Practices-Consumer Protection Act, and violations of Insurance Code articles 21.21 and 21.55. Brainard settled all claims against Premier for $1,000,000, Premier's policy limit.

A jury found that Premier's negligence caused the accident and awarded Brainard $1,010,000 and an additional $100,000 for attorney's fees. The trial court applied a $1,005,000 credit for Brainard's settlement and PIP benefits and entered a judgment against Trinity for the remaining $5000 and the attorney's fees, but refused to award prejudgment interest on the $1,010,000 in damages. The court of appeals affirmed the trial court's denial of prejudgment interest.

HOLDING: Affirmed in part, reversed in part, and remanded.

REASONING: The Texas Supreme Court held that the UIM insurance covered prejudgment interest that Premier would owe on the $1,010,000 in actual damages. Tex. Ins. Code. art. 5.06-1(5) mandated that UIM coverage provide payment of the amount that the insured would be able to recover "because of bodily injury or property damage." The court explained that the compensatory purpose of article 5.06-1(5) is well served by allowing the insured to obtain prejudgment interest that the underinsured motorist would have owed.

Compensatory purpose of article 5.06-1(5) is well served by allowing the insured to obtain prejudgment interest that the underinsured motorist would have owed.

The court rejected Trinity's argument that prejudgment interest is compensation for lost use of money, not damages from bodily injury. Interpreting the phrase "because of bodily injury" literally to eliminate covering prejudgment interest contradicts the court's precedent and the statute's history. Precedent requires that article 5.06-1 should be liberally construed to protect those who are legally entitled to recover damages from underinsured motorists. A literal reading of the phrase would also "entail splitting hairs among purely compensatory damages, such as those for mental anguish and loss of society." The court further rejected Trinity's alternative argument that Brainard's recovery was based on a written contract and that prejudgment interest was not authorized for purely contractual claims. Premier would have been liable for prejudgment interest under Tex. Fin. Code § 304.102, which authorizes prejudgment interest in wrongful death, personal injury, and property cases. Although Brainard's suit against Trinity is based in contract, section 304.102 was applicable. The UIM policy "effectively incorporates the statute." Once the liability of the underinsured is determined, the UIM policy controlls the insurer's obligations. Accordingly, Brainard obtained a judgment against Premier which established its negligence and underinsured status, and the contract requirs Trinity to pay benefits, including prejudgment interest.

The court also held that under Chapter 38 of the Civil Practice & Remedies Code a claim for UIM benefits is not presented until the trial court signs a judgment establishing the negligence and underinsured status of the other motorist. Chapter 38 allowed for recovery of attorney's fees in a successful breach of contract suit against an insurer. Because the UIM contract did not require Trinity to pay benefits before determining whether Premier was negligent and underinsured, Brainard did not present a contract claim until the trial court rendered its judgment and Chapter 38 did not authorize the recovery of attorney's fees.

The court explained that the insured party may settle with the tortfeasor and then pursue the UIM coverage claim with the insurer as Brainard did in this case. Nevertheless, obtaining a settlement or an admission of liability from the tortfeasor does not establish UIM coverage. A jury could determine that the suspected tortfeasor was not at fault or it could award damages to be be fully covered by the tortfeasor's liability insurance. An essential element to recovery under Chapter 38 is the existence of a duty to pay the insured which the insurer has failed to meet. The court held, "neither requesting UIM benefits nor filing suit against the insurer triggers a contractual duty to pay."

DEBT COLLECTION

NO DAMAGES FOR VIOLATION OF AUTOMATIC STAY

Goodrich v. Union Planters Mortg., 196 F. App'x 586 (9th Cir. 2006).

FACTS: Jeffrey and Shelly Goodrich were the owners of real property in Mira Loma, California. They filed for Chapter 13 bankruptcy, triggering an automatic stay of all actions and claims upon their property pursuant to 11 U.S.C. § 362(a). Union Planters Mortgage was the beneficiary on the deed of trust on the property. Unaware of the bankruptcy filing, they foreclosed on the Goodrich's home and recorded a trustee's deed of sale. The Goodrichs filed an action for damages under 11 U.S.C. § 362(k) for violation of the automatic stay. The Bankruptcy Court for the Central District of California found in favor of the creditor. The Bankruptcy Appellate Panel for the Ninth Circuit Court of Appeals affirmed the decision. The Goodrichs appealed the decision.

HOLDING: Affirmed.

REASONING: The Court held that the Goodrichs were not able to recover under Section 362 because the violation was not willful and they did not suffer damages.

The Bankruptcy Act establishes an affirmative duty for creditors to discontinue collection actions upon debtor's filing of a bankruptcy application. 11 U.S.C. § 362(k) The Act allows for the recovery of actual damages and in some cases punitive damages when an individual is injured by a willful violation of a stay. A § 362(k) claim requires proof that: (1) a stay was violated, (2) the violation was willful, and (3) that the injury was a result of the violation.

Upon learning of the bankruptcy proceeding, a creditor must immediately discontinue all post-petition collection actions in non-bankruptcy for and against a debtor. *Eskanos & Adler v.*

Leetien, 309 F.3d 1210 (9th Cir. 2002). Union Planters' failure to formally rescind the deed for two years after learning of the Goodrich's bankruptcy proceedings was a technical violation of the automatic stay. When Union Planters learned of the stay, they took action suggesting that they understood the foreclosure to be void. Union Planters placed the Goodrich's loan back on the books, filed a proof of claim and subsequent motion for relief from stay in the bankruptcy court, entered into an adequate protection agreement with the Goodrichs, and accepted the Goodrichs voluntary mortgage payments. Thus, the court determined that the violation was not willful because other than a technical violation, Union Planters abided by the automatic stay.

The Goodrichs also failed to establish any injury stemming from Union Planters' violation of the stay. Union Planters never attempted to evict the Goodrichs or take possession of their property during the proceedings. During the proceedings the Goodrichs never alleged how Union Planters' violation in any way caused injury. It was only after the bankruptcy proceedings ended and the Goodrichs failed to make mortgage payments that Union Planters entered the final foreclosure. The $24,000 that the Goodrichs had paid in adequate protection mortgage payments did not constitute damages.

PROVISION OF 2005 BANKRUPTCY AMENDMENTS ESTABLISHING ADVERTISING REQUIREMENTS IS UNCONSTITUTIONAL

Milavetz, Gallop & Milavetz P.A. v. U.S., 355 B.R. 758 (D. Minn. 2006).

FACTS: The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") requires that "debt relief agencies' advertisements declare: 'We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code,' or something similar." Milavetz, Gallop, and Milavetz ("plaintiffs") are bankruptcy attorneys who are suing the United States government. Plaintiffs contend that the statute is unconstitutional based on the First Amendment of the United States Constitution.

Requiring inclusion of the term "debt relief agency" in attorney advertising actually could increase confusion among consumers because the term is a "legislative contrivance."

HOLDING: The court held that "BAPCPA's advertising disclosure requirements, . . . as applied to attorneys, are unconstitutional."

REASONING: The court reasoned that the appropriate standard of review "turns on whether the statute regulates deceptive or truthful advertising. Statutes regulating deceptive commercial speech need only withstand rational basis review. But restrictions on non-deceptive advertising must employ means that directly advance a substantial government interest." The government cited evidence that "some bankruptcy lawyers did not mention in their advertisements that their ability to make 'debts disappear' derived from the use of the bankruptcy process." However, the court agreed with plaintiffs, who argued that the disclosure requirements "mandated a blunderbuss[,] which strikes truthful, as well as false or deceptive advertising." The court stated that a claim to make "debts disappear" is not in itself deceptive, and "the government may only regulate truthful advertisements if: (1) the regulation directly advances (2) a substantial government interest, and is (3) 'narrowly drawn.'"

The court reasoned that requiring inclusion of the term "debt relief agency" in attorney advertising actually could increase confusion among consumers because the term is a "legislative contrivance." The court recognized that the term "debt relief agency" is an "almost all encompassing," term, which includes bankruptcy lawyers and non-lawyers alike. The court determined that the merging of "both attorneys and non-attorneys is, itself, likely to confuse the public." Thus, the court held that "§ 528 fails to directly advance the government's stated interest in clarifying bankruptcy service advertisements." As to the narrowly drawn requirement, the court stated that the standard "may be no broader than reasonably necessary to prevent the 'perceived evil.'" However, the court noted that the language in §528 "binds all who advertise bankruptcy services. This sweeping regulation goes beyond whatever problem it was designed to address." Therefore, "the government cannot prevail."

LAW FIRM THAT HANDLES EVICTIONS MAY BE LIABLE UNDER FAIR DEBT COLLECTION PRACTICES ACT

Hodges v. Feinstein, Raiss, Kelin & Booker, L.L.C., 915 A.2d 1 (N.J. 2007).

FACTS: The Hodges sisters resided in apartments operated by the Sasil Corporation. Their rent was subsidized by Section 8 rental assistance and set by federal law at thirty percent of their adjusted monthly household income. The sisters signed identical rental agreements requiring monthly payment of rent. The lease agreements defined "additional rent" as all late charges, reasonable attorneys' fees, and court costs incurred by Sasil as a result of the sisters' failure to comply with the agreements. The leases allowed Sasil to terminate the agreements for the "non-payment of rent," but not "for failure to pay late charges." Both sisters were regularly in arrears on rent, and thus accrued late charges, attorneys' fees, and court costs under their leases. Sasil's attorneys, Feinstein, Raiss, Kelin & Booker, L.L.C., filed actions seeking their eviction or, alternatively, payment of "rent." The complaints itemized all rent, late charges, attorneys' fees, and miscellaneous fees as amounts due and owing, but labeled the total due as "rent." The complaints did not inform either sister that they were required to pay only the statutorily-defined rent to avoid eviction. Under a mistaken belief, the Hodges regularly remitted amounts substantially exceeding the minimum needed to prevent eviction. The sisters filed suit, claiming that Feinstein's conduct violated the Fair Debt Collection Practices Act ("FDCPA"). The trial court granted Feinstein's motion for summary judgment before discovery. The appellate division reversed, holding that law firms regularly engaged in summary dispossess proceedings are subject to the FDCPA's strictures. Feinstein appealed.

HOLDING: Affirmed and remanded.

REASONING: The court followed federal and state precedent that rent squarely comported with the FDCPA's definition of

"debt" when it is paid for residential purposes. The court held that for Feinstein and other law firms engaged in summary dispossess actions to be debt collectors, the filing of a summary dispossess action for nonpayment of rent must be either a direct or an indirect attempt to collect debt. The court relied on the United States Supreme Court's decision in *Heintz v. Jenkins* that litigating attorneys who regularly attempt to collect debts are subject to the FDCPA. 514 U.S. 291, 292, (1995). Additionally, the court found that Congress intended to subject attorneys to the FDCPA (*see* Financial Services Regulatory Relief Act of 2006, Pub. L. No. 109-351) (creating an exemption for attorney work-product). Furthermore, the court rejected the argument that summary dispossess actions are not debt collections because the litigation was designed to recover possession, not rent. The court followed the 2nd Circuit's holding in *Romea v. Heiberger & Associates* that the notice, which served as a statutory condition precedent to a summary dispossess action, was not mutually exclusive with debt collection and was at least in part to induce the tenant to pay the back rent allegedly owed. 163 F.3d 111, 116 (2nd Cir. 1998). The court then found that holding both law firms and individual attorneys who "regularly" engage in this activity subject to the FDCPA furthered congressional objectives underlying the statute. While affirming the appellate division, the court remanded for further determination of whether Feinstein regularly engaged in summary dispossess actions.

MALPRACTICE AWARD IS DISCHARGABLE IN LAWYER'S BANKRUPTCY

Hughes v. Sanders, 469 F.3d 475 (6th Cir. 2006).

FACTS: Appellee Sanders represented Hughes in an employment dispute against Ford Motor Company. Hughes later sued Sanders for malpractice. During the course of the malpractice action, Sanders violated a number of court orders. Eventually, the district court entered a default judgment as to Sanders' liability and awarded Hughes $894,316.81 for wages and interest claimed in the underlying Ford Motor Company Case; $143,602.25 for attorney's fees, costs, and interest in that case; and $25,873.95 for attorney's fees, costs, and interest in the malpractice action. Later that year, Sanders filed for Chapter 7 bankruptcy and listed Hughes as a creditor. Hughes then brought an action in district court seeking a declaration that the judgment owed to him was a nondischargeable debt under 11 U.S.C § 523(a)(7). The district court reluctantly granted Sanders' motion to dismiss, concluding that the judgment, although of a punitive nature, did not meet the statutory requirements that it be payable to a governmental unit and that it be non-compensatory.
HOLDING: Affirmed.
REASONING: Under the plain language of 11 U.S.C. § 523(a)(7), Hughes could not prevail unless he could show that the judgment owed by Sanders was payable to and for the benefit of a governmental unit, and not compensation for actual pecuniary loss. Here, he could show neither. It was undisputed that the penalty was payable to Hughes, who is not a governmental unit, and it is an amount calculated to compensate Hughes for the damage he incurred as a result of Sanders' malpractice. Though one could argue that the default judgment and resulting damages were a penalty against Sanders, the fact that the judgment was for an amount explicitly calculated to compensate Hughes for pecuniary losses confirmed its compensatory character.

CLAIM AGAINST DEBTOR WHO FAILED TO PREVENT SON'S DEATH CANNOT BE DISCHARGED IN BANKRUPTCY

In re Patch, 356 B.R. 450 (B.A.P. 8th Cir. 2006).

FACTS: Denise Irene Patch (Debtor) and Bryan Blocker had two children, Dillon and Breanna. Debtor and Blocker's relationship ended and Debtor began dating Steven McBride, who moved in with Debtor and her children. Shortly thereafter, McBride began physically abusing Dillon. Debtor asked McBride to stop abusing Dillon but took no further action to stop the abuse. Debtor withdrew Dillon from daycare when the employees at the center began to question her about Dillon's bruises. One night, while Debtor was working, McBride phoned her and said that Dillon was hurt. Dillon began having problems breathing and speaking after Debtor arrived home. Debtor did not seek medical treatment, opting instead to put him to bed with McBride. Debtor checked on Dillon the next morning when she awoke, but Dillon was dead. McBride was convicted of first-degree murder, and Debtor pled guilty to second-degree manslaughter.

As personal representative of Dillon's estate, Blocker filed a wrongful death action against Debtor. While the action was pending, Debtor filed for relief under Chapter 7 of the Bankruptcy Code. Blocker filed an adversary complaint against Debtor. Blocker contended that Debtor's obligation to Dillon's estate "is excepted from discharge, under 11 U.S.C. § 523(a)(6), for willful and malicious injury." Debtor filed a motion for summary judgment and the bankruptcy court issued an order denying Debtor's motion and granting summary judgment in favor of Blocker sua sponte.
HOLDING: Affirmed.
REASONING: The court reasoned that "willful and malicious injury are two distinct requirements that [Blocker], as the party seeking to avoid the discharge of the debt, must prove by a preponderance of the evidence." Debtor conceded that she continually left Dillon with McBride and that she prevented Dillon from getting medical help on the night of his death. The court disagreed with the Debtor's assertion that her acts were merely reckless. The court cited the decision in *Kawaauhau v. Geiger*, 523 U.S. 57 (1998), that "[Section 523](a)(6) triggers the idea of intentional torts." Debtor's actions amounted to more than acts of omission, and were "in our view, acts of commission." Debtor argued that she did not intend for the acts to occur, so her debt cannot fall within § 523(a)(6) exception. The court agreed with the substantial certainty standard put forth in the *Geiger* decision. They noted that "if the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the laws as if he had in fact desired to produce the result."

The court analogized this case to *In re Limmer*, 2006 WL 1614838 (Bankr. E.D. Mich. 2006), in which a party did not seek medical attention after giving a girl, who later died, a "date rape" drug, GHB. The bankruptcy court found that the girl's estate was nondischargeable under § 523(a)(6) because, although the debtor did not actually give the drug to the girl, he intentionally

delayed seeking medical treatment, knowing that she had ingested GHB. Here, "Debtor knew Dillon had been a victim of abuse, continued to expose him to his abuser…knew that serious injury or death were substantially certain to result from McBride's abuse, yet she failed to protect him without just cause or excuse. Consequently, […]the record establishes that the Debtor willfully and maliciously caused Dillon's injuries and death within the meaning of § 523(a)(6)." Thus the trial court's granting of the summary judgment in favor of Blocker was affirmed.

BANKRUPTCY DEBTOR FORFEITED HIS RIGHT TO CONVERT FROM CHAPTER 7 TO CHAPTER 13 BY BAD-FAITH CONCEALMENT OF ASSETS

Marrama v. Citizens Bank, 127 S. Ct. 1105 (2007).

FACTS: Robert Marrama filed a voluntary petition for bankruptcy under Chapter 7. He misrepresented the value of his property citing his house in Maine to be worth $0 and falsely claiming he had not transferred it during the preceding year. Subsequently, he admitted to having created a trust solely to protect the house from his creditors. After the estate's trustee notified Marrama's counsel that he intended to recover the Maine property as an asset of the estate, Marrama filed for conversion to Chapter 13. He claimed to have an absolute right to convert his case from Chapter 7 to Chapter 13 under the plain language of § 706(a) of the Bankruptcy Code. This section allows a Chapter 7 debtor to convert his case as long as it has not been converted previously and any waivers of the right to convert are unenforceable. Respondents argued that the bankruptcy court may dismiss a petition to convert to Chapter 13 based on a showing of "bad faith" on the part of the debtor.

He claimed to have an absolute right to convert his case from Chapter 7 to Chapter 13 under the plain language of § 706(a) of the Bankruptcy Code.

The bankruptcy judge denied the request for conversion, ruling that there is no "Oops" defense to the concealment of assets and facts as shown to establish bad faith. The bankruptcy appellate panel affirmed, construing §706(a) when read in connection with other provisions as creating an absolute right to convert a Chapter 7 case to Chapter 13 "only in the absence of extreme circumstances." The First Circuit Court of Appeals affirmed.
HOLDING: Affirmed.
REASONING: The court held there are "bad faith" exceptions to the broad conversion right created by §706(a) as construed by the lower courts. It interpreted the statutory language as excluding Marrama from being a debtor within its meaning. The court found the appellant did not fall within the interpretation of who may file a "for cause" conversion of a Chapter 7 to a Chapter 13 proceeding. Marrama's behavior during the bankruptcy proceedings, including his attempts to conceal assets from creditors, placed him outside the class of "honest but unfortunate debtor[s]" who the bankruptcy laws were enacted to protect. Even though §706(a) includes a provision nullifying any waivers of the right to convert, the court held this does not constitute a shield against forfeiture. Neither the text nor the legislative history suggest that courts lack the authority to take appropriate action in response to a debtor's fraudulent conduct. The majority concluded that even absent explicit language authorizing federal courts to curb "abusive litigation practices", authority for the court's action could be found in *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980). The United States Supreme Court found an inherent power to levy sanctions in response to abusive litigation practices; a power also recognized at common law. In the instant case, the necessity of promptly dismissing unmeritorious claims allows bankruptcy courts to punish obviously dishonest debtor behavior.

MARITAL ASSETS ARE PART OF HUSBAND'S BANKRUPTCY ESTATE

Musso v. Ostashko, 468 F.3d 99 (2nd Cir. 2006).

FACTS: Tanya and Vladimir Ostashko were married in Russia in 1992 and moved to the United States in 1994. In 1994, Vladimir purchased a home on Staten Island in his name with $400,000 in cash and a $400,000 mortgage. The couple separated in 1997. On January 15, 1998, Vladimir entered into a credit agreement with Informtechnika Bank that provided him with an unsecured credit line of 5,900,000 rubles (equivalent to approximately $900,000, at that time), and, in April 1998, he drew 5,500,000 rubles on the credit line. Vladimir defaulted on the loan payments and Informtechnika sued in New York County Supreme Court to collect on the debt. The case was settled and Informtechnika received a consent judgment. The consent judgment was then assigned to Zuritta- Teks.

In light of statements by Vladimir that Tanya "would not receive a single kopeck when the dust from the divorce settled," and the district court's discovery that toward the end of 1997 and the beginning of 1998 Vladimir engaged in a wholesale liquidation of the marital assets to prevent Tanya from securing an interest in them, the district court found that "the loan was clearly the means by which Vladimir turned remaining marital assets into immediate cash." In light of the court's findings, the district court held that the consent judgment was constructively a fraudulent conveyance. On December 18, 2003, Zuritta-Teks filed an involuntary Chapter 7 bankruptcy petition against Vladimir. At that time, the final judgment of divorce was neither signed nor entered. The issue before the court was: "when marital assets have been awarded to the wife in a state court matrimonial proceeding, are those assets nevertheless part of the husband's bankruptcy estate if a Chapter 7 petition was filed after the state court's decision but before the state court judgment was entered?" The United States Bankruptcy Court for the Eastern District of New York ruled that the property must be included in the estate. On appeal, the United States District Court for the Eastern District of New York reversed.
HOLDING: Vacated and remanded.
REASONING: Under New York law an equitable distribution award is a remedy, and the enforcement of that remedy is no different than the enforcement of any other judgment. Rights in equitable distribution, like judgment liens, vested no earlier than entry of the judgment by which they were created. New York adhered to the bright line rule that the priority of judgment

creditors is determined on the basis of the order in which judgments are docketed or executed. While the "Decision After Inquest" determined the rights to the marital assets as between husband and wife, the decision did not purport to determine the rights to the assets as between Tanya and all other judgments lien creditors. Based upon these considerations, and the undisputed fact that the matrimonial judgment was docketed after the filing of the Chapter 7 petition, the court held that the marital assets were part of the bankruptcy estate and subject to distribution in due course by the bankruptcy court.

NO HOMESTEAD EXEMPTION FOR BOAT

Norris v. Thomas, 215 S.W.3d 851 (Tex. 2007).

FACTS: Norris filed for bankruptcy and claimed his yacht as exempt property under the homestead exemption. Norris stated that he took up permanent residence on the boat after selling a previous home. Norris lived on the boat while it was drydocked, and the boat received water, phone service, and electricity through connections to a dock. Norris testified that after purchasing the boat he cruised the Gulf Coast extensively.

After the bankruptcy petition was filed, the boat was moved from Port Aransas to a marina in Corpus Christi. Although the boat was described in the record as "drydocked," there was no indication that Norris ever permanently affixed the boat to real estate or intended to do so. Rather, the boat retained its mobile character, being capable of self-propulsion at all times.

The bankruptcy court held that the Texas homestead exemption, even broadly construed, does not include boats. The federal district court agreed, concluding that the boat was a movable chattel "by virtue of its self-powered mobility". Norris appealed to the Fifth Circuit Court of Appeals, which certified the question: "[d]oes a motorized waterborne vessel, used as a primary residence and otherwise fulfilling all of the requirements of a homestead except attachment to land, qualify for the homestead exemption under Article 16, §§ 50 and 51 of the Texas Constitution?"

HOLDING: A waterborne vessel not permanently attached to land cannot qualify for the homestead exemption under current law.

REASONING: The Texas Supreme Court held that boats do not meet the constitutional requirements for homestead protection. The Texas Constitution restricts the maximum size of a protected homestead, limiting rural and urban homesteads by acres of land and including any land-based improvements. Tex. Const. art. XVI, § 51. The court emphasized the use of "thereon" and "on the land" in the provisions of the Constitution. While the court reviewed several mobile home cases involving homestead claims, the court distinguished a boat from a mobile home given the Constitution's unequivocal requirement that protected improvements be on the land. Norris's boat, unlike a dwelling permanently affixed to land, retains its independent, mobile character even when attached to dock-based amenities because it has self-contained utility and plumbing systems as well as its own propulsion. Though Norris took steps to tether the boat to realty, these steps did not alter the boat's mobile character. The court held that Norris's boat remained a movable chattel. It did not rest "thereon" or "on the land" as Texas homestead law clearly requires; it had not become a permanent part of the real estate; and was not sufficiently attached to real property to merit homestead protection. In the court's view, the homestead exemption contemplates a requisite degree of physical permanency and attachment to fixed realty - "thereon" and "on the land" constituted the operative language.

The court held that Norris's boat remained a movable chattel.

ARBITRATION

DECEASED'S CHILDREN AND PARENTS ARE BOUND BY ARBITRATION AGREEMENT UNDER THE THEORY OF DIRECT BENEFIT ESTOPPEL

In re Ford Motor Co., ___ S.W.3d. ___ (Tex. App.—San Antonio 2006).

FACTS: In 2003, Rudy Leija and his wife Maricella DeLeon bought a used 2000 Ford Expedition from Gillespie Motor Company. They signed a contract containing an arbitration provision that required any claims "be settled solely by the means of final and binding arbitration." In 2005, Rudy was killed when the Expedition was involved in a rollover accident. His wife sued Ford and Gillespie individually, as a representative of her husband's estate, and on behalf of their three minor children. Leija's parents also joined the lawsuit. They alleged that through the sale of the Ford Expedition to the plaintiffs, the defendants expressly and impliedly warranted that the vehicle was fit for the purposes for which it was intended.

Ford and Gillespie moved to stay the trial court proceedings and order all plaintiffs to arbitrate the claims. The court ordered only DeLeon, individually and as the representative of her husband's estate to arbitration, rejecting that the children and the parents should be compelled to arbitrate. The trial court rejected the defendants' argument that Leija's children and parents should be required to arbitrate under the theory of direct benefit estoppel. The defendants then petitioned the court for a writ of mandamus to compel the trial court to order arbitration for Leija's children and parents.

HOLDING: Writ of mandamus conditionally granted.

REASONING: First, the appeals court found the contract was governed by the Federal Arbitration Act ("FAA") because it covered a transaction involving interstate commerce. Under the FAA, courts must decide gateway matters such as whether an arbitration agreement is binding on a nonparty absent evidence to the contrary. Texas law places the burden of proving both the existence of a valid arbitration agreement and that claims fall within the scope of that agreement on the party seeking to compel arbitration. Ford and Gillespie were unable to provide unmistakable evidence that the parties intended the arbitrator to