trial court initially granted the motion, but after Gentry filed a motion for rehearing, signed an order setting aside the initial summary judgment order.

The trial court ordered the parties to mediate, but the dispute was not resolved. The trial court then granted the bill of review and set aside the default judgment. As a result, the Firm's original suit was set on the court's trial docket.

Gentry filed an answer and counterclaim. The Firm answered the counterclaim and filed a motion to enforce the arbitration clause in the fee agreement. Gentry responded and asserted the Firm had waived its right to arbitrate. The trial court denied the Firm's motion and the Firm appealed.

HOLDING: Affirmed.

REASONING: The court explained that while neither the trial court, the parties, nor the agreement indicated whether this action is governed by the Texas General Arbitration Act or the Federal Arbitration Act, the standard for determining waiver of the right to arbitration is the same.

The test for determining waiver is two-pronged: (1) did the party seeking arbitration substantially invoke the judicial process, and (2) did the opposing party prove it suffered prejudice as a result. The judicial process is substantially invoked when the party seeking arbitration has taken specific and deliberate actions that are inconsistent with the right to arbitrate. Waiver is a valid defense to arbitration, but because public policy favors arbitration, there is a strong presumption against finding a party has waived his right to arbitration, and the burden to prove waiver is a heavy one.

The court considered the first prong and determined that the Firm initiated litigation and elected to aggressively pursue discovery. The court found the Firm's actions evidenced its intent to relinquish its right to arbitrate.

Turning to the second prong, the court explained that prejudice refers to the inherent unfairness in terms of delay, expense or damage to a party's legal position when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue. The court found that Gentry incurred substantial attorney's fees and opined that the Firm attempted to manipulate the process, which was precisely the kind of inherent unfairness that constitutes prejudice under federal and state law.

Because the Firm substantially invoked the litigation process and Gentry suffered prejudice, the court concluded that the trial court did not err in its determination that the Firm waived the right to arbitration, and affirmed the trial court's order.

MISCELLANEOUS

REPOSSESSION DID NOT BREACH THE PEACE

Chapa v. Traciers & Assoc., Inc., 267 S.W.3d 386, (Tex. App.—Houston [14th Dist.] 2008).

FACTS: Ford Motor Credit Corporation ("FMCC") hired Traciers & Associates, Inc. ("Traciers") to repossess a white 2002 Ford Expedition owned by Marissa Chapa, who was in default on the associated promissory note. Traciers directed its field manager, Paul Chambers ("Chambers"), to conduct the repossession and gave Chambers an address for Marissa. However, FMCC, Traciers, and Chambers were unaware that the address was that of Marissa's brother, Carlos Chapa, who owned a similar white 2003 Ford Expedition. Carlos and his wife, Maria Chapa ("Chapa"), were not in default on their loan.

Chambers investigated the address, observed the Chapa's white 2003 Ford Expedition, noted that the license plate numbers did not match, but could not see the Expedition's vehicle identification number. The next morning, Maria Chapa loaded her two minor children into the Expedition. Maria then left the keys in the ignition with the engine running while she re-entered the house momentarily. Chambers then quickly towed the vehicle onto an adjacent street before realizing that the Expedition's engine was running. Chambers stopped the vehicle, noticed the two Chapa children inside, and immediately returned the Expedition to the Chapas. During this span of time, Maria returned outside and discovered her children were missing,. She frantically called 911 and her husband to report their disappearance.

The Chapas filed suit against FMCC, Traciers, and Chambers for mental anguish suffered, arising from an alleged breach of the peace caused by Chambers while attempting the repossession. The trial court found that the repossession did not breach the peace and granted summary judgment against the Chapas.. The Chapas appealed.

HOLDING: Affirmed.

REASONING: In order for the Chapas to be able to recover against FMCC and Traciers for mental anguish suffered, they must first establish that a breach of the peace occurred. The court examined the elements of breach of the peace both from a criminal law standpoint, as well as from a Uniform Commercial Code ("UCC") standpoint.

It was also undisputed that Chambers did not know the children were in the vehicle when he towed it.

Under Texas criminal law, a breach of the peace includes all violations of the public peace or order. The court recognized that this is a broad definition, and that whether a specific act constitutes a breach of the peace depends on the surrounding facts and circumstances in the particular case. The court noted that it was undisputed that Chambers did not behave violently or threaten physical injury to anyone. It was also undisputed that Chambers did not know the children were in the vehicle when he towed it. Based on the facts of this case, the court found that Chambers' conduct did not breach the peace under criminal or common law.

The UCC specifically addresses breaches of the peace concerning repossession of property, referring to conduct that leads or is likely to lead to an immediate loss of public order and tranquility. The court found no evidence that Chambers met with any objections while attempting to repossess the vehicle. To the contrary, Chambers desisted repossession as soon as he learned of the presence of the children. The court found further

evidence that Chambers was attempting to avoid confrontation by removing a seemingly unoccupied vehicle from a public street when the driver was not present. For these reasons, the court held that Chambers' conduct did not breach the peace in violation of the UCC and affirmed the summary judgment of the lower court.

CONSUMER DAMAGES AGAINST TELEMARKETER FOR VIOLATION OF TCPA LIMITED

Charvat v. GVN Michigan, 561 F.3d 623 (6th Cir 2009).

FACTS: GVN and its agents placed ten telemarketing calls to plaintiff-appellant Charvat's residence, soliciting the plaintiff to attend a sales presentation in which he would be invited to purchase travel and vacation services from GVN. Charvat requested during the first call that the caller not call him again, and despite a confirmation that GVN would take him off the list, GVN placed nine more telemarketing calls to Charvat's residence. Charvat filed a complaint alleging 186 claims against GVN based on alleged violations of the federal Telephone Consumer Protection Act of 1991 (TCPA) and the Ohio Consumer Sales Practices Act (CSPA). The district court held that Charvat could not recover damages under the TCPA based on violations occurring in the first phone call made by GVN and that Charvat was limited to recovery of statutory damages on a per-call basis rather than per violation. The district court also found that these limitations reduced the amount in controversy below $75,000 and dismissed Charvat's case for lack of subject-matter jurisdiction because there was no diversity jurisdiction or federal question jurisdiction.
HOLDING: Affirmed.
REASONING: The court reasoned that the diversity statute requires that the matter in controversy exceed the sum or value of $75,000, and to defeat diversity, it must appear to a legal certainty that the claim is really for less than the jurisdictional amount. The court noted that if the plaintiffs could recover multiple damages awards per call, the amount claimed would very quickly climb beyond the maximum amount allowable for small-claims court jurisdiction and often beyond the minimum amount necessary for federal-court diversity jurisdiction. Recovery of damages for each specific violation would upset the balance that is meant to be fair to both the consumer and telemarketer. The court explained that because Charvat ultimately had not met the amount-in-controversy requirement for diversity jurisdiction, and because Charvat did not argue any other basis of subject-matter jurisdiction, the dismissal of the case was proper.

DESIGNATION AS "RESPONSIBLE THIRD PARTY" ELIMINATES STATUTE OF LIMITATION DEFENSE

Flack v. Hanke, ____ SW.3d ____ (Tex. App.—San Antonio 2009).

FACTS: Lawrence Flack hired Dan Hanke and the Hanke Group, P.C. to create an employee stock ownership plan ("ESOP") in Flack Interiors and to sell Flack's stock in the business to the ESOP. The ESOP purchased Flack's stock with loans from Frost National Bank, but poor financial performance resulted in Frost's requiring restructuring of the loans and Flack purchasing the loans from Frost. On Hanke's advice, Flack hired Cox Smith Matthews Inc., including various attorneys (collectively "Cox Smith"), for advice regarding sale of the business, the stock plan, and the loans. After financial difficulties, Flack then hired, again upon Hanke's advice, Langley & Banack, Inc., along with various attorneys (collectively "Langley & Banack") to represent Flack in connection with Flack Interior's bankruptcy proceeding.

A few months after the bankruptcy court approved a settlement agreement resolving Flack's claims regarding his financial dealings with the ESOP, Flack sued Hanke for negligent advice regarding the creation of the ESOP and the restructuring of the loans. More than two years later, Flack joined Langley & Banack in the suit and asserted that he suffered a monetary loss due to Langley & Banack's failure to maximize collateral in the bankruptcy. Flack also joined Cox Smith in the lawsuit.

Flack reached a settlement agreement with Hanke which required Hanke to agree to a new trial setting and to designate both Langley & Banack and Cox Smith (jointly Appellees) as responsible third parties. In accordance with the settlement agreement, Hanke filed Defendants' Motion for Leave to Designate Responsible Third Parties pursuant to the Texas Civil Practice and Remedies Code Section 33.004, which was granted. Shortly thereafter, Flack and Hanke filed an Agreed Motion to Add Third Parties, also signed by the trial court, joining each of the Appellees as defendants. Flack filed Plaintiff's Second Amended Original Petition asserting claims of negligence and breaches of fiduciary duty against the Appellees.

The court found that the Appellees were properly designated Responsible Third Parties

Each Appellee subsequently filed a general denial and affirmative defenses including a limitations defense, as well as traditional motions for partial summary judgment based on limitations, arguing they were not designated as responsible third parties and joined as defendants within the two-year statute of limitations. The trial court granted summary judgment in favor of Appellees based on limitations; Flack appealed.
HOLDING: Reversed.
REASONING: The Motion for Leave to Designate Responsible Third Parties was filed pursuant to section 33.004 of the Texas Civil Practice and Remedies Code, so the court explained it must first look to the code in deciding the limitations issue. According to the code the defendant need only file a motion for leave to designate an RTP sixty days prior to trial. The statute further provides that joinder is not prohibited "even though such joinder would otherwise be barred by limitations, if the claimant seeks to join that person not later than sixty days after that person is designated as a responsible third party." TEX. CIV. PRAC. & REM. CODE ANN. § 33.004(e).

The court found the Appellees were timely joined as defendants well within sixty days after being designated as Responsible Third Parties. While Appellees asserted that Flack's claims of negligence were barred by the two-year statute of limitations because the claims were filed approximately three years after the day the cause of action accrued, the court found that the Appellees were properly designated Responsible Third Parties and Flack was not barred by limitations from joining Appellees

as defendants under section 33.004. The court held that the trial court erred in granting Appellees' motions for partial summary judgment based on limitations, and reversed.

DIET DRUG CLAIMS PREEMPTED BY FEDERAL LAW

Longs v. Wyeth, 621 F. Supp. 2d 504 (N.D. Ohio 2009).

FACTS: Plaintiff Ramona Longs filed suit as executor of the estate of decedent Mary Buchanan, alleging product liability claims regarding the diet pill Redux against Wyeth. The district court granted summary judgment in favor of Wyeth and found that the strict liability and negligence claims related to pre-FDA approval were preempted by federal law. Plaintiff moved to vacate the order and alter judgment under Federal Rule of Civil Procedure 59(e), to have the district court set aside its order for dismissal. Plaintiff argued, among other issues, that her claims were not preempted based on recent Supreme Court decisions.
HOLDINGS: Motion to vacate order and alter judgment denied.
REASONING: A Rule 59(e) motion may be granted in the following instances: (1) clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) to prevent manifest injustice. In support of reconsideration, Plaintiff submitted several cases: *Reigel v. Medtronic, Inc.*, 128 S.Ct. 999, 169 L.Ed.2d 892 (2008); *Warner-Lambert Co., LLC, v. Kent*, 128 S.Ct. 1168, 170 L.Ed.2d 51 (2008); and *Wyeth v. Levine*, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009). The court held that *Reigel* was not relevant as it did not address federal preemption of tort claims under the FDCA. The court also held that *Warner-Lambert* was not persuasive as the case was affirmed by an equal divided Supreme Court, and thus entitled to no precedential weight.

Congress intended to have state law complement federal drug regulation and that state tort suits are important in uncovering unknown drug hazards.

The court held that *Wyeth* did not support Plaintiff's 59(e) motion for reconsideration. In *Wyeth*, the Supreme Court considered the narrow issue of "whether the FDA's drug labeling judgments preempt state law product liability claims premised on the theory that different labeling judgments were necessary to make drugs reasonably safe for use." *Wyeth*, 129 S.Ct. at 1193. The Supreme Court held that the FDA's approval of the defendant-drug manufacturer's label did not provide a complete defense to the plaintiff's failure to warn claim, as the claim was not preempted by federal law. The Supreme Court further noted that Congress intended to have state law complement federal drug regulation and that state tort suits are important in uncovering unknown drug hazards.

The court distinguished the instant case from *Wyeth* because the instant case did not involve a failure to warn claim. Furthermore, the court noted that while *Wyeth* may stand for the proposition that post-FDA approval claims are not preempted, it does not purport to hold that the same is true for pre-FDA approval claims. Thus, Plaintiff failed to demonstrate that this court erred in its holding that Plaintiff's pre-FDA approval claims are preempted.

JUNK FAX SUIT CAN BE BROUGHT IN STATE COURT

MLC Mortg. Corp. v. Sun Amer. Mortgage Co., ____ P.3d ____ (Okla. 2009).

FACTS: Consumers filed two actions against solicitors to recover damages under the federal Telecommunications Consumer Protection Act ("TCPA") based on the receipt of allegedly unsolicited facsimile advertisements. The solicitors argued that because the Oklahoma Legislature had not specifically provided for such a cause of action, no private suit could be maintained. They also asserted that any faxed documents received by the private parties were not "unsolicited" within the meaning of the TCPA. In both suits, the district court granted solicitors' motions for summary judgment based on determination that private parties could not proceed on a cause of action in state courts for violation of the TCPA.
HOLDING: Reversed and remanded.
REASONING: The court reasoned that the purpose of the TCPA is to protect fax machine owners from unsolicited advertisements and that TCPA claims require no legislative intervention before private parties may proceed in state courts to protect themselves from unsolicited facsimile transmissions. The court noted that in this opinion, they were joining the almost unanimous pronouncements of extant federal and state courts having decided the issue by determining that private parties may pursue violations of the TCPA in Oklahoma state courts. The court emphasized that they were expressing no opinion as to whether the private parties would succeed in their attempts to collect damages from the solicitors for violations of the TCPA.

NYC'S CALORIE DISCLOSURE REGULATION ISN'T PREEMPTED

N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114 (2nd Cir. 2009).

FACTS: The New York State Restaurant Association ("NYSRA") challenged the constitutionality of the 2008 revised New York City Health Code § 81.50, which required chain restaurants to conspicuously post calorie content information on their menus. NYSRA filed suit against the New York City Board of Health ("City") and challenged Regulation 81.50 on several grounds, including federal preemption by the Nutrition Labeling and Education Act of 1990 ("NLEA"). The district court rejected NYSRA's claim and granted the City summary judgment that the regulation was not preempted by NLEA. NYSRA appealed, and argued that Regulation 81.50 were nutritional "claims" within the meaning of the NLEA.
HOLDING: Affirmed.
REASONING: Under the Supremacy Clause of the United States Constitution, "state laws that conflict with federal law are without effect and are preempted." The NLEA was enacted to clarify the Food and Drug Administration's legal authority to require nutritional information and to establish the circumstances when claims can be made of the nutritional content in foods.

Further, the NLEA contains express provisions of how it interacts with state laws. NLEA § 343(q) requires mandatory labeling of nutritional *content*, commonly found on packaged foods as the "nutritional facts" box. NLEA § 343(r) addresses nutritional *claims*, such as "low in sodium", generally found on packaging. Unlike § 343(q), restaurants are not exempt from § 343(r) if they choose to make a nutritional claim and must conform to FDA regulations that define such claims. The court noted that NLEA does not regulate nutritional labeling on restaurant foods, and allows states to adopt their own rules regulating whether a restaurant must provide nutritional content for their food. However, the NLEA does regulate nutritional claims and requires states to adopt NLEA-identical regulations.

The court rejected NYSRA's challenge that the posting of calorie content constituted a nutritional "claim" that would invoke NLEA preemption. NYSRA pointed to § 343(r)(1), which states "[a] statement of the type required by [Section 343(q)] that appears as part of the nutrition information required or permitted by such paragraph is not a claim," and argued that (1) in order for a Section 343(q)-type statement not to be a claim, (2) it must appear with all the other information listed in Section 343(q)'s complete Nutrition Fact panel. The court disagreed because that interpretation would have rendered meaningless §§ 343(q)(5)(A)(i) and 343-1(a)(4). Because those sections permit states to adopt non-identical labeling rules for restaurants, section 343(r)(1)'s reference to nutrition labeling "required or permitted" by § 343(q), does not necessarily pertain to the complete list of nutrient information noted in § 343(q), but rather to whatever (identical or non-identical) requirements that states or localities choose to adopt as it relates to restaurant food. Thus, the court held that § 343(r)(1) to provide that: 1) in order for a § 343(q)-type statement not to be a claim, 2) it must appear with the other information required or permitted by the NLEA for packaged food, or applicable state or local law for restaurant food, such as the total number of calories.

In affirming the district court's decision, the court also formally adopted a proposed FDA test to exclude nutritional information from the NLEA if 1) the statement must be of the type required under NLEA provision addressing mandatory information on nutrients, and appear as part of the nutrition information required or permitted by that provision; and 2), a state or municipal regulatory authority must require the statement to be disclosed with regard to restaurant food as part of nutrition labeling, and the information must be disclosed pursuant to that authority.

RISK OF IDENTITY THEFT PROVIDES STANDING, BUT INADEQUATE DAMAGE TO YIELD NEGLIGENCE CLAIM.

Ruiz v. Gap, Inc., 622 F. Supp. 2d 908 (N.D. Cal 2009).

FACTS: Vangent, a Gap Vendor, processes Gap job applications. On September 28, 2007, a thief broke into Vangent's offices in Chicago, Illinois, and stole two laptop computers. One of the stolen computers was downloading information about Gap job applicants at the time it was stolen, and contained personal information, including social security numbers, of approximately 750,000 Gap job applicants. On September 28, 2007, Gap sent a notification letter to the applicants, whose personal information was on the stolen computer, advising them to contact their banks and sign up for a free credit report. Ruiz, the plaintiff in this case, was one of the job applicants who received the notification letter from Gap. However, he did not contact his bank or successfully sign up for a free credit report. On November 13, 2007, Ruiz filed a complaint against Gap asserting (1) negligence; (2) bailment; (3) violation of California Business and Professions Code; (4) violation of the California Constitutional right to privacy; and (5) violation of California Civil Code § 1798.85. Ruiz also filed an amended complaint naming Vangent as a defendant and adding a breach of contract claim.

HOLDING: Gap and Vangent's motions for summary judgment granted.

REASONING: The court reasoned that under California law, present harm is an essential element of a negligence cause of action, and the breach of a duty causing only speculative harm or the threat of future harm does not normally suffice to create a cause of action for negligence. The court noted that Ruiz has been placed at an increased risk of identity theft, and he will continue to have to spend time and/or money to protect himself as a result of the defendants' conduct. The court explained that while Ruiz has standing to sue based on an increased risk of future identity theft, this risk does not rise to the level of appreciable harm necessary to assert a negligence claim under California law. The court further noted that Ruiz, at a very minimum, would have to present evidence establishing a significant exposure of his personal information to sustain a negligence cause of action.

ATTORNEY CAN SEND UNSOLICITATED FAX NEWSLETTERS

Stern v. Bluestone, ____ N.E.2d ____ (N.Y. 2009).

FACTS: During a 16-month period, Marc Stern, a solo practitioner, received 14 unasked-for facsimile messages from Andrew Bluestone, a solo practitioner specializing in bringing attorney malpractice actions. Each fax was entitled "Attorney Malpractice Report," and included Bluestone's contact information and web site addresses. The body of each fax was a short essay about different topics related to attorney malpractice. Stern sued Bluestone pursuant to the Telephone Consumer Protection Act (TCPA) of 1991. The New York County Supreme Court granted Stern's motion for summary judgment and found the faxes indirectly advertised Bluestone's services. The TCPA prohibits sending "unsolicited advertisements" via fax machine. 47 U.S.C. § 227b(1)(C). At the time Bluestone sent the faxes, the TCPA defined "unsolicited advertisements" as "any material advertising the commercial availability or quality of any property, goods, or services, which is transmitted to any person without that person's express invitation or permission." Former 47 U.S.C. § 227a(4). Bluestone appealed.

HOLDING: Reversed.

REASONING: The court cited the Federal Communications Commission's elaboration on what constituted an "unsolicited advertisement." With respect to "informational messages" sent via fax, the FCC stated that faxes that contain only information, such as industry news articles, legislative updates, or employee benefit information, would not violate TCPA rules. The court explained

that under the FCC an incidental advertisement contained in such a newsletter does not convert the entire communication into an advertisement. Thus, a trade organization's newsletter sent via fax would not be an unsolicited advertisement, so long as the newsletter's primary purpose is informational rather than to promote commercial products. The court reasoned that Bluestone's faxes qualified as "informational messages" as defined by the FCC and therefore were not "unsolicited advertisements" that violated the TCPA. The court stated that the reports contained information about attorney malpractice lawsuits, the substantive content varied from issue to issue, and the reports did not promote commercial products. The court found that the faxes contained at most an "incidental advertisement" for Bluestone's services and did not convert the entire communication into an advertisement.

INTENTIONAL INJURY EXCLUSION REQUIRES INTENTIONAL DAMAGE, NOT JUST INTENTIONAL CONDUCT

Tanner v. Nationwide Mut. Fire Ins. Co., ____ S.W.3d ____ (Tex. 2009).

FACTS: The Tanner family obtained a default judgment on their personal injury claim against the driver who struck their vehicle while fleeing police. Nationwide, the driver's insurer, refused to pay damages and filed a declaratory-judgment action arguing the intentional-injury exclusion barred coverage for the Tanners' claims. The jury found for the injured family, but the district court granted Nationwide's motion for judgment notwithstanding the verdict. The Eastland Court of Appeals affirmed that decision.
HOLDING: Reversed.
REASONING: The court construed the policy provision under ordinary rules of contract interpretation to determine the parties' intent from the terms of the contract. The court explained that contracts are interpreted according to the words' plain, ordinary meaning unless qualified by another provision of the policy that indicated intent to use a different technical meaning. The court organized the opinion by breaking down the policy exclusion in clauses and evaluated each clause for its plain meaning, finding no provision that showed the alternative intent of the parties.

The policy voided coverage when the resulting injury was intentional, not when the conduct was intentional.

The court found the meaning of "[p]roperty damage or bodily injury caused intentionally" was effect-based, rather than cause-based, when given its plain meaning. The court held that the policy voided coverage when the resulting injury was intentional, not when the conduct was intentional.

Nationwide argued that the policy provision's second clause excluding coverage for "…willful acts the result of which the insured knows or ought to know will follow…" excludes coverage not only where the insured subjectively knew that injury would follow, but also where a reasonable person would know that injury would follow. The court rejected this view, ruling that the use of "will follow" demonstrated that the result must inevitably follow the action. The court rejected the contention that the Tanner's injury, resulting from a high-speed chase, was so inevitable that as a matter of law it was intended. The court noted that the high-speed chase could have ended in any number of ways, not necessarily with injury to the Tanners. The court found the judgment notwithstanding the verdict to be inappropriate because Nationwide failed to establish as a matter of law that the insured intentionally caused the Tanners' injuries.

ELECTRONIC TRANSFER CASE NOT TIME-BARRED

Wike v. Vertrue, Inc. 566 F.3d 590 (6th Cir. 2009).

FACTS: Margaret Wike filed this lawsuit against Vertrue and its subsidiary, Adaptive Marketing (collectively "Vertrue"), claiming that Vertrue violated federal law by enrolling her in a discount club and charging a monthly fee to her debit card. The district court granted summary judgment to Vertrue on Wike's claim under the Electronic Funds Transfer Act ("EFTA"). The court found that Wike's claim was barred by the one-year limitation period of the EFTA.
HOLDING: Reversed and remanded.
REASONING: The court noted that while Wike failed to bring her claim within one year of Vertrue arranging the funds transfer, her claim was within one year of the first time Vertrue transferred funds from her account. The court reasoned that the date of the transfer, not the date Vertrue arranged for the transfer, triggered the limitations clock.

The court stated that under EFTA the key provision speaks of preauthorized "transfers," not efforts to arrange them. Second, the court noted that a statute of limitations generally begins to run when the plaintiff has a complete and present cause of action and thus can file suit and obtain relief. The court noted that Congress may have authority to alter this standard rule and to create a limitations period that begins before a plaintiff has a cause of action, but that EFTA contains no such indication.

Third, the court discussed the practical problems of beginning the limitation period at the time the payments were arranged. The court explained that if the limitations clock starts when a payee arranges a future transfer, but the plaintiff cannot sue until a transfer occurs, then the payee could violate EFTA with impunity. The court reasoned that as long as the payee sets up transfers that will occur at least a year in the future, the plaintiff's time to file suit would run out before he has a claim to bring.

Finally, the court noted that before withdrawing funds from Wike's account, Vertrue had to obtain her written consent and give her a record of that writing. The court stated that because EFTA does not identify when a payee's inaction evolves into a violation (save upon a transfer), it makes little sense to say that a consumer's cause of action arises at the moment the payee fails to comply with EFTA's authorization requirement. The court found that it was better to pin the accrual on an identifiable date when the plaintiff has been injured and an EFTA duty necessarily has been violated-the date of first transfer.