Thanksgiving holiday, DRC emailed its employees a memo asking the employees to read three attached documents. The memo did not require any acknowledgement from the employees. The first attachment was a two-page document describing the new dispute resolution program ("program"). This attachment said that the new program "does not limit or change any substantive legal rights of our employees." The second attachment described the new program in detail. The document was 15 pages long with 18 pages of appendices. The class action waiver clause was not contained in the body of the document, but rather in Appendices A and B. The final page of Appendix A stated that employees consented to the new program by returning to work the next Monday.

Shortly after Skirchak resigned, he filed a complaint with the U.S. Department of Labor ("DOL") alleging that DRC violated the Fair Labor Standards Act ("FLSA"). Following the DOL's investigation, DCR agreed to return $75,000 to its employees and to change their policies. The plaintiffs then filed a class action suit against DRC alleging violations of the FLSA and the Massachusetts Minimum Fair Wage Law. The plaintiffs claimed damages beyond the relief obtained as a result of the DOL's investigation. DRC moved to dismiss and compel arbitration per the company's program. The district court issued an order compelling arbitration but struck the clause barring class action. DRC appealed the striking of the class action clause.

HOLDING: Affirmed and remanded.
REASONING: The court determined that it must follow state law in determining whether the terms of the program were unconscionable. Under Massachusetts law, when a waiver of statutory rights is at issue, the waiver must be both knowing and voluntary. The Massachusetts Supreme Judicial Court held a waiver to be unconscionable if it resulted in oppression and unfair surprise to the disadvantaged parties.

Here, the court found the waiver of the class action at bar to be oppressive and an unfair surprise to the employees of DRC. The timing, language, and format of the program documentation obscured the waiver of class action. The court stated several events that raised unconscionability concerns including: 1) the obscurity of the waiver clause; 2) the timing of the email just before Thanksgiving break; 3) the failure to require a response by employees; 4) the statement that the new program would not limit or change any substantive legal rights; 5) that the memo failed to give notice; and 6) the shortness of time the employees had to consider the waiver clause. Adding to the finding of unconscionability, the court also noted that DRC veered from its normal business practices by e-mailing an employee policy change and not requiring a response. The court also noted that when DRC made personal policy changes in the past, it offered training to employees, mailed documentation to the employees' homes and announced changes at company wide meetings.

MISCELLANEOUS

SUPREME COURT LIMIT SUITS OVER MEDICAL DEVICES

Riegel v. Medtronic, Inc., 128 S. Ct. 999 (2008).

FACTS: Charles Riegel suffered a myocardial infarction shortly after undergoing coronary angioplasty. His right coronary artery was diffusely diseased and heavily calcified. His doctor inserted Medtronic's Evergreen Balloon Catheter to dilate his artery. The label stated the catheter should not be used on patients with diffuse or calcified stenoses. The label also warned that the catheter should not be filled greater than 8 atmospheres. Riegel's doctor inflated the catheter to 10 atmospheres, causing it to burst. Riegel developed a heart block resulting in the need for an emergency coronary bypass.

Medtronic received pre-market approval for a Class III device from the Food and Drug Administration ("FDA") for its Evergreen Balloon Catheter in 1994. The Medical Device Amendments of 1976 ("MDA") established a rigorous review for Class III devices. Section 360(k)(a) of the MDA grants express federal preemption for oversight of medical devices. Specifically, § 360(k)(a) states, "no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement. . . (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter."

Riegel sued Medtronic alleging its catheter was designed, labeled, and manufactured in a manner that violated New York common law. The district court held that the MDA preempted Riegel's common law claims. The court of appeals affirmed and Riegel appealed.
HOLDING: Affirmed.
REASONING: The Court found that the FDA's pre-market approval imposes requirements to the catheter under the MDA since such approval is specific to individual devices. Previously the Court held that general federal requirements for devices might not be subject to the MDA preemption provision. Devices approved by the FDA for pre-market approval are individually reviewed for safety and effectiveness. The specificity of FDA reviews entitles pre-market approvals to preempt state regulatory laws.

The Court held the Riegel's common law claims were preempted by § 360(k)(a). The Court found that state common law, like state statutes regulating medical devices, may be preempted by § 360(k)(a). State requirements for medical devices that are different from, or in addition to, federal requirements are pre-empted under the MDA only to the extent that they are "different from, or in addition to" the requirements imposed by federal law. Thus, § 360k does not prevent a state from providing a damages remedy for claims premised on a violation of FDA regulations; the state duties in such a case "parallel," rather than add to, federal requirements.

PROPERTY CODE § 53.055 DOES NOT REQUIRE THAT A LIEN AFFIDAVIT BE FILED WITH THE COUNTY CLERK BEFORE THE REQUIRED NOTICE IS GIVEN

Arias v. Brookstone, L.P., ____ S.W.3d ____ (Tex. App.—Houston [1st Dist.] 2007).

FACTS: Unity Church of Christianity ("Unity") hired Brookstone, L.P. as the general contractor for the construction of a new building. Brookstone subcontracted the site preparation work to Site Work Group, Inc. ("SWG"), who in turn, subcontracted work to Gustavo Arias. Dissatisfied with his work, SWG refused to pay Arias. In response, Arias executed lien affidavits against the property and mailed copies to Unity, Brookstone, and SWG. Arias later filed the affidavits with the county clerk.

The court clarified that the legislative purpose of § 53.055 was to ensure that a property owner received actual notice that a lien affidavit had been executed so that he may take appropriate measures to avoid being ambushed by a recorded lien.

Brookstone filed suit and was granted declaratory judgment that Arias had no right to assert liens against the property on the grounds that Arias failed to comply with the notice provision under Texas Property Code § 53.055 because he sent copies of the affidavit to Brookstone before filing the affidavit with the county clerk. Under § 53.055, a person filing a lien affidavit must send a copy to the property owner "not later than the fifth day after the date the affidavit is filed with the county clerk."

HOLDING: Reversed.

REASONING: The court of appeals agreed with Arias that the plain language of § 53.055 does not indicate that notice must be given after the lien affidavit is filed. The court clarified that the legislative purpose of § 53.055 was to ensure that a property owner received actual notice that a lien affidavit had been executed so that he may take appropriate measures to avoid being ambushed by a recorded lien. Because the person executing the lien affidavit must file the affidavit by a relatively short deadline stated in Texas Property Code §§ 53.052 and 53.056 (generally within two to four months from the date the indebtedness accrues), the owner and original contractor can hardly claim to be hurt when they are notified in advance of the actual filing of the lien affidavit.

PRIVATE ACTION AVAILABLE FOR SATELLITE PIRACY

DIRECTV, Inc., v. Seijas, 508 F.3d 123 (3rd Cir. 2007).

FACTS: DIRECTV filed a complaint against Scott Williamson and alleged that Williamson had illegally intercepted DIRECTV's satellite transmissions and owned illegal pirate access devices in violation of the Federal Communications Act ("FCA"), 47 U.S.C. § 605(a), and the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. § 2511(1)(a).

After Williamson failed to respond to DIRECTV's discovery requests, the district court granted DIRECTV summary judgment and was awarded statutory damages, attorneys' fees, and injunctive relief. Williamson appealed on the grounds that neither the FCA nor ECPA grants a private cause of action.

HOLDING: Affirmed.

REASONING: The Third Circuit Court of Appeals held that the plain language of FCA § 605(e) provides private parties with a cause of action. FCA § 605(a) provides, in relevant part, "No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto." Section 605(e)(3)(A), in turn, provides, "*Any person* aggrieved by *any violation of subsection (a)* of this section . . . may bring a civil action in a United States district court . . ." 47 U.S.C. § 605(e)(3)(A) (emphasis added).

The court examined available civil actions under the ECPA and reaffirmed its decision in *DIRECTV, Inc. v. Pepe*, 431 F.3d 162 (3rd Cir. 2005). The court concluded that the plain language of ECPA §§ 2511(1)(a) and 2520, as well as § 605(a) of the FCA grant a private right of action.

"NO CALL" PHONE NUMBER PROTECTED DESPITE BUSINESS USE

Holcomb v. Jan-Pro Cleaning Sys. of S. Colo., 172 P.3d 888 (Colo. 2007).

FACTS: John Holcomb filed a claim in small claims court against Jan-Pro Cleaning Systems of Colorado ("Jan-Pro"). Holcomb claimed that Jan-Pro committed deceptive practices by violating both the registration and no-call provisions of the Colorado No-Call List Act. It was uncontested that Jan-Pro had solicited Holcomb regarding its cleaning services, over a telephone for which he had subscribed to residential service; however he sometimes used that line to make business calls. Jan-Pro had acquired his telephone number from a calling list of business numbers obtained from Info USA and Dun & Bradstreet. Jan-Pro had not registered as a telephone solicitor because they had no intention of marketing to residences.

Holcomb had placed his residential telephone number on a do-not-call telephone list, but because the same number was used occasionally for business purposes, the number was included on the list Jan-Pro received. Business telephone numbers are exempt from protection under Colorado's do-not-call list. The district court held that Holcomb removed himself from the protected class of residential subscribers by listing his telephone as both a residential phone and a business phone.

HOLDING: Reversed.

REASONING: After examining the definition of "residential subscriber" in the Colorado No-Call List Act, the court determined that "residential subscriber" was a statutorily-defined term of art, which expressly included any person who subscribed to residential telephone service with a local exchange provider. The court found nothing in the statutory provision soliciting residential subscribers on the list or in the definition of "residential subscriber" that suggested that using a no-call listed telephone number for business purposes or permitting it to appear on commercial telephone listings would lead to a "residential subscriber" losing the protections of the act.

LIABILITY OF CREDIT BUREAU BASED ON IDENTITY THEFT IS AFFIRMED

Sloane v. Equifax Info. Servs., L.L.C., 510 F.3d 495 (4th Cir. 2007).

FACTS: After discovering she had been the victim of identity theft, Suzanne Sloan contacted the police and Equifax Information Services, a credit reporting service, to have them fix her credit report. Twenty-one months later, Equifax still had not corrected all the errors in her report, preventing Sloane from getting desired loans and necessary financial assistance. Consequently, Sloane filed a claim against Equifax and others, alleging violations of the Fair Credit Reporting Act ("FCRA"). Sloane settled with all parties except Equifax. The case went to trial and the jury returned a verdict against Equifax, awarding Sloane $106,000 for economic loss and $245,000 for mental anguish, humiliation, and emotional distress. Equifax appealed.
HOLDING: Affirmed.
REASONING: On appeal, Equifax argued that Sloane should not have recovered any damages because she allegedly suffered a single, indivisible injury or, alternatively, that the damages should have been reduced because of prior settlements with other defendants. The court disagreed, finding that Sloane provided credible evidence that her damages resulted from separate acts by separate parties and that the inaccuracies in Equifax's credit reports caused Sloane discrete injures independent of those caused by the other credit reporting agencies.

Equifax also argued that the evidence did not support an award for economic loss. The court again disagreed, citing to evidence at trial that demonstrated that Sloan tried to secure lines of credit from financial institutions and had been denied or offered less advantageous terms than she might have received absent the credit reporting agency's failure to expunge errors from consumer's credit report. The court found a legally sufficient evidentiary basis for a reasonable jury to have found that Equifax's conduct resulted in economic losses for Sloane. Accordingly, the court affirmed the district court's finding of Equifax's liability.

IDENTITY THEFT VICTIM GETS $150,000 FOR EMOTIONAL DISTRESS

Sloane v. Equifax Info. Servs., L.L.C., 510 F.3d 495 (4th Cir. 2007).

FACTS: In 2003, Suzanne Sloane's social security number was misappropriated by an identity thief who fraudulently obtained credit, cash advances, goods and services in excess of $30,000. Sloane discovered the identity theft in 2004, promptly notified the credit reporting agency, Equifax Information Services, and immediately followed Equifax's direction to notify all of her creditors to correct her credit history. Thirteen months after notification, Sloane sent Equifax a formal letter to dispute twenty-four items which should have been automatically removed earlier under Equifax's "verified victim policy". Equifax deleted all but two of the disputed items, and later restored an additional two items. Sloane alleged that her false credit report caused her to be denied from home refinancing, purchase of a car, and refusal of routine credit from local stores. These denials significantly contributed to the deterioration of her marriage and her development of insomnia.

Sloane filed an action against Equifax for violation of the Federal Credit Report Act ("FCRA") and prevailed. The trial court awarded Sloane $106,000 for economic loss and $245,000 for mental anguish, humiliation, and emotional distress. Equifax moved post-trial for a new trial or remittitur of the emotional damages award. The court denied those motions and Equifax appealed.
HOLDING: Affirmed in part and reversed and remanded in part.
REASONING: Equifax claimed that that the district court erred in refusing to order remittitur of the mental anguish, humiliation, and emotional distress damages award to no more than $25,000. Under Federal Rule of Civil Procedure 59(a), a court may reduce a jury award for compensatory damages that it concludes to be excessive. In its determination of whether the emotional damages were excessive, the court considered several factors summarized in *Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001). The factors considered included the factual context, the nexus of defendant's actions and the emotional distress, and the degree of mental distress. Sloane offered "sufficiently articulated" descriptions of her protracted anxiety through detailed testimony of specific events and the humiliation and anger she experienced as a result of each occurrence. She also provided evidence that the distress was apparent to others, particularly her family. Additionally, substantial evidence attested to the direct "nexus" between Equifax's violations of the FCRA and Suzanne's emotional distress. Furthermore, Suzanne's emotional distress manifested itself in terms of physical symptoms, particularly insomnia. Guided by the *Knussman* factors, the court found that there was substantial, if not overwhelming, objective evidence that supported the jury's emotional damage award.

The court also considered prior case law in its determination of excessiveness. In a survey of FCRA cases, emotional distress awards typically ranged from $20,000 to $75,000, but these cases involved isolated or accidental reporting errors. The court examined defamation cases, since defamation was one of the common law actions used prior to the FCRA's enactment for propagation of inaccurate information. Citing several cases, the court found that the typical emotional damage award was in the range of $250,000. The court held that an in-between sum of $150,000 was an appropriate maximum since there was no actual defamation to sustain the $250,000 award, and Equifax's protracted failure to correct Sloane's credit record supported an award greater than $75,000 for an isolated reporting error in an FCRA case. Based on the reasoning above, the court lowered the emotional distress award to $150,000.

U.S. SUPREME COURT RULES ON LIABILITY IN SECURITIES FRAUD CASE

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008).

FACTS: Plaintiff investors filed a securities fraud class action suit against Scientific-Atlanta, Charter Communications, Inc. and others. Plaintiffs purchased Charter Communications stock and alleged that Charter engaged in a variety of fraudulent accounting

practices. Of interest in this case was an agreement between Scientific and Charter that involved Scientific inflating the price of the cable boxes it sold to Charter, and buying advertising from Charter in the amount of the overcharge. While this transaction violated generally accepted accounting principles, it allowed Charter to inflate its revenue and cash flow numbers in its financial statements.

The investors filed suit alleging violations of § 10(b) of the Securities Exchange Act of 1934 and Securities Exchange Commission ("SEC") Rule 10b-5. The district court granted Scientific's motion to dismiss for failure to state a claim upon which relief could be granted. The Eighth Circuit Court of Appeals noted that Scientific had not made statements that the public had relied upon, and that Scientific had no duty to disclose. At most, the court found that Scientific had "aided and abetted" Charter in its deception. The court found no private right of action under § 10(b) for aiding and abetting and affirmed the decision of the district court. Because there was a split in the circuit courts on this issue, the Supreme Court granted certiorari.

HOLDING: Affirmed.

REASONING: The Supreme Court found that, while there is no textual basis for a right of private action under § 10(b), there exists an implied right under certain circumstances. A plaintiff must prove (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.

The Court noted that in *Central Bank* it declined to extend a § 10(b) right to private action against aiders and abettors because "[w]ere we to allow the aiding and abetting action proposed in this case, the defendant could be liable without any showing that the plaintiff relied upon the aider and abettor's statements or actions." 511 U.S. 164 (1994). The court noted that this led to a call from investors for Congress to amend the code to include a private right. Congress instead directed prosecution of aiders and abettors by the SEC.

The Court found that the statute should not be interpreted to provide a private cause of action against the entire marketplace in which the issuing company operates.

Next, the Court reviewed the facts in the present case to determine whether they rose to the level necessary for a private cause of action. The Court noted that there are two cases where an investor would not have to prove reliance: (1) where a defendant withheld material facts it had a duty to disclose; and (2) under the fraud-on-the-market doctrine, reliance is assumed when statements at issue become public, and affect the stock price. Neither of these situations was found to exist in this case. Scientific had no duty to disclose, and did not disclose information to the public.

The Court also considered plaintiff's "scheme liability" argument, claiming that Scientific contributed to fraudulent financial documents submitted to the public by Charter. The Court found that plaintiffs were trying to extend § 10(b) beyond the securities realm and into the "realm of ordinary business operations." The Court found that the statute should not be interpreted to provide a private cause of action against the entire marketplace in which the issuing company operates. In conjunction with its analysis of congressional intent, the Court declined to extend a private right against aiders and abettors, and affirmed the lower court's ruling.

FEDERAL UNSOLICITED MERCHANDISE STATUTE DOES NOT CREATE PRIVATE CAUSE OF ACTION

Wisniewski v. Rodale, Inc., 510 F.3d 294 (3rd Cir. 2007).

FACTS: Rodale, Inc. sent David Wisniewski books which he never ordered and demanded payment for them. Fearful of the possible damage to his credit rating, Wisniewski paid for the books. Wisniewski sued Rodale, alleging violation of the Postal Reorganization Act's unordered merchandise statute, 39 U.S.C. § 3009. The district court dismissed Wisniewski's claim on the ground that the § 3009 provision does not contain an implied private right of action. Wisniewski appealed.

HOLDING: Affirmed.

REASONING: Although many federal statutes expressly provide a private right of action to allow individuals the means to enforce the duties created therein, neither party contended that § 3009 expressly conferred such a right. The court focused on whether § 3009 created an implied private right of action. A private right of action exists if the statute manifests Congress's intent to create (1) a personal right and (2) a private remedy.

Under the first prong, the court examined the text and structure of § 3009 and held that the statute did not create an actionable personal right. Only § 3009(b) uses the word "right" when it created the right for recipients to treat unsolicited merchandise as a gift. In contrast, § 3009(c), which contains prohibitions against the mailers, uses no such "rights-creating" language for the recipients of unsolicited mail.

Under the second prong, the court held that there was no evidence that Congress intended a private remedy. The express language of § 3009 provides that the Federal Trade Commission ("FTC") may enforce the statute by any means authorized by the FTC Act such as injunctions and civil penalties. The court held that the reference to FTC enforcement combined with the absence of other enforcement provisions creates a strong presumption that §3009 is to be enforced exclusively by the FTC. Relying mainly on the second prong, the court held that there was no indication that Congress intended to create a private right of action under § 3009 and affirmed the district court's dismissal of the claim.

FEDERAL AUTO WINDOW STANDARDS DO NOT PREEMPT CLAIM

O'Hara v. Gen. Motors Corp., 508 F.3d 753 (5th Cir. 2007).

FACTS: Chad and Michelle O'Hara brought suit against General Motors ("GM") for injuries sustained by their minor daughter. Her arm was seriously injured when she was partially ejected from the passenger side window of a Chevrolet Tahoe during a low-speed, quarter-rollover accident. The O'Haras alleged Texas common law theories of strict liability and negligence for the

defective design, manufacture, and marketing of the Tahoe's side windows. The O'Haras claimed that GM's use of tempered glass in the side windows was unreasonably dangerous and that the use of advanced glazing would have decreased the likelihood of passenger ejection.

GM moved for summary judgment on the ground that 49 C.F.R. § 571.205, the federal safety standard for glass used in motor vehicle windows, preempted the O'Haras' claim. In their reply to GM's motion, the O'Haras argued that § 571.205 did not preempt their advanced glazing claim. They also claimed that the Tahoe's side windows did not comply with § 571.205 as designed and that the tempered glass in the window was defectively installed and implemented. The district court granted GM's motion for summary judgment on the basis of preemption.

HOLDING: Reversed and remanded.

REASONING: The glazing standards in § 571.205 were promulgated by the National Highway Traffic Safety Administration ("NHTSA") under the Federal Safety Act ("FSA"). When NHTSA regulations are only intended to create a minimum safety standard, states are free to adopt common law rules which require a greater level of safety.

The court first determined that, on its face, § 571.205 is a materials standard that sets a safety "floor" to ensure that the glazing materials used by manufacturers meet certain basic requirements. Next, the court turned to NHTSA's statements interpreting § 571.205 to see if NHTSA had clearly articulated a glazing materials policy which would be frustrated by the O'Haras' suit. The court determined that the NHTSA's commentary supports the conclusion that § 571.205 is a minimum safety standard.

Because § 571.205 creates a minimum safety standard, the O'Haras' common law negligence and strict liability claims were not preempted by § 571.205. The district court's ruling was reversed and the case was remanded for further proceedings.