when he is not licensed. *Hill v. Spracklen*, No. 05-17-00829-CV, 2018 Tex. App. LEXIS 5313 (Tex. App.–Dallas July 12, 2018, pet. filed).

V. THIRD PARTY INSURANCE POLICIES & PROVISIONS

A. Automobile Liability Insurance

Insured and his 18 year-old step-daughter were killed in a car accident. Step-daughter's estate and wrongful death beneficiary ("claimants") sued insured's estate and obtained a final judgment against insured. Insurer tendered state-minimum policy limits, but excluded coverage for the remainder of the judgment citing "family member" exclusions in the applicable personal auto and liability umbrella insurance policies. The auto policy excluded coverage "for you or any family member for bodily injury to you or any family member" except for the minimum amount required by law. It defined "you" as the named insured shown on the declarations page and the spouse if a resident of the same household. The declarations page showed the insured and his spouse—his step-daughter's mother—as named insureds. It defined "family member" as "a person who is a resident of your household and related to you by blood, marriage, or adoption."



The umbrella policy's family member exclusion was broader, defining insured as the named insured and residents of the named insured's household who are the named insured's relatives and anyone under the age of 21 under the care of the named insured." Claimants refused tender and sued insured's estate and insurer. Both sides filed actions for declaratory judgment and cross-motions for summary judgment to determine whether the decedent step-daughter was a "family member" under the policies and if that condition limited coverage to the state-minimum limits. The trial court granted summary judgment for insurer and claimants appealed. The court of appeals held the deceased step-daughter was a "family member" for purposes of the exclusion because she was related "by blood" to her mother, who was one of the named insureds, and was a resident of her household. It rejected the claimants' arguments that the family member exclusion did not apply to the insured step-father because he was the at-fault driver and not related to the claimant by blood, marriage, or adoption. "Nothing in the auto policy," the court said, "limits the definition of 'you' to an at-fault insured." Furthermore, even if it did, it said the insured was related to his step-daughter "by marriage, or affinity" which it defined as "[t]he relation that one spouse has to the blood relatives of the other spouse." (citing Black's Law Dictionary 70 (10th ed. 2014)). It held the auto policy's family member exclusion unambiguously excluded coverage for the insured over the required state-minimum limits. It likewise rejected the claimants argument that the broader umbrella policy exclusion was against public policy. "Precedent, however, requires us to conclude otherwise," it said, because the Supreme Court has upheld the family member exclusion in auto policies as long as it provides the state-minimum coverage and "[t[he same public policy considerations apply to the family member exclusion contained in the umbrella policy." It affirmed the trial court's judgment and ordered the claimants to pay the insurer's costs. *Kidd v. State Farm Mut. Auto. Ins. Co.*, No. 05-16-01387-CV, 2018 Tex. App. LEXIS 2620 (Tex. App.–Dallas Apr. 12, 2018, pet. filed) (mem. op.).

A charter bus was involved in a motor vehicle accident that killed nine people and injured more than forty others. The five million dollar insurance policy was quickly exhausted by settling claims with a portion of injured passengers. The unsettled passengers initiated a involuntary bankruptcy petition against the charter bus company. The dispute involved whether proceeds of a debtor-owned liability insurance policy are property of the bankruptcy estate when the policy limit is insufficient to cover a multitude of tort claims. The Fifth Circuit explained due to the siege of tort claimants that threatened the estate above policy limits, the policy proceeds should be categorized as property of the estate. The court highlighted these facts represented "limited circumstances," giving rise to an equitable interest of the debtor in having the policy proceeds applied to satisfy as many claims as possible. The determination as to the enforceability of the initial settlement with a portion of the injured passengers was left for another day. *In re OGA Charters, L.L.C.*, 901 F.3d 599 (5th Cir. 2018).

VI. DUTIES OF LIABILITY INSURERS

A. Duty to Defend

A roof subcontractor obtained insurance to cover its work performed on a building. The subcontractor's insurance policy obligated the insurer to defend the subcontractor and any "additional insured" against any suit seeking damages for "property damage" covered by the policy. A person is an "additional insured" provided that the subcontractor agreed by written contract to designate a person as such. The contract between the subcontractor and general contractor did require the subcontractor to obtain a general liability policy and to designate the general contractor as an additional insured. Even though the contract between the subcontractor and general contractor was not signed by the general contractor, the court held that the contract was still valid because the insurance policy did not expressly state the contract had to be signed by all parties. Therefore, the general contractor was an "additional insured" under the policy.

Applying the eight corners rule, the Fifth Circuit held that the subcontractor's insurer had a duty to defend the general contractor in the lawsuit brought by the property owner. The lawsuit alleged that the general contractor was responsible for numerous material deficiencies affecting portions of the project, including the roof. This would fall under coverage for "property damage" in the subcontractor's insurance policy. The general contractor argued that the insurer violated the Insurance Code by knowingly misrepresenting the subcontractor's insurance coverage in order to avoid defending the general contractor in the suit, and that this violation caused the general contractor to incur defense costs as extra-contractual damages. The Fifth Circuit agreed, applying the recently decided case *USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018). Following *Menchaca*, the Texas Supreme Court outlined two rules that are directly relevant to this case. The "entitled to benefits" rule provides that "an insured who establishes a right to receive benefits under the insurance policy can recover those benefits as 'actual damages' under the [Insurance Code] if the insurer's statutory violation causes the loss of benefits." The "independent injury rule" has two parts: (1) if an insurer's statutory violation causes an injury independent of the insured's right to recover policy benefits, the insured may recover damages for that injury even in the policy does not entitle the insured to receive benefits and (2) an insurer's statutory violation does not permit the insured to recover any damages beyond policy benefits unless the violation causes an injury that is independent from the loss of benefits. The court noted that "as the phrase 'beyond policy benefits' suggests, the independent-injury rule does not restrict the damages an insured can recover under the entitled-to-benefits rule. Rather, the independent-injury rule limits the recovery of *other* damages that 'flow' or 'stem' from a mere denial of policy benefits." Because the general contractor was entitled to a defense from the subcontractor's insurer, the court held if the general contractor established that the insured's alleged misrepresentations caused it to be deprived of that benefit, the general contractor could recover the resulting defense costs it incurred as actual damages under Ch. 541–without limitation from the independent injury rule. Additionally, if the general contractor proves that the subcontractor's insurer committed the statutory violation "knowingly," it may recover treble that amount. *Lyda Swinerton Builders, Inc. v. Okla. Sur. Co.*, 903 F.3d 435 (5th Cir. 2018) (withdrawing its prior opinion in this case, and substituting the new holding in light of *Menchaca*).

After a car accident, all parties reported to the police and insurance company that the driver at fault was the named insured of the car. However, the person actually driving the car was specifically excluded under a named driver exclusion in the policy. The insurer discovered the insured was not the driver of the car right before her deposition. The insurer then sent a letter to the injured party denying coverage for the claim pursuant to the driver exclusion provision in the policy. Counsel for the insured owner of the car withdrew, and judgment was ultimately rendered against the insured, who assigned her potential claim against her insurer to the injured party. The injured party sued the insurer for negligence, breach of contract, breach of the duty of good faith and fair dealing, and violations of the DTPA. The injured party argued that the insurer had a duty to defend the insured in the negligence suit. The lower court granted summary judgment in favor of the insurer stating it had no duty to defend the insured. This court applied the eight-corners rule holding the insurer did have a duty to defend the insured. Even though the insured admits in her deposition that it was not her driving the car, but her husband, who was specifically excluded from the policy, under the eight-corners rule, the court noted that it could not consider such extrinsic evidence as it directly contradicts the injured party's allegations. The court held the insurer was required to defend the insured against allegations that she negligently operated the car, even if the allegations were false or fraudulent. Therefore, the court reversed the summary judgment issued by the lower court in favor of the insurer and remanded the case to the trial court. *Avalos v. Loya Ins. Co.*, No. 04-17-00070-CV, 2018 Tex. App. LEXIS 5629 (Tex. App.–San Antonio July 25, 2018, pet. filed).

An armed gunman entered a nightclub and injured a server. The server required significant medical treatment. She sued the nightclub's operators along with the security company on duty the night she was injured. The server took a default judgment against the security company, as it did not answer, and then sought payment from the security company's insurer. The insurer filed a declaratory judgment seeking a determination that it did not owe a duty to defend or indemnify the security company, as it did not receive notice of the initial lawsuit until over 40 days after the default judgment was entered against its insured. The trial court held that no duty to defend or indemnify was owed by the insurer to its insured because of the insured's delay in providing notice of suit, which also meant the server could not recover against the insurer. The Fifth Circuit affirmed the trial court's decision, stating the delayed notice prejudiced the insurer as a matter of law and relieved the insurer of liability under the policy. *Nautilus Ins. Co. v. Miranda-Mondragon*, 711 Fed. Appx. 214 (5th Cir. 2017).

In affirming summary judgment in insurer's favor, an appellate court reiterated when an insured fails to comply with the notice-of-suit provisions of the policy, an insurance company is not required *sua sponte* to defend its insured. In this case, the injured party's attorney notified insurer of the lawsuit and his intention to proceed with a default judgment against its insured. Following the default judgment, the injured party sued insurer for enforcement of the default judgment. Due to insured's failure to notify his insurer that he expected his insurer to provide a defense, insurer's duty to defend was not triggered. Given a default judgment was obtained, insurer established, as a matter of law, that it was prejudiced by the lack of notice and summary judgment in favor of insurer was appropriate. *Egly v. Farmers Ins. Exch.*, No. 03-17-00467-CV, 2018 Tex. App. LEXIS 1253 (Tex. App.–Austin Feb. 15, 2018, pet. denied).

A minor patron sued a restaurant and its owner for a variety of claims including intentional torts, negligence, gross negligence, and Dram Shop liability as a result of the restaurant's owner over-serving and drugging the patron at the restaurant and then sexually assaulting her at a nearby hotel. Insurer initially provided the owner a defense before seeking declaratory judgment that it had no duty to defend or indemnify the restaurant. The trial court granted insurer's motion for summary judgment based on the liquor-liability and intentional-act exclusions. With respect to the duty to defend, the Fifth Circuit went through the "eight-corners" rule, and explained minor's complaint makes clear that her damages clearly stemmed from her intoxication at the hands of the restaurant. The policy excluded coverage for injuries arising out of or resulting from a criminal act committed by any insured. As her damages arose from a criminal act, the insurer had no duty to defend the underlying suit. Likewise, as for the duty to indemnify, the Fifth Circuit determined the criminal act exclusion bars all coverage. It explained the insurer had no duty to indemnify because the minor's damages arose out of the criminal act of giving alcohol to a minor. *Century Sur. Co. v. Seidel*, 893 F.3d 328 (5th Cir. 2018).

The insurer was required to defend the insured against allegations that she negligently operated the car, even if the allegations were false or fraudulent.

VII. THIRD PARTY THEORIES OF LIABILITY

A. Breach of Contract

Following a fire in a condominium complex, the unit owners sued the property manager and insurance agent for breach of contract and negligence. Due to a lack of contractual relationship, the contract claim against the agent was dismissed. Pursuant to their contract, the HOA Board had the sole responsibility to ensure the proper insurance coverage was in effect. However, the property manager was charged with providing recommendations as to the adequacy of the insurance coverage. The property manager had advised the Board to raise policy limits on two occasions. The Board heeded his advice the first time, but ignored it the second time. The Board asserted the manager's failure to re-advise them of the need to increase the amount of insurance caused its damages. In reasoning the manager did not breach his contract, the court explained, there was no evidence that another warning that the property was underinsured would have caused the Board to increase the amount of insurance. Absent this evidence, the Board failed to establish the manager's failure to advise them caused any damages. With respect to negligence claims, the court advised an insurance broker has common-law duties (1) to use reasonable diligence in attempting to place the requested insurance and (2) to inform the client promptly if unable to do so. This obligation does not extend to the insurance agent. As such, the court declined to place a duty of care on the insurance agent. Therefore, the appellate court affirmed the trial court's granting summary judgment in favor of the agent and property manager. *Ruch v. Ted W. Allen & Assoc., Inc.*, No. 01-15-01081-CV, 2017 Tex. App. LEXIS 9830 (Tex. App.–Houston [1st Dist.] Oct. 19, 2017, pet. denied).

B. Deceptive Trade Practices & Unconscionable Conduct

A woman purchased a new car, and called an insurance agency to discuss coverage for her vehicle. The receptionist at the insurance agency quoted rates from several companies, and told her that the new car would be covered by her existing insurance until she found a new policy. The new car's windshield was broken during an attempted theft, and the existing insurer would not pay the claim, as the new car was not added to the policy. The woman sued the insurance agency she had contacted for the receptionist misrepresenting she was an agent, as well as for claims of negligence and breach of contract. The trial court struck all references to any assumption by the receptionist regarding whether the new car would be covered under the existing insurance policy.

To prevail on a DTPA claim, the plaintiff must prove that (1) the plaintiff is a consumer, (2) the defendant engaged in false, misleading or deceptive practices, and (3) these acts constituted a producing cause of the consumer's damages. The court affirmed the trial court's granting summary judgment in favor of the agency on this issue as it held there was no evidence in the record that any misrepresentation regarding the receptionist's licensure was a producing cause of the woman's damages. *Wagley v. Neighborhood Ins. Specialists*, No. 14-16-00859-CV, 2018

Tex. App. LEXIS 3295 (Tex. App.–Houston [14th Dist.] May 10, 2018, pet. filed).

VIII. SUITS BY INSURERS

A. Subrogation

A truck driver was injured during the course and scope of his employment while at a customer's asphalt terminal. The driver received workers' compensation benefits from his employer's workers' compensation carrier. Subsequently, the driver sued a third party, the owner of the asphalt terminal, and carrier asserted a subrogation interest in any recovery from the third party defendant. At the trial court, it was undisputed that the worker's compensation carrier had executed a "waiver of subrogation." The carrier asserted it waived a direct recovery from the third party; however, it maintained the right to indirectly recover from the driver when he received the settlement funds. The Supreme Court, citing over twenty years of unanimous case law to the contrary, disagreed and held that a carrier cannot indirectly recover from an injured party the proceeds which it contractually agreed not to pursue directly from the third party. The dissent argued that although there was a subrogation waiver, that endorsement did not waive the separate statutory reimbursement allowed by Tex. Labor Code section 417.002. The majority opinion disagreed, holding that an insurer's wavier of the right to subrogation encompassed a waiver of the right to reimbursement. Additionally, when insurer waived its right to recover benefits it paid to employee, it received a higher premium for assuming that risk, making reimbursement inappropriate. *Wausau Underwriters Ins. Co. v. Wedel*, No. 17-0462, 2018 Tex. LEXIS 519 (Tex. June 8, 2018), reh'g denied (Oct. 19, 2018).

IX. DAMAGES & OTHER ELEMENTS OF RECOVERY

A. Policy Benefits

Insurer appealed a trial court decision that its Texas personal auto policy covered punitive damages awarded against its insured. The court of appeals issued an opinion and judgment, but then withdrew it and reissued a substitute opinion and judgment after both parties sought rehearing. The court held the "plain language" of the policy did not cover punitive damages and remanded the case to the trial court. The ruling hinged on the policy's language that insurer "will pay damages for bodily injury or property damage for which any covered person becomes legally responsible because of an auto accident." The court dissected the definitions of the three operative terms: "damages," "for," and "bodily injury." "Damages," it said, simply meant "a sum or money to compensate for an injury;" "for" meant "in exchange as the equivalent of;" and "bodily injury" meant "physical damage to a human being's body." That language, when piled together, "has only one reasonable interpretation: a promise to pay a sum of money as compensation for the bodily injuries sustained by an injured person." The court rejected the insured's (who had assigned his rights against the insurer to the injured party under a turnover order) argument that the term "bodily injury" contemplated punitive damages and the policy did not specifically exclude punitive damages. In so doing, it addressed and declined to follow another Texas appellate court holding the same policy language covered punitive damages. *See Manriquez v. Mid-Century Ins. Co. of Tex.*, 779 S.W.2d 482 (Tex. App.—El Paso 1989, writ denied). The court noted the *Manriquez* decision relied on other appellate decisions granting punitive damage coverage for slightly different policy language that promised to pay "all sums which the insured shall become legally obligated to pay as damages because of…bodily injury." It faulted the *Manriquez* court for "effectively add[ing] the all sums language to the policy" and said "that we cannot do." Furthermore, it said the absence of a policy exclusion for punitive damages "cannot confer coverage." It avoided the insurer's alternative public policy argument against punitive damage coverage because, having found the plain meaning of the policy did not cover punitive damages, it was unnecessary. *Farmers Tex. Cnty. Mut. Ins. Co. v. Zuniga*, 548 S.W.3d 646 (Tex. App.–San Antonio 2017, pet. filed).

X. DEFENSES & COUNTERCLAIMS

A. Limitations

Insureds received their homeowners insurance offer package in June 2013 that contained (1) a notice that their old policy was not being renewed, (2) an offer for a new policy, (3) a comparison of the old and new policy, and (4) a new endorsement that limited coverage to situations where a covered peril (such as hail) punctures a roof or renders it functionless, and explicitly excluded coverage for denting and scratching. The offer package did not include a copy of the proposed policy but urged the insureds to review the policy and to contact their insurance agent for more information. The insureds purchased the new policy. Three years later, a hailstorm occurred in April 2016 cosmetically damaging the insureds' roof. In January 2017, the insureds sued their insurance company and agent for violations of the Tex. Ins. Code sect. 541 for claims relating to the insurance packet. A person must bring an action under that chapter before the second anniversary of either (1) the date the unfair practice occurred; or (2) the date the person discovered or, by the exercise of reasonable diligence should have discovered that the unfair practice occurred. The insureds argued that the limitations was tolled until the hail storm in April 2016. Before then, they argue that the "exercise of reasonable diligence" would not have permitted them to discover the basis for their claims, that the entire policy was not included in the packet, that the summary comparison had misleading language, and that their agent did not actually write the letter encouraging the insureds to contact him about their policy. The Fifth Circuit disagreed holding that reasonable diligence would have allowed the insured to find out each of the alleged claims prior to the hailstorm. Therefore, the claim was time barred, as the statute was not tolled based on the discovery rule. *Sideman v. Farmers Grp.*, No. 17-51106, 2018 U.S. App. LEXIS 25855 (5th Cir. Sept. 12, 2018).

XI. PRACTICE & PROCEDURE

A. Jurisdiction

A property owner, Bell, sold Texas property to a buyer and transferred the proceeds of the sale to Goldsmith, a friend. A year after the sale of the property, the U.S. government told the buyer it had a lien on the property. The title insurance company had to pay the federal government for the release of the lien. Insurer sued Bell, a Texas resident, and Goldsmith, a Louisiana resident under the Texas Uniform Fraudulent Transfers Act for alleged fraudulent transfers. The court of appeals, affirming the trial court's ruling, held Goldsmith did not purposefully avail herself of the state of Texas for personal jurisdictional purposes. On appeal, insurer asserted Goldsmith made the following contacts with Texas: (1) weekly telephone calls with a Texas resident; (2) knowingly making eighty-one transfers to a bank account in Texas; (3) held a lien on three vehicles in Texas; and (4) accepted and deposited sales proceeds from a Texas resident derived from Texas real property. The Supreme Court highlighted purposeful availment requires that a defendant "seek some benefit, advantage or profit by availing itself of the jurisdiction." The Supreme Court determined Goldsmith did not seek a benefit from the phone calls and upheld the lower courts' rulings by determining Goldsmith's contacts were too attenuated to establish jurisdiction. *Old Republic Nat'l Title Ins. Co. v. Bell,* 549 S.W. 3d 550 (Tex. 2018).

B. Venue

In this case there are 11 pending lawsuits in four different counties against multiple Farmers entities. The Texas Supreme Court held that because these suits allege contractual and extra-contractual causes of action based on Farmers' handling of residential property damage claims arising out of Hurricane Harvey, these cases are related and that transfer to a single pretrial court for coordinated pretrial proceedings would result in a more efficient pretrial of the related cases. However, the court declined to appoint a judge from Harris County, stating that it disfavors requests to appoint specific judges. *In re Farmers Ins. Co. Hurricane Harvey Litig.*, MDL 18-0547, 2018 Tex. LEXIS 737 (Tex. July 27, 2018).

In another multi-district litigation panel, the Texas Supreme Court denied an insurer's motion for rehearing of remand of tag along cases, holding that nine cases that had been removed from the MDL 2 Pre-trial Panel were properly remanded to their original trial courts. The court held that these remanded cases did not contain claims of standard or common business practices, which was the reason the MDL 2 cases had been transferred together. The insurer argued that since the lawyers had the benefit of the MDL discovery, they cannot later have their case "prosecuted in a vacuum." The court disagreed, stating that argument would preclude remand of any case once it is placed in an MDL pre-trial court. *In re Farmers Ins. Co. Wind/Hail Storm Litig.*, MDL No. 16-0142, 2018 Tex. LEXIS 704 (Tex. July 13, 2018).

C. Discovery

Insured brought contractual and extra-contractual claims against her insurer based on a car accident with an underinsured motorist. The extra-contractual claims were severed and abated. In the underlying contractual claim, the handling adjuster verified insurer's responses to interrogatories. As such, insured noticed the adjuster's deposition. Insurer's motion to quash was denied and insurer sought mandamus relief. The court of appeals granted relief and determined the adjuster's deposition was not relevant to any asserted claim or defense, as questions about uninsured motorist coverage await determination of primary liability and damages. *In re Liberty Cnty. Mut. Ins. Co.,* 537 S.W.3d 214 (Tex. App.–Houston [1st Dist.] 2017, no pet.).

D. Arbitration

A farmer purchased a crop revenue coverage insurance policy through an insurance agency. The insurance policy contained an arbitration clause that referred to the insurer and farmer. The insurance agency was not named in the policy, nor did anyone from the agency sign the agreement. The farmer lost a crop and claimed he promptly contacted the insurance agency to report the loss. The claim was denied on several bases, including that the farmer did not provide timely notice to the insurer. The dispute was arbitrated, and the farmer lost on the issue that he did not timely provide notice of his claim. The farmer then sued the agency and agent for breach of fiduciary duty and deceptive trade practices. The agency moved to compel arbitration, which the farmer opposed arguing that the agency was a non-signatory to the arbitration agreement, but the trial court granted the agency's request. The agency won the arbitration, with the arbitrator deciding it had the right to arbitrate even though the agency was a non-signatory to the policy. The trial court confirmed the arbitration award, and the court of appeals affirmed. The farmer filed a petition for review with the Texas Supreme Court. The Texas Supreme Court held that given the absence of clear and unmistakable evidence that the farmer agreed to arbitrate arbitrability in a dispute with a non-signatory, compelled arbitration could not precede a judicial determination that an agreement to arbitrate existed. Therefore, the trial court should have determined whether a valid agreement existed between the farmer and the agency before any issue was referred to arbitration. Arbitrators lack authority to resolve a dispute absent a valid arbitration agreement. There are only six scenarios where arbitration with a non-signatory may be required: (1) incorporation by reference, (2) assumption, (3) agency, (4) alter ego, (5) equitable estoppel, and (6) third-party beneficiary.

The court held that the insurer did not have control over the agency's actions in relaying information from the farmer to the insurer, and therefore the insurer did not exercise control over the agency, so arbitration could not be compelled on an agency argument. Additionally, direct-benefits estoppel did not apply because the farmer was not attempting to sue the agency under the contract, but then avoid the arbitration clause in the contract. The farmer's claims against the agency are independent of the insurance policy, as they are general, non-contract obligations. Because the farmer and the agency did not agree to arbitrate any matter - not the question of arbitrability and not the merits of the dispute - the farmer should not have been compelled to arbitrate. Moreover, the agency and estoppel theories do not apply. Therefore, the court reversed the court of appeals' judgment, vacated the arbitration award, and remanded the case to the trial court for further proceedings. *Jody James Farms, JV v. Altman Grp, Inc.*, 547 S.W.3d 624 (Tex. 2018).

E. Appraisal

An insured submitted claims to its insurer for damage sustained to its apartment complexes. After the damage amount could not be agreed to, the insurer demanded appraisal as set out in the insurance policy. The insured then filed suit against the insurer, after which the insurer filed a motion to compel appraisal and abate the lawsuit. The trial court denied the insurer's motion to compel appraisal and request for abatement, and the insurer filed a petition for writ of mandamus to the appellate court. No claim of illegality was made against the insurer which would allow a waiver of the appraisal process in the contract. Moreover, the court held a waiver of the appraisal right did not occur, as an impasse was not reached in the case before the appraisal clause was invoked. An "impasse" is "the apparent breakdown of good-faith negotiations." The court held that even though the insured and insurer were arguing about the cost of repairs, that alone was not notice of an impasse. Additionally, the court noted the insured never notified the insurer that it refused to discuss the matter further prior to the appraisal request. It was only after the insured filed suit that the insurer had notice of the impasse, and by that time, it had already invoked the appraisal clause. Therefore, the appellate court vacated the order denying the insurer's motion to compel appraisal and abate, ordered the parties to engage in the appraisal process, and abated the lawsuit pending the completion of the appraisal

The Texas Supreme Court held that given the absence of clear and unmistakable evidence that the farmer agreed to arbitrate arbitrability in a dispute with a non-signatory, compelled arbitration could not precede a judicial determination that an agreement to arbitrate existed.

process. *In re Acceptance Indem. Ins. Co.*, No. 04-18-00231-CV, 2018 Tex. App. LEXIS 7795 (Tex. App.–San Antonio Sept. 26, 2018, pet. filed).

An insured filed a lawsuit against his homeowners insurer after his house was damaged. Insurer invoked the appraisal process and timely paid the cash value of the appraisal award. The trial court granted insurer's motion for summary judgment on the contractual and extra-contractual claims, as the insurer timely paid the award and the insured failed to show he suffered damages above and beyond the failure to receive policy proceeds. The court cited to *USAA Tex. Lloyds Co. v. Menchaca*, No. 14-0721, 2017 Tex. LEXIS 361 (Tex. April 7, 2017), to state that the insured must establish that the statutory violation caused an injury that is independent from the loss of benefits. Insured appealed and argued several covered items were excluded from the appraisal award. The court of appeals highlighted the insured failed to amend his pleadings to assert one of the three grounds to set aside the appraisal award. Further, the insured failed to move for the trial court to set aside the appraisal award. As such, the award bound the parties to the amount of the loss, and the insurer's tender of the amount owed estopped the insured from bringing a breach of contract claim. Likewise, insured's extra-contractual claims were barred by the controlling nature of the appraisal award. *Zhu v. First Cmty. Ins. Co,* 543 S.W.3d 428 (Tex. App.–Houston [14th Dist.] 2018, pet. filed) (It should be noted this case was decided prior to the new *Menchaca* ruling and cites to the old *Menchaca* case).

Insured submitted claim to his insurer after his property was damaged in a storm. Insurer said damage did not exceed deductible, so no payment was made. Insured then sued insurer for contractual and extra-contractual claims. The insurer invoked the appraisal process provided for in the policy, and the case was abated pending completion of the appraisal. Insurer timely paid the appraisal award, and the trial court granted summary judgment in insurer's favor holding payment of the appraisal award estopped the insured from maintaining a breach of contract claim and precluded the extra-contractual claims. On appeal, insured argued the court of appeals should reconsider its prior precedent based on the *Menchaca* decision that said a statutory bad faith claim could be proven without a corresponding breach of contract claim. However, the appellate court distinguished *Menchaca* on the basis it did not involve the payment of an appraisal award. Further, the court of appeals discussed the five rules outlined in *Menchaca* and explained the insurer was still entitled to summary judgment. *Ortiz v. State Farm Lloyds*, No. 04-17-00252-CV, 2017 Tex. App. LEXIS 10395 (Tex. App.–San Antonio Nov. 8, 2017, pet. filed).

An insured school district sued the Texas Windstorm Insurance Association for its handling of the school's Hurricane Ike claims. TWIA invoked the appraisal process which awarded $10.8 million in damages. TWIA failed to pay the award and argued the damages were not caused by covered perils, wind and hail. Rather, TWIA asserted the policy explicitly excluded damage caused by or resulting from "rain, whether driven by wind or not unless wind or hail first makes an opening in the walls or roof of the described building." Ultimately, the matter proceeded to trial where the jury awarded the school district $9.6 million in damages. TWIA appealed and argued, in part, the school district failed to establish the damages reflected in the appraisal award were caused by covered perils. Appraisal clauses generally estop a litigant from contesting damages; however, liability questions are reserved for the courts, especially when different causes are alleged for a single injury to property. The court explained, under the doctrine of concurrent causes, the insured is entitled to recover that portion of the damage caused solely by the covered peril. The matter was remanded, in part, to allow the parties to offer expert evidence to establish whether or not the damage was caused by a covered peril. *Tex. Windstorm Ins. Ass'n v. Dickinson Indep. Sch. Dist.*, No. 14-16-00474-CV, 2018 Tex. App. LEXIS 8083 (Tex. App.–Houston [14th Dist.] Oct. 4, 2018, no pet.).

Insured sued homeowners insurer for breach of contract and extra-contractual claims after he disagreed with its damage appraisal on a water damage claim. The trial court appointed an umpire to rule between the two appraisers, and the umpire sided with the insurer. Insured moved to vacate the award and appoint a new umpire because the award was "clearly a product of mistake." At the same time, insurer had a pending motion for summary judgment. The trial court denied the insured's motion, affirmed the umpire's award, and granted the insurer summary judgment on the insured's contractual claim. Insurer filed a second motion for summary judgment attacking the extra-contractual claims, which the trial court granted. Insured appealed, alleging the trial court erred in denying his motion to vacate and granting summary judgment to the insurer. The court of appeals sided with the insurer and affirmed the trial court's decisions. It acknowledged "mistake is one of the few grounds upon which an insurance appraisal award may be vacated," but that only applies when "the award fails to speak what the appraisers intended." Mere disagreements between appraisals are not mistakes and the umpire's decision to choose one over the other did not mean "'the appraisal resulted from accident or mistake.'" (quoting *MLCSV10 v. Stateside Enters., Inc.*, 866 F. Supp. 2d 691, 702 (S.D. Tex. 2012). The court also held that "mere omission of some aspect of damage" from the disputed appraisal is not sufficient to establish a mistake. The court upheld the trial court's summary judgment disposing of the insured's contractual claim because the insured based his appeal of that issue on the court's failure to grant his motion to vacate—which the appellate court affirmed. The court next addressed the insured's extra-contractual claims. It found the trial court's granting of summary judgment was proper because, in each instance, the insured failed to show evidence of actual damages or independent injury that resulted from his extra-contractual claims. Quoting the Supreme Court's recent decision in *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018), the court held an insured can only recover bad-faith damages if they are different from the benefits due under the contract. The court said the insured "cited us to no evidence of him suffering damages, much less to evidence of any injury causing damages independent of the benefits under the [insurer's] insurance policy." *Abdalla v. Farmers Ins. Exch.*, No. 07-17-00020-CV, 2018 Tex. App. LEXIS 3358 (Tex. App.–Amarillo May 14, 2018, no pet. h.).

F. Severance & Separate Trials

Insured sued underinsured motorist (UIM) insurer alleging breach of contract and extra-contractual claims after receiving the policy limits from the other party's insurer for injuries from a car accident. Citing *Brainard v. Trinity Universal Ins.* Co., 216 S.W.3d 809 (Tex. 2006), insurer moved to sever and abate the extra-contractual claims. Insured objected to abatement, citing the Texas Supreme Court's recent decision in *USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018), that held contractual and extra-contractual claims are "distinct and independent" of each other. The trial court severed the extra-contractual claims, but did not abate them. Insurer sought mandamus relief from the court of appeals, which said "[w]e believe the plaintiffs read *Manchaca* [sic] too broadly." *Menchaca*, it held, did not bluntly apply to UIM cases because, for one thing, it "never mentions *Brainard*, much less overrules or limits *Brainard*." For that to happen, the Supreme Court would have to do it itself. "When the Texas Supreme Court's decisions create uncertainties, 'it is [the Supreme Court's] duty to settle the conflicts in order that the confusion will as nearly as possible be set to rest…'" (citing *Trapp v. Shell Oil Co.*, 145 Tex. 323, 198 S.W.2d 424, 427 (1946)).

The court cited its sister court dealing with a congruent post-*Brainard* issue this year: "[W]hatever the virtues of a contrary rule might be, as an intermediate court, we are bound to follow the rule laid down in *Brainard* unless and until the supreme court reconsiders or revises it." *Weber v. Progressive Cnty. Mut. Ins. Co.*, 2018 Tex. App. LEXIS 784 (Tex. App.–Dallas Jan. 26, 2018). Nevertheless, the court swiftly concluded "we believe the holding in *Menchaca* is consistent with the holding in *Brainard*." Quoting *Brainard,* it agreed UIM insurance is unlike other first-party insurance contracts because it relies on tort law to determine an insured's right to recover policy benefits. "[A] 'UIM contract is unique because, according to its terms, benefits are conditioned upon the insured's legal entitlement to receive damages from a *third* party.'" Having settled that, it moved on to whether it was improper for the trial court to refuse to abate the insured's extra-contractual claims. It cited two post-*Menchaca* appellate decisions that denied discovery on extra-contactual UIM claims that had been severed and abated. *See In re Allstate Fire & Cas. Ins. Co.*, 12-17-00266-CV, 2017 WL 5167350, at *4 (Tex. App.–Tyler Nov. 8, 2017, orig. proceeding)(mem. op.); *In re Liberty Mut. Ins. Co.*, 01-17-00363-CV, 2017 WL 4414033, at *4 (Tex. App.–Houston [1st Dist.] Oct. 5, 2017, orig. proceeding). The cases were instructive, the court reasoned, because they acknowledged discovery on contractual claims may be irrelevant to extra-contractual claims and protected an insurer from expending litigation resources on extra-contractual claims that could be rendered moot.

The court disregarded two pre-*Menchaca* appellate decisions used by the plaintiffs to show a "trend" allowing discovery on extra-contractual UIM claims. *See In re Luna*, 13-16-00467-CV, 2016 WL 6576879, at *1 (Tex. App.–Corpus Christi Nov. 7, 2016, orig. proceeding); *In re Garcia*, 04-07-00173-CV, 2007 WL 1481897, at *1 (Tex. App.–San Antonio May 23, 2007, orig. proceeding). "We do not believe either *Luna* or *Garcia* is inconsistent with the continued viability of *Brainard*," the court ruled. It noted that, in both cases, the extra-contractual claims had been severed and abated, and the court allowed discovery relevant to the breach of contract claims—something the insured was presumably free to do in this case as well. The court highlighted *Menchaca* did not involve a UIM claim or whether contractual and extra-contractual claims should be severed and abated. Therefore, the court granted the insurer's petition for writ of mandamus and directed the trial court to vacate the portion of its order denying the insurer's motion to abate, and abate the extra-contractual claims. *In re State Farm Mut. Auto. Ins. Co.*, 553 S.W.3d 557 (Tex. App.–San Antonio 2018, no pet. h.).

Insured was involved in a car accident with an uninsured driver which was not made a party to the underlying suit. Instead, insured sued insurer under the uninsured motorist provision of her policy. In her petition, insured alleged breach of contract, bad faith, as well as various violations of the DTPA and Insurance Code. The trial court denied insurer's motion to sever and abate the extra-contractual claims from the underlying claim until insured proved her contractual right to UIM benefits. The court of appeals granted mandamus and instructed the trial court to sever and abate the extra-contractual claims. The court noted an insured first has to show insurer is liable on the contract before the insured can recover on extra-contractual claims against an insurer for failing to pay or settle an underinsured claim. The court reasoned insurer was in a catch-22 situation and would be prejudiced by its submission of settlement offers. Absent a severance, insurer would have to decide whether to admit or exclude evidence of a settlement offer which jeopardizes the successful defense of the other claim. Specifically, in the contract claim, insurer will insist on excluding evidence of a settlement offer to negate liability. However, in the extra-contractual claims, insurer would insist on admitting the settlement offer to negate liability. Therefore, severance and abatement was appropriate. *In re Germania Ins. Co.*, No.13-18-00102-CV, 2018 Tex. App. LEXIS 2834 (Tex. App.–Corpus Christi April 23, 2018, no pet.).

G. Evidence

Insureds sued homeowners insurer after it denied their storm damage claim. Insurer filed traditional and no-evidence motion for summary judgment. Insureds responded with late-filed evidence, including two expert reports and an affidavit, and the insurer objected in writing. The trial court granted the insurer's summary judgment motion without specifying the grounds for the judgment, and failed to rule on the insurer's objections. The appellate court affirmed the trial court's judgment and held insured's summary judgment evidence was incompetent, as the reports were not verified or authenticated. The Texas Supreme Court noted that if purported summary-judgment evidence presents a defect in "form," the defect cannot provide "grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend." (citing Tex. R. Civ. P. 166a(f)). Moreover, if the insurer complained of a defect in form, the insurer was obligated to object and also obtain a ruling on its objection. The appellate court must have thought the defects complained of were substantive, which can be complained of for the first time on appeal. However, the defect the insurer complained of was one of form, so the insurer was required to obtain a ruling on the objection from the trial court. Therefore, the Texas Supreme Court reversed and remanded to the appellate court, holding that because insurer failed to obtain a ruling on its evidentiary objections to the affidavit's form from the trial court, the appellate court improperly disregarded it. *Seim v. Allstate Tex. Lloyds*, 551 S.W.3d 161 (Tex. 2018).

XII. OTHER ISSUES

A. Multiple Insurers

Insured sued two related underinsured motorist insurers for failure to pay claims after he settled with the liability carrier and another underinsured motorist carrier that covered the vehicle he was driving at the time of an automobile collision. The insurers denied the claims based on the "other insurance" provisions in their policies that deemed their coverage "excess over any other collectible insurance." The trial court granted summary judgment for the insurers and the court of appeals reversed and remanded, after which the parties stipulated to the tortfeasor's liability and the insured's total damages—which were less than the amount the insured recovered from the liability and primary

UIM carriers. Insured argued at trial that his UIM policies should both pay because "if you buy five life insurance policies, you get paid five times," but the trial court again found in favor of the insurers. Insured appealed arguing the "other insurance" language violated Sec. 1952.106 of the Insurance Code. The appellate court affirmed because the "other insurance" provisions did not prevent the insured from recovering his actual damages caused by the underinsured motorist. *Elwess v. Tex. Farm Bureau Mut. Ins. Co.*, 538 S.W.3d 776 (Tex. App.–Eastland 2017, no pet. h.).

B. Excess & Primary Coverage

An insured general contractor was hired to build a courthouse, and hired subcontractors to perform different construction roles. In addition to a first layer of insurance, the insured purchased a second layer of insurance that would kick in after the first layer was depleted. The construction did not go well, and the insured was fired from the job and the dispute was arbitrated with the final award totaling over $8 million. The insured brought subcontractors into the arbitration and settled with the subcontractors for around $4.5 million. After the first layer of coverage was exhausted, the insured looked to the second layer insurer who argued that the remaining amount fell under uncovered damages in the policy. The court held that the insured bore the burden to show that the subcontractor settlement proceeds were properly allocated to either covered or non-covered damages. Because the insured did not provide a detailed allocation, the Fifth Circuit affirmed the district court's granting summary judgment in favor of the second layer insurer. *Satterfield & Pontikes Constr., Inc. v. U.S. Fire Ins. Co.*, 898 F.3d 574 (5th Cir. 2018).

C. Worker's Compensation

Fuentes v. Texas Mut. Ins. Co., No. 04-16-00662-CV, 2018 Tex. App. LEXIS 2881 (Tex. App.–San Antonio Apr. 25, 2018, no pet.) involves a beneficiary's entitlement to workers' compensation benefits following her husband's death on the way to work. Insured worked at an air force base in San Angelo, Texas. Insured was tasked with delivering his crew's timesheet each week to the employer's office in San Angelo. He was permitted to fax the timesheets; however, he routinely dropped the time sheets off on his way to work at the air force base. Insured was involved in car accident on his way to the employer's office before starting his work day at the air force base.

The court reiterated travel to and from work is statutorily excluded from course and scope of work. This exclusion is commonly referred to as the "coming and going" exclusion. If an employee's ultimate destinations are home and work, the coming and going exclusion must be analyzed. The Texas Supreme Court has explained that for a claimant to recover for an injury occurring while traveling, he must show that the injury occurred while in "furtherance of his employer's affairs or business" and that the injury "originated in the employer's work, trade, business, or profession." The furtherance factor is generally met by traveling to and from work as "an employee's travel to and from work makes employment possible and furthers the employer's business, satisfying" the furtherance requirement.

Origination is a separate inquiry in which the court looks at many factors, including (1) whether the employment contract expressly or impliedly required the travel involved; (2) whether the employer furnished the transportation; (3) whether the employee was traveling on a special mission for the employer; and (4) whether the travel was at the direction of the employer, such as requiring the employee to bring tools or other employees to work or another location. After a fact intensive analysis, the court determined the insured's travel failed to meet the origination element. The court focused on the fact the insured worked on a separate worksite, was not reimbursed for travel, and was not in a company vehicle. Therefore, the court affirmed the trial court's summary judgment in favor of the insurer. *Fuentes v. Tex. Mut. Ins. Co.*, No. 04-16-00662-CV, 2018 Tex. App. LEXIS 2881 (Tex. App.–San Antonio Apr. 25, 2018, no pet.).

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1 *See Aldous v. Darwin Nat'l Assurance Co.*, 889 F.3d 798 (5th Cir. 2018); *Lyda Swinerton Builders, Inc. v. Okla. Sur. Co.*, 903 F.3d 435 (5th Cir. 2018); *State Farm Lloyds v. Fuentes*, 549 S.W.3d 585 (Tex. 2018); *Abdalla v. Farmers Ins. Exch.*, No. 07-17-00020-CV, 2018 Tex. App. LEXIS 3358 (Tex. App.–Amarillo May 14, 2018, no pet. h.).
2 *Perrett v. Allstate Ins. Co.*, No. 4:18-CV-01386, 2018 U.S. Dist. LEXIS 97405 (S.D. Tex. June 11, 2018).
3 *Avalos v. Loya Ins. Co.*, No. 04-17-00070-CV, 2018 Tex. App. LEXIS 5629 (Tex. App.–San Antonio July 25, 2018, pet. filed).
4 *Wausau Underwriters Ins. Co. v. Wedel*, No. 17-0462, 2018 Tex. LEXIS 519 (Tex. June 8, 2018).
5 *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018).
6 *See In re State Farm Mut. Auto. Ins. Co.*, 553 S.W.3d 557 (Tex. App.–San Antonio 2018, no pet. h.).
7 *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018).
8 *Id.*

Class Arbitration – Can It Even Work?

By Jay Bogan*

Courts continue to devote a lot of attention to class arbitration. The U.S. Supreme Court has a case on its docket, the Eleventh Circuit just decided an issue of first impression, and another important case is teed up before the Second Circuit.

But the most important question underlying all of this jurisprudential activity remains: Can class arbitration even work?

Think about your typical consumer fraud class action. The class representative files the class action in a trial court, such as an Article III federal district court, where it will be governed by rules of procedure constituting, essentially, legislative enactment, often Federal Rule of Civil Procedure 23. Most of these cases seek damages, such as under Federal Rule 23(b)(3), with the result that all class members receive notice and an opportunity to opt out if the court grants certification or approves a class settlement. In other words, your typical class action (as opposed to a collective action under the federal Fair Labor Standards Act) will not be structured as an ***opt-in*** class. If the class member receives notice and fails to opt out, the class member ultimately will be bound by the judgment entered by the trial court, whether favorable or unfavorable to the class.

How do you bind absent class members through an arbitration process, where the arbitrator's power derives solely from the parties' private contractual framework, and without the recognized authority of a court acting pursuant to procedural rules that have the force of law?

Justice Alito raised the issue of whether a class arbitration can effectively bind absent class members in his concurring opinion in *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 573 (2013) (Alito, J., concurring), and the issue has been ruled on by the Southern District of New York in a case now pending on appeal before the Second Circuit.

In his concurrence, Justice Alito reasoned that where an arbitration agreement does not explicitly authorize class arbitration, the distribution of opt-out notices to the putative members of an arbitration class would not be sufficient to bind them to a class arbitration award. *Sutter*, 569 U.S. at 574. "'[A]rbitration is simply a matter of contract between the parties,' and an offeree's silence does not normally modify the terms of a contract." *Id.* (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995), and citing 1 *Restatement (Second) of Contracts* § 69(1) (1979)). According to Justice Alito, "at least where absent class members have not been required to opt *in*, it is difficult to see how an arbitrator's decision to conduct class proceedings could bind absent class members who have not authorized the arbitrator to decide on a classwide basis which arbitration procedures are to be used." *Id.* (emphasis in original).

In the recent Southern District of New York case, Judge Jed Rakoff held the arbitrator could *not* bind absent class members to class procedures under an arbitration agreement that did not explicitly authorize class arbitration, even if the named parties had agreed to submit the class issue to the arbitrator. *Jock* *v. Sterling Jewelers Inc.*, 284 F. Supp. 3d 566 (S.D.N.Y. 2018), *appeal filed*, No. 18-153 (2d Cir. Jan. 18, 2018). According to Judge Rakoff, who relied in important respects on Justice Alito's concurrence in *Sutter*, only the named parties to the arbitration proceeding and specific class members who agreed to *opt in* could be bound by the arbitrator's decision. And he recognized that the question of whether absent class members could be bound where the parties' arbitration agreement explicitly authorized class arbitration remained unresolved. *Id*. at 570 n.2 (stating that he "need not reach the question of whether, had the RESOLVE agreement, in fact, permitted class procedures, the Arbitrator would have had the authority to bind absent class members based on the fact that each absent class member agreed to such procedures by virtue of having signed the agreement").

As class action waivers continue to proliferate in consumer and employment contracts, the question of whether class members can be bound where an arbitration agreement expressly authorized class arbitration may never be answered. But even assuming every member of a putative class had agreed to a clause authorizing class arbitration, an absent class member might still later object to a class arbitration award, arguing, for example, that he or she did not have an opportunity to select the arbitrator, an opportunity always afforded under arbitration agreements and rules.

The Supreme Court recently heard a class arbitration case out of the Ninth Circuit. In that case, a 2-1 Ninth Circuit panel affirmed the district court's ruling that class arbitration claims could proceed, because ambiguous language in the contract regarding class arbitration had to be construed against the drafter of the contract under the state law contractual interpretation doctrine of *contra proferentem*. *See Varela v. Lamps Plus, Inc.*, 701 F. App'x 670, 672-73 (9th Cir. 2017), *cert. granted*, 138 S.Ct. 1697 (U.S. 2018). If the Supreme Court will address the deeper question of whether opt-out class arbitration can ever work – or address only whether the Ninth Circuit's ruling can be squared with *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) – remains to be seen.

In *JPay, Inc. v. Kobel*, 904 F.3d 923 (11th Cir. 2018), a 2-1 Eleventh Circuit panel decided, as matter of first impression, that the availability of class arbitration constitutes a substantive, gateway question of arbitrability that is presumptively for a court (rather than an arbitrator) to decide. But the Eleventh Circuit went on to hold that the parties had "clearly and unmistakably" assigned that question to a private arbitrator in their arbitration agreement (*i.e.*, the parties' contractual language overcame the presumption). The arbitration agreement in *JPay* said nothing specifically about class arbitration, prompting a strong dissent to the majority's interpretation of the contract. And the dissent noted the Supreme Court soon will be addressing the contractual interpretation issue in *Lamps Plus, Inc. v. Varela*, 138 S.Ct. 1697 (U.S. 2018) (cert. granted).

As the dissent in *JPay* notes, a Supreme Court ruling in *Lamps Plus* that the Federal Arbitration Act displaces contractual interpretation rules such as *contra proferentem* likely would require vacatur of the *JPay* majority's ruling. But the Supreme Court (or one or more concurring justices) may take the occasion to address the deeper question of whether a class arbitration can ever work. If an arbitrator could never bind absent class members to an "opt out" class arbitration award, questions about whether an ambiguous arbitration agreement assigns the class arbitration issue to the arbitrator in the first instance would become purely academic. And even if *Lamps Plus* does not provide the vehicle to address this question of arbitrator power, the Second Circuit's forthcoming decision in *Jock v. Sterling Jewelers* may constitute the first federal appellate court decision to address the issue directly.

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Class Arbitration – Can It Even Work? Update

Shortly after oral arguments were heard in *Lamps Plus*, discussed above, the author composed the following blog post.

As I explored in the above article ("*Class Arbitration – Can it Even Work?*"), conducting a class arbitration like most class actions – that is, giving absent class members notice and an opportunity to opt-out – may not be sufficient to bind absent class members to a class arbitration award. This problem arises from the purely contractual nature of arbitration and the fact the arbitrator does not have the authority of a court to enforce procedural rules that have the force of law.

The U.S. Supreme Court recently explored this threshold question of viability during oral argument in *Lamps Plus, Inc. v. Varela*, No. 17-988 (U.S. argued Oct. 29, 2018). As noted above, in *Lamps Plus*, a 2-1 Ninth Circuit panel affirmed the district court's ruling allowing class arbitration claims to proceed, agreeing with the lower court that ambiguous language in the contract regarding class arbitration had to be construed against the drafter of the contract under the state law contractual interpretation doctrine of *contra proferentem*. In a two-sentence dissenting opinion, Judge Fernandez concluded that the arbitration agreement – which did not expressly refer to class arbitration – was "not ambiguous" and "[w]e should not allow Varela to enlist us in this palpable evasion of *Stolt-Nielsen*."

Judge Fernandez's dissent focused on *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010). In *Stolt-Nielsen*, the Supreme Court held that, because of the vast differences between bilateral and class arbitration, a party's consent to class arbitration cannot be inferred solely from the fact that the party agreed to arbitrate in the first place. In Judge Fernandez's view, inferring consent to class arbitration based on *contra proferentem* could not be reconciled with *Stolt-Nielsen*.

During oral argument before the Supreme Court, questions from several Justices indicated interest in the deeper question of viability of any opt-out class arbitration, as opposed to addressing only the *Stolt-Nielsen* issue. Several of these questions reflected the concerns articulated by Justice Alito in 2013, when he raised the issue of whether a class arbitration can effectively bind absent class members in his concurring opinion in *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 573 (2013) (Alito, J., concurring). During the *Lamps Plus* argument, Justice Gorsuch asked: "[W]hat do we do with the due process problem that Justice Alito pointed out in Oxford Health?" and "What do we do about those absent class members in opt-out class classes permitted by whatever arbitrable forum's rules prevail?" Transcript of Oral Argument, at 37-38. Justice Gorsuch then tied this "due process" issue to the issue of contractual interpretation: "[S]hould we ignore [the due process issues] in considering the impact here of the Arbitration Act and normal contract principles and whether normal contract principles would abide due process, for example?" *Id.* at 38.

Picking up on his own concurrence in *Oxford Health*, Justice Alito asked: "But do you think that … absent class members who didn't agree to arbitration could be bound by the decision of the arbitrator? … if [absent class members] have a legal claim, how can they be deprived of their legal claim pursuant to an arbitration award if they never agreed to arbitration? I thought arbitration was a matter of contract." *Id.* at 39-40.

Earlier comments by Justice Kavanaugh and Chief Justice Roberts indicate the Supreme Court might find a way to tie the due process issue to the contractual interpretation issue. According to Justice Kavanaugh, if "*Stolt-Nielsen* said that you needed something on the order of express language" to authorize class arbitration, then "the ship has sailed" on the contractual interpretation issue before the Court *Id.* at 20. Chief Justice Roberts, discussing the supposedly "neutral" contractual interpretation rule of *contra proferentem*, remarked: "[T]he question really is whether they're neutral principles. … the argument is that applying these principles has a peculiar impact on arbitration agreements since it authorizes a type of arbitration that is – is like a poison pill that basically [we] said in prior cases is fundamentally inconsistent

Earlier comments by Justice Kavanaugh and Chief Justice Roberts indicate the Supreme Court might find a way to tie the due process issue to the contractual interpretation issue.

with arbitration." *Id*. at 32-33. He later remarked: "So, if the [Federal Arbitration Act] says enforce the contract[] according to its terms, but one of the terms, as our prior precedents say, is fundamentally inconsistent with arbitration itself, then, presumably, the FAA would preclude that term." *Id*. at 35.

Based on these comments, it is possible the U.S. Supreme Court will require that an arbitration agreement contain (borrowing the words of Justice Kavanaugh) "express language" authorizing class arbitration, before a district court or arbitrator can rule that class arbitration may proceed. Otherwise, it cannot be presumed from an arbitration agreement that the parties agreed to a process with inherent due process problems and therefore dubious finality.

But the Court also could address the deeper issue, addressing an arbitrator's power to bind absent parties to any type of representative ruling. The Court could rule that the interpretation issue relates to the underlying contractual basis for arbitration and thus requires, as a matter of due process, a basis for finding express consent by the absent parties to having a single arbitrator or panel of arbitrators decide all of the class members' claims. In other words, unless every class member's arbitration agreement unambiguously authorized an arbitrator selected by a different class member to adjudicate the claims of absent class members, then the absent class members could not be said to have agreed to class arbitration (unless they separately "opted in" to the class arbitration). Such an arbitration agreement almost certainly does not exist.

Ultimately, the *Stolt-Nielsen* issue may become purely academic, as more and more arbitration agreements will include an unambiguous class action waiver.

Ultimately, the *Stolt-Nielsen* issue may become purely academic, as more and more arbitration agreements will include an unambiguous class action waiver. In the meantime, it will be interesting to see if *Lamps Plus* merely extends the *Stolt-Nielsen* rule or takes on Justice Alito's threshold question of an arbitrator's power to bind absent class members.

Consumer News Alert Recent Decisions

Since 2006, the Center for Consumer Law has published the "Consumer News Alert." This short newsletter contains everything from consumer tips and scam alerts, to shopping hints and financial calculators. It also has a section just for attorneys highlighting recent decisions. The alert is delivered by email three times a week. Below is a listing of some of the cases discussed during the past few months. If a link does not work, it may be necessary to cut and paste it to your browser. To subscribe and begin receiving your free copy of the Consumer News Alert in your mailbox, visit www.peopleslawyer.net

FEDERAL CIRCUIT COURTS

Debt collector must face claim over voicemail. The Third Circuit revived a putative class action alleging a debt collector violated federal law when it did not use its actual corporate name in a voicemail. The court reasoned that the use of an alternative business moniker was enough to support a Fair Debt Collection Practices Act allegation. Levins v. Healthcare Revenue Recovery Grp. LLC, 902 F.3d 274 (3d Cir. 2018).
https://law.justia.com/cases/federal/appellate-courts/ca3/17-3330/17-3330-2018-08-22.html

Debt collector's letter referencing the possibility of forgiveness of the debt being reported to the IRS may violate FDCPA. The Third Circuit held that a statement in debt collection letters saying forgiveness of the debt may be reported to the IRS could constitute a violation of the Fair Debt Collection Practices Act because the debts in question were too small to be reported. The decision revived a potential class action against Midland Credit Management, Inc.. Schultz v. Midland Credit Mgmt., Inc., 905 F.3d 159 (3d Cir. 2018).
https://law.justia.com/cases/federal/appellate-courts/ca3/17-2244/17-2244-2018-09-24.html

Fifth Circuit panel rejects an administrative subpoena from the Consumer Financial Protection Bureau that sought documents and other information from a Texas-based public records search company. This case marks only the second time that an appeals court has declined to enforce one of the consumer watchdog agency's so-called civil investigative demands. In a six-page decision, the three-judge panel said the CID issued to The Source for Public Data, L.P., failed to give adequate notice of what conduct the CFPB was investigating and what law the agency thought might have been broken. CFPB v. The Source for Public Data, L.P., 903 F.3d 456 (5th Cir. 2018).
https://www.hudsoncook.com/insights/2018-09-07-decision.pdf

Person may have a claim under the Fair Debt Collection Practices Act even if he denies owing the debt. Debt collector retained the defendant law firm to file a complaint against plaintiff arising out of an unpaid credit card debt. Plaintiff denied owing the debt and that lawsuit was dismissed. Plaintiff then brought this action under the FDCPA alleging that the defendants continued pursuing a lawsuit against him even after being informed that he was not obligated on the debt. Under the FDCPA, a "consumer" is defined as one who is "obligated or allegedly obligated to pay any debt." Based on this definition, the district court dismissed the complaint, holding that plaintiff did not have standing to bring the action as long as he denied owing the debt because he was not "obligated or allegedly obligated" on the debt. The Seventh Circuit reversed, giving plaintiff leave to amend his complaint if necessary. The Court found that a plain reading of the FDCPA demonstrates that the phrase "obligated or allegedly obligated" did not require the plaintiff to allege he or she was obligated on

the debt. Loja v. Main St. Acquisition Corp., 906 F.3d 680 (7th Cir. 2018).
https://law.justia.com/cases/federal/appellate-courts/ca7/17-2477/17-2477-2018-10-18.html

Court rejects attorneys' fees in settlement. The Ninth Circuit panel vacated an $8.7 million attorneys' fees award in a $38 million settlement resolving claims that the company enrolled consumers in a bogus membership rewards program without their consent that charged them monthly fees. The three-judge panel found that the lower court erred by considering $20 credits given to class members as cash rather than coupons under the Class Action Fairness Act. As a result, the panel said, the attorneys' fees could be inflated. "Nothing in the record could have given the district court reason to believe that any class member, let alone all class members, would have viewed the $20 credit as equivalently useful to $20 in cash." In re EasySaver Rewards Litigation, 906 F.3d 747 (9th Cir. 2018).
http://cdn.ca9.uscourts.gov/datastore/opinions/2018/10/03/16-56307.pdf

Food and drug regulations do not preempt misbranding. The Ninth Circuit revived a putative class action alleging supplement maker MusclePharm Corp. mislabeled the protein content of an Arnold Schwarzenegger-branded supplement. The court held the plaintiff can claim the company misrepresented the source of the protein. The panel found U.S. Food and Drug Administration regulations on protein content and measurement in supplements preempt plaintiff Tucker Durnford's claim that MusclePharm Corp. misrepresented how much protein was in its "Arnold Schwarzenegger Series Iron Mass" supplement. "It does not, however, preempt a misbranding theory premised on the label's allegedly false or misleading implication that the Supplement's protein came entirely from two specifically named, genuine protein sources." Durnford v. MusclePharm Corp., 907 F.3d 595 (9th Cir. 2018).
http://cdn.ca9.uscourts.gov/datastore/opinions/2018/10/12/16-15374.pdf

Arbitrator decides issue of class arbitration. In agreement with the Second and Eleventh Circuits, the Tenth Circuit held that an arbitration agreement's incorporation of AAA rules was "clear and unmistakable" evidence that the parties intended an arbitrator to decide whether the agreement allows for arbitration of class claims.
Dish Network L.L.C. v. Ray, 900 F.3d 1240 (10th Cir. 2018).
https://law.justia.com/cases/federal/appellate-courts/ca10/17-1013/17-1013-2018-08-21.html

Court should decide class arbitrability questions. The Eleventh Circuit ruled Wednesday that class arbitrability should be decided by a court if an arbitration clause is silent on the issue, but sent a dispute over class arbitrability between consumers and a prison contractor to an arbitrator after determining that the terms of service agreement clearly states that was the parties' preference. JPay Inc. v. Kobel, 904 F.3d 923 (11th Cir. 2018).
http://media.ca11.uscourts.gov/opinions/pub/files/201713611.pdf

What is standard for the injury threshold in TCPA suit? The Eleventh Circuit is weighing whether a single unwanted text message from a lawyer to a former client qualifies as a concrete injury to sustain a claim under the Telephone Consumer Protection Act. The judges asked several questions, including whether there is a difference in the analysis between one text and 12 or even hundreds, whether the past customer relationship between Salcedo and Hanna's firm makes a difference, and whether the details of how Salcedo reacted or responded to the text and how much of his time was allegedly wasted matters. Salcedo v. Hanna, ___ F.3d ___ (11th Cir. 2018).

FACTA class settlement upheld. The Eleventh Circuit affirmed a class settlement where the defendant allegedly violated the federal Fair and Accurate Credit Transactions Act (FACTA) by printing point-of-sale credit card receipts that included more than the last five digits of the card number. Over objections, the court held that the named plaintiff had *Spokeo* standing. The court also awarded one-third of the settlement as attorney's fees, finding a lodestar analysis was not required. Muransky v. Godiva Chocolatier, Inc., 905 F.3d 1200 (11th Cir. 2018).
http://media.ca11.uscourts.gov/opinions/pub/files/201616486.pdf

Consumer bound by arbitration agreement contained on the packaging. The Eleventh Circuit held that consumers were properly compelled to arbitration and a putative class action was properly dismissed based on an arbitration provision and class action waiver conspicuously appearing on the product's packaging.

Homeowners filed a class action complaint against Tamko alleging that the company's shingles failed to comply with industry standard and were not as-warranted. In response, Tamko moved to compel arbitration and dismiss the class action complaint based on an arbitration provision and class action waiver that appeared on the exterior wrapping of every package of shingles. The United States District Court for the Middle District of Florida granted the motion, and the homeowners appealed.

In affirming the District Court, the Eleventh Circuit held that: (1) the shingle wrappers conveyed a valid offer of Tamko's product terms, including that any dispute must be arbitrated on an individual basis; and (2) the roofer's acceptance of the product terms by opening and installing the shingles was imputed to the homeowners. Dye v. Tamko Building Products, Inc., 908 F.3d 675 (11th Cir. 2018).
https://law.justia.com/cases/federal/appellate-courts/ca11/17-14052/17-14052-2018-11-02.html

FEDERAL DISTRICT COURTS

Customer not forced to arbitrate based on contract with acquiring company. A California federal court held that DirecTV cannot force the customer behind a proposed class action accusing the company of placing unauthorized robocalls to arbitrate his claims. The judge found the customer signed a contract with AT&T, not its recently acquired DirecTV unit. The judge stated, "It was not the parties' intent to enter into an arbitration agreement that would cover claims against an entity (like DirecTV) that became affiliated with AT&T Mobility years after [Revitch] entered into the contract ... as the result of an acquisition by AT&T Mobility's parent company and not due to an assignment of any obligations in the original contract." Revitch v. DirecTV, LLC, ___ F.Supp.3d ___ (N.D. Cal. 2018).
https://www.leagle.com/decision/infdco20180824c88

A California federal court held that DirecTV cannot force the customer behind a proposed class action accusing the company of placing unauthorized robocalls to arbitrate his claims.

Company that did not prove agency status cannot rely on arbitration clause. A company accused of making unsolicited phone calls for AT&T cannot move a Telephone Consumer Protection Act case out of court for now, because it did not prove it acted as an agent for the telecom giant when seeking arbitration, an Illinois federal judge ruled. Thompson v. AT&T Services, Inc. ___ F.Supp.3d ___ (N.D. Ill. 2018).
https://us-arbitration.shearman.com/siteFiles/24071/ 2108.09. 24% 20 Thompson%20v.%20AT&T%20Services,%20 Inc.,%20No.%20117-CV-03607%20(N.D.%20Ill.%20....pdf

Court holds company's non-disparagement clause unlawful. A district court in Florida, in a case brought by the Federal Trade Commission against weight-loss supplement marketer Roca Labs, granted the FTC's summary judgment motion in a case in which the FTC challenged the company's enforcement of "gag clauses" to stop consumers from posting negative reviews. The court found that the defendants violated the FTC Act by making deceptive weight-loss claims about their dietary supplements, known as Roca Labs Formula or "Gastric Bypass Alternative." The court also found that the defendants' threats to sue, and filing of lawsuits against dissatisfied consumers for violating non-disparagement clauses in their online sales contracts, unfairly suppressed negative information about the defendants and their products, to the detriment of subsequent purchasers, in violation of the FTC Act. FTC v. Roca Labs, Inc., ___ F.Supp.3d ___ (M.D. Fla. 2018).

https://www.ftc.gov/system/files/documents/cases/roca_labs_opinion_grant_msj_deny_partial_msj_9-25-18.pdf

Child who used mobile app not bound by arbitration clause. A California federal judge shot down Viacom's bid to send to arbitration a proposed class action accusing it of unlawfully collecting and selling personal information belonging to children who used one of its mobile apps. The court ruled that there was no evidence that the users had ever seen or agreed to the arbitration requirement.

Amanda Rushing and her minor daughter, identified as L.L., sued Viacom in August 2017 for allegedly violating child privacy laws by secretly gathering kids' personal information as they played the mobile game "Llama Spit Spit" and selling that data to advertising networks that used it to target ads. Viacom countered that the suit should be shipped off to arbitration because users of its apps are repeatedly reminded while downloading and installing the software about a clause in the end user license agreement that requires the use of arbitration to resolve such disputes.

In a four-page order issued Monday, U.S. District Judge James Donato refused to grant Viacom's request to stay the case pending arbitration, finding that an agreement to arbitrate such disagreements had never been formed between the parties because the plaintiffs had not received adequate notice of the existence of the arbitration clause, which app users did not have to explicitly consent to in order to download and play the game. "Arbitration is a matter of contract, and there can be no contract without an offer and an acceptance," Judge Donato wrote. "A user cannot accept an offer through silence and inaction where she could not reasonably have known that an offer was ever made to her. That is the situation here, and consequently Viacom's motion is denied." Rushing v. Viacom Inc., ___ F.Supp.3d ___ (N.D. Cal. 2018).
https://us-arbitration.shearman.com/siteFiles/24605/2018.10.15%20Rushing%20et%20al%20v.%20Viacom%20Inc.%20et%20al,%20317-cv-04492,%20No.%2083%20(N.D....pdf

Hertz can force arbitration in rental fee case. An Illinois federal judge sided with Hertz Corp. in a putative class action suit against the rental car company brought by a customer, saying a contract required arbitration for the bulk of claims accusing Hertz of repeatedly charging improper fees. Kurth v. The Hertz Corp., ___ F.Supp.3d ___ (N.D. Ill. 2018).
https://law.justia.com/cases/federal/district-courts/illinois/ilndce/1:2018cv02785/351591/35/

Plaintiff must arbitrate FDCPA claims against loan servicer. The US District Court for the Western District of Washington held that arbitration provisions in promissory notes signed by the plaintiff were broad enough to encompass her FCRA claim against the servicer of her student loans. The court found that the arbitration clause at issue – which provided for arbitration as to any claim that "ar[ose] from or relate[d] in any way to the Note" – was broad enough to encompass the plaintiff's FCRA claims against Navient because its "reporting or investigatory actions on the loans [we]re inherently related to the underlying promissory Notes." Howard v. Navient Solutions, ___ F.Supp.3d ___ (W.D. Wash. 2018).
https://www.consumerfinancialserviceslawmonitor.com/wp-content/uploads/sites/501/2018/10/Howard-v.-Navient-Sols._-LLC_-2018-U.S.-Dist.-LEXIS-180.pdf

Court denies arbitration under "effective vindication" exception to the Federal Arbitration Act. The U.S. District Court for the Western District of Washington denied a motion to compel arbitration. Per the terms of the loan agreements, the borrowers consented to binding arbitration for any disputes and agreed per the choice-of-law provision that tribal law applied, effectively waiving any protections they might have enjoyed under federal and state law. According to the court, the arbitration clause operated as a prospective waiver of most federal statutory remedies. The court found that while the FAA gives parties the freedom to structure arbitration agreements as they choose, that freedom does not extend to a substantive waiver of federally protected statutory rights. Titus v. ZestFinance, Inc., ___ F.Supp.3d ___ (W.D. Wash. 2018).
https://www.leagle.com/decision/infdco20181023d42

Credit union must face suit over misleading overdraft policy. The largest credit union in New England must face a proposed class action by customers who say its overdraft policies are unclear. A Massachusetts federal district court judge ruled Thursday, upholding breach of contract claims while tossing other claims for equitable relief. The judge stated, "I find that Plaintiff has plausibly argued that the contracts, even when construed together, are ambiguous as to whether they use the 'available balance' method to determine whether an account has been overdrafted." He continued, "This ambiguity presents a factual dispute not appropriate for resolution on this motion." Salls v. Digital Federal Credit Union, ___ F.Supp.3d ___ (D. Mass. 2018).
https://buckleysandler.com/sites/default/files/Buckley%20Sandler%20Infobytes%20-%20Salls%20v.%20Digital%20Federal%20Credit%20Union%20-%20district%20court%20opinion%202018.11.08.pdf

The violation of a procedural right granted by statute may be sufficient in and of itself to constitute concrete injury under Spokeo. A United States District Court for the Western District of Michigan stated that "the alleged violation of § 1692f(8) [FDCPA] in this case is sufficient in and of itself to constitute concrete injury in fact where Congress conferred the procedural right to protect a plaintiff's privacy interests and the alleged procedural violation entails a degree of risk sufficient to meet the concreteness requirement. The risk of harm is traceable to Defendant's purported failure to comply with federal law. In short, the Court is satisfied as to the existence of its power to hear this case." Brown v. Asset Acceptance, LLC, 2018 WL 6011934 (W.D. Mich. 2018).

STATE COURTS

Legal settlement cash advances are not loans. The Georgia Supreme Court handed a win to the consumer legal funding industry finding that legal case "investments" are not loans and are, therefore, outside the scope of state usury laws. The court found that the advance was not a loan under either the Georgia loan act or payday lending law. "We agree with our Court of Appeals that, when the obligation to repay is only contingent and limited, there generally is no 'loan.'" Ruth v. Cherokee Funding, LLC, ___ S.E.2d ___ (Ga. 2018).
https://law.justia.com/cases/georgia/supreme-court/2018/s17g2021.html

The court found that the advance was not a loan under either the Georgia loan act or payday lending law.

MISCELLANEOUS

Seventeen AGs say HUD should not change disparate impact rule. A coalition of state attorneys general has urged the U.S. Department of Housing and Urban Development to leave alone its Obama-era rule on disparate impact liability under the Fair Housing Act, saying it is already consistent with U.S. Supreme Court precedent.

Led by North Carolina's Attorney General Josh Stein, seventeen top prosecutors told HUD in a comment letter dated Monday that no changes need to be made to the so-called disparate impact rule, which the agency has said it is eyeing for potential rewrites in light of the Supreme Court's 2015 decision in Texas Department of Housing and Community Affairs v. Inclusive Communities Project Inc.. Read more, here: https://www.enewspf.com/latest-news/latest-local-news/attorney-general-madigan-joins-coalition-urging-hud-to-retain-rules-on-fair-housing/

President approves prohibition on pharmacy "gag clauses." President Trump signed a pair of bills designed to ban the practice of hiding lower prescription drug costs from patients, the federal government said Wednesday. The President signed the Patient Right to Know Drug Prices Act, S. 2554, and the Know the Lowest Price Act of 2018, S. 2553, which ban the use of so-called "gag clauses." These clauses prevent pharmacists from proactively letting customers know if the out-of-pocket cost of a medication is less than what they would pay with insurance. The ban on the clauses applies to both Medicare plans and private insurance plans. Read more here, http://fortune.com/2018/10/11/trump-administration-gag-clause-compare-prescription-prices/

DECEPTIVE TRADE PRACTICES AND WARRANTY

MERE BREACH OF CONTRACT DEFENSE IS THE APPLICATION OF THE ECONOMIC LOSS RULE TO THE DTPA

Salek v. SunTrust Mortgage, Inc., ___ F. Supp. 3d. ___ (S.D. Tex. 2018).
https://www.leagle.com/decision/infdco20180809e30

FACTS: Plaintiff, Lina Salek, and Defendant, SunTrust Mortgage, executed a Deed of Trust (the "Deed") in connection to Plaintiff's purchase of real property. Under the Deed, Plaintiff was required to purchase flood insurance. In the event of damage to the property, any insurance proceeds would be applied to the restoration or repair of the property. The Deed further specified that during such repairs and restorations, the Defendant had the right to hold such insurance proceeds until the Defendant had an opportunity to inspect the property, provided that such inspection was undertaken promptly. Pursuant to the Deed, when Plaintiff's property was damaged Defendant held on to the proceeds while the property was being repaired. Plaintiff alleged that her efforts to repair were inhibited by Defendant's "unusually burdensome" requirements, including that each contractor provide a copy of their license, W-9 forms, and sign a waiver of lien with respect to the property. Further, Plaintiff alleged that Defendant did not disburse the insurance funds in a timely manner.

An allegation of a mere breach of contract does not constitute a "false, misleading, or deceptive act" in violation of the DTPA.

Plaintiff filed suit, alleging that Defendant's actions violated Section 17.50(a)(3) of the DTPA, which allows for a claim against a person who commits an "unconscionable action or course of action" that causes economic damages or damages for mental anguish. Defendant filed a Motion to Dismiss.
HOLDING: Motion Granted.
REASONING: Plaintiff argued that Defendant's actions violated Section 17.50(a)(3) of the DTPA and that DTPA unconscionability claims were beyond the scope of the "economic loss rule." Defendant argued that Plaintiff's DTPA claim functionally reasserted her breach of contract claim and was barred by the "economic loss rule."

The court agreed with Defendant's claim, relying on the Texas Supreme Court's extension of the principles underlying the economic loss rule under the "mere breach of contract" defense. The court also relied on Texas law that stated an allegation of a mere breach of contract does not constitute a "false, misleading, or deceptive act" in violation of the DTPA. The inquiry is whether the alleged unconscionable conduct could have resulted in the absence of a contract between the parties.

Because there was no independent duty outside of the Deed regarding the Defendant's conduct, Texas law states that such claims may be asserted in contract only, and not in tort under the DTPA. Thus, the Motion to Dismiss was granted.

COURT FINDS CAR DEALER'S CONDUCT WAS UNCONSCIONABLE AND MORE THAN "MERE BREACH OF CONTRACT"

Yates Brothers Motor Company, Inc. v. Watson, 548 S.W.3d. 662 (Tex. App.–Texarkana 2018).
https://caselaw.findlaw.com/tx-court-of-appeals/1894474.html

FACTS: Appellee, Donna Watson, bought a motor vehicle from Appellant, Yates Brothers Motor Company, Inc. ("Yates"). Watson purchased and financed the vehicle from Yates, a car dealer, upon entering a Motor Vehicle Installment Sales Contract and an Insurance Addendum Agreement (collectively "the Contract"). Per the terms of the Contract, Watson was required to provide Yates written proof of insurance, make timely payments, and inform Yates of any change of address. Watson purchased insurance for the vehicle shortly afterwards and requested that proof of insurance be sent directly from the insurance company to Yates. After claiming they never received Watson's proof of insurance, Yates repossessed and later sold the vehicle. Watson brought suit against Yates for violations of Texas DTPA and DTPA unconscionability.

The trial court ruled in favor of Watson, concluding that Yates' treatment of Watson constituted unconscionable conduct. Yates appealed.
HELD: Affirmed.
REASONING: Yates argued the legal and factual insufficiency of the evidence to support a jury verdict on the DTPA unconscionability claim because Watson did not complain of any language in the contract that she did not understand and did not allege that the truck was misrepresented to her detriment. Yates also argued that there was a lack of evidence to support a DTPA unconscionability claim because a mere breach of conduct cannot constitute unconscionable conduct.
The court rejected Yates' argument by reasoning that their unconscionable conduct was outside of the Contract and took advantage of Watson's lack of knowledge to a grossly unfair degree. The court found that Yates engaged in unconscionable acts when it: (1) failed to contact Watson prior to the repossession of her vehicle for the alleged failure to provide proof of insurance, (2) installed an illegal GPS tracker in the vehicle without the knowledge and consent of Watson, (3) cited Watson's failure to make timely payments and update Yates on her new address as reasons for repossession while Watson was current on all due payments and had notified Yates of her change of address, and (4) demanded a repossession fee of $500 without any stipulation of the repossession in the Contract or proof of the actual cost of the repossession.

DTPA DOES NOT APPLY TO A TRANSACTION IN EXCESS OF $100,000

Lakepointe Pharmacy #2, LLC v. PM Forney MOB, LP, ___ S.W.3d ___ (Tex. App.—Dallas 2018)
https://law.justia.com/cases/texas/fifth-court-of-appeals/2018/05-16-01413-cv.html

FACTS: Lakepointe Pharmacy #2, LLC, Raymond Amaechi, and Valerie Amaechi (collectively, "Appellants") and PM Realty Group, LP, PM Forney MOB, WRAM Investments, LLC, Richard Allen and Richard Spires (collectively, "Appellees") executed an Assignment Assumption and Amendment to a Medical Office Building Lease ("assignment") involving a total consideration in excess of $100,000. Under the assignment, Appellant's assumed Appellee's lease obligations for the purpose of operating a pharmacy in the building and signed a personal guaranty of the pharmacy's obligations under the lease.

After a dispute arose between Forney Deerval LLC and Forney Willeta, LCC (collectively, "Landlord') and Appellees over rent and other charges due under the lease, the Landlord filed suit against Appellants for breach of the lease and guarantee. Appellants filed countersuits against Landlord and Appellees for fraud, fraud by misrepresentation, and violations of the DTPA alleging that they had been fraudulently induced to assume the lease. Appellees filed various motions for summary judgment on Appellant's claims against them. The trial court granted summary judgment in favor of Appellees. Appellants appealed.

Appellants argued that Appellees relied on unreliable witness testimony, rent, and other costs charged under the lease to show that the amount in controversy was over $100,000.

HOLDING: Affirmed.
REASONING: Appellants argued that the trial court erred in granting Appellees summary judgment on Appellant's DTPA claims because Appellees did not offer competent summary judgment evidence that the lease assignment was exempt from the DTPA by showing consideration over $100,000. Section 17.49(f) of the DTPA provided that nothing would apply to a claim arising out of a written contract if the contract was related to a transaction involving a total consideration by the consumer of more than $100,000, the consumer had legal counsel during negotiation, and the claim did not involve the consumer's residence. Appellants argued that Appellees relied on unreliable witness testimony, rent, and other costs charged under the lease to show that the amount in controversy was over $100,000. Appellants claimed the evidence was unreliable because the witness did not review or confirm whether any of the data for the bills was input correctly or based on any actual invoice or cost incurred.
The court rejected that argument reasoning that the Appellees' witness, who produced the affidavit, was qualified in her capacity as custodian of Appellee's records to attest to the amounts due by Appellants to the Landlord under the lease. Therefore, Appellees' affidavit and attached exhibits constituted competent summary judgment evidence. The court was persuaded by the fact that the Appellee's witness' affidavit showed Appellants paid over $92,765.43 under the lease and were sued for unpaid rent of at least $33,452.49. The evidence also included a statement made by Appellant's own attorney that Appellant's total obligation under the lease appeared to be $106,080.00. All elements of §17.49 were established as matter of law and Appellants did not produce evidence to raise a genuine issue of material fact as to the applicability of the DTPA.

DTPA NOTICE NOT REQUIRED WHEN NOTICE IS RENDERED IMPRACTICABLE BY REASON OF THE NECESSITY OF FILING SUIT IN ORDER TO PREVENT THE EXPIRATION OF THE STATUTE OF LIMITATIONS

In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig., ___ F. Supp. 3d ___ (N.D. Cal. 2018).
https://www.leagle.com/decision/infdco20181004f03

FACTS: Plaintiffs were a class of consumers who had purchased "clean diesel" cars from Defendant Volkswagen, but had sold their cars prior to public knowledge that the EPA had issued a Notice of Violation to Volkswagen for violating the Clean Air Act. Volkswagen installed defeat devices in order to pass emissions testing and settled with customers who owned their cars at the time of the scandal. Plaintiffs were excluded from the settlement. Volkswagen contended that these consumers were not injured by the fraud because they did not experience a drop in resale value because the cars were sold before the knowledge was public.

Plaintiffs filed suit for relief after the settlement with consumers who leased or sold the cars after the EPA issued that the notice had been approved. Volkswagen filed for a motion to dismiss on the grounds that Plaintiffs did not provide written notice at least 60 days before filing the suit, which failed to comply with the notice requirement under the DTPA.
HOLDING: Motion denied.
REASONING: Plaintiffs argued that while they did not comply with the notice requirement under the DTPA, an exception applied because notice was rendered impracticable by the necessity of filing suit in order to prevent the expiration of the two-year statute of limitations on DTPA claims. By the time the Plaintiffs filed this suit, they were within 60 days of when the limitations period reasonably could have been expected to expire given the EPA's notice was made public on September 18, 2015. The proper notice of 60 days under the DTPA was, therefore, not practicable at the time the Plaintiffs filed suit, making them eligible for the §17.505(b) exception.

The court found that because the plaintiffs filed suit within the 60 days of when the limitations period reasonably could have been expected to expire, notice was not practicable and therefore the exception applied. The court did not abate the DTPA claims.

CONSUMER MAY PURSUE A CLAIM UNDER CHECK VERIFICATION PROVISIONS OF THE TEXAS CONSUMER CREDIT REPORTING ACT (TCCRA)

THE TCCRA IS A TIE-IN STATUTE

Walters v. Certegy Check Servs., ___ F. Supp. 3d ___ (W.D. Tex. 2018).
https://www.leagle.com/decision/infdco20181003i14

FACTS: Defendant, Certegy Check Services, Inc., provides check authorization recommendations to merchants, who use them to determine whether to honor a check presented by a consumer. Plaintiff, Mark Walters, was denied check-cashing privileges on four occasions based on Certegy's recommendations. Walters requested a reinvestigation of the denied transactions. Certegy responded with a letter indicating "the checks fell outside of approval guidelines." However, Certegy declined to disclose the guidelines it had used. Walters filed suit in state court.

Certegy removed to federal court. Walters filed an amended complaint alleging Certegy violated TCCRA, Business and Commerce Code, §20.021 and §20.06(f), and that Certegy was also liable under the DTPA. Certegy moved for judgment on the pleadings.

HOLDING: Denied.

REASONING: Certegy argued it is exempt from §20.06 because it is a "check verification company." The court rejected that argument by stating that §20.06(h) explicitly notes that §20.06 applies to a business offering check verification services. Because Certegy conceded it was such a business, it was not exempt from §20.06.

Walters argued that that Certegy was liable under the DTPA via a tie-in provision recognizing any violation of the TCCRA as "a false, misleading, or deceptive act or practice" for purposes of the DTPA. The court held that the TCCRA's tie-in provision to the DTPA allowed a plaintiff who properly alleged a violation of the TCCRA to bring a corresponding claim under the DTPA based on the conduct that gave rise to liability under the TCCRA. Because Walters had properly plead Certegy violated §20.021 and §20.06(f) of the TCCRA, the court found the violations formed the basis for two corresponding DTPA claims.

COURT APPLIES TIE-IN STATUTE OF LIMITATIONS PERIOD IN CASE BROUGHT THROUGH THE DTPA

Vine v. PLS Fin. Servs., ___ F. Supp. 3d ___ (W.D. Tex. 2018).
https://docs.justia.com/cases/federal/district-courts/texas/txwdce/3:2016cv00031/793811/90

FACTS: Plaintiffs Lucinda Vine and Kristy Pond both obtained short-term loans through Defendants PLS Financial Services, Inc. and PLS Loan Store of Texas. The Defendants were loan brokers in the business of connecting customers with lenders. The Plaintiffs both executed Credit Services Agreements in relation to their loans and customarily provided signed and postdated checks for the loan amount along with interest and fees. The Defendants allegedly assured the Plaintiffs that the checks would never be deposited but instead would only be used to verify that the borrowers had operational bank accounts.

The Plaintiffs defaulted on their loans shortly thereafter, and the Defendants deposited the checks despite allegedly knowing that the accounts lacked sufficient funds. When the checks bounced, the Defendants submitted "Worthless Check Affidavits" to the District Attorney's office (the "DA") pursuant to a program implemented to prosecute the writing of "hot checks." Because the program's policy prohibited the submission of an affidavit pertaining to a postdated checks offered as security for loans, the Defendants were required to swear that the checks were not postdated. The Plaintiffs received letters from the DA in March and October of 2012 demanding full payment of the check amounts—along with DA service fees—on pain of prosecution. The Plaintiffs avoided prosecution by paying in full, but asserted that the Defendants' use of the DA's program was a fraudulent and improper attempt at debt collection. In December 2015, they filed several claims against the Defendants, including a violation of the Texas Finance Code §393, which is a "tie-in" claim actionable under the DTPA that provides its own four-year statute of limitations.

After a brief discovery period, the Defendants filed a motion for summary judgment on the Plaintiff's §393 claim arguing that it was time-barred under the DTPA's default two-year statute of limitations.

HOLDING: Motion denied.

REASONING: The Defendants argued that, despite §393's specific four-year statute of limitations for violations tied into the DTPA, the DTPA's default two-year limitation trumps the longer one.

The court rejected this argument because there was no precedence that implicated either §393 or other tie-in statutes having their own limitations periods. To address which limitations period controls the claim, the court resorted to the statutory construction principle—that a general statutory rule only governs when there is no more specific rule to supersede it. With that in mind, the court concluded that the more specific four-year limitations period attached to §393 controls over the general two-year provision of the DTPA. The court further confirmed this conclusion by pointing out that the more specific limitation period in §393 was passed by the legislature almost twenty years after it passed the DTPA.

A general statutory rule only governs when there is no more specific rule to supersede it.

COURT CORRECTLY CALCULATES DTPA ADDITIONAL DAMAGES

Apple-Sport Chevrolet v. Rolston, ___ S.W.3d___ (Tex. App.—Waco 2018).
https://law.justia.com/cases/texas/tenth-court-of-appeals/2018/10-17-00046-cv.html

FACTS: Appellee Rolston brought a DTPA claim against Appellant, Apple Sport Chevrolet, Inc. claiming that he sought services on his car which were "not done properly causing the vehicle to be towed." Rolston claimed that Apple had clearly misrepresented its repair bill and did not fix the problem after billing Rolston $706.31. In response, Apple filed an answer asserting numerous affirmative defenses and motions for summary judgment, which

were denied. The case proceeded to trial. At the conclusion of the trial, the jury awarded Rolston $706.31 in benefit-of-the-bargain damages, $75 in out-of-pocket damages, $50 in expenses, $250 in lost profits, $80 in lost time, $5,000 in exemplary damages, and $2,500 in attorney's fees. The final judgment included damages of $8,661.31 against Apple. Apple appealed.
HOLDING: Affirmed, in part, modified, in part, conditioned on remittitur.
REASONING: Apple claimed that Rolston could not recover both out-of-pocket ("OOP") and benefit-of-the-bargain ("BOTB") damages. A prevailing consumer is able to recover only one – whichever is greater. To recover on both would be impermissible double recovery. A prevailing consumer may only recover the greater of either OOP or BOTB damages. In this case, BOTB damages were greater so the OOP damages of $75 were impermissible double recovery.

Apple also contended that the $5,000 "exemplary damages" award was improper because a plaintiff cannot recover exemplary damages in an action for violation of DTPA. The court explained that while the DTPA does not authorize the recovery of exemplary damages under Chapter 41, one can recover treble damages for conduct that was committed knowingly. Here, Apple did not challenge the calculations done by the jury. After trebling the sum of the proper damages, however, the sum came to $3,258.93—a number that was significantly lower than the jury's $5,000. The court concluded that the jury's exemplary damages award exceeded the statutory maximum, and, thus, lacked evidentiary support. Based on the lack of evidentiary support, the court suggested a remittitur of that part of the damages.

CONSUMER CREDIT

GEORGIA SUPREME COURT HOLDS LEGAL SETTLEMENT CASH ADVANCES ARE NOT LOANS.

Ruth et al. v. Cherokee Funding, LLC et al., ___S.E.2d ___ (Ga. 2018).
https://law.justia.com/cases/georgia/supreme-court/2018/s17g2021.html

FACTS: Appellees Ronald Ruth, Kimberly Oglesby and a punitive class of similarly situated persons obtained cash advances from appellant Cherokee Funding, LLC to cover legal fees stemming from personal injury lawsuits. The financing agreements extended by Cherokee Funding would provide Ruth and Oglesby funds for personal expenses amassed during their pending lawsuits. The obligation to pay back the funds was contingent on the success of their lawsuits, with no obligation to pay if they were unsuccessful. If they were successful, however, Ruth and Oglesby would pay back the funds to Cherokee Funding, plus interest and various fees. In each case, the party's settled their lawsuits for an undisclosed amount.

Following the settlement, Cherokee funding attempted to collect $84,000.00 from Ruth after lending him $5,550.00 and $1,000 from Oglesby after lending her $400.00. Ruth and Oglesby alleged that their financing agreements with Cherokee Funding violated the Georgia Industrial Loan Act and the Payday Lending Act. They sought relief against Cherokee Funding pursuant to the remedial measures of those statutes. Cherokee Funding filed a motion to dismiss, stating that neither statute applied to their financing agreements with Ruth and Oglesby.

The trial court held that the Payday Lending Act applied, but that the Industrial Loan Act did not. The Georgia Court of Appeals concluded that neither the Industrial Loan Act nor the Payday Lending Act applies to this transaction.
HOLDING: Affirmed.
REASONING: Because Ruth and Oglesby alleged violations under the two Acts, the court stated their claims depended on whether their transactions with Cherokee Funding amounted to "loans." The Industrial Loan Act defines a loan as "any advance of money… under a contract requiring repayment." The Payday Lending Act does not expressly define "loan" but implicitly gives meaning to the term by its provision stating that the Act "shall apply with respect to all transactions in which funds are advanced to be repaid at a later date."
The court stated that when funds are advanced under an agreement where repayment is only on a contingent and limited basis, and not required to be repaid, the funds are not "loans" according to the two definitions set forth in the Acts. Ruth and Oglesby argued that the advances made by Cherokee Funding were, in fact, loans because they only extended to those advances when there was no risk that the contingency would fail to arise, thus making the terms illusory. The court agreed that would be a possible scenario but stated that because evidence to combat a motion to dismiss must be "within the framework of the complaint," it was not the case here. Ruth and Oglesby's original complaint did not allege the financing agreements were illusory. The court concluded that the funds provided by Cherokee were not "loans" pursuant to the Payday Lending Act or the Industrial Loan Act and, therefore, must be dismissed.

The Industrial Loan Act defines a loan as "any advance of money… under a contract requiring repayment."

NEW YORK CREDIT CARD LAW REQUIRES FULL CREDIT PRICE BE POSTED

Expressions Hair Design v. Schneiderman, 808 F.3d 118 (2nd Cir. 2018).
https://law.justia.com/cases/new-york/court-of-appeals/2018/100.html

FACTS: Section 518 of New York General Business Law prohibits credit-card surcharges. Plaintiff, Expressions Hair Design, planned to charge credit-card customers more than cash customers to account for credit-card companies' swipe fees. Expressions did not want to display two separate prices for each good and service offered, but rather, a single set of prices and the credit card surcharge amount. However, §518 prohibits the pricing scheme that Expressions wished to employ. Expressions sued New York, seeking a declaration that §518 is both unconstitutional and preempted, as well as an injunction against its enforcement.

The district court granted Expressions' preliminary injunction motion and denied New York's motion to dismiss. The district court found that §518 burdens speech by drawing the line between prohibited "surcharges" and permissible "discounts" based on words and labels rather than economic realities. New York appealed.

HOLDING: Vacated and remanded.

REASONING: The Second Circuit agreed with New York and held that §518 regulates conduct, not speech. The court found that prices, although necessarily communicated through language, did not rank as "speech" within the meaning of the First Amendment. Section 518 regulates the difference between a seller's sticker price and the ultimate price that it charges to credit-card customers.

The court found that §518 was readily susceptible to a narrowing construction, and Expression's putative over-breadth challenge failed, meaning the court declined to decide Expression's as-applied challenge.

FAIR AND ACCURATE CREDIT TRANSACTIONS ACT (FACTA) CLASS SETTLEMENT UPHELD

Muransky v. Godiva Chocolatier, Inc., 905 F.3d 1200 (11th Cir. 2018).

http://media.ca11.uscourts.gov/opinions/pub/files/201616486.pdf

FACTS: Plaintiff-Appellee, Dr. David Muransky, made a purchase from Defendant-Appellee, Godiva Chocolatier, Inc., and was given a receipt for the purchase that showed his credit card number's first six and last four digits. FACTA prohibits merchants from printing more than the last five digits of the card number or the expiration date upon receipt provided to the cardholder at the point of the sale or transaction. Muransky brought a class action suit against Godiva for allegedly violating FACTA, asserting that Godiva's willful violation of FACTA exposed Muransky and the class to an "elevated risk of identity theft."

The parties subsequently engaged in mediation of the case. In late November 2015, the parties notified the court of an agreement in principle to settle the case on a class-wide basis. Appellants James Price and Eric Isaacson ("the objectors") objected to a class settlement reached by Dr. Muransky and Godiva. Nevertheless, the district court approved the settlement.

HOLDING: Affirmed.

REASONING: Dr. Muransky argued that the class settlement would be more favorable than going to trial on the case, even if the class members won. He estimated that class members would receive $235 as their pro-rata share of the $6.3 million settlement fund, which is more than double than what they would receive as FACTA actual and statutory damages for a successful trial. Furthermore, Dr. Muransky reasoned that two pending cases before the Supreme Court relating to class certification, posed serious risks to the class members' ability to pursue FACTA claims against Godiva. Lastly, Dr. Muransky acknowledged the difficulty of proving the "willfulness" of Godiva's FACTA violation at trial. The objectors countered by claiming that the settlement itself, specifically Dr. Muransky's incentive award, and notice of the attorney's fees motion should be subjected to further analysis because they were inadequate and unwarranted.

The court swept aside the objector's argument and held that the district court did not abuse its discretion by awarding Dr. Muransky the $10,000 incentive award for his efforts in the case, as many circuits properly endorse and incentivize such awards for named class representatives. The court upheld the attorney's fees motion by explaining that while the district court erred by requiring class members to object before they could assess the motion, class members were not prejudiced in any way by the objection schedule. The court acknowledged that while the 33% attorney's fees award was bigger than some awards in other suits, it was reasonable based on the results obtained and substantial benefits conferred on the class members.

Finally, reviewing the issue of Dr. Muransky's standing, the court found that the complainant alleged two concrete injuries: one based on statutory violation and its relationship to common law causes of action and another based on Godiva giving Dr. Muransky an untruncated receipt. Ultimately, the court agreed with the district court and upheld approval of the class settlement.

DEBT COLLECTION

DEBT COLLECTOR'S LETTER STATING FORGIVENESS OF THE DEBT WILL BE REPORTED TO THE IRS MAY VIOLATE FDCPA

Schultz v. Midland Credit Mgmt., Inc., 905 F.3d. 159 (3d Cir. 2018).
https://law.justia.com/cases/federal/appellate-courts/ca3/17-2244/17-2244-2018-09-24.html

FACTS: Plaintiff-Appellants, Robert A. Schultz, Jr. and Donna Schultz (the "Schultzes") were debtors of Defendant-Appellee, Midland Credit Management, Inc. ("Midland"). On six occasions, Midland sent letters to the Schultzes, attempting to collect three separate outstanding debts that had been outsourced to Midland for collection after default. Each letter offered to settle for less than the full amount owed. Four of the letters stated, "[i] f you pay your full balance we will report your account as Paid in Full. If you pay less than your full balance, we will report your account as Paid in Full for less than the full balance." All of the letters stated, "[w]e are not obligated to renew this offer. We will report forgiveness of debt as required by IRS regulations. Reporting is not required every time a debt is canceled or settled, and might not be required in your case." None of the Schultzes' three debts exceeded the $600 minimum amount at which the Department of the Treasury requires an entity or organization to report a discharge of indebtedness to the IRS.

The Schultzes filed a punitive class action, asserting that the inclusion of the language was false or misleading, in violation of the FDCPA. Midland moved to dismiss, claiming the Schultzes failed to plead a plausible violation of the FDCPA. The district court granted Midland's motion, concluding that the language set forth in the letters was not violative of the FDCPA. The Schultzes appealed.

HOLDING: Reversed and remanded.

REASONING: The Schultzes argued that by including the language, "[w]e will report forgiveness of debt as required by IRS regulations," Midland presented a false or misleading view of the law in order to scare or intimidate the Schultzes into paying the outstanding debts listed in the letters, even though Midland knew that any discharge of the Schultzes' debt would not be reported to the IRS. Midland argued that in order to conclude that a consumer would be misled by this statement, one would have to ignore the conditional word "might" in the qualifying statement that "[r]eporting is not required every time a debt is canceled or settled, and might not be required in your case." Midland argued that usage of "might" should signal to the least sophisticated debtor that reporting will occur only under certain circumstances.

Is not merely the inclusion of a lie, but also incomplete or inapplicable language in a collection letter that may form the basis for a potential FDCPA violation.

The court agreed with the Schultzes' argument, holding that because the reporting requirement under the Internal Revenue Code is wholly inapplicable to the Schultzes' debts, including the reporting language on letters addressing debts of less than $600 might persuade the least sophisticated debtor into thinking that the discharge of any portion of their debt, regardless of the amount discharged, may be reportable.

The court further held that it is not merely the inclusion of a lie, but also incomplete or inapplicable language in a collection letter that may form the basis for a potential FDCPA violation. Therefore, because under no set of circumstances would reporting ever occur, the least sophisticated debtor could be left with the false impression that reporting could occur, even with the qualifying statement.

DEBT COLLECTION LETTER COULD BE FOUND TO BE DECEPTIVE AND MISLEADING TO THE LEAST SOPHISTICATED DEBTOR

Knight v. Midland Credit Mgmt., ___ F. 3d ___ (3d Cir. 2018).
https://law.justia.com/cases/federal/appellate-courts/ca3/17-3786/17-3786-2018-11-08.html

FACTS: Plaintiff Reneisha Knight owed $944.08 of personal credit card debt to Capital One Bank. The debt was later purchased by defendant Midland Funding, LLC ("Midland"). In order to collect on the debt, Midland sent Knight a letter. Below the basic information of the debt was the statement: "We can't change the past, but we can help with your future." The remainder of the letter offered three loan payment options, two of which expressly extended discounts for swift payment. The letter expressed that Midland "believes that everyone deserves a second chance," and encouraged Knight "to accept one of these discounts." The remainder of the letter affirmed that the account would be considered paid upon receipt of final payment. An asterisk on the word "paid" referred to a note at the bottom of the page saying, "If you pay your full balance, we will report your account as **Paid in Full**. If you pay less than your full balance, we will report your account as **Paid in Full for less than the full balance**." Knight sued Midland under §1692(e) of the FDCPA, alleging that the letter was false, deceptive, and misleading.

Midland filed motions to dismiss each of Knight's amended complaints for failure to state a claim. The district court granted each motion without prejudice, concluding that the debt collection letter was not confusing or misleading as a matter of law. Knight appealed.

HOLDING: Reversed and remanded.

REASONING: Knight argued four ways in which the letter could be found false, deceptive, and misleading. First, the letter appeared to promise financial benefit to those who paid off their delinquent debt. Knight argued that this was untrue because doing so would actually hurt the debtor's credit score. Second, the letter was unclear to whom payments would be reported. Knight contended that a debtor could assume Midland would report payments to the original creditor, to the credit reporting agencies, or to both. Third, the letter was ambiguous as to when a payment would be reported "Paid in full" or "Paid in Full for less than the full balance." Knight pointed out multiple possible answers to this question that would materially affect a debtor's choice of payment method. Finally, the letter was misleading in failing to distinguish the ramifications of the two above reporting statuses. Knight contended that a debtor may inappropriately conclude that the two statuses had the same effect.

The court agreed with Knight and concluded that the debt collection letter was false, deceptive or misleading for each of the four reasons she proposed. In order to reach this conclusion, the court found that FDCPA claims are analyzed under the "least sophisticated debtor" standard, which is lower than that of the "reasonable debtor" standard. Under this standard, the plaintiff did not need to prove that she was actually confused or mislead by the letter in order to state a claim. Furthermore, a letter is deceptive as a matter of law when it could be "reasonably read to have two or more different meanings, one of which is inaccurate," and when the ambiguity would affect the "decision-making process of the least sophisticated debtor." Applying these rules, the court determined that Knight's claim was sufficient to survive Midland's motions to dismiss.

A letter is deceptive as a matter of law when it could be "reasonably read to have two or more different meanings, one of which is inaccurate."

EXTREME FACTS JUSTIFY THE DISTRICT COURT'S DENIAL OF ATTORNEY'S FEES IN FAIR DEBT COLLECTION PRACTICES ACT (FDCPA) CASE

Davis v. Credit Bureau of the South, 908 F.3d 972 (5th Cir. 2018).
https://caselaw.findlaw.com/us-5th-circuit/1901953.html

FACTS: Plaintiff-Appellant Crystal Davis ("Davis") brought a FDCPA claim against Defendant-Appellee Credit Bureau of the South ("CBOTS") for misrepresenting itself as a credit bureau in an attempt to collect a debt. Davis was awarded summary judgment and statutory damages as a result of the CBOTS violation. Davis filed a motion for attorney's fees in the amount of $130,410. The motion was denied by the magistrate judge based on special circumstances that rendered an award of attorney's fees unjust. The magistrate judge found that Davis and her attorney's had colluded to create the claim against CBOTS in order to charge incredibly high attorney's fees. The judge further found that the hours claimed by Davis's attorneys were excessive given the simple nature of the case, and the hourly billable rate was excessive by orders of magnitude given the caliber of the work. All told, the judge found that the facts constituted extraordinary circumstances that warranted the denial of attorney's fees.

Davis appealed the denial.

HOLDING: Affirmed.

REASONING: Davis argued that the magistrate judge erred in denying her motion for attorney's fees as she had received a favorable summary judgment ruling and, therefore, under the plain language of the FDCPA, had a statutory right to attorney's fees.

However, the Fifth Circuit held that the magistrate's findings were reasonable. Further, because no actual damages had been proven, the court relied on Johnson v. Eaton, 80 F.3d 148 (5th Cir. 1996), to support the denial. In *Johnson,* the court interpreted the FDCPA to require attorneys to look for more than a technical violation of the FDCPA before bringing suit in order to deter attorneys from bringing cases as a means to generate attorney's fees.

The court found that, although the denial of otherwise mandatory attorney's fees is a rare and drastic sanction, the circumstances created by Davis and her attorneys were not in line with the purpose of the FDCPA, requiring a denial for deterrence purposes.

PERSON MAY HAVE A CLAIM UNDER THE FAIR DEBT COLLECTION PRACTICES ACT EVEN IF HE DENIES OWING THE DEBT

Loja v. Main St. Acquisition Corp., 906 F.3d 680 (7th Cir. 2018).
https://law.justia.com/cases/federal/appellate-courts/ca7/17-2477/17-2477-2018-10-18.html

FACTS: A credit card was opened under the name of Mario Loja. After the card fell into default, the bank sold off the $4,018.07 debt to Main Street Acquisition Corporation. Main Street filed a collection action in small claims court against Loja. Loja insisted the debt was not his. Loja then filed this action seeking damages under the FDCPA. Main Street moved to dismiss, contending that Loja had failed to allege a qualifying debt, and, therefore, he could not sue under the FDCPA.

Loja appealed.

HOLDING: Reversed and remanded.

REASONING: The court accepted Loja's argument he was a qualifying consumer under the FDCPA, because the FDCPA defines "consumer" as "any natural person obligated or allegedly obligated to pay any debt." The court pointed out that "consumer" under the FDCPA included consumers who have been alleged by a debt collector to owe a debt that the consumers themselves contended they did not owe. Because Main Street alleged that Loja owed the debt, that claim was sufficient to qualify Loja as a consumer under the FDCPA.

RECENT DEVELOPMENTS

ARBITRATION

COURT SHOULD DECIDE CLASS ARBITRABILITY QUESTIONS

JPay, Inc. v. Kobel, 904 F.3d 923 (11th Cir. 2018).
http://media.ca11.uscourts.gov/opinions/pub/files/201713611.pdf

FACTS: Defendant-Appellants, Cynthia Kobel and Shalanda Houston, purchased services from Plaintiff-Appellee, JPay, Inc., allowing them to send electronic money transfers to inmates. Kobel and Houston alleged JPay charged exorbitant transfer fees and dissuaded users from sending money through paper money orders for free by intentionally making the money order process slow and complicated and by deceptively marketing money orders as unreliable. Kobel and Houston filed a Demand for Arbitration against JPay, alleging contractual violations and violation of a Florida consumer protection statute, and sought to represent a class consisting of "all natural persons who paid a fee to JPay for electronic money-transfer services and who agreed to arbitrate their claims with JPay." JPay filed suit in state court, seeking to stay class arbitration and to compel bilateral arbitration. Kobel and Houston removed the case to federal court and moved to compel arbitration on the question of whether class arbitration was available under JPay's Terms of Services.

The district court denied Kobel and Houston's motion to compel arbitration, finding that the availability of class arbitration was a substantive "question of arbitrability" that was presumptively for a court to decide. Kobel and Houston appealed.

HOLDING: Reversed and remanded.

REASONING: Kobel and Houston argued that class availability is a "procedural" question. Kobel and Houston relied on Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003), which held that the availability of class arbitration concerned neither the validity of the arbitration clause nor its applicability to the underlying dispute, but rather contract interpretation and arbitration procedures that arbitrators were well situated to analyze.

The availability of class arbitration is a gateway question because it determines what type of proceeding will determine the parties' rights and obligations.

The court rejected that argument by explaining that the *Bazzle* plurality's holding is nonbinding and that the question remained an open one. The court cited two cases, in which the Supreme Court stated that *Bazzle* did not yield a majority decision and that the Court has not yet decided whether the availability of class arbitration is a question of arbitrability.

The court found instead that the availability of class arbitration is a gateway question because it determines what type of proceeding will determine the parties' rights and obligations. Formally, the availability of class arbitration determined the scope of the arbitration proceedings because allowing a class proceeding would determine the rights of parties that are not actively involved or represented by their own counsel. Functionally, the availability of class arbitration allowed plaintiffs to pool resources to collectively argue for recovery of small dollar amounts that otherwise would not be cost effective. Finally, unlike a procedural question, how the court determined the question did not depend on how one viewed the merits of the case, but was a separate matter of contract interpretation.

ARBITRATOR DECIDES ISSUE OF CLASS ARBITRATION

DISH Network L.L.C. v. Ray, 900 F.3d 1240 (10th Cir. 2018)
https://law.justia.com/cases/federal/appellate-courts/ca10/17-1013/17-1013-2018-08-21.html

FACTS: Appellee, Matthew Ray worked as a sales associate for Appellant, DISH Network L.L.C. While employed, Mr. Ray signed an Arbitration Agreement ("Agreement") drafted by DISH. The Agreement stated, "any claim…arising out of and/or in any way related to…employment…shall be resolved by arbitration…" and "[a] single arbitrator…from the American Arbitration Association ("AAA") shall conduct the arbitration under… current procedures of the AAA's National Rules..." After his termination, Mr. Ray filed suit in federal district court alleging violations of FLSA, Colorado's Minimum Wage and Wage Claim Acts, and a common law claim for breach of contract. DISH moved to dismiss, demanding Mr. Ray arbitrate his claims according to the Agreement. Mr. Ray dismissed the suit and filed the same claims with the AAA. Mr. Ray then pursued his claims as a class action under Fed. R. Civ. P. 23, and a collective action under 29 U.S.C. §216(b).

One issue presented to the arbitrator was whether the Agreement permitted class arbitration. The arbitrator reasoned this question was not a "gateway issue" normally decided by the court and concluded that the Agreement permitted collective action covering these claims. The court agreed that the arbitrator had jurisdiction to decide the issue. However, the court concluded that a determination of class wide arbitrability was a "gateway issue," which should be determined by the court. Nevertheless, the court found that the Agreement clearly and unmistakably expressed the parties' intention to have the arbitrator resolve questions of arbitrability. DISH appealed.

HOLDING: Affirmed.

REASONING: DISH argued that the arbitrator exceeded his powers in determining the gateway issue of jurisdiction over class wide arbitrability. Under the Federal Arbitration Act, vacation of an award was limited to certain instances such as fraud, corruption, and arbitrator misconduct. This level of deference only applied to disputes that the parties agreed to submit to arbitration. The Supreme Court has recognized that "arbitration is a matter of contract" and has found the "question of arbitrability" – whether the parties have submitted a dispute to arbitration – is a gateway issue for judicial determination, unless the parties clearly and unmistakably provided otherwise. The court reasoned it was not necessary to decide the gateway issue because it found the parties showed clear and unmistakable evidence of their intention to delegate the decision. The court concluded that the incorporation of the AAA Rules in the Agreement language provided clear and unmistakable evidence the parties intended to delegate all matters of arbitrability to the arbitrator, including class wide claims.

DISH further argued that the arbitrator's decision manifestly disregarded applicable law and must be vacated. Courts have found vacation of an award appropriate when an arbitrator's decision is based on a "manifest[ed] disregard of the law." However, because the court found the arbitrator had jurisdiction to decide arbitrability, the court's deferential review narrowed to only whether the arbitrator interpreted the parties' Agreement, not whether the interpretation was correct. Summarizing the arbitrator's interpretation, the court reasoned the arbitrator "clearly considered their contract and decided whether it reflected an agreement to permit class proceedings."

PLAINTIFF MUST ARBITRATE FCRA CLAIMS AGAINST LOAN SERVICER

Howard v. Navient Sols., LLC, ___ F. Supp. 3d ___ (W.D. Wash. 2018).
https://scholar.google.com/scholar_case?case=12759717535915419279&q=Howard+v.+Navient+Solutions,+LLC&hl=en&as_sdt=6,44&as_vis=1

FACTS: Plaintiff Adrienne Howard entered into three student loans with Navient, a student-loan servicer, formerly known as Sallie Mae. Equifax and Experian are consumer credit reporting agencies as defined under Fair Credit Reporting Act ("FCRA"). The promissory note ("Note") associated with each loan contained an arbitration agreement that covered any claim that "arose from or related in any way to the promissory note." Howard signed the Note and failed to opt out of the Note's arbitration clause. Howard filed for bankruptcy and Sallie Mae agreed to a stipulated settlement that consolidated Howard's loans under the three Notes and reduced their principal balance. The Bankruptcy court approved and dismissed the case.

Howard contends that from 2011 on, Sallie Mae and then Navient failed to report Howard's updated and reduced loan balance to the credit reporting agencies and also reported Howards loans as delinquent when Howard made payments lower than the amount she owed prior to the settlement, even though those payment amounts were approved under the settlement agreement. Howard alleged that Navient's inaccurate reporting of the loan balance caused Experian and Equifax to report various delinquencies on Howard's credit report.

Howard filed a complaint against Navient, Experian, and Equifax asserting causes of action against each defendant under the FCRA, 15 U.S.C §1681. Navient moved to compel all parties to arbitration.

HOLDING: Motion granted.

REASONING: Howard argued that the arbitration agreement did not apply to her FCRA claims. Howard claimed she did not bring a claim that could be arbitrated under the agreement because her cause of action did not arise from Navient's failure to comply with its duties under the promissory note, but instead stemmed from Navient's failure to report accurate information after the settlement. The court rejected that argument by reasoning that any challenge Howard made against Navient's reporting or investigatory actions on the loans were inherently related to the underlying promissory notes. Because Howard challenged the amounts she owed under the Notes, and the arbitration agreement was controlling over the Notes, the arbitration agreement controlled Howard's claim.

Any challenge Howard made against Navient's reporting or investigatory actions on the loans were inherently related to the underlying promissory notes.

Howard further argued that the arbitration agreement was unconscionable because it contained a unilateral right of appeal and a class waiver provision. The court rejected that argument also, stating that because neither the class waiver provision nor the language presumably creating a unilateral appellate right were oppressive, the agreement was not unconscionable.

The court compelled Howard to arbitrate her claims against Navient because Howard's claims arose from Navient's performance of its duties under the promissory notes, the arbitration agreement was not substantively unconscionable, and the settlement stipulation itself was directly related to the promissory notes.

NAMED PLAINTIFF IN A PUTATIVE CLASS ACTION DID NOT HAVE TO ARBITRATE HER CLAIMS FOR VIOLATIONS OF THE COMMUNICATIONS ACT

Perez v. DirecTV, LLC, 740 F. App'x 560 (9th Cir. 2018).
https://law.justia.com/cases/federal/appellate-courts/ca9/17-55764/17-55764-2018-10-19.html

FACTS: Plaintiff-Appellant Doneyda Perez, owner of a beauty salon, was a subscriber of Defendant-Appellee, DirecTV. A DirecTV salesman walked into Perez's salon and persuaded her to sign-up for a promotional deal. The salesman started the service the same day and made the programming available for her salon customers to view. Unbeknownst to Perez, DirecTV classified her account as a residential account whose terms of service prohibited programming from being displayed in commercial establishments, such as Perez's salon. For nearly two years, DirecTV never indicated to Perez that she might be misusing its service until a DirecTV lawyer called Perez and accused her of violating DirecTV's terms of service and the Communications Act. The lawyer declared Perez owed $75,000 in penalties and threatened to sue in federal court. After several harassing calls, the lawyer offered Perez a settlement of $5,000. Without the benefit of legal counsel and fearing the prospect of a federal lawsuit, Perez accepted the settlement offer. Perez filed a class-action suit seeking redress and DirecTV invoked the arbitration provision in the customer agreement.

DirecTV filed a motion to compel arbitration. The district court denied the motion. DirecTV appealed.

HOLDING: Affirmed.

REASONING: Section 9(d)(ii) of DirecTV's Customer Agreement exempted from arbitration "any dispute involving a violation of the Communications Act of 1934…or any statement or law governing theft of service." The court found both exemptions unambiguously covered Perez's claims. First, because Perez's claim alleged DirecTV's scheme against small minority-owned businesses involved threatening customers with lawsuits for violating the Communications Act, the court reasoned her claim involved a violation of the Communications Act. Second, because Perez's claim alleged DirecTV accused her of theft of satellite cable television services and pressured her into a settlement, the court reasoned that Perez's claim involved statements or law governing theft of service. As a result, the court concluded that the district court did not err in holding Perez's claims were outside the scope of the arbitration agreement.

Although finding DirecTV's conduct deplorable, the dissenting opinion concluded current law allows DirecTV to enforce its arbitration provision against Perez. First, the dissent found a valid arbitration agreement existed and asserted Perez signed a document stating in plain terms that she agreed to arbitrate all disputes. Second, the dissent argued Perez's claims are covered by the arbitration agreement and reasoned that although the scope of the arbitration exemptions is ambiguous, these types of ambiguities must be resolved in favor of arbitration. Further, the dissent found that the arbitration provision unfairly one-sided because it allows DirecTV to bring suit in court against customers while requiring customer claims against the company to be resolved in arbitration. However, the dissent concluded that the one-sided aspect does not render the provision invalid and noted California law dictates that the one-sided aspect of the provision may be severed, leaving the underlying arbitration agreement enforceable.

COURT DENIES ARBITRATION UNDER "EFFECTIVE VINDICATION" EXCEPTION TO THE FEDERAL ARBITRATION ACT

Titus v. ZestFinance, Inc., ___ F. Supp. 3d ___ (W.D. Wash. 2018).
https://www.leagle.com/decision/infdco20181023d42

FACTS: Plaintiff, Teresa Titus, received a series of loans from Defendants, ZestFinance, Inc. ("Zest"), BlueChip Financial, and Douglas Merrill. Each time Plaintiff received a loan from BlueChip, Plaintiff electronically signed internally inconsistent loan agreements. The loan agreements specified the law of the Turtle Mountain Band of Chippewa Indians applied to the loan agreement and that state law did not apply in any way. However, the loan agreements also included an arbitration clause and jury waiver, which provided that state law applies if a court found the Federal Arbitration Act inapplicable – contradicting the previous statement in the agreement.

Plaintiff filed suit against Defendants, alleging the loans violated Washington usury law and the Washington Consumer Protection Act, and unjustly benefitted Defendants. Zest and BlueChip moved to compel arbitration under the loan agreement.

HOLDING: Motion denied.

REASONING: Plaintiff argued the arbitration clause was invalid because the only reasonable construction of the loan agreement was that it implicitly forbade the application of state and federal law. Additionally, Plaintiff argued that the loan agreement was invalid because it prospectively waived her state and federal statutory rights under the effective vindication exception to arbitration, which, "serves to harmonize competing federal policies" by allowing courts to invalidate arbitration agreements that "operate as a waiver of a party's right to pursue statutory remedies." Am. Exp. Co. v. Italian Colors Rest., 570 U.S. 228, 235 (2013). Plaintiff also argued how this effort to force the arbitration further showed how the contract was designed to circumvent federal law and thus invalid.

Zest and BlueChip argued arbitration should be compelled because the effective vindication exception only applied to the waiver of federal rights, and the loan agreement permitted the application of federal law by indicating that certain federal law applied.

The court rejected Zest and BlueChip's argument, holding that the arbitration clause operated as a prospective waiver of Plaintiff's right to pursue federal statutory remedies. The court stated that the only reasonable way to interpret the loan agreement, as a whole, was to conclude that Tribal law applied, thus barring the application of federal law except where it was expressly included. By implicitly excluding all other federal law, there was an implicit prospective waiver of federal rights. The court stated that an agreement that is "a substantive waiver" of federal statutory rights will not be upheld.

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Defendants asserted that because the contract referenced other federal laws there could not be a prospective waiver of federal rights. The court stated that this was not persuasive because if a mere reference to federal law was sufficient to save the contract, then it would render the "effective vindication" exception meaningless. Accordingly, under the effective vindication exception and the Federal Arbitration Act's §2 public policy grounds, the arbitration clause was invalid.

CONSUMER BOUND BY ARBITRATION AGREEMENT CONTAINED ON PACKAGING OPENED BY ROOFER

Dye v. Tamko Bldg. Products Inc., 908 F.3d 675 (11th Cir. 2018).
https://law.justia.com/cases/federal/appellate-courts/ca11/17-14052/17-14052-2018-11-02.html

FACTS: Plaintiffs hired roofers to purchase and install shingles that were manufactured by Tamko. On each package of shingles was a section that read "IMPORTANT" and "READ CAREFULLY BEFORE OPENING BUNDLE." The Shingles' thirty-year Limited Warranty was printed on the packaging. The Limited Warranty contained a mandatory arbitration clause.

Plaintiff filed multiple causes of action regarding the shingles. In response, Tamko filed a motion to compel arbitration, arguing that plaintiffs are required to arbitrate their claims individually pursuant to the arbitration clause contained in the Limited Warranty.

The district court granted Tamko's motion and dismissed the plaintiffs' complaint. Plaintiff appealed.

HOLDING: Affirmed.

REASONING: Plaintiffs' main contention was that the arbitration clause was not binding on the Plaintiffs because Tamko could not establish that the Plaintiffs assented to the arbitration agreement. Further, plaintiffs argue that because the roofers were the ones to purchase and install the shingles, plaintiffs were unaware that there was an arbitration agreement and could not be bound by it.

Through principles of agency, the roofers' knowledge of the arbitration agreement was imputed to the plaintiffs and, therefore, the plaintiffs were bound by the agreement to arbitrate.

The court likened the shingles' packaging to shrinkwrap on certain products that contain agreements by which the customer is bound by once the product is opened and found the arbitration agreement to be enforceable against the plaintiffs. Tamko's packaging provided conspicuous notice of its offer. According to the court, opening and retaining the shingles was the conduct from which their assent could be inferred.

The court also explained that, through principles of agency, the roofers' knowledge of the arbitration agreement was imputed to the plaintiffs and, therefore, the plaintiffs were bound by the agreement to arbitrate. The court noted that whether or not the plaintiffs actually read the warranty is irrelevant. The essential elements of an agency relationship are: 1) acknowledgement by the principal that the agent will act for him, 2) the agent's acceptance of the undertaking, and 3) control by the principal over the actions of the agent.

The court concluded that acceptance of Tamko's purchase terms, including the arbitration agreement, was incidental and necessary to accomplish the plaintiff's express grant of agency authority to their roofers to purchase and install shingles, and in any event, the roofers' notice of the terms printed on the shingle wrappers was properly imputed to the homeowners.

WHETHER CLASS OR COLLECTIVE ARBITRATION AGREEMENT IS A THRESHOLD QUESTION FOR THE DISTRICT COURT, NOT AN ARBITRATOR

Herrington v. Waterstone Mortg. Corp., 907 F.3d 502 (7th Cir. 2018).
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2018/D10-22/C:17-3609:J:Barrett:aut:T:fnOp:N:2237495:S:0

FACTS: Pamela Herrington brought federal collective and class actions against her former employer, Waterstone Mortgage Corporation ("Waterstone"). However, Herrington signed an agreement with Waterstone to arbitrate employment disputes. Waterstone moved to enforce this agreement. The arbitration agreement included a waiver clause that forbade the joinder of "claims by any persons not party to this Agreement." Pursuant to that clause, Waterstone asked the district court to dismiss Herrington's claims for lack of jurisdiction. Herrington retorted that the arbitration agreement was unenforceable, and that the waiver clause was unlawful. The district court compelled arbitration pursuant to the employment agreement, but agreed with Herrington that the waiver clause was unlawful under the National Labor Relations Act (NLRA).

The arbitrator issued an award of more than $10 million to Herrington and 174 other claimants. Waterstone appealed from the district court's final judgment enforcing the arbitration award.

HOLDING: Award vacated. Remanded to district court for questions of arbitrability.

REASONING: Waterstone argued that the waiver clause was valid, and that the collective arbitration violated its agreement with Herrington.

The court agreed that the waiver clause was valid. While the appeal was pending, the Supreme Court held that waiver clauses requiring employment disputes to be decided in single-claimant arbitrations do not violate the NLRA. The resulting issue was who would have the authority to decide whether the class and collective arbitration violated the parties' agreement. The court held that this was a question of arbitrability for the district court for two primary reasons.

First, the availability of class or collective arbitration involves two foundational arbitrability questions: 1) whether the potential parties to the arbitration agreed to arbitrate, and 2) whether the agreement to arbitrate covers a particular controversy. Questions of arbitrability are decided by courts, while subsidiary issues are for the arbitrator. Therefore, the issue of the availability of class or collective arbitration are matters for the district court to decide.

Second, questions involving the "fundamental" structural features of the arbitration—i.e., whether it is bilateral or class arbitration—belong in the "gateway" category. If arbitrators were required to make these decisions, the informality and efficiency of arbitration would be sacrificed. Furthermore, placing such a fundamental question in the hands of the arbitrator would expose the parties to restricted access to appellate review.

Herrington argued contrarily that arbitrators should be able to determine whether class or collective arbitration is available by pointing to a prior decision in which the court held that an arbitrator may decide whether to consolidate multiple arbitrations into one proceeding. The court rejected Herrington's argument, asserting that the cited precedent expressly holds the opposite—making a clear distinction between class and consolidated arbitration.

INSURANCE

EXTRA-CONTRACTUAL CLAIMS IN ADDITION TO A CLAIM FOR BREACH OF CONTRACT, SHOULD BE ABATED PENDING APPRAISAL

Jovita Debesingh v. GeoVera Specialty Insurance Company, ___ F. Supp. 3d ___ (S.D. Tex 2018).
https://docs.justia.com/cases/federal/district-courts/texas/txsdce/4:2018cv02316/1532872/17

FACTS: Plaintiff Jovita Debesingh purchased a homeowner's insurance policy from Defendant GeoVera Specialty Insurance Company to cover certain risks to her residence in La Porte, Texas. The policy contained an appraisal provision that stated that any suit regarding a dispute in the amount of losses claimed under the policy should be abated until after an appraisal award had been issued.

On April 27, 2018, Debesingh sued GeoVera alleging they had underpaid an insurance claim she made for damage to her residence as a result of Hurricane Harvey. Debesingh alleged breach of the insurance policy, violations of the Texas Insurance Code, and the DTPA. On August 9, 2018 GeoVera sent Debesingh a demand for appraisal, and subsequently filed a motion for abatement on August 13, 2018.

HOLDING: Motion for abatement granted.

REASONING: The court granted GeoVera's abatement, stating Texas courts interpret insurance policies according to the rules of contractual construction, adding that unambiguous contracts are enforced as written. Therefore, based on the plain language of the appraisal provision, the court concluded that the case should be abated pending completion of the appraisal process as described in the policy.

Debesingh argued that the court retained discretion in its decision to abate a lawsuit after ordering an appraisal, or while appraisal is ongoing, if it would aid in judicial efficiency and economy. The court agreed that may be the case when there is no mandatory abatement provision in the insurance policy. However, in this case, it was not just judicial economy, but a binding provision in the parties' contract that compelled the court to abate Debesingh's lawsuit.

Based on the plain language of the appraisal provision, the court concluded that the case should be abated pending completion of the appraisal process.

Further, the court stated even if the policy had lacked the abatement requirement, the court would have concluded judicial economy was best served by abatement. According to the court, a majority of Texas courts have held that when a plaintiff asserts extra-judicial contractual claims in addition to breach of contract claims, it is generally in the best interest of justice that the entire case be abated pending appraisal. This is because an insurer's payment of an appraisal award will generally dispose of all contractual and extra-contractual claims. Even when appraisal fails to resolve the entire issue, litigation proceedings can be focused on the specific issues remaining.

Therefore, the court concluded GeoVera's motion for abatement should be granted, and the case stayed until after an appraisal award was issued in accordance to the parties' insurance policy.

MISCELLANEOUS

STANDING AND GOVERNMENTAL IMMUNITY CANNOT BE WAIVED AND MAY BE RAISED FOR THE FIRST TIME ON APPEAL

Meyers v. JDC/Firethorne, LTD., 548 S.W.3d. 477 (Tex. 2018).
https://law.justia.com/cases/texas/supremecourt/2018/17-0105.html

FACTS: Plaintiff-Respondent, JDC/Firethorne, LTD., submitted plat applications to develop a master-planned community in the City of Fulshear, whose progress was interfered with by Defendant-Petitioner, Andy Meyers, as the County Commissioner for Fort Bend County. JDC/Firethorne alleged their process of submitting plat applications for the land developments failed when their applications were placed on hold by Meyers in an effort to extract a concession to construct a four lane road instead of the originally agreed upon two lane road.

In 2014, following the alleged "hold" placed on the application process, JDC/Firethorne filed suit against Meyers for injunctive relief to cease and desist Meyers from instructing the Fort Bend Engineering Department to impede the plat applications. Meyers filed a plea to the jurisdiction in response. The trial court denied Meyers' appeal, but allowed Meyers to reassert the matter after further discovery. The court of appeals affirmed, holding that JDC/Firethorne's response to the plea raises a fact issue as to whether Meyers acted without legal authority for purposes of demonstrating the district court's jurisdiction. Meyers appealed.
HOLDING: Reversed and dismissed with prejudice.
REASONING: Meyers argued that governmental immunity barred suit against him in his official capacity. Furthermore, Meyers contended that standing was also precluded because JDC/Firethorne had not alleged any illegal acts by him in his official capacity.

The court accepted that argument by holding that JDC/Firethorne lacks standing to sue Meyers in his official capacity. The court stated that because Meyers' position as a County Commissioner lacks legal authority to receive, process, or present plat applications for approval, JDC/Firethorne failed to show a substantial likelihood that the injunction against Meyers would have remedied its injury. The court reasoned that governmental immunity barred a suit against Meyers, stating that governmental immunity from suit defeats a trial court's subject matter jurisdiction. Like standing, governmental immunity determines whether a court has subject matter jurisdiction.

The failure to establish standing meant that the trial court did not have subject matter jurisdiction. Subject matter jurisdiction is essential to the court's authority to decide a case. In addition, the court stated that when a plaintiff alleges an injury caused by unlawful government regulation, standing is substantially more difficult to establish. The court concluded that because both governmental immunity and standing are components of subject matter jurisdiction, they cannot be waived and may be raised for the first time on appeal.

A THIRD PARTY CANNOT BE DESIGNATED A RESPONSIBLE THIRD PARTY IF THAT PARTY'S ACTIONS WERE NOT "NEGLIGENT" OR OTHERWISE "VIOLAT[ED] AN APPLICABLE LEGAL STANDARD"

Stabilis Fund II, LLC v. Compass Bank, ___ F. Supp. 3d ___ (N.D. Tex. 2018).
https://scholar.google.com/scholar_case?case=6366948798922565520&q=stabilis+fund+ii,+llc+v.+compass+bank&hl=en&as_sdt=6,44&as_vis=1

FACTS: Plaintiff, Stabilis Fund II, LLC, purchased a default commercial loan from Defendant, Compass Bank. This purchase involved all the rights to a $4,050,000 loan that Compass made to Vinod Kuara and Veena Kaura ("Kauras"). Stabilis claimed that despite conducting due diligence, they were unable to uncover a loan modification agreement ("LMA") because Compass concealed the LMA. The LMA executed between Compass and the Kauras, allegedly, materially undermined the loan's value prior to the purchase. Stabilis claimed that if they had known about the LMA, they would not have purchased the loan.

Stabilis filed suit against Compass claiming fraudulent inducement and fraudulent concealment based on Compass's alleged misrepresentations and concealment of the LMA. Compass filed a Motion for Leave to Designate Responsible Third-Parties, seeking to designate the Kauras as responsible third parties with respect to Stabilis's claims. The court reviewed Compass's Motion.
HOLDING: Motion denied.
REASONING: Compass argued that the Kauras, as responsible third parties, were liable for the damages sought in the current case for failure to pay taxes, failure to pay the amounts due on the loan, bringing meritless claims against Compass and Stabilis, and causing repeated delays by the filing of a series of bankruptcy petitions that resulted in Stabilis's harm. Stabilis countered that Compass could not designate the Kauras as responsible third parties for breach of their contractual duties under the loan because Chapter 33 of the Texas Civil Practice and Remedies Code applied only to jointly committed torts, not breach of contract claims.

Compass could not designate the Kauras as responsible third parties for breach of their contractual duties under the loan because Chapter 33 of the Texas Civil Practice and Remedies Code applied only to jointly committed torts, not breach of contract claims.

The court agreed with Stabilis's argument by explaining that the Kauras were not complicit in Compass's fraud, nor were they otherwise conducting their own concurrent fraudulent scheme jointly with Compass. The court further rejected Compass's argument that while the Kauras did not jointly commit the alleged fraud, their conduct contributed, at least in part, to Stabilis's alleged harm, making them partially responsible for Stabilis's recovery of damages from Compass.

Compass was required to show that the harm was caused by a negligent act, omission, other conduct, or activity that violates an applicable legal standard. The court reasoned that Compass failed to demonstrate which of Kauras's actions, that ultimately resulted in Stabilis's harm, incurred from Compass's alleged fraud. Further, the court concluded that because none of the acts alleged to be conducted by the Kauras amounted to a "negligent act or omission," "a defective or unreasonably dangerous product," or an "activity that violates an applicable legal standard" the Kauras could not be held as responsible third parties for Stabilis's claims.

Happy New Year!

And this issue of the *Journal* is a great way to get 2019 started.

As usual for the first issue of the year, it contains the "Annual Survey of Texas Insurance Law." Suzette E. Selden, Jonathan D. Selden and Dennis L. Grebe do a great job discussing all of the recent significant insurance law cases—among those is the new opinion issued in *USAA Tex. Lloyds Co. v. Menchaca*.

There is also a very current and relevant article by Jay Bogan, discussing whether class action arbitrations can work. This question was raised last fall in the United States Supreme Court case *Lamp Plus, Inc. v. Valera*, and an opinion should be issued shortly. Jay's blog post that follows his article was written after the Court's oral arguments, and explains how he views what the justices said.

Of course it would not be the *Journal* if we also didn't discuss many recent decisions, all of interest to consumer and commercial lawyers.

Hope you all have a great 2019.

Richard M. Alderman
Editor-in-Chief