HOLDING: Affirmed.
REASONING: The Court noted that the issue was one of apparent first impression in the 8th Circuit, and recognized that some courts have construed the term "knows" to require actual knowledge while others have held that the term refers to actual or implied knowledge. The Court reasoned the theory of implied knowledge contradicts established agency law, which dictates that while the knowledge of the agent is imputed to the principal, the converse is not true.

The court declined to follow authority urged by Schmitt in support of his claim that the FDCPA created a specific exception to the rule. First, the Court found no textual basis within the statute to suggest that an exception to such a well-settled rule was intended. Second, a distinction between creditors and debt collectors is fundamental to the FDCPA, which does not regulate creditor's activities. Third, even if the FDCPA created an exception allowing a principal's knowledge to be imputed to the agent under narrow circumstances, it was not clear on the record whether the relationship between the creditor and debtor was one of principal-agent or whether the debt collector was an independent contractor.

The Court affirmed the judgment, holding that a creditor's knowledge would not be imputed to a debt collector.

THE FILING OF A COMPLAINT IN A STATE COURT COLLECTION SUIT TRIGGERED THE PROTECTIONS OF THE FAIR DEBT COLLECTION PRACTICES ACT

Thomas v. Law Firm of Simpson & Cybak, 392 F.3d 914 (7th Cir. 2004).

FACTS: Frank Thomas purchased a Chevrolet Blazer under an installment contract. Upon default, the creditor sent a letter to Thomas and informed him that payment was past due. The creditor later, through its attorneys, sued Thomas in Illinois state court to recover the vehicle. The law firm's complaint stated it was a debt collector attempting to collect under the Fair Debt Collection Practices Act ("FDCPA"). Thomas then filed suit against the debtor and the law firm under the FDCPA, claiming that he did not receive notice of his rights as a debtor from either party.

The district court dismissed Thomas' claim, holding the creditor's letter and the debt collector's initiation of the lawsuit in state court did not constitute "initial communications" as required by the FDCPA. The district court granted both defendants' motions to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Thomas appealed.
HOLDING: Reversed and remanded.
REASONING: The FDCPA requires that within five days after the initial communication with a consumer, in connection with the collection of any debt, the debt collector must send the debtor a written validation notice. The notice must contain the amount of the debt, the name of the creditor, and state that the debt will be assumed valid if the debtor does not dispute the debt within 30 days of receipt of the notice. The court held that the default letter from the creditor did not constitute an "initial communication" under the FDCPA. In *Schlosser v. Fairbanks Capital*, 323 F.3d 534, 536 (7th Cir. 2003), the Court found that while the FDCPA defines "communication" broadly, it regulates debt collectors rather than creditors. The Court found that Congress did not intend for a creditor's unilateral actions to obligate debt collectors to inform debtors of their rights.

The Court found that the service of summons and complaint by the law firm, as a debt collector, did constitute an "initial communication" which triggered its obligation to notify Thomas of his validation rights. Although courts are divided on the issue of whether pleadings are communications, the Court found the FDCPA's broad definition of communication encompassed the service of a summons and complaint, and that such a finding was consistent with the legislature's intent. The Court reasoned that to allow an exception of pleadings from the definition of communication would erode the requirement of debt collectors to inform debtors of their validation rights, because debt collectors could avoid their obligation to advise debtors of their rights by initiating litigation.

ARBITRATION

A CHECK-CASHING COMPANY COULD NOT REQUIRE ARBITRATION OF A CLASS ACTION THAT ALLEGED IT CHARGED CUSTOMERS USURIOUS RATES

Cardegna et. al v. Buckeye Check Cashing, Inc., 894 So.2d 860 (Fla. 2005).

FACTS: Borrowers brought a class action lawsuit against Buckeye Check Cashing Inc. ("Lender"), alleging that it made illegal usurious loans disguised as check cashing transactions in violation of Florida statutes. Lender filed a motion to compel arbitration pursuant to provisions for arbitration contained in the deferred deposit and disclosure agreement signed by the borrowers. The circuit court denied the motion. Lender appealed and the appeals court reversed and remanded. The borrowers petitioned for review based on a direct conflict with another decision.
HOLDING: Quashed and remanded.
REASONING: The petitioners claimed that the court's holding conflicted with the decision in *FastFunding v. Betts*, 758 So.2d 1143 (Fla. 5th DCA 2000), which held that arbitration cannot be compelled under a contract that is void under Florida law, and that the issue of the contract's legality must be determined in Florida's courts. The court concluded that a party who alleges and offers evidence that a contract is illegal cannot be compelled to arbitrate the issue of the existence of the agreement to arbitrate. Only the court can make that determination. The Lender argued that the U.S. Supreme Court's decision in *Prima Paint* supported the court's

decision, and required that an arbitrator resolve plaintiff's illegality claim because the parties agreed in the contract to be governed by the Federal Arbitration Act. *Prima Paint Corp. v. Flood & Conklin Manufacturing Co*., 388 U.S. 395, (1967).

The court stated that *Prima Paint* did not apply to this case because the central claim of that case involved fraud in the inducement, which would have rendered the underlying contract merely voidable. In this case, the underlying contract would be rendered void, not merely voidable, from the outset if the contract violated Florida's usury laws. Florida public policy and contract law prohibits allowing potentially illegal contracts by enforcing the included arbitration clause. A policy which violates a provision of the constitution or a statute is void and illegal and will not be enforced in Florida courts. *Harris v. Gonzales*, 789 So.2d 405, 409 (Fla. 4th DCA 2001).

Accordingly, the court held that where a party sufficiently alleges that a contract is void for violation of Florida's usury laws, the Florida courts, and not an arbitrator, must first determine the contract's legality before a party may be required to submit to arbitration under a provision of the contract. Hence, the petitioner's claim that the underlying check cashing contract was illegal and void *ab initio* as being usurious must be resolved by a trial court before arbitration of any other disputes may be compelled.

TRIAL COURTS HAVE NO AUTHORITY TO ENTER A TEMPORARY INJUNCTION WHEN THE CASE IS PROPERLY SUBJECT TO ARBITRATION UNDER THE FAA

Metra United Escalante, L.P., et al. v. The Lynd Co., 158 S.W.3d 535 (Tex. App.—San Antonio 2004).

FACTS: Around December of 2002, the Lynd Company ("Lynd") entered into management agreements with ten Metra limited partnerships, each of which owned an apartment complex in San Antonio, Texas. Each agreement contained a mandatory arbitration clause, except the agreements with Metra United Escalante ("Escalante") and Metra United Promontory. In December of 2003, the Metra partnerships terminated the agreements without providing Lynd with the requisite notice, and without paying certain fees and expenses still owed to Lynd. In March of 2004, the Escalante partnership sold its apartment complex and deposited the proceeds of the sale into an intercompany account. The proceeds were subsequently distributed to Escalante's equity holders in Israel, with the exception of $500,000. As a result, the balance remaining in Escalante's operating account was insufficient to pay the liability owed to Lynd.

On March 25, 2004, Lynd filed an application for a temporary restraining order and a temporary injunction to enjoin further property sales. A TRO was entered, after which the case was removed to federal court and subsequently remanded back to the trial court. After a two-day hearing, the trial court entered the temporary injunction, which was subsequently amended. Metra appealed the temporary injunction order.

HOLDING: Reversed and remanded.

REASONING: In its appeal, Metra contended that the trial court abused its discretion in entering the temporary order contrary to the Federal Arbitration Act ("FAA"). Metra argued Texas courts had held trial courts have no authority to enter such an order when the case is properly subject to arbitration under the FAA. In response Lynd asserted, *inter-alia*, that Texas law permitted a trial court to grant a temporary injunction in aid of arbitration, that the FAA did not preclude injunctive relief under the majority view, and that injunctive relief was proper under the FAA because the arbitration clause in the management agreements contained a no-encumbrance provision.

In focusing on the question of whether the FAA precluded the granting of injunctive relief, the court first looked to Fifth Circuit precedence for guidance. The Fifth Circuit has held that in those cases where the agreement between the parties clearly contemplated the use of injunctive relief to maintain the status quo pending arbitration, such relief was appropriate to prevent one of the parties from terminating the contract. The court then looked to the Texas Court of Appeals for the 14th District in Houston, which has noted that the federal courts in Texas generally agree that the issuance of a preliminary injunction was not appropriate when the underlying claims were subject to arbitration under the FAA.

None of the agreements contained express language demonstrating that the parties contemplated court intervention to maintain the status quo.

After finding that none of the agreements contained express language demonstrating that the parties contemplated court intervention to maintain the status quo, the court decided that it would follow the general rule applied by federal courts in Texas. The court concluded that the issuance of a preliminary injunction was not appropriate when the underlying claims were subject to arbitration under the FAA, and held the temporary injunction was overly broad in its application to the eight partnerships whose agreements included a mandatory arbitration provision. The court instructed the trial court to modify the injunction to eliminate the enjoining of sales of the apartment complexes owned by those eight partnerships.

PATIENT WAS NOT BOUND BY AN ARBITRATION AGREEMENT EXECUTED FOR EARLIER TREATMENT

Reigelsperger v. Siller, 23 Cal. Rptr. 3d 249 (Cal. Dist. Ct. App. 2005).

FACTS: On August 11, 2000, Terry Reigelsperger twisted his back while inspecting a business. The owner of the business arranged for Reigelsperger to see James Siller, a licensed chiropractor, at Siller's office. Siller examined and treated Reigelsperger, leaving him in considerably less pain than when he arrived. Reigelsperger paid Siller $25 cash as payment in full. He also signed an arbitration agreement and waiver which Siller told Reigelsperger he needed to sign for Siller's file. There was no discussion concerning further treatment.

The arbitration agreement required that the parties submit to arbitration "any dispute as to medical malpractice" and stated that "[t]his agreement is intended to bind the patient and the health care provider…who now or in the future treat[s] the patient…" Reigelsperger did not return to Siller for further treatment of his lower back, however, about two years later he again sought chiropractic treatment from Siller, this time for his cervical spine and shoulder. As a result of an injury incurred during that treatment, Reigelsperger and his wife filed a complaint against Siller for medical malpractice.

Siller filed a petition to compel arbitration. The trial court denied Siller's petition after finding there was no open-book account between Reigelsperger and Siller. Siller appealed, contending the trial court erred by ignoring the plain meaning of the arbitration agreement and by finding no open-book account existed within the meaning of section 1295 of the California Civil Procedure Code.

HOLDING: Affirmed.

REASONING: The court recognized that, generally speaking, written agreements to arbitrate medical malpractice claims are enforceable. Section 1295(c) of the California Civil Procedure Code states, "Once signed, such a contract governs all subsequent open-book account transactions for medical services for which the contract was signed, unless rescinded by written notice within 30 days." In *Gross v. Recabaren*, 206 Cal. App.3d 771 (1988), the court defined an open-book account to include an "account with one or more items unsettled" and an "account with dealings still continuing."

The court held there was no open-book account in the technical sense because there was no evidence of a permanent record evidencing an open account of debits and credits. The court also held that there was no expectation of future transactions between the parties as there was no continuing physician-patient relationship.

Regarding Siller's plain meaning argument, the court found the agreement silent on the duration of the contract. The court explained that the doctor-patient relationship gave rise to an implied-in-fact contract and that the court could imply the operative period of the arbitration agreement from the nature of the agreement establishing the doctor-patient relationship. The court assumed the parties intended the arbitration agreement to operate during the period the doctor-patient relationship existed and implied that period as specified in §1295, namely to "all subsequent open-book transactions…" The court also relied on the language of the accompanying informed consent agreement, which was part of the same contractual instrument. The informed consent agreement included the language "…for my present condition and for any future condition(s) for which I seek treatment." The court reasoned that if the parties had intended the arbitration agreement to apply to treatment of future conditions, they would have said so, as they did in the informed consent agreement. The court concluded that the trial court properly construed the contract and found the treatment in 2002 was not an open-book account transaction and the agreement did not require the Reigelspergers to arbitrate the claims.

LANDLORD TENANT

"AS IS" CLAUSE IN A COMMERCIAL LEASE MAY APPLY IN THE HOLDOVER PERIOD OF A LEASE

"AS IS" CLAUSE MAY NEGATE CAUSATION FOR CLAIMS REGARDING THE BUILDING'S PHYSICIAL CONDITION AND MAY WAIVE THE IMPLIED WARRANTY OF SUITABILITY

Gym-N-I Playgrounds, Inc. v. Snider, 158 S.W.3d 78 (Tex. App.—Austin 2005).

FACTS: Snider owned both Gym-N-I Playgrounds, Inc. ("Gym-N-I") and the building where the company operated. The fire marshal recommended Snider install a sprinkler system in his building, but since the building was only slightly over the square footage limit he did not require it. Later, Snider sold the Gym-N-I business to long-time employees of the company, Patrick Finn and Bonnie Caddell ("Tenants"), and agreed to lease the building to them. The lease agreement contained an "as is" clause which stated the tenant accepted the building "as is" with no warranties. Tenants were represented by counsel in the lease transaction and admitted to being aware of the "as is" provision and the fire marshal'ss sprinkler recommendation at the time they negotiated the lease. After the lease term expired, Tenants failed to renew the lease but continued leasing the building using the previous lease's holdover provision. Approximately four years after the lease expired, a fire destroyed the building and all its contents. Tenants asserted the "as is" clause did not carry over into the holdover period of the lease and sued Snider for negligence, violation of the Deceptive Trade Practices Act ("DTPA"), and breach of implied warranty of suitability. The district court granted summary judgment in favor of Snider.

HOLDING: Affirmed.

REASONING: The court found the plain, ordinary and generally accepted meaning of the holdover provision language in the original lease clearly stated that any subsequent holdover arrangement would be governed by the terms of the original lease. The lease hold over provision stated: "[a]ny holding over…shall constitute a lease from month-to-month, under the terms and conditions of this lease…" The court reasoned the "as is" clause was enforceable after applying five factors including: (1) the sophistication of the parties; (2) the terms of the "as is" agreement; (3) whether the "as is" clause was freely negotiated; (4) whether the agreement was an arm's length transaction; and (5) whether there was knowing misrepresentation or concealment of a known fact. Here, Tenants were familiar with the building space, were represented by counsel during