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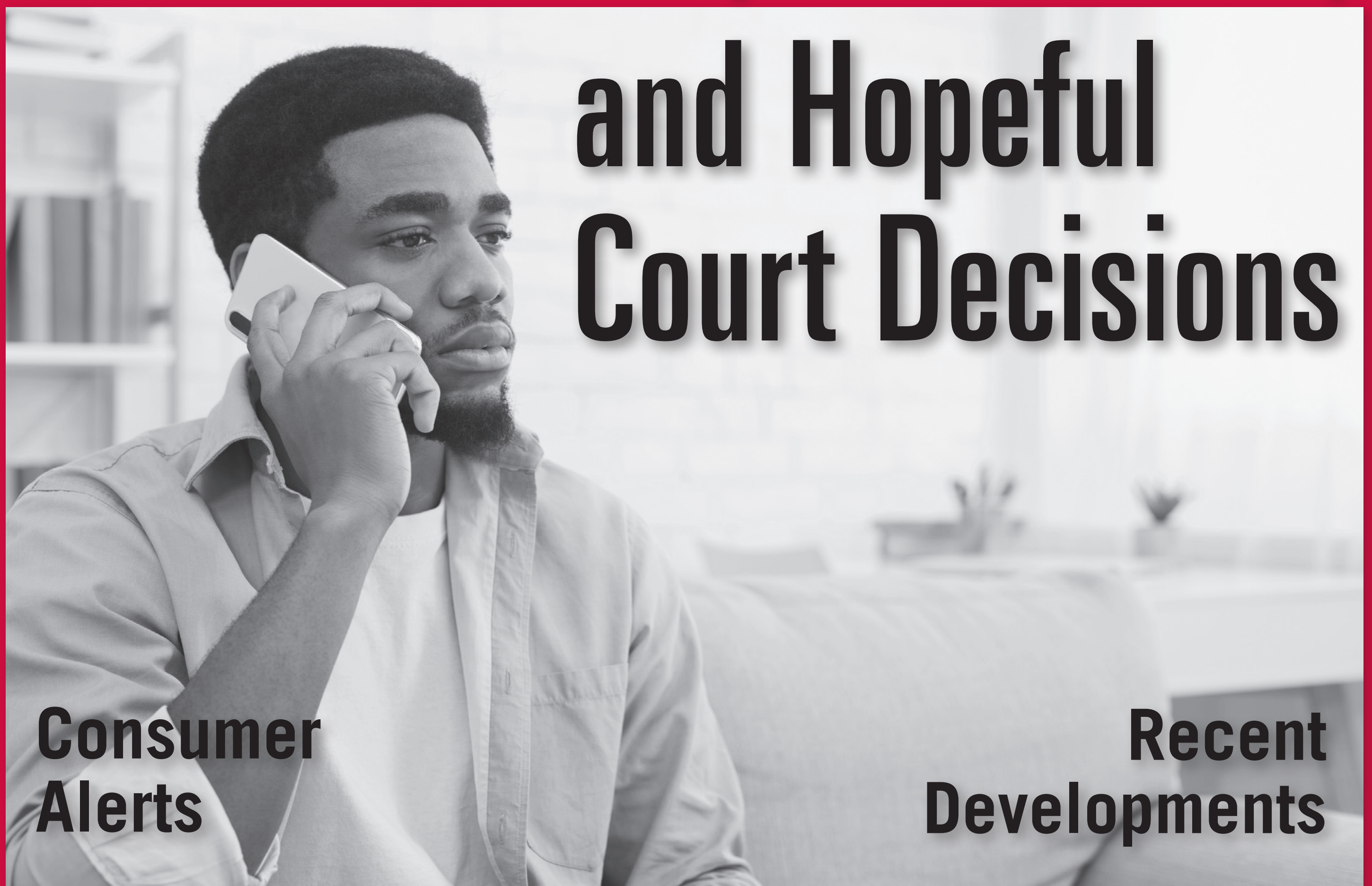
PROVIDING HOPE TO CONSUMERS

The Telephone Consumer Protection Act, Arbitration, and Hopeful Court Decisions



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PROVIDING HOPE TO CONSUMERS

The Telephone Consumer Protection Act, Arbitration, and Hopeful Court Decisions

By Victoria Grefer*

The Telephone Consumer Protection Act ("TCPA") was enacted to limit the rising number of telemarketing and debt collection calls reaching consumers during the early 1990's.

I. Introduction

The Telephone Consumer Protection Act ("TCPA") was enacted to limit the rising number of telemarketing and debt collection calls reaching consumers during the early 1990's. To reduce these pesky calls and protect consumers' privacy, the TCPA largely limits telephone solicitation by use of automatic dialing systems and prerecorded or artificial voice messages.[1] The TCPA covers communication mediums such as phone calls, text messages, and fax machines in this limitation.[2] Consumers, however, may give telemarketers or debt collectors permission to contact them. This consent is often given in the form of a signed provision located in business contracts such as loan agreements, purchase and sales agreements, and others. These contracts also habitually include arbitration agreements that include language deferring "any claim, dispute or controversy" "arising from or out of" an agreement to arbitration. As a result, TCPA cases are commonly compelled to arbitration.[3]

However, some courts have recently refused to compel TCPA claims to arbitration, despite the broad language of the Federal Arbitration Act ("FAA") and a federal policy that favors arbitration agreements. In fact, § 3 of the FAA contains mandatory language, stating that if a lawsuit is brought on an issue referable to arbitration under an agreement in writing, "the court…shall…stay the trial of the action until such arbitration has been had…"[4] Because of the mandatory "shall" language, courts *must* compel cases to arbitration when a valid agreement to arbitrate exists and the agreement encompasses the dispute at issue.[5]

At the same time, however, "nothing in the [Federal Arbitration Act] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement."[6] Thus, litigants typically dispute whether the issue or conduct in question is covered in their respective arbitration agreements. This article will examine the debate over what conduct is covered by a contract's arbitration agreement when a TCPA action is brought.

The article begins with a discussion of a recent unpublished Eleventh Circuit case, *Gamble v. New Eng. Auto Fin., Inc.* that held differently than most courts by refusing to compel arbitration on a plaintiff's TCPA claim.[7] Additionally, it will review a district court case in the Ninth Circuit, *Briggs v. Pfvt Motors Llc*, that followed the Eleventh Circuit in their ruling.[8] Lastly, this article will discuss another district court case from the Eleventh Circuit case that ruled contrary to *Gamble* and *Briggs*.

II. Eleventh Circuit Refused to Compel Arbitration for TCPA Claim Regarding Post-Agreement Conduct

Plaintiff Hope Gamble obtained a car loan from Defendant New England Auto Finance, Inc. ("NEAF") and entered into an auto loan agreement (the "Loan Agreement") that contained a an Arbitration Provision requiring arbitration of any "claim, dispute or controversy... whether preexisting, present or future, that in any way arises from or relates to this Agreement or the Motor Vehicle securing this Agreement."[9] The Loan Agreement document also contained a provision (the "Text Consent Provision") that gave NEAF the right to send its customers "e-mails, text messages and other electronic communications."[10] However, the Loan Agreement and the Text Consent Provision required separate signatures, and Gamble signed the Loan Agreement but did not sign the Text Consent Provision.[11] After Gamble finished paying the loan off, she began to receive text messages several months later from NEAF seeking new business from her.[12] Gamble informed NEAF that she did not want to receive these text messages, but NEAF continued to send them.[13]

In 2017, Gamble, on behalf of herself and others similarly situated, brought a class action lawsuit against NEAF under the TCPA.[14] In response, NEAF filed a motion to compel arbitration, arguing that the Loan Agreement between it and Gamble contained an arbitration provision that governed Gamble's TCPA claim.[15] The district court denied NEAF's motion on the grounds that Ms. Gamble's TCPA claim fell outside the scope of the loan agreement.[16] NEAF appealed, and the Eleventh Circuit affirmed.[17]

NEAF argued that the Arbitration Provision was broad enough to encompass Gamble's TCPA claims. NEAF identified specific language in the Arbitration Provision defining ''claim" as "any claim, dispute or controversy . . . whether preexisting, present or future, that in any way arises from or relates to this Agreement," while encompassing "disputes based upon contract, tort, consumer rights . . . [and] statute."[18]

The Eleventh Circuit rejected NEAF's argument. The court noted that the plain language of the Arbitration Provision required that the dispute "arise[] from or relate[] to this Agreement or the Motor Vehicle securing this Agreement."[19] Although this language made the arbitration provision broad, the court stated that it did not make it *limitless*.[20] Gamble's TCPA claim arose not from the Loan Agreement or any breach of it, "but from *post-agreement conduct* that allegedly violated a separate, distinct federal law."[21] NEAF's sending of the text messages did not relate to or arise from its lending money to Gamble, Gamble's repayment of that loan, or the vehicle which secured the loan. Further, the court reasoned that the Text Consent Provision was a separate stand-alone provision which Ms. Gamble never signed, and thus no agreement regarding text messages existed between the parties.[22] Thus, the court rejected NEAF's argument that the Arbitration Provision was broad enough to encompass Gamble's TCPA claim and affirmed the district court's decision.[23]

III. Ninth Circuit District Court Followed the Eleventh Circuit and Refused to Compel Arbitration on TCPA Claim

Subsequently, a district court in the Ninth Circuit followed the Eleventh Circuit, relying on *Gamble*, by refusing to compel arbitration for post-agreement conduct. In *Briggs v. Pfvt Motors Llc*, the defendant allegedly sent illegal marketing text messages to solicit new business to its customer who had recently purchased a vehicle.[24] The vehicle purchase contract contained an arbitration provision applying to all disputes "which arise out of or relate to this Agreement or any resulting transaction or relationship."[25] The defendant moved to compel arbitration on the TCPA claim arguing that the texts were sent in furtherance of the relationship arising out of the agreement.[26]

The court disagreed, stating that the arbitration clause did not encompass the dispute. The court reasoned that the TCPA allegations did not "'touch matters' covered by the Agreement because this suit [was] the result of Defendant's *extra-contractual actions*, unrelated to the promises outlined in the parties' contract."[27] The court noted that while courts do interpret arbitration agreements broadly, "they must be bound by some limiting principle which excludes wholly unrelated conduct between the parties."[28] Thus, the court denied the defendants motion to compel arbitration.

IV. An Eleventh Circuit District Court Choses Not to Follow *Gamble*

Some courts, however, continue to compel arbitration on TCPA claims that concern similar extra-contractual conduct outlined in *Gamble* and *Briggs*. Recently, in *Kent v. Citibank, N.A.*, the defendant Citibank sent text messages violating the TCPA months *prior* to entering into a cardholder agreement containing an arbitration provision with the plaintiff.[29] The plaintiff subsequently filed a TCPA claim and the court granted the defendant's motion to compel arbitration. The court relied on the arbitration clause's "clear language" stating that the provision applies to "any claim ... arising out of or related to your Account, a previous related Account or our relationship," including "past, present, or future conduct."[30] Thus, the court concluded that the text messages were within the scope of the dispute and must be compelled to arbitration.[31]

Kent is similar to *Gamble* and *Briggs* because it concerned conduct that occurred outside of the timeframe of the governing contract, arguably making it "extra-contractual" conduct. However, *Kent,* an Eleventh Circuit district court case, chose not to follow *Gamble* as an unpublished Eleventh Circuit decision, and leaves open the question of how courts are going to handle this issue in the future.

V. Conclusion

While federal law and courts highly favor arbitration and read arbitration provisions broadly, recent decisions such as *Gamble* and *Briggs* indicate that courts are beginning to make important distinctions between contractual and non-contractual conduct when assessing an arbitration provision. This is a more just framework of analysis to assess a motion to compel arbitration that provides a pathway for consumers to not be forced into arbitration. While arbitration may save courts' time and costly litigation costs, it also prevents harmed consumers from having their day in court. Significantly, consumers also lose their ability to bring collective actions against TCPA violators who have caused them and others damage. While it is unclear how courts will move forward on this issue, the courts in *Gamble* and *Briggs* indicate that some courts are becoming more reluctant to compel TCPA claims to arbitration. Thus, consumers can have hope moving forward that they may not always be forced into arbitration on their TCPA actions.

While federal law and courts highly favor arbitration and read arbitration provisions broadly, recent decisions such as Gamble and Briggs indicate that courts are beginning to make important distinctions between contractual and non-contractual conduct when assessing an arbitration provision.

** Victoria Grefer is a 3L at the University of Houston Law Center. She received a B.A. in both history and sociology from the University of Texas at Austin.*

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1 Telephone Consumer Protection Act, 47 U.S.C. §§ 227(b)(1)(a)-(c).
2 *Id.*
3 *See generally* Mendoza v. Ad Astra Recovery Services, Inc., 2014 U.S. Dist. LEXIS 1716 (C.D. Cal. Jan. 6, 2014); Betancourt v. Green Tree Servicing, LLC, 2013 U.S. Dist. LEXIS 176728 (M.D. Fla. Dec. 17, 2013); Cyganiewicz v. Sallie Mae, Inc., 2013 U.S. Dist. LEXIS 153554 (D. Mass. Oct. 24, 2013); and Brown v. DIRECTV, LLC, 2013 U.S. Dist. LEXIS 90894 (C.D. Cal. June 26, 2013).
4 Federal Arbitration Act, 9 U.S.C. § 3.
5 Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 218, 84 L. Ed. 2d 158, 105 S. Ct. 1238 (1985).
6 E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 289, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002).

7 Gamble v. New Eng. Auto Fin., Inc., 735 F. App'x 664 (11th Cir. 2018).
8 Briggs v. Pfvt Motors Llc, 2020 WL 8613676 (D. Az. 2020).
9 Gamble, 735 F. App'x at 665.
10 *Id*.
11 *Id*.
12 *Id*. at 664.
13 *Id*. at 665.
14 *Id*.
15 Gamble v. New England Auto Fin., Inc., 281 F. Supp. 3d 1354, 1359 (N.D. Ga. 2017).
16 *Id*.
17 Gamble, 735 F. App'x at 664.
18 *Id*. at 666.
19 *Id*.
20 *Id*.
21 *Id*. (emphasis added).
22 Gamble v. New Eng. Auto Fin., Inc., 735 F. App'x 664, 666 (11th Cir. 2018).
23 *Id*. at 667.
24 Briggs v. Pfvt Motors Llc, 2020 WL 8613676 (D. Az. 2020).
25 *Id*.
26 *Id*.
27 *Id*. at 5. (emphasis added).
28 *Id*. at 6.
29 Kent v. Citibank, N.A., 2019 WL 11505347 (S.D. Fla. 2019).
30 *Id*. at *4.
31 *Id*.

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 won't review national class action ruling. The U.S. Supreme Court said it will not consider overturning the Seventh Circuit's decision allowing consumers from other states into an Illinois proposed class action over unwanted faxes.

Justices declined to hear a bid from health information tech company IQVIA to undo a lower court ruling on the putative class in a federal junk-fax suit spearheaded by a doctor. The company had sought review in light of the high court's 2017 decision limiting out-of-state plaintiffs in mass torts, saying the same principle applies to class actions.

But the class action plaintiffs cited Supreme Court case law to argue that for more than a century, "an unbroken line of cases" has recognized that the "rights and liabilities of all" may be resolved by representation in one centralized proceeding.
Plaintiffs argued that "The Seventh Circuit applied these longstanding and uncontroversial principles to an unremarkable context: a class action in federal court alleging federal consumer protection claims," they said. "And, in line with this consensus, it held that where a federal district court concededly has personal jurisdiction over the named plaintiff's claims against the defendant, it need not undertake a separate, individualized jurisdictional inquiry as to each and every unnamed class member."
IQVIA Inc. V. Florence Mussat, ___ U.S. ___ (2021). https://www.scotusblog.com/case-files/cases/iqvia-inc-v-mussat/

Secured creditor keeps repossessed car after bankruptcy filing. The filing of a bankruptcy petition typically slants the playing field in favor of the debtor. The U.S. Supreme Court, however, recently scored a victory for secured creditors, specifically banks or lenders that finance or lease vehicles to the public. The Court held that the creditor's mere retention of a debtor's property after the filing of a bankruptcy petition does not violate the automatic stay under Section 362(a)(3) of the Bankruptcy Code.

Under the automatic stay, if a creditor wants to take action against a debtor, such as continuing a lawsuit or repossessing collateral, the creditor must first obtain relief from the automatic stay from the bankruptcy court. Creditors can be held in contempt and/or be forced to pay damages if they violate the stay. The Bankruptcy Code clearly prohibits any affirmative action against a debtor while the automatic stay is in place, but until this decision, there was a split in authority on whether a creditor violated the automatic stay by merely retaining collateral repossessed pre-bankruptcy.

The U.S. Supreme Court, in an 8-0 opinion, held that

creditors are permitted to retain possession of the collateral repossessed pre-petition and are not obligated to return the collateral due to the debtor's filing of a bankruptcy petition. The Court interpreted the language of the statute, finding that Section 362(a)(3) prohibits "affirmative acts that would disturb the status quo of the estate property as of the time when the bankruptcy petition was filed."
City of Chicago v. Fulton ___ U.S. ___ (2021). https://www.supremecourt.gov/opinions/20pdf/19-357_6k47.pdf.

Supreme Court makes it easier for people to sue, allowing them to bring their claims in the state where they were injured. In this case, a state court exercised jurisdiction over Ford in a products-liability suit stemming from a car accident that injured a resident in the State.

Ford moved to dismiss for lack of personal jurisdiction. It argued that each state court had jurisdiction only if the company's conduct in the State had given rise to the plaintiff's claims. And that causal link existed, according to Ford, only if the company had designed, manufactured, or sold in the State the particular vehicle involved in the accident. In neither suit could the plaintiff make that showing. Only later resales and relocations by consumers had brought the vehicles to Montana. The State supreme court rejected Ford's argument, and held that the company's activities in the State had the needed connection to the plaintiff's allegations that a defective Ford caused instate injury

Supreme Court makes it easier for people to sue, allowing them to bring their claims in the state where they were injured.

The Supreme Court held the connection between the plaintiffs' claims and Ford's activities in the forum States is close enough to support specific jurisdiction. The Court recognized the Fourteenth Amendment's Due Process Clause limits a state court's power to exercise jurisdiction over a defendant. The canonical decision in this area remains *International Shoe Co. v. Washington*, 326 U. S. 310. There, the Court held that a tribunal's authority depends on the defendant's having such "contacts" with the forum State that "the maintenance of the suit" is "reasonable" and "does not offend traditional notions of fair play and substantial justice." In applying that formulation, the Court has long focused on the nature and extent of "the defendant's relationship to the forum State." That focus has led to the recognition of two types of personal jurisdiction: general and specific jurisdiction. A state court may exercise general jurisdiction only when a defendant is "essentially at home" in the State. Specific jurisdiction covers defendants less intimately connected with a State, but only as to a narrower class of claims. To be subject to that kind of jurisdiction, the defendant must take "some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State." And the plaintiff's claims "must arise out of or relate to the defendant's contacts" with the forum.

Ford admits that it has "purposefully avail[ed] itself of the privilege of conducting activities" in Montana. The company's claim is instead that those activities are insufficiently connected to the suits. In Ford's view, due process requires a causal link locating jurisdiction only in the State where Ford sold the car in question, or the States where Ford designed and manufactured the vehicle. And because none of these things occurred in Montana, its courts have no power over these cases. Ford's causation-only approach finds no support in this Court's requirement of a "connection" between a plaintiff's suit and a defendant's activities.

The most common formulation of that rule demands that the suit "arise out of or relate to the defendant's contacts with the forum." The Court has stated that specific jurisdiction attaches in cases identical to this one—when a company cultivates a market for a product in the forum State and the product malfunctions there. Here, Ford advertises and markets its vehicles in Montana. Apart from sales, the company works hard to foster ongoing connections to its cars' owners. All this Montana based conduct relates to the claims in these cases, brought by state residents in the States' courts. Put slightly differently, because Ford had systematically served a market in Montana for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States, there is a strong "relationship among the defendant, the forum, and the litigation"—the "essential foundation" of specific jurisdiction. Allowing jurisdiction in these circumstances both treats Ford fairly and serves principles of "interstate federalism."
Ford Motor Co. v. Montana Eighth Judicial District Court et. al., 592 U.S. ___ (2021). https://www.supremecourt.gov/opinions/20pdf/19-368_febh.pdf.

Supreme Court holds if all a device does is call numbers as directed, it's not an Automatic Telephone Dialing System under the Telephone Consumer Protection Act. The Telephone Consumer Protection Act of 1991 (TCPA) proscribes abusive telemarketing practices by, among other things, restricting certain communications made with an "automatic telephone dialing system." The TCPA defines such "autodialers" as equipment with the capacity both "to store or produce telephone numbers to be called, using a random or sequential number generator," and to dial those numbers. 47 U. S. C. §227(a)(1).

Petitioner Facebook, Inc., maintains a social media platform that, as a security feature, allows users to elect to receive text messages when someone attempts to log in to the user's account from a new device or browser. Facebook sent such texts to Noah Duguid, alerting him to login activity on a Facebook account linked to his telephone number, but Duguid never created that account (or any account on Facebook). Duguid tried without success to stop the unwanted messages, and eventually brought a putative class action against Facebook. He alleged that Facebook violated the TCPA by maintaining a database that stored phone numbers and programming its equipment to send automated text messages.

Facebook countered that the TCPA does not apply because the technology it used to text Duguid did not use a "random or sequential number generator." The Ninth Circuit disagreed, holding that §227(a)(1) applies to a notification system like Facebook's that has the capacity to dial automatically stored numbers.

The Supreme Court reversed, holding that to qualify as an "automatic telephone dialing system" under the TCPA, a device must have the capacity either to store a telephone number using a random or sequential number generator, or to produce a telephone number using a random or sequential number generator. Congress' chosen definition of an autodialer requires that the equipment in question must use a random or sequential number generator. That definition excludes equipment like Facebook's login notification system. *Facebook v. Duguid, et al.*, 292 U.S, ___ (2021). https://www.supremecourt.gov/opinions/20pdf/19-511_p86b.pdf.

Supreme Court holds monetary is unavailable to the Federal Trade Commission. The Court states:

> Section 13(b) of the Federal Trade Commission Act authorizes the Commission to obtain, "in proper cases," a "permanent injunction" in federal court against "any person, partnership, or corporation" that it believes "is

> violating, or is about to violate, any provision of law" that the Commission enforces. 87 Stat. 592, 15 U. S. C. §53(b). The question presented is whether this statutory language authorizes the Commission to seek, and a court to award, equitable monetary relief such as restitution or disgorgement. We conclude that it does not.

AMG Capital Management v. FTC, ___ U.S. ___ (2021). https://www.supremecourt.gov/opinions/20pdf/19-508_l6gn.pdf.

FEDERAL CIRCUIT COURTS OF APPEALS

Ninth Circuit revives suit over meaning of "Krab Mix." A split court revived a proposed class action alleging that P.F. Chang's misled and deceived consumers when it used the term "krab mix" on its restaurant menus to describe food that did not contain any real crab meat.

In an unpublished opinion, the panel reversed a district judge's ruling that dismissed the plaintiff's allegations for being "implausible on their face." Kang, however, claimed that the restaurant using "krab mix" to describe its sushi rolls that don't have any authentic crab is "unfair and deceptive."

The ninth Circuit reversed, "Because the term 'krab mix' lacks any commonly understood contrary meaning, we cannot say, in the absence of evidence bearing on the issue, that Kang's allegation is implausible on its face." *Chansue Kang v. P.F. Chang's China Bistro et al.*, ___ F.3d ___ (9th Cir. 2021).
https://www.courtlistener.com/opinion/4855188/chansue-kang-v-pf-changs-china-bistro.

Plaintiffs lacked Article III standing to maintain their action because they described only a general, regulatory violation, not something that was particularized to them and concrete. Plaintiff filed a class action in state court. Defendant removed the case to federal court, and the question of jurisdiction was appealed to the Seventh Circuit. The court first noted:

> To establish standing under Article III of the Constitution, a plaintiff must demonstrate (1) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the injury would likely be redressed by the requested judicial relief.

Ordinarily, it is the plaintiff who bears the burden of demonstrating that the district court has subject-matter jurisdiction over her case and that it falls within "the Judicial Power" conferred in Article III. But more generally, the party that wants the federal forum, in this case the defendant, is the one that has the burden of establishing the court's authority to hear the case. The court concluded:

> Our job is to decide whether Thornley and her co-plaintiffs have Article III standing to pursue the case they have presented in their complaint. We have concluded that they do not: they have described only a general, regulatory violation, not something that is particularized to them and concrete. It is no secret to anyone that they took care in their allegations, and especially in the scope of the proposed class they would like to represent, to steer clear of federal court. But in general, plaintiffs may do this.

Thornley v. Clearview AI, Inc., 984 F.3d 1241 (7th Cir. 2021). http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2021/D01-14/C:20-3249:J:Wood:aut:T:fnOp:N:2644794:S:0.

Eleventh Circuit clarifies ascertainability standard for class actions. The court significantly clarified its requirements for certifying class actions, ruling that a Florida federal judge erred when he tossed a suit worth upwards of $2 billion because a group of consumers failed to prove the "administrative feasibility" of identifying class members.

In its opinion, the three-judge panel vacated the dismissal and denial of class certification in the case, which claimed defendant sold potentially millions of consumers defective refrigerators for recreational vehicles. The court sent the case back to the district court for further proceedings.

The panel based its decision on its finding that Federal Rule of Civil Procedure 23, which governs class actions, does not require plaintiffs to prove an administratively feasible method for identifying absent class members to obtain certification. It also said that although jurisdiction was based solely on the Class Action Fairness Act of 2005, jurisdiction in such circumstances does not depend on class certification and a trial court retains jurisdiction even after denying certification.

Cherry et al. v. Dometic Corp., ___ F.3d ___ (11th Cir. 2021). https://casetext.com/case/cherry-v-dometic-corp.

Language in debt collection letter stating consumer may call to eliminate further collection action, does not violate the Fair Debt Collection Practices Act. The Third Circuit upheld a summary judgment from a Pennsylvania federal court, rejecting the assertion that the letter violated the FDCPA by misleading a debtor to believe that a phone call is a "legally effective way to stop such collection action" when only a written communication can do so.

Language in debt collection letter stating consumer may call to eliminate further collection action, does not violate the Fair Debt Collection Practices Act.

The court found that the sentence inviting her to call the firm "does not suggest that a debtor could exercise any [Section] 1692g rights over the phone." "The order of the paragraphs does not create confusion about what each one conveys."

Candace Moyer v. Patenaude & Felix APC, ___ F.2d ___ (3rd Cir. 2021). https://law.justia.com/cases/federal/appellate-courts/ca3/20-1937/20-1937-2021-03-16.html.

Arbitration clause voids suit against debt collector. The Third Circuit overturned a New Jersey federal court ruling and declared that an arbitration agreement barred a former client from litigating her claims in court. A three-judge panel reversed the federal court's ruling denying the firm's bid to compel arbitration of plaintiff's claims that collector engaged in unlawful debt adjustment and related activities.

The circuit court found the arbitration clause met the standard set forth bythe New Jersey Supreme Court. The court stated that decision held that arbitration provisions must "clearly and unambiguously" signal that consumers are waiving their right to pursue claims in court. "The agreement's arbitration provision makes 'clear and understandable to the average consumer' that she is waiving her right to bring suit in a judicial forum." The panel noted that the arbitration clause "explains that arbitration 'replaces the right to go to court before a judge or jury' and further states that arbitration 'may limit each party's right to discovery and appeal.'"

Caren Frederick, on Behalf of Herself and All Other Class Mem-

bers Similarly Situated v. Law Office of Fox Kohler & Associates et al., ___ F.2d ___ (3d Cir. 2021). https://law.justia.com/cases/federal/appellate-courts/ca3/20-2539/20-2539-2021-03-24.html.

*Third Circuit finds debt collection letter not false or misleading***.** The Third Circuit shot down a consumer's bid to revive a proposed class action alleging a collector falsely suggested a debt could increase by itemizing the balance to include "$0.00" in interest and fees in a collection letter. The court ruled that such representations are not misleading.

The court upheld a New Jersey federal court ruling nixing plaintiff Randy Hopkins' suit against Collecto, which does business as EOS CCA. The panel found that Hopkins' Fair Debt Collection Practices Act claims fell short under both the "least sophisticated debtor" standard in the circuit and the "unsophisticated debtor" standard in other circuits. The court stated, "Even our case law's hypothetical 'least sophisticated consumer' — gullible though he may be — reads a debt collection letter without speculating about what could happen in the future based on true statements concerning the past."
Randy Hopkins v. Collecto Inc. et al., ___ F.2d ___ (3d Cir. 2021). https://law.justia.com/cases/federal/appellate-courts/ca3/20-1955/20-1955-2021-04-12.html.

FEDERAL DISTRICT COURTS

Judge strikes down D.C.'s ban on filing eviction cases. A D.C. Superior Court Judge struck down the district's local law moratorium on filing new eviction cases during the COVID-19 pandemic. The court found that the eviction filing ban unconstitutionally infringed on landlords' right of access to the courts. The decision strikes down the District's ban on eviction filings, however, it does *not* overturn the city's moratorium on actual evictions.
Borger Management v. Hernandez-Cruz, Superior Court of the District of Columbia (2021). https://www.jdsupra.com/legal-news/is-the-cdc-s-nationwide-covid-19-7768527/.

Judge strikes down D.C.'s ban on filing eviction cases.

U.S. District Court invalidates two provisions of the CFPB's "Prepaid Rule." The United States District Court for the District of Columbia entered an Order in invalidating two provisions of the Consumer Financial Protection Bureau "Prepaid Rule" ("the Rule"). The court invalidated the mandatory short-form fee disclosure requirement, and the requirement for a thirty-day waiting period before linking prepaid products to credit. In granting plaintiff PayPal's motion for summary judgment, the Court held that the CFPB acted outside of its statutory authority.
PayPal, Inc. v. Consumer Financial Protection Bureau, et al., ___ F. Supp. 3d ___ (D.D.C. 2020). https://www.consumerfinancialserviceslawmonitor.com/wp-content/uploads/sites/501/2021/01/Paypal-v.-CFPB-et-al.-Ct.-Opinion.pdf.

Non-signatory held to arbitration agreement. The U.S. District Court for the Eastern District of Pennsylvania granted a national cable provider's motion to compel arbitration in a putative class action alleging the company violated the FCRA by checking consumer credit reports without a permissible purpose.

After the consumer filed the putative class action, the company moved to arbitrate the claims pursuant to a provision contained "in various written materials that were originally provided to [the consumer]'s household in 2006" upon the opening of a company account. In response, the consumer asserted that the arbitration provision is not binding on him, because he was not the signatory on the document that contains the provision.

The court disagreed with the consumer, concluding that, even though he was a non-signatory, he "actively sought and obtained benefits provided pursuant to the Subscriber Agreement. Thus, he is equitably estopped from avoiding the Arbitration Provision contained therein." The court acknowledged the existence of the arbitration agreement was not in dispute, but whether the consumer was bound by it. The court found that, not only did the consumer obtain benefits from the household account, he also "exceris[ed] control over the account," including placing servicing calls regarding the account. Moreover, because the claims filed by the consumer fall within the scope of the arbitration agreement, as they "relate[] to [company] and/or [consumer]'s relationship with [company]," and the court granted the company's motion to compel arbitration.
Shelton v. Comcast Corporation, ___ F.Supp.3d ___ (E.D. Pa. 2021). https://scholar.google.com/scholar_case?case=3840387153740959969&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

Letter collecting service fee authorized by contract does not violate FDCPA. Debt collector sent a debt collection letter to consumer containing the following language regarding a service fee: "[a] service fee of $9.95 may be charged for payments if paying by Credit/Debit card depending on consumer's location and applicable contractual documents." Consumer filed suit, alleging Defendants violated the FDCPA, in reference to the service fee language, by causing him "informational injury" in using "false representation in collection of a debt" and "unfairly advis[ing] him that he owed more money than the amount of the debit."

The Court held that Plaintiff failed to show a violation of his rights under the FDCPA because the FDCPA allows for collection of debts "permitted by contract or applicable law." It reasoned that the service fee language of the letter ICF sent to Plaintiff simply stated the "same conditions and limitations on the collection of service fees that the FDCPA places on debt collection in general," and that the "least sophisticated debtor" would not see the language as a "threat to impose unlawful fees or a false statement as to ICR's power with respect to debt collections." Accordingly, the Court granted the motion to dismiss. In its ruling, the Court reiterated that a debt collector does not violate the FDCPA by taking collection actions permitted by the underlying contracts. *Martinez v. Integrated Capital Recovery, LLC,* ___ F. Supp. 3d ___ (E.D. Ca. 2021). https://casetext.com/case/martinez-v-integrated-capital-recovery-llc.

Creditor's action may both violate the Bankruptcy automatic stay and create liability under the FDCPA. Nothing in the structure of the FDCPA suggests that the same conduct can›t violate specific prohibitions in multiple sections. The Southern District of Texas considered whether a consumer may bring a claim under the Fair Debt Collection Practices Act based on conduct that violated the Bankruptcy Code, and whether specific conduct may be actionable under more than one section of the FRCPA. The court answered both questions in the affirmative. *Houser v. Ltd. Fin. Servs. LP*, ___ F. Supp. 3d ___ (S.D. Tex. 2021). https://casetext.com/case/houser-v-ltd-fin-servs-lp.

Spouse cannot blame husband's company for her Covid-19 infection. A California federal judge has thrown out a woman's bid to hold her husband's employer responsible for her COVID-19 infection, finding that her claims that her husband contracted the disease at work and then passed it on to her are barred by the state's workers' compensation law.

U.S. District Judge Maxine M. Chesney dismissed with leave to amend the suit, giving a win to Victory Woodworks Inc. The court found that because Corby Kuciemba's injury is dependent entirely on her husband's work-related infection, the state's workers' compensation law provides the only possible remedy.
Kuciemba et al. v. Victory Woodworks Inc., ___ F. Supp. 3d ___ (N.D. Ca. 2021). https://docs.justia.com/cases/federal/district-courts/california/candce/3:2020cv09355/371175/19.

FCRA claim regarding reporting of charge off dismissed for lack of Article III standing. After the plaintiff defaulted on her loan, Toyota Motor Credit Corporation and Experian reported that the balance of her loan had been charged off, but that a lesser amount was past due. Arriaza alleges that Defendants violated various provisions of the Fair Credit Reporting Act ("FCRA") by inaccurately portraying her debt with TMCC.

FCRA claim regarding reporting of charge off dismissed for lack of Article III standing.

The court questioned the plaintiff's contention that the reporting of a lesser past due amount than the amount of the charge-off could negatively impact the plaintiff's credit score. In so holding, the court reasoned that, even if such reporting was inconsistent with Metro 2 guidelines, the plaintiff had failed to allege a plausible concrete injury to establish standing. Further, the Court emphasized that, in enacting the FCRA, Congress did not intend to preclude all inaccuracies in credit reporting, but only those inaccuracies that are either "patently incorrect" or "misleading in such a way and to such an extent that [they] can be expected" to adversely affect credit decisions.
Deysi Arriaza v. Experian Information Solutions, Inc., et al., ___ F. Supp. 3d ___ (D. Md. 2021). https://casetext.com/case/arriaza-v-experian-info-sols.

STATE COURTS

DTPA additional damages as well as damages for emotional distress and mental anguish awarded. A Texas appellate court affirmed a judgment for $500 in actual damages for breach of contract, $45,000 in compensatory damages for emotional distress and mental anguish, and $90,000 additional damages for knowingly and intentionally violating the DTPA. The court also affirmed finding of intentional infliction of emotional distress.
Psalms Funeral Home LLC v. Hogan-Rogers, ___ S.W. 3d ___ (Tex. App.—Beaumont 2020). https://casetext.com/case/psalms-funeral-home-llc-v-hogan-rogers.

Employer may not reserve the right to litigate claims against an employee in court while simultaneously seeking to restrict the employee to arbitrate her employment. The Missouri Court of Appeals considered the question of whether an arbitration agreement was enforceable.

A former at-will employee sued his former employer (UniFirst) under the Missouri Human Rights Act alleging disability discrimination and retaliation claims. UniFirst moved to compel arbitration based on the arbitration clause in Caldwell's employment contract. The district court denied UniFirst's motion holding the arbitration clause lacked adequate consideration in two aspects: first, Caldwell's at-will employment was insufficient consideration to support the arbitration agreement, and second, the arbitration clause lacked mutuality because UniFirst unilaterally reserved for itself the ability to assert certain claims in court against Caldwell while Caldwell was required to arbitrate all potential claims.

On appeal the question of whether the arbitration agreement was supported by consideration. At the outset, the Missouri Court of Appeals (Eastern District) held that Missouri contract law principles – including consideration – govern whether an arbitration agreement is valid. Under Missouri law, a promise by one party to a contract is sufficient consideration in exchange for a promise by the other party. But when one party retains the unilateral right to sidestep its obligations, that party's promise is considered "illusory" and thus unenforceable.
Caldwell v. UniFirst Corporation, ___ S.W. 3d ___ (Mo. Ct. App. 2020). https://casetext.com/case/caldwell-v-unifirst-corp-2.

Manufacturer not liable for contribution or indemnity to consumer who brought suit against dealer. The Court of Appeals of Texas, Fourteenth District, Houston held that a manufacturer is not required to provide contribution or indemnity is suit by consumer against dealer under Tex. Civ. Prac. & Rem. 82.002 because suit did not concern bodily injury or tort. The court also found that because manufacturer did not participation in arbitration and was not adjudicated responsible, contribution or indemnity was not available under Tex. Civ. Prac. & Rem. 32.002.
Charlie Thomas Ford, Ltd. v. Ford Motor Co., ___ S.W. 3d ___ (Tex. App.—Houston [14th Dist.] 2021). https://casetext.com/case/charlie-thomas-ford-ltd-v-ford-motor-co.

FEDERAL NEWS

Consumer cases in the Supreme Court. This year will bring major U.S. Supreme Court decisions focused on consumer protection, including one regarding Federal Trade Commission financial penalties AMG Capital Management LLC et al. v. FTC, case number 19-508, and another concerning standing for damages in class actions, *TransUnion LLC v. Sergio L. Ramirez,* case number 20-297.

Consumer protection attorneys and experts also are anticipating new class actions stemming from COVID-19 products such as masks and hand sanitizer. Cases to watch include *Archer et al. v. Carnival Corp.* and PLC et al., case number 2:20-cv-04203 and *Juishan Hsu et al. v. Princess Cruise Lines Ltd.*, case number 2:20-cv-03488, in the U.S. District Court for the Central District of California.

And New York prepares to implement a new law strictly regulating automatic subscription renewal terms. The state is poised to enact a strict ARL mirroring California's, which took effect in 2010 and is, to date, one of the strictest such laws. The New York and California laws have multiple key things in common, including that they both require companies to receive affirmative consent from a customer before setting up an automatic renewal. The subscription category is expansive, but examples include magazines and newspapers, weight loss programs and recurring shipments of groceries or toiletries.

Finally, in early December, the Supreme Court heard oral arguments over what defines automatic telephone dialing systems, which are prohibited under the Telephone Consumer Protection Act. The justices will rule on Facebook v. Duguid early this year, and experts are watching the case closely because of its potential to limit or expand protections under the law.

CFPB says discrimination by lenders on the basis of sexual orientation or gender identity is illegal. The Consumer Financial Protection Bureau today issued an interpretive rule clarifying that the prohibition against sex discrimination under the Equal Credit Opportunity Act and Regulation B includes sexual orientation discrimination and gender identity discrimination. This prohi-

bition also covers discrimination based on actual or perceived nonconformity with traditional sex- or gender-based stereotypes, and discrimination based on an applicant's social or other associations. The rule follows a request for public comment issued by the CFPB last July. The rule is *here*. The CFPB's press release is *here*.

STATE NEWS

Florida Governor signs Covid-19 liability protection law. Florida became the most populous state to date to enact legislation shielding businesses and health care providers from COVID-19 injury and death lawsuits, with the law drawing mostly praise from the many in the state's legal community as needed to support a post-pandemic economic recovery despite controversy over certain provisions.

Florida Governor signs Covid-19 liability protection law.

The legislation had drawn opposition from various groups, including the state's Plaintiffs Bar, unions and the AARP, plus Democratic lawmakers. But it was a top priority for Republicans, who control the Sunshine State's executive and legislative branches, and pushed the proposal through substantially in its original form and largely along party lines. More information and a copy of the law may be found at, https://www.natlawreview.com/article/florida-enacts-covid-19-business-liability-shield.

DECEPTIVE TRADE PRACTICES AND WARRANTY

PLAINTIFF IMPERMISSIBLY FRACTURES HIS DTPA PROFESSIONAL NEGLIGENCE CLAIM

Babauta v. Jennings, ___ S.W.3d ___ (Tex. App. 2021).
https://law.justia.com/cases/texas/fourteenth-court-of-appeals/2021/14-16-00540-cv.html

FACTS: Appellant Felix Babauta was arrested and suffered various physical injuries by the officers. Babauta, represented by Appellees Jennings and Wilkins, sued the deputy and Harris County but his suit was dismissed. Subsequently, his appeal was also dismissed due to late filing.

Babauta sued Jennings and Wilkins alleging that the attorneys negligently failed to conduct discovery in the underlying suit and misinformed Babauta about the federal mailbox rule causing his notice of appeal to be filed untimely. Babauta asserted claims for breach of contract, negligence, fraud, breach of fiduciary duty, and violations of the DTPA. Wilkins and Jennings filed motions for no-evidence summary judgment that were granted by the trial court. Babauta appealed.

HOLDING: Affirmed.

REASONING: In asserting a DTPA violation, Babauta alleged that "Wilkins' acts in representing to Babauta that, if he filed the Notice of Appeal through the long-standing doctrine known as the [sic] is a DTPA violation because it is one of material fact."

If the gist of a client's complaint is that the attorney did not exercise that degree of care, skill, or diligence as attorneys of ordinary skill and knowledge commonly possess, then that complaint should be pursued as a negligence claim, rather than some other claim.

The court reasoned that because Babauta based his claims for DTPA violations on the same factual underpinnings of the negligence claim, Babauta impermissibly fractured his professional negligence claim. The court noted that under Texas law, a plaintiff is not permitted to divide or fracture a legal malpractice claim into additional claims that do not sound in negligence. Although other claims can coexist with a legal malpractice claim, the plaintiff must do more than merely reassert the same claim for legal malpractice under an alternative label.

Moreover, the court noted that if the gist of a client's complaint is that the attorney did not exercise that degree of care, skill, or diligence as attorneys of ordinary skill and knowledge commonly possess, then that complaint should be pursued as a negligence claim, rather than some other claim. Here, Babauta characterized Jennings and Wilkins' allegedly negligent conduct as involving "failure to perform" does not transform the essence of Babauta's claim from professional negligence to non-negligence. The Court held that the crux of Babauta's claim was that Jennings and Wilkins did not provide adequate legal representation to Babauta, and therefore, Babauta's claims should have been pursued only as a professional negligence claim.

MANUFACTURER IS NOT REQUIRED TO PROVIDE CONTRIBUTION OR INDEMNITY IN SUIT BY CONSUMER AGAINST DEALER UNDER TEX. CIV. PRAC. & REM. 82.002, BECAUSE SUIT SOUGHT ONLY ECONOMIC DAMAGES

Charlie Thomas Ford, Ltd. v. Ford Motor Co., 2021 Tex. App. LEXIS 1494 (Tex. App.—Houston [14th Dist.] Mar. 2, 2021).
https://casetext.com/case/charlie-thomas-ford-ltd-v-ford-motor-co

FACTS: Appellant was Charlie Thomas Ford, LTD d/b/a AutoNation Ford Gulf Freeway, a car dealership that dealt cars manufactured by Appellee Ford Motor Company.

AutoNation and Ford were defendants in an underlying suit filed by Sylvia and Alejandra Roman, who claimed that an automobile they purchased from AutoNation was unfit under the DTPA. The Romans' claims against AutoNation went to arbitration, which resulted in an award for the Romans. AutoNation sought contribution and indemnity from Ford which resulted in both parties filing cross-motions for summary judgement. The trial court granted Ford's motion, denied AutoNation's motion, and dismissed AutoNation's claims. AutoNation appealed.

HOLDING: Affirmed.

REASONING: AutoNation argued that the trial court erroneously determined that Ford owed no indemnity under the parties' sales and services agreement because the sales and services agreement stated that Ford would defend, indemnify, hold harmless, and protect AutoNation from all losses, damages, or expenses resulting from lawsuits, complaints, or claims from third parties concerning "[p]roperty damage to a company product or bodily injury or property damage arising out of an occurrence caused solely by a 'production defect'. . . . [or] a defect in the design of that product."

A products liability action is an action against a manufacturer or seller for recovery of damages arising out of personal injury, death, or property damage.

The Romans' sought damages for the loss of trade-in value of their Ford Escape, the cost of Ford's extended service plan, the cost of the value care plan, and rental costs for a replacement vehicle. Under CPRC § 82.002, manufacturers must indemnify or hold harmless product sellers, the purpose being to cover products liability actions. A products liability action is an action against a manufacturer or seller for recovery of damages arising out of personal injury, death, or property damage from an alleged product defect.

The court concluded that the Romans' lawsuit did not allege or concern "bodily injury" or "property damage" "arising out of an occurrence caused solely by "a production or design defect in the Romans' vehicle. Instead, their lawsuit sought to recover economic damages only. Therefore, the trial court did not err in granting summary judgement on this issue.

NINTH CIRCUIT REVIVES SUIT OVER MEANING OF "KRAB MIX"

Kang v. P.F. Chang's China Bistro, Inc., ___ Fed. Appx. ___ (9th Cir. 2021).
https://www.proskaueronadvertising.com/wp-content/uploads/sites/16/2021/03/Chansue-Kang-v.-PF-Changs-China-Bistro.pdf

FACTS: Plaintiff-Appellant Chansue Kang was a customer of Defendant-Appellee P.F. Chang's China Bistro, Inc. Defendant sold food items containing "krab mix" on its menu, however no crab meat existed in these items.

Kang filed suit on behalf of himself and a California class of people who purchased products containing krab mix from Defendant, alleging that Defendant's menu was deceptive. The district court concluded that Kang's allegations were implausible on their face and granted defendant's motion to dismiss. Kang appealed.

HOLDING: Reversed and remanded.

REASONING: Defendant argued that reasonable consumers would not be misled by use of the term "krab mix" in the ingredient list for sushi rolls because other items on the menu include "crab" among their ingredients.

The court rejected this statement because reasonable consumers could not be assumed to look past the term "krab mix" in the item they were ordering to notice that "crab" appeared as an ingredient in other items on the same menu. The court also added that the word "crab" in the ingredient lists of other menu items did not represent "qualifying language" that would dispel the alleged deception. The court held that because the term "krab mix" lacked any commonly understood contrary meaning, Kang's allegation was not implausible on its face.

DEBT COLLECTION

DEBT COLLECTOR'S FAILURE TO INCLUDE WARNINGS ABOUT PARTICIAL PAYMENTS DOES NOT VIOLATE FAIR DEBT COLLECTION PRACTICES ACT

Christie v. Contract Callers, Inc., ___ F. Supp. 3d ___ (N.D. Tex. 2021).
https://casetext.com/case/christie-v-contract-callers-inc

FACTS: Defendant Contract Callers, Inc. ("CCI") sent Plaintiff a 30-day debt validation letter dated May 27, 2019 (the "Letter"), in which CCI sought payment of a debt. CCI informed Plaintiff at the outset that the above referenced account has been listed with their office for collection. The Letter provided that the creditor was T-Mobile and that the amount owed was $64.60. The Letter further provided several different methods of payment. Finally, the Letter explained, "[t]he law limits how long you can be sued on a debt. Because of the age of your debt, we will not sue you for it. If you do not pay the debt, we [CCI] may report or continue to report it to the credit reporting agencies as unpaid."

Plaintiff filed a putative class action complaint against CCI, asserting a claim for violations of the Fair Debt Collection Practices Act ("FDCPA"). CCI filed a motion to dismiss.
HOLDING: Granted.
REASONING: CCI asserted that the quoted language of the Letter satisfied the FDCPA because the language was approved by the Fair Trade Commission ("FTC") and Consumer Financial Protection Bureau ("CFPB") in two consent decrees and because the Fifth Circuit has approved the language in *Manuel v. Merchants & Professional Bureau, Inc*. Plaintiff responded that CCI violated the FDCPA because although the Letter did state that "[b]ecause of the age of your debt, we will not sue you for it[,]" it failed to additionally disclose that a partial payment of the debt would revive the debt under Texas state law.

The court found that partial payment alone is not sufficient to revive a time-barred debt under Texas state law.

The court granted CCI's motion to dismiss Plaintiff's FDCPA claims based on CCI's failure to include warnings about partial payments. First, the court found that partial payment alone is not sufficient to revive a time-barred debt under Texas state law. Second, nothing in the FDCPA requires debt collectors to make disclosures that partial payments on debts may revive the statute of limitations in certain states. The court did not find any misrepresentation as to the legal enforceability of the debt from CCI in the Letter. Nor does the court find any "urgent language and vague threats of additional but unspecified collection efforts" that the Fifth Circuit has previously concluded to be violative of the FDCPA.

LETTER COLLECTING SERVICE FEE AUTHORIZED BY CONTRACT DOES NOT VIOLATE FDCPA

Martinez v. Integrated Capital Recovery, LLC, ___ F. Supp. 3d ___ (E.D. Cal. 2021).
https://casetext.com/case/martinez-v-integrated-capital-recovery-llc

FACTS: A debt was "allegedly" incurred to Build Card – Republic Bank in connection with a transaction by Plaintiff Brandon Martinez. Build Card – Republic Bank sold the debt to DNF Associates, LLC ("DNF"), who then contracted Integrated Capital Recovery ("IRC" and, together with DNF, "Defendants") to collect it. IRC sent a letter to the Martinez calling for several payments to pay off the alleged debt. The letter stated that "[a] service fee of $9.95 may be charged for payments if paying by Credit/Debit card depending on consumer's location and applicable contractual documents." Martinez stated that this service fee was not authorized by the agreement creating the debt or permitted by law and that he did not agree to the charge. therefore, creating a false representation in the collection of a debt.

Martinez brought a class action under the Fair Debt Collection Protection Act ("FDCPA"). Defendants filed a motion to dismiss for lack of standing and for failure to state a claim.
HOLDING: Granted.
REASONING: Martinez argued that in several cases, courts had found violations of the FDCPA in connection with statements regarding the collection of service fees. However, the court noted that those cases were scenarios in which the defendants made false statements in connection with collecting debts by representing that they were entitled to collect service fees that they were not entitled to collect. Specifically, in those cases, service fees were categorically applied to all transactions of a certain type, and statements concerning the collection of service fees did not reflect the conditions or limitations set forth in Section 1692f (1).

A collection notice statement does not violate the FDCPA if it is accurate and does not contain a false representation of the defendant's power with respect to collecting payment. Further, if the least sophisticated debtor would not construe the notice as a threat to take action, then the notice is not unfair or unconscionable. Accordingly, the court held that the service fee from IRC follows the rules set forth in the FDCPA itself, and there was no credible allegation that this statement contained any false representation as it related to Defendant's collection powers. Finally, the court reasoned that the least sophisticated debtor would see this as accurate information useful in selecting a mode of payment, not a threat to impose unlawful fees or a false representation of IRC's debt collection powers. For these reasons, the court found that the Martinez's action must be dismissed with prejudice.

NOTHING IN THE STRUCTURE OF THE FDCPA SUGGESTS THAT THE SAME CONDUCT CAN'T VIOLATE SPECIFIC PROHIBITIONS IN MULTIPLE SECTIONS

Houser v. Ltd. Fin. Servs. LP, ___ F. Supp. 3d ___ (S.D. Tex. 2021). https://casetext.com/case/houser-v-ltd-fin-servs-lp

FACTS: Plaintiff Houser secured a home loan from United Guaranty Corporation ("UGC") in 2011. Houser defaulted on his payments by November 2018 and UGC turned his debt over to Defendant LTD for collection. LTD began making collection calls in November 2018 and Houser advised LTD in December 2018 that it was no longer allowed to call him. LTD continued to call him despite that request. Houser filed for Chapter Seven bankruptcy on December 18, 2018 and listed the debt he owed to UGC in his schedule of assets protected by the bankruptcy stay. Houser continued to receive letters and approximately fifteen phone calls from LTD after he requested that they stop, and he filed for bankruptcy.

Houser claimed multiple causes of action under the Fair Debt Collection Practices Act ("FDCPA"). LTD moved to for summary judgement.

HOLDING: Denied.

REASONING: LTD observed that Houser supported his claims under §1692(f) with the exact same facts as his claims under §1692(c) and (d). LTD argued that a claim under §1692(f) is limited to conduct not enumerated in the other provisions of the FDCPA.

The court rejected this claim relying on decisions from other circuit courts that have held that the same conduct can be both false, deceptive, or misleading under §1692(e).

The court rejected this claim relying on decisions from other circuit courts that have held that the same conduct can be both false, deceptive, or misleading under §1692(e) and unfair or unconscionable under §1692(f). Therefore, LTD had not precluded action from proceeding under §1692(f) generally, even when action may also proceed under §1692(e) generally or under other specific subsections of §1692(e) or (f). Houser's §1692(f)(1) claim in some way replicated his claim under §1692(e)(2). However, the fact remained that Houser pleaded his claim based on the conduct listed within the provisions of §1692(f) and nothing in the structure of the FDCPA suggested that same conduct cannot violate specific prohibitions in multiple sections.

LANGUAGE IN DEBT COLLECTION LETTER STATING CONSUMER MAY CALL TO ELIMINATE FURTHER COLLECTION ACTION DOES NOT VIOLATE THE FAIR DEBT COLLECTION PRACTICES ACT

Moyer v. Patenaude & Felix A.P.C., ___ F.3d___ (3d Cir. 2021). https://law.justia.com/cases/federal/appellate-courts/ca3/20-1937/20-1937-2021-03-16.html

FACTS: Plaintiff Candace Moyer failed to pay her credit-card debt, so the card issuer hired Defendant Patenaude & Felix A.P.C. ("Patenuade") to collect it. Patenuade sent a collection letter that included a Contact Sentence, stating "[i]f you wish to eliminate further collection action, please contact us at [phone number]". Following the Contact Sentence, the letter then instructed debtors to exercise their §1692g rights via written notification within 30 days in a Validation Notice.

Moyer sued under the Fair Debt Collection Practices Act ("FDCPA") because (1) the Contact Sentence would lead a debtor to believe that a phone call is a "legally effective way to stop such collection action" and (2) the Contact Sentence would make a debtor uncertain about her right to dispute the debt in writing. The District Court granted summary judgment in favor of Patenuade and Moyer appealed.

The court employed the "least sophisticated debtor" standard and found that the Contact Sentence does not violate the FDCPA.

HOLDING: Affirmed.

REASONING: The court employed the "least sophisticated debtor" standard and found that the Contact Sentence does not violate the FDCPA. Moyer argued that the letter is a deceptive means of debt collection in violation of § 1692e (10) because Patenuade indicated that a phone call was a legally effective means of stopping collection activity. The court disagreed, concluding that Patenuade invited Moyer to call to "eliminate" collection action, but never asserted, explicitly or implicitly, that the phone call would, by law, force Patenuade to cease its collection efforts.

Moyer also contended that Patenaude's insertion of the invitation to call in the Contact Sentence before the Validation Notice caused confusion regarding how to pursue her rights contained in the Validation Notice. The court concluded the rest of the collection letter instructed the debtor to write to exercise their §1692g rights, leaving no suggestion that a phone call would suffice. Likewise, the court concluded the Contact Sentence did not suggest that a debtor could exercise any § 1692g rights over the phone and the order of the paragraphs did not create confusion. For the foregoing reasons, the court affirmed the judgment of the district court.

VICARIOUS LIABILITY FOR CREDITOR IS NOT AUTOMATIC FOR FDCPA CLAIMS

Reygadas v. DNF Assocs., LLC, 982 F.3d 1119 (8th Cir. 2020). https://law.justia.com/cases/federal/appellate-courts/ca8/19-3167/19-3167-2020-12-14.html

FACTS: Defendant DNF Associates, LLC ("DNF"), purchased a debt that Plaintiff Stephanie Reygadas owed to an online retailer and hired a licensed debt collection agency, Radius Global Solutions, LLC ("RGS"), to collect Reygadas's debt. RGS, unaware that Reygadas had retained an attorney to represent her in a previous collection action brought by DNF in state court, sent her a letter offering to settle.

Reygadas sued DNF, alleging that by using RGS services, it had violated the FDCPA §1692c(a)(2). She argued that RGS acted wrongfully by contacting her directly without the consent of her attorney and DNF was liable for that violation because it hired RGS to perform a task DNF could not lawfully perform. DNF moved for summary judgment but the district court denied the motion and granted partial summary judgment *sua sponte* in favor of Reygadas on the question of DNF's liability. The district court also declined to certify an interlocutory appeal, provided Reygadas a $4,000 offer of judgment and entered final judgment in her favor. DNF appealed.

HOLDING: Vacated and remanded.

REASONING: DNF argued that it knew that Reygadas was represented by counsel in the state court action, but it was RGS that sent the offending letter. Therefore, Reygadas was required to show DNF was responsible for RGS's action.

Vicarious liability, under traditional agency law, is established only through the agent's knowledge transferred to the principal, not the opposite.

The court held Reygadas could not recover from DNF based on a theory of vicarious liability for RGS's action. Courts are required to establish vicarious liability against a legal background of ordinary tort-related vicarious liability rules that apply traditional agency law to the question of actual knowledge under §1692c(a)(2). Under traditional agency law, DNF would have been liable for a violation of §1692c(a)(2) if RGS, the purported agent debt collector, had actual knowledge that Reygadas was represented by counsel. Whether DNF was aware of that fact was irrelevant because vicarious liability, under traditional agency law, is established only through the agent's knowledge transferred to the principal, not the opposite.

Reygadas failed to prove an agency relationship to establish that DNF, as the principal, was responsible for RGS's acts as a matter of law. Case precedents relied on in this case found that liability did not apply to situations where no agency relationship could be established in a creditor and debt-collector relationship under the FDCPA.

DEBT COLLECTION LETTER NOT FALSE OR MISLEADING

Hopkins v. Collecto, Inc., 2021 WL 1345203 (3d Cir. Apr. 12, 2021).

https://law.justia.com/cases/federal/appellate-courts/ca3/20-1955/20-1955-2021-04-12.html

FACTS: On behalf of Appellees US Asset Management, Inc. ("USAM"), Collecto, Inc. d/b/a EOS CCA ("Collecto") sent a letter to Apellant Randy Hopkins to collect a debt that Hopkins initially owed to Verizon. The letter included an itemization of the debt in a table that assigned a "$0.00" value for interest and collection fees and concluded that Hopkins owed $1,088.34 that could be "resolved in full" if he paid a reduced amount of $761.84.

Hopkins filed a putative class action complaint Jersey against USAM and Collecto and alleged that the itemized table in Collector's letter that denoted "$0.00" in interest and collection fees falsely implied that interest and collection fees were materially likely to accrue on the static debt. Thus, Collecto's letter violated the Fair Debt Collection Practices Act's ("FDCPA") prohibition on deceptive and unfair or unconscionable means of collecting consumer debts. The district court dismissed Hopkins' complaint and concluded that Hopkins' complaint failed to show that Collecto's debt itemization violated the FDCPA as it would not have left one in doubt of the nature and legal status of the underlying debt. Hopkins appealed.

HOLDING: Affirmed.

REASONING: Hopkins argued that the least sophisticated debtor, less savvy than the merely unsophisticated debtor, would have been plausibly misled or deceived about the nature of his debt if a collection letter listed it as including $0.00 in interest and fees.

The court rejected Hopkins' argument and noted that debt collection letters spoke only about the past and that even the least sophisticated debtor would not interpret debt collection letters that stated their respective balances due without discussing interest or fees as misleading nor as collector's threat to charge them in future.

The court further noted that even the least sophisticated debtor would understand that collection letters, as reflected by their fonts, formatting, contents and fields, often derive from templates and may contain information not relevant to one particular situation. Thus, the court held that the debt collection letter did not violate the FDCPA and affirmed the district court's dismissal.

RECENT DEVELOPMENTS

CONSUMER CREDIT

FAIR CREDIT REPORTING ACT CLAIM REGARDING REPORTING OF CHARGE -OFF DISMISSED FOR LACK OF ARTICLE III STANDING

Arriaza v. Experian Info. Sols. Inc., ___ F. Supp. 3d___ (D.MD. 2021).
https://casetext.com/case/arriaza-v-experian-info-sols

FACTS: Defendant Toyota Motor Credit Corporation ("TMCC") wrote off part of Plaintiff Deysi Arriaza's debt and reported the write off and the outstanding balance to Experian Information Solutions, Inc. ("Experian"). Experian published Arriaza's credit report with three amounts: "Recent Balance: $7,035," "$10,068 written off[,]" and "$7,035 past due."

After the alleged failure to conduct a reasonable investigation and revise the credit report, Arriaza sued TMCC and Experian ("Defendants") for violating various provisions of the Fair Credit Reporting Act ("FCRA") by inaccurately portraying her debt with TMCC. TMCC answered the complaint and Experian filed a motion to dismiss.

HOLDING: Granted.

REASONING: The district court found that Arriaza lacked injury-in-fact, thus not satisfying her Article III standing to bring an FCRA claim and the court lacked subject matter jurisdiction over Experian. Although Experian and Arriaza disagreed on how to interpret the $10,068 write off, taking the interpretation most favorable to Arriaza, the court found the alleged inaccuracy in credit reporting did not cause Arriaza's "concrete harm or risk of real harm."

Arriaza claimed that if Experian added the write off to her past-due balance, her credit score would have improved. In other words, underreporting of her Arriaza's debt *negatively* impacted her credit score.

The court found Arriaza's claim to be conclusory [and] devoid of any reference to actual events and, therefore, could not establish standing. The court also rejected Arriaza's claim that TMCC and Experian may continue to report her debt with TMCC even if that debt has been paid off because the alleged future harm is not sufficiently imminent to establish Article III standing.

DEBT COLLECTOR'S FAILURE TO INCLUDE WARNINGS ABOUT PARTICIAL PAYMENTS DOES NOT VIOLATE FAIR DEBT COLLECTION PRACTICES ACT

Christie v. Contract Callers, Inc., ___ F. Supp. 3d ___ (N.D. Tex. 2021).
https://casetext.com/case/christie-v-contract-callers-inc

FACTS: Defendant Contract Callers, Inc. ("CCI") sent Plaintiff a 30-day debt validation letter dated May 27, 2019 (the "Letter"), in which CCI sought payment of a debt. CCI informed Plaintiff at the outset that the above referenced account has been listed with their office for collection. The Letter provided that the creditor was T-Mobile and that the amount owed was $64.60. The Letter further provided several different methods of payment. Finally, the Letter explained, "[t]he law limits how long you can be sued on a debt. Because of the age of your debt, we will not sue you for it. If you do not pay the debt, we [CCI] may report or continue to report it to the credit reporting agencies as unpaid."

Plaintiff filed a putative class action complaint against CCI, asserting a claim for violations of the Fair Debt Collection Practices Act ("FDCPA"). CCI filed a motion to dismiss.

HOLDING: Granted.

REASONING: CCI asserted that the quoted language of the Letter satisfied the FDCPA because the language was approved by the Fair Trade Commission ("FTC") and Consumer Financial Protection Bureau ("CFPB") in two consent decrees and because the Fifth Circuit has approved the language in Manuel v. Merchants & Professional Bureau, Inc., 956 F.3d 822, 826 (5th Cir. 2020). Plaintiff responded that CCI violated the FDCPA because although the Letter did state that "[b]ecause of the age of your debt, we will not sue you for it[,]" it failed to additionally disclose that a partial payment of the debt would revive the debt under Texas state law.

The court found that partial payment alone is not sufficient to revive a time-barred debt under Texas state law.

The court granted CCI's motion to dismiss Plaintiff's FDCPA claims based on CCI's failure to include warnings about partial payments. First, the court found that partial payment alone is not sufficient to revive a time-barred debt under Texas state law. Second, nothing in the FDCPA requires debt collectors to make disclosures that partial payments on debts may revive the statute of limitations in certain states. The court did not find any misrepresentation as to the legal enforceability of the debt from CCI in the Letter. Nor does the court find any "urgent language and vague threats of additional but unspecified collection efforts" that the Fifth Circuit has previously concluded to be violative of the FDCPA.

LETTER COLLECTING SERVICE FEE AUTHORIZED BY CONTRACT DOES NOT VIOLATE FDCPA

Martinez v. Integrated Capital Recovery, LLC, ___ F. Supp. 3d ___ (E.D. Cal. 2021).
https://casetext.com/case/martinez-v-integrated-capital-recovery-llc

FACTS: A debt was "allegedly" incurred to Build Card – Republic Bank in connection with a transaction by Plaintiff Brandon Martinez. Build Card – Republic Bank sold the debt to DNF Associates, LLC ("DNF"), who then contracted Integrated Capital Recovery ("IRC" and, together with DNF, "Defendants") to collect it. IRC sent a letter to the Martinez calling for several payments to pay off the alleged debt. The letter stated that "[a] service fee of $9.95 may be charged for payments if paying by Credit/Debit card depending on consumer's location and applicable contractual documents." Martinez stated that this service fee was not

authorized by the agreement creating the debt or permitted by law and that he did not agree to the charge, therefore, creating a false representation in the collection of a debt.

Martinez brought a class action under the Fair Debt Collection Protection Act ("FDCPA"). Defendants filed a motion to dismiss for lack of standing and for failure to state a claim.

HOLDING: Granted.

REASONING: Martinez argued that in several cases, courts had found violations of the FDCPA in connection with statements regarding the collection of service fees. However, the court noted that those cases were scenarios in which the defendants made false statements in connection with collecting debts by representing that they were entitled to collect service fees that they were not entitled to collect. Specifically, in those cases, service fees were categorically applied to all transactions of a certain type, and statements concerning the collection of service fees did not reflect the conditions or limitations set forth in Section 1692f (1).

A collection notice statement does not violate the FDCPA if it is accurate and does not contain a false representation of the defendant's power with respect to collecting payment.

A collection notice statement does not violate the FDCPA if it is accurate and does not contain a false representation of the defendant's power with respect to collecting payment. Further, if the least sophisticated debtor would not construe the notice as a threat to take action, then the notice is not unfair or unconscionable. Accordingly, the court held that the service fee from IRC follows the rules set forth in the FDCPA itself, and there was no credible allegation that this statement contained any false representation as it related to Defendant's collection powers. Finally, the court reasoned that the least sophisticated debtor would see this as accurate information useful in selecting a mode of payment, not a threat to impose unlawful fees or a false representation of IRC's debt collection powers. For these reasons, the court found that the Martinez's action must be dismissed with prejudice.

ARBITRATION

ARBITRATION CLAUSE VOIDS SUIT AGAINST DEBT COLLECTOR

Caren Frederick v. Law Office of Fox Kohler & Assn., ___ F.3d ___ (3d Cir. 2021).
https://law.justia.com/cases/federal/appellate-courts/ca3/20-2539/20-2539-2021-03-24.html

FACTS: Plaintiff Caren Fredrick entered into a Professional Legal Services Agreement (the "Agreement") with the Defendant Law Office of Fox Kohler & Assn. (the "Law Firm") to help negotiate her accounts with creditors.

The arbitration provision in the Agreement was enforceable because it made clear and understandable to Frederick that she was waiving her right to bring suit in a judicial forum.

Six years later, Fredrick filed suit against the Law Firm on behalf of herself and others who received legal services from the Law Firm for allegedly engaging in racketeering, consumer fraud, and unlawful debt adjustment practices. The Law Firm moved to compel arbitration pursuant to a provision in the parties' Agreement. The trial court denied the Law Firm's motion, holding the provision to be unenforceable. The Law Firm appealed.
HOLDING: Reversed.
REASONING: The Law Firm argued that the district court erred in concluding that the Agreement's arbitration provision is invalid because the Federal Arbitration Act ("FAA") preempted New Jersey state law.

The Court accepted the Law Firm's argument, holding that because the underlying principle of all arbitration decisions is that arbitration is strictly a matter of consent, the FAA requires courts to enforce arbitration agreements according to their terms. An arbitration clause is valid if it, at least in some general and sufficiently broad way, explains that the plaintiff is giving up her right to bring her claims in court or have a jury resolve the dispute. That standard was met here because the Agreement's arbitration provision explained that arbitration "replace[d] the right to go to court before a judge or jury" and further stated that arbitration "may limit each party's right to discovery and appeal." Additionally, the Agreement stated that "any dispute that cannot be resolved between the parties after 180 days must be resolved by binding arbitration" and the Agreement "shall be submitted for binding arbitration in accordance with the rules of the American Arbitration Association," thereby both clarifying that arbitration is the singular way for the parties to resolve their disputes and establishing the rules that will govern the arbitration. The arbitration provision in the Agreement was enforceable because it made clear and understandable to Frederick that she was waiving her right to bring suit in a judicial forum.

COURT ENFORCES PROVISION OF AN ARBITRATION AGREEMENT THAT REQUIRED THE PARTIES TO WAIVE APPELLATE REVIEW

Beckley Oncology Assocs. v. Abumasmah, 993 F.3d 261 (4th Cir. 2021).
https://www.employmentclassactionreport.com/wp-content/uploads/sites/8/2021/04/191751.P.pdf

FACTS: Plaintiff Beckley Oncology Associates ("BOA") recruited Defendant Dr. Rami Abumasmah to join the practice and Dr. Abumasmah signed an employment agreement with BOA. The employment agreement provided that the parties would arbitrate any claims arising out of the employment contract. The employment agreement between BOA and Dr. Abumasmah purported to waive both judicial and appellate review of the arbitrator's decision. Dr. Abumasmah then left BOA to leave the country to take care of his mother. BOA terminated Dr. Abumasmah's employment and sent him a separation agreement. Dr. Abumasmah disagreed with the incentive bonus he was given. Dr. Abumasmah sought arbitration of his claims against BOA. The arbitrator determined that Dr. Abumasmah was entitled to an incentive bonus. The arbitrator awarded Dr. Abumasmah $167,030.

BOA filed a complaint in federal district court to vacate the arbitration award. The district court granted Dr. Abumasmah's motion to dismiss and confirmed the award. BOA appealed.
HOLDING: Affirmed.
REASONING: The court held that the courts of appeals will enforce agreements that waive appellate review of district court decisions. Deciding to waive appellate review is similar to waiving constitutional rights such as the right to counsel, or the right to a jury trial. They are not precluded from waiving procedural rights granted by statute.

PROPOSED CLASS ACTION CLAIMING FAIR CREDIT REPORTING ACT VIOLATIONS MUST GO TO ARBITRATION DUE TO A PRIOR SUBSCRIBER AGREEMENT SIGNED BY THE PROPOSED LEAD PLAINTIFF.

Hearn v. Comcast Cable Communs., LLC, 992 F.3d 1209 (11th Cir. 2021).
https://www.leagle.com/decision/infco20210405033

FACTS: Plaintiff-appellee Michael Hearn obtained services from Defendant Comcast Cable Communications LLC. While securing these services, Plaintiff signed a work order containing a Subscriber Agreement that included an arbitration provision that broadly applied to "any claim or controversy related to Comcast." Plaintiff later terminated Defendants services in August of 2017. However, in March 2019, Defendant claimed that Plaintiff called about reconnecting services while Plaintiff claimed that they called Defendant to open a new account because he had terminated the previous services under the Subscriber Agreement. Plaintiff contended that Defendant pulled his credit score during this call and thus violated the Fair Credit Reporting Act ("FCRA").

Plaintiff brought a putative class action against Defendant. Defendant moved to compel arbitration. The district court denied the motion concluding that the FRCA claim did not relate to the Subscriber Agreement. Defendant appealed.
HOLDING: Reversed and Remanded.
REASONING: The Defendants argue that (1) under the Federal Arbitration Act (FAA) the courts must enforce a valid arbitration agreement and (2) that this case must be arbitrated because the Plaintiffs claims relate to the subscriber agreement.

The court reasoned that there must be some direct relationship between the dispute and the performance of duties specified by the contract in order to find that the dispute arises out of, relates to, or is connected to the underlying agreement.

Citing to *Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1218 (11th Cir. 2011), the court reasoned that there must be some direct relationship between the dispute and the performance of duties specified by the contract in order to find that the dispute arises out of, relates to, or is connected to the underlying agreement. Following this reasoning, the court concluded the Plaintiff's FCRA claim related to the Subscriber Agreement.

The court held that a comprehensive reading of the Reconnection Provision in the Subscriber Agreement demonstrated that the Plaintiff's claim still related to the agreement even if Plaintiff's claim that they were not calling to reconnect services were accepted. They reasoned that the Reconnection Provision applied because Plaintiff was seeking to reconnect services at the same house Plaintiff originally had them. Thus, it did not matter whether the original services were terminated or suspended.

Moreover, the court held that this made it foreseeable that Defendant would use the Plaintiff's information that it already had on file to reinstate services—furthermore, the Credit Inquiries Provision in the Subscriber Agreement directly related to the Plaintiff's FCRA claim. Thus, the court ordered that the case be reversed and remanded.

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BOA filed a complaint in federal district court to vacate the arbitration award. The district court granted Dr. Abumasmah's motion to dismiss and confirmed the award. BOA appealed.
HOLDING: Affirmed.
REASONING: The court held that the courts of appeals will enforce agreements that waive appellate review of district court decisions. Deciding to waive appellate review is similar to waiving constitutional rights such as the right to counsel, or the right to a jury trial. They are not precluded from waiving procedural rights granted by statute.

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https://www.leagle.com/decision/infco20210405033

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Plaintiff brought a putative class action against Defendant. Defendant moved to compel arbitration. The district court denied the motion concluding that the FRCA claim did not relate to the Subscriber Agreement. Defendant appealed.
HOLDING: Reversed and Remanded.
REASONING: The Defendants argue that (1) under the Federal Arbitration Act (FAA) the courts must enforce a valid arbitration agreement and (2) that this case must be arbitrated because the Plaintiffs claims relate to the subscriber agreement.

Citing to *Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1218 (11th Cir. 2011), the court reasoned that there must be some direct relationship between the dispute and the performance of duties specified by the contract in order to find that the dispute arises out of, relates to, or is connected to the underlying agreement. Following this reasoning, the court concluded the Plaintiff's FCRA claim related to the Subscriber Agreement.

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if Plaintiff's claim that they were not calling to reconnect services were accepted. They reasoned that the Reconnection Provision applied because Plaintiff was seeking to reconnect services at the same house Plaintiff originally had them. Thus, it did not matter whether the original services were terminated or suspended.

Moreover, the court held that this made it foreseeable that Defendant would use the Plaintiff's information that it already had on file to reinstate services—furthermore, the Credit Inquiries Provision in the Subscriber Agreement directly related to the Plaintiff's FCRA claim. Thus, the court ordered that the case be reversed and remanded.

MISCELLANEOUS

SUPREME COURT HOLDS IF ALL A DEVICE DOES IS CALL NUMBERS AS DIRECTED, IT'S NOT AN AUTOMATIC TELEPHONE DIALING SYSTEM UNDER THE TELEPHONE CONSUMER PROTECTION ACT

Facebook v. Duguid, et al., 292 U.S. ___ (2021).
https://www.supremecourt.gov/opinions/20pdf/19-511_p86b.pdf

FACTS: Plaintiff Noah Duguid sued Defendant Facebook, Inc., alleging that Facebook had violated the Telephone Consumer Protection Act ("TCPA") by maintaining a database of stored phone numbers and programming its equipment to send automated text messages. The TCPA forbids abusive telemarketing practices by restricting communications made with an "automatic telephone dialing system" ("autodialer"). The TCPA defined autodialers as equipment that can "store or produce telephone numbers to be called, using a random or sequential number generator."

The Court used the conventional rules of grammar and punctuation for its statutory interpretation.

Duguid brought a putative class action against Facebook because he was unable to stop their unwanted text messages alerting him of login activity. Facebook moved to dismiss the suit for failure to state a claim because Duguid did not claim the text messages were sent to phone numbers randomly generated. The trial court dismissed with prejudice the complaint. The appellate court reversed, holding Duguid had stated a claim because an autodialer did not need to use a random generator. The Supreme Court granted certiorari to determine whether the statutory definition of an autodialer required the use of a random number generator in storing telephone numbers.
HOLDING: Reversed and remanded.
REASONING: Duguid argued for a statutory interpretation of the TCPA that excluded from autodialers the characteristic use of a "random or sequential number generator" in storing phone numbers. The Court disagreed with Duguid's textual statutory interpretation of an autodialer and found the statutory context supported Facebook's autodialer definition.

The Court used the conventional rules of grammar and punctuation for its statutory interpretation. This led the Court to require the use of a random number generator in both producing and storing phone numbers, refuting Duguid's limitation to only producing. The Court concluded that within the TCPA's statutory context, an autodialer excluded equipment that did not use a random number generator, and concluded that Duguid's definition of an autodialer was too broad as to encompass ordinary cell phone use.

SUPREME COURT HOLDS SECURED CREDITOR MAY RETAIN REPOSSESSED CAR AFTER BANKRUPTCY FILING

City of Chicago v. Fulton, ___ U.S. ___ (2021).
https://www.supremecourt.gov/opinions/20pdf/19-357_6k47.pdf

FACTS: Separate Chapter 13 debtors ("Respondents") requested that the City of Chicago (the "City") return his or her vehicle. The City impounded Respondents' vehicles for failure to pay fines for motor vehicle infractions.

The City refused to turn over the vehicles. In each case, a bankruptcy court held that the City's refusal violated the automatic stay. In a consolidated opinion, the Seventh Circuit affirmed, concluding that by retaining possession of the vehicles, the City had acted "to exercise control over" Respondents' property in violation of §362(a)(3). The Supreme Court of the United States granted certiorari.
HOLDING: Vacated and remanded.
REASONING: The City argued it did not violate the automatic stay by retaining possession of the debtors' vehicles after the bankruptcy filings.

There was a circuit split over whether an entity that retained possession of bankruptcy estate property violated §362(a)(3). The Court examined the definitions of §362(a)(3)'s operative terms. The Court concluded §362(a)(3) halted any affirmative act that would alter the status quo as of the time of the filing of a bankruptcy petition. If read in the alternative, it would have rendered §542 superfluous despite it being the provision governing turnover of estate property. This alternative reading would have also caused contradictions between §362(a)(3) and §542. Section 542 carves out exceptions to the turnover command. Under Respondents' reading, an entity would be required to turn over property under §362(a)(3) even if that property were exempt from turnover under §542. The history of the Bankruptcy Code confirmed the better reading. The Code originally included both §362(a)(3) and §542(a). However, §362(a)(3) lacked the phrase "or to exercise control over property of the estate." When that phrase was later added by amendment, Congress made no mention of transforming §362(a)(3) into an affirmative turnover obligation. It was unlikely Congress would have made such an important change by merely adding the phrase "exercise control" rather than by adding a cross-reference to §542(a) or some other indication that it was so transforming §362(a)(3).

There was a circuit split over whether an entity that retained possession of bankruptcy estate property violated §362(a)(3).

SUPREME COURT HOLDS MONETARY IS UNAVAILABLE TO THE FEDERAL TRADE COMMISSION UNDER SECTION 13(b)

AMG Capital Mgmt. LLC et al., Petitioners v. FTC, 593 U.S. ___ (2021).
https://www.supremecourt.gov/opinions/20pdf/19-508_l6gn.pdf

FACTS: Petitioner-Appellant, Scott Tucker (All defendants collectively will be referred to as Tucker), controller of several companies that provided borrowers with short-term payday loans. Tucker's companies operated online and provided customers with misleading explanations to loan terms. The terms included fine print saying that the loans would automatically be renewed unless customers took affirmative steps to opt out. This led to more than $1.3 billion in deceptive charges between 2008 and 2012.

The Court reasoned that the language refers only to injunctions, and injunctions are not the same as an award of equitable monetary relief.

The Federal Trades Commission filed suit, alleging Tucker and his companies were engaging in "unfair or deceptive acts or practiced in or affecting commerce," in violation of §5(a) of the Act. 15 U. S. C. §45(a)(1). The Commission relied upon §13(b) and asked for a permanent injunction to prevent Tucker from committing future violations of the Act. Relying on the same provision, the Commission also asked the court to order monetary relief. The district court granted summary judgment for the Commission, the Commission's request for injunction, and directed Tucker to pay $1.27 billion in restitution and disgorgement. Tucker appealed.

The Ninth Circuit rejected Tucker's argument that §13(b) does not authorize the monetary relief the district court granted, pointing to Circuit precedent that interpreted §13(b) as "empower[ing] district courts to grant any ancillary relief necessary to accomplish complete justice, including restitution." Tucker appealed. The Supreme Court granted certiorari.

HOLDING: Reversed and Remanded.

REASONING: The Court looked to decide if Congress, by enacting §13(b)'s words, "permanent injunction," granted the Commission authority to obtain monetary relief directly from courts, thereby effectively bypassing the process set forth in §5 and §19.

The Court reasoned that the language refers only to injunctions, and injunctions are not the same as an award of equitable monetary relief. The Court stated that the words "permanent injunction" have a purpose that does not extend to the grant of monetary relief. When looking at the entire provision it focused on prospective, not retrospective relief.

THE LAST WORD

As you may have noticed, this issue of the *Journal* is a bit shorter than usual. I'll blame this on Covid, which resulted in a shortage of cases and difficulty finding authors. I think you will still find it well worth reading and informative.

This also is the last issue for the current "Covid" student editors. Student Editor-in-Chief Victoria Grefer and her entire board have done an excellent job—some of the best writing of any *Journal* staff. They performed extremely well, notwithstanding the difficulty of attending law school virtually, and the inability to have in person exchanges. I know you all join me in welcoming the new Student Editor-in-Chief Yujie Xiong, and the board of Volume 25.

Finally, as I have said many times before, the success of the *Journal* depends in part on you, our readers. We rely on you submit articles you think will be of interest to your colleagues. We consider everything you send, long and short, footnotes, endnotes or textual citations. Send your paper to me, at alderman@uh.edu.

In the last issue I stated, "I am sure none of you will miss 2020, and all of you look forward to 2021." Well, 2021 has arrived. I hope you are all enjoying getting back to some degree of normal. I know I am.

Richard M. Alderman
Editor-in-Chief

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