agreement specified arbitration for disputes "arising out of the Agreement or other action performed ... by [First Texas]." The Greenes' claims of discriminatory and derogatory conduct by First Texas were all directly related to First Texas's construction of their home and refusal to fix alleged defects. Also, the arbitration clause was not limited to conduct occurring prior to execution of the contract. The court remanded the case with instructions to vacate and compel arbitration of all claims.

THE INABILITY TO READ AND UNDERSTAND AN ARBITRATION AGREEMENT DOES NOT RENDER THE AGREEMENT UNCONSCIONABLE OR OTHERWISE UNENFORCEABLE

Washington Mut. Fin. Group v. Bailey 364 F.3d 260 (5th Cir. 2004).

FACTS: Washington Mutual Finance Group, LLC ("WM Finance") provided loans for several illiterate consumers ("Borrowers"). In the same transaction, the Borrowers also purchased several types of insurance from American Bankers Life Assurance Company of Florida. Each Borrower signed an agreement to arbitrate any disputes they might have with WM Finance.

Later, when a dispute arose, the Borrowers did not seek arbitration but rather sued WM Finance, primarily alleging that they were sold and charged for insurance that they did not need or want. The Borrowers also claimed the arbitration agreement was unenforceable because their illiteracy prevented them from understanding it. WM Finance brought an action under the Federal Arbitration Act ("FAA") seeking an order staying the state actions and compelling the Borrowers to arbitrate their disputes. The district court found that the Borrowers' illiteracy and WM Finance's failure to specifically inform them that they were signing arbitration agreements rendered the arbitration agreements procedurally unconscionable and therefore unenforceable.

HOLDING: Reversed.

REASONING: "The FAA expresses a strong national policy favoring arbitration of disputes, and all doubts concerning the arbitrability of claims should be resolved in favor of arbitration." *Primerica Life Ins. Co. v. Brown,* 304 F.3d 469, 471 (5th Cir. 2002). Under Mississippi contract law, which governs Mississippi arbitration agreements, a contract can be unconscionable procedurally and/or substantively. *Russell v. Performance Toyota, Inc.,* 826 So. 2d 719, 725 (Miss. 2002). The Borrowers attacked the formation of the agreement to arbitrate as opposed to the substance of the agreement. Procedural unconscionability may be evidenced by, "a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties and/or a lack of opportunity to study the contract and inquire about the contract terms." *Id.* The Borrowers signed the arbitration agreements without coercion and the legal language of the agreements and bargaining powers of the parties was not in dispute. The Mississippi Supreme Court has held as a matter of law that an individual's inability to understand a contract because of his or her illiteracy is not a sufficient basis for concluding a contract is unenforceable. *Mixon v. Sovereign Camp,* 125 So. 413, 415 (Miss. 1930). A person is charged with knowing the contents of any document that he executes. *Russell*, 826 So. 2d at 726. Therefore, "[a] person cannot avoid a written contract which he has entered into on the ground that he did not read it or have it read to him." *J.R. Watkins Co. v. Runnels,* 172 So. 2d 567, 571 (Miss. 1965). A person who cannot read has a duty to find someone to read the contract to him. *Dixon v. First Family Fin. Servs. Inc.,* 2003 WL 21788959, at *3 (S.D. Miss. 2003). Accordingly, under Mississippi law, the inability to read and understand the arbitration agreement does not render the agreement unconscionable or otherwise unenforceable in the absence of other factors.

MISCELLANEOUS

SECTION 3 OF THE RESTATEMENT (3d) OF TORTS GENERALLY DOES NOT APPLY TO USED PRODUCTS

Ford Motor Co. v. Ridgway, ____ S.W.3d ____ (Tex. 2004).

FACTS: In July 1997, Jack Ridgway suffered second-degree burns to twenty percent of his body when his two-year-old, Ford F-150 pick-up truck caught fire. Ridgway was the third owner of the vehicle. Previous owners brought the truck in for repairs multiple times to Red McCombs Ford of San Antonio. At the time of the accident the truck had accumulated 54,792 miles. An expert Ridgway hired to inspect the truck after the accident concluded that the suspected cause of the fire was the electrical system in the engine compartment and opined that a malfunction of the electrical system in the engine compartment caused the fire. The expert, however, declined to eliminate all portions of the fuel system as a possible cause of the accident and conceded that the actual cause of the fire had not been determined. Although the expert suggested that further investigation might have yielded a more definitive conclusion, particularly if the vehicle were disassembled, Ridgway made no motion for further testing and did not complain that the trial court failed to allow adequate time for or sufficient scope of discovery.

Ridgway sued McCombs and Ford Motor Company alleging, among other things, products liability and negligence. After Ridgway nonsuited McCombs, the trial court granted Ford's motion for summary judgment because Ridgway did not produce specific evidence of a manufacturing defect. A divided court of appeals affirmed the trial court's judgment on Ridgway's negligence claim, but reversed on the products liability claim. Ford appealed the appellate court's decision on the products liability claim.

HOLDING: Reversed.

REASONING: Ridgway argued section 3 of the Third Re-

statement of Torts had no requirement to produce specific evidence of a defect. Under the Restatement, harm could be inferred as being caused by a defect existing at the time of sale or distribution if it was of the kind that ordinarily occurred as a result of a product defect, and it was not, in the particular case, solely the result of causes other than the product defect existing at the time of sale or distribution. Restatement (Third) of Torts: Products Liability § 3 (1998). The Court held that section 3 generally only applied to new or almost new products, and therefore, would not be applicable to the facts of this case. The Court emphasized that this limitation was clear from the reporter's notes to section 3, which states that an inference of defect may not be drawn from the mere fact of a product-related accident, and that evidence of improper use or alteration by repair people weakens the inference. The Court noted that in decisions in other jurisdictions where section 3 had been cited, this limitation had also been noted. These decisions allowed the inference of a product defect only in cases involving new or almost new products, and disallowed the inference and required specific proof of a defect in cases involving older products. Ridgway produced no direct evidence of the fire's cause, and his circumstantial evidence that a manufacturing defect existed in the Ford F-150 when it left the manufacturer did not exceed a scintilla. Summary Judgment on the products liability claim was appropriate and the appellate courts' decision was reversed.

FOR A PROPERTY OWNER TO QUALIFY AS A WITNESS TO THE DAMAGES TO HIS PROPERTY, HIS TESIMONY MUST SHOW THAT IT REFERS TO MARKET, RATHER THAN INSTRINSIC OR SOME OTHER VALUE TO THE PROPERTY

Ford Motor Co. v. Cooper, 125 S.W.3d 794 (Tex.App.—Texarkana 2004).

FACTS: Cooper test drove a sedan and found the steering wheel pulled to one side. The car salesman from Crane Lincoln-Mercury, Inc. ("Crane") assured him the car needed alignment and that it would be repaired before Cooper purchased the vehicle. When Cooper later purchased the vehicle he received further assurances that it had been repaired. Cooper soon discovered the problem remained and returned the vehicle to the dealership on numerous occasions for repair, but the problem persisted. Cooper took the car to several independent repair shops and was told the car was dangerous. Cooper filed suit against Crane and Ford Motor Company ("Ford"), the manufacturer, for violations of the Texas Deceptive Trade Practices Act and breach of warranty. A jury awarded Cooper a total of $72,000 for the diminished value of his vehicle, expenses, and for Crane and Ford's knowing conduct. The trial court reduced the award to $18,000. Ford and Crane appealed, contending the evidence was legally insufficient to support the jury's award of actual damages.
HOLDING: Reversed and remanded.
REASONING: The measure of damages pled by Cooper was the difference between the fair market value of the car as sold and the value it would have had if it had been as warranted and represented. The purchase price of the car, $33,150, was sufficient evidence to support a finding on fair market value of the car as warranted. Crane and Ford claimed that because Cooper offered no evidence as to the actual market value of the vehicle in its alleged defective condition, the judgment could not stand. They claimed that Cooper's only attempt at proving such value was insufficient because it referred only to personal value.

The Texas Supreme Court has held that for an owner to qualify as a witness to the damages to his property, his testimony must refer to market, rather than intrinsic value of the property. Cooper did not state that he was familiar with the market value of the vehicle. He testified that he regarded the vehicle as worthless for driving long trips, which was the purpose for which he had purchased it. His testimony affirmatively referred to the personal value of the property to him and not the market value. Cooper argued that because he had sought the advice of mechanics, his testimony provided evidence of market value. This evidence, however, merely showed that the mechanics regarded the vehicles as unsafe, but did not prove how this affected market value.

Because Cooper's opinion affirmatively showed he was referring to personal, not market, value, it was not evidence of the value of the vehicle in its alleged defective condition.

The court stated that the specific words "market value" were not necessary to provide this evidence, as long as the opinion is clearly based on market value, not solely on intrinsic or personal value. Because Cooper's opinion affirmatively showed he was referring to personal, not market, value, it was not evidence of the value of the vehicle in its alleged defective condition. The jury verdict for diminished value had no support in the record and the court set it aside. The court remanded the case for a new trial.

PUNITIVE DAMAGES MUST BEAR A REASONABLE RELATIONSHIP TO THE INDIVIDUAL INJURY AT ISSUE

Romo v. Ford Motor Company, 113 Cal.App.4th 738 (Cal. App. 5th Dist. 2003).

FACTS: The Romo family was riding in their 1978 Ford Bronco when it rolled over as Juan Romo tried to avoid a swerving car. Both parents and a child died in the accident when the steel portion of the Bronco's roof collapsed and the fiberglass portion shattered. Juan, Evangelina, and Maria Romo were also injured, but did not die. In a products liability action, the jury awarded the Romos almost $5 million compensatory damages and $290 million in punitive damages. The court granted Ford's motion for a new trial on punitive damages, and both sides appealed. The appellate court reinstated and affirmed the judgment, and the California Supreme Court denied Ford's petition. Ford appealed to the United States Supreme Court, which granted certiorari, vacated the judgment, and remand-

ed to the appeals court in light of their holding in *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003).
HOLDING: Modified and conditionally affirmed.
REASONING: In *Grimshaw v. Ford Motor Co.*, 119 Cal. App.3d 757, 819-820 (1981), the California court adopted the goal of punitive damages as actual deterrence of a broad course of bad conduct through sanctions imposed in individual litigation. The *Grimshaw* court adopted this view to deter a course of conduct by depriving the wrongdoer of a profit from the action or making it so expensive as to put the wrongdoer at a competitive disadvantage. However, in *State Farm*, the Supreme Court imposed a constitutional limitation on both the goal and the measure of punitive damages. The Supreme Court made it clear that the permissible punishment was for the harm inflicted on the present plaintiff. It is not a permissible goal to punish a defendant for everything else it may have done wrong.

One of the factors set out in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) as a limitation on the measurement of punitive damages was the historic notion that there must be a reasonable relationship between compensatory and punitive damages. In discussing this reasonable relationship, the court mentioned that even among instances of deadly malicious conduct, some conduct would be more or less reprehensible than other. Therefore, the *State Farm* court concluded that, given the unique nature of the compensatory damages arising under the California statute, the proportionality inquiry must focus on the relationship of punitive damages to the harm to the deceased victim, not merely to compensatory damages.

The court interpreted *State Farm* as narrowing the concept of punitive damages to satisfy Fourteenth Amendment due process, and found that single-digit multipliers of compensatory damages satisfied the requirement. *State Farm* also stated, while a higher single-digit multiplier might be appropriate where non-economic harm is difficult to detect or value under traditional compensatory-damages standards, the "converse is also true." Analyzing these factors to the plaintiff's case, the court found that five times the jury verdict, a total of $23,723,287 – including a $5 million dollar punitive damage award, per deceased parent – was not more than a properly instructed jury would award and would not be constitutionally unreasonable. If the Romos timely consented to the reduction, then the judgment would be modified accordingly and, as modified, affirmed.
indicating such, and the Notice emphasizes that it contains disclosures of the condition of the property "as of the date signed by the seller." Therefore, the statutory form, as well as the Notice prepared by the Texas Association of Realtors, did not ask for, or otherwise require, the disclosure of a lawsuit that was not pending.

CABLE CUSTOMER CAN CHALLENGE LATE FEES EVEN IF PAID

Time Warner Entm't Co., L.P. v. Whiteman, 802 N.E.2d 886 (Ind. 2004).

FACTS: Kelly Whiteman and Jean Wilson (collectively "customers") sued Time Warner Entertainment, L.P. ("Time Warner") for damages, alleging that Time Warner's $4.65 late fee was excessive. They also requested injunctive and declaratory relief to prevent Time Warner from charging excessive late fees in the future.

The trial court initially granted summary judgment for Time Warner because Indiana's "voluntary payment doctrine" prohibited recovery of funds voluntarily paid with full knowledge of all the facts, but under a mistaken belief that a legal obligation existed, and the company's late fee was a valid liquidated damage assessment. Following customers' motion to correct error, however, the trial court vacated the judgment and permitted the action to proceed.

The court of appeals affirmed in part and reversed in part, concluding that a genuine issue of material fact existed as to Time Warner's actual cost basis of late payment charges. It also affirmed the reinstatement of claims for injunctive and declaratory relief, but determined that the voluntary payment doctrine barred money damages as a matter of law. Customers appealed.
HOLDING: Reversed.
REASONING: Acknowledging weighty authority – both within and outside of Indiana – behind the voluntary payment doctrine, the court declined to follow it. First, customers alleged being put in the position of having to pay to continue receiving service. Successful voluntary payment doctrine plaintiffs face no immediate deprivation of goods or services if they do not pay. *See Lafayette & I.R. Co. v. Pattision*, 41 Ind. 312 (Ind.1872) (holding payments not to be voluntary where one person had to pay in order to obtain possession of his property). Second, the court clarified the doctrine by siding with contemporary scholars that the distinction between a mistake of law and mistake of fact is artificial. A genuine issue of material fact existed as to whether customers voluntarily paid the late fees in the face of a recognized uncertainty as to the existence or extent of a legal obligation to pay. Third, the court observed that although the weight of authority favored Time Warner, many other courts have stood on the opposite side.

The court concluded that a genuine issue of material fact existed as to Time Warner's actual cost basis of late payment charges.

The two primary policies behind the doctrine, that recipients of payment for services rely upon these funds for future activities, and the doctrine's resolution of legal disputes without litigation, were unpersuasive when: 1) the company would be allowed to profit by its own wrongdoing; and 2) the alternative dispute resolution would neglect to inquire into plaintiff's uncertainty as to the existence or extent of the obligation. Because of these three arguments, the doctrine did not bar customers' claims for actual damages. The court also found that the question of whether the contractual provision concerning late fees constituted a valid "liquidated damage" clause was a genuine issue of material fact, and as such it was not appropriate to dismiss on summary judgment.