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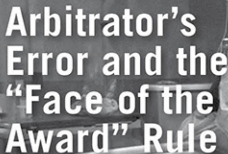
ANNUAL SURVEY OF Texas Insurance Law 2020

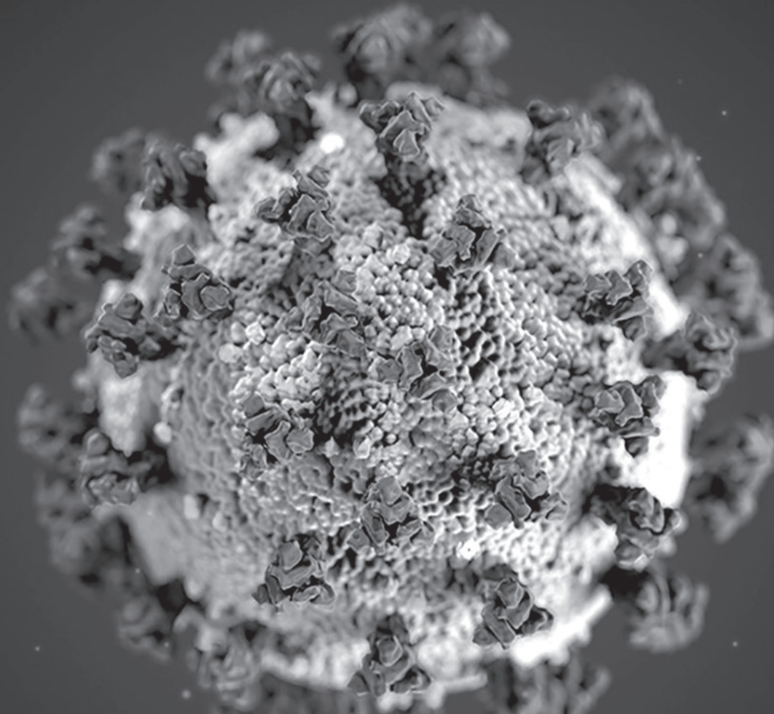


Arbitrator's Error and the "Face of the Award" Rule

Recent Developments

Consumer Bankruptcy Reform Act of 2020

ANNUAL SURVEY OF TEXAS INSURANCE LAW 2020



By Suzette E. Selden,* Jonathan D. Selden,** & Dennis L. Grebe***

I. INTRODUCTION

2020 is definitely a year we will all remember. There were not as many Texas court opinions as usual, as attorneys, clients, courts, and staff figured out how to navigate the new normal during this global pandemic caused by COVID-19.

In 2021, we will likely see a large number of business interruption insurance cases decided after COVID-19 shut down numerous businesses for an extended period of time. Many of these cases are currently underway, with just a few reported opinions. One federal district court held a "virus" did not fall under the "forces of nature" provision in Texas Insurance Code Chapter 542A and remanded the case to state court, holding the insurer could not accept liability for the adjuster to defeat diversity jurisdiction.[1] This gives us a glimpse of where these business interruption cases may be decided.

Additionally, courts continue to analyze Texas Insurance Code section 542A.006(a), reviewing the proper timing for an insurer to elect to accept potential liability for its adjuster, and determining when it will allow the insurer to remove the case to federal court asserting diversity jurisdiction.[2]

The Texas Supreme Court reversed and remanded several cases in light of its holdings in *Barbara Technologies Corporation v. State Farm Lloyds*, 589 S.W.3d 806 (Tex. 2019) and *Ortiz v. State Farm Lloyds*, 589 S.W.3d 127 (Tex. 2019), enforcing its holding that an insured has a right to damages under the Texas Prompt Payment of Claims Act even after an appraisal award is paid.[3]

A worker's compensation case decided by the Texas Supreme Court found a deputy sheriff killed when driving home from an extra-duty assignment with a private employer was in the course and scope of his employment while driving his patrol car.[4] Similarly, the Texas Supreme Court found the intentional-injury exception to the Texas Workers' Compensation Act did not apply to an egregious act by an employer that resulted in the death of an employee.[5]

In 2021, we will likely see a large number of business interruption insurance cases decided after COVID-19 shut down numerous businesses for an extended period of time.

II. FIRST PARTY INSURANCE POLICIES & PROVISIONS

A. Automobile

The San Antonio Court of Appeals took the unusual step of creating a new tort claim against insurance companies while reversing itself after en banc reconsideration of its 2019 opinion in *Kenyon v. Elephant Insurance Company, L.L.C.*, No. 04-18-00131-CV, 2019 WL 1779933 (Tex. App.—San Antonio April 24, 2019, pet. filed). The case concerns the tragic circumstances and novel legal arguments of a widow whose husband was killed while he took pictures of her one-car collision after their auto insurer instructed her to "go ahead and take pictures." Evidence showed the insurer trained its "first notice of loss" (FNOL) employees to ask insureds to take pictures at collision scenes "'on every FNOL call, every time,'" even though a police officer testified "'we have more issues with people getting out of cars to [take pictures of] crash scenes than anything else.'" The insured sued her insurance company for negligence, among other things, and the insurer moved for summary judgment, arguing "an insurance company owes no duty to protect its insureds' physical safety." The trial court granted summary judgment to the insurer, but permitted interlocutory appeal on the insured's negligence claims. A three-judge panel originally sided with the trial court, refusing to create a new duty of care for insurers. But, after the insured moved for and the court ordered en banc reconsideration, the court withdrew its prior opinion and substituted a new one holding the exact opposite—that there was indeed a fact issue whether the insurer owed a legal duty of care to its insured. "Because [the insurer] instructed [the insured] to take pictures to process [the insured's] insurance claim, the special relationship duty that applies in claims processing 'extends' to or 'implicates' the instruction to take pictures." The court also reversed itself and the trial court's dismissal of the insured's negligent undertaking, negligent training, and gross negligence claims, holding there was a fact issue "whether [the insurer's] investigative request—instructing [its insured] to take pictures—and the manner in which it provided roadside assistance increased the risk of harm." The insurer has filed a petition for review with the Texas Supreme Court complaining the decision "created a new extra-contractual cause of action against insurance companies." *Kenyon v. Elephant Ins. Co.*, L.L.C., No. 04-18-00131-CV, 2020 WL 1540392 (Tex. App.—San Antonio April 1, 2020, pet. filed).

B. Commercial Property

The insurer issued a property insurance policy to a business that travels to ports to inspect barges and the policy provided coverage for business interruption and real estate. The relevant clause stated, "coverage for earnings and/or extra expense is extended to loss of earning or extra expenses that 'you' incur during the 'restoration period' when 'your' 'business' is interrupted by direct physical loss or damage, caused by a covered peril, to property at a 'dependent location' described on the schedule." The policy also provided coverage for interruption by order of civil authority if the order is a "result of direct physical loss of or damage to property, other than at a 'covered location' and must be caused by a covered peril." After a hurricane, although the insured property did not sustain damage, the insured brought a claim for business interruption and extra expense incurred as a result of port closures. Insurer denied the claim explaining that there was no loss as a result of denial of access by an order of civil authority as a result of physical loss or damage. Both parties moved for summary judgment on the issue of coverage. The court noted the general rule for civil authority coverage to apply is in cases where access to the insured's property is prevented by order of civil authority as a direct result of physical damage to other premises close to the insured's property. However, in this case, the civil authority order was not issued as a result of direct physical loss to any property. The port closures occurred before the hurricane made landfall or had done damage. Because the port closures were not made "as a result of direct physical loss of or damage to property," the court held the insured's claim was not covered under the policy. Therefore, the court granted summary judgment in favor of the insurer. *Evanston Ins. Co. v. Amspec Holding Corp.*, No. 4:19-CV-1498, 2020 WL 6152190 (S.D. Tex. Oct. 20, 2020).

The developer of a commercial building hired a general contractor to build a building. The general contractor hired a subcontractor for the erection of the structural steel. The developer purchased a commercial inland policy that included builder's risk insurance as the general contractor required, and the general contractor was an additional insured on the policy. The structural steel subcontractor installed a metal plate that fell down the side of the building damaging exterior glass windows on lower floors. A claim was submitted to the insurer for the damage. The insurer denied the claim explaining the loss was excluded. The contractors replaced the windows themselves at a cost of almost $700,000, and sued the insurer for breach of contract and violations of the Texas Insurance Code. The district court found in favor of the insurer, granting its motion for summary judgment. The parties agreed that the claim fell within the policy exclusion because it resulted from an act of construction, workmanship, or installation. The issue was whether an exception to the exclusion applied. The exception states, "[I]f an act, defect, error, or omission as described above resulted in a covered peril, 'we' do cover the loss or damage caused by that covered peril." This is an ensuing loss clause. The Fifth Circuit upheld summary judgment in favor of the insurer holding that an "ensuing loss provision like the one presented here is only triggered when one (excluded) peril results in a distinct (covered) peril." The court stated in this case the welding operation involved falling slag which damaged the exterior glass, and stated the falling slag was not an independent event that resulted in a covered peril. Moreover, the court said even if the falling slag was separable from the welding operation, it is not a "covered peril" under the policy. Therefore, the Fifth Circuit held the policy does not provide coverage for the claim, and affirmed summary judgment in favor of the insurer. *Balfour Beatty Constr. v. Liberty Mut. Fire Ins.*, 968 F.3d 504 (5th Cir. 2020).

III. FIRST PARTY THEORIES OF LIABILITY

A. Breach of Contract

During a hurricane, a tree fell on insureds' house and damaged the roof, home, fence, and shed. The adjuster provided a check to cover various repairs; however, he did not provide compensation for interior damage. Further, the insureds did not receive a written explanation for the insurer's denial of their claim for interior damage.

During the breach of contract claim, a dispute arose whether the insureds failed to comply with their insurance policy. The jury found insureds failed to comply with the insurance policy, and the insurer moved for judgment in its favor on the extra-contractual claims based on the theory that the claims did not survive as insureds did not prevail on their contract claims. Insureds asked the trial court to disregard the jury findings that they failed to comply with the policy. In its final judgment, the trial court disregarded the jury's answer to the questions regarding insureds' compliance with the policy, and rendered judgment in the insureds' favor.

The appellate court explained the jury findings not challenged by the insurer indicate there was no breach by the insureds with regard to notice, documentation of their claim, or that such breach was excused. Further, the court noted the record did not reflect evidence that any breach detrimentally affected the insurer's rights and/or obligation under the policy. To support the insurer's affirmative defense of prior material breach, there had to be evidence that the insurer would have been in a better position had the insureds complied with the policy. The court explained because there was not legally-sufficient evidence to support the jury's answers to questions regarding compliance with the policy by the insureds, and the questions were immaterial and should not have been submitted, the trial court did not err by disregarding these findings. As such, the insureds prevailed on their breach of contact claim.

Next, the court went through the rules promulgated by *USAA Texas Lloyds Company v. Menchaca*, 545 S.W.3d 479 (Tex. 2018) and highlighted mental anguish damages are available as damages for an independent injury. Therefore, the court upheld the insureds' $27,000 award for their mental-anguish damages as it met the independent-injury rule. *State Farm Lloyds v. Fuentes*, 597 S.W.3d 925 (Tex. App.—Houston [14th Dist.] 2020, no pet.).

B. Prompt Payment of Claims – Article 21.55

An insured's property was damaged during a hail storm. The insurer denied the claim after inspecting the property stating the damage was less than the deductible. The insured asked for an appraisal after the insurer did a second inspection and still held the damage was less than the deductible. However, the insurer refused, saying it was the only one that could invoke the appraisal process. The insured sued alleging breach of contract, bad faith and violations of the Texas Prompt Payment of Claims Act (TPPCA). Over eight months later, the insurer invoked the appraisal process where the loss was set at $168,808, well above the deductible. The insurer then paid the appraisal award, and both parties filed summary judgment motions. The court granted summary judgment in favor of the insurer. The appellate court affirmed holding that the insured's bad faith and prompt payment claims failed because it did not allege an injury independent from the policy benefits and did not demonstrate policy benefits were withheld after the appraisal award was paid. The Texas Supreme Court reversed the appellate court and remanded the case to the trial court to consider in light of *Barbara Technologies Corporation v. State Farm Lloyds,* 589 S.W.3d 806 (Tex. 2019) (insurer's payment of appraisal value does not foreclose TPPCA damages under Tex. Ins. Code § 542.060). Additionally, the Texas Supreme Court noted that although the appellate court's holding regarding breach of contract and bad faith violations comported with *Ortiz v. State Farm Lloyds,* 589 S.W.3d 127 (Tex. 2019), *Ortiz* did not have a unilateral appraisal clause. Therefore, the Court said it had not considered whether payment of an appraisal award under a unilateral clause would have the same effect as to these claims. *Biasatti v. Guideone Nat'l Ins. Co.*, 601 S.W.3d 792 (Tex. 2020).

The court remanded the case to the trial court to consider the insured's prompt payment claims because "payment in accordance with an appraisal is neither an acknowledgment of liability nor a determination of liability."

The Texas Supreme Court reversed an appellate court decision that an insured's extra-contractual claims under the Texas Prompt Payment of Claims Act were barred as a matter of law because the insurer paid a full appraisal award. Citing its one-year-old precedents in *Barbara Technologies Corporation* and *Ortiz*, the court remanded the case to the trial court to

consider the insured's prompt payment claims because "payment in accordance with an appraisal is neither an acknowledgment of liability nor a determination of liability," *Barbara Technologies Corporation* at 820, and "an insurer's payment of an appraisal award does not as a matter of law bar an insured's claims under the Prompt Payment Act." *Ortiz* at 135. *Perry v. United Servs. Auto. Ass'n*, 602 S.W.3d 915 (Tex. 2020).

C. Automobile liability insurance

Insureds involved in a car accident sought damages under their employer's UM/UIM policy with Great American Insurance Company after receiving permission from the insurer to settle any claims against the tortfeasor for policy limits. The policy outlined that "coverage shall not apply directly or indirectly to benefit…[a]ny insurer or self-insurer under any workers' compensation, disability, or similar law." Great American requested the insureds provide copies of their medical records to the workers' compensation insurance carrier, Texas Mutual Insurance Company. Further, Great American requested the insureds provide a letter of rejection from Texas Mutual before Great American would issue payment.

Following suit, Great American sought abatement so that insureds could seek reimbursement from Texas Mutual and provide proof, such that the condition precedent to Great American's contractual obligations was met. The court granted the motion and abated the case for sixty days to allow insureds an opportunity to obtain a final determination from Texas Mutual on workers' compensation benefits.

Four months later, Great American filed a motion for summary judgment. In granting the motion, the court highlighted Great American is not yet obligated to pay because it must first receive proof there is no coverage available under a workers' compensation policy, a condition precedent to its obligation to pay. Great American argued it had never denied UM/UIM coverage, but was merely waiting on insureds to provide information with respect to Texas Mutual's coverage decisions.

In granting the motion for summary judgment, the court highlighted Great American met its burden to provide the applicability of an exclusion permitting it to deny coverage, where payments could be made by a workers' compensation carrier. As such, the burden shifts back to insureds to prove that the exclusion does not apply. Despite the abatement, insureds failed to obtain the necessary evidence that Texas Mutual was denying workers' compensation benefits. Therefore, insureds had no evidence that the exclusion did not apply, so summary judgment was appropriate. *Sanchez v. Great Am. Ins. Co.*, No. SA-18-CV-804-XR, 2020 WL 2086552 (W.D. Tex. April 29, 2020).

I. DUTIES OF LIABILITY INSURERS

A. Duty to defend

A child died in an ATV accident at his paternal grandparent's house. The child's mother sued the grandparents who looked to their homeowner's insurer for a defense. The insurer refused and the court granted a declaration that the insurer did not have a duty to defend its insured. The Fifth Circuit reversed and remanded, noting Texas' well-established eight corners rule, which states an insurer's "duty to defend is determined by the claims alleged in the petition and the coverage provided in the policy." The appellant did allege facts that possibly implicated coverage under the policy. The Fifth Circuit sent a certified question to the Supreme Court of Texas asking, "Is the policy-language exception to the eight-corners rule articulated in *B. Hall Contracting Inc. v. Evanston Ins. Co.*, 447 F. Supp. 2d 634 (N.D. Tex. 2006), a permissible exception under Texas law?" The Texas Supreme Court answered, "The 'policy-language exception' to the eight-corners rule … is not a permissible exception under Texas law." Therefore, the lower district court erred in applying the policy-language exception, as no allegations of collusive fraud by the insured were alleged. The insurer attempted to prove that exceptions to coverage applied but could only do this by using extrinsic evidence outside of the allegations in the petition. This is not allowed under the eight-corners rule. Therefore, the Fifth Circuit reversed the district court's ruling that the insurer did not have a duty to defend or indemnify the grandparents. *State Farm Lloyds v. Richards,* 966 F.3d 389 (5th Cir. 2020).

An insured's husband was explicitly excluded from coverage under his wife's car insurance policy. The husband was in an accident while moving his wife's car, and he, his wife, and the injured party all agreed to tell the police officer that the wife was driving the car at the time of the accident. The insured wife disclosed the lie to her attorney provided by her insurance company. The insurer responded by withdrawing its defense and coverage. The trial court awarded a large sum to the injured party, and the insured wife assigned her rights against her insurer to the injured party. In the suit against the insurer, the trial court granted summary judgment in favor of the insurer remarking that the injured party was asking the court to perpetuate fraud. The appeals court reversed holding that "as logically contrary as it may seem," the insurer had a duty to defend under the eight corners rule. However, the Texas Supreme Court held that in this case an exception to the eight corners rule applied stating, "an insurer owes no duty to defend when there is conclusive evidence that groundless, false or fraudulent claims against the insured have been manipulated by the insured's own hands in order to secure a defense and coverage where they would not otherwise exist." Moreover, the court stated a summary judgment was a proper course of action for the insurer to have the court decide regarding duty to defend, and said an insurer faced with undisputed evidence of collusive fraud should not be required to pursue a declaratory judgment action before withdrawing its defense. Therefore, the Texas Supreme Court reversed the appellate court's decision and reinstated the trial court's summary judgment in favor of the insurer. *Loya Ins. Co. v. Avalos*, No. 18-0837, 2020 WL 2089752 (Tex. May 1, 2020).

B. Breach of policy condition by insured

The Fourteenth Court of Appeals continued Texas' hardline rule that a third-party beneficiary of an insurance policy cannot give an insurer actual notice of a pending lawsuit. The

third-party beneficiary, a woman and her two minor children, notified the insurer when she sued and served its insured and sent it a courtesy-copy of her subsequent motion for default judgment. After judgment, she sued the insurer, and it moved for summary judgment because its insured did not notify it about the lawsuit or request a defense. The trial court granted summary judgment in favor of the insurer, and the third-party beneficiary appealed. Citing the Texas Supreme Court's earlier decision in *National Union Fire Company of Pittsburgh, PA v. Crocker*, 246 S.W.3d 603 (Tex. 2008), the court found an insurer is prejudiced as a matter of law when its insured fails to notify it of a lawsuit or request a defense. This is because, as outlined in *Crocker*, the notice provision serves two purposes: (1) to notify the insurer of the suit *and* (2) to "inform the insurer that an insured expects the insurer to provide a defense." Regardless of whether the third-party beneficiary "step[ped] into the shoes" of the insured, she could not get around the insured's failure to comply with the policy's notice provision. "[T]he consequences of the insured's failure to request a defense," it held, "is binding on the third-party beneficiary." Therefore, the appellate court affirmed the trial court's ruling. *Lewis v. ACCC Ins. Co.*, No. 14-19-00197, 2020 WL 4461338 (Tex. App.—Houston [14th Dist.] Aug. 4, 2020, pet. filed).

This case dealt with another third-party beneficiary who attempted to get around the strict notice requirements of a claims-made-and-reported insurance policy. The claimant, the winner of a default judgment against a bankrupt hospital for employment discrimination, alleged contractual, Texas Insurance Code, and conspiracy claims against the hospital's insurer after it denied coverage because the hospital did not report the claim within the policy reporting period. The court dismissed the claimant's summary judgment evidence that the insurer was somehow aware of the claim during the reporting period as "mere suspicion." The claimant also argued the hospital's bankruptcy stayed the notice provision, but the court roundly noted the stay did not "stop the passage of time" and had nothing to do with the reporting period. The court reiterated the Texas Supreme Court's holding in *Prodigy Communications Corporation v. Agricultural Excess & Surplus Insurance Company*, 288 S.W.3d 374 (Tex. 2009), that a showing of prejudice was not required for claims-made-and-reported policies if notice is given after the reporting period (prejudice required for insurer to deny coverage for failing to give notice "'as soon as practicable'"). Having rejected all his other arguments, the court denied the claimant's conspiracy allegation as a derivative claim that failed with the others. *Valentine v. Fed. Ins. Co.*, No. 14-18-00438-CV,
2020 WL 1467352 (Tex. App.—Houston [14th Dist.] March 26, 2020, pet. filed).

The Fifth Circuit reversed a trial court's grant of summary judgment to an insurer who denied coverage because its insured did not report a claim to the proper department. In what will offend kindergarten teachers everywhere, the court's reasoning hinged on the insurer's use of the "precatory ('please')" rather than the "mandatory ('shall')" in its "Notice of Claim" provision in its policy. This courtesy, the court said, permitted the insured to give notice in a policy renewal application supplement to the insurer's underwriting department rather than to its claims department as specified in the policy. Therefore, the court said, the insurer's "direction of notice to the claims department cannot be considered a material condition" and it could only deny coverage if it could show it was prejudiced. Because the trial court did not reach that issue, the court remanded for further proceedings. *Landmark Am. Ins. Co. v. Lonergan Law Firm, P.L.L.C.*, 809 Fed. Appx. 239 (5th Cir. 2020).

IV. PRACTICE & PROCEDURE

A. Parties

A man was struck by a pipe and sustained fatal injuries while working at a business. An insurer provided workers' compensation and employer liability insurance coverage for the business. The insurer asserted the deceased was an employee of the business, so the man's beneficiaries were entitled to death income benefits and the employer was entitled to the exclusive remedy provision in the Texas Workers'Compensation Act. The deceased's beneficiaries argued he was an independent contractor and the exclusive remedy did not apply. At a contested case hearing at the Division of Workers' Compensation, the deceased was determined to be an independent contractor. Therefore, his beneficiaries were not entitled to death income benefits. The insurer sought judicial review of the decision in order to establish the deceased was an employee; therefore, the exclusive remedy provision applied. The beneficiaries moved to dismiss the insurer's request for lack of statutory standing. The district court converted the motion to dismiss into a motion for summary judgment and granted it in favor of the beneficiaries, and the insurer appealed. The insurer argued that it is aggrieved and has standing to seek judicial review of an adverse workers' compensation decision that it is not liable for workers' compensation benefits. The beneficiaries argued that the insurer's aggrievement argument was premised on a nonexistent injury or loss. The insurer asserted it was aggrieved because it may have to reimburse some workers' compensation premiums to the business in the future. However, Texas courts have said that "…[a] possible future injury or loss as a consequence of a panel decision is not sufficient to show aggrievement." The Fifth Circuit dismissed the appeal stating the insurer did not have standing to seek judicial review as it was not liable for workers' compensation benefits, and had not refunded any premiums nor paid any benefits. Moreover, the court noted the insurer could not establish that any such possible future injury would result from the final decision. *Sentinel Ins. Co. v. Ortiz*, 802 F. App'x 864 (5th Cir. 2020).

B. Jurisdiction

The Texas Supreme Court reversed an appellate court and dismissed an insured's claim of standing after his personal injury protection (PIP) insurer paid him the reduced rates negotiated by his health insurance company rather than his medical provider's full billed charges. Relying on the court's 2006 decision in *Allstate Indemnity Company v. Forth*, 204 S.W.3d 795 (Tex. 2006) illuminated by its landmark 2011 holding in *Haygood v. De Escabedo*, 356 S.W.3d 390 (Tex. 2011), the supreme court held the plaintiff lacked standing because he "failed to allege an actual or threatened injury." Like in *Forth*, the court said the insured did not have any "unreimbursed, out-of-pocket medical expenses" after his health insurer's negotiated adjustments and payments to his medical providers. Unlike in *Forth*, it said it did not matter the insured was seeking only money damages rather than injunctive relief because the "standing question in both cases is exactly the same: Did the litigant plead an injury sufficient to invoke the trial court's jurisdiction? The answer to this question should be the same in both cases, notwithstanding the difference in the relief sought." The court stiff-armed the insured's collateral source arguments because, like in *Escabedo*, it said the insured's health insurer's adjustments were not a collateral source of benefits. *Farmers Tex. Cnty. Mut. Ins. Co. v. Beasley*, 598 S.W.3d 237 (Tex. 2020).

This insurance dispute occurred due to state and local orders requiring the closure of certain businesses during the COVID-19 pandemic. The insureds owned several restaurants and had purchased business insurance for the restaurants. As a

result of the shelter-in-place orders and closure of all "nonessential" businesses by the state, the insured sustained heavy income losses. The restaurants were limited to take-out or delivery services under these orders. After reporting a business interruption claim to its insurer, an adjuster investigated and denied the claim. The insurer stated the loss was not covered because the policy contained exclusions for losses caused by a virus and there was no showing of direct physical loss or damage to property. Insured filed suit against the insurer and adjuster in state court. The insurer elected under Texas Insurance Code section 542A.006(a) that it was accepting any potential liability for the adjuster, and then removed the case to federal court asserting diversity jurisdiction. The insured moved to remand the case to state court arguing Chapter 542A of the Texas Insurance Code did not apply to its claim, as that section limits its coverage to weather events. The Chapter defines "claim" as "a first party claim that 'arises from damage to or loss of covered property caused, wholly or partly, by forces of nature, including an earthquake or earth tremor, a wildfire, a flood, a tornado, lightning, a hurricane, hail, wind, a snowstorm, or a rainstorm.'" Tex. Ins. Code § 542A.001(2)(c). The insurer argued "forces of nature" is not limited to weather and could include "acts of God" which is defined in the dictionary as forces so unexpected that no human skill could reasonably be expected to anticipate it. The court disagreed and stated a virus is not a "force of nature," especially when used in a list of items only involving weather and not diseases. Insurer then argued the adjuster was improperly joined because the claims the insured made against him under Chapter 541 and 542 of the Texas Insurance Code regulate the conduct of the insurer, not an adjuster. The court again disagreed holding the insureds' claims against the adjuster of improper investigation and misrepresentations do apply to insurance adjusters, not just the insurer. Therefore, the court remanded the case to state court holding that Chapter 542A of the Texas Insurance Code did not apply, the adjuster was properly joined and diversity jurisdiction did not exist. *Jada Rest. Grp., L.L.C. v. Acadia Ins. Co.*, No. SA-20-CV-00807-XR, 2020 WL 5362071 (W.D. Tex. Sept. 8, 2020).

The insurer stated the loss was not covered because the policy contained exclusions for losses caused by a virus and there was no showing of direct physical loss or damage to property.

Insured's property was damaged in a hailstorm, and he submitted a claim to his insurer. Insurer assigned adjuster to the claim, which was then denied. Insured had property re-inspected and submitted additional evidence to insurer and adjuster, neither of which responded. Then insured filed suit for violations of the Texas Insurance Code and the Texas Deceptive Trade Practices-Consumer Protection Act against insurer and adjuster in state court. Insurer then filed its Texas Insurance Code section 542A.006(a) election of responsibility for its adjuster in state court, and removed the case to federal district court. The insurer refiled before the state court acknowledged the election and dismissed the adjuster from the case. The federal district court was concerned about the effect of the timing of the election on the court's subject matter jurisdiction and ordered the insurer to "show cause for why this case should not be remanded to state court." The court analyzed cases holding both ways on this issue and sided with the majority view holding that, "an election alone does not render the non-diverse Defendant improperly joined when the election is made after an action is brought." Moreover, in this case the non-diverse defendant was not dismissed by the state court prior to removal. Therefore, the federal district court lacked subject-matter jurisdiction and remanded the case to state court. *Stowell v. United Prop. & Cas. Ins. Co.*, No. 3:20-CV-0527-B, 2020 WL 3270709 (N.D. Tex. June 16, 2020) (mem. op.).

Two insurance claims were made for hail damage to commercial properties, the Pera Property and Maxwell property. The insurer provided two different claim numbers for the separate losses. The insurer hired an adjuster for the claim, who in turn hired an engineer to inspect the Pera Property. The retained engineer determined there was no wind or hail damage to the Pera Property. Therefore, the claim was denied. Insureds retained their own expert who determined damages were in excess of $500,000. Insureds sent separate demands for the two properties. Subsequently, the insurer sent a letter to insureds, pursuant to Section 542A.006(a) of the Texas Insurance Code, to serve as a notice of its election to accept its adjuster's liability, if any. Insureds brought suit in state court against the insurer and its adjuster for alleged insurance code violations. Following suit, the insurer removed the action to federal court based on diversity jurisdiction. The insurer argued the adjuster was improperly joined because it previously sent a letter to accept his negligence, if any. Therefore, the insurer requested the federal court to assume jurisdiction and dismiss the adjuster.

Insureds argued the letter sent to them had several errors with respect to property name, claim number, and date of expert report. The insurer argued the letter provided adequate notice despite typographical oversights. The court highlighted the plain language of Section 542A.006(a) suggesting that an insurer's election of its agent's liability is effective as to a specific claim. The court determined there was an ambiguity in the letter as to whether the election of liability was made for the Pera Claim or the Maxwell claim; therefore, remand was appropriate. The insurer argued remand was unnecessary, as it would adopt the adjuster's liability and render the case removable again. Therefore, remand would only delay litigation. The court explained there is a split among courts in this circuit over the effect a Section 542A.006(a) election's timing has on the improper joinder analysis. One line holds that an election made after a lawsuit commences but before removal renders the adjuster improperly joined. However, the majority view concludes that the touchstone of the improper joinder inquiry focuses on whether the parties were improperly joined at the time of joinder. Therefore, the court remanded the case noting that a post-lawsuit election does not by itself establish improper joinder. *Project Vida v. Phila. Indem. Ins. Co.,* No. EP-20-CV-00082-DCG, 2020 WL 2220193 (W.D. Tex. May 7, 2020) (slip op.).

CBX Resources, L.L.C. v. ACE American Insurance Company, 959 F.3d 175 (5th Cir. 2020) deals with the "finality trap" involving claims non-suited without prejudice. Initially, CBX brought suit against Espada Operating, L.L.C. An insurer defended Espada at the outset of the litigation, but ultimately withdrew its defense. CBX obtained a default judgment against Espada, who in turn assigned its claims against its insurer to CBX. CBX lost a declaratory judgment that the insurer had a duty to defend, which negated elements of its claim. Therefore, CBX dismissed its Texas Insurance Code claims without prejudice and brought an appeal. As these claims were not resolved on

the merits, CBX could bring a later suit on the same cause of action. The court dismissed the appeal for lack of jurisdiction as there is not yet a final appealable judgment. The court reiterated there is not an appealable final judgment when some claims are dismissed without prejudice. Parties can pursue a Rule 54(b) partial summary judgment in an attempt to create a final appealable judgment. The court explained CBX apparently was hoping to reverse the district court's "no duty to defend" decision which was an attempt to obtain a quasi-interlocutory appeal. Allowing these appeals would allow plaintiff to "have his cake (the ability to refile the claims voluntarily dismissed) and eat it too (getting an early appellate bite at reversing the claims dismissed involuntarily)." The court also rejected CBX's argument that the district judge made clear his intention that an appeal of his ruling be available immediately. In order to succeed, CBX would have to demonstrate unmistakable intent in the judgment itself or in the document the judgment references. As there was no unmistakable intent in the judgment, the court dismissed the appeal as it did not have jurisdiction.

C. Pleadings

Insureds sued their homeowner's insurer after it denied their claim for windstorm damage to their home. The court granted summary judgment in favor of the insurer on several causes of action but allowed the insured's breach of contract claim to be presented to the jury, which granted a verdict in favor of insureds. The insureds sought attorney's fees and statutory interest of 18 percent, but the district court after originally granting this relief ruled that the failure of the insureds to specifically plead relief under Texas Insurance Code section 542.060, the Texas Prompt Payment of Claims Act, barred the requested relief. The court reversed its previous ruling stating it was following a recent decision in *Chavez v. State Farm* Lloyds, 746 F. App'x 337 (5th Cir. 2018) which concluded that because the "bad faith insurance code claims had been properly dismissed by the district court, Chavez could not recover under [section] 542.060." Applying *Chavez*, the trial court only awarded the amount of the breach of contract damages awarded by the jury along with pre-judgment and post-judgment interest. The insureds appealed. The insured's pleading asked for an '"18% [p]enalty [i]nterest pursuant to Ch. 542 of the Texas Insurance Code'" and "'[a]ttorney's fees.'" The Fifth Circuit noted the only relevant statute entitling an insured to 18% penalty is section 542.060 of the Texas Insurance Code. While the pleading could have been more detailed, the court said the *Twombly/Iqbal* "plausibility" standard does not require magic words. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). Moreover, the court stated the insurer was not surprised by the insured's request. As to the question *Chavez* addressed of whether a violation of the bad faith provisions of the Texas Insurance Code is a necessary prerequisite to section 542.060 relief, the Fifth Circuit looked to a recent Texas Supreme Court decision holding, "'[n]othing in the TPPCA would excuse an insurer from liability for TPPCA damages if it was liable under the terms of the policy but delayed payment beyond the applicable statutory deadline[.]'" *Barbara Techs. Corp. v. State Farm Lloyds*, 589 S.W.3d 806 (Tex. 2019). Following recent case law, the Fifth Circuit held it is not necessary for the insured to prove the insurer acted wrongfully or in bad faith. Therefore, the Fifth Circuit held that the district court was wrong in holding that *Chavez* barred the insureds' claims for the 18% penalty and attorney's fees under Chapter 542, reversing the lower court's ruling and remanding for a new judgment. *Agredano v. State Farm Lloyds*, No. 5:15-CV-1067 (5th Cir. Sept. 16, 2020).

D. Discovery

An insured injured in a car accident sued her insurer to recover her uninsured motorist benefits after settling with the party that caused the accident. The insured sought to take the deposition of the insurer's corporate representative on nine topics. The trial court ordered the insurer to produce its corporate representative for deposition. The insurer filed a writ of mandamus contending the trial court abused its discretion because the relevant issues were not within the insurer's personal knowledge and producing a corporate representative would be unduly burdensome. The appellate court held that the insurer did not agree to the amount of damages at issue or that the other driver had deficient coverage. Because the amount of damages was in dispute, the court of appeals concluded the trial court did not abuse its discretion by granting the insured's motion to compel the deposition of the insurer's corporate representative. However, the appellate court did limit the deposition to matters relevant to damages and the insurer's defenses in the pending lawsuit, noting that certain topics such as information regarding the nature of the insured's injuries were not appropriate for the deposition of an insurer's corporate representative. *In re Garrison Prop. & Cas. Ins. Co.*, No. 12-20-00190-CV, 2020 WL 6164982 (Tex. App.—Tyler Oct. 21, 2020, no pet. h.).

An appellate court held a tort claimant was entitled to discovery from a liability carrier as a third-party beneficiary even though he had not established its insured gave the insurer notice of suit under the policy. The third-party beneficiary had sued and obtained a default judgment against the tortfeasor, who did not appear or answer the suit even though he had liability insurance coverage. By coincidence, the third-party beneficiary also had an uninsured or underinsured motorist (UM/UIM) policy with the same insurer. The third-party beneficiary sued the insurer as third-party beneficiary of the liability policy and said he was "not seeking UM/UIM benefits" and did not plead them. Nonetheless, he sought discovery from the insurer about both the liability coverage and his own UM/UIM coverage because, he said, the "UM/UIM representative may have information regarding the status of the liability coverage." The trial court denied the insurer's motion to quash and for protective order, and the insurer sought mandamus relief. The appellate court granted the insurer relief from the UM/UIM discovery requests, but let stand the requests about the underlying liability policy. The appellate court agreed with the third-party beneficiary's argument that "'[a] lthough proof of a condition precedent may be required before liability is ultimately imposed,' it is not a prerequisite to obtaining discovery." *In re GEICO Cnty. Mut. Ins. Co.*, No. 05-20-00259, 2020 WL 2537249 (Tex. App.—Dallas May 19, 2020, pet. filed).

E. Experts

A mother brought a claim after her son died while in the course and scope of his employment. Following his death, a toxicology screen was performed that indicated he had marijuana metabolites in his blood at the time of death. Under Texas law, intoxication is defined as "not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of a controlled substance." Further, a positive drug screen creates rebuttable presumption that an injured worker is intoxicated at the time of the accident; therefore, he did not sustain a compensable injury. The Division of Worker's Compensation upheld the insurer's denial of the claim, and the mother sought judicial review. At trial, the mother presented evidence from her son's co-worker, as well as, expert testimony from a toxicologist in order to establish her son had the normal use of his mental or physical faculties. The expert for the mother said the results of the blood test were unreliable and should not be considered when

determining intoxication. The expert for the insurer said the blood test led him to conclude the deceased was likely intoxicated at the time of the accident. The co-worker testified the deceased performed physical tasks on the day of the accident. Further, he did not smell like marijuana and the co-worker had never seen the deceased use drugs. Lastly, the co-worker asserted the deceased acted normal and appeared to have the normal use of his mental and physical faculties.

The jury found that the deceased was not intoxicated at the time of his death. The insurer appealed arguing the jury determination that the deceased was not intoxicated at the time of the accident was legally and factually insufficient. With respect to this point, the court highlighted a lay person is competent to testify to whether a person was acting normally at the time of his injury. Therefore, the court held it was reasonable for the jury to give the co-worker's testimony sufficient weight to conclude that the deceased was not intoxicated at the time of the accident that caused his death. *Tex. Mut. Ins. Co. v. Mendez,* No. 07-19-00087-CV, 2020 WL 2786675 (Tex. App.—Amarillo May 26, 2020, no pet.).

F. Appraisal

The insured's home sustained damage during a hailstorm. Initially, the insurer said there was no property damage from the storm, then later it said the damage was less than the deductible. An appraisal was completed, which exceeded the insurer's prior estimates. The insurer paid the award and moved for summary

judgment on the remainder of the insured's claims which the trial court granted and the appellate court affirmed. The Texas Supreme Court reversed the lower courts' holdings. The court noted two prior Texas Supreme Court decisions from 2019 both holding the payment of an appraisal award did not as a matter of law bar an insured's claim under the Texas Prompt Payment of Claims Act. *See Barbara Tech. Corp. v. State Farm Lloyds,* 589 S.W.3d 806 (Tex. 2019); *Ortiz v. State Farm Lloyds*, 589 S.W.3d 127 (Tex. 2019). Therefore, the court held the insured's prompt payment claim was not extinguished after the payment of the appraisal award. *Marchbanks v. Liberty Ins. Corp.*, 602 S.W.3d 917 (Tex. 2020).

The Texas Supreme Court again reversed and remanded the lower courts' holdings that an appraisal award entitled an insurer to summary judgment on all of the insured's contractual and extra-contractual claims. In *Lazos v. State Farm Lloyds*, 601 S.W.3d 783 (Tex. 2020), an insured's property sustained wind and hail damage. Following two inspections, the insurer said the damage fell below the deductible. The insured sued and the insurer compelled an appraisal, where the damage amount was found to be more than the deductible. The insurer paid the appraisal award, and moved for summary judgment on all of the insured's claims. The trial and appellate courts granted the motion in favor of the insurer. The insured appealed the decision. During this time period, the Texas Supreme Court decided two cases specifically on this issue, one holding that "an insurer's payment of an appraisal award does not as a matter of law bar an insured's claims under the Prompt Payment Act." *Ortiz*, 589 S.W.3d 127 (Tex. 2019); *see also Barbara Tech. Corp. v. State Farm Lloyds*, 589 S.W.3d 806 (Tex. 2019). Therefore, the Texas Supreme Court reversed the decision of the appellate court and remanded the case to the trial court to consider the prompt payment claim in light of the recent rulings.

Again *Ortiz and Barbara Technologies Corporation*, resulted in the reversal and remand of an appraisal award case. In *Alvarez v. State Farm Lloyds*, 601 S.W.3d 781 (Tex. 2020), the insured's property sustained wind and hail damage. The insured sued the insurer after he believed the offered damage amount was undervalued. The insurer obtained an appraisal which exceeded the insurer's prior estimates. The insurer paid the appraisal award and moved for summary judgment on the insured's claims. The trial court granted summary judgment with the appellate court affirming. Looking to its prior rulings, the Texas Supreme Court reversed the judgment of the court of appeals and remanded the case to the trial court to consider the prompt payment claims.

G. Motions for Summary Judgment

A woman sustained a work-related injury and was ultimately dissatisfied with the results of a contested case hearing. She filed a judicial review challenging the Division of Workers' Compensation's findings on the disputed issues. The insurer filed a no-evidence summary judgment motion, and the worker filed a response with several exhibits. However, her exhibits were not authenticated and contained hearsay. The exhibits were struck and the trial court granted summary judgment in insurer's favor. On appeal, the worker argued the trial court abused its discretion in excluding her evidence and the evidence was legally insufficient to support the court's summary judgment order. The appellate court highlighted that as a prerequisite to presenting a complaint for appellate review, the record must show the complaints were made to the trial court by a timely request, objection, or motion. A party may not argue "any and every new issue" she can think of on appeal. Rather, by failing to raise complaints as to the merits of the trial court's ruling on the objections, the worker failed to preserve error for appeal. Further, the insurer urged the worker's exhibits be excluded under several avenues, and the worker failed to appeal her evidences' exclusion on all grounds. Therefore, the worker waived the issue for appeal because she failed to challenge all possible grounds for the trial court's ruling that sustained the objection to her summary judgment evidence. *Davila v. Tex. Mut. Ins. Co.*, No. 03-19-00366-CV, 2020 WL 1174190 (Tex. App.—Austin Mar. 12, 2020, no pet. h.).

H. Severance & Separate Trials

Brainard v. Trinity Universal Insurance Company, 216 S.W.3d 809 (Tex. 2006) continues to cause headaches for insurers and insureds and add to the tsunami of appellate litigation trying to decipher it and develop work-arounds. In one of the latest examples, the Houston Court of Appeals rejected an insured's attempt to pursue extra-contractual claims for bad faith, Texas Insurance Code, and Texas Deceptive Trade Practices Consumer

Protection Act violations. The general consensus, initiated by *Brainard* and settled by subsequent appellate decisions, is that extra-contractual claims must be severed and abated from underlying declaratory judgment actions to determine whether insureds are "legally entitled" to underinsured motorist (UIM) benefits. Then, and only then, can insureds pursue common law and statutory remedies outside their UIM contract. In this case, the insured argued her insurance company did not respond to her UIM claim—at all—rather than "satisfactorily respond." This, however, was a "distinction without a difference," the court held, and stated the insured's extra-contractual claims must be severed and abated pending resolution of her declaratory action. *In re State Farm Mut. Auto. Ins. Co.*, No. 01-19-00821-CV, 2020 WL 1264184 (Tex. App.—Houston [1st Dist.] March 17, 2020, no pet.).

I. Evidence

An appellate court upheld a trial court's denial of judgment notwithstanding the verdict to two plaintiffs who received drastically reduced medical expense damage awards from a jury. The plaintiffs proved-up over $15,000 in past medical expenses with uncontroverted affidavits admissible under Sec. 18.001 of the Texas Civil Practice and Remedies Code, but the jury awarded just $500 to each plaintiff. Because the plaintiffs' injuries were subjective and some of their treatment delayed, the court ruled "the jury [was] within its discretion to award zero or minimal damages." *Espinoza v. Ruiz*, No. 13-18-00273-CV, 2020 WL 2776716 (Tex. App.—Corpus Christi-Edinburg 2020, pet. filed) (mem. op.).

J. Excess & Primary Coverage

The jewelry retailer Zales had a primary layer of insurance coverage from Liberty for directors' and officers' liability, and then two excess insurers. Zales announced a merger with Signet to which a minority of shareholders dissented, arguing the directors and officers failed to maximize stockholder value. Then Zales extended its insurance policies for the next six years and added run-off endorsements, which stated the policies would not include coverage for wrongful acts that occurred on or after the merger date. The dissenting shareholders brought appraisal actions after the merger was completed, and Zales and Signet settled with these shareholders without the insurers' consent for over $34 million. Zales then demanded payment from the two excess insurers, which the insurers denied. Zales filed suit alleging breach of contract and unfair settlement practices against the excess insurers. The excess insurers moved for summary judgment. The court stated the alleged "wrongful act" was the merger execution, and did not agree with the petitioners that the "wrongful act" was the entire merger process. Therefore, summary judgment in favor of the insurers was granted because the execution of the merger did not occur until the day of the merger which was the day after coverage ended under the insurance policy period. The appellate court affirmed. *Zale Corp. v. Berkley Ins. Co.*, No. 05-19-00730, 2020 WL 4361942 (Tex. App.—Dallas July 30, 2020, no pet. h.) (mem. op.).

K. Worker's Compensation

The Texas Supreme Court overcame a "troubling" fact-pattern to constrict the intentional-injury exception of the Texas Workers' Compensation Act to apply only to an employer that "believe[s] that its actions are substantially certain to result in a particular injury to a particular employee." The employer, according to a manager, systematically required its truck drivers to work insomniaic hours ("'routinely working 100 hours or more per week' and '19 to 24 hours straight—day after day'") while "encourag[ing] them to 'alter their work logs to appear that they were in compliance with DOT sleep and rest regulations.'" Alerted by the manager that one of its drivers "'was going to get killed,'" another manager said "'we will cross that bridge when we come to it.'" They came to it when one of their drivers was killed when he fell asleep at the wheel and ran off the road at three-in-the-morning after working 19-hours the day before. The deceased employee's parents and sister (he had no spouse or children) sued the employer for wrongful death, alleging the "intentional injury" exception allowed them to get around the workers' compensation statute. The trial court dismissed their claims on summary judgment, but the appellate court reversed and remanded before the Texas Supreme Court granted review. The Texas Supreme Court, citing its prior decision in *Reed Tool Co. v. Copelin*, 689 S.W.2d 404 (Tex. 1985) and quoting the RESTATEMENT (SECOND) OF TORTS § 8A (1965), acknowledged the century-old intentional injury exception requires "specific intent to inflict injury" but said that intent could be shown by an employer who believed bad consequences were "substantially certain." Recognizing "[s]ubstantial certainty will always be hard to quantify," the court said it could only apply to "specific consequences" and not general dereliction like the employers' "awareness of the commonsense notion that fatigued drivers are more likely to be involved in a crash than well-rested drivers." Its purpose, the court said, was to maintain the integrity of the workers' compensation scheme and "prevent the intentional-injury exception from devolving into a standard of exceptionally egregious gross negligence." Therefore, the court held the beneficiaries' evidence did not raise a fact issue under the intentional-injury exception, so the claims were barred by the exclusive-remedy provision in the act. Therefore, the court reversed the appellate judgment in favor of the estate, and rendered judgment for the employer. In a concurring opinion, Justice Eva Guzman stated that although precedent compelled her to concur in the court's conclusion, she made the case for changes to be made in regards to cases like this, stating:

> In a perfect world, employers would do the right thing simply because it is the right thing to do. But we don't live in a perfect world. We live in a world that requires laws, regulations, and disincentives to help ensure employers don't do the wrong thing. Without meaningful consequences for engaging in prohibited conduct, laws are not effective. On that score, the Worker's Compensation Act has a loophole that unwittingly permits employers to engage, with impunity, in unsafe practices. I believe the tragic circumstances presented here make a strong case for aligning the Workers' Compensation Act with the Wrongful Death Act, and I call on the Legislature to do so.

Mo-Vac Serv. Co., Inc. v. Escobedo, 603 S.W.3d 119 (Tex. 2020).

A deputy sheriff died in a car accident while driving his patrol car. At the time of the accident, he was driving home from an extra-duty assignment with a private employer. Pursuant to the local sheriff's manual, this extra-duty employment was permissible, but must be approved. Further, it was anticipated law enforcement powers might be utilized in this type of activity. The deceased sheriff wore his uniform, badge, and gun while performing security at a local football game. Following the end of the game, the deputy sheriff checked in through his laptop and notified dispatch he was available for assignment while on his way home. His surviving spouse filed a claim for worker's compensation benefits with the county of El Paso, a self-insurer under the Texas Workers' Compensation Act. The county denied

the claim believing deceased was not in the course and scope of his employment at the time of the accident. The widow brought her claim to a contested hearing where the hearing officer ruled in the widow's favor, concluding her husband was in the course and scope of his employment at the time of the accident. The county appealed, and the administrative panel reversed, holding deceased was not in course and scope of his employment at time of his death. The widow sought judicial review with the trial court and won. The county appealed, and the court of appeals reversed, rendering judgment that the widow take nothing. The Texas Supreme Court noted the daunting history of the case as it determined its ruling.

The court concluded the patrol car amounted to employer-provided travel, and the fact he was required to notify dispatch indicated his transportation was under the control of the employer.

For an injury to be within the course and scope of employment, it must both arise out of a risk or hazard that has to do with and originates in the work of the employer and that is performed by an employee while engaged in the furtherance of the employer's affairs. A risk or hazard arises out of employment when a causative factor peculiar to the work and not common to the general public results in the injury.

Travel from work to home is statutorily excluded from course and scope. This exclusion is commonly referred to as the "coming and going" exclusion. The coming and going exclusion rule is provided for in section 401.011(12)(A) of the Texas Labor Code:

> (12) "course and scope of employment" means an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer. The term includes any activity conducted on the premises of the employer or at the other locations. The term does not include:
>
> (A) transportation to and from the place of employment unless:
>
> (i) the transportation is furnished as part of the contract of employment or is paid for by the employer;
>
> (ii) the means of transportation are under the control of the employer; or
>
> (iii) the employee is directed in the employee's employment to proceed from one place to another place.

Second, dual purpose travel which is both for personal and business reasons is excluded from the course and scope of employment, absent certain conditions.

The court found the travel originated in the employer's business and highlighted the patrol car on the public streets being an activity that clearly relates to the department's work. Further, the presence of uniformed deputies in marked patrol cars furthered the department's work in preserving peace and responding to citizens in need of assistance. As the deputy's authorized operation of a marked patrol car on a public street is considered an official business activity of the department, the deceased deputy was in the course and scope of his employment.

Notably, the employer argued different exclusions at various levels of the dispute. These exclusions are mutually exclusive; therefore, if one applies, the other cannot. Ultimately, the court decided the coming and going exclusion applied; therefore, the dual purpose exclusion did not need to be analyzed. Without providing detailed analysis, the court also found two exceptions to the coming and going analysis applied. Essentially, the court concluded the patrol car amounted to employer-provided travel, and the fact he was required to notify dispatch indicated his transportation was under the control of the employer. Therefore, the deputy's travel was not excluded from course and scope of employment. *Orozco v. Cnty. of El Paso*, 602 S.W.3d 389 (Tex. 2020).

Generally, workers' compensation providers reimburse medical providers in accordance with fee guidelines promulgated by the Division of Workers' Compensation. When the Division has not adopted an applicable guideline, the insurer must reimburse the provider for its services up to a "fair and reasonable" amount. To date, the Division has not provided a fee guideline for air ambulance services.

In this case, the insurer reimbursed an air ambulance service at 125% of the Medicare rate for their services, which is consistent with the Division's fee guideline for providers other than hospitals and pharmacies. The air ambulance service disagreed with this adjustment and argued it was entitled to the full billed amount. The Division determined the air ambulance service was entitled to 149% of the Medicare rate and both parties sought judicial review. This amount is the average amount paid to the air ambulance service for services in Texas during the relevant period in dispute. The trial court awarded summary judgment in favor of the Division and insurers. The appellate court reversed, holding the Texas Worker's Compensation Act reimbursement provisions are preempted by the Airline Deregulation Act (ADA), finding in favor of the air ambulance service. The Division and insurers sought review with the Texas Supreme Court.

The Texas Supreme Court held the ADA did not preempt workers' compensation law. The Court highlighted Texas' retained police powers include the power to provide a compensation system for injured workers. As part of this system, Texas requires insurers to reimburse providers up to a "fair and reasonable" amount. The court held the air ambulance services failed to demonstrate the "fair and reasonable" standard had a significant effect on its prices for carrying injured customers by air. The court explained the full amount billed for services is not the starting point for measuring significant effect on cost as the ADA does not guarantee any payment of air-ambulance claims. Certainly, the ADA does not demand payment for whatever the air carrier deems appropriate. Further, the billed amount is not part of a transactional relationship since the air ambulance service's customer generally has not agreed to pay it. Absent an agreement on price, the court explained the ADA implies a fair or reasonable price. As Texas has enacted this standard for reimbursement, preemption does not apply. Therefore, the court reversed the appellate court's ruling and reinstated the trial court's

summary judgment declaring no preemption. *Tex. Mut. Ins. Co. v. PHI Air Med., L.L.C.,* No. 18-0216, 2020 WL 3477002 (Tex. June 26, 2020).

The underlying disputes were the long-running series between Vista hospitals and carriers of workers' compensation policy holders over reimbursement of medical expenses. In Texas, the Department of Insurance is tasked with development fee guidelines that govern reimbursement for different types of medical care. Once the Division adopts a guideline, workers' compensation carriers must reimburse providers in accordance with the guideline. If no fee guideline applies to a certain type of care, the carrier must reimburse at "a fair and reasonable reimbursement amount."

In over fifty-three instances, Vista billed pursuant to procedure codes and the carriers paid a portion of the bill. Vista requested the carriers to reconsider and reimburse Vista at 100% of the billed charges. Ultimately, Vista sought contested case hearings before the State Office of Administrative Hearings (SOAH) and the disputes remained on SOAH's docket for several years. In the meantime, the Division promulgated new rules and guidelines which affected Vista's reimbursement amounts. Vista changed its methodology for calculation "fair and reasonable" in the fifty-three disputes which resulted in lower overall amounts requested for reimbursement. SOAH agreed with the new calculations and ordered carriers to pay additional benefits. The carriers filed suit in district court seeking judicial review of the decision and order. The trial court affirmed the decision and order and rendered judgment against the carriers for the amounts SOAH had ordered to be paid. The carriers appealed.

The appellate court rejected the carriers' arguments that the amended reimbursement amounts constituted new medical bills. Rather, the court explained the calculation process was merely a different way to assert "fair and reasonable" reimbursement. The court explained the new calculations complied with the Division's recent Fee Guidelines and the evidence supported SOAH's determination on all issues. Therefore, the appellate court affirmed the trial court's judgment. *Facility Ins. Co., et al. v. Vista Hosp. of Dallas,* No. 03-18-00663-CV, 2019 WL 6603168 (Tex. App.—Austin Dec. 5, 2019, pet. denied).

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1 Jada Rest. Grp., L.L.C. v. Acadia Ins. Co., No. SA-20-CV-00807-XR, 2020 WL 5362071 (W.D. Tex. Sept. 8, 2020).
2 *See* Jada Rest. Grp., L.L.C., No. SA-20-CV-00807-XR, 2020 WL 5362071; Stowell v. United Prop. & Cas. Ins. Co., No. 3:20-CV-0527-B, 2020 WL 3270709 (N.D. Tex. June 16, 2020) (mem. op.); Project Vida v. Phila. Indem. Ins. Co., No. EP-20-CV-00082-DCG, 2020 WL 2220193 (W.D. Tex. May 7, 2020) (slip op.).
3 Perry v. United Servs. Auto. Ass'n, 602 S.W.3d 915 (Tex. 2020); Marchbanks v. Liberty Ins. Corp., 602 S.W.3d 917 (Tex. 2020); Alvarez v. State Farm Lloyds, 601 S.W.3d 781 (Tex. 2020); Biasatti v. Guideone Nat'l Ins. Co., 601 S.W.3d 792 (Tex. 2020); Lazos v. State Farm Lloyds, 601 S.W.3d 783 (Tex. 2020).
4 Orozco v. Cnty. of El Paso, 602 S.W.3d 389 (Tex. 2020).
5 Mo-Vac Serv. Co., Inc. v. Escobedo, 603 S.W.3d 119 (Tex. 2020).

ARBITRATOR'S ERROR AND THE "FACE OF THE AWARD" RULE

By John B. Rich*

Introduction

In *Mid Atlantic v. Bien*, the Tenth Circuit U.S. Court of Appeals adopted the "face-of-the-award" rule, despite granting a "double recovery" to an elderly couple.[1] In *Bien,* petitioner Cross Defendant-Appellant / Cross-Appellee Mid Atlantic Capital Corporation ("Mid Atlantic"), a brokerage firm, moved to modify an arbitration award to investors to correct evident material miscalculations of figures under the Federal Arbitration Act ("FAA"). Mid Atlantic claimed the arbitration panel awarded Respondents Beverly Bien and David H. Wellman a double-recovery. In response, Ms. Bien and Mr. Wellman, a married couple, moved to confirm the arbitration award and claimed the district court could only modify the award to correct the double-recovery if there was "an evident material miscalculation of figures" on the face of the award.[2] While the district court found the arbitration award to be "disturbing," the court ruled in favor of Ms. Bien and Mr. Wellman. The court concluded that it lacked the authority to modify the reward because the alleged double counting appeared only upon looking at the arbitration record. The court denied Mid Atlantic's motion to modify and granted Ms. Bien and Mr. Wellman's motion to confirm the award. The court agreed with the couple and adopted the "face-of-the-award" rule, holding that a miscalculation or mistake is "evident" only if it appears in the award.[3]

The Tenth Circuit affirmed. With this decision, the Tenth Circuit joins the Fourth, Sixth, and Eleventh Circuits in affirming the "face-of-the-award" rule, widening the split in the circuits.[4]

Facts

Ms. Bien and Mr. Wellman opened several brokerage accounts with Mid Atlantic, a brokerage firm registered with the Financial Industry Regulatory Authority ("FINRA"). Through Ms. Bien and Mr. Wellman's brokerage accounts they invested in two vehicles, Sonoma Ridge Partners and KBS REIT ("KBS"). Ms. Bien and Mr. Wellman's contracts with Mid Atlantic included identical arbitration clauses that obligated the parties to resolve all disputes through binding arbitration conducted according to FINRA rules.

After the Sonoma Ridge Partners and KBS investments suffered substantial losses, Ms. Bien and Mr. Wellman initiated arbitration proceedings against Mid Atlantic. They alleged Mid Atlantic had sold them unreasonably risky investments. Ms. Bien and Mr. Wellman sought damages, attorney's fees, costs, and interest.

At arbitration, Ms. Bien and Mr. Wellman's expert offered two ways to calculate the losses at issue. The first option looked to their "net out-of-pocket" losses.[5] The net out-of-pocket losses were calculated at $292,411. The second option looked to Ms. Bien and Mr. Wellman's "market-adjusted-damages."[6] The market-adjusted-damages were, "the difference between the actual return on these investments and what the return would have been if [Ms. Bien and Mr. Wellman's] money had been invested in a well-managed 'benchmark' account."[7] The expert calculated the market-adjusted-damages to be between $484,684 and $618,049. Mid Atlantic presented no expert testimony. During the closing arguments of the hearing, Ms. Bien and Mr. Wellman read a written final prayer for relief in which they requested market-adjusted damages. They asserted that if they were compensated for their net out-of-pocket losses it would be "inconsistent with case law" and would not make them whole.[8] On top of the market-adjusted damages, Ms. Bien and Mr. Wellman also prayed for $118,560 in attorney's fees, $26,812.82 in costs, interest on the damages at 8% per year, and punitive damages.

The arbitration panel ruled in favor of Ms. Bien and Mr. Wellman, ordering Mid Atlantic to pay them; (1) initial-investment-loss damages and (2) compensatory damages.

Damages Award	Ms. Bien	Mr. Wellman	Both	Total
Initial Investment Loss	$240,321	N/A	$52,090	$292,411
Compensatory Damages	$437,286	$47,397	N/A	$484,683
Total	$677,607	$47,397	$52,090	$777,094

The arbitration panel also ordered Mid Atlantic to pay interest at 8% per year on each form of damages to "accrue from the date Ms. Bien and Mr. Wellman initiated arbitration proceedings until the damages were paid in full."[9] In addition to the damages previously listed, the award consisted of $118,560 in attorney's fees, $26,812.82 in costs, and all arbitration fees. Punitive damages were not awarded. The arbitration panel ordered Ms. Bien and Mr. Wellman to "reassign ownership of all Sonoma Ridge Partners and KBS REIT investments to [Mid Atlantic]."[10]

Mid Atlantic moved in the district court to modify the award, arguing that the arbitration panel had given Ms. Bien and Mr. Wellman a double recovery. Mid Atlantic claimed that the panel's $292,411 award in initial-investment-loss corresponded with Ms. Bien and Mr. Wellman's expert's testimony that their net out-of-pocket losses were of an equal amount. Mid Atlantic also claimed that the panel's $484,683 award in compensatory damages almost matched the $484,684 in market-adjusted damaged that the expert had calculated. The expert presented net out-of-pocket damaged and market-adjusted damages as alternatives, and Ms. Bien and Mr. Wellman had only requested market-adjusted damages in their final prayer. By awarding Ms. Bien and Mr. Wellman both forms of damages, the panel potentially gave them a double recovery. Mid Atlantic asked that the district court to modify the arbitration award in order to correct this issue.

In response, Ms. Bien and Mr. Wellman moved for the district court to confirm the award. They claimed that there must be "an evident material miscalculation of figures" on the face of the award for the district court to modify it.[11] Ms. Bien and Mr. Wellman argued that the district court lacked the authority for modification of the award because the alleged double recovery appeared here only when one delved into the arbitration record.

The court read 9 U.S.C. §11(a) as only authorizing the court to correct an evident material miscalculation of figures if the miscalculation appeared on the face of the award.

The district court agreed with Mid Atlantic that "what the panel called 'initial investment loss[es]'" and "compensatory damages" corresponded with what Ms. Bien and Mr. Wellman had called, respectively, "net out-of-pocket losses" and "market-adjusted damages."[12] The district court found that by awarding "both net out-of-pocket losses … and market-adjusted damages," the panel essentially gave Ms. Bien and Mr. Wellman a double-recovery.[13]

Even though the district court agreed with Mid Atlantic, however, it still ruled in favor of Ms. Bien and Mr. Wellman. The court read 9 U.S.C. §11(a) as only authorizing the court to correct an evident material miscalculation of figures if the miscalculation appeared on the face of the award. The district court concluded that they lacked the authority to modify the award because the double counting at issue only appeared upon looking into the arbitration record. As a result, the court denied Mid Atlantic's motion to modify the award and granted Ms. Bien and Wellman's motion to confirm the award.

After receiving proposed judgements from both parties, the district court entered an amended final judgement. The judgement awarded Ms. Bien and Mr. Wellman damages, attorney's fees, and costs in the same amount that the arbitration panel specified. The court confirmed the 8% yearly prejudgment interest on the damages but did not include interest on the attorney's fees or costs. The court applied the 2.1% federal rate listed in 28 U.S.C. §1961 for post judgment interest. Lastly, the court ordered Ms. Bien and Mr. Wellman to reassign to Mid Atlantic their ownership interests in the investments in Sonoma Ridge Partners and KBS, including any post award distributions.

Both parties filed appeals from the amended final judgement in the Tenth Circuit Court of Appeals. Mid Atlantic's appeal presented one question: Did the district court err by holding that it lacked authority to modify the arbitration award to correct an alleged evident material miscalculation of figures because that miscalculation did not appear on the face of the award? Ms. Bien

and Mr. Wellman raised three questions, asking whether the district court erred by: (1) granting post-award interest on damages, but not on attorney's fees and other costs; (2) awarding post judgment interest at the federal rate; and (3) ordering Ms. Bien and Mr. Wellman to reassign to Mid Atlantic any post-award distributions from their ownership interests in Sonoma Ridge Partners and KBS (as well as interest thereon).

Holding

A. Mid Atlantic's Question

Mid Atlantic's question was broken into two parts. First, whether 9 U.S.C. §11(a) permits courts to look beyond the face of the arbitration award when deciding whether to modify an award. Second, if not, does the face of this arbitration award contain an evident material miscalculation of figures.

1. Part 1

For §11(a) to authorize courts to modify arbitration awards, the award must contain "an evident miscalculation of figures. . ."[14] Mid Atlantic argued that the district court erred in interpreting §11(a) to embody a face-of-the-award limitation. The Tenth Circuit recognized that there is a narrow and deferential standard of review in arbitration context, requiring it to interpret §11(a) as written. By drawing inferences from the text and context of the FAA and looking to the persuasive authority of their sister circuits the Tenth Circuit concluded that §11(a) does embody a face-of-the-award limitation.

The court drew inference from the FAA by interpreting §11(a) as written and giving words their plain meaning when "read in their context and with a view to their place in the overall statutory scheme."[15] Starting with §11(a)'s plain meaning, the court first looked at the phrase "miscalculation of figures." In American English, a "miscalculation of figures" refers to mathematical, not legal, errors.[16] "Material" is found to mean "important; essential; relevant."[17] Then, the court looked to define "evident" which means "plain or obvious."[18] Combining the definitions, the court found §11(a) to allow courts to correct obvious, significant mathematical errors. Even with these dictionary definitions, the court did not find the meaning of "evident" to be evident. The court viewed the issue to be whether a miscalculation must be obvious on the face of the award or after one looks to the arbitration record. To help infer the meaning, the court looked to §11(a)'s context in the FAA.

The FAA's principle purpose is to "ensur[e] that private arbitration agreements are enforced according to their terms."[19] The FAA's purpose is furthered by reading "evident" as relating to a miscalculation appearing on the face of the award. Face-of the award limitations preserve the integrity of the parties' bargain by preserving the deal for an arbitrator's resolution as opposed to a court's. A face-of-the-award interpretation keeps arbitration from being a "prelude to a more cumbersome and time-consuming judicial review process."[20] As the court notes, reading §11(a) to allow courts to hunt through the arbitration record for "evident" miscalculations opens the door to the full-bore legal and evidentiary appeals that the parties contracted to avoid.

The court viewed the face-of-the-award limitation to be part of the "old soil" that §11(a) brought with it from previous New York law.[21] When Congress transplanted "an evident miscalculation of figures" into §11(a), New York courts had long interpreted that phrase to mean a miscalculation that appeared "on its face."[22] The language in §11(a) has been untouched over decades so the court believed that the face-of-the-award limitation that has long been attached to §11(a) is "old soil" and should remain attached.

The structure of the FAA further confirms that the face-of-the-award limitation should be respected. Section 9 of the FAA says that courts "'must' confirm an arbitration award 'unless' it is vacated, modified, or corrected."[23] §11(a) only allows for modification to "address egregious departures from the parties' agreed-upon arbitration.[24] Mid Atlantic's proposed interpretation would change §11(a) from an exception to address egregious departures into a free for all authorization for courts to dig into arbitration records.

The Tenth Circuit recognized that it must use a narrow and deferential standard of review in the context of arbitration. Therefore, the court does "not sit to hear claims of factual or legal error by an arbitrator."[25] Reading §11(a) to allow courts to dive into arbitration records would open arbitration awards to judicial second-guessing, undercutting the narrow standard of review.

Mid Atlantic further argued that "[t]he only way to determine whether a miscalculation or mistake is 'material' is to analyze the [arbitration] record."[26] Meaning, if §11(a) allowed a face-of-the-award limitation, then the term "material" would have no effect. The court found this argument invalid because it is generally evident when there is a material mathematical error in an award without delving into the records.

The court found that it is clear based on the purpose, history, and structure of the FAA that Congress intended §11(a) to function with a face-of-the-award limitation. Section 11(a) allows courts to review an arbitration award, not an arbitration record. The face-of-the-award limitation furthers Congress's goal of providing "just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."[27] This combined with the persuasive authority from sister courts lead the court to conclude §11(a) allows courts to correct only evident material miscalculations that appear on the face of the award.

2. Part 2

Having come to the conclusion that §11(a) does incorporate a face-of-the-award limitation, the court moved on to the second part of Mid Atlantic's question: whether the arbitration award contained an evident material miscalculation of figures.

Mid Atlantic claimed that the arbitration award contained a clear double counting. Mid Atlantic's reasoning was that the $292,411 for initial investment loss represented the net out-of-pocket losses calculated by Ms. Bien and Mr. Wellman's ex-

pert and the $484,683 in compensatory damages represented the $484,684 in market adjusted damages also calculated by the expert. The expert at one point stated that "market-adjusted damages include net out-of-pocket damages."[28] Mid Atlantic stated that by awarding initial investment losses and compensatory damages, the panel mistakenly awarded Ms. Bien and Mr. Wellman damages twice.

Even if the court had accepted this, the issue would have been whether this mistake appeared on the face-of-the-award. It is evident that the mistake did not. The award never mentioned that there was any correlation between the initial investment loss or compensatory damages and net out-of-pocket losses or market-adjusted damages. Therefore, there was no math issue on the face-of-the-award, and Mid Atlantic did not meet its burden of identifying any evident material miscalculation. Therefore, the court upheld the district court's decision to not fix the alleged double recovery in favor of Ms. Bien and Mr. Wellman.

B. Ms. Bien and Mr. Wellman's Questions

The three questions Ms. Bien and Mr. Wellman raised on their cross appeal were whether the district court erred by: (1) granting post-award interest on damages, but not attorney's fees and other costs; (2) awarding post-judgement interest at the federal rate; and (3) ordering Ms. Bien and Mr. Wellman to reassign to Mid Atlantic any post-award distributions from their ownership in Sonoma Rudge Partners and KBS. The court found that the district court did not err in any of these respects.

1. Post-Award Interest on Damages

The court of appeals found that the district court did not err in granting post-award interest only on damages, while not awarding it for attorney's fees and costs. The arbitration award ordered Mid Atlantic to pay Ms. Bien and Mr. Wellman damages, attorney's fees, and arbitration costs. On top of these payments, the arbitration award stated that Mid Atlantic was "liable for and shall pay . . . interest at the rate of 8% per annum beginning February 6, 2015[,] until" each type of damages was "paid in full."[29] The award only mentioned interest on damages, not attorney's fees and costs. The award specifically implied the denial of interest on attorney's fees and costs when it stated,"[a]ny and all claims for relief not specifically addressed herein . . . are denied."[30] The district court did not err in granting interest only on damages and the court affirmed this portion of the amended final judgement.

2. Post-Judgement Interest at Federal Rate

The court of appeals also found that the district court did not err in awarding post-judgment interest at the federal rate. Federal law sets the rate at which post-judgment interest accrues on civil judgments in federal court.[31] Section 9 U.S.C. §13 gives judgements modifying or confirming arbitration awards the "same force and effect" as any other judgement and subjects them to the same "provisions of law."[32] When a district court confirms or modifies an arbitration award, the cause of action underlying the award "merges into the judgement" and the federal rate applies.[33] The parties do have an option to contract around this merger rule, setting forth a different interest rate, but they must express this intent using "clear unambiguous and unequivocal language."[34] The parties did not express their intent to contract around the federal interest rate and, therefore, the district court was correct in applying the federal post-judgement interest rate.

3. Reassignment of Ownership in Sonoma Rudge Partners and KBS

Finally, the court of appeals found that Ms. Bien and Mr. Wellman were unable to show that the district court erred by ordering them to reassign to Mid Atlantic the post-award distributions from their ownership interests in Sonoma Ridge Partners and KBS.

After the service of the arbitration award, Ms. Bien and Mr. Wellman contacted Mid Atlantic about reassigning their investments. Mid Atlantic thought that reassignment at this point was premature because Ms. Bien and Mr. Wellman had moved to vacate the award. Ms. Bien and Mr. Wellman maintained ownership of the investments throughout the district courts proceedings. Like the arbitration award, the district court's ruling ordered Ms. Bien and Mr. Wellman to reassign their ownership in the investments, however the district court clarified that "the reassignment shall include any and all amounts distributed to [Ms. Bien and Mr. Wellman] by the Sonoma Ridge Partners and KBS REIT investments after the [arbitration] award, as well as any interest on such distributions."[35] Ms. Bien and Mr. Wellman argued that the court strayed from the language of the arbitration award and that the initial award did not require them to pay Mid Atlantic the post-award distributions from the investments. This argument failed. They did not cite to any on-point legal authority supporting a finding of error. Ms. Bien and Mr. Wellman were paid cash for the investments post award and both investments if liquidated had no value other than the substantial distribution received for their ownership interests in KBS. They made no credible argument for retaining the distributions, other than the fact that then investment itself had no value. The court found this argument unpersuasive and rejected Ms. Bien and Mr. Wellman's last contention. The court affirmed the amended final judgement in all respects.

Conclusion

Although Ms. Bien and Mr. Wellman were not successful on any of their cross claims, they were successful in affirming the arbitration award and the ruling from the district court. The court was almost hesitant in affirming the face-of-the-award rule in this case. It seemed to agree with Mid Atlantic that the arbitration award granted Ms. Bien and Mr. Wellman double recovery. However, the court believed the law was clear, and there was just nothing it could do to remedy the situation.

The face-of-the-award rule is controversial because it sometimes allows mistakes to go without remedy. It is more than likely that all parties were aware that the arbitration damages correlated with damages calculated by Ms. Bien and Mr. Wellman's expert. It seems clear that Ms. Bien and Mr. Wellman recovered twice. However, if one had no knowledge of the arbitration or the damages calculated by the expert, it would be impossible to see that there was an error made.

The mistake made in this arbitration award was an anomaly, and it would not have been prudent to open the arbitration award to additional scrutiny.

It is not in the spirit of justice to allow someone to recover twice for a single harm. A criminal may not be charged twice for a single crime. Why should a party in a civil suit be required to pay damages twice for a single mistake? Should not a court be able to take reasonable measures to keep this from happening? By not allowing courts to look past the-face-of-the-award, defendants are not only hurt when overpaying damages, but plaintiffs are encouraged to take advantage of the rule and attempt to disguise damages when making their complaints in hopes that a mistake is made so that they can collect more without the courts asking questions.

On the other hand, a face-of-the-award approach ensures that arbitration remains an efficient means to resolve disputes rather than "merely a prelude to a more cumbersome and time-consuming judicial review process."[36] Arbitration is a means to keep our courts from becoming too overcrowded and a face-of-the-award rule helps further mitigate this issue. By keeping parties from claiming that there was a mistake made in an arbitration it helps uphold the reason arbitrations exist: to keep parties from going to court. Without the face-of-the-award rule many more cases would go to court and much more time would be wasted by our justice system.

The mistake made in this arbitration award was an anomaly, and it would not have been prudent to open the arbitration award to additional scrutiny.

But Mid Atlantic v. Bien is a perfect example of why an absolute face-of-the-award standard is not always "just." Ms. Bien and Mr. Wellman were aware that they received a double recovery and took advantage of Mid Atlantic. The ruling of the court, however, is an example of why it is more important to keep arbitrations private to preserve their integrity and usefulness rather than opening a can of worms by allowing courts to analyze what happens in arbitrations so that they can resolve a mistake here or there. The mistake made in this arbitration award was an anomaly, and it would not have been prudent to open the arbitration award to additional scrutiny. That is why the Tenth Circuit joined the Fourth, Sixth, and Eleventh Circuits in affirming the face-of-the-award rule.

**John B. Rich is a 2L in the joint JD/LLM program at the University of Houston Law Center. He received his M.A. in Applied Economics and B.S. in both Finance and Economics at The University of Alabama.*

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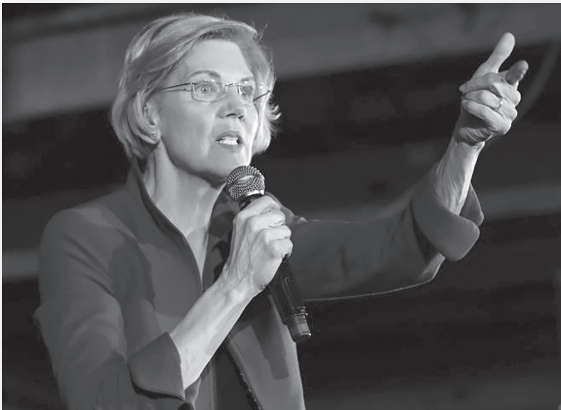
1 Mid Atl. Capital Corp. v. Bien, 956 F.3d 1182, 1191 (10th C ir. 2020).
2 *See* 9 U.S.C. §11(a).
3 *Mid. Atl., supra* note 1, at 1189.
4 *Id*. at 1197, 1203, 1210. *See* Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc., 142 F.3d 188, 194 (4th Cir. 1998), Grain v. Trinity Health, Mercy Health Servs. Inc., 551 F.3d 374 (6th Cir. 2008), Parsons & Whittemore Ala. Mach. & Servs. Corp. v. Yeargin Const. Co., 744 F.2d 1482, 1483–84 (11th Cir. 1984).
5 *Mid. Atl., supra* note 1, at 1187.
6 *Id*.
7 *Id*.
8 *Id*. at 1188.
9 *Id*.
10 *Id*. at 1211 (Quoting Aplt.'s App.,Vol. I, at 28 (Arbitration Award, dated Dec. 12, 2016)).
11 *Mid. Atl., supra* note 1, at 1188.
12 *Id*. at 1189 (Quoting Aplt.'s App., Vol. V, at 1084).
13 *Id*.
14 *See* 9 U.S.C. §11(a).
15 Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743, (2019).
16 *See* Calculate, New Oxford American Dictionary 242 (2d ed. 2005).
17 *Id*. at 1045.
18 *Id*. at 585.
19 AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344, (2011).
20 Hall St. Assoc. v. Mattel, Inc., 552 U.S. 576, at 588 (2008).
21 *Mid. Atl.*, *supra* note 1, at 1194.
22 *See* Remington Paper Co. v. London Assurance Corp. of Eng., 43 N.Y.S. 431 (N.Y. App. Div. 1896) (affirming order concluding that "[t]he party who seeks to set aside an award upon the ground of mistake must show, from the award itself, that but for the mistake the award would have been different.").
23 *Hall St.*, *supra* note 20, at 582.
24 *Id*. at 586.
25 *Stolt-Nielsen*, 559 U.S. at 696.
26 *Mid. Atl.*, *supra* note 1, at 1195.
27 *Hall St.*, *supra* note 20, at 588.
28 *Mid. Atl.*, *supra* note 1, at 1205.
29 Aplt.'s App., Vol. I, at 28.
30 *Id*.
31 *See* 28 U.S.C. §1961; Youngs v. Am. Nutrition, Inc., 537 F.3d 1135, 1146 (10th Cir. 2008).
32 *See* 9 U.S.C. §13.
33 *See* Tricon Energy Ltd. v.Vinmar Int'l, Ltd., 718 F.3d 448, 457 (5th Cir. 2013).
34 *See* Newmont U.S.A., Ltd. v. Ins. Co. of N. Am., 615 F.3d 1268, 1276 (10th Cir. 2010).
35 *Mid. Atl.*, *supra* note 1, at 1211.
36 *Hall St.*, *supra* note 20.

Consumer Bankruptcy Reform Act of 2020



Senator Elizabeth Warren and House Judiciary Chair Jerrold Nadler have introduce the Consumer Bankruptcy Reform Act of 2020. The proposed legislation is designed to simplify and modernize the consumer bankruptcy system to make it easier for individuals and families forced into bankruptcy to get back on their feet. "Our bankruptcy system too often fails to provide financially struggling individuals and families the relief they desperately need," said Senator Warren. Adding, "The Consumer Bankruptcy Reform Act of 2020 will take long overdue steps to make it easier and less expensive for financially-strapped families and individuals to obtain meaningful bankruptcy relief and give Americans a better chance to get back on their feet."

The following letter explaining and supporting the legislation, was drafted by Professor Pamela Foohey, signed by more than 74 consumer law professors, and sent to Senator Warren. For a copy of the letter with all signatories, visit, https://bit.ly/3mjUHJM

December 14, 2020

The Honorable Elizabeth Warren
United States Senate
317 Hart Senate Office Building
Washington DC 20510

Dear Senator Warren:

We are 74 law professors who specialize in bankruptcy and consumer law. We write to express our support for the Consumer Bankruptcy Reform Act of 2020, S.4991. The consumer bankruptcy system is expensive and complex, and it too often fails to provide effective relief. People who need to file bankruptcy can be shut out altogether when they cannot afford to hire an attorney to help them navigate the bankruptcy process. We support the Consumer Bankruptcy Reform Act because it will address these systemic issues as well as many other problems that plague the current consumer bankruptcy system.

Congress enacted our current Bankruptcy Code in 1978. Much has changed since then. Even after adjusting for population growth and inflation, Federal Reserve data show that credit-card debt has tripled. In 1978, student-loan debt was such a small part of household finances that the Federal Reserve did not even separately track it. Today, student-loan debt is the largest component of household debt except for home mortgages. In 1978, asset securitization was in its infancy. Mortgages and auto loans are now routinely bundled and sold to investors, separating the servicing of the loan from the financial institutions that own

the loan. Advances in technology have made it easier for debt collectors to hound consumers even for debts that are decades old. In 1978, what we now think of as the Internet was a little-known research tool for academics instead of a global information revolution that has affected how Americans interact, including with consumer lenders, attorneys, and the court system. Given all these changes, it is little surprise that a forty-year-old bankruptcy law no longer serves our needs today.

The central piece of the Consumer Bankruptcy Reform Act is to create a new chapter 10 for individual bankruptcy filers. The Act also eliminates chapter 7 as an option for individual filers and repeals chapter 13. Individuals will remain able to file under chapter 11 (those with debts over $7.5 million will be required to use that chapter), but for most people, the new chapter 10 will be a single point of entry into the bankruptcy system.

The single point will substantially improve the consumer bankruptcy system by replacing the current structure where consumer debtors must choose between a chapter 7 liquidation bankruptcy or a chapter 13 repayment plan bankruptcy. There are substantial differences around the country in the rates at which people use chapter 7 and chapter 13. In 2019, only 9.6% of the bankruptcy cases in the District of Idaho were chapter 13 cases as compared to 81.0% of the cases in the Southern District of Georgia. The gaping disparity itself is an indictment of a federal system that the Constitution directs to be "uniform."

Because bankruptcy wipes out a filer's obligations, bankruptcy attorneys usually will ask for payment upfront before filing a chapter 7.

Academic studies and media articles have documented that Black households are more likely to end up in chapter 13. Although chapter 13 can be a good choice for people who wish to retain assets they would otherwise lose in a chapter 7, chapter 13 is far more expensive, and it takes years rather than months for a debtor to complete a chapter 13 plan and receive a bankruptcy discharge. Also, more than 50% of chapter 13 debtors do not receive a discharge because they are unable to complete their repayment plan. The racial disparity in chapter choice is deeply troubling, especially given that bankruptcy lawyers must necessarily play a role in the chapter-choice decisions.

For most chapter 10 debtors, relief will be swift. Immediately upon filing a chapter 10 petition, a consumer bankruptcy debtor will face a screen for income and assets reasonably available to pay creditors. Debtors who pass this screen will receive an immediate discharge and be sent on their way. Debtors who have income or assets to pay creditors will have a minimum payment obligation they meet over three years. Debtors will not have to wait to receive a discharge but, if they fail to pay, they will be pursued by the bankruptcy trustee for nonpayment.

A debtor's minimum payment obligation is based on a combination of the value of all nonexempt assets plus the amount by which the debtor's income exceeds 135% of their state's median income for a household of like size. Debtors can satisfy this minimum payment obligation by surrendering nonexempt, unencumbered assets to the bankruptcy trustee or by paying out of future income. These asset and income screens are a reasonable approach to catching the few "can pay" debtors while getting the many more "can't pay" debtors out of the system quickly, efficiently, and cheaply.

The current system often turns on what the debtor spends. In contrast, the new chapter 10 focuses on what the debtor has. By doing so, chapter 10 would get the bankruptcy courts out of the business of making decisions best left to the family. Debtors who want to sacrifice in some areas to meet a payment obligation so their children can attend a private religious school will not have to explain why their decision is reasonable. Debtors with what might be considered nontraditional families will not have to justify the choices they have made about whose expenses belong to the household. Chapter 10 will not be a free ride, but it will recognize the diversity of American households.

Importantly, chapter 10 eliminates unnecessary complexity and useless paperwork and ineffective credit counseling for the vast majority of bankruptcy filers. Although chapter 10 will catch "can pay" debtors, study after study has shown that most every bankruptcy filer arrives in bankruptcy court in dire financial shape, suffering not from bad choices but from bad luck. Under current bankruptcy law, attorneys must document the debtor's income from the past six months even when it is apparent the debtor's income is far below any threshold where it would be legally relevant. These requirements drive up costs to no one's benefit, and understandably lead lawyers to charge more to help with bankruptcy cases because of the increased burdens on their time. The Consumer Bankruptcy Reform Act will allow debtors to establish income with basic documentation and will allow attorneys to rely on that documentation unless it shows that the debtor was within 80% of the relevant threshold. The Consumer Bankruptcy Reform Act also eliminates other unnecessary filing requirements for debtors. In combination with its simpler procedures, chapter 10's streamlined disclosures should lower attorney's fees and provide better access to the bankruptcy system for those who need it.

The Consumer Bankruptcy Reform Act also creates a pathway for people to pay for their attorneys. Because bankruptcy wipes out a filer's obligations, bankruptcy attorneys usually will ask for payment upfront before filing a chapter 7. At present, consumers without the money to afford an attorney might use chapter 13 to pay for that attorney. If so, the cost of their bankruptcy case will now be closer to the $3,800 it costs for a typical chapter 13 rather than the $1,300 it costs for a typical chapter 7. Nevertheless, many people are forced into chapter 13 just to pay for attorney representation, only to have their chapter 13 case fail when they cannot complete the plan payments. The Consumer Bankruptcy Reform Act creates a procedure for debtors to pay their attorneys over time through the bankruptcy plan. Unlike in chapter 13, however, if the debtor is ultimately unable to pay the attorney's fees, the debtor's discharge will not be jeopardized. The Consumer Bankruptcy Reform Act ensures that bankruptcy attorneys are fairly compensated for their services—and thus will continue to provide those services—without letting the fees become an obstacle to access to justice.

The Consumer Bankruptcy Reform Act streamlines the bankruptcy process in other ways. Like current law, it gives a debtor tools to try to save a family home or motor vehicle, but it unpackages those tools into their own separate components. A consumer who is having problems with a home mortgage or an auto loan can use chapter 10 to deal only with that mortgage or auto loan, leaving the rest of the consumer's financial affairs out of the bankruptcy case. By doing so, the Consumer Bankruptcy Reform Act should incentivize a home or auto lender to reach an out-of-court solution for a loan that has fallen behind. If the home or auto lender does not want to cooperate, chapter 10 gives the debtor a tool to deal with that loan only. This streamlined

process should further lower costs to consumers by eliminating the need for a full-blown bankruptcy case just to deal with one troubled loan.

The Bankruptcy Code has never given effective tools for renters to try to stay in their residences. Renters have always been required to immediately catch up on all back rent if they want to keep their residence—usually an impossible task. The Consumer Bankruptcy Reform Act remedies that gap by giving renters the ability to stay in a lease and treat several months of rent arrearage like any other debt.

Bankruptcy is also a type of debt collection procedure, and legal scholarship has documented many abusive debt collection practices spilling over into bankruptcy. Many consumer debts themselves were incurred in violation of various federal and state consumer protection laws. The Consumer Bankruptcy Reform Act tackles these abuses head on. It provides for the disallowance of claims if the underlying debt violates consumer financial protection laws, and it enables debtors to obtain compensation from creditors that harass them in violation of the bankruptcy discharge injunction. The Consumer Bankruptcy Reform Act also gives the Consumer Financial Protection Bureau a role in bankruptcy, enabling the Bureau to appear in bankruptcy cases and to create a process for informal resolution of complaints of individual debtors. Additionally, the Consumer Bankruptcy Reform Act provides much needed updating and inflation indexing of the remedial provisions of federal consumer financial protection laws, which date back to the 1970s without inflation adjustment.

As bankruptcy and consumer law scholars, we have focused this letter on the important structural changes the Consumer Bankruptcy Reform Act would make, but we would be remiss not to mention one specific change that will have great benefits for many consumers. The Act would make student loans like any other debt by making them subject to the bankruptcy discharge. Student loan debt is crushing households across America. Money that would be going into purchasing new homes and building new families is instead going to pay overwhelming student loan debt, often from a predatory educational institution that failed to deliver the education it had promised. Again, chapter 10 will not be a free ride. Debtors who can pay will not be able to walk away from their obligations. For debtors who cannot pay, allowing student-debt relief is not only the right thing to do but also helps the economy by freeing up income for productive investment to help people build their financial lives.

Although we have listed our titles and affiliations below, we speak for ourselves and not our institutions. Similarly, the signatures on this letter should be not be understood as any individual's endorsement of every word of the bill now or after it is amended. The Consumer Bankruptcy Reform Act provides a thoughtful, workable, and comprehensive response to the problems that plague the current consumer bankruptcy system, which is why we support it.

Sincerely,

All 74 signatories may be found at, https://bit.ly/3mjUHJM

Consumer News Alert Recent Decisions

Since 2006, the Center for Consumer Law has published the "Consumer News Alert." This short newsletter contains everything from consumer tips and scam alerts, to shopping hints and financial calculators. It also has a section just for attorneys highlighting recent decisions. The alert is delivered by email three times a week. Below is a listing of some of the cases discussed during the past few months. If a link does not work, it may be necessary to cut and paste it to your browser. To subscribe and begin receiving your free copy of the Consumer News Alert in your mailbox, visit http://www.peopleslawyer.net/

U.S. SUPREME COURT

Supreme Court refuses to review ruling endorsing class action arbitration. In 2019, the Second Circuit found that class arbitration works just fine, so long as the entire putative class executed identical arbitration agreements that incorporated the rules of the American Arbitration Association (AAA) and do not include an express class action waiver. The court observed that the incorporation of the AAA rules into the RESOLVE Program agreement gave the arbitrator the power under those rules to decide issues of arbitrability.

Sterling Jewelers then applied for certiorari, asking the Supreme Court to consider whether an arbitrator can certify a class and bind all parties – including absent class members – without finding that all members of the putative class consented to the process. The Supreme Court denied Sterling Jewelers' application.

Jock v. Sterling Jewelers Inc., 942 F.3d 617 (2d Cir. 2019), *cert. denied*, No. 19-1382, S. Ct., WL 5882321 (U.S. Oct. 5, 2020). https://law.justia.com/cases/federal/appellate-courts/ca2/18-153/18-153-2019-11-18.html.

Questions of arbitration agreement formation must be decided by a Court. The Tenth Circuit held that a challenge to whether an arbitration agreement was ever formed can only be resolved by a court, even if the arbitration agreement delegates issues of arbitrability to the arbitrator.

The court began by reviewing U.S. Supreme Court case law on delegation clauses in arbitration agreements. "While courts typically resolve 'arbitrability' issues such as the validity, scope, or enforcement of an arbitration contract, delegation clauses within arbitration contracts can commit the determination of such issues to an arbitrator." "The delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement." The Supreme Court has "recognized that parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." "An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other."

The court then noted, "But not all arbitrability issues can be delegated." Analyzing the Supreme Court's directives in *Rent-A-Center* and *Granite City*, the Tenth Circuit concluded that, "while issues such as the 'scope' and 'enforceability" of an arbitration clause can be committed to an arbitrator through a '[delegation] provision,' courts must 'always' resolve 'whether the clause was agreed to' by the parties." "The issue of whether an arbitration agreement was formed between the parties must always be decided by a court, regardless of whether the alleged agreement contained a delegation clause or whether one of the parties specifically challenged such a clause." "Courts must therefore first determine whether an arbitration agreement was indeed formed before enforcing a delegation clause therein."
Fedor v. United Healthcare, No. 19-2066, 2020 WL 5540551 (10th Cir. Sep. 16, 2020). https://law.justia.com/cases/federal/appellate-courts/ca10/19-2066/19-2066-2020-09-16.html.

FEDERAL CIRCUIT COURTS OF APPEALS

Court revives suit over "100% Parm Cheese label." The Seventh Circuit has given new life to claims that grated cheese made by Kraft Heinz Co. misleads consumers by claiming to be "100% Grated Parmesan Cheese," saying the question of whether consumers would be misled is a factual dispute that can't be decided at a motion to dismiss

While the district court had found that the ingredients list — which shows that the cheese contains other ingredients — cures the alleged deception of the front label, the panel judges found that this is asking too much of the average customer, who is unlikely to scrutinize the labeling the way attorneys or judges would. "Consumer-protection laws do not impose on average consumers an obligation to question the labels they see and to parse them as lawyers might for ambiguities, especially in the seconds usually spent picking a low-cost product," the panel wrote.

> According to the court, if there are multiple ways to interpret a label, and one of those ways is deceptive, then it's up to a factfinder to decide if consumers would be misled.

Bell et al. v. Albertson Companies Inc., et al., No. 19-2741, and Bell et al. v. Publix Super Markets Inc. et al., No. 19-2581, in the U.S. Court of Appeals for the Seventh Circuit. https://www.govinfo.gov/content/pkg/USCOURTS-ca7-19-02741/pdf/USCOURTS-ca7-19-02741-0.pdf.

Consumer bound by arbitration clause against acquired company. The Fourth Circuit held that a West Virginia woman must arbitrate claims that DirecTV violated the Telephone Consumer Protection Act because she is bound by a contract she signed with AT&T before it acquired the satellite TV provider.

A split three-judge panel ruled that Diana Mey signed an arbitration agreement with AT&T Inc. upon opening a new line of service in 2012 and that arbitration clause was extended to potential TCPA claims against DirecTV LLC when the telecommunications company acquired the satellite service provider in 2015.

The 2012 agreement mandated that disputes against AT&T and its "affiliates" go to arbitration, and DirecTV is considered an "affiliate" of AT&T due to the 2015 acquisition, the majority said the agreement extended its protections against litigation to DirecTV.
Diana Mey v. DirecTV LLC, No. 18-1534, in the U.S. Court of Appeals for the Fourth Circuit. https://www.govinfo.gov/content/pkg/USCOURTS-ca4-18-01534/pdf/USCOURTS-ca4-18-01534-0.pdf.

Consumer bound to terms of 2014 arbitration agreement. The Ninth Circuit held that a former Experian subscriber must arbitrate her false advertising claims against the consumer credit reporting company. The court found that her single visit to the Experian website in 2018 does not allow her to invoke the company's updated arbitration terms, which are more lenient than the ones she agreed to when she bought its services years earlier in 2014.

"Stover assented only once to the terms of a single contract that Experian later modified without providing notice," the court said. "Stover had no obligation to investigate whether Experian issued new terms without providing notice to her that it had done so. Indeed, the opposite rule would lead to absurd results: contract drafters who included a change-of-terms provision would be permitted to bind individuals daily, or even hourly, to subsequent changes in the terms."
Rachel Stover v. Experian Holdings, Inc. et al., No. 19-55204, in the U.S. Court of Appeals for the Ninth Circuit. https://cdn.ca9.uscourts.gov/datastore/opinions/2020/10/21/19-55204.pdf.

FAA does not apply to independent contractor's class action wage claims. The United States Court of Appeals for the First Circuit ruled on the transportation worker exemption contained in Section 1 of the Federal Arbitration Act (FAA). The court upheld a district court's decision not to compel Amazon "AmFlex" delivery drivers (who are independent contractors) to arbitrate their wage claims.

The Federal Arbitration Act sets forth a procedural framework that requires courts to treat arbitration agreements as "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." While the FAA applies broadly, Section 1 of the statute renders its provisions inapplicable to contracts of employment of seamen, railroad employees, and other transportation workers engaged in interstate commerce. The First Circuit addressed the question whether AmFlex drivers who do not cross state lines themselves, but who deliver goods that have crossed state lines, qualify as transportation workers "engaged in foreign or interstate commerce" who are exempt from the FAA under Section 1.

The court then addressed Amazon's argument that Waithaka and the other AmFlex delivery drivers in his putative class were not engaged in interstate commerce, and thus were not covered by the transportation worker exemption, because they operated entirely within Massachusetts and did not themselves carry goods across state lines. The court rejected Amazon's "cramped construction" of the transportation worker exemption, reasoning that "regardless of whether the workers themselves physically cross state lines[,] … [b]y virtue of their work transporting goods or people 'within the flow of interstate commerce,' … Waithaka and other AmFlex workers are 'a class of workers engaged in … interstate commerce.'"
Waithaka v. Amazon.com, Inc., 966 F.3d 10 (1st Cir. 2020). https://law.justia.com/cases/federal/appellate-courts/ca1/19-1848/19-1848-2020-07-17.html.

Arbitration awards cannot be modified unless a material miscalculation appears on the face of the award. An arbitration panel awarded a couple more than $777,000 in damages along with attorney fees and costs of arbitration. Defendant asked a Colorado federal court to modify the damage award pursuant to section 11(a) of the Federal Arbitration Act based on "an evident material miscalculation of figures." Defendant claimed that the panel had accidently awarded the couple a double recovery instead of only awarding one of the alternative measure of damages offered by the couple's damages expert.

On appeal, the Tenth Circuit first considered Section

11(a)'s plain meaning. That section provides, in relevant part, that a court may modify an award if it contains "an evident material miscalculation of figures." The court found that, in ordinary English, a "miscalculation of figures" refers to mathematical, not legal, errors; that "material" means important, essential or relevant; and that "evident" means plain or obvious. Section 11(a) thus allows courts to correct obvious, significant mathematical errors.

The court focused, however, on whether the term "evident" meant that the error had to be obvious on the face of the award or after one looked to the arbitration record. Because the text could support either possibility, the court considered that a "face-of-the-award limitation" best supported the FAA's purposes. Mid Atlantic Corp. v. Bien, Nos. 18-1195 and 18-1200 (10th Cir. Apr. 14, 2020). https://law.justia.com/cases/federal/appellate-courts/ca10/18-1195/18-1195-2020-04-14.html.

Auto dialer that dials from a stored list of numbers only—qualifies as an ATDS, under TCPA.
The Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq. ("TCPA"), contains an auto dialer ban, which generally makes it a finable offense to use an automatic telephone dialing system ("ATDS") to make unconsented-to calls or texts

The question in this case is whether, as a matter of statutory interpretation, the Avaya auto dialer system that PHEAA uses to make collection-related calls qualifies as an ATDS. Although it is clear from the text of the auto dialer definition under § 227(a) that a device that generates and dials random or sequential numbers qualifies as an ATDS, it is not clear whether a device like the Avaya system—that dials from a stored list of numbers only—qualifies as an ATDS. Fortunately, related provisions clear up any ambiguity. We hold that the plain text of § 227, read in its entirety, makes clear that devices that dial from a stored list of numbers are subject to the auto dialer ban.
Allan v. Pennsylvania Higher Education Assistance Agency, No. 19-2043 (6th Cir. Jul. 29, 2020). www.opn.ca6.uscourts.gov/opinions.pdf/20a0233p-06.pdf

Debt collector's failure to use the FDCPA's precise language in its notices is not a violation. The Second Circuit affirmed the dismissal of plaintiff's action under the FDCPA because the debt collector did not omit statutorily required information in a debt collection notice it sent to plaintiff seeking rental arrears. The court noted that the failure to use the FDCPA's precise language in its notices was not a violation, as there was no requirement in the statute that any of its provisions be quoted verbatim. The court also found that the Plaintiff's argument that the debt collector violated 15 U.S.C.§1692g lacked merit because the least sophisticated consumer would not, upon reading a letter stating that she had the right to dispute that she owed rent arrears totaling $12,209.26, rationally think that she did not also have a right to dispute a portion of that debt.
Chaperon v. Sontag & Hyman, PC, No. 19-4244, 2020 U.S. App. LEXIS 28176 (2d Cir. 2020). https://casetext.com/case/chaperon-v-sontag-hyman-pc-1.

Omitting a favorable credit item does create a misleading credit report. The Fifth Circuit affirmed a district court's dismissal of a plaintiff's FCRA claims against two consumer reporting agencies (CRAs), holding that omitting a favorable credit item does not render a credit report misleading.

The plaintiff filed a lawsuit after the CRAs stopped reporting a favorable item—a timely paid credit card account—and refused to restore it, alleging that the refusal to include the item on his consumer report violated section 1681e(b), which requires CRAs to follow "reasonable procedures to assure maximum possible accuracy" of consumer information. As a result, the plaintiff claimed his creditworthiness was harmed, which caused him to be denied a credit card and rejected for a mortgage. The district court dismissed the suit.

The 5th Circuit found that the omission of a single credit item does not render a report "inaccurate" or "misleading." According to the court, a "credit report does not become inaccurate whenever there is an omission, but only when an omission renders the report misleading in such a way and to such an extent that it can be expected to adversely affect credit decisions." As such, "[b]usinesses relying on credit reports have no reason to believe that a credit report reflects all relevant information on a consumer." The Fifth Circuit further held that the plaintiff failed to state a claim for violations of section 1681i(a), which requires agencies to conduct an investigation if consumers dispute "the completeness or accuracy of any item of information contained in a consumer's file." The court held that because the plaintiff "disputed the completeness of his credit report, not of an item in that report," the statute did not require an investigation.
Hammer v. Equifax Info. Servs., No. 19-10199 (5th Cir., Sep. 2020).
https://buckleyfirm.com/sites/default/files/Buckley%20InfoBytes%20-%20Hammer%20v.%20Equifax%20et%20al%20-%20Fifth%20Circuit%20Opinion%202020.09.09.pdf

Class-action "incentive" awards are prohibited. The Eleventh Circuit held that so-called "incentive" or "service" awards to named class-action plaintiffs are unlawful. That is, in a class-action settlement, a named plaintiff may not be paid extra money (over and above money paid to *all* class members) as reimbursement/compensation for her efforts on behalf of the class or as an incentive to act as a representative plaintiff.

As recognized by the court, such awards are common in most class actions. The court noted that, "in approving the settlement here, the district court repeated several errors that, while clear to us, have become commonplace in everyday class-action practice." The district court awarded the class representative a $6,000 "[i]ncentive [p]ayment," as "acknowledgment of his role in prosecuting th[e] case on behalf of the [c]lass [m]embers." Relying on two Supreme Court cases from the1800s, the court stated, "in so doing, we conclude, the court ignored on-point Supreme Court precedent prohibiting such awards.

The court recognized, however, that the District Court was acting as most other courts act. "We don't necessarily fault the district court—it handled the class-action settlement here in pretty much exactly the same way that hundreds of courts before it has handled similar settlements. But familiarity breeds inattention, and it falls to us to correct the errors in the case before us."
Johnson v. NPAS Solutions, No. 18-12344 (11th Cir., Sep. 17, 2020). https://media.ca11.uscourts.gov/opinions/pub/files/201812344.pdf.

Arbitration award stands despite alleged misrepresentation of contract. The Eleventh Circuit refused to vacate an employee's arbitration award for nearly $4 million for wrongful termination based on the employer's claim that the arbitration panel misinterpreted the parties' employment and arbitration agreements in

The employee brought several claims in arbitration, including a claim for wrongful termination, when his employer fired him three days after he sent his employer a letter threatening to challenge in arbitration a "final warning" letter, which he received from his employer after he allegedly behaved inappropriately and aggressively towards his colleagues. Despite language in the employment agreement, which indicated that the employee was employed "at will" and could be terminated at any time and

for no reason, the arbitration panel ruled in the employee's favor on the wrongful termination claim.

The employee moved to confirm the award, and the employer moved to vacate it. The U.S. District Court for the Southern District of Florida granted the employer's motion to vacate, reasoning that the arbitrators "exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4). The employee appealed.

On appeal, the majority emphasized the "very narrow[]" nature of § 10(a)(4) as "among the narrowest known to the law." A serious interpretive error does not justify vacatur under § 10(a)(4). After all, the court reasoned, the "'sole question' under § 10(a)(4) . . . is 'whether the arbitrator (even arguably) interpreted the parties' contract, not whether she got its meaning right or wrong.'"

Gherardi v. Citigroup Global Markets Inc., (11th Cir. Sept. 17, 2020). https://cases.justia.com/federal/appellate-courts/ca11/18-13181/18-13181-2020-09-17.pdf?ts=1600349438.

Who decides if an agreement subject to arbitration exists? The Third Circuit recently addressed what's been called the "queen of all threshold issues" in arbitration law: does a court or an arbitrator decide whether an agreement exists, if the purported agreement delegates that decision to an arbitrator? The Court answered this circular question by holding that, under the Federal Arbitration Act, questions about the making of an agreement to arbitrate are for the courts to decide "unless the parties have clearly and unmistakably referred those issues to arbitration in a written contract whose formation is not in issue." In the instant case, formation of the contract was in dispute, so the Court had authority to decide whether an agreement existed.

In MZM Constr. Co. v. N.J. Bldg. Laborers Statewide Benefit Funds, (3rd Cir. 2020).
https://www2.ca3.uscourts.gov/opinarch/183791p.pdf.

Enforcement of arbitration clause would lead to "absurd results." A split Ninth Circuit on affirmed a lower court's ruling that DirectTV can't force a customer accusing the company of placing unauthorized robocalls to arbitrate his claims. The court held that to enforce an agreement he signed with AT&T before it purchased DirecTV would lead to "absurd results."

The 2-1 opinion authored by Circuit Judge Diarmuid Fionntain O'Scannlain held that the Federal Arbitration Act does not preempt California law requiring courts to interpret contracts to avoid absurd results. The majority acknowledged its ruling is in contrast to a recent Fourth Circuit opinion that examined an "identical" arbitration clause also applied to Telephone Consumer Protection Act claims.

Because the plaintiff in the proposed class action signed an arbitration agreement with AT&T, the panel's majority said that under DirecTV's interpretation of the agreement, Revich "would be forced to arbitrate any dispute with any corporate entity that happens to be acquired by AT&T, even if neither the entity nor the dispute has anything to do with providing wireless services to plaintiff— and even if the entity becomes an affiliate years or even decades in the future."

The panel added, "No one disputes that arbitration clauses subject to the [Federal Arbitration Act] must be enforced in federal courts. But we are mindful that arbitration is a matter of consent, and we conclude that DirecTV has failed to establish that Revitch consented to arbitrate this pending dispute."

Jeremy Revitch v. DirecTV LLC (9th Cir., 2020) https://cdn.ca9.uscourts.gov/datastore/opinions/2020/09/30/18-16823.pdf

Dunning letter stating zero balance for interest not misleading under FDCPA. Plaintiff Joseph Degroot defaulted on a credit card debt, which was subsequently placed with a collection agency. The agency sent the plaintiff a collection letter stating that "interest and fees are no longer being added to your account," which the plaintiff took to mean that the account had been charged off. The debt was then placed with a second agency, which sent the plaintiff its own collection letter that included an itemized breakdown of the debt, as follows:

Balance Due at Charge-Off: $425.86
Interest: $0.00
Other Charges: $0.00
Payments Made: $0.00
Current Balance: $425.86

The district court granted the defendant's motion to dismiss, finding that the second letter had accurately and correctly disclosed the amount of the debt, and that letter did not imply fees or interest would be added to the debt in the future. The court also noted that even if the letter did imply that fees and interest would begin to accrue at a later date if the debt remained outstanding, the statement was not false or misleading given that state law provided for the assessment of fees and interest on "static" debts in certain circumstances.

Degroot v. Client Services (7th Cir., 2020). https://law.justia.com/cases/federal/appellate-courts/ca7/20-1089/20-1089-2020-10-08.html

Debt collector's letter may overshadow validation notice. The Second Circuit recently reversed a District Court decision and held that a law firm's letter threatening imminent litigation may have violated the FDCPA. The defendant law firm sent a collection letter to plaintiff seeking to collect a debt. Although the letter included the standard validation notice informing the debtor of his right to dispute the debt within 30 days, it also include language that the firm had been instructed to commence a lawsuit, that there may be "no further notice" before the filing of the lawsuit, that a lawsuit could be avoided by paying "now," and that the debtor may be liable for defendant's attorneys' fees in the lawsuit. The debtor then brought this action under the FDCPA, alleging violations because (i) the language about an imminent lawsuit overshadowed the required 30-day validation notice, and (ii) the claim about attorneys' fees was false. Defendant filed a motion to dismiss, and the District Court dismissed the action.

The second Circuit reversed. The Court found that the threatening language overshadowed the validation notice in violation of the FDCPA. "Even if the letter does not literally demand immediate payment, these warnings, combined with the all-caps admonition that no further notice might follow before a lawsuit is filed, could have created the misimpression that immediate payment is the consumer's only means of avoiding a parade of collateral consequences, thereby overshadowing the consumer's validation rights."

Mizrachi v. Wilson, Elser, Moskowitz, Edelman & Dicker LLP, 2020 WL 6494875 (2d Cir. Nov. 5, 2020). https://www.courtlistener.com/opinion/4803593/mizrachi-v-wilson-elser-moskowitz-edelman-dicker-llp/.

FEDERAL DISTRICT COURTS

DTPA claim is not added to Magnuson-Moss for purposes of amount in controversy.

Plaintiff sued BMW under Magnuson-Moss and the DTPA. Plaintiff sued in federal court claiming the amount in controversy exceeded the $50,000 required by Magnuson-Moss. The court found that the amount alleged for warranty damages under

Magnuson-Moss did not exceed the statutory limit. Plaintiff then argued that the amount recoverable under the DTA should be added to the amount in controversy amount. The court disagreed. It found noted that, while the Court could consider treble damages under the DTPA if it were conducting a diversity jurisdiction analysis of the amount in controversy…, the Court may not do so when determining the amount in controversy in an MMWA claim.
Alam v. BMW of N. Am., LLC, 2020 U.S. Dist. LEXIS 134220 (W.D. Tex. 2020). https://casetext.com/case/alam-v-bmw-of-n-am-llc.

The mere fact that a franchisor violated the FTC Rule did not give rise to a claim under the Texas DTPA. United States District Court for the Western District of Texas examined whether a violation of an FTC rules automatically gives rise to a claim under the DTPA. The court recognized that some Texas courts have allowed a violation of the FTCA to be used as the basis for finding an independent violation of the Texas DTPA. *See Texas Cookie Co. v. Hendricks & Peralta, Inc.*, 747 S.W.2d 873, 877 (Tex. App.-Corpus Christi 1988, writ den.). However, the Fifth Circuit recently pointed out that "no provision of Texas or Federal Law declares violations of the FTC Franchise Rule to be actionable deceptive trade practices under the Texas DTPA." *Yumilicious Franchise, L.L.C. v. Barrie*, 819 F.3d 170, 176 (5th Cir. 2016). The court in the instant case followed the Fifth Circuit.
Arruda v. Curves Int'l, Inc., No. 6:20-cv-00092-ADA, 2020 U.S. Dist. LEXIS 132273 (W.D. Tex. 2020). https://casetext.com/case/arruda-v-curves-intl-inc.

Consumer Reporting Agency must reinvestigate disputed inquiries. The Eastern District of Pennsylvania provided some helpful clarifications regarding the reinvestigation obligations of a consumer reporting agency ("CRA") under the Fair Credit Reporting Act ("FCRA"). Section 611(a) of the FCRA requires a CRA to conduct a reasonable reinvestigation of any item of information in a consumer's file if the consumer alleges the item to be inaccurate.

A home security company called Safe Home pulled a credit report on the plaintiff. Not only did he not authorize Safe Home to do so, he explicitly instructed them not to. The plaintiff noticed the inquiry on this credit report and disputed the inquiry with TransUnion ("TU"), the CRA that had prepared the credit report. When plaintiff called TU to dispute, they told him they could not remove the inquiry and to call Safe Home.

While TU conceded that the plaintiff had lodged the dispute and that it conducted no reinvestigation, TU asserted several arguments as to why it was not obligated to do so. TU was not obligated to reinvestigate because plaintiff's file was accurate. The court found that while the inquiry in this case was technically accurate, it was misleading and, therefore, inaccurate:

TU did not have to reinvestigate because plaintiff did not preliminarily "show" an inaccuracy. As long as the accuracy of some piece of information in the consumer's file is disputed directly with a CRA, a consumer has fulfilled his duty to trigger the CRA's reasonable reinvestigation obligation; and TU's duty to reinvestigate is limited to information provided by furnishers. Section 611 explicitly grants consumers the right to dispute the "completeness or accuracy of any item of information contained in a consumer's file," subject to two exceptions not relevant in this case.

Having found plaintiff satisfied the requirements for class certification and TU's arguments to be lacking, the court granted class certification.

Norman v. Trans Union, Inc., No. 18-5225, 2020 U.S. Dist. LEXIS 146642 (E.D. Pa. Aug. 14, 2020). https://www.leagle.com/decision/infdco20200817b26.

Claim arising from servicing of loan does not give rise to DTPA consumer status. The District Court for the Eastern District of Texas considered whether a plaintiff was a consumer when claims relate to the servicing of her loan. Performance of any services incidental to the loan transaction, such as acceleration, abandonment, and foreclosure, does not transform Plaintiff into a "consumer" under the DTPA. The court cited *Sgroe v. Wells Fargo Bank, N.A.*, 941 F. Supp. 2d 731, 746 (E.D. Tex. 2013), wherein the court found the mortgagor was not a consumer because, "it is undisputed that [the plaintiff]'s claims arise out of a loan and do not involve the purchase or lease of either goods or services." The court concluded "Plaintiff here is similarly not a consumer under the DTPA."
Pittman v. U.S. Bank NA, No. 4:19-CV-00397-RWS, 2020 U.S. Dist. LEXIS 175739 (E.D. Tex. 2020). https://cases.justia.com/federal/district-courts/texas/txedce/4:2019cv00397/189945/73/0.pdf?ts=1588930045.

Letter that provides notice of change in debt ownership may be actionable under FDCPA. The U.S. District Court for the Middle District of Florida denied a debt collector's motion for summary judgment, holding that a letter which provides notice of a change in debt ownership and requests payments be remitted to the new owner qualifies as a communication related to a debt under the Fair Debt Collection Practices Act ("FDCPA"), which restricts how debt collectors can collect from debtors. The court noted that that a communication from a debt collector can have dual purposes, such as giving notice and demanding payment.
Valenzuela v. Axiom Acquisition Ventures, LLC.
https://casetext.com/case/valenzuela-v-axiom-acquisition-ventures-llc

N.J. District Court permits incentive awards for named plaintiff. As noted earlier in this *Alert*, in *Johnson v. NPAS Sols., LLC*, No. 18-12344 (11th Cir. Sep. 17, 2020), the Eleventh Circuit invalidated the use of incentive awards for named plaintiffs in a TCPA class action as inconsistent with the Federal Rules. Now, in at least one circuit, the practice has been deemed unlawful.

In *Johnson* the court held, "A plaintiff suing on behalf of a class can be reimbursed for attorneys' fees and expenses incurred in carrying on the litigation, but he cannot be paid a salary or be reimbursed for his personal expenses." Although it noted that incentive awards are commonplace in class actions, the Eleventh Circuit found them to be unlawful and reversed the district court's approval of a $6,000 payment to the class representative. District Courts in the Eleventh Circuit have already rejected class settlements that include incentive payments.

At least one court outside the Eleventh Circuit, however, has recently rejected the holding in *Johnson*, paving the way for a circuit split. The New Jersey District Court noted that "Until and unless the Supreme Court or Third Circuit bars incentive awards or payments to class plaintiffs, they will be approved by this Court if appropriate under the circumstances. Here the incentive payments to the class plaintiffs is appropriate given their substantial contribution to the successful settlement of the case."
Somogyi v. Freedom Mortgage Corp., *2020 WL 6146875, *9 (Oct. 20, 2020).* https://www.govinfo.gov/content/pkg/USCOURTS-njd-1_17-cv-06546/pdf/USCOURTS-njd-1_17-cv-06546-0.pdf.

STATE COURTS

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.). https://casetext.com/case/webb-v-ellis-2.

Deceptive meeting voids law firm's arbitration clause. A Texas appellate court has declined to enforce an arbitration clause in a dispute between an automobile crash victim and a law firm, finding the trial judge had enough evidence to determine the man was "tricked" into signing a contract that contained an arbitration provision.

A Fifth Court of Appeals panel upheld the ruling in favor of injured motorist Eric Herman, declining to send the dispute with Law Firm PLLC to arbitration. Herman had alleged a non-attorney representative of the firm met with him for less than 10 minutes at a McDonald's, told him the paperwork he was asked to sign was not a contract, and refused to provide Herman a copy.

But what Herman signed was actually a lawyer-client agreement, in which he agreed to arbitrate any dispute with the law firm, and which entitled the firm to a contingency fee of 35% to 48% of any recovery in his collision suit, according to the opinion. Daspit Law Firm PLLC v. Eric Herman and Law Offices of Anjel K. Avant PLLC, dba Avant Law Firm, No. 05-19-00615-cv, in the Fifth Court of Appeals of Texas. https://law.justia.com/cases/texas/fifth-court-of-appeals/2020/05-19-00615-cv.html.

Nominal damages are not available when the harm is entirely economic and subject to proof. Lost profits must be shown with reasonable certainty. First Service Credit Union refused to provide funds to plaintiff Chehab immediately after the deposit of a wire transfer. Plaintiff filed suit alleging breach of contract, breach of fiduciary duty and DTPA, because his deposit contract with the bank required it to make funds available immediately. The court of appeals found nominal damages were not recoverable, noting that "by pleading for monetary damages, Chehab is not entitled to recover nominal damages."

The court also noted that damages are a required element of each of Chehab's claims. To avoid summary judgment when presented with a no-evidence motion, an injured party must do more than show that he suffered some lost profits. He must show the amount of the loss by competent evidence with reasonable certainty. At a minimum, opinions or estimates of lost profits must be based on objective facts, figures, or data from which the amount of lost profits may be ascertained. The court concluded, "Chehab's claims did not raise a genuine issue of fact as to whether Chehab suffered any lost profits damages resulting from First Service's alleged breach of contract, breach of fiduciary duty, or violation of the DTPA."
Chehab v. First Serv. Credit Union, 2020 Tex. App. LEXIS 7136 (Tex. App.—Houston [14th Dist.] 2020, no pet. h.). https://cases.justia.com/texas/fourteenth-court-of-appeals/2020-14-18-00969-cv.pdf?ts=1599135339.

DTPA consumer established reliance, knowledge, producing cause, and a corporate agent may be individually liable under DTPA. In an interesting DTPA opinion, the Austin Court of Appeals discusses numerous provisions of the DTPA to conclude that the consumer has established liability and a knowing violation of the Act.
Kerr v. Lambert, No. 03-19-00359-CV, 2020 Tex. App. LEXIS 8387 (Tex. App.—Austin Oct. 23, 2020). https://casetext.com/case/kerr-v-lambert.

Arbitration does not require signature to be enforceable unless express language requires it. A Houston Court of Appeals reviewed whether an employee's agreement to arbitrate disputes was valid. The court noted that the strong policy favoring arbitration applies only after a valid agreement is established. It then reviewed the agreement at issue and held that the failure of the employer to sign the agreement did not invalidate it.
SK Plymouth v. Simmons, 605 S.W.3d 706 (Tex. App.—Houston [1st Dist.] 2020). https://casetext.com/case/sk-plymouth-llc-v-simmons-5.

A Texas Court of Appeals held that a person modifying a loan cannot qualify as a consumer under the DTPA. The court noted that "Generally, a person cannot qualify as a consumer if the underlying transaction is a pure loan because money is considered neither a good nor a service." The court also held that the Texas Debt Collection Act does not apply because statements regarding loan modifications do not concern the "character, extent, or amount of consumer debt" for purposes of the TDCA. *Compass Bank v. Collier,* 2020 Tex. App. LEXIS 8646 (Tex. App.—Beaumont 2020). https://cases.justia.com/texas/ninth-court-of-appeals/2020-09-19-00112-cv.pdf?ts=1604582128.

FEDERAL NEWS

FINRA postpones in-person arbitrations and mediations until 2021. Due to the COVID-19 pandemic, FINRA has extended the postponement of all in-person arbitration and mediation hearings scheduled through January 1, 2021. If parties decide to postpone an in-person hearing, the postponement will not affect other case deadlines. However, if all parties and arbitrators agree to proceed in-person based on their own assessment of public health conditions, and applicable state and local orders allow, a case may proceed with an in-person hearing provided that the participants comply with state and local orders related to the COVID-19 pandemic.
Parties may also opt to proceed telephonically or by Zoom, or a panel may order that the hearings take place telephonically or by Zoom. For more information, click here, https://www.finra.org/rules-guidance/key-topics/covid-19/arb-hearings

The Consumer Financial Protection Bureau recently released the Debt Collection Final Rule. With the rule, the Bureau also began releasing compliance aids to assist industry. As the implementation period for the final rule progresses, the Bureau will continue to provide more compliance aids.

To provide more clarity and transparency on how the Bureau provides assistance during the implementation period, the Bureau has developed this resource that provides an overview of the Regulatory Implementation and Guidance (RIG) team at the Bureau, the RIG team's strategy for providing assistance to industry, and instructions for how to find compliance aids related to the Debt Collection Final Rule. It also provides a link to the Bureau's Debt Collection compliance aid resource webpage, your dedicated access point to Debt Collection materials such as compliance aids, supervisory guidance, and any subsequent rules the Bureau publishes regarding debt collection.

DECEPTIVE TRADE PRACTICES AND WARRANTY

DTPA CLAIM IS NOT ADDED TO MAGNUSON-MOSS FOR PURPOSES OF AMOUNT IN CONTROVERSY

Alam v. BMW of N. Am., LLC, ___ F. Supp. 3d ___ (W.D. Tex. 2020).
https://casetext.com/case/alam-v-bmw-of-n-am-llc-1

FACTS: Plaintiff Mohammed Alam purchased a certified pre-owned BMW vehicle from Defendant BMW of Austin (BMW). After the purchase, Alam discovered that the vehicle's engine was defective.

Alam filed suit against BMW, alleging express and implied warranty claims under the Magnuson-Moss Warranty Act (the "MMWA") and violations of Texas Deceptive Trade Practices Act ("DTPA"). BMW filed a motion to dismiss for lack of subject matter jurisdiction.

HOLDING: Motion granted.

REASONING: Alam asserted that the court had jurisdiction over this case because of the federal question raised by his MMWA claim, along with pendent jurisdiction over the remaining claims. The MMWA contains its own "amount in controversy" requirement, providing that "if the amount in controversy is less than the sum or value of $50,000 (exclusive of interests and costs) computed on the basis of all claims to be determined in th[e] suit," the federal courts lack jurisdiction. 15 U.S.C. § 2310(d)(3)(B)). Alam argued that the court must include the DTPA damages in the MMWA "amount in controversy" analysis. Alam claimed that there was more than $50,000 at issue by trebling his damages under the DTPA or, in the alternative, by arguing that he was entitled to a refund of the full purchase price of the car under the DTPA.

Damages for any pendent state-law claims should not be included to satisfy the jurisdictional amount under the MMWA.

The court rejected Alam's assertions. Citing Fifth Circuit precedent, the court held that damages for any pendent state-law claims should not be included to satisfy the jurisdictional amount under the MMWA. Thus, while the court could consider treble damages under the DTPA if it were conducting a diversity jurisdiction analysis of the amount in controversy, the court may not do so when determining the amount in controversy in an MMWA claim.

CLAIM ARISING FROM SERVICING OF LOAN DOES NOT GIVE RISE TO DTPA CONSUMER STATUS

Pittman v. U.S. Bank NA, ___ F. Supp. 3d ___ (E.D. Tex. 2020).
https://casetext.com/case/pittman-v-usbank-na

FACTS: Plaintiff Cheryl Pittman obtained a loan (the "Note"), secured by conveying a security interest in a purchased property. Plaintiff conveyed the security interest by executing a "Deed of Trust" (with the Note, the "Loan"). Defendants U.S. Bank NA, Successor Trustee to Bank of America, NA, Successor in Interest to LaSalle Bank NA ("Trustee Bank") asserted that it was the owner and holder of the Note. Trustee Bank was the beneficiary of the Deed of Trust by assignment and a Purchase Agreement. Defendant Select Portfolio Servicing, Inc. ("SPS") serviced the Loan. Plaintiff defaulted under the terms of the Loan. Following communications between the parties, the sale of the property proceeded, and the Trustee Bank purchased the Property.

Plaintiff sued Defendants, alleging Deceptive Trade Practices Act ("DTPA") violations. The magistrate judge found in their proposed findings of fact (the "Report") that the Plaintiff failed to respond to Defendants' argument that Plaintiff was not a consumer under the DTPA. Plaintiff objected to this finding in the Report.

HOLDING: Overruled.

REASONING: Plaintiff argued that under the DTPA, a borrower is a consumer.

The district overruled Plaintiff's objection and held the reply did not address Defendants' argument that Plaintiff is not a consumer under prevailing law. The court held that a mortgagor qualifies as a consumer under the DTPA if his or her primary objective in obtaining the loan was to acquire a good or service, and that good or service forms the basis of the complaint. Here, the secured real property did not form the basis of Plaintiff's complaint. Instead, Plaintiff's claims related to the servicing of her loan. The court held that performance of any services incidental to the loan transaction, such as acceleration, abandonment, and foreclosure, did not transform Plaintiff into a consumer under the DTPA.

A PERSON CANNOT QUALIFY AS A CONSUMER IF THE UNDERLYING TRANSACTION IS A PURE LOAN BECAUSE MONEY IS CONSIDERED NEITHER A GOOD NOR A SERVICE

STATEMENTS REGARDING LOAN MODIFICATIONS DO NOT CONCERN THE "CHARACTER, EXTENT, OR AMOUNT OF CONSUMER DEBT" FOR PURPOSES OF THE TDCA

Compass Bank v. Collier, ___ S.W.3d ___ (Tex. App. 2020).
https://casetext.com/case/compass-bank-v-collier

FACTS: Appellees Everett Wayne Collier and Jan Collier attempted to modify their mortgage loan with Appellant Compass Bank ("Compass") after the Colliers defaulted to avoid foreclosure. Compass sent the Colliers a "Commitment Letter" outlining various conditions for loan modification approval. The Colliers signed the Commitment Letter. However, the Colliers failed to provide tax returns and failed to ensure that the Compass lien remained in first place. The Colliers made three required payments under the Commitment Letter. Due to the Colliers' failure to file tax returns, they could not produce tax returns and the IRS asserted federal tax liens on the property. Compass denied the loan modification.

The Colliers sued Compass alleging violation of both the Texas Deceptive Trade Practices-Consumer Protection Act ("DTPA") and the Texas Debt Collection Act ("TDCA"). The Colliers prevailed against Compass. Compass appealed.

HOLDING: Reversed.

REASONING: Compass argued that the Colliers' DTPA claims should fail because the Colliers did not qualify for consumer status. The Colliers, however, contended that they were consumers because the original loan financed the expansion of their house.

The court agreed with Compass, holding a loan modification was similar to refinancing a loan because it was not sought for the acquisition of a good or service but instead to finance an existing loan on previously acquired property. None of the Colliers' evidence of alleged deceptive trade practices pertaining to the actual home sales transaction or a deceptive act related to the original financing of their home. Nor did the Colliers not seek to acquire a good or service with the loan modification. Rather, the Colliers merely attempted to refinance an existing loan on a previously acquired property.

Discussions regarding loan modification or the postponement of foreclosure were not representations or misrepresentations of the amount or character of a debt.

Compass further argued that loan modifications were not actionable under the TDCA. The Colliers rebutted that Compass attempted to foreclose without authority and misrepresented amounts owed after modification was denied in violation of TDCA §392.304(a)(8).

The court rejected Collier's arguments. Federal courts have repeatedly held that statements regarding loan modifications did not concern the character, extent, or amount of consumer debt under §392.304(a)(8). Other evidence and the Commitment Letter, signed by the Colliers, established that the Colliers knew they were in default, the amount they owed, the steps to cure default, and the risk of foreclosure. Discussions regarding loan modification or the postponement of foreclosure were not representations or misrepresentations of the amount or character of a debt nor were those discussions a deceptive means to collect a debt.

DTPA CONSUMER ESTABLISHED RELIANCE, KNOWLEDGE, PRODUCING CAUSE

A CORPORATE AGENT MAY BE INDIVIDUALLY LIABLE UNDER DTPA

Kerr v. Lambert, ___ S.W.3d ___ (Tex. App. 2020).
https://casetext.com/case/kerr-v-lambert

FACTS: Plaintiff-Appellees the Lamberts purchased ranch land ("Property"). After purchasing the Property, the Lamberts wanted to remove dead cacti but did not want to use a tractor and blade. Defendant-Appellant Kerr stated that he would spray the cactus with Picloram, an herbicide. Kerr told the Lamberts that he had sprayed Picloram on the trees and that it would not harm them. The Lamberts hired an arborist, who noted the trees were dying. The Lamberts waited two years to reassess the trees and 1,000 oak trees on the Property were either dead or dying.

The Lamberts brought a Deceptive Trade Practices-Consumer Protection Act ("DTPA") suit against Kerr, individually and as an agent of Cowpuncher Services ("Appellants"). Appellants appealed from the trial court's judgment after a bench trial held in favor of Lambert on their claims.

HOLDING: Affirmed.

REASONING: The Lamberts alleged that they relied on Kerr's assurance that Picloram would not harm their trees and that they would not have hired Kerr had he disclosed to them that the herbicide could harm the trees.

Appellants argued that the evidence presented at trial was legally insufficient to support this finding. They argued that there was a complete absence of evidence that the spraying was the proximate cause of the death of the Lamberts' trees.

The court disagreed with the Appellants. The court relied on (1) the testimony of horticulturists presented at trial for the finding that Picloram harmed trees on the property, (2) the label for Picloram cautioned that it can "control" trees, including oak trees, (3) Appellants' conduct in assuring Lambert that Picloram was safe for his trees, and (4) Lambert testified that without those assurances he would not have hired Appellants to spray Picloram on the Property.

Appellants also argued that the trial court erred when it concluded that Kerr was personally liable for misrepresentations made to Lambert. Lambert argued that Kerr, as Cowpuncher's agent, was personally liable for any misrepresentation he made, even if he was acting as agent for a corporation.

The appellate court disagreed with Appellants, reiterating the Texas Supreme Court holding that an agent for a corporation may be held personally liable for his own violations of the DTPA.

DEBT COLLECTION

DEBT COLLECTOR'S FAILURE TO USE THE FDCPA'S PRECISE LANGUAGE IN ITS NOTICES IS NOT A VIOLATION

Chaperon v. Sontag & Hyman, PC, ___ F.3d ___ (2d Cir. 2020). https://casetext.com/case/chaperon-v-sontag-hyman-pc-1

FACTS: Plaintiff-Appellant Julia Chaperon fell into arrears on her rental payments. Chaperon's debt was subsequently assigned to Defendant-Appellee Sontag & Hyman, PC ("Sontag") for collection purposes. Sontag delivered a debt collection notice to Chaperon. The notice did not explicitly state that Chaperon could dispute a portion of the debt.

Chaperon sued Sontag, alleging that Sontag violated the Fair Debt Collection Practices Act ("FDCPA") by not including the statutory information in the debt collection notice it had sent to Chaperon. Sontag filed a motion to dismiss and the court granted it. Chaperon appealed.

HOLDING: Affirmed.

REASONING: Chaperon argued that under the least-sophisticated-consumer test, the least sophisticated consumer who received Sontag's notice would be confused as to whether she was entitled to dispute a portion of the debt. Chaperon also argued that Sontag violated the FDCPA by attempting to collect a debt with notice that was false and misleading because Sontag did not convey to Chaperon that she had a right to dispute a portion of the debt.

The court noted that it has previously held that a debt collector's failure to use the FDCPA's precise language in its notices is not a violation, as there is no requirement in the statute that any of its provisions be quoted verbatim. Thus, the court concluded that the least sophisticated consumer would not, upon reading a letter stating that she has the right to dispute that she owes rent arrears totaling $12,209.26, rationally think that she does not also have a right to dispute a portion of that debt. Therefore, the court held that Chaperon's assertion that Sontag violated the FDCPA lacked merit.

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Compass Bank v. Collier, ___ S.W.3d ___ (Tex. App. 2020). https://casetext.com/case/compass-bank-v-collier

FACTS: Appellees Everett Wayne Collier and Jan Collier attempted to modify their mortgage loan with Appellant Compass Bank ("Compass") after the Colliers defaulted to avoid foreclosure. Compass sent the Colliers a "Commitment Letter" outlining various conditions for loan modification approval. The Colliers signed the Commitment Letter. However, the Colliers failed to provide tax returns and failed to ensure that the Compass lien remained in first place. The Colliers made three required payments under the Commitment Letter. Due to the Colliers' failure to file tax returns, they could not produce tax returns and the IRS asserted federal tax liens on the property. Compass denied the loan modification.

The Colliers sued Compass alleging violation of both the Texas Deceptive Trade Practices-Consumer Protection Act ("DTPA") and the Texas Debt Collection Act ("TDCA"). The Colliers prevailed against Compass. Compass appealed.

HOLDING: Reversed.

REASONING: Compass argued that the Colliers' DTPA claims should fail because the Colliers did not qualify for consumer status. The Colliers, however, contended that they were consumers because the original loan financed the expansion of their house.

The court agreed with Compass, holding a loan modification was similar to refinancing a loan because it was not sought for the acquisition of a good or service but instead to finance an existing loan on previously acquired property. None of the Colliers' evidence of alleged deceptive trade practices pertaining to the actual home sales transaction or a deceptive act related to the original financing of their home. Nor did the Colliers not seek to acquire a good or service with the loan modification. Rather, the Colliers merely attempted to refinance an existing loan on a previously acquired property.

Discussions regarding loan modification or the postponement of foreclosure.

Compass further argued that loan modifications were not actionable under the TDCA. The Colliers rebutted that Compass attempted to foreclose without authority and misrepresented amounts owed after modification was denied in violation of TDCA §392.304(a)(8).

The court rejected Collier's arguments. Federal courts have repeatedly held that statements regarding loan modifications did not concern the character, extent, or amount of consumer debt under §392.304(a)(8). Other evidence and the Commitment Letter, signed by the Colliers, established that the Colliers knew they were in default, the amount they owed, the steps to cure default, and the risk of foreclosure. Discussions regarding loan modification or the postponement of foreclosure were not representations or misrepresentations of the amount or character of a debt nor were those discussions a deceptive means to collect a debt.

DUNNING LETTER STATING ZERO BALANCE FOR INTEREST NOT MISLEADING UNDER FDCPA

Degroot v. Client Serv., 977 F.3d 656 (7th Cir. 2020). https://law.justia.com/cases/federal/appellate-courts/ca7/20-1089/20-1089-2020-10-08.html

FACTS: Plaintiff-Appellant Joseph Degroot defaulted on a debt owed to Capital One Bank. Capital One placed that debt for collections with AllianceOne Receivables Management, Inc. Allian-

ceOne sent Degroot a letter stating, "[t]he amount of your debt is $425.86. Please keep in mind, interest and fees are no longer being added to your account. This means every dollar you pay goes towards paying off your balance." Degroot understood this to mean that his debt would no longer accrue interest, late charges, or other fees. Capital One reassigned the account to Defendant-Appellee Client Services Incorporated ("CSI") for collections. CSI then sent Degroot a letter with an itemized summary of his debt. In that letter there was a zero-balance next to "[i]nterest." The letter included an "account resolution offer" with terms including a notice stating that "no interest will be added to your account balance through the course of Client Services, Inc. collection efforts concerning your account."

Degroot filed suit, alleging that CSI's letter violated the Fair Debt Collection Practices Ac ("FDCPA") by misleadingly implying that Capital One would begin to add interest and possible fees to previously charged-off debts if consumers failed to resolve their debts with CSI. CSI filed a motion to dismiss. The district court granted that motion, concluding that CSI's letter was not false, misleading, or deceptive. Degroot appealed.

HOLDING: Affirmed.

REASONING: Degroot argued that CSI violated 15 U.S.C §1692(e) by using false, deceptive, and misleading representations or means to collect a debt and 15 U.S.C §1692(g) by failing to disclose the amount of the debt in a clear and unambiguous fashion. The question in this case was whether CSI, by providing a breakdown of Degroot's debt that showed a zero balance for "interest," violated 15 U.S.C §1692(e) and 15 U.S.C §1692(g) by implying that interest would accrue if the debt remained unpaid.

The court reasoned that the unsophisticated consumer would not construe a zero-balance to be forward looking and, therefore, misleading.

The court held that a debt collector violates §1692(e) by making statements or representations that "would materially mislead or confuse an unsophisticated consumer." The court concluded that Degroot's understanding of the letter and the zero-balance for interest was "bizarre." The court reasoned that the unsophisticated consumer would not construe a zero-balance to be forward looking and, therefore, misleading. Further, just because an interest balance is zero and "interest and fees are no longer being added" does not mean that interest would never be added. Therefore, the court held that the letter was not misleading under the FDCPA.

CONSUMER FAILS TO SUPPORT CLAIM UNDER EITHER TDCPA OR FDCPA

Smith v. First Choice Loan Servs., ___ F. Supp. 3d ___ (N.D. Tex. 2020).
https://casetext.com/case/smith-v-first-choice-loan-servs

FACTS: Plaintiff purchased a home with a home mortgage loan from Defendant First Choice Loan Service, Inc. ("First Choice"). The loan, evidenced by a note and secured by a deed of trust, was later assigned to Defendant Amerihome Mortgage Company, LLC ("Amerihome").

Plaintiff filed suit under the Texas Debt Collection Practices Act and the Fair Debt Collection Practices Act, alleging that First Choice failed to include the taxes owed to Mansfield ISD in its disclosure statement, which lead to a miscalculation of payments that resulted in an escrow shortage, late fees, and penalties. Plaintiff also alleged that Amerihome failed to accurately calculate taxes owed and the escrow payment necessary on the loan. Defendants subsequently filed motions to dismiss for failure to state a claim.

HOLDING: Granted.

REASONING: Defendants argued that the case should be dismissed because Plaintiff failed to state a TDCPA claim or an FDCPA claim.

The court accepted Defendants' arguments and granted the motion to dismiss. The court held that Plaintiff failed to state a TDCPA claim against Amerihome or First Choice. First Choice was not a third-party debt collector, which is mandated by TDCPA for the requirement of a surety bond. The petition also failed to allege any false or misleading statement by Amerihome, as required by the TDCPA.

The court further held that Plaintiff failed to state an FDCPA claim against Defendants. To allege an FDCPA claim, defendant must be a "debt collector." The court found that First Choice was the original lender and creditor, rather than a debt collector, under FDCPA. Plaintiff also ignored the requirement that Amerihome must have become the mortgage lender and servicer. Therefore, Plaintiff could not file the FDCPA suit against Amerihome.

DEBT COLLCTOR'S LETTER MAY OVERSHADOW VALIDATION NOTICE

Mizrachi v. Wilson, Elser, Moskowitz, Edelman & Dicker LLP, ___ F.3d ___ (2nd Cir. 2020).
https://casetext.com/case/mizrachi-v-wilson-elser-moskowitz-edelman-dicker-llp

FACTS: Defendant-Appellee law firm Wilson, Elser, Moskowitz, Edelman & Dicker, LLP ("Wilson Elser") sent Plaintiff-Appellant Jordan Mizrachi a debt collection letter stating the firm had been instructed by the creditor "to commence litigation against [Mizrachi] in order to collect" the debt and warned "THERE MAY BE NO FURTHER NOTICE OR DEMAND IN WRITING FROM [WILSON ELSER] PRIOR TO THE FILING OF SUIT." The letter also contained a validation notice, informing Mizrachi that he could avoid legal consequences by "paying . . . now or making a suitable payment arrangement." Pursuant to the Fair Debt Collection Practices Act ("FDCPA"), the letter also included a notice explaining Mizrachi's right to dispute the debt by demanding validation within 30 days.

Mizrachi filed suit, claiming that the letter violated the FDCPA because the apparent demand for immediate payment in combination with a threat of severe legal consequences overshadowed the validation notice. The district court dismissed the suit for failure to state a claim. Mizrachi appealed.

HOLDING: Reversed.
REASONING: Mizrachi argued the letter from the law firm could not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt because the statement from the law firm made him uncertain about his rights.

Wilson Elser argued that the word "now" only applied to payment and not the making of "a suitable payment arrangement."

The court identified two reasons why the letter threatened a lawsuit, cataloged myriad consequences of such a suit, and suggested payment or arrangement of payment "now" was the sole means of avoiding suit. First, even if the letter did not literally demand immediate payment, these warnings, combined with the all-caps admonition that no further notice might follow before a lawsuit is filed, could have created the misimpression that immediate payment is the consumer's only means of avoiding a parade of collateral consequences, thereby overshadowing the Mizrachi's validation rights. Second, the letter contained no "transitional language" explaining that the demand for payment did not override Mizrachi's validation rights, so the uncertainty created by the demand was left unmitigated. The letter failed to mention that Mizrachi's demand for validation pauses the collection process, causing uncertainty not only as to whether he could dispute the debt but also as to he could withhold payment while doing so. Thus, the court reversed the decision in favor of Mizrachi.

LETTER THAT PROVIDES NOTICE OF CHANGE IN DEBT OWNERSHIP MAY BE ACTIONABLE UNDER FDCPA

Valenzuela v. Axiom Acquisition Ventures, LLC, ___ F. Supp. 3d___ (M.D. Fla. 2020).
https://casetext.com/case/valenzuela-v-axiom-acquisition-ventures-llc

FACTS: Plaintiff Robert Valenzuela defaulted on a personal loan he took out from Cross River Bank. The bank then sold the debt to Defendant Axiom Acquisition Ventures, LLC ("Axiom"). Axiom sent a letter to Valenzuela informing him of a change in ownership of the underlying debt.

Valenzuela filed suit against Axiom, claiming that the letter violated the Fair Debt Collection Practices Act ("FDCPA"). Axiom filed a motion for summary judgment.
HOLDING: Denied.
REASONING: Axiom argued that the letter did not qualify as communication in connection with the collection of a debt because the purpose of the letter was merely to inform Valenzuela of a change in ownership of the underlying debt. Thus, Axiom contended that it did not violate the FDCPA.

After reviewing the letter in issue, the court concluded the letter had dual purposes: (1) to give notice to Valenzuela of changing in ownership and (2) a call of action for Valenzuela to remit payment. The court held that the demand for payment constituted a communication in connection with collection of a debt. Therefore, Axiom's motion for summary judgment was denied.

CONSUMER CREDIT

CONSUMER REPORTING AGENCY MUST REINVESTIGATE DISPUTED INQUIRIES

Norman v. Trans Union, LLC, ___ F. Supp. 3d ___ (E.D. Pa. 2020).
https://www.casemine.com/judgement/us/5f398cf94653d06cd6ba7bff

FACTS: Plaintiff Norman sued Defendant Trans Union, LLC for its refusal to reinvestigate or remove an entry from Norman's credit report. Against his explicit instruction, Safe Home Security ("Safe Home") made an inquiry on Norman's credit report. In his dispute letters, Norman expressed his explicit dissent to Safe Home's credit report inquiry. Norman claimed that Trans Union failed to uphold its duty under the Fair Credit Reporting Act ("FCRA") to promptly reinvestigate any item of information in a consumer's file disputed as incomplete or inaccurate.

Norman sued on behalf of himself and a class and motioned for class certification.

HOLDING: Motion granted.

REASONING: To trigger a reinvestigation, the consumer must (1) "directly . . . dispute" (2) "the completeness or accuracy of" (3) "any item of information . . . in [the] consumer's file." 15 U.S.C. § 1681i (2020). The court stated that Norman directly disputed by posting his letters directly to Trans Union. The court reasoned that the Safe Home inquiry qualified as "any item of information" in the consumer's file.

Trans Union argued that they were not obligated to reinvestigate because the entry accurately reflected that an inquiry had occurred. The court rejected Trans Union's definition of "accurate" by reasoning that a credit report inquiry can have negative effects and, if falsely made, can be misleading. The court held that Norman properly disputed the "accuracy" of the entry by sending dispute letters questioning the propriety of the inquiry to which he had explicitly dissented.

Trans Union further argued that a disputing consumer must show an inaccuracy to trigger an agency's duty to reinvestigate. The court rejected this argument by stating that neither the statute's structure nor Trans Union's cited authority supported it. The court held that a consumer need not make a prima facie showing of inaccuracy to trigger an agency's reinvestigation obligation. Instead, the provision requires that the consumer only "dispute" the accuracy of some item of information on their credit file.

Additionally, Trans Union contended that its duty to reinvestigate was exclusively limited to information supplied by "furnishers" cited in the statute's subheading. The court rejected this argument by reasoning that "furnishers" was meant in the general sense, was unambiguous, and did not command a limiting definition.

Finally, Trans Union claimed that it could not be liable under the statute for failing to reinvestigate if the entity that requested the consumer's credit information had a "permissible purpose" in doing so. However, the court held that the legitimacy or illegitimacy of Same Home's inquiry was irrelevant. The fact that Trans Union may ultimately have resolved the dispute against Norman did not obviate its duty to investigate.

Thus, the court held that Norman triggered Trans Union's duty to reinvestigate and that Trans Union's failure to do so supported a valid cause of action.

OMITTING A FAVORABLE CREDIT ITEM DOES NOT CREATE A MISLEADING CREDIT REPORT

Hammer v. Equifax Info. Servs., ___ F. Supp. 3d. ___ (N.D. Tex. 2020).
https://buckleyfirm.com/sites/default/files/Buckley%20InfoBytes%20-%20Hammer%20v.%20Equifax%20et%20al%20-%20Fifth%20Circuit%20Opinion%202020.09.09.pdf

Facts: Plaintiff Scott Hammer obtained a credit card from Capital One Bank. Every month thereafter, he made timely payments on his credit card. The three largest consumer reporting agencies ("CRAs") in the United States, Equifax, Experian, and TransUnion, reported Hammer's Capital One account until 2017. After learning that the CRAs stopped reporting the account, Hammer requested that each CRA restore it. TransUnion complied with the request, but Defendants Equifax and Experian refused. Hammer's credit score fell as a result of losing a positive trade line from his report.

Businesses relying on credit reports have no reason to believe that a credit report reflects all relevant information on a consumer.

Hammer sued Experian and Equifax for negligent and willful violations of the Fair Credit Reporting Act ("FCRA"). The district court granted Experian and Equifax's motion to dismiss and entered final judgment resolving Hammer's claims. Hammer appealed.

Holding: Affirmed.

Reasoning: Hammer argued that Equifax violated the FRCA because it had favorable information about his Capital One card, omitted it from his credit report, and thereby harmed his creditworthiness. In his view, a credit report was inaccurate under the FRCA if a CRA (1) had verified information on the consumer, (2) omitted that information from the report, and (3) that omission harmed the consumer's credit.

The court rejected Hammer's interpretation, holding that a credit report does not become inaccurate whenever there is an omission, but only when an omission renders the report "misleading in such a way and to such an extent that it can be expected to adversely affect credit decisions." The court held that an omission of a single credit item does not render a report "inaccurate" or "misleading." Businesses relying on credit reports have no reason to believe that a credit report reflects all relevant information on a consumer. Such a requirement would be impossible for a CRA to satisfy, as creditors furnish CRAs with consumer information only on a voluntary basis.

ARBITRATION

DECEPTIVE MEETING VOIDS LAW FIRM'S ARBITRATION CLAUSE

Daspit Law Firm, PLLC v. Herman, ___ S.W.3d ___ (Tex. App. 2020).
https://www.leagle.com/decision/intxco20200826540

FACTS: Plaintiff Eric Herman was injured in a car accident and met with a non-attorney employee ("the employee") of Daspit Law Firm ("Appellant") to discuss the accident. During the meeting, the employee asked Herman to sign a document. Herman asked if it was a contract, and the employee told him that it was not a contract but a way to gather information for future legal representation. Herman requested a copy of the document and the employee refused. Despite the employee's representation that the document was not a contract, the document was a lawyer–client agreement in which Appellant agreed to represent Herman. The contract also contained an arbitration agreement requiring any disputes about the contract or appellant's representation of Herman to be arbitrated in Harris County. Herman left the meeting not knowing whether he had hired an attorney. Herman and Avant Law firm ("Avant"), Herman's new counsel, discovered the misrepresentation when Herman's insurer paid a personal injury claim for the accident, addressing the check to Herman, Avant, and Appellant.

The court rejected that argument and held that the arbitration clause was procedurally unconscionable and void.

Avant filed suit, seeking a declaratory judgment to determine whether Appellant's contract with Herman was void. Appellant filed a motion to abate the lawsuit and to compel arbitration of the claims, relying on the attorney–client agreement Herman had signed. The trial court denied the motion to compel arbitration. Appellant appealed.

HOLDING: Affirmed.

REASONING: Appellant argued that the trial court abused its discretion by denying the motion to compel arbitration. The court rejected that argument and held that the arbitration clause was procedurally unconscionable and void.

The court considered factors surrounding the contract formation such as the atmosphere, the alternatives presented to parties, whether the contract was illegal or against public policy, and whether it was oppressive or unreasonable. Herman testified that the meeting with Appellant's employee was less than ten minutes. The employee seemed aware that the document contained an arbitration agreement but rushed Herman into signing the misrepresented document and refused to give further explications. Additionally, Herman argued that Appellant's employee did not permit Herman to read the arbitration provision before signing the document.

Under the Federal Arbitration Act, arbitration is dismissed when the plaintiffs were so deceived, they did not understand they were contracting. Under the Texas Arbitration Act, a court may not enforce an arbitration agreement if the court found it was unconscionable at the time it was made. Based on the facts, the court held that the trial court could have reasonably concluded the conduct by a law firm toward Herman was sufficiently shocking to constitute procedural unconscionability concerning the arbitration agreement. Therefore, the trial court did not abuse its discretion by denying Appellant's motion to compel arbitration of Herman's claims.

ARBITRATION AWARDS CANNOT BE MODIFIED UNLESS A MATERIAL MISCALCULATION APPEARS ON THE FACE OF THE AWARD

Mid Atl. Cap. Corp. v. Bien, 956 F.3d 1182 (10th Cir. 2020).
https://www.leagle.com/decision/infco20200414058

FACTS: Ms. Bien and Mr. Wellman invested money with the brokerage firm Mid Atlantic Capital Corporation. When their investments performed poorly, Ms. Bien and Mr. Wellman initiated arbitration proceedings against Mid Atlantic alleging unreasonably risky investments. During arbitration, Ms. Bien and Mr. Wellman's expert witness proposed two methods to calculate their losses: "net out-of-pocket losses" of $292,411 *or* "market-adjusted damages" between $484,684 and $618,049. In their final prayer for relief, they requested only the market-adjusted damages calculation. The arbitration contract specifically provided, "'[t]he arbitrators do not have to explain the reason(s) for their award.'" The arbitration panel awarded Ms. Bien and Mr. Wellman initial-investment-loss damages of $292,41, compensatory damages of $484,683, attorney's fees and arbitration costs.

Mid Atlantic moved the district court to modify the arbitration award. Mid Atlantic argued Ms. Bien and Mr. Wellman received double recovery because the damage awards nearly matched the expert testimony of both proposed damage calculations. The district court denied Mid Atlantic's motion and held 9 U.S.C. § 11(a) requires the court to only examine the face of the award for "evident material miscalculation of figures." The district court concluded that it lacked authority to modify the award because the alleged double counting at issue appeared only upon looking to the arbitration record. The amended final judgment ordered Mid Atlantic to pay the arbitration award. Mid Atlantic appealed the district court's denial of its motion to modify the arbitration award.

HOLDING: Affirmed.

REASONING: Mid Atlantic argued that when looking for an evident material miscalculation of figures in an arbitration award, § 11(a) did not limit a court to the face of the award. Mid Atlantic argued that the only way to make this determination was to look at the record, otherwise the results would be arbitrary.

The court rejected this interpretation and held that § 11(a) had "a face-of-the-award limitation." The court read §11(a) within the context of the entire statutory scheme giving plain meaning to the relevant words of the provision. The court concluded its ability to modify an award is limited to only "obvious, significant mathematical errors" from the face of the award. If courts could open the door to look at the arbitration record, then

it would defeat the primary purpose of the Federal Arbitration Act to ensure efficient private litigation and to avoid cumbersome judicial review.

The court further reasoned that if Mid Atlantic's construction was accepted, then it would undermine the extremely deferential standard of review courts give arbitration awards. Because arbitration is a matter of contract, it would be inappropriate for the court to rewrite the parties' agreement. Persuasive authority from the other circuit courts and New York state courts supported the holding. The court did not opine as to the type of information needed to determine a material miscalculation evident on the face of the award. Instead, the court held "there was no math issue," and Mid Atlantic failed to meet its burden of identifying an evident material miscalculation of figures that appeared on the face of the award.

FAA DOES NOT APPLY TO INDEPENDENT CONTRACTOR'S CLASS ACTION WAGE CLAIMS

Waithaka v. Amazon.com, Inc, 966 F. 3d 10 (1st. Cir. 2020).
https://law.justia.com/cases/federal/appellate-courts/ca1/19-1848/19-1848-2020-07-17.html

FACTS: Plaintiff-Appellee, Bernard Waithaka, was a "last-mile" delivery driver for Defendant-Appellants, Amazon.com, Inc. and its subsidiary, Amazon Logistics, Inc. Waithaka signed up for the job through the Amazon Flex ("AmFlex") smartphone application. Waithaka was hired as an independent contractor and agreed to the AmFlex Independent Contractor Terms of Service (the "Agreement").

Waithaka filed a class action against Amazon on behalf of himself and other delivery drivers who worked for the appellants in Massachusetts and were classified as independent contractors. Amazon moved to compel arbitration pursuant to the Agreement. The district court denied the motion, holding that Waithaka's Agreement was exempt from the Federal Arbitration Act ("FAA"). Amazon appealed.

HOLDING: Affirmed.

REASONING: The court determined that §1 of the FAA providing an exemption for "contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce" applied only to employment contracts for transportation workers. The court further held that the term "contract of employees" applied to agreements to perform work, including those of independent contractors.

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Thus, the court concluded that Waithaka was a transportation worker for purposes of the §1 exemption because last-mile delivery workers who haul goods on the final legs of interstate journeys are transportation workers "engaged in…interstate commerce," regardless of whether the workers themselves physically cross state lines. Therefore, the court held that the FAA did not govern the dispute and provided no basis to compel arbitration required by the dispute resolution section of the Agreement.

COURT REFUSES TO COMPEL TCPA CASE TO ARBITRATION

Briggs v. Pfvt Motors Llc, ___ F. Supp. 3d ___ (D. Az. 2020).
https://law.justia.com/cases/federal/district-courts/arizona/azdce/2:2020cv00478/1235958/28/

FACTS: Plaintiff Karen Briggs purchased a vehicle from Defendant PFVT Motors. The Retail Order For a Motor Vehicle Agreement ("Agreement") between Plaintiff and Defendant contained an arbitration clause. Several years after purchasing the vehicle, Plaintiff began receiving calls from Defendant seeking new business. Plaintiff requested Defendant stop contacting her but continued to receive calls.

Plaintiff filed suit, alleging Defendant violated the Telephone Consumer Protection Act ("TCPA"). Defendant filed a motion to compel arbitration, claiming that the arbitration clause from the Agreement governed the TCPA claim.

HOLDING: Denied.

REASONING: Defendant argued the TCPA claim fell within the arbitration clause of the Agreement.

The court held that an arbitration clause must encompass the dispute at issue. This suit was the result of the Defendant's extra-contractual actions, which were unrelated to the promises outlined in the Agreement. The Agreement was for the purchase of a vehicle; however, this suit concerned the Defendant's subsequent attempts to solicit new business. The arbitration clause did not "touch matters" with the subject of the suit so it did not encompass the dispute.

ARBITRATION DOES NOT REQUIRE SIGNATURE TO BE ENFORCEABLE UNLESS EXPRESS LANGUAGE REQUIRES IT

STRONG POLICY FAVORING ARBITRATION APPLIES ONLY AFTER A VALID AGREEMENT IS ESTABLISHED

SK Plymouth v. Simmons, 605 S.W.3d 706 (Tex. App. 2020).
https://www.leagle.com/decision/intxco20200416529

FACTS: Jean Elizabeth Simmons sued Appellants SK Plymouth, LLC, SK E&P Operations America, LLC (SKEPOA), and Joey Jun, for wrongful termination of employment.

Based on an arbitration agreement signed by Simmons when she began employment with SKEPOA, Appellants filed a motion to compel arbitration under the Federal Arbitration Act ("FAA"). Simmons asserted that the arbitration agreement was not enforceable because SKEPOA had not signed the agreement. The trial court denied Appellants' motion to compel arbitration. Appellants appealed.

HOLDING: Reversed and remanded.

REASONING: Simmons argued that SKEPOA was required to sign the arbitration agreement. The court rejected that argument by reasoning that the arbitration agreement did not contain any provision expressly requiring the agreement to be signed by the

parties in order to make it binding or modify it. Simmons further pointed to the initial employment offer, which stated that in order to begin her employment, Simmons was required to sign the company's arbitration agreement.

The court rejected this argument, reasoning that a requirement that Simmons signed the arbitration agreement as condition of her employment did not indicate an intent by the parties to require SKEPOA to sign the agreement to show its assent. The court reasoned that while signature and delivery are often evidence of a mutual assent required for a contract, they are not essential. The court pointed to the Supreme Court of Texas where they held that the FAA did not require parties to sign an arbitration agreement for it to be valid so long as the agreement was written and agreed to by the parties. That court made clear that it has never held that an employer must sign the arbitration agreement before it may insist on arbitrating a dispute with its employee.

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Furthermore, the court held that while there is a strong policy favoring arbitration, this policy does not apply to the initial determination whether there is a valid arbitration agreement. The presumption favoring arbitration arises only after the party seeking to compel arbitration establishes a valid agreement to arbitrate because the purpose of the FAA is to make arbitration agreements as enforceable as other contracts, not more so.

SUPREME COURT REFUSES TO REVIEW RULING ENDORSING CLASS ACTION ARBITRATION

Jock v. Sterling Jewelers Inc., 942 F.3d 617 (2d Cir. 2019), cert. denied, No. 19-1382, __ S. Ct. __, 2020 WL 5882321 (U.S. Oct. 5, 2020).
https://law.justia.com/cases/federal/appellate-courts/ca2/18-153/18-153-2019-11-18.html

FACTS: Plaintiff Laryssa Jock and her co-Plaintiffs-Appellants were a group of current and former retail sales employees of Sterling Jewelers (Sterling). Jock filed suit against Sterling, alleging she and other female employees were paid less than their male counterparts on account of their gender in violation of Title VII of the Civil Rights Act of 1964 and the Equal Pay Act. All employees were required as a condition of their employment to sign a "resolve program" agreement which mandated that they participate in arbitration.

The case was brought to the Second Circuit four times. In Jock I, the arbitrator issued an award in favor of then-named plaintiffs. The Second Circuit reversed, holding that the district court impermissibly substituted its own legal analysis for that of the arbitrator. Following Jock I, the arbitrator issued a class certification determination that certified a class of approximately 44,000 women. The district court denied Sterling's motion to vacate the class determination award. Sterling appealed. In Jock II, the Second Circuit reversed and remanded, clarifying that Jock I did not squarely address whether the arbitrator had the power to bind absent class members. On remand, the district court vacated the arbitrator's determination ruling after determining that (1) the "resolve" agreement did not give the arbitrator authority to certify the class and (2) the fact that named plaintiffs and the defendant submitted the question of whether the "resolve" agreement allowed for class procedures to the arbitrator also did not give the arbitrator that authority. This appeal followed.

HOLDING: Supreme Court Petition Denied; Second Circuit reversed.

REASONING: The district court held that the deferential standard does not apply when absent class members did not affirmatively opt into the arbitrator's proceeding and thereby consented to the arbitrator's authority to decide whether the resolve agreement permits class procedures. The Second Circuit Court of Appeals disagreed and reasoned that the district court wrongly relied on its original view that the arbitrator wrongly interpreted the resolve agreement to permit class procedures.

Appellants argued that the absent class members had authorized the arbitrator to determine whether the resolve agreement permits class procedures. Appellants contended that all Sterling employees signed such agreement and all Sterling employees agreed that, if any of them initiated a putative class proceeding, the arbitrator in that proceeding would be empowered to decide class-arbitrability—and, if he or she found it appropriate to certify a class encompassing other employees' claims. The Second Circuit agreed, reasoning that although the absent class members had not affirmatively opted in to the arbitration proceeding, by signing the resolve agreement, they consented to the arbitrator's authority to decide the threshold question of whether the agreement permits class arbitration. Furthermore, the resolve agreement provided that "questions of arbitrability" and "procedural questions" "shall be decided by the arbitrator." The Supreme Court suggested that the availability of class wide arbitration is a "question of arbitrability" and refused to review the petition. Thus, the Supreme Court denied a petition for writ of certiorari.

The resolve agreement provided that "questions of arbitrability" and "procedural questions" "shall be decided by the arbitrator."

QUESTIONS OF ARBITRATION AGREEMENT FORMATION MUST BE DECIDED BY A COURT

Fedor v. United Healthcare, Inc., 976 F.3d 1100 (10th Cir. 2020).
https://cases.justia.com/federal/appellate-courts/ca10/19-2066/19-2066-2020-09-16.pdf?ts=1600272056

FACTS: Plaintiff-Appellant Dana Fedor was an employee of Defendant-Appellee United Healthcare, Inc. ("UHC"). Fedor signed an arbitration agreement when she commenced employment with UHC in 2013. However, UHC periodically updated its arbitration policy and the "active at time" version was the 2016 version. Unlike former versions, the 2016 policy contained a delegation clause establishing that an arbitrator would resolve dis-

putes regarding the policy's "interpretation, enforceability, applicability, unconscionability, arbitrability or formation, or whether the Policy or any portion of the Policy is void or voidable."

Fedor filed a collective suit alleging that UHC violated the Fair Labor Standards Act ("FLSA") and New Mexico's wage law. UHC moved court to compel arbitration. The district court compelled arbitration based on the 2016 policy and noted that Fedor challenged "only the validity of the contract as a whole," rather than specifically challenge the delegation clause within the 2016 policy. Fedor appealed.

HOLDING: Vacated and remanded.

REASONING: Fedor argued that the 2016 arbitration agreement was never formed between herself and UHC. She also argued that for arbitration policies containing delegation clauses, courts must first determine whether an agreement to arbitrate was formed before sending the case to an arbitrator. The court agreed, holding that a delegation clause cannot be severed from an agreement that did not exist; therefore, before severing and enforcing the delegation clause from an arbitration agreement, questions of the agreement formation must first be decided by a court.

While issues such as the "scope" and "enforceability" of an arbitration clause can be committed to an arbitrator through a delegation provision, courts must always resolve whether the clause was agreed to by the parties.

Analyzing the Supreme Court's directives in *Rent-A-Center, West. Inc. v. Jackson*, the court admitted that a delegation clause can typically be "severed" from an arbitration agreement and can thus prevent a court from deciding certain arbitrability issues unless a litigant challenged the clause directly. However, the court then noted that not all arbitrability issues can be delegated. Analyzing *Granite Rock Co. v. International Brotherhood of Teamsters*, the court concluded that while issues such as the "scope" and "enforceability" of an arbitration clause can be committed to an arbitrator through a delegation provision, courts must always resolve whether the clause was agreed to by the parties. Finally, the court held that courts must first determine whether an arbitration agreement was indeed formed before enforcing a delegation clause therein.

MISCELLANEOUS

NOMINAL DAMAGES ARE NOT AVAILABLE WHEN THE HARM IS ENTIRELY ECONOMIC AND SUBJECT TO PROOF

LOST PROFITS MUST BE SHOWN WITH REASONABLE CERTAINTY

Chehab v. First Serv. Credit Union, ___ S.W.3d ___, (Tex. App. 2020).
https://law.justia.com/cases/texas/fourteenth-court-of-appeals/2020/14-18-00969-cv.html

FACTS: Plaintiff-Appellant Nasser Chehab opened a checking account with Defendant-Appellee First Service Credit Union ("First Service"). The checking account was governed by a Deposit Account Contract. On a Friday, Chehab visited the Northwest Branch of First Service and asked to withdraw $80,000 in cash. The branch manager refused Chehab's request because such a large cash request could only be processed with prior notice but offered alternative methods of withdrawing. Chehab agreed to accept $20,000 in cash that day and visited the Downtown Branch on the following Monday, requesting $60,000 in cash. Again, the branch manager refused the request and offered the same alternative choices. Chehab ended up receiving $8,000 in cash on Tuesday and $54,000 in cash on Wednesday from the Downtown Branch.

Chehab filed suit alleging breach of contract because the Deposit Account Contract required First Service to make Chehab's funds available immediately, and he suffered damages from lost profits and nominal damages. First Service moved for summary judgment, and the motion was granted with respect to the claims for lost profits. Chehab appealed.

HOLDING: Affirmed.

REASONING: Chehab argued that Texas law recognized nominal damages for breach of contract, and therefore he would not be required to produce evidence of damages. The court rejected this argument by noting that Chehab had not pleaded for nominal damages for non-economic harm. Nominal damages were for cases in which there were no damages or none that could ever be proved. The rule in Texas is that nominal damages are not available when the harm is entirely economic and subject to proof, as opposed to non-economic harm to civil or property rights. Since Chehab only pleaded for monetary damages, he was not entitled to recover nominal damages.

Chehab then asserted that he produced enough evidence to create a fact issue on lost profits damages. The court rejected this argument as well, holding that Chehab had not shown competent evidence with reasonable certainty. The court stated that opinions or estimates of lost profits must be based on objective facts, figures, or data from which the amount of lost profits may be ascertained. The only evidence Chehab presented in response to First Service's no-evidence motion were the affidavits of two used car business owners, and the affidavits only recounted the personal experiences. Because the affidavits were not evidence of opinions or estimates based on objective facts, figures, or data from which the amount of lost profits may be ascertained, they could not support a genuine issue of fact as to whether Chehab suffered any lost profits damages.

ELEVENTH CIRCUIT VACATES FACTA CLASS ACTION SETTLEMENT

Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917 (11th Cir. 2020).
https://media.ca11.uscourts.gov/opinions/pub/files/201616486.enb.pdf

FACTS: Plaintiff Dr. David Muransky used his credit card to purchase products at a Godiva retail store. He was handed a receipt containing the first six and last four digits of his 16-digit credit card number.

Muransky filed a class action complaint against Godiva, alleging that the receipts constituted violations of the Fair and Accurate Credit Transactions Act ("FACTA"). During the settlement period, the Supreme Court decided *Spokeo, Inc. v. Robins*. *Spokeo* held that there is no standing if there was no concrete injury suffered. Both parties pushed through the class fairness hearing and proceeded to fairness review.

HOLDING: Vacated and remanded.

REASONING: Plaintiff contended that he and the members of the class all suffered irreparable harm and an elevated risk of identity theft as a result of Godiva's receipts.

The court rejected the Plaintiff's arguments, holding that he was alleging a mere statutory violation, not a concrete injury, and thus had no standing. The court acknowledged that one of the primary objectives of FACTA is to prevent identity theft. In support of that goal, FACTA forbids merchants from printing more than the last five digits of the card number on receipts offered to customers. Thus, the receipt given by Godiva was in violation of FACTA.

However, under *Spokeo*, for a party to have standing to bring a lawsuit, it must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct. at 1547. In other words, the plaintiff needs to show that the defendant harmed him. However, even without any direct harm, a plaintiff can establish an injury in fact by showing that a statutory violation created a "real risk of harm."

Plaintiffs can show concrete harm if they can prove the statutory violation itself caused a harm. A mere statutory violation by itself is not enough to have standing. Examples of tangible injuries are physical injury or financial loss. Muransky and the other plaintiffs did not suffer any injuries. None of them had their identity stolen or had money taken from them due to the receipts. The risk of harm was not increased by the receipts either. While there were more credit card numbers than what is allowed by FACTA, it still was not enough to substantially increase the risk of harm.

N.J. DISTRICT COURT PERMITS INCENTIVE AWARDS FOR NAMED PLAINTIFF

Somogyi v. Freedom Mortg. Corp., ___ F. Supp. 3d___ (D.N.J. 2020).
https://law.justia.com/cases/federal/district-courts/new-jersey/njdce/1:2017cv06546/353695/115/

FACTS: Plaintiffs Joshua and Kelly Somogyi and Stewart Sieleman seperately sued Freedom Mortgage Corp. ("FMC") for violation of the Telephone Consumer Protection Act ("TCPA"). Both cases were consolidated into a class action suit. Plantiffs alleged that FMC made unsolicited phone calls using an automated telephone dialing system ("ATDS") without their prior written consent, placed calls even after its customers requested the calls to stop, and instructed its managers to delete "do-not-call" requests from the system so the customers could be called again. FMC denied all liabilities or fault.

After motions, discovery, and three mediation sections, the parties entered into a settlement agreement in 2019. The settlement terms include an incentive award to the named plaintiffs of $5,000 each, a total of $15,000. Plaintiffs motioned to approve of the Class Action Settlement.

HOLDING: Motion granted.

REASONING: In *Johnson v. NPAS Sols., LLC*, https://law.justia.com/cases/federal/appellate-courts/ca11/18-12344/18-12344-2020-09-17.html, the Eleventh Circuit invalidated the use of incentive awards for named plaintiffs in a TCPA class action as inconsistent with the Federal Rules. In *Johnson*, the court held, "[a] plaintiff suing on behalf of a class can be reimbursed for attorneys' fees and expenses incurred in carrying on the litigation, but he cannot be paid a salary or be reimbursed for his personal expenses." Although the court noted that incentive awards are commonplace in class actions, the Eleventh Circuit found them to be unlawful and reversed the district court's approval of a $6,000 payment to the class representative. District courts in the Eleventh Circuit had already rejected class settlements that include incentive payments.

[U]ntil and unless the Supreme Court or Third Circuit bars incentive awards or payments to class plaintiffs, they will be approved by this Court if appropriate under the circumstances.

In this case, the New Jersey district court rejected the holding in *Johnson*, paving the way for a circuit split. Following the Third Circuit and the district court's precedent, the district court noted that "[u]ntil and unless the Supreme Court or Third Circuit bars incentive awards or payments to class plaintiffs, they will be approved by this Court if appropriate under the circumstances. Here the incentive payments to the class plaintiffs is appropriate given their substantial contribution to the successful settlement of the case." Thus, the court granted the motion to approve of the Class Action Settlement.