MISCELLANEOUS

USDA PREEMPTION APPLIES TO PRODUCT LABELS ONLY IF USDA HAD ACTUALLY APPROVED THE LABELS

USDA LABEL PREEMPTION DOES NOT APPLY TO WEBSITES

Cohen v. ConAgra Brands, Inc., ___F.4th ___ (9th Cir. 2021). https://pubcit.typepad.com/files/cohen-v-conagra-opinion-102621-1.pdf

FACTS: In 2015, Plaintiff Robert Cohen began purchasing various frozen chicken products produced by Defendant ConAgra Brands, Inc. that were labeled as having no preservatives, no artificial colors, no added hormones, and being made with 100% natural white meat chicken. Cohen later discovered that the products contained three synthetic ingredients used as colorants, preservatives, and thickening agents. He then visited the website, and it contained similar language to the labels.

Cohen brought suit, alleging that ConAgra falsely advertised its frozen chicken products as natural and preservative-free even though they contained synthetic ingredients. The district court dismissed Cohen's claims as preempted by the Poultry Products Inspection Act and found no reason to distinguish between the packaging itself and an image of the packaging viewed over the internet. Cohen appealed.

HOLDING: Reversed and remanded.

REASONING: Cohen argued that there was not enough evidence in the record to support the district court's finding that ConAgra's labels were reviewed and approved by FSIS and that the only evidence presented was the label itself.

The court agreed with Cohen and found that the mere existence of the label was insufficient to establish that it was reviewed and approved by FSIS. Preemption is an affirmative defense, so the defendant bears the burden of pleading and supporting its preemption argument. The court reversed and remanded the district court's holding for the parties to produce the requisite evidence needed to find whether ConAgra's label was approved by FSIS, and therefore whether Cohen's claims would be preempted.

Regarding representations on websites, it has been held that even though these were not labels, if the state law claims were premised upon advertising related to inadequacy of a product label, then it would be treated the same as a claim about the label itself and preempted. *Pure-Gro,* 54 F.3d at 561 (1995). Here though, the label and website were not materially identical because the website had different language: the website claimed that the chicken products as whole were made without preservatives, artificial flavors, or artificial colors, while the label did not. Because of this difference, Cohen's state law claims challenging the website representations were not preempted, whether or not the product labels were reviewed and approved by the FSIS, because they were not premised on the label itself.

RECOVERY FOR MEDICAL EXPENSES FROM A TORTFEASOR LIMITED TO AMOUNT ACTUALLY PAID OR INCURRED AND MUST BE REASONABLE

In re K & L Auto Crushers, LLC, 627 S.W.3d 239 (Tex. 2021). https://law.justia.com/cases/texas/supreme-court/2021/19-1022.html

FACTS: Plaintiff Kevin Walker alleged injuries from a motor vehicle collision with a tractor-trailer rig driven by an employee of K & L Auto. After the accident, Walker received medical treatment and surgeries billed at $1.2 million. Walker's attorneys sent the medical providers "letters of protection" promising to protect the providers' interests "for any reasonable and necessary medical charges." Walker then sued the driver and K & L Auto for recovery.

In response, K & L Auto served subpoenas on Walker's healthcare providers and moved to compel discovery of documents about the reasonableness of the medical expenses and amounts the providers paid for the devices and equipment billed to Walker. These subpoenas, along with a subsequent narrowed request, were quashed without explanation after the providers questioned their breadth and usefulness. K & L Auto petitioned for a writ of mandamus from the Texas Supreme Court after being denied relief in the court of appeals.

HOLDING: Mandamus relief granted.

REASONING: K & L Auto argued they were only required to pay Walker's medical expenses up to a reasonable amount. The trial court's refusal to allow narrowed discovery of the requested documents compromised K & L Auto's reasonable opportunity to defend that unreasonable charges were not recoverable.

In Texas, recovery for medical expenses is limited to amounts actually "paid or incurred" in addition to "any other limitations under law."

The Texas Supreme Court accepted K & L Auto's argument, noting that in Texas, recovery for medical expenses is limited to amounts actually "paid or incurred" in addition to "any other limitations under law." One such additional requirement under common law is that the billed amount be reasonable, and it is well settled in Texas that recovery of medical expenses will be denied unless the party seeking expenses can show evidence to prove the charges were reasonable. A simple showing that the amount desired was billed does not by itself constitute reasonableness.

Note: Effective June 2021 an amendment to section 3.8.001 substituted "organization other than a quasi-governmental entity authorized to perform a function by state law, a religious organization, a charitable organization, or a charitable trust" for the term "corporation," greatly expanding the scope of who may be ordered to pay attorney's fees. Section 1.002 (62) provides:

"Organization" means a corporation, limited or general partnership, limited liability company, business trust, real estate invest-

ment trust, joint venture, joint stock company, cooperative, association, bank, insurance company, credit union, savings and loan association, or other organization, regardless of whether the organization is for-profit, nonprofit, domestic, or foreign.

TRIAL COURT CANNOT ORDER LIMITED LIABILITY PARTNERSHIPS, LIMITED LIABILITY COMPANIES, OR LIMITED PARTNERSHIPS TO PAY ATTORNEY'S FEES

Benge Gen. Contracting, LLC v. Hertz Elec., LLC, ___ S.W.3d___ (Tex. App. 2021).
https://casetext.com/case/benge-gen-contracting-llc-v-hertz-elec-1

FACTS: Appellant, Benge General Contracting, LLC ("BGC"), hired appellees, Hertz Electrical, LLC ("Hertz") and HTJ Global Electric, LLC ("HTJ") to perform electrical work on several commercial sites in North Texas. Hertz and HTJ submitted single page bids and BGC's owner, James Benge, accepted the contracts. Appellees completed all the work required under the contracts and the work passed inspections as required by the city. BGC contended that it later learned that appellees had failed to perform the work competently and hired new electrical contractors to repair the work.

BGC filed suit alleging that appellees failed to perform their duties in a good and workmanlike manner and brought claims for breach of contract and fraud. BGC also sought attorney's fees. The parties moved to trial and the jury returned a verdict for appellees and found for appellees on their breach of contract, fraud claims, and their request for attorney's fees. Importantly, the jury found that Benge was using BGC as his alter ego in perpetrating a fraud on appellees. BGC's motion for a new trial was denied. BGC appealed.

HOLDING: Reversed.

REASONING: BGC argued that the trial court erred in making both BGC and the owner, James Benge, liable for attorney's fees because BGC is an LLC. Further BGC argued that if BGC could not be liable for attorney's fees, and BGC were Benge's alter ego, then, by extension, Benge also could not be liable for attorney's fees. Appellees argued that it would be unfair to allow Benge to get the benefit of an LLC that was a mere corporate fiction and illusory for liability purposes.

The court agreed with BGC. Texas follows the American Rule that litigants may recover attorney's fees only if specifically allowed by statute or contract. Section 38.001 of the Texas Civil Practice and Remedies Code states that a trial court cannot order limited liability partnerships, limited liability companies, or limited partnerships to pay attorney's fees. Here, appellees cited dicta from one federal case and authority establishing that the alter-ego theory permits piercing of the corporate veil of an LLC to hold members liable for an LLC's debts, but they did not cite to any authority applying this doctrine to attorney's fees. The court held that absent mandatory, or at least persuasive, authority applying the alter ego theory to hold an LLC's members liable for attorney's fees that could not be incurred by the LLC, the court must abide by the plain statutory language. Therefore, the court concluded that the trial court abused its discretion in awarding attorney's fees.

NOTE: Effective June 2021 an amendment to section 3.8.001 substituted "organization other than a quasi-governmental entity authorized to perform a function by state law, a religious organization, a charitable organization, or a charitable trust" for the term "corporation," greatly expanding the scope of who may be ordered to pay attorney's fees. Section 1.002 (62) provides:
Organization" means a corporation, limited or general partnership, limited liability company, business trust, real estate investment trust, joint venture, joint stock company, cooperative, association, bank, insurance company, credit union, savings and loan association, or other organization, regardless of whether the organization is for-profit, nonprofit, domestic, or foreign.

SUCCESSFUL PARTY IS REQUIRED TO SEGREGATE ATTORNEY'S FEES, AND IF HE FAILs TO DO SO SHOULD BE GIVEN THE OPPORTUNITY TO SEGREGATE

Wease v. Ocwen Loan Servicing, LLC, ___ F. Supp. 3d ___ (N.D. Tex. 2021).
https://www.govinfo.gov/content/pkg/USCOURTS-txnd-3_13-cv-04107/pdf/USCOURTS-txnd-3_13-cv-04107-2.pdf

FACTS: Plaintiff Michael Wease obtained a home equity loan that was assigned to Defendant Wells Fargo Bank, N.A., and Defendant Ocwen Loan Servicing, LLC (collectively "Ocwen") was the servicing agent for Wease's loan. Ocwen attempted to collect loan payments and foreclose on the Wease's property.

Wease filed suit asserting breach of contract, unclean hands, and violations of RESPA and TDCA. Ocwen answered and counterclaimed for foreclosure. The court entered judgment in Ocwen's favor. Wease appealed and was partially successful when the Fifth Circuit reversed judgment regarding his breach of contract claim and Ocwen's foreclosure counterclaim. On remand, the jury verdict found in Ocwen's favor. Ocwen filed a motion for attorney's fees, and Wease objected to the attorneys' fees related to his partially successful appeal.

HOLDING: Motion partially granted.

REASONING: Ocwen argued that the facts and circumstances were the same or nearly identical as to each cause of action on appeal, and segregating fees incurred in prosecuting each separate claim was impossible. Wease did not assert an argument regarding segregating fees but asserted none of the fees related to the appeal were recoverable.

There must be an attempt to identify the amount of fees attributable to the recoverable claims.

The court held that Ocwen was required to segregate its fees and could recover fees related only to Wease's unsuccessful appeal. In Texas, an appellee may not recover attorneys' fees for work performed on any appealed issue where the appellant was successful. The court reasoned intertwined facts alone were not enough to avoid the general duty to segregate. And even if the claims were dependent upon the same set of facts or circumstances, that did not mean they all required the same research, discovery, proof, or legal expertise. The court recognized some work would not be wholly attributable to a recoverable or unrecoverable claim, and this would not bar recovery. However, there must be an attempt to identify the amount of fees attributable to the

recoverable claims. Because Ocwen did not segregate its fees, the court held it would grant Ocwen the opportunity to segregate.

COURT FINDS THE "SUBSTANTIAL SIMILARITY" TEST APPROPRIATE TO DETERMINE WHETHER NAMED PLAINTIFF HAS STANDING FOR A CLASS

Franklin v. Apple Inc., ___ F. Supp.3d ___ (E.D. Tex. 2021). https://www.leagle.com/decision/infdco20211101a75

FACTS: Plaintiff Robert Franklin purchased an iPhone 6 manufactured by Defendant Apple Inc. The iPhone 6 suddenly exploded and caught fire, causing Franklin to suffer eye and wrist injuries. Franklin alleged that the defective battery caused his iPhone to be unsafe to operate.

Franklin started a class action against Apple Inc. in the United States District Court for the Eastern District of Texas and filed an amended complaint that included a Texas Deceptive Trade Practices Act claim, a design defect claim, manufacturing defect claim, failure to warn claim, and a negligence claim. Apple Inc. moved to dismiss the amended complaint pursuant to 12(b)(6) and 12(b)(1).

HOLDING: Motion denied.

REASONING: Apple argued that the court must dismiss Franklin's class claim with respect to other iPhone 6 series models he did not purchase for lack of subject-matter jurisdiction, and that Franklin lacked standing to bring claims based on products he did not buy.

Franklin countered by stating that he had established standing and that the issue of whether he could bring claims based on products he did not purchase should be addressed at the class certification stage. The court had analyzed this this question in the past, holding that a Plaintiff might assert the claims as long as the products and alleged misrepresentations were substantially similar. Apple argued that even under the substantial similarity approach, Franklin failed to allege that iPhone 6 series models were substantially similar.

Franklin failed to allege that iPhone 6 series models were substantially similar.

The court disagreed with Apple, finding that because the purchased model and unpurchased models were alleged to have the same defect and Apple's alleged wrongful conduct applied to all of the models, Franklin had pleaded substantial similarity between the products at this stage to overcome Apple's motion to dismiss. The "substantially similar" test requires that 1) the products be similar and 2) the alleged misrepresentations at issue are substantially similar. Using the test, the court concluded that Franklin had standing to bring the claims on behalf of the proposed class.