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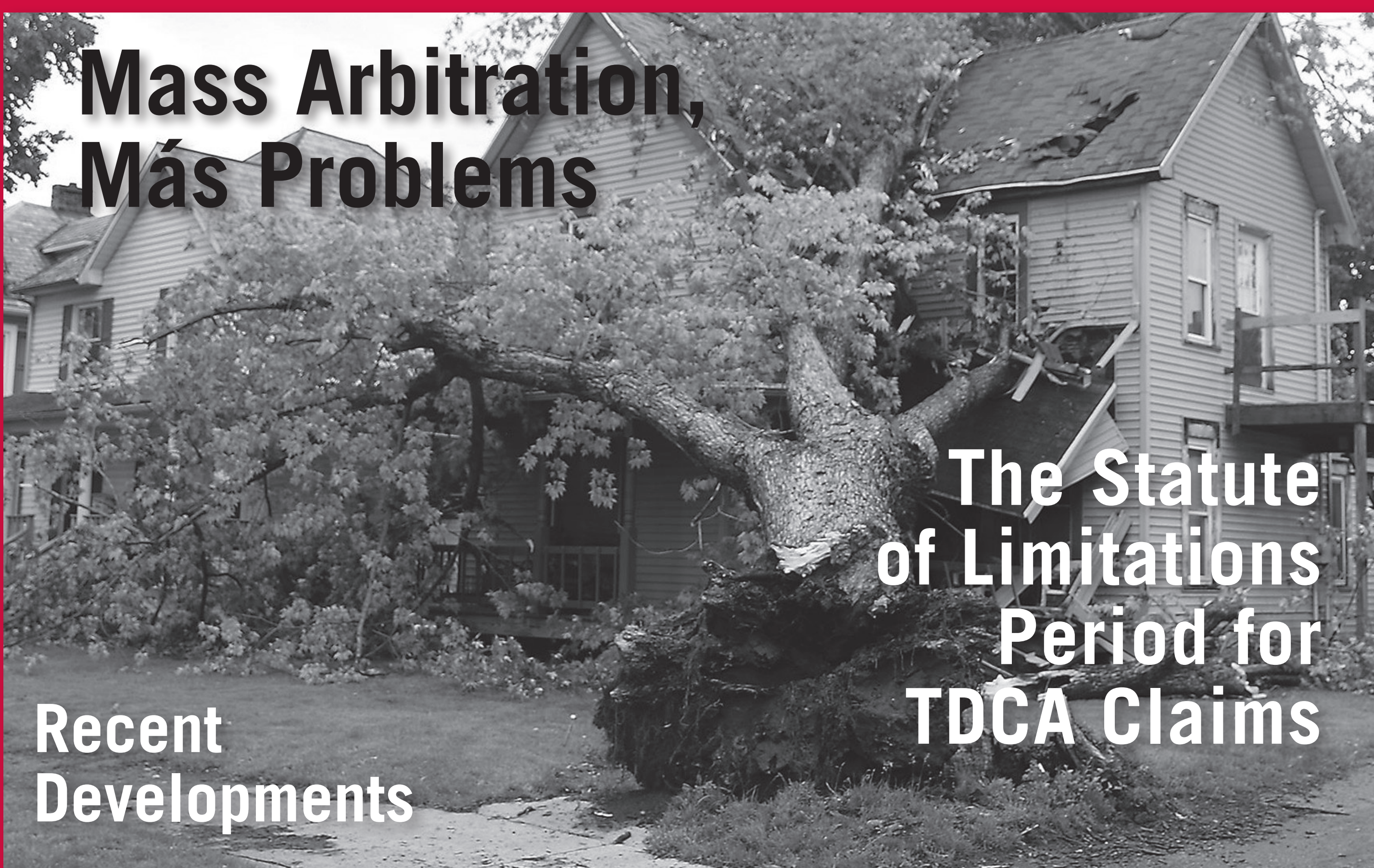
WHAT PUBLIC Insurance Adjusters CAN AND CANNOT DO UNDER TEXAS LAW



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Articles

Recent Developments

WHAT PUBLIC INSURANCE ADJUSTERS CAN AND CANNOT DO UNDER TEXAS LAW

by Karl A. Schulz*

As we are enter the time of year with the most hurricane and hail activity, we also enter the time of year when public insurance adjusters (herein referred to as "public adjusters") are likely at their most active. However, the limits on public adjusters' activities have not been widely analyzed in Texas legal scholarship. This article sets forth what public adjusters can and cannot do under Texas law.

Background

A public adjuster represents an insured in connection with insurance claims, generally on a contingency fee basis in an agency relationship.[1] According to the National Association of Public Insurance Adjusters ("NAPIA"), "a public adjuster inspects the loss site immediately, analyzes the damages, assembles claim support data, reviews the insured's coverage, determines current replacement costs and exclusively serves the client, not the insurance company."[2] Public adjusters usually pitch their services as a way to level the playing field in a "David versus Goliath" fight against unfair, cheating insurance companies. NAPIA is sponsored by well-known policyholder law firms, who make the same pitch.[3] As discussed herein, there is often interplay between public adjusters and policyholder attorneys, and the Texas Legislature has recently increased regulation of both.

Public adjusters must be licensed under Texas law,[4] and are therefore part of the heavily regulated Texas insurance industry. Indeed, public adjusters are subject to a comprehensive regulatory statute contained within Title 13 of the Texas Insurance Code, Regulation of Professionals, under which agents and insurer-side adjuster are also regulated.[5] The Texas Department of Insurance lists 944 individual licensed public adjusters.[6] By contrast, the Texas Department of Insurance lists 117,745 individual licensed insurer-side adjusters.[7]

The Texas Administrative Code includes a Code of Ethics for public adjusters, most recently amended in 2020.[8] Among other things, this Code of Ethics requires:

> (1) Licensees must conduct business fairly with their clients, insurance companies, and the public.
>
> ..
>
> (6) Licensees must have appropriate knowledge and experience for the work they undertake and should obtain competent technical assistance, when necessary, to help handle claims and losses outside their area of expertise.
>
> …
>
> (8) Licensees must avoid conflicts of interest, including acquiring any interest in salvaged property or participating in any way, directly or indirectly, in the reconstruction, repair, or restoration of damaged property that is the subject of a claim adjusted by the licensee, except as allowed in Insurance Code Chapter 4102 and this subchapter.[9]

Several provisions in the Texas Administrative Code's Code of Ethics for public adjusters simply reiterate the statute that governs public adjusters, for example, prohibiting misrepresentations, prohibiting deceptive advertising, and requiring continuing education.[10] NAPIA published a Code of Conduct in 2015 applicable to members of the association.[11] The Texas Administrative Code's Code of Ethics is similar to NAPIA's.

Public adjusters are often criticized by both insureds and insurers for predatory and unscrupulous practices, particularly following natural disasters.[12] The Texas Insurance Code sections governing public adjusters were amended in 2015 and 2019 to address perceived abuses by public adjusters.[13] Similarly, the Texas Insurance Code was amended in 2017 to add an entirely new section to address perceived abuses by policyholder attorneys.[14]

What Public Adjusters Can Do Under Texas Law

Texas Insurance Code §4102.001 defines a "public insurance adjuster" as

> (A) a person who, for direct, indirect, or any other compensation:
>
> (i) acts on behalf of an insured in negotiating for or effecting the settlement of a claim or claims for loss or damage under any policy of insurance covering real or personal property; or
> (ii) on behalf of any other public insurance adjuster, investigates, settles, or adjusts or advises or assists an insured with a claim or claims for loss or damage under any policy of insurance covering real or personal property; or
> (B) a person who advertises, solicits business, or holds himself or herself out to the public as an adjuster of claims for loss or damage under any policy of insurance covering real or personal property.[15]
>
> Texas Insurance Code §4102.101 provides:
> (a) A license issued under this chapter authorizes the adjusting of claims on behalf of insureds for fire and allied coverages, burglary, flood, and all other property claims, both real and personal, including loss of income, but only when the client is an insured under the insurance policy.[16]

A public adjuster can also receive insurance claim proceeds under limited circumstances, as set forth in Texas Insurance Code §4102.111:

> (a) All funds received as claim proceeds by a license holder acting as a public insurance adjuster are received and held by the license holder in a fiduciary capacity. A license holder may not divert or appropriate fiduciary funds received or held.[17]

These are the only Texas Insurance Code sections authorizing activities by public adjusters. As discussed below, the prohibitions on activities by public adjusters in the Texas Insurance Code and Texas common law are much more extensive. Thus, public adjusters have a very limited scope of authorized activities under Texas law.

What Public Adjusters Cannot Do Under Texas Law

A. Cannot Practice Public Adjusting Without a License

As mentioned, public adjusters must first obtain a license before practicing.[18] In order to obtain a license, the applicant must take an examination, undergo a background check, and then submit an application.[19] Temporary, provisional, and emergency licenses are not allowed.[20] Insureds, insurers, and any member of the public can check the Texas Department of Insurance's list of licensed public adjusters online.[21]

B. Cannot Practice Law

Texas Insurance Code § Sec. 4102.156 provides:

> A license holder may not render services or perform acts that constitute the practice of law, including the giving of legal advice to any person in the license holder's capacity as a public insurance adjuster.[22]

There is also case law concerning prohibition of the unauthorized practice of law by public adjusters.[23] But when does public adjusting trespass into the practice of law?

The State Bar Act provides in relevant part:

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

(b)The definition in this section is not exclusive and does not deprive the judicial branch of the power and authority under both this chapter and the adjudicated cases to determine whether other services and acts not enumerated may constitute the practice of law.[24]

Under the common law, the following activities constitute the practice of law:

(1) Contracting with persons to represent them with regard to their personal causes of action for property damages or personal injury.

(2) Advising persons as to their rights and the advisability of making claims for personal injuries or property damages.

(3) Advising persons whether to accept an offered sum of money in settlement of claims for personal injuries or property damages.

(4) Entering into contracts with persons to represent them in their personal injury or property damage matters on a contingent fee together with an attempted assignment of a portion of the person's cause of action.

(5) Entering into contracts with third persons which purport to grant the exclusive right to select and retain legal counsel to represent the individual in any legal proceeding.

(6) Advising clients of their legal rights, duties and privileges under the law.[25]

Using similar terminology, the Texas Penal Code prohibits the unauthorized practice of law and provides in relevant part:

(a) A person commits an offense if, with intent to obtain an economic benefit for himself or herself, the person:

(1) contracts with any person to represent that person with regard to personal causes of action for property damages or personal injury;

(2) advises any person as to the person 's rights and the advisability of making claims for personal injuries or property
damages;

(3) advises any person as to whether or not to accept an offered sum of money in settlement of claims for personal injuries or property damages;

(4) enters into any contract with another person to represent that person in personal injury or property damage matters on a contingent fee basis with an attempted assignment of a portion of the person's cause of action; or

(5) enters into any contract with a third person which purports to grant the exclusive right to select and retain legal counsel to represent the individual in any legal proceeding.

(b)This section does not apply to a person currently licensed to practice law in this state, another state, or a foreign country and in good standing with the State Bar of Texas and the state bar or licensing authority of any and all other states and foreign countries where licensed.[26]

Courts have found that the following activities by public adjusters <u>do not constitute</u> the unauthorized practice of law:

(1) measuring and documenting first-party insurance claims and to presenting them to insurers;

(2) legitimately investigating the facts and negotiating for the claimant;

(3) advising claimants on property damage valuations.[27]

Courts have found that the following activities by public adjusters (or persons otherwise representing insurance claimants) *do constitute* the unauthorized practice of law or likely constitute the unauthorized practice of law:

(1) interpreting insurance contracts;
(2) discussing or negotiating coverage matters with insurers;
(3) engaging in a course of conduct that encourages litigation and the prosecution of claims;
(4) determining liability, extent of legally compensable damages, and a claimant's legal rights and privileges; and
(5) advising a claimant to accept a settlement under some circumstances.[28]

As the Court in *Johnson v. McLeaish* summarized, "a 'public adjuster' is not authorized to engage in the practice of law, which embraces, in general, all advice to clients and all action taken for them in matters connected with the law."[29] These lists are not exclusive. Because cases of alleged unauthorized practice of law often involve unique facts, courts can decide what constitutes the practice of law on a case-by-case basis.[30]

Some legal commentary has stated that there is a "fine line" between public adjusting and the unauthorized practice of law. Respectfully, such commentary is incorrect. The statutes, common law, and codes of ethics governing public adjusters make it clear that the practice of public adjusting is very different than the practice of law, and the public adjuster should not even come close to the line.

C. Cannot Accept Referral Fees

As mentioned, public adjusters are usually compensated on a contingent fee basis tied to the amount of insurance proceeds that they help recover. To combat barratry, conflicts of interest, and the unauthorized practice of law, the Texas Insurance Code places further limits on public adjusters' compensation:

(a) A licensed public insurance adjuster may not accept a fee, commission, or other valuable consideration of any nature, regardless of form or amount, in exchange for the referral by a licensed public insurance adjuster of an insured to any third-party individual or firm, including an attorney, appraiser, umpire, construction company, contractor, or salvage company.[31]

This section does not prevent the referral from happening. Such referrals are common. Rather, this section merely prevents collecting a fee for such a referral.

D. Cannot Participate in Repair and Reconstruction or Act as Agent for Attorney

Similarly, Texas Insurance Code §4102.158 provides as follows regarding conflicts of interest:

(a)A license holder may not:
(1) participate directly or indirectly in the reconstruction, repair, or restoration of damaged property that is the subject of a claim adjusted by the license holder; or
(2) engage in any other activities that may reasonably be construed as presenting a conflict of interest, including soliciting or accepting any remuneration from, having a financial interest in, or deriving any direct or indirect financial benefit from, any salvage firm, repair firm, construction firm, or other firm that obtains business in connection with any claim the license holder has a contract or agreement to adjust.
(b)A license holder may not, without the knowledge and consent of the insured in writing, acquire an interest in salvaged property that is the subject of a claim adjusted by the license holder.
(c)A license holder may not represent an insured on a claim or charge a fee to an insured while representing the insurance carrier against which the claim is made.
(d) A license holder may not directly or indirectly solicit, as described by Chapter 38, Penal Code, employment for an attorney or enter into a contract with an insured for the primary purpose of referring an insured to an attorney and without the intent to actually perform the services customarily provided by a licensed public insurance adjuster. This section may not be construed to prohibit a license holder from recommending a particular attorney to an insured.
(e) A license holder may not act on behalf of an attorney in having an insured sign an attorney representation agreement.
(f) A license holder must become familiar with and at all times act in conformance with the criminal barratry statute set forth in Section 38.12, Penal Code.[32]

The court in *Lon Smith & Assocs. v. Key* recently re-affirmed these prohibitions and also made it clear that roofers cannot work as unlicensed public adjusters to negotiate claims with insurers and refer themselves repair work.[33]

E. Cannot Pay Referral Fees or Put the Insured "On Salary"

In further recognition of the problems created by referral fees and conflicts of interest, the Texas Insurance Code prohibits public adjusters from paying referral fees to a third party in order to obtain the insured's business.[34] This section, and the sections discussed immediately above, prohibit what might otherwise become a chain or ring of referrals from repair contractors to public adjusters to attorneys, with referral fees collected at each stage, making profit the primary interest of the referring parties, rather than the consumer's best interest.

Policyholder attorneys, and plaintiff's attorneys in general, often advance money to clients, or "put them on salary." This can be very profitable for the attorney. The Texas Insurance Code prohibits this practice between public adjusters and potential clients or insureds.[35]

F. Cannot Server as an Appraiser

The typical appraisal clause in insurance policy requires that the insured's appraiser be "unbiased" or "independent."[36] Under Texas law, "an appraiser with a financial interest in the outcome of an insurance appraisal is not impartial."[37] Even public adjusters who are not on a contingency fee basis will have confirmation bias and will not be "independent" since they had previously served as the insured's agent and advocate. Thus, a public adjuster on a loss cannot serve as the appraiser on that same loss.

G. Cannot Solicit New Clients During a Natural Disaster

Texas Insurance Code §4102.151 provides:

A license holder may not solicit or attempt to solicit a client for employment during the progress of a loss-producing natural disaster occurrence.[38]

This common sense prohibition recognizes that consumers

are vulnerable during natural disasters and that travel within disaster zones should be limited to emergency responders.[39]

H. Cannot Serve as an Expert Without More

Under Texas law, a person may qualify as an expert by his or her knowledge, skill, experience, training, or education.[40] Simply holding a title or license is not enough to qualify a person as an expert.[41] Therefore, a licensed Texas public adjuster is not necessarily qualified to opine regarding every aspect of a property insurance claim, such as forensic damage evaluation or costs of repair, simply because he or she is a licensed Texas adjuster. More is required.[42]

Other Issues

A. Enforcement

Because of limited budgets at the Texas Department of Insurance and Unauthorized Practice of Law Committee,[43] enforcement of the regulatory scheme governing public adjusters is difficult. Violation of the statute governing public adjusters is actionable by the consumer under the DTPA.[44] However, as the *Guerra* case discussed above shows, a consumer wronged by a public adjuster may be mired in a web of attorneys and contractors aligned with the public adjuster, and finding a separate attorney to successfully prosecute a claim against the public adjuster may be difficult. Also, insurers lack swift and sure vehicles to address wrongdoing by public adjusters on their claims. The Texas legislature may wish to address these issues.

B. Imputation

When a public adjuster provides the insurer with false or inflated claim information, there may be sufficient grounds to void the policy by enforcement of a policy's misrepresentation or concealment provision.[45] There are sound legal and public policy reasons for such accountability and the Texas legislature may also wish to address these issues.

C. Do Your Homework

If an insured is inclined to retain a public adjuster, he should do his homework. He should make sure that the public adjuster is licensed and reputable. Also, beware the public adjuster who wears more than one hat, for example a public adjuster who is also a roofer, because it can be easy to run afoul of the statutory scheme governing public adjusters and become embroiled in litigation.[46]

Conclusion

Public adjusters have a very limited scope of permissible action under Texas law. It is likely that regulation of public adjusters will continue to evolve following major weather events like hurricanes.

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1 *See* Tex. Ins. Code §4102.104(a). In addition to contingent fees, public adjusters are allowed to chart flat fees, hourly rates, or another method that does not result in a total commission that exceeds 10% of the amount of the insurance settlement on the claim. *See id.*

2 https://www.napia.com/aboutnapia1 (last access June 17, 2020).

3 https://www.napia.com (last accessed June 17, 2020).

4 *See* Tex. Gov't Code §4102.051.

5 *See* Tex. Ins. Code §4102.001 *et seq.*

6 https://www.tdi.texas.gov/agent/agentlists.html (last accessed June 16, 2020).

7 *Id.*

8 Tex. Admin. Code Title 28, Part 1, Chapter 19, Rule 19.713.

9 *See id.*

10 *See id.*

11 https://www.napia.com/codeofconduct (last accessed June 17, 2020).

12 *See, e.g., Int'l Risk Control, LLC v. Seascape Owners Ass'n,* 395 S.W.3d 821, 823 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (insureds' counsel who took over claim from public adjusters alleged that the public adjusters' work product was "rife with errors and improper calculations"); *Nat'l Claims Negotiators, LLC v. Guerra*, 2020 Tex. App. LEXIS 2835, *2 (Tex. App.—Dallas 2020, no pet.) (ruling that plaintiff homeowners can proceed with their claims against defendant public adjusters without waiting for arbitration of claims against attorneys allegedly involved in scam; defendants including public adjusters are accused of an elaborate scam in which homeowners are charged excessive fees); *see also Liberty Mut. Ins. Co. v. Land*, 2010 N.J. Super. Unpub. 89, *4 (N.J. Sup. Ct. App. Div. Jan. 24, 2010) (insured's nephew/public adjuster was caught on tape smashing a tree into a roof to increase damage).

13 *See* Tex. Ins. Code §4102.001 *et seq.*

14 *See* Tex. Ins. Code §542A.001 *et seq.*

15 *See* Tex. Ins. Code §4102.001(3)(A) *et seq.* This section of the Texas Insurance Code impliedly limits public adjusters to working on property insurance damage claims, but another section explicitly forbids public adjusters from working on bodily injury claims. *See* Tex. Ins. Code §4102.157.

16 Tex. Ins. Code §4102.101.
17 Tex. Ins. Code §4102.111.
18 *See* Tex. Ins. Code §4102.051.
19 https://www.tdi.texas.gov/agent/adjuster-public-insurance-apply.html (last accessed June 19, 2020); *see also generally Tex. Ins. Code* §4102.001 et seq. (providing the regulatory scheme for becoming a licensed public adjuster and maintaining licensure).
20 *Id.*
21 *See* https://www.tdi.texas.gov/agent/agentlists.html (last accessed June 16, 2020).
22 Tex. Ins. Code §4102.156. For good measure, Texas Insurance Code §4102.003 provides: "This chapter may not be construed as entitling a person who is not licensed by the Supreme Court of Texas to practice law in this state."
23 *See, e.g., Kubala Pub. Adjusters, Inc. v. Unauthorized Practice of Law Comm.,* 133 S.W.3d 790 (Tex. App.—Texarkana 2004, no pet.); *Unauthorized Practice of Law Comm. v. Jansen,* 816 S.W.2d 813 (Tex. App.—Houston [14th Dist.] 1991, no writ).
24 Tex. Gov't Code §81.101.
25 *Brown v. Unauthorized Practice of Law Comm.,* 742 S.W.2d 34, 42 (Tex. App.—Dallas 1987, writ denied); *Johnson v. McLeaish,* 1995 Tex. App. LEXIS 3341, *16 (Tex. App.—Dallas 1995, no writ).
26 Tex. Penal Code §38.123.
27 *See Jansen,* 816 S.W.2d at 816.
28 *Id.; see also Brown,* 742 S.W.2d at 42; *Johnson*, 1995 Tex. App. LEXIS at *14.
29 *Johnson,* 1995 Tex. App. LEXIS at *30.
30 *Brown,* 742 S.W.2d at 41; *see also Linder v. Ins. Claims Consultants, Inc.,* 560 S.E.2d 612, 260 (S.C. 2002) (same, also analyzing Texas authorities and providing comprehensive discussion about unauthorized practice of law with regard to public adjusters).
31 Tex. Ins. Code §4102.164.
32 Tex. Ins. Code §4102.158(a)-(f).
33 *Lon Smith & Assocs. v. Key*, 526 S.W.3d 604, 617-635 (Tex. App.—Fort Worth 2017, pet. denied) (commenting also: "Looking to the entirety of chapter 4102, the legislature's enactment of the following provisions applicable to licensed public insurance adjusters demonstrates that the disgorgement provisions of section 4102.207 are punitive—intended to punish and to deter roofing and construction companies from taking advantage of Texas consumers by purporting to act, while unlicensed, as public insurance adjusters for insureds. *See id.* § 4102.103 (providing that the contract used by a public insurance adjuster must include "a prominently displayed notice in 12-point boldface type that states 'WE REPRESENT THE INSURED ONLY'"), § 4102.111 (providing that all funds received as claim proceeds by a license holder acting as a public insurance adjuster are received and held by the license holder in a fiduciary capacity), § 4102.151 (prohibiting a license holder from soliciting or attempting to solicit a client for employment during the progress of a loss-producing, natural-disaster occurrence), § 4102.158 (prohibiting a license holder from participating directly or indirectly in reconstruction, repair, or restoration of damaged property that is the subject of a claim adjusted by the license holder). Because unlicensed public insurance adjusters are not subject to the checks, balances, and penalties that licensed public insurance adjusters are, section 4102.207's disgorgement provision is a punitive deterrent. *Morton*, 412 S.W.3d at 511 (holding property code provision was subject to common-law rescission principles because it "was not intended to be punitive"). To construe section 4102.207 as LSRC desires would in effect render it toothless; if construction companies and roofing companies that are unlicensed as public insurance adjusters are able to successfully solicit repair contracts by agreeing to act as the insured's public insurance adjuster and nonetheless retain the monies paid to them for their repair or roofing services, then from a cost-benefit standpoint, the statute imposes no financial incentive for such companies to stop acting as unlicensed public insurance adjusters."); *see also* https://www.law360.com/articles/1106125/there-s-a-storm-brewing-for-some-texas-contractors (last accessed July 13, 2020).
34 Tex. Ins. Code §4102.160(2).
35 Tex. Ins. Code §4102.160(1).
36 *See Franco v. Slavonic Mut. Fire Ins. Ass'n*, 154 S.W.3d 777, 786–87 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *Gardner v. State Farm Lloyds*, 76 S.W.3d 140, 143-44 (Tex. App.--Houston [1st Dist.] 2002, no pet.); *see also generally* Karl A. Schulz, *Accurate Outcomes in Appraisal – The Importance of the Umpire's Subject Matter Expertise*, 15 J. Consumer & Commercial Law 54 (2012).
37 *General Star Indem. Co. v. Spring Creek Village Apt. Phase V Inc.*, 152 S.W.3d 733, 737 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *see also Devonshire Real Estate and Asset Management, LP v. The American Insurance Company*, 2013 U.S. Dist. Lexis 194668, *4 (N.D. Tex. 2013) (a disqualifying pecuniary interest may be found, for example, where an appraiser has entered into a contingency fee contract with the insured); *Colo. Hospitality Servs. v. Owners Ins. Co.*, 2015 U.S. Dist. LEXIS 91307, *7 (D. Colo. 2015) (as a matter of law, a public adjuster who was originally paid an hourly rate but later had a contingency fee agreement was not "impartial" within the meaning of the policy, and the appraisal award must be vacated); *State Farm Florida Ins. Co. v. Sanders*, 2019 Fla. App. LEXIS 11655, *3 (3d DCA July 24, 2019) (insured's public adjuster, who had been involved in the claim from the beginning, was not "disinterested" as required by the appraisal clause because the public adjuster had a financial interest in whether the insured recovered and how much the insured recovered; public adjuster contract created agency relationship between public adjuster and the insured, and the resulting fiduciary relationship precludes the public adjuster from serving as an appraiser as a matter of law).
38 Tex. Ins. Code §4102.151.
39 However, the limitation of this prohibition to "during the progress of a loss-producing natural disaster occurrence" seems vague and unnecessarily short. The need for consumer protection and free movement of emergency responders does not stop the moment the rain and wind stop. The legislature should consider revising this section. An adjacent section of the Texas Insurance Code, §4102.152, limits the times of day during which public adjusters can solicit or attempt to solicit business.
40 *See* Tex. R. Civ. Pro.702.
41 *See Green v. Brantley,* 11 S.W.3d 259, 263 (Tex. App.—Fort Worth 2000, pet. denied) ("A license to practice a profession does not inherently qualify the licensee as an expert in every matter related to the profession."); *Bakker v. Ferman,* 2001 Tex. App. LEXIS 5112, *12 (Tex. App.—Dallas 2001, no pet.) (same).
42 *See id.* (requiring proof of the expert's qualifications and the basis for opinions).
43 Indeed, the Unauthorized Practice of Law Committee depends on *pro bono* lawyers to represent it. http://www.txuplc.org/Home/about (last accessed July 8, 2020).
44 *See Reyelts v. Cross,* 968 F. Supp. 2d 835, 844 (N.D. Tex. 2013).
45 *See Reverse Now VII, LLC v. Or. Mut. Ins. Co.,* 341 F. Supp. 3d 1233, 1240 (W.D. Wash. 2018); *Chubb & Son Inc. v. Consoli,* 283 A.D.2d 297, 298, 726 N.Y.S.2d 398 (1st Dept. 2001); *Harold J. Warren, Inc. v. Federated Mut. Ins. Co.,* 386 F.2d 579, 582 (1st Cir. 1967).
46 *See Hill v. Spracken,* 2018 Tex. App. LEXIS 5313 (Tex. App.—Dallas 2018, pet. denied); *Lon Smith*, 527 S.W.3d at 635.

Mass Arbitration, Más Problems

Class-Action Procedures May Guide Solutions to Issues in Mass Arbitrations

By Thomas E. Birsic,* Max A. Gelernter, Wesley A. Prichard,*** and Elizabeth A. Hoadley******

Arbitration provides a lower-cost alternative to litigation. Yet, a growing predicament continues to penetrate the conversation surrounding arbitration: mass arbitration. On the one hand, no rational customer or employee would spend the funds required to arbitrate claims that are worth less than the total costs.

On the other hand, when parties file such claims individually *en masse*, companies may be on the hook to pay millions in filing fees. As a result, the company could pay up to 10 times the claimant's potential recovery. In order to address this growing concern, parties are beginning to evaluate the benefits and burdens of their arbitration agreements.

Arbitration is Generally Beneficial…

The benefits of arbitration agreements are generally well known. For example, arbitration agreements give the parties the flexibility to agree mutually on a decision-maker or set guidelines for a prospective arbitrator's qualifications or experience, which can avoid the unpredictability of potential jury verdicts. Additionally, arbitration agreements can provide the parties with a higher level of privacy than is available in court. Unlike most court documents, arbitration hearings and decisions are typically private due to confidentiality agreements.[1] As such, arbitration allows employers to maintain privacy regarding employment matters that may otherwise reveal confidential business information.

In addition to these general benefits, the U.S. Supreme Court recently held in *Epic Systems Corp. v. Lewis* that arbitration allows employers to avoid costly collective actions.[2] In deciding the validity of an arbitration agreement that limited employees from taking collective action, the Supreme Court held that such agreements "must be enforced as written."[3] Given this, employers have used similar agreements to avoid the notice requirement to all potentially affected individuals, thereby reducing the number of claims filed and costs expended on a particular issue.[4]

…But Mass Arbitration Can Be Costly

While arbitration is often also beneficial to employees due to the time and cost savings, an employee may face a scenario where the cost of bringing a claim outweighs the potential benefit. For employees with small claims, the potential benefit of pursuing individual arbitration in a claim worth only hundreds of dollars is little to none. As one attorney stated in federal court, "no rational customer would arbitrate a $162 claim against…" a company given the costs related to arbitration.[5]

Recently, where arbitration agreements restrict the filing of class actions, counsel for employees have opted to file thousands of individual arbitration claims within a short timeframe, thereby triggering the requirement that the employer pay the filing fee for each claim—approximately $1,500.[6] In some cases, this mass filing of arbitration claims can commit an employer to paying more than $12 million in filing fees alone.[7] This allows employees with the lowest-value claims to artificially inflate their claim value by imposing filing fees on employers that are potentially multiple times higher than the claim's worth.

For example, a transportation company recently sought to avoid the costs associated with a collective action on behalf of thousands of its employees. In the end, the U.S. Court of Appeals for the Ninth Circuit held that the arbitration clause was enforceable against the employees and that the employer must follow the arbitration agreement and pay the filing fee for all claims.[8] This result would have forced the employer to incur fees related to thousands of individual arbitration claims, all due within the span of a few months.[9] However, rather than individually arbitrating each claim and incurring the associated fees, the employer opted to settle all claims for $146 million or approximately $11,000 per claim.[10]

According to a study of one bank's arbitration program completed by the Economic Policy Institute, individual arbitration results in the average employee-claimant paying the bank $11,000.[11] As such, the employees' incentive to attempt to gain an advantage on a group-wide scale should not be underestimated. Where the average claimant can end up owing $11,000 in some contexts, it is no surprise that employees and employees' counsel are looking for ways to harness the negotiating power of mass arbitration.

Other companies in the transportation and food industries have also faced similar debilitating fees because of mass arbitration.[12] Some employers have challenged this strategy only to be met by courts enforcing the agreements as written and requiring full arbitration of each individual claim.[13] For instance, a company in the food industry faced 2,814 claims regarding labor standards, with each individual claim valued "in the hundreds of dollars," and the company's challenge to the employees' counsel was characterized by the U.S. District Court for the District of Colorado as "unseemly."[14] However, although the court's approach has solidified costly results for agreements that do not contain specific procedures, these decisions should alert the parties to the potential solution: using the arbitration agreement itself. Therefore, employers should carefully consider their response to mass arbitration before seeking to challenge an arbitration agreement in court, as the benefit of such deference to the written agreement can be used to alleviate mass arbitration's burden.

Counsel for employees have opted to file thousands of individual arbitration claims within a short timeframe.

Modifying Arbitration Agreements: A Potential Path Forward

Some private associations, such as the American Arbitration Association and Judicial Arbitration and Mediation Services (JAMS), have similarly maintained the enforcement of the parties' agreements regarding filing fees depending on the nature of the arbitration agreement, even where the filing fees are financially onerous.[15] For example, when faced with a request to stay all relevant arbitration pending a decision related to mass arbitration, JAMS stated that "[w]hile it is not our preference to force the parties to litigate these issues seriatim, our policies and procedures, absent party agreement otherwise, require that we collect a filing fee in each case to be pursued."[16] As JAMS notes, although current arbitration agreements are enforced as written, that does not preclude the parties from forming agreements to address mass arbitration.

The International Institute for Conflict Prevention and Resolution (the CPR) took this approach a step further by creating its own distinct mass arbitration procedure. On November 6, 2019, the CPR announced the launch of its new "Mass Claims Protocol and Procedure" ("the Protocol").[17] Claims filed under the CPR Administered Arbitration Rules or CPR Non-Administered Arbitration Rules trigger the Protocol "any time greater than 30 individual employment-related arbitration claims of a nearly identical nature are, or have been, filed with CPR against the same Respondent(s) in close proximity to one another."[18] The Protocol uses examples that have worked in other collective action areas, such as the early implementation of "test" cases, which function much like "bellwether" cases in class actions.[19]

The Protocol not only alleviates the time and expense of collective actions, it also provides more flexibility to the parties regarding the claims chosen as "test" cases. While the first ten test cases are chosen via random assignment, both parties may present five additional cases for arbitration, along with reasoning for "why the addition of such claims would be necessary to the mediation process."[20] Further, the Protocol reserves to the CPR the right to change fees at any time, providing an opportunity to avoid potentially burdensome mass arbitration expenses.[21]

As such, the Protocol may provide parties with a resource for tackling the difficulties present with mass arbitration, and it can be an informative resource to consider. Whether a company decides to adopt the Protocol or adjust fee-sharing provisions in arbitration clauses, it is clear that the arbitration agreement itself can be used to create a solution.[22] As the Protocol shows, looking to class-action procedure is a useful first step for creative changes to standard arbitration agreements. While the enforcement of arbitration agreements as written has placed an enormous burden on companies in the context of mass arbitration, the impact of such rulings on the ability to use creative solutions for this issue should not be underestimated.

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1 Laura A Kaster, *Confidentiality in U.S. Arbitration*, 5 N.Y. Disp. Res. Law. 23, 23 (May 2012).

2 *See Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

3 *Id*. at 1632.

4 David S. Baffa, John L. Collins & Gerald L. Maatman, *Guidance for Employers Considering Mandatory Arbitration Agreements with Class and Collective Action Waivers*, Seyfarth Shaw LLP, at 4 (Dec. 2013), https://www.seyfarth.com/images/content/7/5/v1/7580/GuidanceMandatoryArbitration.pdf.

5 Alison Frankel, *Fitbit Lawyers Reveal 'Ugly Truth' About Arbitration, Judge Threatens Contempt*, Reuters (June 1, 2018), https://www.reuters.com/article/legal-us-otc-fitbit/fitbit-lawyers-reveal-ugly-truth-about-arbitration-judge-threatens-contempt-idUSKCN1IX5QM#:~:text=Fitbit%20lawyers%20reveal%20'ugly%20truth'%20about%20arbitration%2C%20judge%20threatens%20contempt,-Alison%20Frankel&text=(Reuters)%20%2D%20At%20a%20hearing,%24162%20claim%20against%20the%20company.

6 *See, e.g.*, Int'l Inst. for Conflict Prevention & Resolution, Pricing and Fees, https://www.cpradr.org/dispute-resolution-services/pricing-fees.

7 Alison Frankel, *'This Hypocrisy will not be Blessed': Judge Orders Company to Arbitrate 5,000 Couriers' Claims*, Reuters (Feb. 11, 2020), https://www.reuters.com/article/us-otc-doordash/this-hypocrisy-will-not-be-blessed-judge-orders-doordash-to-arbitrate-5000-couriers-claims-idUSKBN2052S1#:~:text=6%20months%20ago-,'This%20hypocrisy%20will%20not%20be%20blessed'%3A%20Judge%20orders%20DoorDash,to%20arbitrate%205%2C000%20couriers'%20claims&text=(Reuters)%20%2D%20U.S.%20District%20Judge,hour%20claims%20by%205%2C010%20couriers.

8 *See O'Connor v. Uber Technologies, Inc.*, 904 F.3d 1087 (9th Cir. 2018).

9 Andrew Wallender, *Uber Settles 'Majority' of Arbitrations for at least $146M (1)*, Bloomberg L. (May 9, 2019), https://news.bloomberglaw.com/daily-labor-report/uber-sees-wage-suits-dropped-including-12-501-arbitration-claims.

10 *Id*.

11 *The Average Consumer in Arbitration with Bank is Ordered to Pay the Bank Nearly $11,000*, Econ. Policy Inst. (Oct. 3, 2017), https://www.epi.org/press/the-average-consumer-in-arbitration-with-wells-fargo-is-ordered-to-pay-the-bank-nearly-11000/.

12 Andrew Wallender, *Corporate Arbitration Tactics Backfires as Claims Flood In*, Bloomberg L., Daily Labor Report (Feb. 11, 2019), https://news.bloomberglaw.com/daily-labor-report/corporate-arbitration-tactic-backfires-as-claims-flood-in

13 *Turner v. Chipotle Mexican Grill, Inc.*, 2018 U.S. Dist. LEXIS 152589 (D. Colo. Aug. 3, 2018).

14 *Id.*

15 *Frankel*, *supra* note 7.

16 Alison Frankel, *JAMS to Uber: Our Rules and Your Contracts Demand Individual Arbitrations*, Reuters (Jan. 25, 2019), https://www.reuters.com/article/legal-us-otc-jams/jams-to-uber-our-rules-and-your-contracts-demand-individual-arbitrations-idUSKCN1PJ2I0#:~:text=JAMS%20to%20Uber%3A%20Our%20rules%20and%20your%20contracts%20demand%20individual%20arbitrations,-Alison%20Frankel&text=The%20drivers%20said%20in%20a,the%20fees%20for%20individual%20arbitration.

17 Int'l Inst. for Conflict Prevention & Resolution, CPR Launches New Mass Claims Protocol and Procedure, (Nov. 6, 2019), https://www.cpradr.org/news-publications/press-releases/2019-11-06-cpr-launches-new-mass-claims-protocol-and-procedure; Susan Antilla, *Arbitration Storm at Door Dash*, The Am. Prospect (Feb. 27, 2020), https://prospect.org/labor/doordash-company-arbitration-storm-workers/.

18 *Employment-related Mass Claims Protocol*, Int'l Inst. for Conflict Prevention & Resolution at 2 (Nov. 4, 2019), https://www.cpradr.org/dispute-resolution-services/employment-related-mass-claims-documents/emp-mass-claims-protocol.

19 *Id*.

20 *Id*. at 3.

21 Int'l Inst. for Conflict Prevention & Resolution, *Pricing and Fees*, https://www.cpradr.org/dispute-resolution-services/pricing-fees.

22 Note that some jurisdictions have invalidated fee-sharing provisions where the provision would deter a "substantial number of potential litigants from seeking to vindicate their statutory rights." *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 663 (6th Cir. 2003); *see also Nesbitt v. FCNH, Inc.*, 811 F.3d 371, 378 (10th Cir. 2016) (invalidating a fee-splitting arbitration provision that required plaintiff to pay US$2,500 because it "deterred vindication of federal statutory rights").

Copycat Courts

The Statute of Limitations Period for TDCA Claims

By Mitchell J. Armstrong*

I. Introduction

Assessing whether a claim is time barred by a statute of limitations is a critical step before any legal claim is made. There is little value in investigating claims and marshalling evidence if the claim can no longer be acted upon. Statutes of limitations are valuable because they deter old controversies from being litigated that may no longer be fit for full investigation. It is also a weighty legal tool because a potential plaintiff may no longer seek redress whatsoever if a claim is barred by limitations. Because of the importance of statutes of limitations, disputes often arise over when a limitation

Regarding the latter, the statute of limitations period for claims under the Texas Fair Debt Collection Practices Act ("TDCA") warrants close scrutiny. This article will address the statute of limitations period for a TDCA claim, why courts use a certain limitations period, the TDCA tie-in provision for the Deceptive Trade Practices Act ("DTPA"), an amendment to the TDCA, and what the statute of limitations period should be for TDCA claims.

II. TDCA: What it is and its Limitations Period

The TDCA, or Chapter 392 of the Texas Finance Code defines terms related to debt collection, prohibits harmful methods of debt collection such as threats or coercion, and creates a statutory basis for causes of action involving debt collection.[1] The TDCA lacks an express statute of limitations, so courts have looked to other statutory authorities and to case law to determine what the limitations period should be.[2] This article will look at a few state and federal court cases to see how the limitations period has been interpreted. This section will demonstrate that there are several decisions that have found that period to be two years.

State court case law on the TDCA limitations period is thin, and its analysis of what the limitations period should be equally slim. One of the few state court cases that have brought up the TDCA limitations period is *Galindo v. Snoddy*.[3] In *Galindo,* the Plaintiff, Galindo, made both TDCA and DTPA claims. The court stated that the parties agreed "that the two-year statute of limitations applies to all of Galindo's claims" and cited Tex. Civ. Prac. & Rem. Code Ann § 16.003(a).[4] Section 16.003 states that "a person must bring suit for trespass for injury to the estate or to the property of another, conversion of personal property, taking or detaining the personal property of another, personal injury, forcible entry and detainer, and forcible detainer not later than two years after the day the cause of action accrues."[5] The full legal analysis of the limitations period was that short declaration that the parties were in agreement about it. Whatever the cause for this analysis, because there is no explanation for why the court chose §16.003 as the authority for the limitations period, this case and others like it offer poor authority for future cases on this subject. As we will see in the following paragraph discussing the TDCA in federal courts, § 16.003 is frequently cited in reference to the limitations period of the TDCA, perhaps due to a broad reading of the word "property" to include debt.

Case law on the TDCA limitations period is more plentiful in the federal courts, however federal court analysis of the limitations period is also scarce, with one notable exception discussed below. The following two cases were in federal district courts and are significant only because they lead back to what appears to be the origin of the current standard for the TDCA limitations period. First, in *Baker v. U.S. Bank* the court stated that "[t]he statute of limitations for a TDCA claim is two years."[6] The court in *Baker* quoted the court in *Bashore v. Bank of AM* in making this assertion.[7] The court in *Bashore*, in turn, relied on the opinion in *Duzich v. Marine Office of Am Corp*, a state court case.[8]

Unlike the courts in *Baker* and *Bashore*, in *Duzich* the Texas Court of Appeals did not cite any case law to determine the limitations period for TDCA claims, and instead relied solely on statutory authority. The court held that for "allegations of negligence, gross negligence, intentional infliction of emotional distress, negligent infliction of emotional distress, and unfair debt collection practices[,] [e]ach of these causes have two-year statutes of limitations."[9] The court in *Duzich* created a legal knot by listing the authorities for these claims in a string citation. The court cited Tex. Civ. Prac. & Rem. Code Ann. § 16.003, Tex. Rev. Civ. Stat. Ann. § 5069–11.11, and Tex. Bus. & Com. Code Ann. § 17.565.[10] Because *Duzich* is a state case and has not received a negative treatment in a higher state court, it is still good law.

Although the following case is merely persuasive in state courts, the court in *Vine v. PLS Financial Services* offers a relatively thorough analysis of the authorities cited by the court in *Duzich,* and best explains how the limitations periods of the TDCA and DTPA should be interpreted. The court in *Vine* did not come to the same conclusions as the court in *Duzich*. Addressing the authorities cited in *Duzich* regarding the limitations period of TDCA claims, the court in *Vine* noted that because the statutes cited for the allegations were listed in a string citation, it was not clear which statutory provision applied to which type of claim, so the court evaluated the merits of each statute.[11]

First, the court addressed Tex. Bus. & Com. Code Ann. § 17.565, outlining the two-year statute of limitations for the DTPA, and concluded that because the TDCA claim was brought independently of the DTPA, the statute was inapplicable.[12] Second, the court stated that Tex. Rev. Civ. Stat. § 5069 was repealed in 1997 and that because "the Texas Finance Code does not contain a statute of limitations. . . as it currently stands this code section provides no support whatsoever for a two-year statute of limitations on claims for unfair debt collection practices."[13]

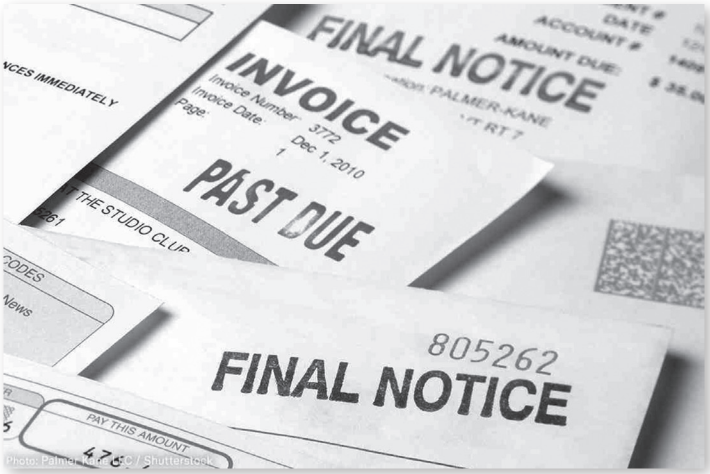
State court case law on the TDCA limitations period is thin, and its analysis of what the limitations

Third, regarding Tex. Civ. Prac. & Rem. Code § 16.003, the court argued that the code's "language does not apply to a suit for the type of unlawful debt collection practices that are at issue here."[14] The court explained that the § 16.003 language regarding trespass, conversion of personal property, personal injury, forcible entry, and forcible detainer could not have been intended to be encompassed by "debt collection" unless "defined enormously broadly."[15] The court in *Vine* thus concluded that the two-year limitations period was inappropriate "[w]ithout a clear indication from Texas state courts or the Texas legislature that debt collection practices were meant to fall with § 16.003's ambit."[16]

Absent a clear position on the issue by Texas courts, the court in *Vine* opted for the four-year residual statute of limitations period, describing it as a "more appropriate" limitations period than the two year period invoked in *Duzich* and the cases that relied on it.[17] Texas Civil Practice and Remedies Code §16.051 provides a residual limitations period for "[e]very action for which there is no express limitations period, except an action for the recovery of real property, [that] must be brought not later than four years after the day the cause of action accrues"[18] Ordinarily, if a statute does not contain an express statute of limitations period, courts will apply the residual four year statute of limitations. Because the TDCA does not have an explicit statute of limitations listed, it may be argued that the *Vine* court was correct in concluding that the residual statute of limitations should apply.

While *Vine* has not been overruled, the Fifth Circuit also addressed the limitations period of TDCA claims in *Clark v. Deutsche Bank National Trust Company*.[19] The *Clark* opinion was published six days after *Vine*'s, so the lower court did not cite to the Fifth circuit opinion. The Fifth circuit followed the path of previous lower court decisions and concluded that the TDCA has a two-year limitations period, citing *Galindo* and § 16.003.[20]

Although the *Vine* court's decision is merely persuasive authority in state courts (and is in direct conflict with the *Clark* decision) it makes reasonable arguments against the two-year limitations period. Due to the lack of case law supporting and explaining the current limitations period, the line of reasoning used



in *Vine* could produce favorable results for an attorney seeking to challenge the current application of the law.

III. TDCA and the DTPA Tie-In Provision

The DTPA is a consumer protection law meant to protect against "false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection."[21] As stated previously, Section 17.565 of the Business and Commerce Code sets out the limitations period for DTPA claims, which means that unlike the TDCA, the DTPA has an express limitations period of two years.[22] The code states, in part, that "[a]ll actions brought under this subchapter must be commenced within two years after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice."[23]

The TDCA contains a tie-in provision for the DTPA. Section 392.404 of the TDCA states that "[a] violation of this chapter is a deceptive trade practice under Subchapter E, Chapter 17, Business & Commerce Code, and is actionable under that subchapter."[24] In other words, if a person has a claim under the TDCA, they also have a separate claim under the DTPA.

The tied in DTPA claim is constrained by the restrictions that accompany ordinary,

Due to the TDCA's lack of an express limitations period, it may be unclear what effect the DTPA's limitations period may have on TDCA claims. Conveniently, the court in *Vine* also addressed the interplay between the TDCA and DTPA regarding limitations periods. Regarding pure TDCA claims brought independently of the DTPA, as stated previously the court in *Vine* found the DTPA limitations period inapplicable.[25] This approach makes sense because, absent a clear statutory authority, it would be absurd to arbitrarily apply the limitations period controlling one type of claim to another.

Regarding tie-in claims, the courts in *Vine* and *Bashore* both concluded that the two-year statute of limitations was applicable to TDCA claims that were tied into the DTPA.[26] This means that when making a DTPA claim through the TDCA tie-in provision, the tied in DTPA claim is constrained by the restrictions that accompany ordinary, independent DTPA claims. The TDCA claim, however, would still exist independent of the DTPA under the suggested four-year limitations period.

IV. 2019 Amendment to the TDCA

In 2019, the Texas Legislature passed the Fair Consumer Debt Protection Act.[27] This act added section 392.307 to Chapter 392 of the finance code.[28] Section 392.307 states, in part, that "A debt buyer may not, directly or indirectly, commence an action against or initiate arbitration with a consumer to collect a consumer debt after the expiration of the applicable limitations period provided by Section 16.004, Civil Practice and Remedies Code, or Section 3.118, Business & Commerce Code."[29] This provision is the only portion of the TDCA that explicitly references a statute of limitations period.[30]

The significance of this amendment is manifold because it raises several issues. First, § 16.004 of the Civil Practices and Remedies Code states that "[a] person must bring suit on the following actions not later than four years after the day the cause of action accrues: (1) specific performance of a contract for the conveyance of real property; (2) penalty or damages on the penal clause of a bond to convey real property; (3) debt; (4) fraud; or (5) breach of fiduciary duty."[31] Second, Section 3.118 of the Business & Commerce Code states that "an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date."[32] If the current application of the limitations period remains unchanged, then it seems that a debtor making a claim under the TDCA would be limited to a two-year limitation period while a debt buyer would have between an additional two to four years to make a claim. It seems absurd that an act that is primarily used to prevent hostile debt collector action would have such unequal terms that benefit collectors more than debtors.

Attorneys seeking to challenge the applicability of the two-year limitations period could argue that the 2019 amendment makes it clear that it would be an absurd result for debtors to have a shorter limitations period than collectors in a statute meant to protect debtors. Attorneys seeking to uphold the two-year limitations period in light of previously discussed criticisms against it could argue that the 2019 amendment suggest that the legislature is aware of issues with the TDCA and that it would have lengthened the limitations period by statute if it disagreed with how courts have been applying the law.

V. What Should the Statute of Limitations for TDCA Claims Be?

The residual limitations period provision states that "every action for which there is no express limitations period has a limitations period of four years.[33] By the unambiguous language of the text, the TDCA does not have an express limitations period. Therefore, the residual statute of limitations period should be the limitations period used by the courts. The absence of a statute of limitations period does not *ipso facto* mean that the legislature did not contemplate a limitations period and refrain from implementing one. Due to the strong language of the residual statute of limitations statute, courts should view the absence of a limitations period in the TDCA as the legislature invoking the residual statute of limitations period.

VI. Conclusion

Despite the clear language of The Texas Civil Practice and Remedies Code §16.051, the residual statute of limitations, courts have erred in using the two-year statute of limitations period for pure TDCA claims. DTPA tie-in claims arising from TDCA claims are rightly limited to a two-year imitations period. Of all of the courts that have discussed the limitations period of TDCA claims, the court in *Vine* provided the best construction.

The court's opinion in *Vine* that allows for a four-year statute of limitations period for pure TDCA claims and a two-year statute of limitations period for DTPA tie-in claims should be adopted in future cases.

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1 Tex. Fin. Code Ann. § 392.001 *et seq*.
2 *Id*.
3 *See* Galindo v. Snoddy, 415 S.W.3d 905 (Tex. App.—Texarkana 2013, no pet.)
4 *Id.* at 911.
5 Tex. Civ. Prac. & Rem. Code Ann. §16.003(a).
6 Baker v. U.S. Bank, N.A., 2017 U.S. Dist. LEXIS 45417 (N.D. Tex. Mar. 10, 2017) (Quoting Bashore v. Bank of Am., 2012 WL 629060 (E.D. Tex. 2012).
7 *Bashore v. Bank of AM*, 2012 WL 629060 (E.D. Tex. 2012).
8 *Id*.
9 Duzich v. MarineOffice of Am. Corp., 980 S.W.2d 857 (Tex. App.—Corpus Christi, 1998).
10 *Id.*at 872.
11 Vine v. PLS Fin. Srvs, Inc., 2018 WL 456031 (W.D. Tex. 2 018).
12 *Id*. at *16.
13 *Id*. at *17.
14 *Id*.
15 *Id*.
16 *Id*.
17 *Id*.
18 Tex. Civ. Prac. & Rem. Code Ann. §16.051
19 *See* Clark v. Deutsche Bank National Trust Company, 719 Fed. Appx. 341 (5th Cir. 2018).
20 *Id*.
21 V.T.C.A., Bus. & C. § 17.44.
22 Tex. Bus. & Com. Code Ann. § 17.565.
23 *Id*.
24 Tex. Fin. Code Ann. § 392.404.
25 *Vine, supra* note 11.
26 *Id*. at *9, *Bashore, supra note 7,* at *6.
27 *See* Tex. Fin. Code Ann. § 392.307.
28 *Id*.
29 *Id*.
30 *Id*.
31 Tex. Civ. Prac. & Rem. Code Ann. §16.004.
32 V.T.C.A., Bus. & C. § 3.118
33 Tex. Civ. Prac. & Rem. Code Ann. §16.051.

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

CFPB Director may be fired. The U.S. Supreme Court held that the Consumer Financial Protection Bureau's structure unconstitutionally insulates the agency from presidential oversight and must be altered. The Court rejected a limit that the Dodd-Frank Act placed on the president's ability to fire the head of the agency.

Joined by Justices Clarence Thomas, Samuel Alito, Neil Gorsuch and Brett Kavanaugh, Chief Justice John Roberts concluded that Congress went too far with the tenure protection it gave to the CFPB's director in Dodd-Frank, which bars the president from ousting the agency's top official except for "inefficiency, neglect of duty or malfeasance." But the high court stopped short of striking down the CFPB entirely, declaring instead that the agency's constitutional flaw could be fixed by narrowly eliminating just this "for-cause" removal restriction. Seila Law LLC v. Consumer Financial Protection Bureau, https://www.supremecourt.gov/opinions/19pdf/19-7_n6io.pdf

Supreme Court upholds Telephone Consumer Protection Act broad ban on autodial calls to cell phones. TCPA exception for call regarding federally backed debt held invalid. The Supreme Court upheld the Telephone Consumer Protection Act's sweeping ban on autodialed calls to cellphones, but found that an exception to that prohibition for calls made to collect federally backed debts must fall, rejecting an argument that would have drastically reduced the flood of litigation under the decades-old statute. William P. Barr et al. v. American Association of Political Consultants Inc. et al., case number 19-631, in the U.S. Supreme Court. https://www.supremecourt.gov/opinions/19pdf/19-631_2d93.pdf

FEDERAL CIRCUIT COURTS OF APPEALS

Court adopts the "face-of-the-award" rule. The Tenth Circuit U.S. Court of Appeals adopted the "face-of-the award" rule for dealing with arbitrator errors in damage calculations under Section 11(a) of the FAA, despite granting "double recovery" to an elderly couple. The couple's expert testified their out-of-pocket losses were about $292,000 and their actual damages, based on returns from appropriate investments, were between $485,000 and $610,000. In their final prayer for relief at the hearing, the couple asked only for market-adjusted damages. The FINRA arbitrators found for the couple and awarded them both their net out-of-pocket and their market adjusted damages of $777,092, plus interest, attorneys' fees, and costs.

The couple moved to confirm the award, arguing the court could modify the award to correct the alleged double recovery only if there was an "evident material miscalculation of figures" on the face of the award. The U.S. District Judge agreed with the couple and adopted the "face-of-the-award" rule which holds that a miscalculation or mistake is "evident" only if it appears in the award. The Tenth Circuit affirmed.

With this decision, the 10th Circuit joins the Fourth, Sixth, and Eleventh Circuits in affirming the "face-of-the-award" rule, widening the split in the circuits. The Fifth and Seventh Circuits allow courts to consider some parts of the record.

Mid Atl. Capital Corp. v. Bien, No. 18-1195, 2020 WL 1860125 (10th Cir. Apr. 14, 2020). https://law.justia.com/cases/federal/appellate-courts/ca10/18-1195/18-1195-2020-04-14.html

TCPA consent cannot be revoked. The Eleventh Circuit held that consumers who consent to receive Telephone Consumer Protection Act-barred robocalls through a binding contract can't later revoke that permission, even though federal regulations say consent can be revoked at any time. The panel let Dish Network off the hook for alleged violations of the Telephone Consumer Protection Act finding the satellite provider had permission to continue robocalling a subscriber under that individual's service contract.

Although onetime Dish customer Linda Medley and her legal team repeatedly reached out to the company to try to revoke her consent, the Eleventh Circuit said she can't withdraw permission built into a legally binding agreement. "Permitting Medley to unilaterally revoke a mutually-agreed-upon term in a contract would run counter to black-letter contract law in effect at the time Congress enacted the TCPA," the panel said. Linda Medley v. Dish Network, LLC, case number 18-13841, in the U.S. Court of Appeals for the Eleventh Circuit. https://casetext.com/case/medley-v-dish-network-llc

Market survey solicitations can violate TCPA. A divided Third Circuit panel ruled that unwanted faxes soliciting to buy products or services, rather than to sell them, could be considered violations of the Telephone Consumer Protection Act.

A three-judge panel ruled 2-1 that faxes seeking out doctors to participate in market research surveys in exchange for monetary compensation should be considered unwanted solicitations because they were clearly commercial in nature even if they weren't offering anything for sale. The court stated, "We do not doubt that a recipient of a fax offering to buy goods or services from the recipient would consider the fax to be an advertisement…." "After all, a fax attempting to buy goods or services is no less commercial than a fax attempting to sell goods or services."

In a dissenting opinion, however, Judge Kent Jordan said he believed the majority's opinion added words to the statute that simply weren't there. He pointed to language in the TCPA defining advertisement as "material advertising the commercial availability or quality of any property, goods or services."

Richard Fischbein v. Olson Research Group Inc. et al., case number 19-3018, and Robert Mauthe v. ITG Inc. et al., case number 19-3222, both before the U.S. Court of Appeals for the Third Circuit. https://law.justia.com/cases/federal/appellate-courts/ca3/19-3018/19-3018-2020-05-15.html and https://casetext.com/case/robert-w-mauthe-md-pc-v-itg-inc

Fifth Circuit stays mail-in voting order. The Fifth Circuit upended a district court order won by Texas Democrats that directed the Lone Star State to allow all voters to use mail-in ballots, with the appeals panel saying the lower court's decision "will be remembered more for audacity than legal reasoning."

The opinion slammed the May 19 order by a Western District of Texas judge overseeing a case in which the Texas Democratic Party asked the federal court to help determine what elections will look like during the coronavirus pandemic. The court stated:

> "In an order that will be remembered more for audacity than legal reasoning, the district judge intervenes just weeks before an election, entering a sweeping preliminary injunction that requires state officials, inter alia, to distribute mail-in ballots to any eligible voter who wants one." "But because the spread of the virus has not given 'unelected federal jud[ges]' a roving commission to rewrite state election codes, we stay the preliminary injunction pending appeal."

Texas Democratic Party et al. v. Abbott et al., case number 20-50407, in the U.S. Court of Appeals for the Fifth Circuit. https://law.justia.com/cases/federal/appellate-courts/ca5/20-50407/20-50407-2020-06-04.html

Settlement of individual claims moots class allegations. Can a plaintiff settle his or her individual claim and then continue to chase the class allegations? The Ninth Circuit says no.

The plaintiff brought relatively straightforward claims for alleged missed break periods under the law of the state of Washington. After what the court described as "several years of litigation," the district court found no basis, and refused, to certify a class. At that point, the plaintiff settled his individual claims but purported not to have resolved his "Class Claims." Following the entry of final judgment, the plaintiff appealed the prior denial of certification.

The Ninth Circuit concluded that the settlement mooted the class claims, and it dismissed the appeal. It found that the plaintiff could not pursue class claims simply because he had not dismissed them but needed a genuine financial stake in the outcome of the class claims. It rejected the notion that his desire for an incentive award or fear of liability for costs advanced by his attorneys would constitute such an interest.

Brady v. AutoZone Stores, Inc., Case No. 19-35122 (9th Cir., June 3, 2020). https://law.justia.com/cases/federal/appellate-courts/ca9/19-35122/19-35122-2020-06-03.html

Court evaluates debt collection letter by unsophisticated debtor standard. The Seventh Circuit affirmed a motion to dismiss a FDCPA class action claim based on a series of letters. The court noted that "a claim under § 1692e may be dismissed when it is clear from the face of the communication that no reasonable person, however unsophisticated, would be deceived by the allegedly false or misleading statement." Reviewing the letters on their face, the court concluded, "Our case law makes clear that 'mere speculation' by the plaintiff that a collection letter is misleading is insufficient to survive a debt collector's motion for summary judgment."

Court evaluates debt collection letter by unsophisticated debtor standard.

Johnson v. Enhanced Recovery Co., 2020 U.S. App. LEXIS 18086 (7th Cir. 2020). https://law.justia.com/cases/federal/appellate-courts/ca7/19-1210/19-1210-2020-06-09.html

Punitive damage award under Fair Credit Reporting Act reversed. The Eleventh Circuit ruled that the credit reporting company's actions misreporting a consumer's credit history were not willful violations of the Fair Credit Reporting Act and did not warrant punitive damages.

The court found that, though Experian Information Solutions Inc. acted negligently with regard to consumer Shaun Younger — whose disputed debt the company refused to investigate — there was no proof at trial demonstrating that this action was something other than just careless. The verdict of willfulness cannot stand on this record."

Younger v. Experian Information Solutions Inc. LLC, case numbers 19-11487 and 19-11940, in the U.S. Court of Appeals for the Eleventh Circuit. https://law.justia.com/cases/federal/appellate-courts/ca11/19-11487/19-11487-2020-06-19.html

Separate violations of FDCPA are subject to new statute of limitations. The Fourth Circuit joins the Eighth and Tenth Circuit, holding each violation of the FDCPA gives rise to a separate claim governed by its own statute of limitations period.

Homeowner alleged numerous violations of the Fair Debt Collection Practices Act by a law firm between April 16, 201 and Feb. 6, 2018. On April 5, 2018, the homeowners filed a complaint against the law firm under the FDCPA. In their complaint, the homeowners alleged that the law firm violated various provisions of the FDCPA by engaging in unfair debt collection practices and by improperly communicating with the homeowners after they had disputed the debt and had made a written request that the law firm cease further communications. The law firm responded by seeking dismissal of the complaint as untimely or, in the alternative, for summary judgment.

The trial court granted the law firm's motion to dismiss the complaint based on the statute of limitations holding that the entire complaint was time-barred because the more recent violations that the homeowners alleged were of the "same type" as other violations that occurred outside the one-year limitations period. The homeowners appealed. To the Fourth Circuit.The sole question on appeal was whether the trial court erred in concluding that all the homeowners' claims were barred by the FDCPA's statute of limitations.

The Fourth Circuit first acknowledged that under the FDCPA, claims must be brought "within one year from the date on which the violation occurs." 15 U.S.C. § 1692k(d). The Court noted, however, that nothing in the FDCPA suggests that "similar" violations should be grouped together and treated as a single claim for purposes of the FDCPA's statute of limitations. The court found that a "separate violation" of the FDCPA occurs "every time" an improper communication, threat, or misrepresentation is made. The Court concluded that Section 1692k(d) establishes a separate one-year limitations period for each violation of the FDCPA. *Bender v. Elmore & Throop, P.C.* https://www.ca4.uscourts.gov/Opinions/191325.P.pdf. See also *Demarais v. Gurstel Chargo, P.A.*, 869 F.3d 685, 694 (8th Cir. 2017); *Llewellyn v. Allstate Home Loans, Inc*., 711 F.3d 1173, 1188 (10th Cir. 2013).

Arbitration clause limiting borrowers' statutory rights is unenforceable. The Third Circuit affirmed a district court's denial of defendants' motion to compel arbitration, holding that an arbitration clause contained within an online tribal lender's payday loan agreement impermissibly strips borrowers of their right to assert statutory claims and is, therefore, unenforceable. Williams v. Medley Opportunity Fund https://law.justia.com/cases/federal/appellate-courts/ca3/19-2058/19-2058-2020-07-14.html

FEDERAL DISTRICT COURTS

FCRA personal jurisdiction may be very broad. The doctrine of "personal jurisdiction" in federal courts generally asks whether the court is empowered with jurisdiction to issue rulings against a party and enforce those rulings against the party. Generally, personal jurisdiction is based on the state(s) in which the plaintiff and defendant reside, where the complained-of activity occurred, and where the harm was felt. The U.S. District Court for the Eastern District of Pennsylvania added a new category for Fair Credit Reporting Act (FCRA) cases—the residence of a third-party consumer reporting agency (CRA).

Plaintiff alleged she visited the dealership to inquire about a car but did not sign any agreement or otherwise agree to buy a car or submit an application for financing or consent to the dealership's procurement of a consumer report. She alleges the dealer nonetheless directly accessed her credit report through Trans Union, LLC (a resident of Pennsylvania) and submitted loan applications to six lenders who each pulled her credit report. Rogers sued for violation of the FCRA. The dealership moved to dismiss for lack of personal jurisdiction, among other reasons, noting it was a Delaware resident and Rogers visited the dealership in Delaware.

The Court denied the motion. First, the court dispatched Rogers's argument that the court had general personal jurisdiction over the dealership—general jurisdiction only exists in the defendant's "home" forum and, here, that was Delaware. But the court concluded it did have specific personal jurisdiction over the dealership for two reasons. First, the dealership knew Rogers was a Pennsylvania resident when it caused the credit reports to be pulled. The court also concluded specific jurisdiction existed for the independent reason that the dealership purposefully availed itself of Pennsylvania laws by purchasing credit reports from a Pennsylvania CRA—Trans Union. In other words, Trans Union's residence became the dealership's residence in the specific personal jurisdiction analysis. Rogers v. Smith Volkswagen, Ltd., No. 19-2567 (E.D. Pa. April 6, 2020). https://casetext.com/case/rogers-v-smith-volkswagen-ltd

Judge denies motion by Trump and the Trump Corporation to compel arbitration related to multi-level marketing scheme. Judge Schofield of the Southern District of New York. denied the motion by Donald Trump, the Trump Corporation, and other Trump family members to compel arbitration of claims related to the multi-level marketing scheme CAN. Defendants argued that, because the plaintiffs had agreed to arbitrate any claims they might have against ACN, the same arbitration clause should force arbitration of any claims against the Trump defendants related to their endorsement of ACN.

Judge denies motion by Trump and the Trump Corporation to compel arbitration related to multi-level marketing scheme.

Judge Schofield found that the defendants had failed to show the required relatedness from the plaintiffs' perspective between ACN and the Trump defendants in order to apply equitable estoppel:

> The relatedness prong is not met in this case. Plaintiffs claim that Defendants wrongfully held themselves out as offering an independent endorsement of ACN. Plaintiffs were not aware that ACN was paying Defendants to promote and endorse the company, and, consistent with that understanding, Plaintiffs did not treat ACN and Defendants as at least somewhat interchangeable with respect the plaintiffs' rights and responsibilities under the relevant contract. Plaintiffs had no reason to know

> that Defendants were affiliated with ACN in a such a way that it would be unfair to allow Plaintiffs to avoid arbitration with Defendants, given their commitment to ACN to arbitrate.

Jane Doe v. The Trump Corporation. https://www.sdnyblog.com/files/2020/04/18-Civ.-09936-2020.04.08-ACN-Order-Denying-Motion-to-Compel-Arbitration.pdf

FDCPA one-year limitations period extends to next week-day after a weekend. U.S. District Court for the Northern District of Texas held a debt collector violated the Fair Debt Collection Practices Act in connection with inaccurate information reported to the credit bureau. In addition to holding the statute of limitations had not run, the court found that the debt collector violated the FDCPA by communicating credit information that the debt collector knows or should know to be false. Krier v. United Revenue Corp. Krier v. United Revenue Corp., 2020 U.S. Dist. LEXIS 74844

Consumer must individually arbitrate claim against debt collector. A federal judge in New Jersey granted a debt collector's request to force a woman behind a proposed class action over its collection letters to arbitrate her Fair Debt Collection Practices Act claim on an individual basis. The court found she was bound by an arbitration provision in an underlying credit card agreement.

Under the plaintiff's credit card agreement with the South Dakota-based bank, "arbitration is mandatory for claims by 'you or us,' which explicitly includes FPB and 'the employees, parents, subsidiaries, affiliates, beneficiaries, agents and assigns of you and us,'" the judge noted.

The judge found that "The collection agreement — particularly the explicit authority to settle claims — makes Rushmore PBC's agent." "As an agent of PBC, Rushmore may enforce the arbitration agreement. ... And the individual defendants are unquestionably Rushmore's employees. Thus, all defendants may enforce the arbitration clause."

Tailor et al. v. Rushmore Service Center LLC et al., case number 2:18-cv-13698, in the U.S. District Court for the District of New Jersey. https://law.justia.com/cases/federal/district-courts/new-jersey/njdce/2:2018cv13698/383325/26/

Defendant avoids a class action suit by adding a class action arbitration provision after suit is file. Plaintiff, filed suit on behalf of herself and similarly situated Shutterfly users. U.S. District Judge Mary Rowland found that Plaintiff must arbitrate her claims even though Defendant amended its arbitration clause after the lawsuit had begun.

Defendant avoids a class action suit by adding a class action arbitration provision after suit is file.

The Court found that Shutterfly's Terms of Use included a valid change-in-terms provision, which informed users "Shutterfly had the right to unilaterally modify its terms, the modified terms would be posted on Shutterfly's website, and that continued use of Shutterfly's products constitutes acceptance of the modified terms." After Shutterfly posted this amendment in 2015, Plaintiff subsequently placed four orders for products and continued to use her Shutterfly account through 2019.

Plaintiff argued she "did not agree to arbitration before she filed this lawsuit in June 2019, and that the September 2019 email was an attempt to retroactively force her into arbitration." The Court found that Plaintiff is bound by the 2015 modification. In other words, by continuing to use Defendant's products after the 2015 notice, Plaintiff "agreed that her continued use of Shutterfly's services would communicate her assent to the most recent version of the Terms and Use posted online at the time of her use." Accordingly, the Court granted Shutterfly's motion to compel arbitration for Plaintiff. Miracle-Pond v. Shutterfly, Inc., No. 19 cv 04722, 2020 U.S. Dist. LEXIS 86083 (N.D. Ill. May 15, 2020). https://law.justia.com/cases/federal/district-courts/illinois/ilndce/1:2019cv04722/366727/68/

Court awards prejudgment interest for the period before and after an arbitration award, despite the panel's prior refusal to award interest. An arbitration panel found that TIG owed Exxon the full $25 million policy limit. Exxon asked the panel to award more than $6 million of prejudgment interest running from the date of breach. The panel refused, finding that the arbitration agreement did not allow it to award prejudgment interest.

Exxon then asked a federal court to confirm the panel's award and to order TIG to pay prejudgment interest. Exxon asked for prejudgment interest from the date of breach until the date of the arbitration panel's award and the date of the arbitration panel's award until the date of the court's order confirming the panel's award. The Court granted that request.

For interest from the date of breach until the panel's award, the court found it could consider the issue given that the panel found it was without jurisdiction to do so. While the arbitration provision in the parties' contract did not permit the panel to award prejudgment interest, that provision did not bar the court from awarding prejudgment interest. Thus, the Court awarded prejudgment interest from the date of breach until the date of the panel award and from the date of the panel award until the date of the court's order. As the court explained, to decline the imposition of interest would embolden parties, like insurers, to wrongfully withhold payment with no material repercussion. ExxonMobil Oil Corp. v. TIG Ins. Co., No. 16-cv-9527 (S.D.N.Y. May 18, 2020). https://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2016cv09527/466289/49/

Unsolicited fax for free webinar does not violate TCPA. A Pennsylvania district court held an unsolicited fax to a doctor's office offering a free webinar was not an "advertisement" in violation of the Telephone Consumer Protection Act, because there was nothing being sold, a Pennsylvania federal judge has ruled.

Plaintiff claimed defendant's fax soliciting participation in the webinar was a "pretext" for selling the company's urine-screening service. The judge found that the fax was not an advertisement on its face under the language of the TCPA. He also ruled the court did not have to follow a 2006 FCC order and delve into whether the free seminar was meant to sell services.

> "The court concludes that, on its face, the fax is not an advertisement." "The fax and the link associated with the fax only discuss a free seminar, not any property, goods, or services which are commercially available … The fax does not indicate that the plaintiff can purchase any product at all."

Mauthe v. Millennium Health LLC, case number 5:18-cv-01903, in the U.S. District Court for the Eastern District of Pennsylvania. https://law.justia.com/cases/federal/district-courts/pennsylvania/paedce/5:2018cv01903/542500/74/

Slip-and-fall plaintiff is not a consumer under the DTPA. A U.S. District court has joined most other courts in finding that a slip-and-fall plaintiff is not a DTPA consumer. To have standing under the DTPA, the plaintiff must be a "consumer," as that term is defined by the DTPA. A "[c]onsumer," according to the DTPA, is "an individual . . . who seeks or acquires by purchase or lease, any goods or services." Geri v. Starbucks Corp., (W.D. Tex. 2020). https://scholar.google.com/scholar_case?case=17222312505072243156&hl=en&as_sdt=6&as_vis=1&oi=scholarr

DTPA 17.49(e) was only intended to reinforce a prohibition on recovery of non-economic bodily injury damages, such as pain and suffering and loss of consortium. A federal district court reviews the language and history of the DTPA personal injury exemption to correctly conclude that section 17.49(e) does not bar DTPA claims for damages from a personal injury. It limits damages to sections 17.50(b) and (h). Perez v. Am. Med. Sys., 2020 U.S. Dist. LEXIS 87360 (W.D. Tex. 2020)

STATE COURTS

Leasing company can enforce arbitration agreement from dealership's retail order forms. A two-judge panel of the New Jersey Superior Court, Appellate Division, reversed a trial court order denying Defendant Hyundai Capital America, Inc.'s application to compel arbitration against Plaintiffs Christopher D. Curiale and Jerome C. Curiale. The Appellate Division held that the Defendant, as an assignee of a lease, could enforce an arbitration provision and class-action waiver contained in the motor vehicle retail order that was executed by Plaintiffs and the dealership. The Appellate Division further held that the arbitration provision and class waiver were not ambiguous. Curiale v. Hyundai Capital Am., 2020 N.J. Super. Unpub. LEXIS 765. https://law.justia.com/cases/new-jersey/appellate-division-unpublished/2020/a5565-18.html

Texas Supreme Court holds subrogation available for mortgagee that fails to cure constitutional defect. Answering a question certified to it by the U.S. Court of Appeals for the Fifth Circuit, the Supreme Court of Texas held that a lender is entitled to equitable subrogation where it failed to correct a curable constitutional defect in the loan documents under Tex. Const. art. XVI, 50.

The court noted that "[c]ommon law subrogation has coexisted with this constitutional scheme for more than a century. In the mortgage context, the doctrine allows a lender who discharges a valid lien on the property of another to step into the prior lienholder's shoes and assume that lienholder's security interest in the property, even though the lender cannot foreclose on its own lien. This Court has recognized the doctrine in the § 50 context since at least 1890."

The court relied on its ruling in *LaSalle Bank National Association v. White*, which held Section 50(e) "does not destroy the well-established principle of equitable subrogation." It "contains no language that would indicate displacement of equitable common law remedies was intended, and we decline[d] to engraft such a prohibition onto the constitutional language."
Federal Home Loan Mortgage Corporation v. Zepeda, https://www.txcourts.gov/media/1446458/190712.pdf

Colorado court says bank's interest rate does not pass to a non-bank. A Colorado state judge found that a nonbank must abide by the state's interest rate caps when it takes on loans from a out-of-state partner bank that can legally charge higher rates. The ruling is consistent with the Second Circuit's decision in Madden v. Midland Funding, LLC., 786 F.3d 246, 250 (2d Cir. 2015).

The Denver District Court Judge agreed with the Colorado Attorney General's Office that while federal law allows the New Jersey-based bank to lend in Colorado at rates above the local legal limits, those higher permissible rates don't carry over when the bank's loans are transferred to Marlette Funding LLC, a nonbank. Fulford v. Marlette Funding LLC et al., case number 2017-cv-30376, in the District Court for the City and County of Denver, Colorado.
https://www.law360.com/articles/1281797/attachments/0

Written arbitration agreement is enforceable even if not signed. A Texas district court compel arbitration, notwithstanding that the agreement was not signed. The FAA requires an agreement to arbitrate be in writing, but it contains no requirement the writing be signed by the parties. The court also consider whether the agreement bound non-parties. Applying "Erie guess" that the Texas Supreme Court would adopt intertwined claims estoppel, non-signatories were also compelled to arbitrate. *Castaneda v. Volt Mgmt. Corp.*, EP-19-CV-00338-FM, 2020 WL 2308699 (W.D. Tex. May 8, 2020). https://www.leagle.com/decision/infdco20200517q47

Texas lottery contractor not entitled to state's immunity. In two cases, a divided Texas Supreme Court held a government contractor can't escape two $500 million fraud lawsuits over allegedly misleading lottery scratch-off games. The court declined to extend the immunity enjoyed by the Texas Lottery Commission to the private company it partnered with.

The panel trimmed the suit, however, tossing Nettles' claims of conspiracy and aiding and abetting an alleged fraud by the commission. However, it determined the Texas Lottery Commission didn't have sufficient control over the actions that led to the fraud claims — Gtech's choices in writing the game instructions — for immunity to apply and end the litigation.
The majority said "close supervision and final approval" over a contractor's work is not the same as "the government specifying the manner in which a task is to be performed." And in this case, the commission did not tell Gtech how to write the instructions, the panel held. Dawn Nettles v. Gtech Corp. et al., case number 17-1010, https://casetext.com/case/nettles-v-gtech-corp-8 and Gtech Corp. v. James Steele et al., case number 18-0159, in the Texas Supreme Court https://law.justia.com/cases/texas/third-court-of-appeals/2018/03-16-00172-cv.html

DTPA claim dismissed based on Texas Citizen Protection Act. Plaintiff sued under the DTPA, claiming the Roofing Contractors Association of Texas [RCAT] issuance of a private "license" to its members and any resulting advertising is misleading to the "unsuspecting public" because licensure is a term of art associated with an administrative function of the State of Texas.

The court of appeals affirmed the dismissal of the suit under the TCPA, finding that RCAT's was exercising its right to free speech, which includes a communication made in connection with a "matter of public concern." The court note that a matter of public concern includes issues related to "community well-being" or "goods products or services in the market."
Thoman v. Roofing Contractors Ass'n of Tex.,(Tex. App-Austin 2020). https://casetext.com/case/thoman-v-roofing-contractors-assn

Court holds veterinarian exempt from DTPA. The Texas Occupations Code states:

> Subchapter E, Chapter 17, Business & Commerce Code, does not apply to a claim against a veterinarian for damages alleged to have resulted from veterinary malpractice or negligence.122

This provision appears to require negligence or malpractice. Consumer sued her veterinarian alleging negligence and DTPA misrepresentations. The Austin Court of Appeals held that the exemption applied, despite the fact that there was no evidence of negligence or damages produced by negligence, and summary judgment was entered on this claim. An interesting question arising in the application of this provision is whether there must actually be "negligence" to bar the DTPA claim, or is a mere "allegation" sufficient? Should consumer be careful about adding a negligence claim in a suit against a veterinarian? Connor v. Hill Country Animal Hosp.,2019 Tex. App. LEXIS 9133 (Tex. App. 2019, no pet. h.). https://casetext.com/case/connor-v-hill-country-animal-hosp

Legal malpractice cannot simply be converted to a DTPA claim. The Dallas Court of Appeals reviewed a negligence claim against attorneys to determine if the attorneys also violated the DTPA. After finding sufficient evidence to support a negligence finding, the court concluded that the consumers attempt to reclassify the conduct as a DTPA violation failed. The court found that each of the alleged DTPA violations were simply a reclassification of the negligence allegations. "On this record, we conclude the Webbs' DTPA claims are barred by the anti-fracturing rule." Webb v. Ellis, 2020 Tex. App. LEXIS 3527 (Tex. App.—Dallas 2020, no pet. h.).

FOREIGN COURTS

Canada Supreme Court finds Uber arbitration agreement unconscionable. Plaintiff provides food delivery services in Toronto using Uber's software applications. To become a driver for Uber, H had to accept the terms of Uber's standard form services agreement. Under the terms of the agreement, H was required to resolve any dispute with Uber through mediation and arbitration in the Netherlands. The mediation and arbitration process requires up-front administrative and filing fees of US$14,500, plus legal fees and other costs of participation. The fees represent most of H's annual income.

Canada Supreme Court finds Uber arbitration agreement unconscionable.

The court found that applying the unconscionability doctrine, there was clearly inequality of bargaining power between Uber and Plaintiff. The arbitration agreement was part of a standard form contract and a person in his position could not be expected to understand that the arbitration clause imposed a US$14,500 hurdle to relief. The improvidence of the arbitration clause is also clear because these fees are close to H's annual income and are disproportionate to the size of an arbitration award that could reasonably have been foreseen when the contract was entered into.

Respect for arbitration is based on its being a cost-effective and efficient method of resolving disputes. When arbitration is realistically unattainable, it amounts to no dispute resolution mechanism at all. In this case, the arbitration clause is the only way H is permitted to vindicate his rights under the contract, but arbitration is out of reach for him and other drivers in his position. His contractual rights are, as a result, illusory. Based on both the financial and logistic disadvantages faced by H in his ability to protect his bargaining interests and on the unfair terms that resulted, the arbitration clause is unconscionable and therefore invalid. Uber Technologies Inc. v. Heller, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/18406/index.do

FEDERAL NEWS

Supreme Court to consider FTC's right to seek restitution. The U.S. Supreme Court announced that it would review the Federal Trade Commission's authority to seek restitution in federal court for consumers who have been harmed by fraud and other misconduct in the marketplace. Just three weeks after the Court upheld the SEC's authority to seek disgorgement of profits in civil enforcement proceedings (discussed here), the Court agreed to take up a circuit split regarding the FTC's authority to seek monetary relief under the Federal Trade Commission Act. Depending on the outcome, the Court's decision could severely limit what the FTC considers one of its "most important and effective enforcement tools"—upending its enforcement strategy in both consumer protection and competition cases. For more read https://www.complianceweek.com/regulatory-policy/supreme-court-to-consider-scope-of-ftc-enforcement-authority/29177.article.

STATE NEWS

Debt collectors are transforming the business of our civil courts. In Texas, debt claims more than doubled from 2014 to 2018, accounting for 30 percent of the state's civil caseload by the end of that five-year period. This is just one of the findings of a recent Pew study.

The study found that the business of state civil courts has changed over the past three decades. In 1990, a typical civil court docket featured cases with two opposing sides, each with an attorney, most frequently regarding commercial matters and disputes over contracts, injuries, and other harms. The lawyers presented their cases, and the judge, acting as the neutral arbiter, rendered a decision based on those legal and factual arguments.

Thirty years later, that docket is dominated not by cases involving adversaries seeking redress for an injury or business dispute, but rather by cases in which a company represented by an attorney sues an individual, usually without the benefit of legal counsel, for money owed. While the number of cases has declined more than 18% over the past eight years, debt collection cases are rapidly increasing.

The complete study may be found at https://www.pewtrusts.org/en/research-and-analysis/reports/2020/05/how-debt-collectors-are-transforming-the-business-of-state-courts

Judge in Texas pioneers trial by Zoom. A Texas state court judge charted a new path for trials during the coronavirus pandemic Wednesday when he held a one-day bench trial through videoconferencing service Zoom, overcoming technical difficulties to hear a dispute over roughly $96,000 in attorney fees stemming from an insurance case. This is not the first use of Zoom in Texas courts, but it is believed to be the first full-blown trial. Read more here, https://www.law.com/texaslawyer/2020/04/21/now-trending-in-texas-full-blown-bench-trials-via-zoom/?slreturn=20200722152527

DECEPTIVE TRADE PRACTICES AND WARRANTY

DECEPTIVE TRADE PRACRTICES ACT CLAIM DISMISSED BASED ON TEXAS CITIZEN PARTICIPATION ACT

Thoman v. Roofing Contractors Ass'n of Tex., ___S.W.3d___ (Tex. App. 2020).
https://www.leagle.com/decision/intxco20200630624

FACTS: Plaintiff Thomas Thoman sued Roofing Contractors Association of Texas ("RCAT") and its directors, alleging Deceptive Trade Practices Act ("DTPA") violations for issuing licenses to its members that allowed them to advertise as "licensed roofing contracts." Thoman alleged the licenses and advertising were misleading because licensure is a term of art associated with Texas Department of Licensing and Regulation. The district court granted RCAT's motion to dismiss under the Texas Citizens Participation Act ("TCPA"). Thoman appealed.
HOLDING: Affirmed.
REASONING: Thoman argued that the district court erred in dismissing his suit under the TCPA because the statute did not apply to his claims against RCAT. The TCPA allows a party to move for dismissal of any "legal action that is based on… [that] party's exercise of the right of free speech..." Tex. Civ. Prac. & Rem. Code § 27.003. Thoman asserted that because RCAT's communication includes allegedly deceptive statements about goods or services, RCAT was not exercising a protected First Amendment right and, therefore, did not benefit from the protection of the TCPA.

The court held that RCAT met its burden to show that the claim arose from its exercise of the right to free speech under TCPA. Under the TCPA, the "exercise of the right of free speech" includes any "communication made in connection with a matter of public concern." Tex. Civ. Prac. & Rem. Code § 27.001(7). The court held that because Thoman asserted that the licenses and references on RCAT's website falsely implied the superiority of certain goods and services, his allegations were predicated on "statements" made by RCAT and, therefore, were "communication" for the purpose of the TCPA. Further, the court determined those statements were a "matter of public concern" because they purportedly undermined the public's ability to identify qualified construction contractors. Thus, the court held the TCPA was applicable and affirmed the lower court's dismissal.

LEGAL MALPRACTICE CANNOT SIMPLY BE CONVERED TO A DECEPTIVE TRADE PRACTICES ACT CLAIM

Webb v. Ellis, ___ S.W.3d ___(Tex. App. 2020).
https://law.justia.com/cases/texas/fifth-court-of-appeals/2020/05-19-00673-cv.html

FACTS: Plaintiff Michael Webb, individually and as representatives of the estates of Wayne and Rosemary Webb, and David Webb (the "Webbs") hired attorney Defendant Alfred Ellis and the law firm of Sommerman & Quesada, L.L.P (the "Attorneys") to represent them in a product liability suit after a fire in the Webbs' home. During mediation, opposing counsel stated Webb would face problems proving causation of the fire and Webb asked Ellis if it would be necessary to retain additional experts. Ellis responded in the negative. After Ellis persuaded the Webbs to settle their claim, the Webbs retained an expert who was able to determine the cause of the fire.

The Webbs filed a legal malpractice suit and violations of the DTPA. The Attorneys filed a no-evidence motion for summary judgement on appellants' malpractice and DTPA claims and a traditional motion for partial summary judgement on the Webbs' DTPA claim, asserting that claim is barred by the anti-fracturing rule and is exempt from DTPA liability. The trial court granted the motions for summary judgement.
HOLDING: Affirmed in part, reversed in part, and remanded.
REASONING: The Attorneys argued that the Webbs' DTPA claim should have been dismissed because it was nothing more than an impermissible division or fracturing of the Webbs' professional negligence claims, and the professional-services exemption barred liability.

The Court accepted the Attorneys' argument and reasoned that Texas courts do not allow plaintiffs to convert a duty in negligence into a claim for fraud or violations of the DTPA. For the anti-fracturing rule to apply, however, the gravamen of appellants' complaints must focus on the quality or adequacy of the attorney's representation. Whether certain allegations asserted against an attorney and labeled as a violation of the DTPA is a claim for professional negligence is a question of law to be determined by the court. The court must find that the underlying facts implicate independently actionable obligations or duties.

The court reasoned that each of the Webbs' allegations was about giving erroneous legal opinion or advice, failing to give any advice or opinion when legally obligated to do so, delaying or failing to handle a matter entrusted to the attorney's care by the client, and not using an attorney's ordinary care in preparing, managing, and presenting litigation that affects the clients' interests. Thus, the court concluded the Webbs' DTPA claims were barred by the anti-fracturing rule.

CAR PURCHASER DETAINED BY POLICE DUE TO WRONG VIN NUMBER ON CONTRACT DOES NOT HAVE CLAIM UNDER DECEPTIVE TRADE PRACTICES ACT

Charlie Thomas Chevrolet, LTD v. Martinez, 590 S.W.3d 9 (Tex. App. 2019).
https://www.leagle.com/decision/intxco20190808599

FACTS: Plaintiff Gerano Martinez bought a truck from Defendant Charlie Thomas Chevrolet, LTD ("Champion Chevrolet"). At the dealership, Martinez test drove a new black and a new white truck and opted to purchase the black one. When filling out the Retail Purchas Agreement, the Vehicle Identification Number ("VIN") for the white truck was erroneously filled in. A couple week after the sale, Champion Chevrolet thought the black truck was missing from its inventory. Martinez was detained by the police under the suspicion that he stole the black truck. An inspection of the purchase agreement revealed the mistaken VIN.

Martinez sued Champion Chevrolet for instigation of false imprisonment and for other Deceptive Trade Practices Act ("DTPA") violations. A jury found Champion Chevrolet liable for both claims. Martinez elected to recover on his DTPA claim, and the trial court entered judgment for Martinez. Champion Chevrolet appealed.

HOLDING: Reversed and remanded.

REASONING: Champion Chevrolet argued that the judgment on the DTPA claims must be reversed because: (1) the DTPA claims are an impermissible attempt to recast Martinez's instigation-of-imprisonment allegations as an unintentional tort; (2) Champion Chevrolet did not commit a DTPA violation; (3) the allegedly actionable conduct was not a producing cause of harm to Martinez; (4) Martinez presented no evidence of economic damages; (5) there was no knowing or intentional conduct to support an award of mental anguish or enhanced damages; and (6) there was no evidence of mental anguish sufficient to support an award of damages for mental anguish. The court accepted Champion Chevrolet's arguments.

For DTPA claims to be valid, the claim needs to relate to the quality and suitability of the product purchased, and the claim had to be committed with unconscionable action or course of action under the DTPA. The remedy is aimed at economic results. Unconscionability is limited to economic outcomes associated with commercial transactions.

The true nature of Martinez's cause of action was his complaint about the post-transaction stolen-vehicle report and his detention by the police. The VIN mistake in the paperwork had nothing to do with taking advantage of a lack of knowledge, ability, experience, or capacity to a grossly unfair degree in some type of consumer or economic transaction. Thus, the court reversed the trial court's judgment and rendered judgment that Martinez take nothing against Champion Chevrolet on his DTPA claim.

DECEPTIVE TRADE PRACTICES ACT 17.49(E) WAS ONLY INTENDED TO REINFORCE A PROHIBITION ON RECOVERY OF NON-ECONOMIC BODILY INJURY DAMAGES, SUCH AS PAIN AND SUFFERING AND LOSS OF CONSORTIUM

Perez v. Am. Med. Sys. Inc., ___ F. Supp. 3d ___ (W.D. Tex. May 14, 2020).

FACTS: Dr. Lacy implanted Plaintiff Luz Perez with an Elevate mesh device (the "mesh"). Defendant American Medical Systems Inc. was the designer, manufacturer, and seller of the mesh. Ms. Perez claimed that the mesh had caused her to suffer dyspareunia, abdominal pain, pain with urinating, erosion, urinary tract infections, and incontinence. Defendant's instructions for use provided warnings for each of these risks. Dr. Lacy was independently aware of these risks and informed Ms. Perez of them prior to the mesh implant.

Mrs. Luz and her spouse, Dario Perez ("plaintiffs") filed a products liability suit in 2016 in the district court. Defendant filed a motion for summary judgment.

HOLDING: Motion granted in part and denied in part.

REASONING: Defendant argued that it was entitled to summary judgment on plaintiffs' DTPA claim because Section 17.49(e) of the Texas Deceptive Trade Practices Act ("DTPA") bars personal injury claims. The court rejected this argument and agreed with plaintiffs' interpretation of Section 17.49(e), which prohibits plaintiffs from recovering most non-economic damages resulting from bodily injury but permits them to recover economic damages.

The legislative history also supported the court's interpretation.

First, the text of Section 17.49(e) refers back to the statute's general damages provision in subsection (b), to create an exception, and subsection (b) provided only for the recovery of economic damages without a showing of knowing or intentional misconduct. Because the legislators did not carve out the economic damages arising from a physical injury from the definition of the economic damages, the plain text supports the conclusion that claims involving bodily injury were not excluded from the ambit of the DTPA to the extent that they seek to recover only damages that were otherwise permissible under the statute.

Second, the legislative history also supported the court's interpretation. The amendments showed that Section 17.49(e) served to underscore, not override, the damages that are otherwise recoverable under the DTPA.

Finally, the approaches of lower courts were divergent, but the decisions that held different conclusions are not persuasive. Specifically, the court found the narrow interpretation in *Roberts v. Zev Techs, Inc.*, No. 1:15-CV-309 RP, 2015 WL 7454688 (W.D. Tex. Nov 23, 2015) unpersuasive, because the *Roberts* court's reasoning fails on its own terms, and while the plain text is not ambiguous, under Texas law, the court should not resort to rules of construction or extrinsic aids.

SLIP-AND-FALL PLAINTIFF IS NOT A CONSUMER UNDER THE DECEPTIVE TRADE PRACTICES ACT

Geri v. Starbucks Corp., ___ F. Supp. 3d ___ (W.D. Tex. 2020). https://scholar.google.com/scholar_case?case=17222312505072243156&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Plaintiff Stephen Geri slipped, fell, and was injured on Defendant Starbucks Corporation's premises.

Geri filed suit against Starbucks, including a Deceptive Trade Practices Act ("DTPA") claim. Starbucks moved for summary judgment.

HOLDING: Granted.

REASONING The court held that Starbucks was entitled to summary judgement on Geri's DTPA claim because a slip-and-fall plaintiff like Geri does not have standing to assert a DTPA claim. To have standing under the DTPA, the plaintiff must be a consumer. The DTPA defines consumer as an individual "who seeks or acquires by purchase or lease, any goods or services." The goods or services must also form the basis of the consumer's complaint. The court reasoned that Geri was not a consumer for purposes of the DTPA based on a slip-and-fall because his injuries were not sufficiently related to the goods or services he was purchasing—i.e., the coffee or other product he intended to buy.

DEBT COLLECTION

UNDER FAIR DEBT COLLECTION PRACTICES ACT AND TEXAS DEBT COLLECTION ACT CREDITOR HAS NO OBLIGATION TO EXPLAIN TAX CONSEQUENCES TO A CONSUMER

Simins v. Credit Control, LLC, ___ F. Supp. 3d ___ (W.D. Tex. 2020).
https://www.leagle.com/decision/infdco20200526609

FACTS: Defendant Credit Control, LLC sent a debt settlement offer letter to Plaintiff Stacey Simins. The letter included no information regarding any potential tax consequences for Simins. Simins alleged that Credit Control knew that any forgiven debt must be reported as income by Simins. Thus, Credit Control would have known that any taxes paid by Simins on her debt forgiveness income would potentially be offset any debt cancellation savings.

Simins sued Credit Control, alleging that it violated both the FDCPA and TDCA by omitting the potential tax consequences for Simins in the settlement letter. Credit Control moved for Partial Motion to Dismiss for failure to state a claim.
HOLDING: Motion granted.
REASONING: Credit Control argued that it had no duty to explain the tax consequences of a settlement acceptance. Simins argued that the letter violated the FDCPA and TDCA because it used affirmative language as to a specific amount of savings when in reality the net overall savings would be conditional on the tax consequences.

The court rejected this argument and held that Credit Control had no duty to disclose the tax consequences of the debt settlement. Credit Control's letter, referred to "your account" and "option(s) for you to resolve your account for less than the total Amount Due." Thus, the letter referred to savings related specifically to Simins's account. The court noted that if Simins accepted the letter's offer, the payment of the settlement amount would have resolved Simins's account and she literally would have saved the amounts listed from the amount she owed on the debt. Based upon the foregoing, the magistrate judge recommended that the district court grant Credit Control's Partial Motion to Dismiss and dismiss with prejudice all of the claims in the Second Amended Complaint.

FAIR DEBT COLLECTION PRACTICES ACT ONE-YEAR LIMITATIONS PERIOD EXTENDS TO NEXT WEEK-DAY AFTER A WEEKEND

DEBT COLLECTOR VIOLATES FDCPA BY COMMUNICATING CREDIT INFORMATION THAT THE DEBT COLLECTOR KNOWS OR SHOULD KNOW TO BE FALSE

Krier v. United Revenue Corp., ___ F. Supp. 3d ___ (N. D. Tex. 2020).
https://www.leagle.com/decision/infdco20200526594

FACTS: Plaintiff Brandon Krier owed a debt to a third party that was placed for collection with defendant United Revenue Corp. ("United"). United reported Krier's collection account to defendant Experian Information Solutions, Inc. ("Experian"). Subsequently, Krier sent a letter to Experian, disputing the accuracy of Krier's account with United. Krier asserted that after he sent his dispute letter to Experian, United was contacted by Experian and was informed of the dispute. United then furnished information to Experian regarding Krier's account but did not indicate to Experian that the account had been disputed by Krier. Later, Krier received an updated credit report from Experian. That credit report indicated that United had furnished information about Krier's account to Experian. The credit report also listed Krier's account as past due. However, the report did indicate that Krier had disputed the debt. Krier alleged that United's failure to notify Experian of Krier's dispute, and Experian's updated credit report, caused Krier to suffer harm in the form of credit denials caused by the defendants' false credit reporting.

FDCPA claims are subject to a one-year statute of limitations that begins to run on the date the alleged FDCPA violation actually happened.

Krier filed suit against United and Experian, alleging various violations of the FDCPA and FCRA. United filed a motion to dismiss, asserting that Krier's claims were time-barred under the applicable one-year statute of limitations and that Krier failed to state a claim under the FDCPA upon which relief may be granted.
HOLDING: Granted in part and denied in part.
REASONING: FDCPA claims are subject to a one-year statute of limitations that begins to run on the date the alleged FDCPA violation actually happened. The parties agreed that the limitations period on Krier's FDCPA claims began to run on December 14, 2018, when United allegedly furnished Experian with updated information about Krier's account. United argued that because Krier filed his claim on the Monday after the weekend deadline, Krier's claims are barred by statute of limitations. Krier argued that Rule 6(a) of the Fed. R. Cov. P. made the claims timely. Rule 6(a) "allows the period to continue to run until the end of the next day that is not a Saturday, Sunday, or legal holiday." The court accepted Krier's argument. Accordingly, the court concluded that Krier's FDCPA claims were timely filed.

Secondly, Krier claimed that United violated Section 1692e(8) of the FDCPA by failing to include notice of Krier's dispute in the account update that United allegedly furnished to Experian. Section 1692e(8) prohibits a debt collector from communicating to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed. United argued that Krier failed to state a claim under Section 1692e(8) because (1) Krier never disputed the debt directly to United, and (2) Krier fails to support his allegation that Experian notified United of Krier's dispute. The court rejected these arguments.

First, although Krier did not allege that he directly notified United of his dispute, Section 1692e(8) does not require a plaintiff to notify a debt collector directly. Rather, a debt collector can be held liable under Section 1692e(8) for communicating credit information that the debt collector knows or should know to be false, irrespective of the source of such knowledge. Thus, the fact that Krier did not notify United of his dispute directly is not dispositive of whether United knew or should have known about Krier's dispute.

Second, the court held that Krier's allegations gave rise to a plausible inference that United violated Section 1692e(8). Krier asserted that he notified Experian of his dispute by letter on April 27, 2018, and that Experian had a duty under the FCRA to report the dispute to United. Experian was required by law to notify United of the dispute within five business days of receiving Krier's letter. Finally, Krier asserted that Experian notified United of Krier's dispute, but that United nonetheless failed to indicate the dispute when United furnished updated account information to Experian in December, 2018. The court found it reasonable to infer that Experian complied with its statutory duty under 15 U.S.C. § 1681i(a)(2) and notified United of Krier's dispute after receiving Krier's dispute letter. Accordingly, the court held that Krier had stated a claim for relief under 15 U.S.C. § 1692e(8) that was plausible on its face.

CONSUMER MUST INDIVIDUALLY ARBITRATE CLAIM AGAINST DEBT COLLECTOR

George v. Rushmore Serv. Ctr., ___ F. Supp. 3d. ___ (D.N.J. 2020).
https://www.leagle.com/decision/infdco20200517q58

FACTS: Josephine Tailor and Alison George ("Plaintiffs") brought this class action against Rushmore Service Center, LLC and its managers ("Defendants") alleging violations of the FDCPA. Plaintiffs incurred debts from credit cards issued by First Premier Bank ("FPB") that eventually became overdue and in default. The debts were assigned to the Defendants for collection, and the Defendants mailed collection letters on behalf of Premier Bankcard, LLC. ("PBC"), an affiliate of FPB. The Defendants moved to compel arbitration, arguing that the Plaintiffs had incurred the debts pursuant to the card agreement that included an arbitration clause. The Plaintiffs argued that the Defendants could not enforce arbitration because FPB issued the card, and therefore FPB was the only entity with an arguable right to compel arbitration.

This issue was brought before the U.S. District Court for the District of New Jersey. The Defendants filed a motion to compel arbitration.

HOLDING: Motion granted.

REASONING: The Plaintiffs argued that because the card agreement had been made between the Plaintiffs and FPB, only FPB could enforce arbitration. The court rejected this argument. The contract stated that arbitration was mandatory for claims by "you," the card holder, or "us," which explicitly included FPB and its employees, parents, subsidiaries, affiliates, beneficiaries, agents and assigns. The parties agreed that PBC was FPB's affiliate. Additionally, because of their agreement for collection services and the explicit authority to settle claims, the court found that Rushmore was an agent of PBC. Thus, the court held that the Defendants may enforce the arbitration clause.

COURT EVALUATES DEBT COLLECTION LETTER BY UNSOPHISICATED DEBTOR STANDARD

Johnson v. Enhanced Recovery Co., 961 F.3d 975 (7th Cir. 2020).
https://law.justia.com/cases/federal/appellate-courts/ca7/19-1210/19-1210-2020-06-09.html

FACTS: Plaintiff Erin Johnson received three collection letters from the Defendant Enhanced Recovery Company, LLC ("ERC"). Each letter included the disclosure, "[t]his letter serves as notification that your delinquent account may be reported to the national credit bureaus." The second letter was sent to Johnson on April 21, 2016. The letter included three settlement options with a deadline of May 26, 2016. The letter also stated, "[p]ayment of the offered settlement amount will stop collection activity on this matter." ERC reported the unpaid debt to the credit bureaus on April 24, 2016.

Johnson sued, alleging that ERC violated the Fair Debt Collections Practices Act ("FDCPA") because ERC misled her into believing that if she accepted one of the settlement offers before May 26, the debt would not be reported to the credit bureaus. Johnson further alleged that using the word "may" implied ERC would report in the future, not days after the letter was sent. The district court denied a motion to dismiss and granted the motion for summary judgment filed by ERC. Both Johnson and ERC appealed.

HOLDING: Affirmed.

REASONING: Johnson argued that no additional evidence was required beyond her own opinion that a reasonable but unsophisticated consumer would interpret the April 21 letter as a "threat to engage in credit reporting" unless the payment was made by May 26. Johnson insisted that the phrase "may be reported to the national credit bureau" conveyed a future possibility that her debt could have be reported, when in fact by the time she received the letter or shortly thereafter it had already been reported.

The court rejected Johnson's argument because she failed to produce any new evidence "beyond her own opinion" that the letter was misleading enough to constitute a violation of the FDCPA. The court evaluated the disputed language using the objective standpoint of an "unsophisticated debtor" to determine whether a communication was false, deceptive, or misleading. Applying this standard, in cases where the debt collection language was not deceptive or misleading on its face but could be construed to be confusing or misleading to the unsophisticated consumer, the court will hold a plaintiff cannot prevail without producing extrinsic evidence tending to show that unsophisticated consumers are in fact confused or misled by the challenged language. While conceding that the word "may" conveys two different meanings, one of which is misleading, the court concluded that summary judgement in favor of ERC was appropriate.

The court evaluated the disputed language using the objective standpoint of an "unsophisticated debtor" to determine whether a communication was false, deceptive, or misleading.

JUDICIAL FORECLOSURE IS NOT DEBT COLLECTION UNDER FAIR DEBT COLLECTION PRACTICES ACT

Barnes v. Routh Crabtree Olsen PC, ___ F.3d ___ (9th Cir. 2020).
https://buckleyfirm.com/sites/default/files/Buckley%20InfoBytes%20-%20Barnes%20v.%20Olsen%20PC%2C%20et%20al%20-%209th%20Circuit%20Opinion%20-%202020.06.30.pdf

FACTS: Plaintiff Timothy Barnes borrowed money from Chase Bank and granted Chase a deed of trust on his home as security for the note. Barnes then defaulted on the loan, which Chase had sold to Defendant Federal National Mortgage Association ("Fannie Mae").

Fannie Mae initiated a foreclosure proceeding and the action was dismissed. Barnes subsequently filed a complaint alleging Fair Debt Collections Practices Act ("FDCPA") violations by Fannie Mae. The district court dismissed the suit for failure to state a claim. The FDCPA claim was not allowed to proceed because none of the defendants had engaged in debt collection by initiating the judicial foreclosure proceeding. The Ninth Circuit initially affirmed the dismissal of Barnes' complaint. However, upon receipt of Barnes' petition for rehearing, it ordered supplemental briefing to discuss the effect of the Supreme Court's intervening decision in Obduskey v. McCarthy & Holthus LLP, 139 S. Ct. 1029(2019).

HOLDING: Affirmed.
REASONING: The court reasoned that a debt collector is a person who engages in "the collection of a money debt" on behalf of a third party. Because the debt must be owed or due "another," an entity that collects a debt owed itself does not qualify under this definition. The enforcement of a security interest does not entail an attempt to collect money from the debtor. The court noted that courts have long recognized the distinction between security interests and the debts they secure. While the deed of trust creates a lien on the property to secure the creditor's right to repayment, the note makes the debtor personally liable for loan.

The court rejected Barnes' assertion that a person who initiates a judicial foreclosure proceeding is categorically attempting to collect a debt. A plaintiff must identify something beyond the mere enforcement of a security interest to establish that a defendant is acting as a debt collector subject to the FDCPA's broad code of conduct. That additional debt-collection ingredient can be present for judicial foreclosure, provided that state law permits a deficiency judgment, which is often available in judicial foreclosure proceedings. Thus, the court held that unless a deficiency judgment is on the table in the proceeding, a person judicially enforcing a deed of trust is seeking only the return or sale of the security, not to collect a debt. The court affirmed the lower court's dismissal.

SEPARATE VIOLATIONS OF FAIR DEBT COLLECTION PRACTICES ACT ARE SUBJECT TO NEW STATUTE OF LIMITATIONS

Bender v. Elmore & Throop, P.C., 963 F.3d 403 (4th Cir. 2020).
https://www.ca4.uscourts.gov/Opinions/191325.P.pdf

FACTS: Plaintiffs Robert and Deborah Bender ("the Benders") were notified by their HOA's law firm, Defendant Elmore & Throop, P.C. ("Elmore"), that they failed to pay their HOA assessments. Elmore demanded Bender pay the HOA assessments and the costs of attorneys' fees. The Benders delivered copies of cancelled checks to Elmore, proving that they had paid the assessments. Elmore acknowledged that the payments had been received, but nonetheless asserted that the Benders owed the costs and attorneys' fees. The Benders denied they ever made late payments and Elmore persisted in maintaining that late fees, costs, interest, and attorneys' fees were owed. The Benders delivered a letter to Elmore requesting it to stop contacting them about the claim and that they would consider a lien on their property as harassment. The Benders received another letter from Elmore that acknowledged receipt of the HOA payment made by Mr. Bender at the meeting but noted as outstanding the accumulated fees and costs associated with the original disputed payment. The Benders again requested Elmore to stop contacting them. Elmore sent another letter including an updated ledger of the Benders' account showing that a fee had been added for preparation of the last letter. Mr. Bender requested to attend the upcoming annual HOA meeting, however, Elmore told Mr. Bender he was not allowed to attend the meeting and that a lien was placed on his property.

The Benders filed a complaint alleging that Elmore violated various provisions of the Fair Debt Collection Practices Act ("FDCPA") by engaging in unfair debt collection practices and by improperly communicating with the Benders. Elmore sought dismissal of the complaint as untimely. The district court granted Elmore's motion for summary judgement and dismissed the complaint based on the statute of limitations. The district court held that the FDCPA's limitations period runs from the date of the first violation and that later violations of the same type do not trigger a new limitations period under the Act. The Benders appealed.
HOLDING: Vacated and Remanded.
REASONING: The Benders argued that the district court erred in dismissing all of their claims as time-barred because two of the alleged violations occurred less than one year from the date they filed suit. According to the Benders, under the FDCPA, a new statute of limitations arose with each "violation" of the Act. Thus, the Benders contended that the district court erred in dismissing the entirety of their complaint, which contained allegations of FDCPA violations that arose within the one-year statute of limitations.

Elmore argued that the district court did not err in dismissing the entire complaint, because the first alleged violation of the FDCPA occurred outside the limitations period and all later communications by Elmore arose from its attempt to collect the same debt.

The court rejected Elmore's argument and held that a "separate violation" of the FDCPA occurs "every time" an improper communication, threat or misrepresentation is made. Therefore, the court concluded that §1692k(d) of the FDCPA established a separate one-year limitations period for each violation of the FDCPA. The court stated that this avoids creating a safe harbor for unlawful debt collection activity. Under the district court's approach, so long as the debtor does not initiate suit within one year of the first violation, a debt collector would be permitted to violate the FDCPA with regard to that debt infinitely and with impunity. Therefore, the court held that two of the Bender's allegations were not time-barred and remanded the case for further proceedings.

CONSUMER CREDIT

TEXAS SUPREME COURT HOLDS SUBROGATION AVAILABLE FOR MORTGAGE THAT FAILS TO CURE CONSTITUTIONAL DEFECT

Fed. Home Loan Mortg. Corp. v. Zepeda, ___ S.W.3d ___ (Tex. 2020).
https://www.leagle.com/decision/intxco20200424631#

FACTS: Plaintiff Sylvia Zepeda obtained a loan from CIT Group/ Consumer Finance, Inc. to buy her homestead and secured the loan using her homestead as collateral. Zepeda subsequently refinanced her debt with a home-equity loan from Embrace Home Loans, Inc. She also used her homestead as collateral in that transaction. Embrace paid the balance of Zepeda's debt to CIT Group, which then released its claim on the homestead. Zepeda then notified Embrace by letter that the loan documents did not comply with Article XVI, §50 of the Texas Constitution because Embrace had not signed a form acknowledging the homestead's fair market value. The letter requested that Embrace cure the defect within 60 days, as required by §50. In response, Embrace sent Zepeda another copy of the fair-market-value acknowledgment but failed to sign it. Embrace later sold the loan to the Federal Home Loan Mortgage Corp. ("Freddie Mac"). Zepeda sent a letter to Freddie Mac notifying it of the constitutional defect and offering an opportunity to cure. Freddie Mac did not respond.

Zepeda sued to quiet title in the District Court for the Southern District of Texas to establish her ownership of the homestead. The district court granted Zepeda's motion for summary judgement. Freddie Mac appealed to the Fifth Circuit. That court issued the following certified question to the Texas Supreme court: Is a lender entitled to equitable subrogation, where it failed to correct a curable constitutional defect in the loan documents under §50 of the Texas Constitution?
HOLDING: Yes.
REASONING: Zepeda argued that failing to correct the curable constitutional defect and comply with the fair-market-value-acknowledgment requirement of §50(a)(6)(Q)(ix) meant that Freddie Mac did not possess a valid lien on her property. Although Zepeda acknowledged that the Texas common law has recognized the doctrine of equitable subrogation for more than a century, recent amendments to §50 revealed Texas voters' intent to abolish this doctrine.

The court rejected these arguments and departed from the district court's decision and noted two reasons why Freddie Mac could claim equitable subrogation and reaffirm its valid possession of the lien. First, in cases that challenged lenders' right to equitable subrogation, the courts have examined whether lenders discharged a prior lien to determine if they were entitled to equitable subrogation. Because Embrace paid off the balance of CIT Group's to acquire Zepeda's loan, this afforded Freddie Mac the right to equitable subrogation to CIT Group's lien despite its failure to cure the constitutional defect.

Second, equitable subrogation was an established principle that had been part of the legal system for more than a century. Destroying or repealing this principle was not the purpose of the amendments to §50, and such a reading of the Constitution should be avoided, especially in cases where lenders did not cure the constitutional defect but did discharge the prior valid lien. Consequently, under Texas law, a lender who discharges a prior, valid lien on the borrower's homestead property is entitled to subrogation, even if the lender failed to correct a curable defect in the loan documents under §50 of the Texas Constitution.

PUNITIVE DAMAGE AWARD UNDER FAIR CREDIT REPORTING ACT REVERSED

Younger v. Experian Info. Sol., Inc., ___ F.3d ___ (11th Cir. 2020).
https://law.justia.com/cases/federal/appellate-courts/ca11/19-11487/19-11487-2020-06-19.html

FACTS: A prior small-claims debt of Plaintiff Shaun Younger's was resolved by a dismissal with prejudice of the debt claim in January 2015. Younger ran his credit report in March 2015 and noticed that this debt was still being reported on his Experian credit report. Younger sent a letter via certified mail to Defendant Experian with the order of dismissal with prejudice attached and asked Experian to reinvestigate the debt listing and remove it. An unknown person in the Experian mail room concluded that the letter qualified for diversion under Experian's "suspicious mail policy" and diverted the letter. Experian sent to Younger at his home address the standard letter it sends to queries that are diverted by the suspicious mail policy and did nothing further with the matter. In June 2015, pursuant to a communication from the debt holder, Experian deleted from Younger's credit file and report the information about which Younger had complained.

Nothing in the record suggested that Experian did so often enough for a jury to permissibly infer that Experian ran an "unjustifiably high risk" of violating its duty to reinvestigate.

Younger sued Experian under the Fair Credit Reporting Act ("FCRA") for not reinvestigating the 2015 debt claim on his credit report. The jury awarded Younger $5,000 in compensatory damages. The jury further found Experian's violation of the FCRA was willful and assessed $3 million in punitive damages, which the magistrate judge remitted to $490,000. Experian appealed.
HOLDING: Vacated in part and affirmed in part and remanded.
REASONING: The court held that there was an insufficient evidentiary basis to support the verdict that Experian's actions met the requirement of a negligent or willful violation of the FCRA. The "willfulness" standard encompasses not only "knowing" violations of the statute but also those committed in "reckless disregard" of the statute's requirements. A company acts recklessly when its conduct entails an unjustifiably high risk of harm that is either known or so obvious that it should be known. Additionally, a company violates the FCRA where its action, based on a reading

of the statute's terms, is more than "merely careless" and, instead, it engages in conduct which amounts to an "objectively unreasonable" view of the company's duties under the statute.

Although Experian's corporate representative admitted that, in addition to misclassifying Younger's dispute letter, Experian had misclassified other genuine letters under its policy, nothing in the record suggested that Experian did so often enough for a jury to permissibly infer that Experian ran an "unjustifiably high risk" of violating its duty to reinvestigate. Younger offered no evidence of a broad or systemic problem with Experian's suspicious mail policy. That the policy contained some broad characteristics, that Experian employs few persons to sort a large volume of mail, and that Experian has misclassified an unknown number of letters could not, on their own, establish by clear and convincing evidence that Experian ran an unjustifiably high risk of violating its duties under the FCRA, especially in the light of another duty imposed by the FCRA. Accordingly, the court ordered that the magistrate judge on remand should enter judgment for Experian on the willfulness claim, pursuant to Fed. R. Civ. P. 50(e). This eliminated the remitted punitive damages judgment, as punitive damages are only available for willful violations. 15 U.S.C. § 1681n(a)(2).

ARBITRATION

ARBITRATOR'S DECISION TO CONDUCT CLASS ARBITRATION CANNOT BE VACATED

Sun Coast Res., Inc. v. Conrad, 956 F.3d 335 (5th Cir. 2020).
https://law.justia.com/cases/federal/appellate-courts/ca5/19-20058/19-20058-2020-04-16.html

FACTS: Defendant-Appellee Roy Conrad was an hourly employee of Plaintiff-Appellant Sun Coast Resources. Sun Coast provided reimbursements and per diems for Conrad's travel. Conrad believed that Sun Coast violated the Fair Labor Standards Act ("FLSA") by not including the reimbursements and per diems in his regular rate for overtime calculations.

Pursuant to an arbitration agreement, Conrad brought an FLSA claim against Sun Coast in arbitration on behalf of a class of similarly situated employees. In a clause construction award, the arbitrator determined that the agreement clearly provides for collective actions. Sun Coast filed suit asking the district court to vacate the award pursuant to §10(a)(4) of the Federal Arbitration Act. 9 U.S.C. §10(a)(4). The district court rejected the application, determining that the arbitrator had interpreted the agreement and he, therefore, did not exceed his powers. Sun Coast appealed.
HOLDING: Affirmed.
REASONING: Sun Coast argued that deference to the arbitrator was inappropriate because the issue of whether an arbitration agreement permits class proceedings is a gateway issue for courts to decide, not arbitrators.

The Court rejected Sun Coast's argument, noting that the arbitration agreement appeared to assign the question of class arbitrability to the arbitrator rather than to the court. Regardless, the court held that Sun Coast forfeited the issue in two ways. First, Sun Coast did not suggest to the arbitrator that he had no authority to decide class arbitrability issues. Second, Sun Coast did not challenge the arbitrator's authority to decide class arbitrability in a timely fashion before the district court. The court held that the correctness of the arbitrator's interpretation is irrelevant so long as it was an interpretation. The award here showed that the arbitrator interpreted the text of the agreement where it authorizes arbitration of all remedies which might be available in court, and there was no specific carve out for class proceedings. The parties also agreed that the American Arbitration Association (AAA) rules for employment were to govern arbitration. Those rules permit class proceedings. These facts suggested to the arbitrator that class arbitration was appropriate, and thus it would be improper to vacate. Accordingly, the lower court's decision was affirmed.

CONSUMER MUST INDIVIDUALLY ARBITRATE CLAIM AGAINST DEBT COLLECTOR

George v. Rushmore Serv. Ctr., ___ F. Supp. 3d. ___ (D.N.J. 2020).
https://www.leagle.com/decision/infdco20200517q58

FACTS: Josephine Tailor and Alison George ("Plaintiffs") brought this class action against Rushmore Service Center, LLC and its managers ("Defendants") alleging violations of the FDCPA. Plaintiffs incurred debts from credit cards issued by First Premier Bank ("FPB") that eventually became overdue and in default. The debts were assigned to the Defendants for collection, and the Defendants mailed collection letters on behalf of Premier Bankcard, LLC. ("PBC"), an affiliate of FPB. The Defendants moved to compel arbitration, arguing that the Plaintiffs had incurred the debts pursuant to the card agreement that included an arbitration clause. The Plaintiffs argued that the Defendants could not enforce arbitration because FPB issued the card, and, therefore, FPB was the only entity with an arguable right to compel arbitration.

This issue was brought before the U.S. District Court for the District of New Jersey. The Defendants filed a motion to compel arbitration.
HOLDING: Motion granted.
REASONING: The Plaintiffs argued that because the card agreement had been made between the Plaintiffs and FPB, only FPB could enforce arbitration. The court rejected this argument. The contract stated that arbitration was mandatory for claims by "you," the card holder, or "us," which explicitly included FPB and its employees, parents, subsidiaries, affiliates, beneficiaries, agents and assigns. The parties agreed that PBC was FPB's affiliate. Additionally, because of their agreement for collection services and the explicit authority to settle claims, the court found that Rushmore was an agent of PBC. Thus, the court held that the Defendants may enforce the arbitration clause.

PLAINTIFF LOSES ARGUMNET IT WAS NOT BOUND BY EMAIL SENT AFTER FILING LAWSUIT

Miracle-Pond v. Shutterfly, Inc., ___ F.3d ___ (N.D. Ill. 2020).
https://www.casemine.com/judgement/us/5ec569004653d06e0a5eeb62

FACTS: Plaintiffs Vernita Miracle-Pond and Samantha Paraf were users of the mobile phone app Shutterfly, created by Defendant Shutterfly, Inc. In 2014, Ms. Miracle-Pond accepted the Shutterfly terms of use. The terms stated that Shutterfly reserved the right to revise the terms and conditions by simply posting a revised edition of the terms and that continued use of Shutterfly's services constituted agreement to the revised terms. In 2015, Shutterfly added an arbitration clause to its terms.

Ms. Miracle-Pond filed a class action lawsuit against Shutterfly under the Illinois Biometric Information Privacy Act in June 2019. Three months later, Shutterfly sent an email to all of its users stating that it had updated its terms "to clarify your legal rights in the event of a dispute and how disputes will be resolved in arbitration." That email also informed users that if they did not close their account, or if they continued to use the app, they were accepting the new terms. Ms. Miracle-Pond continued to use the app through 2019. Shutterfly filed a motion to compel arbitration.
HOLDING: Motion granted.
REASONING: Ms. Miracle-Pond argued that there was no valid agreement to arbitrate because (1) arbitration clauses subject to unilateral modification are illusory, (2) Ms. Miracle-Pond could not have assented to the arbitration provision because Shutterfly failed to provide notice of the 2015 modification, and (3) arbitration clauses that apply retroactively are unenforceable. She additionally argued that even if the arbitration clause was valid, plaintiffs cannot waive their rights to class arbitration of their claim for an injunction under the McGill rule.

First, the court noted that Illinois courts have repeatedly recognized the enforceability of arbitration provisions added via a unilateral change-in-terms clause. The Terms of Use Ms. Miracle-Pond accepted in 2014 included a valid change-in-terms provision. Thus, Ms. Miracle-Pond's continued use of Shutterfly signaled her assent to the 2015 change of terms. Additionally, when parties agree in advance to allow unilateral modifications to the terms of their contract, subsequent modifications are binding regardless of whether the other party later "accepts" the change. Thus, the court granted Shutterfly's motion to compel arbitration.

WRITTEN ARBITRATION AGREEMENT IS ENFORCEABLE EVEN IF NOT SIGNED

Castaneda v. Volt Mgmt. Corp., ___ F. Supp. 3d ___ (W.D. Tex. 2020).
https://www.leagle.com/decision/infdco20200517q47

FACTS: Defendant Volt Management Corp., a temporary employee leasing agency, hired Plaintiff as an on-site coordinator at Schneider Electric, Inc.. Plaintiff's employment application and employment agreement contained an arbitration provision. Plaintiff completed this application electronically and submitted it via email. Plaintiff did not sign the application or agreement.

Plaintiff filed suit against Volt and Schneider Electric Defendants, alleging disability discrimination and retaliation. Volt moved to compel arbitration.
HOLDING: Motion Granted.
REASONING: Volt argued Plaintiff's employment discrimination and retaliation claims must be referred to arbitration because arbitration provisions in both the application for employment and the employment agreement were binding.

Plaintiff argued that no valid arbitration agreement existed as neither the employment application nor the employment agreement contained Plaintiff's signature.

Although the Federal Arbitration Act requires an agreement to arbitrate be in writing, it contains no requirement the writing be signed by the parties.

The court rejected Plaintiff's argument and held that Plaintiff's email exchange with Volt demonstrated her intent to be bound to the arbitration provision in her employment application. Although the Federal Arbitration Act requires an agreement to arbitrate be in writing, it contains no requirement the writing be signed by the parties. Texas contract law requires only an intent by the parties to be bound. The court noted that Plaintiff filled out the employment application and returned it to Volt without disputing any of its terms. The court concluded Plaintiff's acceptance of the terms in the application employment is clear from the context of the email exchange even without a signature. Therefore, Volt met its burden of establishing a valid arbitration agreement in the employment application.

ARBITRATORS HAVE THE AUTHORITY TO ISSUE SUBPOENAS TO NON-PARTIES AND US FEDERAL COURTS HAVE THE POWER TO ENFORCE THEM

Washington Nat'l Ins. Co. v. OBEX Grp. LLC, 958 F.3d 126 (2d Cir. 2020).
https://www.leagle.com/decision/infco20200501172

FACTS: Plaintiffs Washington National Insurance Company and its affiliate, Bankers Conseco Life Insurance Company ("claimants") were seeking reinsurance for certain "long term care blocks of business." The claimants entered into an agreement with Beechwood Re. Ltd. Unbeknownst to the claimants, two of the founders also managed an investment fund called Platinum Partners, LP. In 2016, the claimants became aware that Beechwood had continuously misrepresented their ownership structure and value of assets in the trusts in order to trick the claimants into indirectly investing with Platinum. The claimants brought an arbitration claim against Beechwood. During the arbitration, the claimants sought documents and testimony from one of Platinum's broker-dealers, OBEX Securities LLC, and Randall Katzenstein, the president and chief executive of OBEX Group LLC. Katzenstein and OBEX Group LLC were the respondents in the action. The arbitration panel issued subpoenas to the respondents. In 2018, the claimants were made aware of a document that should have been produced but was not. Upon request for the document by the claimants, the respondents refused. This led the arbitration panel to issue summonses to the respondents requiring them to appear at a hearing in October with all responsive documents. The respondents, however, did not appear. The panel, therefore, issued an order granting the claimants leave to pursue judicial intervention to obtain the respondents' compliance with the summonses.

In October of 2018, the claimants filed a petition in the district court seeking to enforce the summonses under section 7 of the Federal Arbitration Act ("FAA"). Respondents moved to dismiss and to quash summonses. The district court denied both motions and the respondents appealed.

HOLDING: Affirmed.

REASONING: First, the respondents argued that the arbitration summonses were invalid because the claimants sought pre-hearing discovery and immaterial documents which section 7 of the FAA does not permit. The respondents argued this was a violation because the summonses were an attempt by the claimants to seek impermissible pre-hearing discovery as the claimants had communicated to the respondents that they could comply by producing the documents without appearing for a hearing and "made clear...that they had no interest in having OBEX or Katzenstein testify."

The court rejected this argument and held that a properly issued summons is not rendered invalid by an offer or agreement to produce documents without a hearing. The Court further held that the respondents' argument that the summonses required them to produce immaterial documents was also unpersuasive. The court reasoned that the respondents objected to the number of responsive documents rather than the content of those documents, and that section 7 contains no limit on the number of documents that may be deemed material. Thus, due to the reasoning that the claimants were not seeking pre-hearing discovery or immaterial documents, the court held that the summonses did not violate section 7 of the FAA.

Secondly, the respondents argued that the district court, under section 7 of the FAA, was obliged to rule on their objections to the summonses because of Fed. R. Cov. P. Rule 45. The respondents argued that a district court's obligation to quash any subpoena that subjects a person to an undue burden or requires the disclosure of privileged or other protected matter not only applies to civil litigation, but also to arbitration summonses in enforcement proceedings. The respondents supported this argument by stating that section 7 of the FAA requires summonses to be issued and enforced in the same manner as federal court subpoenas.

The court rejected this argument by reasoning that the respondents cited no authority that interprets section 7 of the FAA this way, nor does the text support this interpretation. The court held that Rule 45 instead generally covers what subpoenas contain, how they are served, where they can require a person to go, and how a person must respond among other things.

ARBITRATION CLAUSE LIMITING BORROWERS' STATUTORY RIGHTS IS UNENFORCEABLE

Williams v. Medley Opportunity Fund II, LP, 965 F.3d 229 (3d Cir. 2020).
https://law.justia.com/cases/federal/appellate-courts/ca3/19-2058/19-2058-2020-07-14.html

FACTS: Plaintiffs obtained payday loans from an online lender, AWL, Inc. AWL's loan agreement provided that only tribal law would apply in arbitration.

Plaintiffs brought suit claiming that AWL's lending practices violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Defendants moved to compel arbitration. The district court denied the motion, stating that the arbitration agreement stripped the Plaintiffs of their rights to assert statutory claims and was, therefore, unenforceable. Defendants appealed.

HOLDING: Affirmed.

REASONING: Defendants argued the arbitration agreement's applicable law subsection was not an impermissible prospective waiver of statutory rights as the agreement repeatedly stated that only tribal law claims could be brought in arbitration.

Plaintiffs argued that the arbitration agreement was unenforceable under the prospective waiver doctrine. The prospective waiver doctrine refers to a situation in which the parties agree that, if disputes arise between them, then they waive the right to rely on federal law. The Supreme Court has observed that such waivers violate public policy. The applicable law subsection of the arbitration agreement provided that a tribal court may confirm an arbitration award "only if" the court "determines that the award...is not based on legal error under Tribal Law." The court noted that this subsection makes clear that tribal law applies in arbitration and that the arbitrator's decision would only be sustained if it was supported by tribal law. Thus, the court held this arbitration agreement limited a party's substantive claims to those under tribal law and forbade federal claims from being brought, rendering it unenforceable.

This arbitration agreement limited a party's substantive claims to those under tribal law and forbade federal claims from being brought, rendering it unenforceable.

CANADA SUPREME COURT FINDS UBER ARBITRATION AGREEMENT REQUIRING OVER $14,000 IN FEES TO ARBITRATE IN THE NETHERLANDS UNCONSCIONABLE

Uber Technologies Inc. v. Heller, 2020 SCC 16
https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/18406/index.do

FACTS: Mr. Heller ("H") provided food delivery services in Toronto using Uber's software applications. As an Uber driver, H was required to resolve any dispute with Uber through mediation and arbitration in the Netherlands. The mediation and arbitration process required up-front administrative, filing, and legal fees. The costs to arbitrate a claim against Uber equaled all or most of the gross annual income H would earn working full-time as an Uber driver.

H started a class proceeding against Uber in Ontario for violations of employment standards legislation. In turn, Uber filed a motion to stay the class proceeding in favor of arbitration in the Netherlands. H argued that the arbitration clause was unconscionable, thus, invalid. The motion judge stayed the proceeding, holding that the arbitration agreement's validity had to be referred to arbitration in Netherlands. The court of appeal allowed H's appeal, setting aside the motion judge's order. The court held H's objections to the arbitration clause did not need to be referred to an arbitrator and could be dealt with by an Ontario court. The court also held the arbitration clause to be unconscionable because of the inequality of bargaining power between the parties and the improvident cost of arbitration. Uber appealed.

HOLDING: Affirmed.

REASONING: The Supreme Court of Canada rejected Uber's position and held the arbitration agreement as unconscionable, thus invalid, based on H's disadvantages in his bargaining position and the unfair terms. The court applied a two-part approach, establishing the two elements needed to determine unconscionability: (1) inequality of bargaining power and (2) a resulting improvident bargain.

The Court held that inequality of bargaining power was clear between H and Uber because H was powerless to negotiate any of its terms with Uber, a sophisticated and large multinational corporation. H's only contractual option was to accept or reject it. The Court noted that the arbitration agreement contained no information about the costs of mediation and arbitration, and explained that a person in H's position cannot be expected to appreciate the financial and legal implications of agreeing to arbitrate under International Chamber of Commerce Rules or under Dutch law. Moreover, the Rules of Arbitration were not attached to the contract for H to read if he wanted to.

The Court held that improvidence of the arbitration clause was clear when the costs of mediation and arbitration process were disproportionate to the size of an arbitration award that could reasonably have been foreseen when the contract was entered into. The costs were also close to H's annual income, and did not include the potential costs of travel, accommodation, legal representation or lost wages. The Court also considered that H had little choice to travel to Netherlands at his own expense to individually pursue its claims against Uber. Any representations to the arbitrator, including about the location of the hearing, could only be made after the arbitration fees were paid. Thus, the Court affirmed the lower court's ruling and held the arbitration agreement unconscionable.

MISCELLANEOUS

UNSOLICITED FAX FOR FREE WEBINAR DOES NOT VIOLATE TELEPHONE CONSUMER PROTECTION ACT

Mauthe v. Millennium Health LLC, ___ F. Supp. 3d ___ (E.D. Pa. 2020).
https://casetext.com/case/robert-w-mauthe-md-pc-v-millennium-health-llc

FACTS: Plaintiff Dr. Robert W. Mauthe received one-page fax containing information regarding a free upcoming seminar from Defendant Millennium Health, LLC. Plaintiff was a private medical practice. The Defendant was a laboratory that provides medication monitoring and drug-testing services.

The plaintiff brought a Telephone Consumer Protection Act ("TCPA") claim against the defendant, alleging that the fax constituted an unsolicited advertisement. The defendant moved for summary judgment.
HOLDING: Motion granted.
REASONING: The plaintiff argued that the defendant violated the TCPA by sending the fax because (1) the fax advertised Defendant's free webinars to recipients; (2) Defendant's webinars served as a pretext for advertising and promoting the commercial availability and quality of Defendant's products and services; and (3) the Defendant's webinar, and the fax that the Defendant sent promoting it, was a pretext to advertise Defendant's drug-monitoring products and services, either during the webinar or thereafter using the contact information provided by fax recipients during the registration process.

The court held that the fax was not on its face an advertisement.

The court disagreed. First, the court held the fax was in fact unsolicited because, although plaintiff provided defendant with their fax number, the fax extended beyond the limited purpose for which the plaintiff originally gave the fax number. However, the court held that the fax was not on its face an advertisement. Because the fax advertised a webinar and not the usual drug testing services of the Defendant, the court applied the direct purchaser test. Under that test, to constitute an advertisement, the fax needs to advertise the commercial availability or quality of any property, goods, or services. However, the fax only discussed a free seminar, not any property, goods, or services which are commercially available. Thus, the fax neither promoted goods or services to be bought or sold, nor had profit as an aim.

Additionally, court declined to engage in pretext analysis. The court held that the 2006 FCC order interpreting the term "unsolicited advertisements" as encompassing faxes that "promote goods or services even at no cost," including faxes promoting free seminars because "[i]n many instances, 'free' seminars serve as a pretext to advertise commercial products and services," was an interpretive rule, which lacks the force and effect of law. The court held that because the definition of "unsolicited advertisement" is not ambiguous, the court would not apply *Chevron* or *Skidmore* deference to the portion of the FCC's 2006 order concerning free seminars. Instead, the court applied the term as it is explicitly defined in the statute. Because the fax concerned a free seminar and lacked any commercial element, the court concluded that the fax did not constitute an unsolicited advertisement in violation of the TCPA and granted the defendant's motion for summary judgement.

SUPREME COURT UPHOLDS TELEPHONE CONSUMER PROTECTION ACT BROAD BAN ON AUTODIAL CALLS TO CELLPHONES

TELEPHONE CONSUMER PROTECTION ACT EXCEPTION FOR CALL REGARDING FEDERALLY BACKED DEBT HELD INVALID

Barr v. Am. Ass'n of Political Consultants, ___ U.S. ___ (2020).
https://www.supremecourt.gov/opinions/19pdf/19-631_2d93.pdf

FACTS: In 2015, an exemption to the to the Telephone Consumer Protection Act of 1991 ("TCPA") was enacted that allowed automated calls relating to collecting debts owed to or guaranteed by the federal government. Plaintiffs ,The American Association of Political Consultants, Inc. and three other organizations, participated in the political system by making calls to citizens to discuss candidates and other political issues. Plaintiffs wanted to make robocalls to cell phones to make their outreach more efficient, but this practice was prohibited because Plaintiffs were not in the practice of collecting government debt.

Plaintiffs filed a claim against the U.S. Attorney General and the Federal Communications Commission ("FCC"), claiming that the 2015 exemption violated the First Amendment. The court granted summary judgement for the Government, concluding that although the robocall restriction was content based, it should survive because of the Government's compelling interest in collecting debt. The Fourth Circuit Court of Appeals vacated the judgment and determined that although the restriction was content-based, it could not survive strict scrutiny, invalidating the government-debt exception from the 2015 amendment and severing it from the robot restriction. The Government appealed.
HOLDING: Affirmed.
REASONING: Plaintiffs argued that Congress's willingness to enact the 2015 government-debt exception demonstrated that Congress no longer had a genuine issue in consumer privacy and, therefore, the 1991 robocall restriction was no longer justified. Additionally, plaintiffs argued that this was a case of First Amendment equal-treatment violation and the Court's decision to uphold the 1991 TCPA only outlawed more speech.

The Court disagreed with this assertion, concluding that just because Congress has a growing interest in collecting government debt does not mean Congress lacks a genuine interest in restricting robocalls. The Court further reasoned that their decision to sever the 2015 amendment rather than strike down the entire statute was attributable to (1) the Court's strong presumption that an unconstitutional provision in a law is severable from the remainder of that law and (2) it has done so for hundreds of years, including several cases in which the Court treated an original, pre-amendment version of a statute as the valid expression of legislative intent. When the Court applied presumption of severability, it concluded that the remainder of the law was capable of functioning independently and would, therefore, be fully operative as a law. Regarding the equal-treatment principle allegation that Congress favored debt-collection robocalls and discriminated against political and other robocalls, the Court held that because the First Amendment did not tell the Court which way to cure the unequal treatment in this case, the Court would apply traditional severability principles and upheld the TCPA broad ban on robocalls to cellphones.

MARKET SURVEY SOLICITATIONS CAN VIOLATE TELEPHONE CONSUMER PROTECTION ACT

Fischbein v. Olson Research Grp., Inc, 959 F.3d 559 (3rd Cir. 2020).
https://www2.ca3.uscourts.gov/opinarch/193018p.pdf

FACTS: In two separate cases, Plaintiffs Dr. Richard Fischbein and Robert Mauthe received faxes from Defendants Olson Research and ITG Market Research, respectively. The faxes offered Plaintiffs money in exchange for their participation in surveys.

Plaintiffs sued Defendants for violating the Telephone Consumer Protection Act ("TCPA") provision that makes it unlawful to send an unsolicited advertisement by fax. The district court dismissed each individual Plaintiff's case, concluding that such surveys were not advertisements under the TCPA because the advertisements did not attempt to sell anything to the recipients. Plaintiffs appealed the dismissals and the cases were consolidated.
HOLDING: Reversed and remanded.
LEGAL REASONING: Defendants argued that the court's previous decision in Mauthe v. Optum Inc., 925 F.3d 129 (3d Cir. 2019) that held for the fax to be an ad, the fax must promote goods or services to be bought or sold and should have profit as an aim. Defendants asserted that this ruling suggested that market research surveys were not advertisements within the TCPA's prohibition against unsolicited fax advertisements.

The court disagreed with the application, holding that nothing in *Optum* limited an advertisement to a fax that the sender intended to facilitate the sale of a service or product to the recipient. The court concluded that an offer of payment to recipients transformed the solicitation of responses to market surveys into advertisements. The court reasoned that because healthcare professionals rely on faxes for certain communications, they are especially vulnerable to unsolicited faxes and the TCPA should apply to market survey solicitations when the market research converts the interaction into a commercial interaction.

TELEPHONE CONSUMER PROTECTION ACT CONSENT CANNOT BE REVOKED

Medley v. DISH Network, LLC, 958 F.3d 1063 (11th Cir. 2020).
https://www.burr.com/wp-content/uploads/2020/05/1269000-1269771-medley-v.-dish-network-llc-no.-18-13841-11th-cir.-may-1-2020.pdf

FACTS: Appellant Linda Medley entered into an agreement with Appellee DISH Network, LLC to receive television services in exchange for monthly payments, including an option to "pause" services for up to nine months. As part of the Pause program services agreement, Medley expressly authorized DISH to contact her regarding her account or to recover any unpaid fees through an automated dialing system or prerecorded messaging system. Medley utilized her pause option and filed for bankruptcy. Her outstanding debt to DISH was successfully discharged, but she continued to accrue a monthly fee for the Pause services. DISH began to send Medley emails seeking payment of the monthly Pause charges. Medley's attorneys responded notifying DISH that Medley revoked any prior express consent. DISH subsequently made six automated calls to Medley.

The TCPA does not allow unilateral revocation of consent given in a bargained-for contract.

Medley filed suit under the Telephone Consumer Practices Act ("TCPA"), claiming DISH used an automatic telephone dialing system or prerecorded voice to call Medley on her cellphone after she revoked consent to such calls. The district court granted summary judgment for DISH on Medley's TCPA claim. Medley appealed.
HOLDING: Affirmed.
REASONING: Medley argued that the district court's decision was inconsistent with previous Eleventh Circuit decisions and with the purpose of consumer protection under the TCPA.

The court disagreed, holding that the TCPA does not allow unilateral revocation of consent given in a bargained-for contract. The court found that it must analyze her revocation of consent under the common law principles governing contracts because gave consent as a mutually-agreed-upon term in a contract. Therefore, the court concluded that TCPA consent cannot be revoked because common law contracts principles do not allow unilateral revocation of consent when given as consideration in a bargained for agreement and Congress drafted the TCPA to establish that consent becomes irrevocable when it is integrated into a binding contract.

TEXAS SUPREME COURT HOLDS TEXAS LOTTERY CONTRACTOR NOT ENTITLED TO STATE'S IMMUNITY

Nettles v. GTECH Corp. et al., ___ S.W.3d ___ (Tex. 2019).
https://www.courthousenews.com/wp-content/uploads/2020/06/lotterytickets.pdf

FACTS: The Lottery Commission contracted with Defendant GTECH Corporation for instant ticket manufacturing and services. In performing its obligations under the contract, GTECH proposed the FUN 5's scratch-off game. The Commission selected the game, and GTECH submitted working papers. The Commission responded to GTECH with changes to the game and GTECH implemented the requested changes. However, GTECH did not change the instructions on the tickets for the game to reflect the changes. The Commission began selling the

Fun 5's scratch off game and lottery players began calling immediately to complain that the game instructions were misleading.

Plaintiffs James Steele and more than 1,200 others (collectively, "Steele") filed suit against GTECH in Travis County. Plaintiff Dawn Nettles filed suit against GTECH in Dallas County. GTECH filed pleas in both counties claiming derivative sovereign immunity. The Dallas County trial court granted GTECH's plea to the jurisdiction and dismissed the case, but the Travis County trial court denied GTECH's plea. Nettles appealed the dismissal of her suit, and the Dallas Court of Appeals affirmed. GTECH appealed the denial of its plea in the Steele Case to the Austin Court of Appeals, and the court affirmed in part and reversed and rendered in part. Both GTECH and Nettles filed petitions for review in the Texas Supreme Court.

HOLDING: Affirmed the judgment of Austin Court of Appeals. Reversed the judgment of the Dallas Court of Appeals as to fraud claims.

REASONING: Nettles and Steele argued that GTECH was not entitled to immunity because it exercised at least some discretion in creating the Fun 5's game by choosing the wording of the instructions and maintaining that wording after changes were made by the Commission.

GTECH could not point to anything in the contract, statute, or elsewhere that left GTECH without discretion to propose complete and non-misleading instructions.

GTECH argued that it was entitled to share in the Commission's immunity because the Commission possessed and exercised total control over all aspects of the Fun 5's tickets through the contract and the State Lottery Act. The contract provided that "[f]inal decisions regarding the direction or control of the Lottery are always the prerogative of the Texas Lottery in its sole discretion." The Lottery Act provided that the Commission "shall exercise strict control and close supervision over all lottery games." Tex. Gov't Code § 466.014(a).

The court rejected GTECH's argument. Under the control standard, if GTECH had some discretion in the complained-of conduct, it could not claim derivative sovereign immunity. The court noted that GTECH did change the final working papers as instructed by the Commission. However, the Commission did not instruct GTECH on how to write the instructions. Thus, GTECH had discretion in the complained-of conduct: choosing the wording of the game instructions. GTECH could not point to anything in the contract, statute, or elsewhere that left GTECH without discretion to propose complete and non-misleading instructions. Thus, the court held GTECH was not entitled to derivative sovereign immunity for the fraud claims.

REAL ESTATE SETTLEMENT PROCEDURES ACT CLAIMS DISMISSED BECAUSE BORROWER WAS ACTUALLY HER LLC

Cocchia v. LendingHome Funding Corp., ___ F. Supp. 3d ___ (W.D. Tex. 2020).
https://law.justia.com/cases/federal/district-courts/texas/txwdce/5:2020cv00066/1079488/9/

FACTS: Plaintiff Chelsea Cocchia purchased the subject property with an LLC, which in turn purchased the property with an extension of credit from Defendant LendingHome Funding Corporation. The subject property was posted for foreclosure when Cocchia had a short sale buyer approved by LendingHome. In compliance with certain provisions of the Real Estate Settlement Procedures Act ("RESPA"), Cocchia sent LendingHome a qualified written request ("QWR") but did not receive a response. Cocchia also submitted a loss mitigation application and was approved for a short sale but had not received a denial letter.

Cocchia filed a petition for declaratory judgment and application for temporary restraining order and injunctive relief against LendingHome. LendingHome then filed a motion to dismiss for failure to state a claim.

HOLDING: Granted.

REASONING: The court rejected Cocchia's argument that LendingHome violated the "dual tracking provision" of RESPA. Specifically, Cocchia alleged that the provision required LendingHome to respond to her QWR letter and correct any errors, as well as provide a loss mitigation rejection letter prior to any foreclosure of the subject property.

The court held that the LLC was the actual borrower in the subject loan documents. The dual tracking provision requirements under RESPA only apply to a mortgage loan that is secured by a property that is a borrower's principal residence. However, the borrower in this case was the LLC, and an LLC could not have a principal residence for purposes of RESPA. Therefore, Cocchia could not assert cause of action for violation of REPSA dual tracking provision, and thus, she failed to allege a cognizable legal theory for violation of RESPA's dual tracking requirement.

SETTLEMENT OF INDIVIDUAL CLAIMS MOOTS CLASS ALLEGATIONS

Brady v. AutoZone Stores, Inc., 960 F. 3d 1172 (9th Cir. 2020).
https://cdn.ca9.uscourts.gov/datastore/opinions/2020/06/03/19-35122.pdf

FACTS: Plaintiff Michael Brady sued AutoZone Stores, Inc. and Autozoners LLC ("AutoZone"), seeking damages individually and on behalf of a putative class for alleged violations of Washington's meal break laws. The district court denied Brady's motion for class certification and declined to modify its ruling. Brady then settled his individual claims with AutoZone. The settlement agreement was "not intended to settle or resolve Brad's Class Claims." However, it did not provide that Brady would be entitled to any financial reward if the unresolved class claims were ultimately successful.

The parties filed a stipulation in the district court explaining that the settlement agreement resolved all of Brady's individual claims, "including but not limited to claims for failure to provide meal periods, unpaid wages, wrongfully withheld wages, unfair business practices, and attorneys' fees." The district court entered final judgment. Brady appealed the class certification rulings.

HOLDING: Dismissed.

REASONING: The court rejected Brady's argument that the class claims should not have been dismissed. The court held that when a class representative voluntarily settles only his individual claims, he must do more than expressly leave class claims unresolved to avoid mootness. A class representative must also retain, as evidenced by an agreement, a financial stake in the outcome of the class claims. Absent such a stake, a class representative's voluntary settlement of individual claims renders class claims moot.

Because Brady did not retain a financial stake in the class claims, the claims were moot.

The court reasoned that Brady's settlement agreement did not indicate that he would receive any additional compensation for the class claims, nor could Brady point to the possibility of an award of attorney's fees because his agreement settled any claim to attorney's fees. The court explained that because Brady did not retain a financial stake in the class claims, the claims were moot.

THE LAST WORD

In the last issue I noted that I was writing this from my house where I have been for almost two months. I never expected to be saying the same thing four months later—but I am. And I know I am not alone. For most of you, your personal and professional life has changed dramatically. These are indeed strange times. Be cautious, stay safe and stay healthy.

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 Public Adjusters, Mass Arbitrations, and the Statute of Limitations for the Texas Debt Collection Act. A little something for everyone.

I hope 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 much else I could be doing.

Richard M. Alderman
Editor-in-Chief