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CHARACTERISTICS AND LEGAL THEORY OF Consumer Protection in Australia

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Articles

Recent Developments

Characteristics and Legal Theory of Consumer Protection in Australia

By Lam Uyen Lu*

I. A Brief History of Consumer Protection Law in Australia

Australian consumer policy history shows the change and subsequent development of legislative thinking about consumer protection. Historical examination demonstrates the process by which Australian law adapted by changing sequentially in line with economic and social development, the global consumer movement, in response to dramatic revolution in the field.

The historical development of consumer protection legislation in Australia began with a focus on simple notions of equity, with less emphasis on the negative impact on the economy in the long run.[1] Australia's policies and regulations in the early years of colonialism manifested as rigid interventions by regulations that mainly focused on quality guarantee instead of promoting the freedom of choice of consumers.[2] When goods were produced in the mid-nineteenth century, the caveat emptor[3] principle became popular in Australia, whereby the spirit of letting "buyers beware" was applied, requiring consumers to make a purchasing decision for themselves relying on their own assessment.

The caveat emptor principle, on the one hand, shows that the consumer protection philosophy at this time in Australia was primarily based on consumers being self-aware of risks in commercial transactions. On the other hand, this prudent principle was also a sign that information imbalance began to be recognized in Australian society, inspiring new ideas and policies.[4] The Australian government, in the late nineteenth and early twentieth centuries, consistently made efforts to improve information asymmetry through regulations such as standardizing measurements and minimal requirements for professions. However, fair market orientation efforts did not manifest as concerns about the party's rights and obligations relating to the consumer contract.[5]

By the end of the nineteenth century, legislation in the field of commerce and trade, including consumer protection, underwent a dramatic change.

By the end of the nineteenth century, legislation in the field of commerce and trade, including consumer protection, underwent a dramatic change. The breakthrough derived from the influence of the Sale of Goods Acts 1893 in England[6], which Australia and the other colonies subsequently enacted as law. This development in commercial transactions regulation manifested in the requirement that goods be of a certain quality and that buyers have the right to inspect the receipt of their goods. These regulations demonstrated a shift from directing the seller's conduct to directing the process of the commercial transaction itself.[7] It can be said that the present consumer protection regime in Australia has achieved a balance between the desire to protect fair trade and rigid intervention in the behavior of the producer. However, at an early stage, state interventions were introduced by industrial and commercial management without the consumer's voice and involvement.

The consumer movement was formally launched in Australia—and worldwide—in the mid-1900s and was marked by the speech of the American President, John F. Kennedy, focused on the four fundamental rights of consumers.[8] Australia was initially swept up in this movement by first activating women's right to demand the best quality merchandise for household shopping, and then by establishing the Australian Consumer Association. Along with the breadth of the consumer movement, industrial production had dramatically increased the volume of merchandise available, creating new challenges for consumers' choice of goods. In response to these new demands and led by the 1962 U.K. report on the consumer protection, the "Molony Report," Victoria enacted the Door to Door Sale Act of 1963,[9] and New South Wales issued the Consumer Protection Act of 1969.[10] At this time, the question was how state intervention should be limited to protect consumers effectively without causing adverse effects on both consumers and the economy.[11] Some new regulations responding to this question emerged in the law through the ban on fraudulent advertisements and bidding frauds.[12]

The modern period of consumer protection in Australia, however, emerged in 1974 with the enactment of the Trade Practices Act (TPA), effectively ending caveat emptor in Australia.[13] In the draft debate, Senator Murphy pointed out that the principle of caveat emptor no longer fit with complex commercial practice.[14] This vigorous declaration inaugurated the government's renewed commitment to the field of consumer protection, expanding state intervention more deeply into commercial activities. Specific manifestations of this development can be seen in regulations that substantively regulate the content of the transaction, not just its form, such as the widespread banning of fraudulent conduct in trade.[15] At the same time, this period saw a significant development in Australia's consumer policy. The idea that the issue of consumer protection is closely linked and adapted to competition policy to create effective competition has been initiated and become a target of the TPA.

From 1974 to the 2000s, amidst continuous economic development, consumption policy pursued social equity and fundamental rights, while legal and economic factors continued to influence consumer policy.[16] The perception of a strong link between consumer protection and competition policy became more deeply embedded. Accordingly, the Australian government recognized that it was prudent to select the subject of regulation and to consider the measures and levels of government interventions in consumer protection. Otherwise, it would be counterproductive and harmful to consumers. It seemed that such careful consideration could be effectively implemented in light of economic analysis studies. The culmination of this view is the Australian government's transfer of responsibility for consumer affairs to the Treasury in 2007.[17] This move, coupled with keeping consumption and competition policy within the Ministry of Finance, manifested the intimate connection between consumer protection and economic policies.

From 1974 to 2010, consumer protection in Australia was regulated at the Commonwealth level through the TPA, the Australian Securities and Investments Commission Act 2001 (Cth),[18] and 17 different laws in states and territories.[19] The difference between the Commonwealth and state laws in consumer protection became increasingly apparent when new regulations were updated in major states. The differences are not only in regard to implied conditions and warranties, industry-specific regulation, and product standards, but consist of different approaches to law enforcement and policy development.[20] By contrast, markets have grown in size, some of which have erased consumer frontiers through increasingly interstate and international transactions which challenge national consumer policy.[21] This is one of the main reasons why the demand for a generic national consumer law emerged and became a specific task in Australia in 2006.

From 2007 to 2010, Australia enacted updates to the national legal framework for consumer protection. On October

2, 2008, a new law at the Commonwealth level was enacted, and a state-wide consensus on consumer protection enforcement regulations was reached.[22] In June 2009, the TPA was renamed the Competition and Consumer Act 2010 (CCA)[23] to reflect a more comprehensive policy of promoting both competition and consumer protection.[24] After a rigorous lawmaking process in July 2009, the Council of Australian Governments signed an Intergovernmental Agreement to draft the Australia Consumer Law (ACL)[25] based on the TPA, accompanied with some amendments, including two tranches. The first part passed as the Trade Practices Amendment (Australian Consumer Law) Act (No 1) in March 2010, containing provisions regulating unfair contracts, the Australian Competition and Consumer Commission's (ACCC) new and powerful role of enforcement, and new civil pecuniary penalties for contraventions of certain consumer protection provisions.[26] The second tranche of the ACL reforms, including the introduction of the ACL, was introduced in the Trade Practices Amendment Bill (No 2) 2010.[27]

Schedule 2 of the CCA set out the ACL as a generic consumer law applied across Australia and took effect on January 1, 2011. The ACL concerns consumer transactions for all goods and services throughout Australia, excluding financial services regulated by the Australian Securities and Investment Commission Act 2001, the Corporations Act 2001, the National Consumer Protection Act 2009, and the National Credit Act.[28]

II. Characteristics and Legal Theory of Consumer Protection

Analysis of the history and characteristics of consumer policy applied in Australia could provide a basis for understanding the causes and significance of existing consumer protection laws in the country. Likewise, the revolution of consumer policy in Australia may foreshadow the process Vietnam will have to undergo to reform consumer protection legislation. The continued development of the commodity market along with growing awareness of fair trade and consumer rights have made Australia's legal doctrines of consumer protection reach their most advanced states. Australia's consumer protection philosophy has gone through periods of change and is influenced by economic development, the consumer movement, and the contributions of global psychological and social studies. As one of the developed, leading countries in competition and consumer protection legislation, the evolution of Australia's consumer policy has largely reflected the global development in the field.

It is appropriate to explore consumer protection policy in Australia in the context of the endless debate between paternalistic legal intervention and the prior guarantee of individual liberty.[29] "Caveat emptor" is likely a crude form of self-determination and self-protection in trade, which has existed in Australia for a long time. Although it is not considered as a means of government intervention, it exists in the common law. However, the development of commodity economics and new insights into policy thinking have prompted the Australian government to adopt a policy of active intervention in consumer protection to optimize the effectiveness of market activities, rather than let the market adjust itself to its inherent defects.

Like other developed countries, Australia has consistently followed both soft paternalism (paternalistic "nudges") and hard paternalism (paternalistic "pushes") in the market with careful consideration of the benefits and harms of each intervention.[30] Chris Field provided explanations for paternalism while maintaining a free market and choice for consumers that showed the consistency in competition and consumer protection policy in Australia.[31] This is quite understandable since the Australian government does not follow the model of a deregulated state but has come to prefer regulation with reasonable interference in the economy, competition, and consumer protection.[32] Kate Tokeley argues that Australia has developed stronger paternalistic interventions in the ACL by the regulations that prohibit unfair contract terms and produce interest rates caps on credit for small amounts of money.[33] Meanwhile, the U.S. allows consumers to protect their interests in light of liberalism.[34] It is necessary to look back at the history of consumer policy development in Australia to understand the Commonwealth's current consumer protection philosophy.

Throughout its history, consumer protection policy in Australia has gone through three levels of development. The first consumer protection policy in Australia that manifested as a hard intervention with gradual progressive development of the object of regulation existed from the early years of colonialism to the late nineteenth century. At this time, the Australian government pursued rigorous interventions through strict regulations on quantity, price and quality of goods, and set criteria and professional standards for some important occupations.[35] At the beginning of this period, regulations were limited to the behavior and characteristics of the producer.[36] The way of interference then became more comprehensive by regulating the trading activities itself through consumer contract.[37] However, this strict consumer policy, while responding to the requirement of fair trade in the short term, negatively influenced the economy in the long run.[38] At the same time, in consideration of the total benefit that consumers receive, excessive state interventions during this period were overall harmful to consumers because they significantly reduced freedom of choice.[39]

Australia's second level of consumer protection policy derived from global economic development and convincing international research in this field. In the 1970s and 1980s, new paradigms emerged that argued for state intervention in the field of competition and consumer protection. Some prominent economists and legal scholars in Europe put forward numerous critical arguments for paternalism in the field of consumer protection based on the effectiveness criteria of microeconomic theory.

Norbert Reich points out Coase theorem with two objections to this theory to traditional intervention.[40] The first argument, based on the transaction cost interpretation of consequence, is that resource allocation should not be the work of legal rules when transaction costs do not exist. Thus, the interventionist approach should not proceed because it will be an obstacle preventing the efficient allocation of resources.[41] The second objection to an interventionist or regulatory approach is under the influence of the political theory of the welfare state. Accordingly, the imperialism of state intervention should have less of an impact on some autonomous social areas including consumer choice.[42] The argument may not have strongly affected Australia since the Australian government does not adhere to a "rugged individualism," disfavoring a consumer policy in which consumers fully manage themselves to maximize their own benefits.[43] Meanwhile, the first argument regarding economic factors affected policymakers in Australia and contributed to guiding new policy trends in this area. Also, the increasingly diversified and complex development of the market altered the notion of rights-based intervention and made the principle of caveat emptor in common law meaningless.[44]

As a result, Australia has witnessed a shift in consumer protection regime rooted in the demands of practice coupled with new insights and marked by the emergence of the TPA.[45] The change in focus from consumer "protection" to consumer "affairs" showed the government's attempt to address the criticism that protection was "anti-business."[46] By placing consumers in a position of resistance to the market and regulating consumer relations under a rights-based government intervention, the Australian government has adopted a philosophy of mutual benefit protection through market-based intervention.[47]

Efforts to protect consumers during this period were emphasized in light of economic theories in the context of the market operation, in which the apparent interaction between consumer law and broad market regulation were significantly considered.[48] This stage showed that the consumer policy of Australia at that time was set in a global perspective, linking the effects of economic policy, competition, and the recognition of market failures.

The emergence of new insights into a quite contradictory concept, the "empowered consumer," made a change in defining the image of well-informed consumers to a "confident consumer."

Two specific theories of market-based consumer protection influenced the consumer policy of developed countries, including Australia, in this period: information failure and the economics of information. In 1970, Akerlof's lemon doctrine highlighted asymmetric information between consumers and sellers, as well as market information deficiencies.[49] This was the time when a well-informed consumer image was an aim of consumer protection in developed countries, including Australia. Information failure highlighted during this period was one of the justifications for the government's first level intervention policy on welfare grounds.[50] The rules pertaining to information obligations in the TPA was strict because the information disclosed must be accurate. Otherwise, the person responsible for providing the information will be held liable even if they have no subjective intention to deceive.[51] Also, the development of the economics of information in the 1970s led governments to seek a balance of information gains with the cost of obtaining information.[52] A government considers the transaction cost in choosing the most beneficial consumer protection policy. When assessing this attribute of the TPA in 1976, the Swanson Commission addressed the need to weigh the effectiveness of consumer protection in the offset between the benefits afforded to consumers and the damage caused by higher prices and limited consumer choice, freedom, or innovation.[53] Consistent with such a view, the interplay between competition and consumer protection that affects the effective allocation of resources has become a priority for policy considerations in Australia. The government began to hesitate in designing directly rigid legislative provisions of which the costs of enforcement were lower than its benefits. Alternatively, the Australian government applied a range of market interventions and helped consumers protect their interests with guidelines, codes of conduct, rules, standards, and dispute resolution mechanisms, as well as information disclosure requirements.[54] The objective of equity and consumer welfare remained, but it was focused on a more comprehensive landscape where a well-developed market aims for the welfare of society. These desires are obvious in the TPA's stated objective of promoting effective competition and fair trade, combining the protection of consumer's interests to enhance the welfare society. The Australian Securities and Investments Commission also stated its objective is "to promote the confident and informed participation of investors and consumers in the financial system."[55] The ultimate goal of the Australian National Competitiveness Policy demonstrated that restructuring the economy by promoting competition and improving the efficiency of the market increases consumer welfare.[56]

The third level, the current consumer protection framework in Australia, the ACL, was formed from insights gained in recent decades.[57] More than three decades after the promulgation of the TPA, behavioral economics emerged as a theory that combines the study of economics with psychological theory and significantly influenced consumer policy in developed countries.[58] Behavioral economics theory provides supplementary justification for state-based interventions due to its discovery that the consumer usually owes misconception to not being rational as recognized by conventional understanding.[59] This explains the choice of substantive intervention, rather than interfering with previous procedural factors, manifested by the regulation of unfair contract terms in the ACL.[60] Behavioral economics has also put forward a number of new issues that require careful consideration by governments such as regulating for self-control and choice overload.[61]

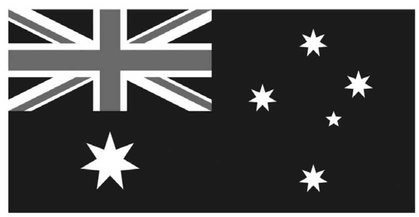
Also, the emergence of new insights into a quite contradictory concept, the "empowered consumer," made a change in defining the image of well-informed consumers to a "confident consumer." This concept derived from the New Labor Party's reconsideration and determination of new policy in the Third Way project, which culminated in the 2007 white paper "Modern Market, Confidential Consumer."[62] This project has identified a change in the target from promoting competition among U.K. industries to improving social justice.[63] The Third Way project also asserts that social wellbeing must be built on trust, whereby consumers are empowered to become knowledgeable, self-confident, assertive, and self-reliant.[64] It is obvious that the vibrant development of theories and economic and social objectives has increasingly required governments to update their consumer protection policy. A modern policy of consumer protection should integrate achievements in the newest policy research and global trends. It should be a policy that restricts information failure to protect consumers' interests by promoting effective competition as well as empowers consumers while retaining the balance between economic growth and social welfare.

In response to the development of the market and consumer policy overseas, the Australian Government adopted a new policy in the last decades of the TPA's lifespan, the so-called "post-interventionist" approach.[65] The post-interventionist approach is a flexible consumer policy focused on consumer protection in relation to competition, political and sociological issues. Such a consumer protection framework would prove to be effective as it belongs to, and is largely a representation of, a philosophy of consumer protection incorporating a complex matrix of economic, sociological and political issues.[66] In such a position, consumer protection tends to take the form of strong state intervention but still guarantees adequate attribution to enhance consumer confidence in the market.

The post-intervention policy has been further developed as Australia entered the new consumer protection era with the introduction of the ACL. In that legislation, the Australian government clearly identified the objective of its consumer protection policy. This final target, along with the way it will be performed, has shown that Australian lawmakers mapped out their policy frameworks by applying diverse approaches of consumer protection theories. These approaches include reviewing specific TPA and *Trading Act 1999* provisions related to consumer wellbeing with considerable application of behavioral economics, especially for vulnerable and disadvantaged consumers. Also, the government has focused on the interaction and linkages between consumer and competition policy and placed consumer protection policy in relation to other sectors of the economy.[67] The comprehensive review has resulted in the specific objective of Australia's consumer protection policy: "[T]o improve consumer well-being by fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers can trade fairly and in good faith."[68]

From the above statement, it is possible to see the two most clearly expressed ideas of the objective of Australia's consumer protection policy, including the promotion of effective competition and the activation of confident consumer participation. The ultimate goal is to maximize consumer wellbeing by maintaining effective competition that is "created by empowered consumers and responsive suppliers that trade fairly."[69] It can be seen that the goal of consumer protection in Australia has been raised to a new level, not only to protect consumers' interests but to improve their active participation in the market, enhancing the wellbeing of each consumer. The empowerment element to create consumer confidence alongside the task of consumer protection is also manifested as a way to attain the ultimate goal.[70]

Australia's consumer protection philosophy demonstrates the combination of both efficiency and equilibrium. Such a comprehensive policy is likely the result of the application of the basic principles of policymaking called the "Wellbeing of the Treasury," of which the first principle is the guarantee of "the opportunity and freedom that allows individuals to lead lives of real value to them."[71]



Australian policymakers argue that competition policy alone is insufficient "to improve consumer wellbeing through consumer empowerment and protection, fostering effective competition and enabling the confident participation of consumers in markets".[72] It is asserted in rationales for consumer protection that competition policy alone cannot guarantee a well-functioning market or reduce the potential disadvantages for consumers. An Australian consumer protection policy must ensure fair trade and achieve harmonization, balancing the interests of the supply and the demand side. It is striking that in the set of goals listed in the review report, the second objective is to promote effective competition, which is likely the result of this balance. Moreover, the consideration of effective practices to attain the goal has been driven by two main approaches. The first is the economics of law, in which the cost of interventions must be taken into account for efficiency, and the second is the application of behavioral science to consumers.[73] The application of new doctrines in consumer protection policy has led to the tendency of Australian policymakers to choose the post-interventionist approach.

However, the Australian government insists that it has not opted for a pure paternalism, but a co-regulatory approach that must meet some essential criteria.[74] Allan Asher lists some essential measures such as addressing consumer concerns, consultation with consumer and community agencies, developing a code of conduct in important industries and conducting periodic assessments of the effectiveness of the code.[75] Also, self-regulation as a form of expression of liberalism in consumer protection is an option considered by the Australian government. However, this method has been deemed limited, only effective in certain small markets. Thus, self-regulation at the federal level is seen as a priority intervention in the consumer market, but other interventions are also used to attain their policy objectives.[76]

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2 *Id*. at 94.
3 *See* Alan M. Weinberger, *Let the Buyer Be Well Informed: Doubting the Demise of Caveat Emptor*, 55 Md. L. Rev. 387, 388 n.5 (1996), for a discussion of the Latin phrase in its entirety: *Caveat emptor, qui ignorare non debuit quodjus alienum emit* ("Let a purchaser, who ought not be ignorant of the amount and nature of the interest which he is about to buy, exercise proper caution").
4 Hally-Burton, Shirodkar & Winckler, *supra* note 1, at 96.
5 *Id*. at 96.
6 The British Sale of Goods Act 1893 (56 & 57 Vict. c. 71).
7 *Id.*at 96.

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9 Victoria Door to Door (Sales) Act 1963 (No. 7091).
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25 Competition and Consumer Law Act 2010 *(Cth) sch 2 (*Australian Consumer Law*).*
26 Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010.
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30 *Id*.
31 Chris Field, *Having One's Cake And Eating It Too – An Analysis Of Behavioural Economics From A Consumer Policy Perspective* (Paper presented at the Roundtable on Behavioural Economics and Public Policy 9 August 2007) 4–6.
32 John Goldring, *Consumer Protection, Globalization and Democracy* (1998) 6 Cardozo J. Int'l & Comp. L. 1, 22.
33 Tokeley, *supra* note 25, at 73.
34 *Id*.
35 Hally-Burton, Shirodkar & Winckler, *supra* note 1, at 97.
36 *Id.*
37 *Id.*
38 *Id*. at 96.
39 *Id.*
40 Norbert Reich, *Diverse Approaches to Consumer Protection Philosophy* (1992) 14(3) Journal of Consumer Policy 257, 262.
41 *Id*.
42 *Id.* at 263.
43 Goldring, *supra* note 28, at 21. Goldring states that the UK and much of Europe are not convinced by "rugged individualism" and implies that these states accept the slight inconvenience of a legitimate state with social welfare system rather than follow the vague advantages of individualism that are promoted in some countries like the US.
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54 Asher, *supra* note 39, at 184.
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57 Brendan Sweeney, *Direct Marketing Code of Practice: An Important Cog in the New Consumer Protection regime* (2000) 28(1) Australian Business Law Review 35. Regulation of commercial activities to protect consumers is moving from a rights-based model to a market-driven model.
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76 Howell, *supra* note 18, at 4. Howell refers to Productivity Commission, 'Taskforce on Industry Self-Regulation, Industry Self-Regulation in Consumer Markets' (2000) <http://www.consumersonline.gov.au/content/SelfRegulation/finalreport_taskforce/default.asp>, and Department of Industry Science and Tourism, 'Codes of Conduct Policy Framework' (1999) 3 <http://www.consumersonline.gov.au/content/SelfRegulation/codes.asp> to explain the role of self-regulation and co-regulatory approaches in achieving outcomes for consumers as stated in the Productivity Commission's discussion draft.

Remedies for Consumers with

Health Club Services Contracts

By John R. Dorocak*

I. Introduction

Some types of businesses, unfairly or not, frequently have a reputation of engaging in sharp business practices such as, for example, the hard sell. One such business is likely gym or health club facilities, at least judging from the scrutiny by some legislatures ostensibly seeking to protect consumers.[1] Prominent states such as Texas and California are among the states that have enacted consumer protection legislation in the area of health club facilities. It may be instructive to consumers, facilities operators, legislators, and others to examine statutes such as the Texas Health Spa Act and California's Health Studio Services Contracts law (or Health Studio Act) in the context of a hypothetical consumer complaint.

Consider the following.[2] The parent, mother or father, decides on the extension of a health club services contract for her son or daughter for tae kwon do or karate, or similar lessons. The proprietor of the studio explains that the current contract is running out and the extension would be for three years. The extension continues lessons, which originally began at the child's public elementary school, as an after-school activity, and then continued at the studio under a program in which the local schools introduce the students to the studio and the discipline. The schools do not have any official or continuing role in the program. Rather, the program is one of several, which are conducted by third-party vendors and about which the schools inform the parents. The proprietor originally offered a one-year contract, at a time when the initial introductory, low-priced, on-campus lessons ended and he first moved the lessons to his studio. For the three-year renewal contract, the proprietor states that the particular discount is a one-time discount, which will only be available if the parent agrees to the extension at the present time.

Once the child has completed one additional year under the three-year contract at the health club, the child is moving on to other sports and the parents would like to end the participation at the club. The club has not moved nor has the student. The proprietor of the club explains that the contract was for a three-year period and has two more years remaining. What remedies might the parents have under state laws such as those of Texas and California regarding terminating the health club services contract?

This article will first consider contractual remedies under laws such as the Texas Health Spa Act and the California Health Studio Act. Secondly, the article will consider, at least briefly, whether theoretically consumers in the hypothetical situation posited herein need to be protected from themselves. Thirdly, the article will consider practically what the consumer party to a health club services contract might be able to do to extricate himself from the contract.

II. Statutory Provisions and Remedies in Health Club Services Contracts Laws in States such as Texas and California

The Texas Occupations Code at Chapter 702, Section 702.001 *et seq.*, and the California Civil Code at Title 2.5, Section 1812.80 *et seq.*, concern contracts for health club services.[3] The Texas legislature to protect the public and to foster competition, and the California legislature for the public welfare to safeguard the public, declared that the legislation on health club service contracts was necessary.[4] The Texas statute defines a health spa as "a business that offers for sale, or sells, memberships that provide members instruction in or the use of facilities for a physical exercise program."[5] The California statute defines a contract for health studio services, and thereby a health studio, rather broadly, as "a contract for instruction, training or assistance in physical culture, bodybuilding, exercising, reducing, figure development, or any other physical skill, …."[6] Both states appear to use a broad definition of health clubs covered by the legislation.[7]

The Texas statute requires that a health spa contract be in writing and delivered to the purchaser.[8] The California statute requires that the health studio services contract be in writing and that a copy of the written contract "be physically given to or delivered by email to the customer at the time he or she signs the contract."[9] Texas law provides that a contract which does not comply with Chapter 720 Health Spas is void.[10] California law similarly provides that a contract which does not comply with the law shall be "void and unenforceable as contrary to public policy."[11] The Texas law also provides that the buyer of a health spa membership may not waive provisions of Chapter 702 and that a contract may not require a note or a series of notes if the negotiation of such notes will cut off any defense or rights as to third parties that the purchaser that the purchaser had against the seller.[12] The California law further provides that any waiver by the buyer shall be void and unenforceable and that a right of action or defense arising out of a contract for health studio services, which right or defense the buyer has against the seller, is not cut off by assignment, unless the assignee gives notice to the buyer and receives no notice within thirty (30) days of a claim or defense which the buyer may have.[13]

The Texas Occupations Code provides that the buyer has the right to cancel the contract by the end of the third business day.[14] The California Civil Code provides that the buyer has the right to cancel the contract by the end of the fifth business day after the date of the agreement.[15] Texas law limits the contract to five (5) years if financed or three (3) years if not financed.[16] Under California law, the period of the contract cannot exceed three (3) years.[17]

Under Texas law, a violation of the Texas Health Spa Act is a deceptive practice under the Texas Deceptive Trade Practices Act (DTPA).[18] Professor Richard Alderman has written, "Because these statutes tie them to the DTPA, they are generally referred to as 'tie-in statutes.'"[19] Apparently under California law, the Deceptive Practices Act and the Health Studio Services Act function separately.[20] California's Health Studio Services Act does provide that its remedies are not exclusive.[21] Professor Alderman indicates that a consumer injured under the Texas Health Spa Act could collect actual damages through the DTPA, including possibly trebled damages if the violation was "knowingly." Significantly, mental anguish damages may also be trebled because the term actual damages encompass damages beyond the economic damages generally awarded under the DTPA.[22]

Under Texas law, a violation of the Texas Health Spa Act is a deceptive practice under the Texas Deceptive Trade Practices Act (DTPA).

It appears that in both Texas and California, the measure of damages recoverable in litigation under the Texas Health Spa Act and the California Health Studio Act is generally reduced for benefit received.[23] In the hypothetical posited herein, the remedy sought is release from the obligation to make future payments for services to be rendered in the future.

The provisions of the Texas and California laws appear similar to statutes in other states. What then if the consumer party to the contract wishes to cancel the contract before the at least three (3) year has run? Theoretically, should state statutes protect consumers from themselves and practically how might the party in the posited scenario extricate himself or herself from the contract?

III. Theoretically, Are State Statutes Intended to Protect Consumers From Themselves with regard to Health Club Services Contracts?

Given the facts of the posited hypothetical and a state statute such as that of Texas or California, there is likely little the buyer, who is party to the health club contract, can do to extricate himself or herself from that contract. Although the Texas Health Spa Act does not apply to "establishments that exclusively teach dance or aerobic exercise",[24] the karate or tae kwon do instruction in the hypothetical would appear to be within the broad language of both statutes. In addition, although the Texas Health Spa Act does not apply to "an activity conducted or sanctioned by a school" and the California Health Services Act does not apply to "contracts for instruction at schools operating pursuant to the provisions of the Education Code",[25] it does not appear likely that those exclusions apply in the hypothetical. Admittedly, the language of each statute raises a question as to whether either statue would apply, because of the school exclusions. Possibly, California's exclusionary language is broader, but, in the absence of additional guidance, the broad statutory purposes set forth at the outset of each statute might indicate that the respective legislatures meant only to exempt instruction which was part the educational curriculum at a school of a general education.

Under the Texas statute, there is a three (3) day cooling off period, and under the California statute, there is a five (5) day cooling off period, during which the signee of the contract can rescind the contract. However, once that period passes the contract can be for at least a three (3) year period. As long as the contract is in writing and is furnished to the health studio member, that member appears to have little recourse to consumer protection in an area in which the states and the federal government have recognized that the consumer may need protection given the number of statutory pronouncements.

The question then arises whether government should seek to protect individuals from their own bad decisions, assuming, in the hypothetical, that the party decided the decision was a poor one in that the three-year term was too long. Recently, much has been written about libertarian paternalism or asymmetric paternalism or nudging citizens by a government seeking a course of action by its citizens.[26] Colin Camerer and his fellow authors have advocated for an "asymmetric paternalism". The authors explain, "A regulation is asymmetrically paternalistic if it creates large benefits for those who make errors, while imposing little or no harm on those who are fully rationale."[27] Professor William English has explained that there is the close relationship and overlap of libertarian paternalism, asymmetric paternalism, and nudging.[28] What these new notions of paternalism may raise for the hypothetical and the health studio services contract law is how far a governmental regulation might extend in protecting consumers from themselves. Professor English has said there are two virtues and two ethical concerns in his view in the nudging paternalism. He sees as virtues that the cognitive costs also enter the cost benefit analysis and that new options are open.[29] He sees as ethical concerns that the nudging can be overly manipulative and extend the scope of governmental powers.[30]

Professor English also praises Professor Richard Thaler's New York Times' article asserting that nudges should be transparent and never misleading, easy as possible to opt out of, and improving the welfare of those being nudged.[31]

This at least newly described paternalism is not of course without critics. Professor Joshua D. Wright has criticized the seemingly increasing calls for paternalistic governmental intervention as follows.

> Nevertheless, some scholars have been less sanguine about the support that behavioral economics lends to the case for paternalism, arguing that a more complete analysis of the long-run costs and benefits of paternalistic regulations suggest a much more limited role for government intervention. They have emphasized the costs of paternalistic proposals, for example, paternalistic regulations may lessen the incentive to engage in learning and development of rational behavior or exacerbate irrational behavior by introducing moral hazard.[32]

Professor Heidi M. Hurd has apparently criticized libertarian paternalism as an attempt to make utilitarianism palatable to libertarians.[33] Professor English points out that proposals for paternalistic intervention or nudging need to be judged on a case-by-case basis because the question of nudging in the abstract is "not particularly interesting", there is "no choice but to nudge", there is "no neutral way of presenting information", and "what we really care about is evaluating particular proposals".[34] In light of Professor English's comments, it may be instructive to examine the hypothetical and some of the standard legal protections regarding health studio services contracts, and to consider whether the consumer protections might be extended further, albeit, in something of a paternalistic fashion.

IV. Practically, Can State Statutes Extend Consumer Protections with regard to Health Club Services Contracts?

Consumers' frequent purchases of extended warrantees are used as at least anecdotal evidence that consumers do frequently make decisions that are contrary to their best interests.[35] Apparently, the behavior is so recognized that even the Simpsons' animated television show has commented on it.[36] As Professor Camerer and his co-authors comment, "The fact that they [extended warrantees] are enormously profitable to retailers implies they are costly to buyers."[37]

Even when paternalistic government intervention has been attempted to protect consumers even from themselves, it is questionable whether such protections are effective. A cooling off period for canceling a contract, often within three to five days, is a long-established consumer protection which may be illusory at best, given studies of how frequently consumers exercise the right granted by the cooling off period.[38] If paternalistic government interventions can likely be so ineffective, the question naturally arises why attempt further intervention? The same cited study, by Professor Sovern, may suggest an underlying rationale, that consumer protection may function, per the estimation of this author, as a conservative type of regulation akin to antitrust law, seeking to keep markets open for scrupulous sellers.[39]

Given that a time-honored consumer protection device such as a cooling off period has little benefit or cost apparently

according to several studies,[40] the question may be what additional consumer protections could be advanced by an admittedly somewhat paternalistic government, although such protections might have limited benefit and, it is hoped, also limited cost.

The rationales for cooling off periods might help illuminate what other consumer protections could be advanced to protect consumers such as in the hypothetical originally suggested in this article. Cooling off periods were supported, at least originally, to protect consumers from the "hard sell" or the high pressure sales pitch of door-to-door salesmen whom the consumer want to just get off her porch or out of her living room.[41] There are at least two other rationales for cooling off periods among the rationales offered. First, "Cooling-off periods can in fact be seen as an indirect mechanism for information revelation."[42] Secondly, "the right to rescind was also aimed at so-called impulse sales which the consumer later regrets."[43]

One extension of a consumer right, which would appear to be consistent with current rights and not necessarily burdensome, would be to require an oral notice.

Returning to the posited hypothetical on the health club contract which the parent entered into for three years and now would like to end after one year, clearly the three rationales for the cooling-off period might well apply. As mentioned at the outset of this article, various state legislatures have concluded that the high pressure, hard sell, or sharp business practices are often used in the health club services contract sales.[44] In addition, the cooling-off period as the time for gathering additional information and rescinding a contract out of buyer remorse would presumably apply to health club services contracts and the hypothetical suggested.

However, in the hypothetical, it is sometime later that the parent concludes that the term of the contract is just too long and does not meet the current needs of the child. What consumer protections might be added in the health club services contract area to assist specifically the parent in the hypothetical? Certainly other remedies, in addition to the cooling-off period and the right of rescission, such as a required independent affirmation of the contract apart from the seller, or even mandatory counseling by a third-party, might be of assistance to some consumer parties to health club services contracts, but do not seem particularly apropos to the hypothetical. A more direct remedy for future potential health service contract buyers similar to the hypothetical buyer would be a limitation on the term of the contract, to say, one year, or possibly even six months. Such a direct limitation appears to raise the question of just how far can a government go in paternalistically protecting citizens without possibly violating the rights of others.

When the federal cooling-off rule was first proposed by the Federal Trade Commission (FTC), there was heavy criticism by sellers, even in testimony to Congress, that such a period with right rescission would "undermine the foundation of the law of contracts" and be "probably unconstitutional"[45] Although in an isolated situation, the arguments concerning the law of contracts and the constitutional basis thereof might be appealing, particularly to this author, by the time the FTC asked for comments on the cooling-off period rule forty years later in 2009, there was little industry criticism and opposition.[46] Professor Sovern suggests, in his comprehensive article on the cooling off period, that the decline in industry opposition to the cooling-off period rule resulted because "opponents' fears about the costs of the cooling-off rules were considerably overstated."[47] Sovern also suggests that changing times, the prevalence of the personal computer with less cumbersome forms, and a lack of seller's history with pre cooling-off and rescission rules also might have contributed to the decline in opposition to those rules.[48]

Possibly the most direct government protectionist intervention for the hypothetical and the health club services industry would be an outright limit on contracts. However, government has already even specifically with regard to this industry limited terms of contracts. At one time, the industry had life-time contracts, some of which might have been even beneficial to consumers.[49] Most statutes, such as those of Texas and California, now generally limit the contracts to a specified period, such as three years.[50]

However, as the various state legislatures have determined, contracts for health club services did not arise in a pristine isolated instance where classical contract law alone should apply. What additional consumer protections might be proposed and are there any limits to such protections even in the age of libertarian paternalism or asymmetric paternalism or nudging? One extension of a consumer right, which would appear to be consistent with current rights and not necessarily burdensome, would be to require an oral notice, as well as a written notice, of a cooling-off period and rescission rights. Professor Sovern, in his study, found, "Comparison of rescission rights for those who provided both oral and written notice with those who provided only written notices shows that those who also told consumers about the right to rescind experienced a higher rescission rate at a statistically significant level."[51] Sovern continues, "It thus appears that oral notice has an impact on whether people rescind their contracts, those who are given only written notices are much less likely to cancel."[52]

Professor Sovern concludes as follows regarding oral disclosures of cooling-off rules:

> If lawmakers retain cooling-off rules, they should consider adding oral disclosure requirements to the cooling-off period laws that do not already include them. Indeed, lawmakers should consider adding oral disclosure requirements to the general consumer protection arsenal. Of course, just because oral notice is effective in the limited context of cooling-off periods does not mean that it will help consumers in other contexts, but further study could clarify its impact.[53]

Sovern summarizes some state statutes which require both oral and written notice, including Cal. Civ. Code sect. 1689.7, which concerns home solicitation contracts or offers for the purchase of personal emergency response units.[54]

Another way to expand consumer rights might be to augment the cooling-off period length of time and permissible action by the buyer. Although Professor Sovern points out that cooling-off period rights are not exercised frequently and that sellers often refuse to deliver goods before cooling off periods expire, he does point out that European law provides for a two-week right of withdrawal.[55] Another possible extended consumer right during the cooling-off period would be, as mentioned previously, for the law to specify that consumers are not under any obligation as to transactions, unless they give written notice of affirmation to the seller.[56] As Professor Sovern indicates, the National Consumer Law Center in its draft National Consumer Act in 1970 provided for such a written affirmation requirement for transactions conducted outside the seller's place of business.[57]

To expand consumer protection and allow for more meaningful, possibly longer, cooling-off periods, an affirmative and independent affirmation of various transactions could be required.

Finally, independent counseling of consumers could be mandated, possibly during an extended cooling-off period. Such mandatory counseling apparently does take place in the situation of first-time home buyers utilizing loans.[58] Of course, any such mandatory counseling would likely invite an entire industry to arise with government support to some extent and thus raise the question of again how paternalistic can or should government be. It might be possible to utilize already existing consumer agencies, with a slight fee (.01%?) to be paid by consumers to agencies such as a Consumer Credit Counseling Service (CCCS).[59]

For the litigious and adventuresome buyer party to a health club services contract, it is possible that a class action might be certified against a health club. In a case under Connecticut law, the court held that a class action was not moot when the defendant health club offered to pay triple damages. The equitable claim for injunctive relief, seeking to compel an amendment to the health club services contract and to prevent collections from renewing members, could not be dismissed.[60]

V. Conclusion

Returning to the hypothetical suggested at the beginning of this article, none of even the extended consumer rights would aid our hypothetical buyer/parent other than the possibility of restricting the contract to a one-year period. However, the unscrupulous seller might run afoul of some of even the currently existing consumer protections. Recall that many of the health club services contract state statutes require that a written contract be given to the buyer, as does Tex. Occ. Code[61] and Cal. Civ. Code.[62] Those Texas Code sections require the "contract…must be…in writing…and [there] must be deliver[ed] to a purchaser a complete copy of the contract, accompanied by a written receipt.'[63] That California Code section requires, "A copy of the written contract shall be physically given to or delivered by email to the customer at the time he or she signs the contract."[64]

In addition, laws such as Tex. Occ. Code and Cal. Civ. Code prohibit waiver of provisions of the health club services contract law: "A person…may not waive a provision of this chapter…"[65] and "Any waiver of the buyer of the provisions of this title shall be deemed contrary to public policy and shall be void an unenforceable."[66] The Texas and California Statutes also provide that contracts not complying with the health studio services contract law are void: " A purported waiver of this chapter is void"[67] and "Any contract for health studio services which does not comply with the applicable provisions of this title shall be void and unenforceable as contrary to public policy."[68]

Thus, even envisioning expansion of consumer rights in a more paternalistic governmental situation, the protection for the buyer from an unscrupulous seller may come from that unscrupulous seller's own activities. In the hypothetical suggested in this article, presumably the contract for health club services would be void, even within the first of three years, under the Texas Occupations Code or California Civil Code, if the seller had not furnished the required written copy of the contract. Of course, it could be argued that not supplying a written contract was an essential violation of the health club services contract law, because the written contract is essential to the consumer being informed of the contract and various rights under it.[69] Furthermore, the buyer's right, to assert that a contract is void for failure to supply a written contract at the time of contracting, survives some attempts to cut off such rights. Texas Occupations Code 702.310[70] California Civil Code section 1812.87 prohibit notes from cutting off a buyer's right of action or defense against the seller. California Civil Code Section 1812.88 prohibits an assignment of the contract from cutting off the buyer's rights unless the assignee gives notice of the assignment to the buyer and, within thirty (30) days of mailing of that notice, the buyer provides no written notice to the assignee of facts giving rise to a claim or defense.[71]

Therefore, as to the hypothetical buyer, the unscrupulous seller's own action, such as failure to supply a written contract, might void the health club services contract. Extending the length of the cooling off period and right of rescission, requiring written and oral notice of the cooling off period and right of rescission, limiting the period for the contract, requiring independent affirmation of the contract, and requiring mandatory counseling might also assist the consumer buyers involved with the health club service contracts.

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1 See, e.g., Ala. Code §§ 8-23-1 to 8-23-13 (1975); Ariz. Rev. Stat. Ann. §§ 44-1791 to 44-1796; Cal. Civil Code §§ 1812.81 to 1812.92; Colo. Rev. Stat. § 6-1-704; Conn. Gen. Stat. § 21a-216 to 21a-227; Fla. Stat. §§ 501.012 to 501.019; Ga. Code Ann. § 10-1-393.2; Haw. Rev. Stat. ch. 486N-1 to 486N-11; 815 Ill. Rev. Stat. §§ 645.1 to 645.14; Iowa Code § 552.1 to 552.22; Md. Com. Law Code Ann. § 14-12B-01 to 14-12B-08; Mass. Gen L. ch. 93, sec. 81; N.H. Rev. Stat. Ann. § 358-I:1 to 358-I:10; N.J. Rev Stat § 56:8-42 (2013); N.Y. Gen. Bus. Law § 620-631; N.C. Gen. Stat. § 66-118 to 66-126;73 Ohio Rev. Code Ann. § 1345.41 to 1345.50; Pa. Cons. Stat. §§ 2161 to 2177; R.I. Gen. Laws §§ 5-50-1 to 5-50-12; S.C. Code Ann. §§ 44-79-10 to 44-

79-120; Tenn. Code Ann. §§ 47-18-301 to 47-18-322; Texas Occ. Code Ann. §§ 702.001 to 702.558; Utah Code Ann. §§ 13-23-1 to 13-23-7; Va. Code Ann. § 59.1-294. Wash. Rev. Code §§ 19.142.005 to 19.142.901; Wis. Stat. § 100.177.

The Federal Trade Commission advises, "Contact your state Attorney General or local consumer protection office to find out whether state laws regulate health club memberships, and whether the office has gotten any complaints about the business." https://www.consumer.ftc.gov/articles/0232-joining-gym (last checked 12192019).

2 Any similarity between the hypothetical facts and real, historical, or fictional persons (living or dead), places, things, or events is purely coincidental.

3 Tex. Occ. Code § 702.001 *et seq.;* Cal. Civ. Code § 1812.80 *et seq*.

4 *Id.*

5 Tex. Occ. Code § 702.003(4).

6 Cal. Civ. Code § 1812.81.

7 Aaron D. Werner, *Compliance with Health and Fitness State Laws: Background, Best Practices and Key Takeaways for Health and Fitness Club Owners*, Natl. L. Rev., available at https://www.natlawreview.com/article/compliance-health-and-fitness-state-laws-background-best-practices-and-key-takeaways (last checked 04/20/2020).

8 Tex. Occ. Code §§ 702.301(a)(1)(A) and 702.302(b)

9 Cal. Civ. Code § 1812.82.

10 Tex. Occ. Code §§ 702.311(1)

11 Cal. Civ. Code §§ 1812.91.

12 Tex. Occ. Code §§ 702.401 and 702.310.

13 Cal. Civ. Code §§ 1812.93 and 1812.88.

14 Tex. Occ. Code § 702.307.

15 Cal. Civ. Code § 1812.85 (20 days, if the amount of the contract is $1,500 up to $2,000; 30 days, $2001 – $2,500; 45 days $2,501 and above).

16 Tex. Occ. Code § 702.303.

17 Cal. Civ. Code § 1812.84.

18 Tex. Occ. Code § 702.403. Richard M. Alderman, *Texas Deceptive Trade Practice Act Remedies,* 15 J. Consumer & Com. L. 2, 5 (Fall 2011).

19 *Id.*

20 *Compare* Cal. Civ. Code § 1770 and Cal Civ. Code § 1812.80 ff.

21 Cal. Civ. Code § 1812.90.

22 Alderman, supra note 18, at 5.

23 *See* Wendt v. 24 Hour Fitness USA Inc., 821 F.3d 547, 551 (5th Cir. 2016) (applying Texas law and finding no standing because no economic injury, "Texas law permits a plaintiff to recover the purchase price he paid under a void contract only if the defendant fails to give the plaintiff all or part of what he paid for it or the statute that renders the contract void explicitly provides that the plaintiff is not liable to pay for any past services rendered by the defendant.") and Cal. Civ. Code sec. 1812.94 (providing the seller has 30 days after the execution of the contract by the buyer to correct noncompliance) and Cal. Civ. Code sec. 1812.85(b)(5) (providing "All moneys paid pursuant to a contract for health studio services shall be refunded within 10 days after receipt of the notice of cancellation, except that payment shall be made for any health studio services received prior to cancellation."). See also notes 60 and 69 infra.

24 Tex. Occ. Code § 702.003(4).

25 Tex. Occ. Code § 702.003(4) and Cal. Civ. Code §1812.81.

26 *See,* e.g. Colin Camerer, et al., *Regulation for Conservatives: Behavioral Economics in the Case for ""Asymmetric Paternalism"",* 151 U. Pa. L. Rev. 1211 (2003): William English, *Symposium: The Ethics of Nudging-Evaluating Libertarian Paternalism: Two Cheers for Nudging*, 14 Geo. J. L. & Pub. Pol'y 829 (2016); Joshua D. Wright, *Behavioral Law and Economics, Paternalism and Consumer Contracts: An Empirical Perspective,* 2 N.Y.U. J. L. & Liberty 470 (2007).

27 Camerer, et al., *supra* note 26 at 1212.

28 English, *supra* note 26, at nn. 1, 10, and 19 and accompanying text, citing, inter alia, Richard H. Thaler, *The Power of Nudges for Good and Bad,* N.Y. Times (Oct. 31, 2015) https://www.nytimes.com/2015/11/01/upshot/the-power-of-nudges-for-good-and-bad.html.

29 *Id*. at 831.

30 *Id* at 840.

31 *Id*. at 837 and n. 19.

32 Wright, *supra* note 26, at 472-473 (footnotes omitted).

33 Heidi M. Hurd, *Symposium: The Ethics of Nudging – Evaluating Libertarian Paternalism: Fudging Nudging: Why 'Libertarian Paternalism' Is the Contradiction it Claims It's Not*, 14 Geo. J. L. & Pub. Pol'y 703 (2016).

34 English, *supra* note 26, at 830.

35 Camerer, et al., supra note 26, at 144 and accompanying text.

36 *Id.* at n. 144 citing The Simpsons: HOMR (Fox Television Broadcast, Dec. 24, 2000).

37 *Id.* at 1253-1254.

38 Jeff Sovern, *Written Notice of Cooling-Off Periods, A Forty-Year National Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures,* 75 U. Pitt. L. Rev. 333-386 (2014).

39 *Id.* at 343-344 and nn. 22-24 and accompanying text.

40 *Id.* at 380-381

> It is not much of an exaggeration to say that the study suggests that cooling-off periods have little impact. Ironically, in light of the overheated rhetoric accompanying their creation, cooling-off periods appear to have virtually no benefits or costs.

See note 41, *infra.*

41 *Id.* at n. 13 and accompanying text.

42 *Id*. at n. 22 and accompanying text quoting Sven Hoeppner, *The Unintended Consequence of Doorstep Consumer Protection : Surprise, Reciprocation, and Consistency,* (May 14, 2012), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2057605.

43 *Id.* at 344.

44 See note 1 *supra.*

45 Sovern, *supra* note 38, at 374-375 and nn. 123-129 and accompanying text.

46 *Id.* at 376-377.

47 *Id.* at n. 138 and accompanying text. Professor Sovern sets forth findings from 5 surveys in his article, *supra* note 38 as follows: 1968 UCLA Survey, at n. 27; 1969 Yale Survey, at n. 39; 1981 PSRG Survey, at n. 41; 1981 Walker Survey, at n. 53; 2010 Sovern's own survey, at n. 67. Sovern in his survey, among others, contacted 100 gyms, of which 25 responded.

48 *Id*. at 379.

49 *See, e.g.,* La. Rev. Stat. Ann. §§ 51:1576-1582 and Jones v. Crescent City Health and Racquetball, 489 So. 2d 381 (La. Ct. App. 5th Cir 1986) cited in *Construction and Applicability of State Statutes Governing Health Club Membership Contracts or Fees,* 48 A.L.R. 6th 223 (2009). A lifetime contract not requiring additional payments, might, of course, be beneficial to the consumer.

50 Cal. Civ. Code § 1812.84.

51 Sovern, *supra* note 38 at 357.

52 *Id*. at 357-358.

53 *Id.* at 359-360 (footnotes omitted).

54 *Id.* at n. 75.

55 Id. at nn. 104-111 and accompanying text.
56 *Id.* at n. 33.
57 *Id.*
58 For discussion of home buyer assistance programs and education classes, *see,* e.g., Lynnette Khalfani-Cox, *Home Buyer Education Courses: A Secret Weapon for First-Time Buyers,* available at HSH.com/finance/mortgage/homebuyer-education-courses-secret-weapon-for-first-time-buyers.html (last checked 12/31/2019). Oren Bar-Gill, Seduction by Contract: Law, Economics, and Psychology in Consumer Markets (2012), cited in Benjamin J. Keele and Nick Sexton, *Keeping Up with New Legal Titles,* 105 Law. Libr. J. 231 (Spring 2013) explains that consumers are "imperfectly rational" and suggests more effective disclosure mandates and "sophisticated intermediaries" to aid consumers.
59 *See, e.g.,* http://www.credit.org/cccs/ last checked 12/31/2019.
60 Hennessey v. Connecticut Valley Fitness Centers, Inc., 30 Conn. L. Rptr. 499 (Conn. Super. Ct. 2001), cited in *Construction and Applicability of State Statutes Governing Health Club Membership Contracts or Fees*, 48 A.L.R. 6th 223 (2009). *See also*, McKean v. ABC Financial Services, Inc. Claim No. '18CV0923WQHRBB (U.S. Dis. Ct. S.D. Ca.) and Courtney Vinopal, *SoulCycle Riders May Get Refunds for Expired Classes Thanks to a Class-Action Settlement*, available at https://www.washingtonian.com/2017/07/18/soulcycle-class-action-settlement-soulcycle-riders-refund/ (last checked 12172019). Gascho v. Global Fitness Holdings, LLC, 822 F.3d 269, 94 Fed. R. Serv. 3d 1009 (6th Cir. 2016), cert. denied, 137 S. Ct. 1065, 197 L. Ed. 2d 176 (2017) and cert. denied, 137 S. Ct. 1065, 197 L. Ed. 2d 176 (2017) (settlement approved providing refunds to consumers and awarding 2.9 million in legal fees); Gascho v. Global Fitness Holdings, LLC, 863 F. Supp. 2d 677 (S.D. Ohio 2012); Robins v. Global Fitness Holdings, LLC, 838 F. Supp. 2d 631, R.I.C.O. Bus. Disp. Guide (CCH) P 12175 (N.D. Ohio 2012) cited in Oh. Consumer L. sec/ 4:62 Pleadings—Class action. *But see*, Baxter v. Salutary Sportsclubs, Inc., 122 Cal. App.4th 941, 19 Cal. Rptr. 3d 317 (2004) in which the court held that private attorney general fees not warranted where few members of the public would receive minimal benefit.
61 Tex, Occ. Code §§ 301 and 302.
62 Cal. Civ. Code § 1812.82.
63 Tex Occ. Code § 702.401.
64 *Id.*
65 Tex. Occ. Code § 702.401.
66 Cal. Civ. Code § 1812.93.
67 Tex. Occ. Code § 702.41.
68 Cal. Civ. Code §1812.91.
69 See, Staples v. Arthur Murray, Inc., 253 Cal. App. 2d 507 (2d Dis. 1967), a case under the former California Dance Act in which the court reinstated a claim, which had been dismissed on demurrer because plaintiffs alleged they were not given copies of contracts. The case likely supports that a technical violation of the Health Studio Act would also allow at least some statutory remedies even absent damages because of offsetting benefit received. See note 23 supra and accompanying text.
70 Tex. Occ. Code § 702.310.
71 Cal. Civ. Code §§1812.87 and 1812.88.

Arbitration

Time to Fix a Flawed Forum

By Gerald Sauer*

Businesses have increasingly embraced arbitration because it helps them avoid the roulette-wheel outcomes of jury trials.

Arbitration has become a hot-button issue. In September, the House of Representatives passed the *Forced Arbitration Injustice Repeal (FAIR) Act,*[1] intended to ban mandatory arbitration in the workplace, and California enacted AB 51,[2] the latest state effort to protect workers from forced arbitration. The Economic Policy Institute and the Center for Popular Democracy predict that, by 2024, almost 83% of the country's private, non-unionized employees will be subject to mandatory arbitration, an increase of 56% since 2017.[3]

In theory, arbitration is a good alternative to jury trials because it is supposed to offer a streamlined process (*e.g.*, limited discovery, motion practice and appellate review) that leads to quicker results than the judicial system. Employers benefit by having a retired judge or a veteran attorney serving as the trier of fact in workplace disputes because such individuals are less prone to identify with the plaintiff, less likely to be swayed by emotional factors, and more capable than a jury of rendering a reasonable monetary award.

States, however, have seen significant inequities in arbitration that hurt individuals, and they have taken steps to protect workers by passing laws, such as AB 51, to ban forced workplace arbitration. Notwithstanding these efforts, mandatory arbitration remains the law of the land. In December, a federal judge in Sacramento stayed the California law, and on February 7, in *Chamber of Commerce of the United States v. Becerra,* the U.S. District Court for the Eastern District of California granted a request for a preliminary injunction.[4] Smart money says the law will never take effect. Federal courts have consistently ruled that the Federal Arbitration Act (FAA)[5] preempts state laws.[6]

The FAA was a simple, little-known law enacted in 1925 that was designed to support business contracts that called for alternative dispute resolution. It required courts to stay litigation, upon motion, when a dispute involved a contract with a written arbitration clause. The law clearly presupposed that parties to the contract would understand its terms, would be in a position to negotiate those terms, and would have willingly and knowingly agreed to those terms.

The existing system, however, is broken and efforts to outlaw forced arbitration at the state and federal levels prove that it is time to finally fix it.

Businesses have increasingly embraced arbitration because it helps them avoid the roulette-wheel outcomes of jury trials, but employees and consumers—bound by fine-print contract terms—do not provide informed consent. In the landmark 2018 Economic Policy Institute (EPI) report, "The Growing Use of Mandatory Arbitration," Cornell University professor Alexander J.S. Colvin polled employers rather than workers to determine the prevalence of employment arbitration.

> The study measured the extent of mandatory employment arbitration by surveying employers rather than by surveying employees because *research has found that employees are often unaware or fail to recall that they have signed arbitration agreements and may not understand the content and meaning of these documents* (emphasis added).[7]

Simply because they get a paycheck or want to purchase a product or service, millions of unsuspecting individuals find that they have signed away their constitutional right to trial by jury. Arbitrators' decisions, which often consist of a conclusory one-line statement, are shielded by secrecy, and the employee's or consumer's ability to reverse a bad decision is extremely limited. According to "The Arbitration Epidemic," a 2015 EPI report by Colvin and Katherine V.W. Stone, "On average, employees and consumers win less often and receive much lower damages in arbitration than they do in court."[8] Absent class actions—effectively killed by the Supreme Court's *Epic Systems* [9]decision—small claims can generally not be aggregated, so employers who shortchange workers a few dollars a month, or businesses that pad customers' bills, have little incentive to do the right thing.

Private judging is problematic. For-profit arbitrators, paid by employers and insurance carriers, are disinclined to bite the hand that feeds them. Businesses, which may utilize the same provider (e.g., the American Arbitration Association) for dozens or even hundreds of cases, provide a guaranteed revenue stream. The industry per diem ($15,000 or more for some neutrals) is still small potatoes when compared to unpredictable, sympathetic jury verdicts.[10]

The economics of arbitration mean that "neutrals," who may truly believe they can render impartial judgment, are subconsciously inclined to favor the party who pays them. A 2015 New York Times expose of private judging recounts tales of arbitrators lunching with defendants and conducting hearings in defendants' conference rooms.[11] Aside from the troubling optics, these stories speak to a fundamental conflict of interest.

Most private arbitrators are retired judges who bring years of education and experience to the hearing and are eminently qualified to understand and evaluate evidence. These arbitrators should be capable of delivering reasoned legal decisions, but economics tend to skew outcomes. The FAA provides no recourse when an arbitrator's decision is based on a flawed legal analysis, and it allows judicial review if and only if a decision meets one of the following criteria:

- It was procured by fraud,
- The arbitrator was biased,
- The arbitrator refused to hear relevant evidence, or
- The arbitrator exceeded his or her power as set forth in the arbitration agreement.[12]

According to California's Ethics Standards for Neutral Arbitrators in Contractual Arbitration, "For arbitration to be effective there must be broad public confidence in the integrity and fairness of the process."[13] Standard 5, General Duty, reads as follows: "An arbitrator must act in a manner that upholds the integrity and fairness of the arbitration process. He or she must maintain impartiality toward all participants in the arbitration at all times."[14] Standard 6 says that "a proposed arbitrator must decline appointment if he or she is not able to be impartial."[15]

An arbitrator who receives substantial repeat business from one party to a dispute is really between a rock and a hard place. Unlike trial judges, who are paid by taxpayers and have no horse in the race, arbitrators have reason to hitch themselves to the horse who provides their livelihood.

Arbitration costs and awards are a relative bargain for most companies, but they could become untenable if every in-

jured worker and consumer pursued individual arbitration. Uber and Lyft drivers are now testing this proposition; imagine if thousands of mistreated workers at other companies and millions of consumers with legitimate grievances followed suit. Companies may find a reason to embrace changes to the current system.

Legislation at the state and federal levels could also help improve arbitration outcomes while leaving mandatory arbitration in place. Such laws might require that every arbitral decision include a reasoned, published opinion; that the legal basis for the decision be subject to outside review and judicial appeal if erroneous; and that awards be commensurate with prevailing court awards for similar cases. Such laws would remove the unchecked discretion that now plagues the system and help level the playing field for all parties.

Arbitration is not bad. It is actually a good vehicle for reducing court dockets and ensuring timely resolution of disputes. The existing system, however, is broken, and efforts to outlaw forced arbitration at the state and federal levels prove that it is time to finally fix it.

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1 H.R. 1423, 116th Cong. (2019).
2 Cal. Gov. Code § 12953; Cal. Lab. Code § 432.6.
3 https://populardemocracy.org/news-and-publications/epi-report-forced-arbitration-cover-80-private-sector-workers-2024
4 *Chamber of Commerce of the U.S.A. v. Becerra*, No. 2:19-cv-02456-KJM-DB, 2020 WL 605877 (E.D. Cal. Feb. 7, 2020)
5 9 U.S.C. § 1, et seq.
6 *See, e.g., Latif v. Morgan Stanley & Co., LLC,* No. 18-cv-11528, 2019 WL 2610985 (S.D.N.Y. June 26, 2019); *Logan v. Lithia Motors, et al.*, No. 18-2-19068-1 SEA (Wa. Sup. Ct. 2019); https://www.lexology.com/library/detail.aspx?g=f5c8f23c-101c-4fab-a4fc-7d88fdff1896.
7 Alexander J.S. Colvin, *The growing use of mandatory arbitration,* Econ. Policy Inst. (Sept. 27, 2017), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/.
8 Katherine V.W. Stone & Alexander J.S. Colvin, *The arbitration epidemic: Mandatory arbitration deprives workers and consumers of their rights,* Econ. Policy Inst. (Dec. 7, 2015), https://www.epi.org/publication/the-arbitration-epidemic/.
9 *Epic Systems Corp. v. Lewis,* 138 S. Ct. 1612 (2018).
10 Deborah Rothman, *Trends in Arbitration Compensation*, Dispute Resolution Magazine (Spring 2017) at 8, https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/spring2017/3_rothman_trends_in_arbitrator.authcheckdam.pdf.
11 Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a "Privatization of the Justice System,"* N.Y. Times (Nov. 1, 2015), https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html.
12 9 U.S.C. § 10(a).
13 Cal. R. Ct., Ethical Standards for Neutral Arbitrators in Contractual Arbitration, std. 1(a).
14 *Id.* std. 5.
15 *Id.* std. 6.

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 http://www.peopleslawyer.net/

U.S. SUPREME COURT

Supreme Court decides FDCPA statute of limitations. The Supreme Court held that absent the application of an equitable doctrine, the FDCPA's statute of limitations begins to run on the date on which the alleged FDCPA violation occurs, not the date on which the violation is discovered.

The Court considered whether a discovery rule applies to the FDCPA's statute of limitations, which provides that actions must be brought "within one year from the date on which the violation occurs." 15 U.S.C. § 1692k(d). Stating that the phrase "discovery rule" has no "generally accepted meaning," the Court addressed two concepts—"the application of a general discovery rule as a principle of statutory interpretation and the application of a fraud-specific discovery rule as an equitable doctrine."

The Court held that there is no general discovery rule that applies to all FDCPA cases, refusing to read such a discovery rule into language it considered unambiguous. The Court also recognized that it has applied an equity-based discovery rule in fraud cases. The Court stated, however, that the petitioner could not rely on that equitable doctrine because he had failed to preserve the issue in the court of appeals or raise it in his petition for certiorari. The Court therefore affirmed the court of appeals, which had held that the action was untimely. Rotkiske v. Klemm, 140 S. Ct. 355 (2019).
https://www.supremecourt.gov/opinions/19pdf/18-328_pm02.pdf

FEDERAL CIRCUIT COURTS OF APPEALS

College did not owe students fiduciary duty. The First Circuit ruled against efforts by former Mount Ida College students to hold the school and its leaders accountable for the rushed and haphazard way it closed, affirming that colleges do not owe a fiduciary duty to students. A fraud allegation against school officials for offering rosy outlooks or omitting vital information while financial conditions worsened also came up short. Students failed to show evidence of false statements or to prove the college had a duty to disclose the financial decline, according to the opinion. Squeri v. Mount Ida College, 954 F.3d 56 (1st Cir. 2020).
https://law.justia.com/cases/federal/appellate-courts/ca1/19-1624/19-1624-2020-03-25.html

Night Club texting platforms are autodialers. The Second Circuit ruled that online texting systems being used by a New York nightclub are a type of prohibited automatic telephone dialing system, adding to the list of competing definitions of illegal autodialers proffered by appeals courts around the country.

A three-judge panel revived and remanded a proposed class action alleging that La Boom Disco Inc. sent lead Plaintiff at least 300 unwanted advertising text messages over more than a year-and-a-half in violation of the Telephone Consumer Protection Act. The decision is a broad reading of the statute, finding that calling from a list of numbers violates the statute. Duran v. La Boom Disco, Inc., ___ F.3d ___ (2d Cir. 2020). https://law.justia.com/cases/federal/appellate-courts/ca2/19-600/19-600-2020-04-07.html

Business card with fax number may constitute consent to receive faxes. The Third Circuit ruled that distributing a business card with a fax number on it can be sufficient to establish "express invitation or permission" to receive faxes, and dismissed a proposed class action under the Telephone Consumer Protection Act over allegedly unwanted faxes.

A divided three-judge panel found that the use of "express consent" and "express invitation or permission" in the TCPA are interchangeable, and apply to unwanted phone calls and faxes equally.

In a decision that waded into unsettled questions for the circuit about what constitutes a violation of the TCPA, Judge Joseph Greenaway, who wrote the majority opinion, further rejected arguments that the law requires faxes to include an opt-out clause even when the recipient is found to have "solicited" for the fax. "Its purpose is not to curb permitted, invited, and consented to—*i.e.*, solicited—faxes," Greenaway said. "As such, under the TCPA, solicited faxes do not need to contain opt-out notices." Physicians Healthsource, Inc. v. Cephalon, Inc., 954 F.3d 615 (3d Cir. 2020). https://images.law.com/contrib/content/uploads/documents/402/60851/PHI-v.-Cephalon.pdf

Court denies 7,600-person class in debt collection suit. The Fifth Circuit held a lower court erred in certifying a class of more than 7,600 recipients of medical debt collection letters from Medicredit. The court found that the named plaintiff had not shown Medicredit threatened legal action while also not actually intending to sue.

Plaintiff said in her underlying suit that the debt collector had sent her a letter that led her to believe she was going to be sued over her debt. Following receipt of the letter and a subsequent conversation with the medical center, Flecha filed suit under the Fair Debt Collection Practices Act, claiming Medicredit's letter made a false threat of legal action. A Texas federal court later certified a class of an estimated 7,650 individuals who had received the same letter.

On appeal, the Fifth Circuit vacated certification, saying plaintiff had not provided "*any* evidence concerning [the medical center's] intent to sue (or lack thereof)—let alone any evidence of *class-wide* intent." "This lack of evidence concerning [the medical center's] class-wide intent is fatal to class certification…." Flecha v. Medicredit Inc., 946 F.3d 762 (5th Cir. 2020). https://law.justia.com/cases/federal/appellate-courts/ca5/18-50551/18-50551-2020-01-08.html

Sixth Circuit reminds parties that notice must be given before binding class members. A recent decision by the U.S. Court of Appeals for the Sixth Circuit provides an important reminder that if defendants want absent class members to be bound by a summary judgment ruling in their favor, generally they must insist that notice be given to the class before that ruling is made.

In the case at hand, the district court certified a class and then, before ordering notice to the class, granted summary judgment in favor of the defendant. The Sixth Circuit affirmed the district court's summary judgment ruling, finding that none of the causes of action were viable under state law. But it also ruled that the class certification ruling in effect was a nullity due to the failure to give notice, and the judgment would apply only to the named plaintiffs. The Sixth Circuit rejected the defendant's suggested approach of remanding so that post-judgment notice could be provided to the class because "post-judgment notice would present no meaningful opportunity for class members to make their case;" rather, it "would only invite parties to enter a fight that they already lost." Faber v. Ciox Health, LLC, 944 F.3d 593 (6th Cir. 2019). https://law.justia.com/cases/federal/appellate-courts/ca6/18-5896/18-5896-2019-12-05.html

Fair Debt Collection Act claim fails. The Sixth Circuit affirmed the dismissal of a Fair Debt Collection Practices Act suit from Buchholz, a Michigan resident, who said a law firm's debt-collection letters made him feel anxious. Buchholz argued that the letters misled him into believing that a lawyer had reviewed his debts and that the firm might sue him if he did not promptly pay up.

The court found in its de novo review of the case that the firm's letters did not threaten litigation and Buchholz never indicated that he refused to pay those debts. "Rather, he fears what might happen if he does not pay. So far as we know, Buchholz might decide to pay his debts, warding off any prospect of litigation," the order said. "Because Buchholz has neither alleged that MNT has threatened to sue him nor that he refuses to pay his debts, we cannot infer that litigation is 'certainly impending.'" "So even if anxiety is a cognizable injury—and we have our doubts—the anxiety that Buchholz alleges is not traceable to anyone but him," the judges said. Buchholz v. Meyer Njus Tanick, PA, 946 F.3d 855 (6th Cir. 2020). https://law.justia.com/cases/federal/appellate-courts/ca6/18-2261/18-2261-2020-01-03.html

Debt collector letter using the terms "original" and "current" creditor does not violate FDCPA. The Seventh Circuit found that a letter sent by a debt collector to a debtor listing the "original" and "current" creditors did not violate 15 U.S.C. § 1692g(a)(2) of the Fair Debt Collection Practices Act because the letter clearly and unambiguously identified the purchaser of the debt as the "current creditor." Section 1692(g)(a)(2) did not require a detailed explanation of the transactions leading to the debt collector's notice, and no evidence of confusion could change the result. Dennis v. Niagara Credit Sols., Inc., 946 F.3d 368 (7th Cir. 2019). https://law.justia.com/cases/federal/appellate-courts/ca7/19-1654/19-1654-2019-12-30.html

Court affirms $5.7M judgment in junk fax suit. The Seventh Circuit upheld a $5.7 million judgment against a pharmaceutical wholesaler accused of sending junk faxes to a class of medical professionals, saying the wholesaler failed to show adequate evidence that customers consented to receiving the company's advertisements.

The faxes at issue were sent to former customers of Allscripts, an electronic health care record system vendor that A-S Medication purchased in 2009 in a full asset sale. A-S argued that customers' consent to receive faxes transferred over with everything else in the purchase, but a three-judge panel disagreed. The panel found that the Telephone Consumer Protection Act must be construed liberally in favor of consumer protection. The

TCPA bars advertisers from sending ads via fax unless they have an established business relationship, prior express permission or invitation from its recipients, the panel said.

> Given those requirements, it would seem odd if a company could solicit express prior permission to send fax advertisements, then transfer that permission to a completely different company who in turn may send advertisements with impunity until the consumer affirmatively terminates its previous permission. Indeed, such a practice could eviscerate the entire statutory scheme which is designed to protect consumers from receiving unwanted contact from unknown entities or individuals.

Physicians Healthsource Inc. v. A-S Medication Sols. LLC, 950 F.3d 959 (7th Cir. 2020).
https://law.justia.com/cases/federal/appellate-courts/ca7/19-1452/19-1452-2020-02-24.html

New standard for class action notice when arbitration clause may exist. The Seventh Circuit created a new test for district courts to utilize in these circumstances and concluded that a court: (1) may not authorize notice to individuals shown to have entered mutual arbitration agreements waiving their right to join the action; and (2) must give the defendant an opportunity to make that showing. Bigger v. Facebook, Inc., 947 F.3d 1043 (7th Cir. 2020).
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2020/D01-24/C:19-1944:J:Kanne:aut:T:fnOp:N:2464184:S:0

Suit against condominium association board director to collect attorneys' fees is not for a consumer debt. The Seventh Circuit found that the former board director failed to state a cause of action under the Fair Debt Collections Practices Act, 15 U.S.C. 1692, et seq., because the attorneys' fees at issue and authorized under the association's "Restated Declaration" agreement for violations of the board's rules or obligations did not constitute a "debt" under the FDCPA's limited, consumer-protection-focused definition.

Suit against condominium association board director to collect attorneys' fees is not for a consumer debt.

It was undisputed that the association's state court action requested that the court impose a financial obligation on the former board director by requiring him to pay fees. However, the Court noted that to determine whether the demand qualifies as a "debt" under the FDCPA "[t]he crucial question is the legal source of the obligation."

The former board director argued that any obligation to pay the association's counsel's attorneys' fees was a consumer debt because but for his condominium purchase he never would have served on the association board; but for his board service, he never would have become ensnared in the state court action; and but for the state court action, he never would have found himself on the receiving end of the association's counsel's legal demand to pay attorneys' fees.

Reviewing Congress's limited definition of "debt" under the FDCPA to consumer debt, however, the Seventh Circuit determined that the attorneys' fees at issue did not "aris[e] out of" a consumer transaction as Congress employed that requirement in defining "debt" (15 U.S.C. § 1692a(5)) and, therefore, fell outside the scope of the statute. Spiegel v. Kim, 952 F.3d 844 (7th Cir. 2020).
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2020/D03-06/C:18-2449:J:Scudder:aut:T:fnOp:N:2484043:S:0

Arbitration under Federal Arbitration Act voluntarily waived. The issue presented to the Seventh Circuit was this: Did a party asserting a right to arbitration in its motion to dismiss, but withdrawing it when the opposing party threatened sanctions for a "frivolous claim" voluntarily waive its right to arbitration, despite asking the court to compel it? The district court denied the request for arbitration, finding:

> Coaster Dynamix waived its right to arbitrate by expressly withdrawing the arbitration demand in its second motion to dismiss. "Coaster chose a course inconsistent with submitting the case to an arbitral forum." Nor did the court allow Coaster Dynamix to rescind its waiver.

The Seventh Circuit affirmed, finding that Coaster waived its right to arbitration and failed to prove an "abnormal circumstance" warranting rescission of its waiver.

> Federal law favors arbitration. Like other contractual rights, though, the right to arbitrate is waivable. A waiver can be express or implied through action. Either way, the question is whether "based on all the circumstances, the party against whom the waiver is to be enforced has acted inconsistently with the right to arbitrate."

Next, the court addressed the test for waiver as follows:

> The analysis can be short when the basis of the waiver is an express abandonment of the right. In most situations, "I waive arbitration" answers the question. The district court found that Coaster Dynamix's withdrawal of the arbitration argument amounted to an explicit waiver of any right to arbitrate.

Brickstructures, Inc. v. Coaster Dynamix Inc., 952 F.3d 887 (7th Cir. 2020).
https://law.justia.com/cases/federal/appellate-courts/ca7/19-2187/19-2187-2020-03-11.html

AT&T cannot impose arbitration. The Ninth Circuit blocked AT&T from contesting a decision that barred it from forcing customers into arbitration over claims that the wireless giant misrepresented unlimited cellphone data plans.

In an unpublished decision, the panel upheld a California court ruling that found the proposed class of consumers need not pursue their claims in private after a state supreme court ruling set a precedent in their favor. "We hold that AT&T's arbitration agreement is unenforceable," the court said. "Accordingly, we affirm the district court's order denying AT&T's motion to compel arbitration." Roberts v. AT&T Mobility LLC, ___ F. App'x ___ (9th Cir. 2020).
https://law.justia.com/cases/federal/appellate-courts/ca9/18-15593/18-15593-2020-02-18.html

Individual class members must show standing to recover damages. The Ninth Circuit found that each individual class member in a class action lawsuit was required to have standing to recover damages, but also agreed with the plaintiff that each of the 8,185 class members had standing. The court relied on the Supreme Court case *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1543 (2016), and held that each class member was not required to show that TransUnion actually disclosed his or her credit report to a third party because TransUnion's violation of the consumers' statutory rights under the FCRA constituted a concrete injury sufficient to confer standing. *Ramirez v. TransUnion LLC*, 951 F.3d 1008 (9th Cir. 2020).

https://law.justia.com/cases/federal/appellate-courts/ca9/17-17244/17-17244-2020-02-27.html

Ninth Circuit defines "debt collector" under FDCPA. Reversing the district court's dismissal of an action under the Fair Debt Collection Practices Act and remanding, the Ninth Circuit held that a business that bought and profited from consumer debts, but outsourced direct collection activities, qualified as a "debt collector" subject to the requirements of the Act. The panel held that an entity that otherwise meets the "principal purpose" definition of debt collector under 15 U.S.C. § 1692(a)(6) (defining debt collector as "any business the principal purpose of which is the collection of any debts") cannot avoid liability under the FDCPA merely by hiring a third party to perform its debt collection activities.

Judge Bea, dissenting, wrote that the complaint failed to allege that the defendant acted directly in any way to violate the plaintiff's rights under the FDCPA; the plaintiff did not adequately allege that the defendant's "principal purpose" was the "collection of any debts;" and the word "collection" must, in context, describe the action of collecting. McAdory v. M.N.S. & Assocs., LLC, 952 F.3d 1089 (9th Cir. 2020). https://cdn.ca9.uscourts.gov/datastore/opinions/2020/03/09/18-35923.pdf

Even 16 minutes late is too late for filing an appeal. The Tenth Circuit upheld a district court's denial of a motion for leave to file an untimely appeal.

The district court entered its final judgment on November 14, triggering the 30-day clock for Hammer to appeal the decision by 11:59 p.m. on December 14. At 12:16 a.m. on December 15, she filed a motion for an extension of the deadline to appeal, citing "several client emergencies," "significant gastrointestinal issues," and interrupted access to her office network and printer. She also detailed her struggles with the court's Electronic Case Filing system, noting that she mistakenly logged into a training website rather than the court's official filing page, and then accidentally logged into the official filing page using incorrect credentials.

The court framed the issue as whether Hammer's individual errors or delays rendered the court clerk's office "inaccessible" under Rule 26(a)(3) of the Federal Rules of Appellate Procedure. It held that they did not, referencing cases from around the country where neither power outages at 11:50 p.m., FedEx's failure to deliver filings on time, nor failed internet connections made the court "inaccessible." The court's system, not the litigant's, must malfunction to excuse a late filing. Chung v. Lamb, 794 F. App'x 773 (10th Cir. 2019). https://www.accountsrecovery.net/wp-content/uploads/2019/12/Boscoe-Chung-v-Lamb.pdf

One-year contractual limit bars wrongful death suit. The Tenth Circuit affirmed the dismissal of a suit accusing a home security company of causing a customer's death in a house fire, saying in that a contractual provision setting a one-year time limit for civil claims was valid and enforceable.

The three-judge panel unanimously affirmed a Kansas federal judge's decision to grant ADT's motion to dismiss in a suit accusing the company of causing the death of customer, who died of smoke inhalation in August 2016 as a result of an accidental fire at her home. Frost v. ADT, LLC, 947 F.3d 1261 (10th Cir. 2020).
https://law.justia.com/cases/federal/appellate-courts/ca10/18-3259/18-3259-2020-01-17.html

The Eleventh Circuit confirmed that neither JP Morgan Chase nor its law firm violated the Fair Debt Collection Practices Act when they named the siblings of a deceased man in a state-court foreclosure action related to his home, holding they are not "debt collectors" as defined by the Act. In an unpublished, unanimous decision, the panel affirmed a Florida federal court's finding that the claims against Chase and its law firm are not actionable under the FDCPA. The assertion from the plaintiffs that Chase collects debt that is owed to another party is wrong, the panel said.

"In attempting to foreclose on [deceased borrower] Clinton Arbuckle's mortgage, Chase was acting on its own behalf and cannot be considered as attempting to collect debts 'owed or due another,'" the panel said. "Chase is the originating lender and is therefore exempt from the FDCPA's definition of 'debt collector.'" Anderman v. JP Morgan Chase Bank, N.A., ___ F. App'x ___ (11th Cir. 2020).
https://law.justia.com/cases/federal/appellate-courts/ca11/19-13734/19-13734-2020-02-11.html

Suit over collection of phantom debt dismissed. The Eleventh Circuit affirmed the dismissal of a student-loan borrower's claims against the Pennsylvania Higher Education Assistance Agency under the Fair Debt Collection Practices Act. The district court found the guaranty agency does not qualify as a debt collector under the statute.

In a 2-1 decision, the appeals court agreed with the agency that it was not acting as a debt collector under the FDCPA when it tried to collect payment for nonexistent student loan debt from Georgia resident Hope Darrisaw. The statute excludes from its definition of "debt collector" anyone "collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity … is incidental to a bona fide fiduciary obligation." A guaranty agency acts as a fiduciary to the federal government and is thus exempt from limitations placed on debt collectors, according to the opinion. Darrisaw v. Pa. Higher Educ. Assistance Agency, 949 F.3d 1302 (11th Cir. 2020).
https://law.justia.com/cases/federal/appellate-courts/ca11/17-12113/17-12113-2020-02-07.html

Privacy dispute subject to arbitration. The Eleventh Circuit on Wednesday handed DirecTV a win in a privacy dispute, finding that a customer's contract requires arbitrating his claim because the claim only arises out of his relationship with DirecTV.

In an unpublished opinion characterized as "narrow" and tailored only to the facts of the current disagreement over an arbitration clause, a three-judge panel said a Georgia federal judge erred in denying DirecTV's move to push René Romero's complaint into arbitration. The court found the agreement to arbitrate—worded as applying to "claims arising out of or relating to any aspect of the relationship between us"—covers Romero's action under the Satellite Television Extension and Localism Act, because the underlying claim would never have cropped up if he were not a DirecTV customer. Cordoba v. DirecTV, LLC, ___ F. App'x ___ (11th Cir. 2020). https://www.courtlistener.com/opinion/4728096/sebastian-cordoba-v-directv-llc/

FEDERAL DISTRICT COURTS

DTPA implied warranty claim against remote manufacturer permitted. A U.S. District Court for the Northern District of Texas has allowed a DTPA implied warranty claim against an automobile manufacturer to proceed, notwithstanding Texas Supreme Court language that appears to prohibit such suits. The court noted that in *PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship*, the Texas Supreme Court explained that "a downstream buyer *can* sue

DTPA implied warranty claim against remote manufacturer permitted.

a remote seller for breach of implied warranty, but *cannot* sue under the DTPA." 146 S.W.3d. 79, 89 (Tex. 2004) (emphasis in original). The court continues, however, to note that "BMW mischaracterizes the holding of this case in its application here." Mize v. BMW of N. Am., LLC, 2020 U.S. Dist. LEXIS 55557 (N.D. Tex. 2020).

Children not bound by parents' arbitration agreement. A Seattle federal judge refused to arbitrate suits brought by children alleging Amazon's Alexa voice-activated speakers violate state privacy laws. The judge stated the children cannot be bound by the arbitration agreement in the conditions of use for a product their parents bought.

In his decision, U.S. District Judge Richard A. Jones denied Amazon Inc.'s request to arbitrate the proposed class claims by several parents and children that the Seattle-based online retailer has built a massive database containing billions of voice recordings without their consent. But just because the parents who purchased an Alexa device agreed to an arbitration clause, that does not mean their children are also bound by that agreement, according to the order. Judge Jones said the children, at most, received an indirect benefit of enjoying the use of the Alexa device from their parents' agreements with Amazon, meaning they cannot be bound by the arbitration clause. B.F. v. Amazon.com, Inc., 2020 WL 1808908 (W.D. Wash. 2020).

Court adopts broad definition of predictive dialer. The case presented a variety of contentious TCPA issues, including: (1) whether calling a phone number previously belonging to a consenting consumer negates or mitigates liability; (2) what qualifies as an Automatic Telephone Dialing System, or "ATDS," under the statute; and (3) whether calls placed to a potentially non-working number are still considered violations of the TCPA.

Credit One placed 380 calls to plaintiff Alejandro Jiminez's phone number between January and March of 2017. Even though some evidence suggested that 43 of the attempted calls were made while the phone number was not in service, the Southern District of New York held Credit One liable for the statutorily-fixed amount of $500 per call, resulting in a $190,000 judgment. Although Jiminez was not a customer of Credit One, Credit One did have consent from the consumer who previously owned the number to call. The court found such prior consent immaterial.

In its order, the Court also deferred to the Federal Communications Commission's 2003 Order, 2008 Ruling, and 2012 Order—all providing a broad definition of predictive dialers and indicating that predictive dialers are ATDSs under the TCPA. Jiminez v. Credit One Bank, N.A., 2019 WL 6251369 (S.D.N.Y. 2019).
https://www.consumerfinancialserviceslawmonitor.com/wp-content/uploads/sites/501/2019/12/2019-TCPA-Case-Jiminez-v.-Credit-One-Bank-final-order.pdf

Plaintiff that receives compensation before filing complaint cannot represent a class. A California federal judge gave CamelBak Products LLC a win Thursday in a proposed class action alleging its "spill-proof" water bottles were defective. The court said the plaintiff has no standing to sue because she was compensated before she filed the complaint. The judge noted that although the plaintiff initially rejected a replacement bottle and check sent her in response to her issues with a defective bottle, she was still made whole by the offer, and, therefore, is not suitable to bring the class action suit.

While the plaintiff argued she did not accept the gifts, as she has maintained both the bottle and $20 in escrow, the judge rejected the argument, as previous courts have routinely done, saying accepting her argument would in effect discourage future plaintiffs from resolving their disputes without going to court. She was already made whole prior to filing the lawsuit, and cannot represent the proposed class, according to the opinion. Lepkowski v. CamelBak Prods. LLC, 2019 WL 6771785 (N.D. Cal. 2019).
https://law.justia.com/cases/federal/district-courts/california/candce/4:2019cv04598/345976/31/

Court refuses to enforce arbitration provision when plaintiff claims he never visited the website. The United States District Court for the Northern District of Georgia refused to submit to arbitration a dispute alleging violation of the Telephone Consumer Protection Act because plaintiff provided a declaration stating that he did not visit defendant Apollo Interactive, Inc.'s website. In doing so, the court kept alive a TCPA class action where Hobbs allegedly provided his telephone number—and may or may not have agreed to arbitrate—in an online submission.

The court's ruling on the motion to dismiss came down to dueling declarations. Defendant Apollo presented a declaration attesting that on August 29, 2018 at 3:57 p.m., Hobbs's contact information was entered in its website from a specific IP address located in Norcross, Georgia. Contrastingly, Hobbs produced his own declaration stating that he did not visit the website and, furthermore, that he could not have visited the website at that time. According to Hobbs, he was driving from his job at the Atlanta Zoo to Columbus, Georgia at the precise time when his contact information was submitted to the site. Hobbs v. Apollo Interactive, 2019 WL 6878863 (M.D. Ga. 2019).
https://www.consumerfinancialserviceslawmonitor.com/wp-content/uploads/sites/501/2020/01/Hobbs-v.-Apollo-Interactive_-Inc._-2019-U.S.-Dist.-LEXI.pdf

Uber data breach lawsuit sent to arbitration. A California federal judge sent to arbitration a proposed class action alleging Uber failed to secure riders' and drivers' personal information after hackers stole 57 million accounts and the rideshare service stayed mum about paying the thieves a $100,000 ransom. The court found that riders and drivers were required to sign up for an account before they could use the service. The agreement they signed included terms and conditions and services agreements that both contain arbitration provisions. Heller v. Rasier, LLC, 2020 WL 413243 (C.D. Cal. 2020).
https://www.jdsupra.com/legalnews/ca-central-district-court-upholds-78831/

Nintendo can arbitrate controller dispute. A suit alleging Nintendo sold defective Switch controllers will go to arbitration, after a Washington federal judge on Monday found that the game company and console buyers had a valid arbitration agreement.

Although the judge granted Nintendo's bid to compel arbitration, he also denied the company's move to dismiss the case, instead pausing the proposed class action pending the outcome of the arbitration.

Nintendo moved to dismiss and compel arbitration in the proposed class action in November, arguing that the end-user license agreements that buyers accepted when buying the console stipulate that any disputes coming from those agreements be sent to arbitration.

The plaintiff opposed the motion, arguing that the arbitration provision is unenforceable, because California law and Ninth Circuit precedent hold that an arbitration clause that precludes injunctive relief, such as the one in the Switch's end-user license agreement, is null and void. However, Judge Zilly rejected this argument, saying the language of the end-user license agreement allows the arbitrator to "grant whatever relief would be available in a court under law or in equity." As the agreement does not preclude injunctive relief, it is valid and enforceable. Diaz v. Nintendo of Am. Inc., 2020 WL 996859 (W.D. Wash. 2020). https://www.courtlistener.com/recap/gov.uscourts.wawd.275807/gov.uscourts.wawd.275807.36.0.pdf

STATE COURTS

Emails did not create a contract. The Texas Supreme Court considered whether an exchange of emails and documents constituted a "definitive agreement."

The parties signed a bidding agreement that, "unless and until a definitive agreement has been executed and delivered, no contract or agreement providing for a transaction between the Parties shall be deemed to exist." The court found that by including the No Obligation Clause in the Confidentiality Agreement, Chalker and LNO agreed that a definitive agreement was a condition precedent to contract formation.

The court noted that despite numerous emails indicating the parties may have believed they reached agreement, "Although the emails are writings, they do not form a definitive agreement." The court also held that the sellers did not waive their right to a definitive agreement as a matter of law. Chalker Energy Partners III LLC v. Le Norman Operating LLC, 595 S.W.3d 668 (Tex. 2020). https://law.justia.com/cases/texas/supreme-court/2020/18-0352.html

Real estate contract found unconscionable. A Texas court of appeals found a real estate contract to be unconscionable under the DTPA based on price. In addition to DTPA damages, the court also ruled the promissory note, deed of trust and vendor's lien in special warranty deed were void pursuant to the DTPA. Sadeghian v. Jaco, 2020 WL 400172 (Tex. App.—Dallas 2020, no pet h.) (mem. op.). https://casetext.com/case/sadeghian-v-jaco-3

Real estate contract found unconscionable.

Car dealer waived arbitration. A New Jersey appeals court held that a car dealership waived its right to force arbitration of "hidden fee" claims based on a vehicle order contract due to its previously unsuccessful attempt to compel arbitration solely under a lease agreement.

Nearly a year after losing an appellate decision on the validity of an arbitration clause in the lease agreement, the dealer failed to convince the two-judge panel to overturn a trial court ruling that the dealership had waived its right to compel arbitration of the plaintiff's claims based on an arbitration provision in his "motor vehicle retail order" agreement.

"Defendant's failure to proffer all relevant documentation, despite its awareness of the MVRO arbitration provision from the onset, is the sort of piecemeal litigation strategy prohibited under *Cole*," and constitutes a waiver. The court also found that the dealer's "after-the-fact assertion of arbitration under the MVRO clearly prejudiced" the plaintiff. The dealership's "initial motion to compel arbitration did not mention the MVRO's provision," and the business "waited over a year to assert the MVRO arbitration provision," the court said. Trout v. Winner Ford, 2019 WL 6486886 (N.J. Super. Ct. App. Div. 2019).
https://law.justia.com/cases/new-jersey/appellate-division-unpublished/2019/a3732-18.html

Third party additional insured bound by policy's arbitration clause. The California Court of Appeal, Third District, reversed a trial court's holding that an additional insured was not bound by an arbitration agreement in an insurance policy. The court held that an arbitration agreement in a commercial general liability policy bound a "third party beneficiary" under the policy that was also "equitably estopped" from avoiding the arbitration clause. The court reversed the trial court, vacated its order denying Philadelphia's petition to compel arbitration, and directed the trial court to order arbitration of the coverage dispute.

The coverage dispute arose out of personal injuries suffered in the parking lot of the Fresno Convention Center during the 2013 Future Farmers of America annual convention. During the event, an attendee tripped over a large pothole in the parking lot of the convention center, hit his head on a car, and suffered serious injuries. The injured attendee sued the City of Fresno as well as SMG.

Under California law, "there are six theories by which a nonsignatory may be bound to arbitrate[.]" The court was concerned with two: (1) the intended third-party beneficiary theory, and (2) the equitable estoppel theory. Based upon the facts and circumstances of the case. The court held that SMG was bound to arbitrate its coverage dispute under both theories. Based upon the license agreement (entered into between SMG and FFA) and the policy, the court held that SMG is an intended beneficiary of the policy. And, "SMG's tender [to Philadelphia] also constitutes a knowing claim of contract benefits, namely defense and indemnity." Phila. Indem. Ins. Co. v. SMG Holdings, Inc., 257 Cal. Rptr. 3d 775 (Cal. Ct. App. 2019). https://law.justia.com/cases/california/court-of-appeal/2020/c082841.html

FEDERAL NEWS

Supreme Court will not take up a payday lender's constitutional challenge to the CFPB, pending at the Fifth Circuit. The justices denied a bid from All American Check Cashing Inc. to skip straight to the high court with its questions about the agency's constitutionality, before the Fifth Circuit renders a judgment on the check cashing and payday loan company's appeal of an enforcement action over allegedly improper business practices.

All American contends it is unconstitutional for the CFPB to be set up with a single leader who can only be removed for cause, and that its enforcement actions are therefore invalid. After Monday's high court denial, it will now be up to the Fifth Circuit to determine the constitutionality of the agency's structure. Click *here* for more.

FCC says emailed faxes are exempt from TCPA. In a ruling that could have sweeping implications, the Federal Communications Commission clarified Monday that online fax services are not actually sending out faxes—at least not how the Telephone Consumer Protection Act defines them.

That means that junk fax suits cannot be aimed at companies or entities that send out such "online faxes," as long as those messages are not delivered to a traditional fax machine, according to the FCC. "Congress did not intend the statute's prohibition to apply to faxes sent to equipment other than a telephone facsimile machine," the agency said in its four-page declaratory ruling. Because email inboxes do not operate in the same way fax machines do, the FCC found that unsolicited messages sent by online fax services do not cause the same kind of harm to consumers that the TCPA is intended to target. 34 FCC Rcd 11950 (2019). https://www.fcc.gov/document/granted-request-declaratory-ruling-filed-amerifactors-financial

EEOC rescinds policy against binding arbitration of discrimination disputes. The Commission in 1997 adopted the Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment (July 10, 1997) (Policy Statement). Since its issuance, the Supreme Court has ruled that agreements to arbitrate employment-related disputes are enforceable under the Federal Arbitration Act (FAA) for disputes between employers and employees. Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001). In other arbitration-related cases the Court has decided since 1997, the Court rejected concerns about using the arbitral forum—both within and outside the context of employment discrimination claims. Those decisions conflict with the 1997 Policy Statement.

EEOC rescinds policy against binding arbitration of discrimination disputes.

Although the rescinded policy recognizes the validity of arbitration agreements between employers and employees, case law also now makes clear that the EEOC continues to be fully available to employees as an avenue to assert EEO rights and to investigate in the public interest. The EEOC may hear disputes, regardless of whether the parties have entered into an enforceable arbitration agreement. Click *here* for more.

The CFPB's new abusiveness policy statement. On Friday, the CFPB issued a Policy Statement on Abusive Acts or Practices. According to one commentator the Policy Statement is disappointing in several respects. The Policy Statement described several limits to how the Bureau plans to use its abusiveness power. The Bureau explained that it would challenge "conduct as abusive…if the Bureau concludes that the harms to consumers from the conduct outweigh its benefits to consumers." In this respect, the Bureau's interpretation of abusiveness implies the use of cost-benefit analysis. If I recall correctly, during the Bureau's symposium on abusiveness, Pat McCoy pointed out that Congress did not include such a cost-benefit test when it enacted the abusiveness power. Chris Peterson made the same point Friday in a tweet. Congress plainly had cost-benefit analysis on its mind when it gave the Bureau the power to pursue abusive acts, because it included a cost-benefit test in the very section, § 5531, conferring upon the Bureau the ability to address abusive practices. That test appears in the provisions giving the Bureau the power to act against unfair practices. § 5531(c)(1). Elsewhere in the statute, Congress directed the Bureau to consider costs and benefits when issuing rules. § 5512(b)(2). It thus seems fairly clear that Congress knew about cost-benefit analysis and chose not to have it be a factor in enforcement and supervisory actions based on abusiveness. Accordingly, the Bureau's statement seems unjustifiable as a matter of statutory interpretation of the text and seems more rooted in its own policy views than what Congress wrote or intended. Click *here* for more.

STATE NEWS

The Texas Supreme Court has entered an order (Emergency Order 10) protecting stimulus payments from garnishment until May 7, 2020. The order basically provides that in any action to collect a consumer debt as defined by Texas Finance Code section 392.001(2), a writ of garnishment under Rule 658 of the Texas Rules of Civil Procedure may issue, but service of the writ of garnishment may not occur until after May 7, 2020. The order also deals with default judgments and receivers. The Texas Supreme Court has also temporarily halted eviction proceedings across the state until April 30 (Emergency Order 9). Click *here* for more.

DECEPTIVE TRADE PRACTICES AND WARRANTY

ATTORNEY MAY BE SUED UNDER DTPA BASED ON UNCONSCIONABILITY

K&L Gates LLP v. Quantum Materials Corp., ___ S.W.3d ___ (Tex. Ct. App. 2020).
https://public.fastcase.com/ppbqSQpNDaJE%2F8PlIk0b8MAj4Ec8JKX1eq0Hbs9kf8TD6xmshN6KgdQiSFIcHgAX

FACTS: Plaintiff technology manufacturer Quantum Materials Corp. retained Defendant law firm K&L Gates LLP for legal services. The parties memorialized their agreement with a letter of engagement ("Engagement Letter"). Affirmative statements made in the Engagement Letter included that K&L Gates would: (1) act in Quantum Materials's best interest; (2) notify Quantum Materials of the end of representation; (3) maintain confidence of any privileged information; (4) decline to engage any adverse clients on substantially related matters during the period of representation; and (5) advise Quantum Materials of certain conflicts following the termination of representation. K&L Gates rendered legal services through 2016. While K&L Gates never formally or expressly terminated its representation of Quantum Materials, it sent its last invoice on January 31, 2017, for services provided through December 31, 2016.

In September of 2017, a legal dispute arose involving Quantum Materials, two lenders, and Empire Stock Transfer ("Empire"). Quantum Materials sued Empire, seeking to enjoin Empire from transferring stock to the lenders. K&L Gates did not represent Quantum Materials at any stage of the litigation, however K&L Gates filed a petition in intervention on behalf of the lenders, with the Lenders alleging Quantum Materials had breached its respective contracts with the lenders. K&L Gates later voluntarily withdrew its representation of the lenders. The following year, K&L Gates later sent a notice to Quantum Materials requesting payment for the legal work provided in 2016. Quantum Materials filed suit against K&L Gates for multiple claims, including violation of the DTPA.

The court rejected K&L Gates's argument, explaining that, in the context of the practice of law, the DTPA prohibits any "express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion."

K&L Gates filed a motion to dismiss. The trial court denied K&L Gates's motion without explanation. K&L Gates appealed.

HOLDING: Affirmed.

REASONING: K&L Gates argued that the trial court erred by denying its motion because Quantum Materials could not make out a prima facie case for the elements of its claims.

The court rejected K&L Gates's argument, explaining that, in the context of the practice of law, the DTPA prohibits any "express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion," and any "unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion." The court further explained that "[u]nconscionable action or course of action" under the DTPA means "an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree."

The court held that K&L Gates's breach of the Engagement Letter and its denial to the trial court of having represented Quantum Materials, when paired with the allegations listed in the court's discussion of breached fiduciary duty, was sufficient to make out a prima facie case of unconscionable conduct. Additionally, the court stated that because these statements and conduct could not be characterized as "advice, opinion, or judgment," the allegations were not exempt from the DTPA's prohibition on unconscionable conduct. Because Quantum Materials had sufficiently argued that K&L Gates's alleged conduct could rise to the level of unconscionability, the court held that Quantum Materials had satisfactorily made out a prima facie case for the elements of its claims.

DTPA IMPLIED WARRANTY CLAIM AGAINST REMOTE MANUFACTURER PERMITTED

Mize v. BMW of N. Am., LLC, ___ F. Supp. 3d ___ (N.D. Tex. 2020)
https://www.leagle.com/decision/infdco20200427c99

FACTS: Plaintiff Dora Smith purchased a BMW vehicle with a certified pre-owned warranty. Smith later discovered the vehicle consumed excessive amounts of engine oil, requiring frequent oil changes and engine repairs which diminished the value of the vehicle. Smith filed suit against the vehicle's manufacturer, Defendant BMW of North America, LLC ("BMW"), claiming various violations of the DTPA, including breach of implied warranty.

BMW moved to dismiss for failure to state a claim.

HOLDING: Motion denied.

REASONING: BMW argued that Smith could not recover because she purchased her vehicle used, that she was "seeking damages based on alleged indirect representations," and claimed that she cited "no direct representation from BMW to herself in connection with her decision to purchase the vehicle." BMW cited to *PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship*, in which the Texas Supreme Court explained that a downstream buyer can sue a remote seller for breach of implied warranty, but not under the DTPA.

The court rejected BMW's argument as a mischaracterization of the holding in *PPG*, pointing out that the Texas Supreme Court was confronted with the issue of assigning rights to sue under the DTPA where a downstream purchaser brought express warranty DTPA claims against a remote manufacturer, even though there was no privity of contract between them. In the instant case, however, the court noted that Smith alleged that she purchased the vehicle from BMW, in privity of contract, when she purchased her vehicle with a certified pre-owned warranty. Because Smith's allegations did not establish her as a "downstream purchaser," she was not prohibited from bringing her claims under the DTPA.

CONTRACT FOUND UNCONSCIONABLE UNDER DTPA BASED ON PRICE

PROMISSORY NOTE, DEED OF TRUST, AND VENDOR'S LIEN IN SPECIAL WARRANTY DEED DECLARED VOID PURSUANT TO DTPA

Sadeghian v. Jaco, ___ S.W.3d ___ (Tex. App. 2020).
https://law.justia.com/cases/texas/fifth-court-of-appeals/2020/05-18-00838-cv.html

The DTPA allows a consumer who prevails on a DTPA claim various remedies, including "any other relief which the court deems proper."

FACTS: Defendant-Appellant Khosrow Sadeghian leased real property to Plaintiff-Appellee David Jaco, and later sold the property to Jaco. For the sale, Jaco paid a $10,000 down payment, and the parties executed a real estate lien note, deed of trust, and special warranty deed with vendor's lien. The note reflected a principal amount due of $159,800. However, the property was appraised at a value of only $30,000 by the county tax assessor.

Jaco filed suit, alleging violation of the DTPA for selling the property at an unconscionable price. The jury returned a verdict in Jaco's favor and Jaco moved for entry of judgment. The trial court entered judgment in Jaco's favor and declared void the promissory note, deed of trust, and vendor's lien in the special warranty deed. Sadeghian appealed.
HOLDING: Affirmed.
REASONING: Sadeghian argued that the evidence was insufficient to show unconscionability. Sadeghian also argued that the relief entered by the trial court was improper because the DTPA required the jury to issue a finding specifically with regard to the sale and the DTPA only allowed Jaco to receive economic damages or mental anguish damages.

The court rejected Sadeghian's argument, holding that the property tax appraisal and sheriff's deed introduced by Jaco at trial were sufficient evidence to show unconscionability of price. Although both the appraisal and deed were hearsay, because Sadeghian did not object to the entry of either into evidence, its probative value could not be denied.

The court also rejected Sadeghian's argument that the relief entered was improper, explaining that the DTPA allows a consumer who prevails on a DTPA claim various remedies, including "any other relief which the court deems proper." Because the remedy provided by the trial court was allowed under the plain language of the DTPA, the trial court did not err in granting the declaratory relief.

CLEANING OF A VEHICLE IS NOT A "REPAIR OR MODIFICATION" UNDER THE TEXAS SUPREME COURT'S DEFINITION

Rogers v. Car Wash Partners, Inc., ___ F. Supp. 3d ___ (S.D. Tex. 2019).
https://law.justia.com/cases/federal/district-courts/texas/txsdce/4:2018cv04181/1591355/28/

FACTS: After washing and detailing Plaintiff Alison Rogers's car, an employee of Defendant Mister Car Wash struck and damaged Plaintiff's car with another customer's car in Defendant's parking lot. Plaintiff filed suit alleging several claims, including breach of an implied warranty of good and workmanlike performance for the repair or modification of existing tangible goods under the DTPA.

Defendant moved for summary judgment in regard to this claim.
HOLDING: Motion granted.
REASONING: Defendant argued that the service of cleaning Plaintiff's vehicle did not constitute a repair or modification for which a warranty of good and workmanlike performance is implied.

The court accepted Defendant's argument, citing *Archibald v. Act III Arabians*, wherein the Texas Supreme Court stated that the term "modification" broadly includes any change or alteration that "introduces new elements into the details of the subject matter or cancels some of them but which leaves the general purpose and effect of the subject matter intact." The court held that no reasonable jury would find that cleaning a vehicle was a modification under this definition. Because there was no repair or modification of Plaintiff's car, there was no implied warranty and the Plaintiff's argument-failed.

MORTGAGOR CHALLENGING HOW AN EXISTING MORTGAGE IS SERVICED IS NOT A "CONSUMER" UNDER THE DTPA BECAUSE THE BASIS OF [THE] CLAIM IS THE SUBSEQUENT LOAN SERVICING AND FORECLOSURE ACTIVITIES, RATHER THAN THE GOODS OR SERVICES ACQUIRED IN THE ORIGINAL TRANSACTION

Moore v. Lakeview Loan Servicing, ___ F.Supp.3d ___ (W.D. Tex. 2019).
https://www.leagle.com/decision/infdco20191224d70

FACTS: Plaintiff Stacie Moore obtained a home equity loan ("Loan") from Georgetown Mortgage, LLC. The Loan was later assigned to Defendant Lakeview Loan Servicing, LLC. After Plaintiff failed to make monthly payments on her Loan, another loan servicing company, Defendant LoanCare, LLC, notified Plaintiff that her Loan was in default. Plaintiff filed suit against Defendants alleging violation of the DTPA.

Defendants removed the case to federal court and moved to dismiss for failure to state a claim on which relief can be granted, arguing that Plaintiff did not qualify as a consumer under the DTPA. The district court referred the motion to a Magistrate.

HOLDING: Recommended dismissal.

REASONING: Plaintiff argued that she satisfied the necessary element of consumer status because a mortgagor qualifies as a consumer under the DTPA if (1) her primary objective in obtaining the loan was to acquire a good or service, and (2) that good or service forms the basis of the complaint.

The court rejected Plaintiff's argument, holding that Plaintiff is not a consumer under the DTPA because her complaint is based entirely on Defendants' loan servicing and foreclosure activities, not the goods or services acquired in the original transaction, namely, the home she purchased with the Loan. Because Plaintiff is not a consumer, she may not assert a claim under the DTPA.

Because Plaintiff is not a consumer, she may not assert a claim under the DTPA.

DEBT COLLECTION

EVEN SIXTEEN MINUTES LATE IS TOO LATE FOR FILING AN APPEAL

Chung v. Lamb, ___ Fed. Appx. ___ (10th Cir. 2019).
https://www.accountsrecovery.net/wp-content/uploads/2019/12/Boscoe-Chung-v-Lamb.pdf

FACTS: Plaintiff-Appellant Emily Chung's attorney, Karen Hammer, (collectively, "Chung") filed the underlying case on behalf of her client to redress Defendant-Appellee Timothy Lamb's alleged violation of the FDCPA. The trial court subsequently granted summary judgment to Lamb and entered its final judgment on November 14, 2018. Under Federal Rule of Appellate Procedure 4(a)(1)(A), the deadline to file a notice of appeal expired on Friday, December 14, 2018. Chung filed a motion for an extension of the deadline to file a notice of appeal at 12:16 a.m. on Saturday, December 15, 2018, stating that she encountered several emergencies, including technological issues, that prevented her from filing a timely notice of appeal.

The trial court denied Chung's motion for an extension of time to appeal. Chung appealed the holding.

HOLDING: Affirmed.

REASONING: Chung argued that the clerk's office was "inaccessible" on December 14 because she made attempts to log in to the court's electronic filing system by first mistakenly logging onto the wrong website, and then by logging onto the correct website with incorrect credentials. Chung further argued that, because Federal Rule of Appellate Procedure 26(a)(3) states that the deadline for filing a notice of appeal "is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday" "if the clerk's office is inaccessible" "on the last day for filing," her appeal was timely.

The court rejected Chung's argument, holding that Chung's mistakes did not render the clerk's office inaccessible. The judge reasoned that Chung did not allege that she was attempting to file the notice of appeal when she mistakenly logged in to the wrong website and thereafter used the wrong credentials. Nor did Chung allege that the system would have prevented her from filing the notice of appeal at any time on December 14 had she accessed the correct site and used the correct credentials. Additionally, the court noted that Chung cited no case in which an individual litigant's errors or delays in attempting to file a pleading warranted a finding that the clerk's office was "inaccessible" on the day in question. Accordingly, the court held that the clerk's office was accessible on December 14 and Chung simply failed to access it, rendering her appeal untimely.

DEBT COLLECTOR USING THE TERMS "ORIGINAL CREDITOR" DOES NOT VIOLATE FDCPA

Dennis v. Niagara Credit Sols., 946 F.3d 368 (7th Cir. 2019).
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2019/D12-30/C:19-1654:J:Flaum:aut:T:fnOp:N:2451207:S:0

FACTS: Defendant-Appellee LVNV Funding ("LVNV") bought Plaintiff-Appellant Thomas Dennis's defaulted debt from Washington Mutual Bank. LVNV was a client of Defendant-Appellee Niagara Credit Solutions ("Niagara"), who sent a debt collection letter to Dennis on LVNV's behalf. The letter stated that Niagara's "client" had authorized Niagara to offer a payment plan or a settlement of the debt in full. The letter identified Washington Mutual Bank as the "original creditor" and LVNV as the "current creditor." Dennis filed a class action suit against LVNV and Niagara, claiming violation of the FDCPA by the defendants' failure to identify clearly and effectively the name of the creditor to whom the debt was owed.

The trial court granted summary judgement for the defendants, concluding that the letter adequately identified to whom the debt was owed. Dennis appealed.

HOLDING: Affirmed.

REASONING: Dennis argued that the debt collection letter violated FDCPA §1692g(a)(2)'s requirement that debt collectors send consumers a written notice containing the name of the creditor to whom the debt is owed. Dennis argued that the letter did not satisfy the FDCPA because identifying two separate entities as the "current creditor" and "original creditor" led to consumer confusion.

The letter provided information clearly enough that the recipient is likely to understand it.

The court rejected Dennis's argument, holding that the defendants did not violate the FDCPA standards because the letter provided information clearly enough that the recipient is likely to understand it. The court explained that when a consumer's debt has been sold, it is helpful to the consumer to identify the original creditor and the current creditor. The court cited its holding in *Smith v. Simm* that FDCPA violations are to be viewed through the objective lens of an unsophisticated consumer who, while "uninformed, naïve, or trusting," possesses at least reasonable intelligence and is capable of making basic logical deductions and inferences. Because an unsophisticated consumer would be capable of understanding from the letter that the debt had been purchased by and was now owed to the current creditor, the court held the letter did not violate FDCPA standards.

UNDER FDCPA, DEBT COLLECTOR'S LETTER REGARDING DEBT DISPUTE PROCEDURE MUST INFORM CONSUMER THAT THESE REQUESTS MUST BE MADE IN WRITING

DEBT COLLECTOR'S LETTER LISTING THE "TOTAL DUE" AS $590.00 VIOLATES FDCPA

Hackler v. Tolteca Enters., Inc., ___ F. Supp. 3d ___ (W.D. Tex. 2019).
https://scholar.google.com/scholar_case?case=7486268692777974584&q=hackler+v.+tolteca+enterprises&hl=en&as_sdt=6,44&as_vis=1

FACTS: Plaintiff Sadie Hackler leased a home. Upon Plaintiff's moving out, the landlord alleged damage to the home that exceeded the amount of Plaintiff's security deposit. Plaintiff disputed the amount of damage and the landlord turned the disputed debt over to Defendant Tolteca Enterprises, Inc. Plaintiff subsequently received a letter from Defendant attempting to collect the disputed debt ("Letter"). Plaintiff filed suit, claiming the Letter's form and content violated the FDCPA.

Plaintiff moved for summary judgment as to liability for violations of the FDCPA. Defendant did not respond to Plaintiff's motion.
HOLDING: Granted.
REASONING: Plaintiff argued that Defendant failed to notify Plaintiff of her right to make a written dispute of debt by excluding the "in writing" language. Plaintiff also argued the Letter violated the FDCPA's "amount due" requirement because the Letter stated the total amount due of $590.00 without clarifying whether the amount of the collection fee is included in the total due. The court agreed with both arguments.

The court explained that §§1692g(a)(4)-(5) requires debt collectors to inform consumers that requests under the FDCPA must be made in writing, as a matter of law. Because Defendant failed to inform Plaintiff that these statutory requests must be made in writing, the Letter failed to comply with the statutory notice requirements.

Next, the court explained that §1692g(a)(1) and §1692e(2)(A) of the FDCPA requires an initial communication to a consumer to inform them of the amount of the debt. The court observed that the Letter listed the total amount due as $590.00, but the Letter also stated that the balance may reflect a one-time agency collection fee. Because the Letter did not specify how much of the total, if any, was attributable to the collection fee and the Defendant failed to offer any evidence to clarify, the court found the Letter "unacceptably increased the level of confusion for an unsophisticated customer as to the actual amount of debt owed and therefore violated the FDCPA.

DEBT COLLECTION NOTICES SENT UNDER FDCPA, 15 U.S.C.S. § 1692g, NEED NOT REQUIRE THAT DISPUTES BE EXPRESSED IN WRITING

Riccio v. Sentry Credit, Inc., ___ F.3d ___ (3d Cir. 2020).
https://cases.justia.com/federal/appellate-courts/ca3/18-1463/18-1463-2020-03-30.pdf?ts=1585605608

FACTS: Defendant-Appellee Sentry Credit, Inc., bought Plaintiff-Appellant Maureen Riccio's debt. Sentry Credit sent a letter to Riccio notifying her that it sought to collect on the debt. Riccio filed suit against Sentry Credit, alleging the letter violated FDCPA § 1692g by providing a debtor with multiple options for contacting rather than explicitly requiring any dispute be in writing.

Sentry Credit moved for summary judgement on the pleadings. The trial court granted the motion. Riccio appealed.
HOLDING: Affirmed.
REASONING: Riccio argued that Sentry Credit did not comply with FDCPA § 1692g requirements because Sentry Credit was required to inform her explicitly that any dispute must be in writing.

The court rejected Riccio's argument, holding that § 1692g does not require written expression of disputes.

The court began by explaining that § 1692g's plain meaning does not require disputes be in writing. The court noted that § 1692g(a)(3) merely calls for the consumer to dispute the validity of the debt in order to rebut the statutory presumption of validity. But, § 1692g(a)(4) requires consumers to notify the debt collector in writing before forcing the collector to mail documentation verifying the debt, and § 1692g(a)(5) similarly demands that consumers make a written request within a thirty-day period to compel the collector to provide the consumer with the name and address of the original creditor, if different from the current creditor. § 1692g(b) then echoes §§ 1692g(a)(4) and (5), obliging collectors to cease collection until obtaining verification if the debtor notified the debt collector of a dispute in writing. The court reasoned that this intra-section variation strongly signaled that § 1692g permits oral disputes.

The court used the rule against surplusage to determine that inserting a writing requirement into § 1692g(a)(3) would strike that provision from the statute.

Next, the court considered the entirety of the FDCPA to determine that Congress did not inadvertently omit a writing requirement from § 1692g. The court noted that §§ 1692e(8) and 1692h, like § 1692g(a)(3), but unlike §§ 1692g(a)(4), (5), and 1692g(b), discussed disputes without specifying a method of communication. The court determined that this intersection variation amplifies the variation within § 1692g, stating that where Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

Finally, the court used the rule against surplusage to determine that inserting a writing requirement into § 1692g(a)(3) would strike that provision from the statute. The court explained that, under § 1692g(a)(3), if a debt is not presumed valid the debt collector must eventually verify it at some point down the road, but §§ 1692g(a)(4) and (b) demand that if a debtor disputes the debt in writing the collector must prove its validity immediately. The court reasoned that because including a writing requirement under § 1692g(a)(3) would also trigger the requirement that a collector prove every debt immediately under §§ 1692g(a)(4) and (b), § 1692g(a)(3) would be left with no independent effect. Because a court will avoid a reading that renders some words redundant, the court declined to read a writing requirement into § 1692g(a)(3).

SUIT AGAINST CONDOMINIUM ASSOCIATION BOARD DIRECTOR TO COLLECT ATTORNEY'S FEES IS NOT FOR A CONSUMER DEBT

Spiegel v. Kim, 952 F.3d 844 (7th Cir. 2020).
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2020/D03-06/C:18-2449:J:Scudder:aut:T:fnOp:N:2484043:S:0

FACTS: Plaintiff Marshall Spiegel served as a director on the board of a condominium's homeowners' association until its members voted to remove him. The association then sued Spiegel in state court, alleging that he took several unauthorized actions leading to and following his removal. The complaint invoked an agreement (the "Restated Declaration") that Spiegel signed when he bought his unit, which provided that condominium owners who violated the board's rules would pay any damages and attorneys' fees that the association incurred as a result. Spiegel filed suit against the association's counsel, Defendant Michael Kim, while the state court litigation was still ongoing.

Spiegel invoked the FDCPA, alleging that Kim's application in state court for attorneys' fees constituted an unfair debt collection practice. Kim moved for summary judgement. The court granted the motion, concluding that Spiegel failed to state a claim because the attorneys' fees Kim requested were not a "debt" within the meaning of the FDCPA. Spiegel moved to vacate the judgment, but the trial court denied the motion. Spiegel appealed.

HOLDING: Affirmed.

REASONING: Spiegel argued that the attorney's fees sought constituted a "debt" under the FDCPA because, but for his condominium purchase, he would not have eventually found himself on the receiving end of Kim's legal demand to pay attorneys' fees.

The court rejected that argument, by first explaining that Congress limited the definition of "debt" under § 1692a(5) of the FDCPA to an obligation "arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes." The court further explained that "the FDCPA limits its reach to those obligations to pay arising from *consensual* transactions, where parties negotiate or contract for *consumer-related goods or services.*" Because Spiegel's obligation to pay attorneys' fees arose out of his alleged wrongdoings as a board member, not from a consensual consumer transaction, the court held that the mere fact Spiegel could connect his condominium purchase to the state court litigation did not bring Kim's demand for attorney fees within the FDCPA's reach.

The court further explained that "the FDCPA limits its reach to those obligations to pay arising from *consensual* transactions, where parties negotiate or contract for *consumer-related goods or services.*"

The court further held that Kim's invocation of the Restated Declaration in his state court lawsuit did not change the court's analysis. The court explained that, although no party disputes that Spiegel signed the agreement as part of a consensual transaction, the state court complaint sought to impose a financial obligation on Spiegel only for the way he conducted himself while serving on the association's board. Because the court held there was no way to read Kim's state court complaint as seeking attorneys' fees for any reason connected to Spiegel's purchase of a condominium, the attorneys' fees sought by Kim could not constitute "debt" under the FDCPA.

THE ELEVENTH CIRCUIT CONFIRMED THAT NEITHER JP MORGAN CHASE NOR ITS LAW FIRM VIOLATED THE FAIR DEBT COLLECTION PRACTICES ACT WHEN CHASE NAMED THE SIBLINGS OF A DECEASED MAN IN A STATE-COURT FORECLOSURE ACTION RELATED TO HIS HOME

Anderman v. JP Morgan Chase Bank, ___ Fed. Appx. ___ (11th Cir. 2020).
https://law.justia.com/cases/federal/appellate-courts/ca11/19-13734/19-13734-2020-02-11.html

FACTS: Plaintiffs were sisters and heirs of decedent Clinton Arbuckle, who passed away while in default on his mortgage. The promissory note and the mortgage both identify Defendant JP Morgan Chase Bank ("Chase") as the lender and Clinton Arbuckle as the borrower. Chase foreclosed on the mortgage and its law firm filed a foreclosure complaint stating the full amount was payable. The foreclosure complaint requested that the court enter a judgment foreclosing the mortgage and retaining jurisdiction. Subsequently, Chase served Plaintiffs with a summons. Plaintiffs filed a federal class-action complaint against Chase and its law firm, alleging that cautionary language in the summons form, as well the fact that the complaint reserved jurisdiction to enter a deficiency judgment, made the foreclosure action an attempt to collect a debt against a deceased borrower's heirs violative of the FDCPA.

The trial court dismissed Plaintiffs' complaint. Plaintiffs appealed.
HOLDING: Affirmed.
REASONING: Plaintiffs argued that Chase and its law firm sought to collect a debt against the potential heirs of a deceased borrower by naming Plaintiffs in foreclosure complaints, in violation of FDCPA § 1692e's prohibition against debt collectors' use of false, deceptive, or misleading representation or means in connection with the collection of any debt, as well as § 1692f's prohibition against debt collectors' use of unfair or unconscionable means to collect or attempt any debt.

The court rejected Plaintiffs' arguments, holding that Plaintiffs failed to properly plead that Chase and its law firm are debt collectors under FDCPA. The court began by explaining that the fact Chase had attempted to collect on the note and mortgage did not sufficiently support the conclusory allegation that the principal purpose of Chase's business is to collect on defaulted debts because Chase, as the payee under the note and mortgage, was attempting to collect the debt for itself and not for others. Because Chase was not attempting to collect the debt for another, Chase did not meet the definition of a debt collector under the FDCPA. Additionally, the court noted that no facts were alleged to support the allegation that the law firm serving as Chase's counsel was a debt collector because the Plaintiff had only offered a conclusory averment that the court held amounted to be a legal conclusion.

Next the court held the complaint and summons were not attempts at debt collection because they did not seek a delinquency against Plaintiffs. The court further held that Defendants' request for the court to retain jurisdiction over the matter to enter other orders, including, if necessary, a deficiency judgment, constituted neither an explicit nor implicit demand for payment. Because Defendants neither sought a delinquency nor demanded payment from Plaintiffs, Defendants' actions did not violate the FDCPA.

SUIT OVER COLLECTION OF PHANTOM DEBT DISMISSED

Darrisaw v. Pa. Higher Educ. Assistance Agency, ___ F.3d ___ (11th Cir. 2020).
https://law.justia.com/cases/federal/appellate-courts/ca11/17-12113/17-12113-2020-02-07.html

FACTS: Plaintiff-Appellant Hope Darrisaw was a student-loan borrower who received multiple warning letters from guaranty agency Pennsylvania Higher Education Assistance Agency ("Agency"). The Agency tried to collect a debt Darrisaw had not borrowed. Even though an Agency representative told Darrisaw that the Agency had no record of her outstanding debt, the Agency nonetheless proceeded to garnish Darrisaw's paychecks. Darrisaw filed suit, claiming the Agency violated the FDCPA by attempting to collect a debt Darrisaw never incurred.

The Agency moved to dismiss Darrisaw's claim. The trial court granted the Agency's motion to dismiss under FDCPA § 1692a(6)(F)(i)'s exemption for those who collect debts "incidental to a bona fide fiduciary obligation." Darrisaw appealed.
HOLDING: Affirmed.
REASONING: Darrisaw argued that a guaranty agency is not protecting federal assets when it attempts to collect a nonexistent debt, and therefore does not act "incidental to a bona fide fiduciary obligation" in that circumstance.

The court rejected Darrisaw's arguments, holding that the application of the fiduciary-obligation exception does not depend on whether the debt a guaranty agency attempts to collect is valid or nonexistent. The court explained that § 1692a(6)(F)(i) states the fiduciary-obligation exception applies whenever a person attempts to collect any debt that is "owed or due or asserted to be owed or due another." The court further explained that to collect a debt that is only "asserted to be owed," is different from being "actually owed." Because the Agency attempted to collect a debt it asserted to be owed, it fell under the fiduciary-obligation exception.

The court acknowledged that in order to fall within the fiduciary-obligation exception, a person must act "incidental to a bona fide fiduciary obligation." The court explained that when a guaranty agency "knowingly" attempts to collect nonexistent debt, it does not act incidental to a good-faith fiduciary obligation. However, because Darrisaw failed to argue that the Agency acted in bad faith in attempting to collect the debt, the Agency still fell under the fiduciary-obligation exception.

NINTH CIRCUIT DEFINES DEBT COLLECTOR UNDER FDCPA

McAdory v. M.N.S. & Assocs., LLC, ___ F.3d ___ (9th Cir. 2020)
https://cdn.ca9.uscourts.gov/datastore/opinions/2020/03/09/18-35923.pdf

FACTS: Defendant DNF Associates, LLC ("DNF") purchased Plaintiff Jillian McAdory's overdue debt to Kay Jewelers, and hired Defendant M.N.S. & Associates, LLC ("MNS") to collect from McAdory. McAdory sued DNF and MNS, alleging eight separate violations of the FDCPA relating to MNS's telephonic message and withdrawal of funds prior to the authorized payment date.

The trial court dismissed McAdory's complaint against DNF, holding that the FDCPA did not apply because DNF had no direct interactions with its debtors and had only hired third parties, such as MNS, to collect debts. McAdory appealed.
HOLDING: Reversed and remanded.
REASONING: DNF argued that it did not qualify as a debt collector under the principle purpose prong of the FDCPA because it outsourced collection activities to third-party contractors and did not directly interacts with its debtors.

The court rejected DNF's argument, explaining that the FDCPA defines debt collectors in two alternative ways: those whose "principal purpose" is the collection of debts, and those who "regularly collect or attempt to collect, directly or indirectly" debts. Citing to the Third Circuit, which

The court held that its understanding of Congress intent in drafting the statute was supported by the "regularly colled" prong, which expressly applies to businesses that indirectly collect debts.

found the the term "collection," as used in the principal purpose prong, should be read as a noun and not a verb, the court held that the plain language of the statute contained no language limiting the application of the statute to those who directly interact with debtors. The court further held that its understanding of Congress' intent in drafting the statute was supported by the "regularly collected" prong, which expressly applies to businesses that indirectly collect debts. Because the court found that DNF's primary business was the collection of debts, the court held DNF is a debt collector under the FDCPA regardless of whether DNF outsources debt collection activities to a third party.

FINANCING STATEMENT DID NOT ADEQUATELY IDENTIFY DEBTOR

In re Keast Enters., Inc., ___ F.3d ___ (Bankr. S.D. Iowa 2020) https://www.leagle.com/decision/inbco20200204660

FACTS: Russell Keast, acting on behalf of Keast Enterprises, Inc. ("Debtor"), bought agricultural products from Evan Larson, doing business as Larsen Ag ("Larsen"). Debtor subsequently filed for Chapter 11 bankruptcy. Larsen filed a proof of claim, representing that he was a secured creditor. As required to perfect the lien, Larsen filed a financing statement, on which Larsen listed Russell Keast, personally, as the debtor. Debtor objected to Larsen's proof of claim on sufficiency grounds.

HOLDING: Sustained.

REASONING: Debtor argued that the financing statement did not sufficiently identify the debtor because Larsen interchangeably used "Keast Enterprises, Inc." and "Russell Keast" to identify the debtor on the financing statement.

The court agreed with the Debtor, explaining that, under the Iowa UCC, a financing statement is sufficient only if it properly names the debtor, the secured party, and the collateral covered. The court further explained that a financing statement sufficiently provides the name of the debtor who is a registered organization when it provides the name that is stated to be the registered organization's name on the public organic record. Finally, the court explained that where a debtor and an owner are not the same person, the term "debtor" refers to the owner of the collateral in any provision dealing with the collateral. The court reasoned that by filing the proof of claim, Larsen acknowledged that Keast Enterprises, Inc., and not Russell Keast, purchased the goods and produced the collateral that served as the basis for the lien. Because Larsen used Keast's individual name instead of Debtor's registered name, the court held the financing statement was rendered seriously misleading, thus making it ineffective and unperfected.

INSURANCE

UNDER TEXAS LAW, IF THE INSURED DOES NOT RELY TO HIS DETRIMENT ON THE MISREPRESENTATION WHEN MAKING A DECISION THERE IS NO ACTIONABLE CLAIM

Taboada v. State Farm Lloyds, ___ F. Supp. 3d ___ (S.D. Tex. 2020).
https://www.leagle.com/decision/infdco20200121j73

FACTS: Plaintiffs Libardo and Lucia Taboada held an insurance policy from Defendant State Farm Lloyds. The roof of Plaintiffs' property sustained cracks and sheet rock damage during Hurricane Harvey, leading to Plaintiffs filing an insurance claim. However, State Farm stated that the damage was not covered because it was pre-existing or caused by uncovered events, such as foundation settlement. Plaintiffs filed suit, claiming that State Farm wrongfully denied or underpaid the insurance claim.

A post-loss "misrepresentation" only amounts to a contract dispute about causation of damages.

Plaintiffs also sought remedy under the Texas insurance Code for State Farm's alleged misrepresentation of a material fact or policy provision relating to their coverage. State Farm moved to dismiss Plaintiffs' misrepresentation claim.

HOLDING: Motion granted.

REASONING: State Farm argued that Plaintiffs' misrepresentation claim should be dismissed because the allegations referred only to post-loss statements, which are not actionable under the Texas Insurance Code.

The court agreed with State Farm, holding that, under Texas law, if the insured does not rely to his detriment on the misrepresentation when making a decision then there is no actionable claim. The court acknowledged that if State Farm represented that it was selling Plaintiffs' coverage at the time of their purchase and that coverage was not, in fact, included in the policy, then Plaintiffs would have a claim. However, the court stated that a post-loss "misrepresentation" only amounts to a contract dispute about causation of damages. Because a difference of opinion on that matter did not rise to the level of a misrepresentation of material fact regarding coverage, the Plaintiff's claim was not actionable

Plaintiffs attempted to distinguish their case from the reliance requirement by referencing that their case was brought under the Texas Insurance Code, rather than under the DTPA. However, the court held that Plaintiffs failed to argue why cases brought under the Texas Insurance Code should be treated any differently. Because no argument was put forward for why the Plaintiff's case should be treated any differently than if it were brought under the DTPA, the court held the fact was of no consequence.

ARBITRATION

HIDDEN ARBITRATION AGREEMENT IS NOT ENFORCEABLE

Wilson v. Huuuge, Inc., 944 F.3d 1212 (9th Cir. 2019).
https://law.justia.com/cases/federal/appellate-courts/ca9/18-36017/18-36017-2019-12-20.html

FACTS: Defendant HUUUGE, Inc. was the owner of the smartphone app Huuuge Casino, which allowed smartphone users to purchase virtual chips used to play casino games. Plaintiff Appellee Sean Wilson downloaded the app from the Apple App Store and played Huuuge Casino. Huuuge did not require users to affirmatively acknowledge or agree to the usage terms ("Terms") before downloading or while using the app. However, users could access the Terms on the Apple App Store before downloading the app or within the app during game play. The Terms included a binding arbitration provision that prohibits class actions. Wilson filed a class action lawsuit alleging Huuuge violated Washington gambling and consumer protection laws by charging users for chips in its app.

Huuuge moved to compel arbitration, alleging that Wilson was on inquiry notice of the Terms. The trial court denied Huuuge's motion. Huuuge appealed.

HOLDING: Affirmed.

REASONING: Huuuge argued that Wilson had actual or constructive notice of the Terms due to the Terms' availability for access. The court rejected Huuuge's argument, holding that Wilson had neither actual nor constructive notice of the Terms.

The court agreed with the trial court's determination that actual notice was not at issue because Huuuge did not present any evidence of Wilson's actual knowledge.

Regarding constructive notice, the court explained that users are put on constructive notice based on the conspicuousness and placement of the terms and conditions, as well as the content and overall design of the app. The court further explained that such agreements will not be enforced where terms are buried at the bottom of a page or tucked away in obscure corners of the website, or where the terms are available only if users scroll to a different screen, complete a multiple-step process of clicking non-obvious links, or parse through confusing or distracting content and advertisements. The court stated that the terms for Huuuge's app were not just submerged, — they were "buried twenty thousand leagues under the sea," requiring "Sherlock Holmes' instincts" or "dumb luck" to find them. Because Huuuge's app was littered with such flaws, it did not qualify as putting users on constructive notice. Accordingly, the court held that Wilson did not have constructive notice of the Terms, and thus was not bound by the arbitration clause.

The terms for Huuuge's app were not just submerged, — they were "buried twenty thousand leagues under the sea."

SEVENTH CIRCUIT CREATES A NEW STANDARD FOR CLASS ACTION NOTICE WHEN ARBITRATION CLAUSE MAY EXIST.

Bigger v. Facebook, Inc., ___ F.3d ___ (7th Cir. 2020).
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2020/D01-24/C:19-1944:J:Kanne:aut:T:fnOp:N:2464184:S:0

FACTS: Plaintiff-Appellee Suzie Bigger, an employee of Defendant-Appellant Facebook, Inc., worked in a position that was classified by Facebook as ineligible for overtime pay. Bigger filed suit against Facebook on behalf of herself and similarly situated employees for violating FLSA overtime pay requirements. The trial court authorized the sending of notice of the action to a group of employees proposed by Bigger. Facebook filed a motion objecting to the notice.

The trial court denied Facebook's motion. Facebook filed an interlocutory appeal.

HOLDING: Vacated and remanded.

REASONING: Facebook argued that sending notice to the whole group would be improper because several of the members of the proposed group had entered into prior arbitration agreements with Facebook.

The court accepted Facebook's argument, holding that, in order to protect the neutrality of the court and not signal that it favors a plaintiff's case, a court must follow certain steps before giving notice. The court stated that the trial court must first determine if a plaintiff contests the defendant's assertions about the existence of a valid arbitration agreement entered by proposed notice recipients.

The court further stated that, if a plaintiff contests the defendant's assertions, the parties must be permitted to submit additional evidence on the agreement's existence and validity. The defendant must show by a preponderance of the evidence the existence of a valid arbitration agreement for each employee that it wants to exclude from receiving notice. If the employer makes this showing, a trial court may not authorize notice.

CHILDREN NOT BOUND BY PARENT'S ARBITRATION AGREEMENT

B.F. v. Amazon.com, Inc., ___ F. Supp. 3d ___ (D. Wash. 2020).
https://www.courtlistener.com/recap/gov.uscourts.wawd.274148/gov.uscourts.wawd.274148.137.0.pdf

FACTS: Twenty-three children ("Children") through their twelve respective parents as legal guardians ("Parents") filed suit against Amazon.com, Inc., and A2Z Development Center, Inc. (collectively, "Amazon"), alleging that Amazon's Alexa service on devices in their homes recorded their confidential communications in violation of the laws of eight states.

Amazon moved to compel arbitration. The trial court's magistrate judge released a report recommending that Amazon's motion to compel arbitration be denied, finding that it is undisputed that the Parents, not the Children, accepted

Amazon's conditions of use containing the arbitration clause. The magistrate's report argued that the Children's relationships to the Parents were not enough to bind the Children to the arbitration agreement. Amazon objected to the report and moved to compel arbitration and dismiss the Children's claims.
HOLDING: Motion denied.
REASONING: Amazon argued that the Children should be compelled to arbitration based on the doctrine of equitable estoppel, which requires a nonsignatory to arbitrate if the person "knowingly exploits" the contract with the arbitration clause. Amazon claimed that the "knowingly exploit" test should be broadly interpreted to include individuals who "directly benefit" from the contract. Amazon also argued that under the "intertwined/ close relationship" test, the Children should be compelled to arbitrate their claim.

Amazon argued that the Children should be compelled to arbitration based on the doctrine of equitable estoppel.

The court rejected Amazon's argument and agreed with the magistrate judge's report. The court identified two reasons why the parent-child relationship is not sufficient to bind the Children to arbitration. First, the court explained that the Children only received "indirect benefits" from the Parents' user agreement with Amazon. Because the Children did not directly benefit from the contract, the doctrine of equitable estoppel did not apply.

Second, the court noted out that Amazon, a signatory defendant, was attempting to compel the Children, nonsignatories, to arbitration. The court stated that if Amazon wanted to include a provision in the agreement requiring the Parents to consent to arbitration on behalf of their minor children, it could have done so. Because Amazon did not include such a provision, the Children were not signatories and thus were not bound to the arbitration agreement.

COURT REFUSES TO ENFORCE ARBITRATION PROVISION WHEN PLAINTIFF CLAIMS HE NEVER VISITED THE WEBSITE

Hobbs v. Apollo Interactive, Inc., ___ F. Supp. 3d ___ (M.D. Ga. 2019).
https://casetext.com/case/hobbs-v-apollo-interactive-inc

FACTS: Plaintiff Hobbs alleged that Defendant Apollo Interactive, Inc., made automated telemarketing calls to him without his consent, in violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227.

Defendant filed a motion to dismiss in favor of arbitration, arguing that Plaintiff agreed to arbitrate his claims.
HOLDING: Motion denied.
REASONING: Defendant argued that the only plausible inference from the evidence provided was that Plaintiff entered his contact information on Defendant's website, BestAutoInsurance.com, and clicked "submit," thereby assenting to the terms and conditions of the website, including an agreement to arbitrate any claims related to the website's terms and conditions. However, Plaintiff presented evidence that he did not visit Defendant's website and that it would have been impossible for him to access the website in the manner Defendant said he did.

The court held that Plaintiff's evidence was sufficient, stating that a reasonable factfinder could determine that Plaintiff did not enter his personal information on Defendant's website or click "submit." Thus, a reasonable factfinder could conclude that Plaintiff did not assent to the website's terms, including the arbitration provision. Because there was a genuine fact dispute as to whether Plaintiff entered an arbitration agreement with Defendant, the Court could not conclude as a matter of law that the parties had a valid agreement to arbitrate.

MISCELLANEOUS

PLAINTIFF THAT RECEIVES COMPENSATION BEFORE FILING COMPLAINT CANNOT REPRESENT A CLASS

Lepkowski v. CamelBak Products, LLC, ___ F.Supp.3d ___ (N.D. Cal. 2019).
https://law.justia.com/cases/federal/district-courts/california/candce/4:2019cv04598/345976/31/

FACTS: Plaintiff Rachel Lepkowski purchased a "spill-proof" water bottle manufactured by Defendant CamelBak Products, LLC. In response to a letter sent by Lepkowski regarding complaints about her water bottle, CamelBak sent her a replacement water bottle along with an unconditional refund check in the amount of $20.00. However, Lepkowski returned both the check and replacement water bottle and filed a class action complaint against CamelBak alleging violations of various consumer protection laws regarding CamelBak's "spill-proof" claims.

CamelBak moved to dismiss Lepkowski's class action alleging lack of standing and failure to allege a concrete injury.
HOLDING: Granted.
REASONING: Lepkowski argued that she was a valid class representative because she returned the replacement water bottle and refund check to CamelBak before filing suit.

The court rejected Lepkowski's argument, explaining that plaintiffs lack standing to pursue monetary claims when they have already been adequately compensated. Because Camelback already sent Lepkowski a check and replacement water bottle, she had been compensated and therefore lacked standing.

Plaintiffs lack standing to pursue monetary claims when they have already been adequately compensated.

Additionally, the court was not persuaded by Lepkowski's argument that she had not been compensated because she rejected CamelBak's offer. The court noted that courts routinely reject similar arguments because allowing them would render hollow the injury-in-fact requirement of standing. Thus, the court held the fact that Lepkowski did not accept the remediation was immaterial and did not extend the life of the dispute.

COURT AFFIRMS $5.7M JUDGMENT IN JUNK FAX SUIT

Physicians Healthsource, Inc. v. A-S Medication Sols., LLC, ___ F. 3d ___ (7th Cir. 2020)
https://www.courtlistener.com/opinion/4729638/physicians-healthsource-inc-v-a-s-medication-solutions-llc/

FACTS: Defendant-Appellant, A-S Medication Solutions, LLC ("AMS"), purchased Allscripts, Inc., acquiring a customer database containing fax numbers of the company's customers, including Plaintiff-Appellee Physicians Healthsource, Inc. ("PHI"). After the transaction, AMS sent a fax to Allscripts's former customers, advertising a new service from AMS and providing contact information. However, AMS never obtained permission from any of the recipients prior to sending the faxes. Additionally, the faxes lacked a disclaimer explaining the recipients' ability to opt out of future faxes. PHI filed a putative class action suit against AMS under the Telephone Consumer Protection Act ("TCPA").

The trial court granted PHI summary judgment on liability, denied an evidentiary hearing on damages, and granted PHI statutory damages of $5,709,000. AMS filed a motion to amend or, in the alternative, reconsider. The trial court denied the motion and entered a distribution plan. AMS appealed.
HOLDING: Affirmed.
REASONING: AMS argued that the trial court erred by never disposing of the purported dispute about who may recover for each of the 11,418 faxes at issue, thus rendering the statutory damages inaccurate.

The court rejected AMS's argument, explaining that once liability is established and the class informs the court that it seeks only statutory damages, there is no need for an adjudication as to the specific nature of each class member's damages. The court reasoned that each class member only needed to show that they received the fax and had some connection to the fax machine in order to recover. The court held that this was shown because AMS's fax log was admitted as evidence and AMS never challenged its validity. Additionally, the parties in the case never disputed how many faxes were sent, or to how many recipients. Accordingly, the court held that once the trial court found that AMS violated the TCPA when it sent each fax, PHI had sufficiently established all that was needed for the trial court to enter the $5,709,000 judgment against AMS.

BUSINESS CARD WITH FAX NUMBER MAY CONSTITUTE CONSENT TO RECEIVE FAXES

Physicians Healthsource, Inc. v. Cephalon, Inc., ___ F.3d ___ (3d Cir. 2020).
https://images.law.com/contrib/content/uploads/documents/402/60851/PHI-v.-Cephalon.pdf

FACTS: Plaintiff-Appellant Physicians Healthsource, Inc. ("PHI"), began receiving faxes from Defendant-Appellee Cephalon, Inc., after Cephalon drug representatives met with a PHI doctor to discuss pharmaceutical drugs. Two faxes were invitations to a dinner meeting program and a lunch product promotion on pain medications that were discussed between the PHI doctor and Cephalon representatives previously. Neither fax had opt-out language. However, it was undisputed that PHI provided its fax number to Cephalon via business cards. PHI filed a putative class action, asserting it was entitled to either its actual monetary losses or statutory damages because Cephalon sent unsolicited faxes that failed to contain opt-out notices.

Cephalon moved for summary judgment, claiming the two faxes were not subject to the Telephone Consumer Protection Act's ("TCPA") requirements because they were

PHI argued that express consent related only to telephone calls, whereas express invitation or permission related to faxes.

sent with prior express permission. The trial court granted both of Cephalon's motions. PHI appealed.

HOLDING: Affirmed.

REASONING: PHI argued that express consent related only to telephone calls, whereas express invitation or permission related to faxes. Thus, PHI argued that Cephalon needed to prove more than the voluntary providing of the fax number to properly meet the burden for summary judgment.

The court rejected PHI's argument, holding that the plain language of the TCPA showed that "express consent" and "express invitation or permission" were interchangeable and both applicable to phone calls and faxes alike. The court further held that prior consent can be deduced from a message-recipient's voluntary provision or knowing release of his number to a message-sender, such that a message is solicited and therefore not prohibited by the TCPA, if the message relates to the reason the number was provided.

Because it was undisputed that PHI voluntarily provided a business card including a fax number to Cephalon and that the two faxes related to prior conversations between Cephalon's drug representatives and PHI's doctor as part of an ongoing business relationship, the court held that PHI gave express consent, invitation, and permission to receive faxes of the related information from Cephalon.

THE LAST WORD

So, what can I say; I am writing this from my house, having barely left it for two months. I know for most of you, your personal and professional life has changed dramatically. These are indeed strange times, but they will pass. I hope all of you have stayed healthy. Be cautious to stay safe as things slowly open-up.

While many aspects of the life have drawn to a halt, the law has not. Consumers continue to face legal problems, many of them novel—caused by the pandemic. And while most trials are on hold, some courts have used zoom, and opinions continue to be written. This issue of the *Journal* gathers together the most significant of these opinions.

As usual, the Recent Developments section includes digests of more than twenty opinions. This issue also contains articles discussing health clubs, the development of consumer law in Australia, and arbitration. A little something for everyone.

Finally, this is the last issue of Volume 23. I want to thank and congratulate Student Editor-in-Chief Michael Goldsmith for the outstanding job he and his staff did on this issue. This has been one of the best student staffs I have had the privilege to work with. I look forward to working with the new Student Editor-in-Chief, Victoria Grefer, and her staff.

I know you will enjoy reading this volume of the *Journal*, as much as I have enjoyed putting it together. To be honest, I didn't have too much else to do.

Richard M. Alderman
Editor-in-Chief