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Article III Standing

New Protections for Homeowners With VA Mortgages, Effective July 27

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University of Houston Law Center
713-825-6068
713-743-2131 (Fax)
alderman@uh.edu

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13809 Research Blvd, Ste 625
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Karen Neeley
Kennedy Sutherland, LLP
700 Lavaca Street, Suite 1400
Austin, TX 78701-3102
kneeley@ibat.org

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James Foley
Foley Law, PLLC
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Fort Worth, TX 76107
james@jamesfoleypllc.com

EMERITUS
D. Esther Chavez
Office of Attorney General
PO Box 12548
Austin, TX 78711
Esther.chavez@oag.texas.gov

Gregg D. Stevens
McGlinchey Stafford PLLC
6688 North Central Expressway, Ste. 400
Dallas, TX 75206
gstevens@mcglinchey.com

Richard Alderman
Editor-In-Chief
Professor Emeritus
Director, Center for Consumer Law
University of Houston Law Center
63 Lodge Trail
Santa Fe, NM 87506
alderman@uh.edu

COUNCIL

TERMS EXPIRE 2021
Mary Spector
SMU Dedman School of Law
P. O. Box 750116
Dallas, TX
mspector@mail.sum.edu

James Foley
Foley Law, PLLC
4116 West vickery Blvd, Suite 103
Fort Worth, TX 76107
james@jamesfoleypllc.com

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McMahon Surovik Suttle, PC
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Abilene, TX 79601
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Rnoriega@trla.org

Manny Newburger
Barron & Newburger, PC
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Austin, TX 78701
mnewburger@bn-lawyers.com

Lou Ann Trevino
The Trevino Law firm
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Suite 800
Houston, TX 77040
latrevino@trevino-law.com

TERMS EXPIRE 2023
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South Texas College of Law
1303 San Jacinto
Houston, TX 77002
msteiner@stcl.edu

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Maurice Wutscher, LLP
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Frisco, TX 75034
kwier@mauricewutscher.com

Rachel Hytken
Quilling, Selander, Lownds,
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2001 Bryan St., Suite 1800
Dallas, TX 75201
rhytken@qslwm.com

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Richard M. Alderman
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Article III Standing — The End of Federal Consumer Litigation[1]

By Manuel H. Newburger* and Brit J. Suttell**

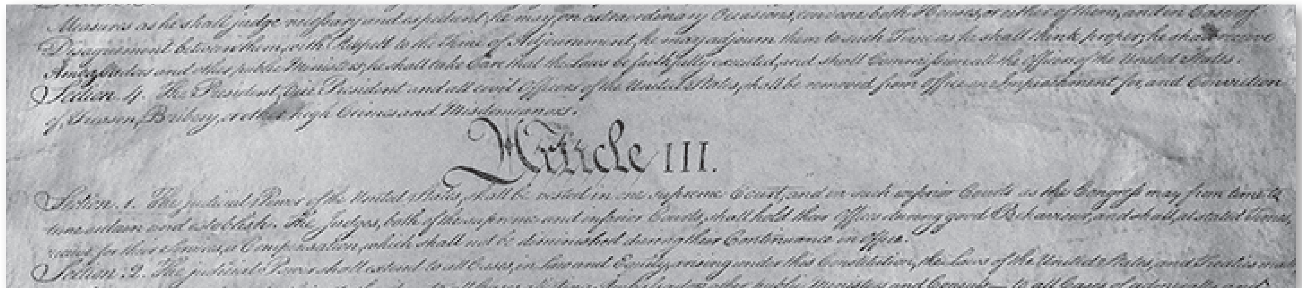
Introduction

Article III of the Constitution grants federal courts the "judicial Power" to resolve only "Cases" or "Controversies." U.S. Const. art. III §§ 1-2. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quotation marks omitted).

Standing is an essential component of Article III's "case or controversy" requirement. *Corbett v. Transp. Sec. Admin.*, 930 F.3d 1225, 1232 (11th Cir. 2019). "Standing is the threshold question in every federal case, determining the power of the court to entertain the suit," and in the absence of standing, "the court is powerless to continue." *Camp Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1269 (11th Cir. 2006) (cleaned up).

The "irreducible constitutional minimum" of standing consists of three elements: (1) the plaintiff must have suffered an injury in fact; (2) the defendant must have caused that injury; and (3) a favorable decision must be likely to redress it. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). The party invoking the jurisdiction of a federal court bears the burden of establishing these elements to the extent required at each stage of the litigation. *Id.* at 561.

Standing is an essential component of Article III's "case or controversy" requirement.



The "foremost" standing requirement is injury in fact, which consists of "an invasion of a legally protected interest" that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.*, at 560. A "concrete" injury must be "de facto"—that is, it must be "real, and not abstract." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). A particularized injury "must affect the plaintiff in a personal and individual way", *Id.*, and each subsidiary element of injury (a legally protected interest, concreteness, particularization, and imminence) must be satisfied. *Id.* at 1545; *Lujan*, 504 U.S. at 560.

Recent cases from the Supreme Court and multiple courts of appeals have used Article III as a basis for dismissal of consumer protection suits. The net effect is to close the doors of federal courthouses to consumers who are allegedly aggrieved by technical violations of federal statutes. However, as is explained below, this is not necessarily good for defendants or the business community.

Standing – The Basics

To establish standing, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*136 S. Ct. at 1547 (2016), as revised (May 24, 2016). "The plaintiff must establish standing at the time suit is filed and cannot manufacture standing afterwards." *Pennell v. Global Trust Mgmt.*, 990 F.3d 1041, 1044 (7th Cir. 2021) (internal quotations omitted). The Article III standing inquiry "remains open to review at all stages of the litigation." *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994). The controversy must exist at all stages of the litigation. *Shiyang Huang v. Equifax Inc. (In re Equifax Customer Data Sec. Breach Litig.)*, 999 F.3d 1247 (11th Cir. 2021), citing *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975).

These cases require a plaintiff to allege a concrete, particularized, injury-in-fact in order to invoke federal court jurisdiction. However, such assertions are not mere formalities. An attorney who asserts an injury-in-fact, is making a material representation of fact and should keep in mind the provisions of the Texas Disciplinary Rules of Professional Conduct.

> **3.01 Meritorious Claims and Contentions**
> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous.
>
> **3.03 Candor Toward the Tribunal**
> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of material fact or law to a tribunal;
>
> (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act;
>
> (3) in an ex parte proceeding, fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision;
>
> (4) fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (5) offer or use evidence that the lawyer knows to be false.
>
> (b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall

> make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.
>
> (c) The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible.

When pleading the existence of an injury-in-fact, an attorney should consider these rules. Apart from the potential ethical consequences, it can be quite painful to invest years of time and effort in a case only to have it dismissed for lack of Article III standing.

Recent Trends

For the first few years following *Spokeo*, federal courts were flooded with motions to dismiss for lack of subject matter jurisdiction based on plaintiffs' alleged lack of Article III standing. However, that trend has changed.

In *Casillas v. Madison Avenue Associates, Inc.*, 926 F.3d 329 (7th Cir. 2019), then-Circuit Judge Amy Coney Barrett, writing for the Seventh Circuit Court of Appeals, found that the plaintiff had asserted "a bare procedural violation" under Section 1692g of the FDCPA (15 U.S.C. § 1692g) without any allegation of concrete harm; thus, she lacked standing to sue. *Casillas* was a harbinger of things to come, but it was not until 2020 that the Article III rapids started to roil.

In *Frank v. Autovest, LLC*, 961 F.3d 1185 (D.C. Cir. 2020), the plaintiff satisfied her burden at the pleading stage by including "general factual allegations of injury resulting from the defendant's conduct." However, the Court of Appeals reversed the District Court's summary judgment for the defendant and remanded with instructions to dismiss based on lack of Article III standing because the consumer failed to identify a concrete injury-in-fact traceable to the alleged statutory violations. Frank's testimony that she neither took nor failed to take any action because of the conduct at issue was fatal to her case. The consumer did not testify that she was confused, misled, or harmed during the collection action, and although she stated that the suit caused her stress and inconvenience, she never connected those general harms to the alleged violations at issue.

> We agree with Frank that the FDCPA creates statutory rights and remedies designed to protect the unsophisticated consumer. *Cf. Jones*, 830 F.3d at 525. But Congress's effort to protect plaintiffs cannot relieve them of the requirement to establish Article III standing—including a "concrete and particularized" injury-in-fact. *Spokeo*, 136 S. Ct. at 1548 (explaining that a "particularized" injury is "personal" to the plaintiff). "Broad though Congress's powers may be to define and create injuries, they cannot override constitutional limits." *Hagy*, 882 F.3d at 623.

This mismatch between the (objective) merits inquiry and the (subjective) standing inquiry is not unique to the FDCPA, but it can trip up an unsuspecting plaintiff. And case law has not always helped matters. Some courts have characterized the Act as "enlist[ing] the efforts of sophisticated consumers . . . as 'private attorneys general' to aid their less sophisticated counterparts, who are unlikely themselves to bring suit under the Act, but who are assumed by the Act to benefit from the deterrent effect of civil actions brought by others." *Jensen*, 791 F.3d at 419 (quoting *Jacobson v. Healthcare Fin. Servs., Inc.*, 516 F.3d 85, 91 (2d Cir. 2008)).

> Read too broadly, this view of the FDCPA is incompatible with the Supreme Court's standing jurisprudence. *See Lujan*, 504 U.S. at 577 (explaining that "a subclass of citizens who suffer no distinctive concrete harm" may not sue to enforce statutory rights). Article III's case-or-controversy requirement remains in effect regardless of the doctrinal test that courts apply to FDCPA claims. And as decisions by our sister circuits indicate, the Act is rife with procedural requirements and substantive prohibitions that do not necessarily trigger concrete injuries when violated. *See Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 339 (7th Cir. 2019) (concluding that a debt collector's failure to inform the debtor that a challenge to the debt under section 1692g(a) must be "in writing" did not cause concrete harm); *Hagy*, 882 F.3d at 622 (holding that the plaintiffs lacked standing to bring a claim under section 1692e(11) for failure to disclose debt-collector status because they did not show that "the non-disclosure created a risk of double payment, caused anxiety, or led to any other concrete harm").
>
> After *Spokeo*, a plaintiff must demonstrate a subjective—that is, an actual—personal injury for standing even when his merits argument turns on the perspective of an objective, unsophisticated consumer. On the margin, this rule might hamper the deterrence purpose of the Act by reducing the number of viable civil suits. HN10. Still, an FDCPA plaintiff possesses multiple avenues to standing, *see Hagy*, 882 F.3d at 622, and he need not suffer

> the same harm that underlies his statutory claim. For instance, a plaintiff could submit evidence of investigatory injuries—e.g., resources spent uncovering or confirming the truth—rather than outright deception. In short, there's ample room for consumers of all sorts and levels of sophistication to bring FDCPA suits, but under Article III, they must be proper plaintiffs.

Frank, 961 F.3d at 1189-90.

Shortly after *Frank*, the Eleventh Circuit issued its opinion in *Trichell v. Midland Credit Mgmt.,* 964 F.3d 990 (11th Cir. 2020). In that case, the District Court found that "the 'least sophisticated consumer' would not find the collection letters sent to Mr. Trichell deceptive or misleading," and granted the defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

On appeal, the Eleventh Circuit vacated that order, remanding the case with instructions to dismiss for lack of Article III jurisdiction. The Court of Appeals noted that at the motion-to-dismiss stage, the plaintiffs bore the burden of alleging facts that plausibly establish their standing. *Trichell*, 964 F.3d at 996, citing *Ashcroft v. Iqbal*, 556 U.S. 662, 677-84 (2009), and *Salcedo v. Hanna*, 936 F.3d 1162, 1168 (11th Cir. 2019). Finding that "the common law furnishes no analog to the FDCPA claims asserted here" *Trichell*, at 998, the Court of Appeals held that merely alleging the FDCPA violations at issue was insufficient to satisfy Article III's standing requirement.

In December, 2020, the Seventh Circuit issued a series of decisions that expanded upon its earlier decision in *Casillas*. In a single week the Court of Appeals decided *Larkin v. Fin. Sys. of Green Bay*, 982 F.3d 1060 (7th Cir. 2020), followed in rapid succession by *Bazile v. Fin. Sys. of Green Bay, Inc.*, 983 F.3d 274 (7th Cir. 2020); *Spuhler v. State Collection Serv.*, 983 F.3d 282 (7th Cir. 2020); *Brunett v. Convergent Outsourcing, Inc.*, 982 F.3d 1067 (7th Cir. 2020); and *Gunn v. Thrasher, Buschmann & Voelkel, P.C.*, 982 F.3d 1069 (7th Cir. 2020). Those cases (and the ones that followed) set a bar for Article III standing, particularly in FDCPA cases, that many plaintiffs will have difficulty clearing – even when defendants have violated a consumer protection statute.

Larkin expanded the holding in *Casillas* from the context of a mere procedural provision of the FDCPA and extended the Article III analysis to the substantive provisions of 15 U.S.C. §§ 1692e and 1692f. The Court of Appeals rejected the procedural vs. substantive distinction proposed by Larkin's attorneys as a basis to distinguish *Casillas*, stating:

> We're not persuaded that the distinction makes *Casillas* inapplicable or alters the Article III calculus. An FDCPA plaintiff must allege a concrete injury regardless of whether the alleged statutory violation is characterized as procedural or substantive. *Thole*, 140 S. Ct. at 1621 (concluding that "the plaintiffs have failed to plausibly allege a concrete injury" in a case raising a substantive ERISA violation).

Larkin, 982 F.3d at 1066.

Following *Larkin*, the *Bazile* court determined that a plaintiff must do more than merely allege (or even prove) an FDCPA violation to establish standing.

> Here, the plaintiff's complaint may survive dismissal as a matter of pleading. But that's not enough for the district court to decide the merits of the action; the truthfulness of the facts necessary for standing have been called into doubt, requiring further inquiry into whether the court has subject-matter jurisdiction.

Bazile, 983 F.3d at 277.

The Court of Appeals held that Bazile needed to show personal harm.

> But even when a plaintiff's allegations sufficiently demonstrate standing at the outset of the action, they don't show standing for long. Once the allegations supporting standing are questioned as a factual matter—either by a party or by the court—the plaintiff must support each controverted element of standing with "competent proof," *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135 (1936), which we've understood as "a showing by a preponderance of the evidence, or proof to a reasonable probability, that standing exists," *Retired Chi. Police Ass'n v. City of Chicago*, 76 F.3d 856, 862 (7th Cir. 1996).

Bazile, 983 F.3d at 279.

After *Bazile*, the *Spuhler* court reiterated that, especially at summary judgment, "the plaintiff bears the burden of establishing the elements of standing." *Spuhler*, 983 F.3d at 285 (citing *Spokeo,* 136 S. Ct. at 1547). The Court of Appeals further explained:

> As the litigation progresses, the way in which the plaintiff demonstrates standing changes. Initially, a plaintiff may demonstrate standing by clearly pleading allegations that "plausibly suggest" each element of standing when all reasonable inferences are drawn in the plaintiff's favor. But if a plaintiff's standing is questioned as a factual matter—for example, in a motion to dismiss under Rule 12(b)(1)—the plaintiff must supply proof, by a preponderance of the evidence or to a reasonable probability, that standing exists. Once the action reaches the summary-judgment stage, the plaintiff must demonstrate standing by "'set[ting] forth' by affidavit or other evidence 'specific facts'" that, taken as true, support each element of standing. Finally, if those facts are later controverted, the plaintiff must adequately support them with evidence adduced at trial. *Id*

The Court of Appeals clearly distinguished the standard of proof at the motion to dismiss stage from the standard at the summary judgment stage:

> To demonstrate standing at the summary judgment stage of litigation, the plaintiffs must "'set forth' by affidavit or other evidence 'specific facts'" demonstrating that they have suffered a concrete and particularized injury that is both fairly traceable to the challenged conduct and

In *TransUnion*, the Supreme Court confirmed that a plaintiff alleging an intangible injury must show that the injury has "a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts."

likely redressable by a judicial decision.

Id. at 284, citing *Lujan,* 504 U.S. at 561.

In *Brunett*, the Seventh Circuit examined standing for the first time on appeal, holding that neither confusion about the defendant's letter nor intimidation resulting from that letter nor the fact that such confusion or intimidation led Brunett to hire a lawyer was sufficient to meet the concrete injury requirement of Article III standing.

> That Brunett's confusion led her to hire a lawyer does not change the evaluation. Even innocuous statements about tax law may lead people to consult counsel. The proposition that forgiving debt is a form of income is not intuitive to non-lawyers (or even to some lawyers). A desire to obtain legal advice is not a reason for universal standing. The plaintiffs in *Thole*, *Spokeo*, *Hein*, and *Richardson* all had counsel. They had been concerned, confused, disturbed, or upset enough to ask lawyers for help. But the Supreme Court held that only people who can show personal, concrete injuries may litigate. Many people think that an advisory opinion will set their minds at ease, but hiring a lawyer in quest of a judicial answer does not permit a federal court, operating under Article III, to give that answer.

Brunett, 982 F.3d at 1069.

Following *Brunett*, *Gunn* rejected the assertion that annoyance or intimidation is sufficient to constitute concrete harm.

The week after its decisions in *Larkin*, *Bazile*, *Spuhler*, *Brunett*, and *Gunn*, the Seventh Circuit issued its decision in *Nettles v. Midland Funding LLC*, 983 F.3d 896 (7th Cir. 2020). In that case, the court found a lack of standing, even when the collection letter at issue overstated Nettles' balance by about $104. Although misrepresenting the amount of a debt is certainly an enumerated FDCPA violation, that fact, standing alone, did not suffice for Article III purposes.

In January, 2021, the Seventh Circuit decided *Smith v. GC Servs. Ltd. P'ship*, 986 F.3d 708 (7th Cir. 2021), affirming the district court's dismissal for lack of standing. Providing its clearest statement yet on the subject of Article III standing, the Court of Appeals declared: "No harm, no foul." Such a statement flies in the face of decades of case law under the FDCPA (and other consumer protection statutes) that allowed plaintiffs who claimed or proved no actual damages to recover statutory damages.

On March 11, 2021, the Seventh Circuit issued its decision in *Pennell v. Global Trust Mgmt.*, 990 F.3d 1041 (7th Cir. 2021). Pennell asserted that the defendant had violated the FDCPA by, *inter alia*, ignoring her cease-and-desist demand and by communicating with a consumer who was represented by counsel. Pennell claimed that she had suffered "stress and confusion" as her injuries, asserting that the debt collector's letter made her think that "her demand had been futile" and that she did not have rights under the FDCPA "to refuse to pay [her] debt and to demand that collection communications cease." *Pennell*, 990 F.3d at 1043. She also claimed that the defendant's dunning letter led her "to question whether she was still represented by counsel as to this debt, which caused stress and confusion as to whether she was required to pay the debt at issue." *Id.*

After the district court granted summary judgment in favor of the defendant, the Seventh Circuit raised the Article III standing issue *sua sponte*. Vacating the judgment and ordering that the case be dismissed for lack of subject matter jurisdiction, the *Pennell* Court reiterated the need to allege a concrete and particularized injury and noted Pennell's failure to do so:

> Pennell alleged in her complaint that Global Trust's dunning letter caused stress and confusion. But we made clear in *Brunett* that 'the state of confusion is not itself an injury. Nor does stress by itself with no physical manifestations and no qualified medical diagnosis amount to concrete harm. For the alleged injury to be concrete, a plaintiff must have acted 'to her detriment, on that confusion.' Pennell failed to show that receiving Global Trust's dunning letter led her to change her course of action or put her in harm's way. Instead, she merely pointed to a statutory violation, which is not enough to establish standing under Article III.

Id., at 1045 (internal citations omitted).

Pennell's claims had an analog in the common law tort of invasion of privacy (specifically, intrusion upon seclusion). That, however, was insufficient to give rise to Article III standing.

Following the line of Seventh Circuit cases, the Sixth Circuit held that confusion and anxiety are insufficient to meet Article III's injury-in-fact requirement. *Garland v. Orlans, PC*, 999 F.3d 432 (6th Cir. 2021). Furthermore, the termination of federal litigation based on Article III standing is not merely an FDCPA phenomenon. It also extends to FCRA cases. *See, e.g., Beaudry v. TeleCheck Servs.*, No. 20-6018, 2021 U.S. App. LEXIS 22488 (6th Cir. July 27, 2021); *Thomas v. Toms King (Ohio II), LLC*, 997 F.3d 629 (6th Cir. 2021). Every type of statutory consumer law claim is subject to challenge based on Article III standing.

Consumer attorneys who thought these cases were likely to be rejected by the Supreme Court had their hopes dashed with that court's decision in *TransUnion LLC v. Ramirez*, ____ U.S. ___, 210 L. Ed. 2d 568, 141 S. Ct. 2190, (2021). In *TransUnion*, the Supreme Court confirmed that a plaintiff

alleging an intangible injury must show that the injury has "a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *TransUnion*, 210 L. Ed. 2d at 579.

However, while claims for invasion of privacy have certainly been recognized as a basis for lawsuits in American courts, the Court made it clear that merely invoking privacy rights was not enough to confer standing:

> For the first time in this Court, the plaintiffs also argue that TransUnion "published" the class members' information internally—for example, to employees within TransUnion and to the vendors that printed and sent the mailings that the class members received. That new argument is forfeited. In any event, it is unavailing. Many American courts did not traditionally recognize intra-company disclosures as actionable publications for purposes of the tort of defamation. *See, e.g., Chalkley v. Atlantic Coast Line R. Co.*, 150 Va. 301, 326-328, 143 S. E. 631, 638-639 (1928). Nor have they necessarily recognized disclosures to printing vendors as actionable publications. *See, e.g., Mack v. Delta Air Lines, Inc.*, 639 Fed. Appx. 582, 586 (CA11 2016). Moreover, even the plaintiffs' cited cases require evidence that the defendant actually "brought an idea to the perception of another," Restatement of Torts §559, Comment a, p. 140 (1938), and thus generally require evidence that the document was actually read and not merely processed, *cf. Ostrowe v. Lee*, 256 N. Y. 36, 38-39, 175 N. E. 505, 505-506 (1931) (Cardozo, C. J.). That evidence is lacking here. In short, the plaintiffs' internal publication theory circumvents a fundamental requirement of an ordinary defamation claim—publication—and does not bear a sufficiently "close relationship" to the traditional defamation tort to qualify for Article III standing.

TransUnion, at 590 n.6.

The Supreme Court has rejected the notion that sharing information with a vendor is, by itself, sufficient to give rise to Article III standing. The Court also attempted to rein in the exercise of jurisdiction by federal courts, noting that "*Spokeo* is not an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts." *TransUnion* at *18.

Furthermore, echoing *Brunett*, the Supreme Court stated:

> But under Article III, an injury in law is not an injury in fact. Only those plaintiffs who have been concretely harmed by a defendant's statutory violation may sue that private defendant over that violation in federal court. As then-Judge Barrett succinctly summarized, "Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions." *Casillas*, 926 F. 3d, at 332.

TransUnion, at 585.

TransUnion appears to align the Supreme Court with the recent line of cases from various Circuit Courts of Appeals, all of which hold that a bare procedural violation of a consumer protection statute, without any allegation of a concrete harm, is insufficient to invoke Article III jurisdiction. *TransUnion* also limits a federal court's jurisdiction over the claims of absent putative class members. Even if a named plaintiff is ultimately determined to have standing, *TransUnion* requires the plaintiff to establish Article III standing for each member of the putative class. "Every class member must have Article III standing in order to recover individual damages. 'Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.'" *TransUnion* quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U. S. 442, 466 (2016) (Roberts, C. J., concurring).

Do These Cases Benefit Defendants?

While the business community has cheered these recent trends in analyzing Article III standing and jurisdiction, those who are cheering have forgotten some fairly recent history. A mere sixteen years ago, Congress passed the Class Action Fairness Act of 2005 ("CAFA"), 119 Stat. 4, which amended 28 U.S.C. §1332(d), 1453, and 1711-1715. CAFA was championed by the business community to make it easier to remove class actions to federal court.

In enacting CAFA, Congress found that "class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm." 119 Stat. 4(a)(1). Congress also found that over the decade preceding the enactment of CAFA, there had been numerous abuses of the class action process that had adversely affected interstate commerce and undermined public respect for our judicial system. 119 Stat. 4(a)(2). Particularly relevant to the present is Congress' finding in 2005 that:

> Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are—
>
> (A) keeping cases of national importance out of Federal court;
>
> (B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and
>
> (C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

119 Stat. 4(a)(4).

Congress declared that the purpose of CAFA was to:

> (1) assure fair and prompt recoveries

What is almost a certainty is that while the Article III case law is inconvenient for consumers, in the long run it is likely to be devastating to the business community.

> for class members with legitimate claims;
> (2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and
> (3) benefit society by encouraging innovation and lowering consumer prices.

19 Stat. 4(b).

The dismissal of a case for lack of Article III jurisdiction is not a decision on the case's merits. The plaintiff in such a suit may, under appropriate circumstances, re-file in state court. Cases under the FDCPA "may be brought in any appropriate United States district court without regard to the amount in controversy, *or in any other court of competent jurisdiction.*" 15 U.S.C. § 1692k(d) (emphasis added). The FCRA contains identical language (15 U.S.C. § 1681p) and similar jurisdiction provisions are in the Truth in Lending Act (15 U.S.C. § 1640(e)), the Equal Credit Opportunity Act (15 U.S.C. § 1691e(f)), the Electronic Fund Transfers Act (15 U.S.C. § 1693m(g)), and the Real Estate Settlement Procedures Act (12 U.S.C. § 2614). A suit under any of those statutes may be brought in a state court that has jurisdiction over the amount in controversy.

Furthermore, in light of all of the recent cases finding that plaintiffs lacked Article III standing, many plaintiffs' attorneys are now filing suit in state court, sometimes in the "judicial hellholes" that led to the passage of CAFA. (Some other plaintiffs' attorneys are skipping courts altogether and filing arbitration claims.) In a relatively recent trend, when defendants remove cases to federal courts, plaintiffs are moving to remand the cases back to state court, arguing that their claims do not give rise to Article III jurisdiction. *And they are winning those motions. See, e.g., Tavarez v. Transworld Sys.*, 2021 U.S. Dist. LEXIS 128956 (E.D. Wis. July 12, 2021); *Winters v. Douglas Emmett, Inc.*, 2021 U.S. Dist. LEXIS 124495 (C.D. Cal. July 2, 2021); *Wittbecker v. Cuptertino Elec., Inc.*, 2021 U.S. Dist. LEXIS 73232 (N.D. Cal. Apr. 14, 2021).

Certainly, some members of the Supreme Court have noted this danger. Justice Thomas, joined by the unlikely trio of Justices Breyer, Sotomayor, and Kagan, wrote, at footnote 9 in his dissent in *TransUnion*:

> Today's decision might actually be a pyrrhic victory for TransUnion. The Court does not prohibit Congress from creating statutory rights for consumers; it simply holds that federal courts lack jurisdiction to hear some of these cases. That combination may leave state courts—which "are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law," *ASARCO Inc. v. Kadish*, 490 U. S. 605, 617, 109 S. Ct. 2037, 104 L. Ed. 2d 696 (1989)—as the sole forum for such cases, with defendants unable to seek removal to federal court. *See also Bennett, The Paradox of Exclusive State-Court Jurisdiction Over Federal Claims*, 105 Minn. L. Rev. 1211 (2021). By declaring that federal courts lack jurisdiction, the Court has thus ensured that state courts will exercise exclusive jurisdiction over these sorts of class actions.

Transunion, at 606 n.9 (Thomas, J., dissenting).

Standing may be the beginning of the end of decades of consumer litigation in federal courts. It may, however, usher in a new era of case law from state courts interpreting federal consumer protection statutes. It remains to be seen whether those state courts will build as consistent a body of case law as the federal courts have built. What is almost a certainty is that while the Article III case law is inconvenient for consumers, in the long run it is likely to be devastating to the business community for the very reasons that led to the enactment of CAFA.

** Barron & Newburger, P.C., Austin, Texas. Manuel H. (Manny) Newburger is the Vice-President of Barron & Newburger, P.C. As an adjunct professor at the University of Texas School of Law he has taught consumer law since 1999. A well-known author on the FDCPA and similar laws, he has appeared as amicus curiae counsel in a number of high-profile consumer law cases, and he has consulted to the collection industry throughout the United States and in India, the Philippines, and Canada.*

Mr. Newburger is licensed to practice in Texas, Colorado, and Massachusetts, and is admitted to practice before the United States Supreme Court, the United States Courts of Appeals for the First through Eleventh and DC Circuits, and twenty-four federal districts across the United States. He is a Fellow of the American College of Consumer Financial Services Lawyers, and he is certified as a specialist in consumer and commercial law by the Texas Board of Legal Specialization.

*** Barron & Newburger, P.C., Media, PA. Brit Suttell is licensed in Pennsylvania and New Jersey and practices in the Pennsylvania office of Barron & Newburger, P.C. They are a member of the firm's Consumer Financial Services Law Practice Group. Britt defends individual and class action suits under state and federal consumer protection laws and also has experience in defending state and federal enforcement matters.*

Brit is the current President of the Pennsylvania Creditors' Bar Association and a member of the board of directors for the National Creditors Bar Association. In 2020, they were awarded the Donald Kramer Award from the National Creditors Bar Association, which is awarded to "someone whose efforts have made a substantial and lasting impact for the benefit of the credit and legal collection community."

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NEW PROTECTIONS FOR HOMEOWNERS WITH VA MORTGAGES, EFFECTIVE JULY 27

By Steve Sharpe*

Many homeowners received a forbearance on their VA mortgage payments during the COVID-19 pandemic, but the mortgage payments were deferred and not forgiven.

Many homeowners received a forbearance on their VA mortgage payments during the COVID-19 pandemic, but the mortgage payments were deferred and not forgiven. *See* NCLC's Mortgage Servicing and Loan Modifications § 12.3.7.3. Homeowners who have recovered from COVID-19 hardships will soon be exiting the forbearance program, and then these homeowners must address both the past deferred payments and the new monthly mortgage payments. This takes on added significance because the moratorium on foreclosure of VA mortgages was scheduled to expire on June 30, 2021, if the expiration date is not extended again.

The VA has just issued a final rule setting out a "partial claim" program that, effective July 27, 2021, allows homeowners to resume their new regular monthly mortgage payments without first having to pay the past mortgage payments that were forborne under the COVID-19 program. *See* 86 Fed. Reg. 28,692 (May 28, 2021). This final rule will provide homeowners significantly better protection than the VA had initially set out last December in its first proposal for a final rule. *See* 85 Fed. Reg. 79,142 (Dec. 9, 2020).

The final rule brings the VA's partial claim program into alignment with other federally related programs dealing with those exiting COVID-19 related mortgage forbearances. For a description of these other forbearance exit programs *see* NCLC's Mortgage Servicing and Loan Modifications §§ 12.3.4.3.2 (Fannie Mae), 12.3.5.2.2 (Freddie Mac), 12.3.6.4 (FHA), 12.3.8.4 (USDA). [Of special note, links to NCLC's Mortgage Servicing and Loan Modifications § 12.3 for a limited time are all open to the public.]

This article also lists homeowner options when a homeowner with a VA mortgage coming out of forbearance cannot afford the new, regular monthly charges. These VA options are examined in more detail at NCLC's Mortgage Servicing and Loan Modifications § 9.2.2. (VA Allows Further Deferral of Forborne Payments, Allowing Borrowers to Resume Their Regular Monthly Payments.)

The VA's new program allows servicers to offer a "partial claim" option to VA-guaranteed borrowers to bring their loans current. The partial claim option is modeled after a long-standing FHA program. *See* NCLC's Mortgage Servicing and Loan Modifications Chapter 8. The partial claim involves the mortgage servicer making a claim on the VA for a portion of the outstanding mortgage balance—in this case the portion equal to the forborne payments. The borrower then owes the partial claim amount to the VA at 0% interest and only due at the end of the mortgage loan. There are no monthly payments required from the borrower to the VA for repayment of the partial claim. After the VA pays the partial claim, borrowers restart their pre-hardship mortgage payments to the mortgage servicer with the same monthly payment as before the forbearance.

The partial claim program is available for VA-guaranteed borrowers who are exiting COVID-19 forbearance plans and who were current or less than thirty days past due as of March 1, 2020. Borrowers must indicate to the mortgage servicer that they can resume their former monthly payment. The partial claim loan cannot exceed 30% of the loan's unpaid principal balance. The VA's Final Rule is significantly more protective than their original proposal.

The new VA rule goes into effect July 27, and is a distinct improvement over the VA's original December 9, 2020, proposal. In response to comments from a coalition of consumer advocates led by the National Consumer Law Center (NCLC) and from the mortgage industry, the VA eliminated several problematic features from their original proposal.

For example, the VA's original proposal required borrowers to repay the partial claim within 10 years but did not require any payments during the first five years of the term. As a result, borrowers still living in their homes would have faced a significant payment shock after the first five years of the partial claim loan. In addition, the VA proposed charging borrowers 1% interest and limiting the size of the partial claim to 15% of the borrower's unpaid balance. It also required a full financial documentation for borrowers wanting to access the partial claim, which would impose a significant barrier to borrowers actually accessing the program.

The VA eliminated all of these problematic loan features and instead provided a program in line with the FHA's partial claim program. *See* NCLC's Mortgage Servicing and Loan Modifications § 12.3.6.4. By making these changes, the VA increased the amount of assistance borrowers can receive and eliminated unnecessary barriers to accessing the programs. VA-guaranteed borrowers no longer face payment shock and additional interest payments.

New Options for VA Borrowers Unable to Afford Their Pre-Hardship Mortgage Payments.

The new final rule delays any obligation to repay the past forborne mortgage payments, allowing homeowners to resume their normal monthly mortgage payment. The VA's new partial claim program does not help borrowers who now cannot afford to pay their new regular mortgage payments. These borrowers should consider the VA's pre-existing loan modification programs including:

- Modification, where a lender may modify the mortgage loan by changing one or more of the terms of the loan, including the interest rate or term, and then re-amortizing the balance due. See NCLC's Mortgage Servicing and Loan Modifications §§ 9.2.2.4, 12.3.7.4.
- Refinancing, where a borrower refinances a high-interest loan at a current, lower rate with the VA's interest rate reduction refinancing loan. The new loan could also be used to obtain a shorter term or a fixed interest rate or to fund energy efficiency improvements. See NCLC' s Mortgage Servicing and Loan Modifications § 9.2.2.9.
- Refunding, where the VA buys the loan when it believes that the default can be cured through various relief measures and the lender is unable or unwilling to grant further relief. Other loss mitigation options may then be available to the homeowner. The VA, for example, may agree to reduce the interest rate well below the market rate. The VA infrequently offers this option. See NCLC's Mortgage Servicing and Loan Modifications § 9.2.2.8.
- Compromise sale, where the property is sold to a third party for an amount insufficient to pay off the loan and the servicer releases the lien and waives the deficiency in exchange for the sale proceeds. Relocation assistance of up to $1500 is available to borrowers who complete a compromise sale. See NCLC's Mortgage Servicing and Loan Modifications § 9.2.2.5.
- Deed in lieu of foreclosure is a voluntary transfer of the property to the holder of the VA-guaranteed loan. Relocation assistance, also known as "cash for keys," of up to $1500 is available to borrowers who successfully complete a deed in lieu of foreclosure. See NCLC's Mor tgage Servicing and Loan Modifications § 9.2.2.6.
- Assumption, where the lender grants forbearance for a reasonable period of time to permit the sale or transfer of the property. If approved, this releases the borrower from any future liability to the VA, including liability for any loss resulting from the default of the purchaser or subsequent owner of the home. See NCLC's Mortgage Servicing and Loan Modifications § 9.2.2.7.

* *Steve Sharpe is a Staff Attorney at the National Consumer Law Center focusing on foreclosures and mortgage lending. He represented homeowners at the Legal Aid Society of Southwest Ohio, LLC. and started his career in 2005 at Indiana Legal Services with a Skadden fellowship focused on representing borrowers with predatory loans. Steve is a contributing author of National Consumer Law Center's* Mortgage Servicing and Loan Modifications, Home Foreclosures, and Truth in Lending legal treatises. *This article is re-published with permission from the NCLC Digital Library, www.nclc.org/library. The library is an excellent source for information about consumer laws.*

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 into your browser. To subscribe and begin receiving your free copy of the Consumer News Alert, visit http://www.peopleslawyer.net/

U.S. SUPREME COURT

Supreme Court holds FCRA class action requires class members suffer "injury in fact." In a 5-4 decision, with significant implications for class actions, the Supreme Court rejected the idea that violation of a statute can ever be grounds enough for a lawsuit unless it comes with a more concrete "injury in fact" to potential plaintiffs. Justice Thomas joined the three liberals in dissent.

The majority said most of the 8,000 people in the class action case lacked the legal right to sue. Of those class members who were wrongly flagged by the credit reporting agency as potential matches to individuals on a terrorist watch list, only about a quarter had their reports sent to third parties.

The bulk of the class members suffered no concrete harm because the reputational risk of the false alerts never materialized. Justice Kavanaugh wrote for the court. "A letter that is not sent does not harm anyone, no matter how insulting the letter is, so too here."
TransUnion LLC v. Ramirez, ___ 594 U.S. ___ (2021).
https://www.supremecourt.gov/opinions/20pdf/20-297_4g25.pdf

FEDERAL CIRCUIT COURTS OF APPEALS

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. The Eleventh Circuit held that the arbitration provision from the previous subscription was still valid.

The court found that because Comcast was only able to conduct the credit report search using information on file from a former contract, the plaintiff's FCRA claims pertain to his original subscriber agreement. "Here, the Arbitration Provision is different in that it applies broadly to all disputes between the parties and applies even if the dispute arises after the Subscriber Agreement is terminated."
Hearn v. Comcast Cable Commc'ns, LLC, 992 F.3d 1209 (11th Cir. 2021).
https://www.courtlistener.com/opinion/4870818/michael-hearn-v-comcast-cable-communications-llc/?q=Michael%20Hearn%20v.%20Comcast%20Cable%20Communications

Amazon cannot force arbitration of minors' privacy suit. The Ninth Circuit affirmed a district court ruling that Amazon cannot arbitrate suits brought by minors, alleging Alexa voice-activated speakers violate state privacy laws.

The court found that the minors are not trying to enforce a contract between their parents and Amazon. The panel unanimously determined in their five-page opinion that the minors, who are nonsignatories to the contracts, cannot be compelled into arbitration because they are not trying to enforce any rights or duties formed by the contracts Amazon holds with their parents.
B.F. v. Amazon.com Inc, ___ F. App'x ___ (9th Cir. 2021).
https://dockets.justia.com/docket/circuit-courts/ca9/20-35359

"Whether conduct violates the Fair Debt Collection Practices Act requires an objective analysis that considers whether the least sophisticated debtor would likely be misled by a communication." The Ninth Circuit found that false but non-material representations are not likely to mislead the least sophisticated consumer and therefore are not actionable under the FDCPA.
Mott v. PNC Fin. Servs. Grp., Inc., ___ F. App'x ___ (9th Cir. 2021).
https://www.leagle.com/decision/infco20210528170

A debt collector's communication of a consumer's personal information to a third-party print vendor violated the Fair Debt Collection Practices Act's prohibition on third-party communications in connection with debt collection. Plaintiff alleged that Preferred Collection transmitted his personal information—including his name, the balance of the debt, that the debt stemmed from his son's medical treatment, and his son's name—to a print vendor to generate and mail a dunning letter. The district court dismissed the case, holding that Preferred Collection's communication with its print vendor did not trigger FDCPA liability because it was not "in connection with the collection of any debt."

The Eleventh Circuit applied "an atextual reading" of "in connection with the collection of any debt" in § 1692c(b) of the FDCPA. The court found that "in connection with" is "invariably a vague, loose connective" phrase. It held that "connection" is broadly defined to mean "relationship or association" and "in connection with" to broadly mean "with reference to [or] concerning," and further noted that § 1692c(b) differed from other sections of the FDCPA.
Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 994 F. 3d 1341 (11th Cir. 2021).
https://scholar.google.com/scholar_case?case=16964404624440555939&hl=en&as_sdt=6&as_vis=1&oi=scholarr

Fair Credit Reporting Act dismissal reversed. The Seventh Circuit reversed a dismissal of an FCRA claim based on a notice of dispute, finding such claims do not require precise language and an inadequate notice does not eliminate the duty to reinvestigate altogether.
Davis v. Experian Info. Sols., Inc., 849 F. App'x 690 (9th Cir. 2021) (mem).
https://cdn.ca9.uscourts.gov/datastore/memoranda/2021/06/10/20-15667.pdf

Telephone Consumer Protection Act applies to job-recruiting Robocalls. The Ninth Circuit unanimously ruled that a lower court misread the TCPA, along with an accompanying Federal Communications Commission "implementing regulation" governing robocall consent standards.

The panel wrote in their opinion:

> "The applicable statutory provision prohibits in plain terms 'any call,' regardless of content, that is made to a cellphone using an automatic telephone dialing system or an artificial or pre-recorded voice, unless the call is made either for emergency purposes or with the prior express consent of the person being called."

Loyhayem v. Fraser Fin. & Ins. Servs., Inc., ___ F.4th ___ (9th Cir. 2021).
https://cdn.ca9.uscourts.gov/datastore/opinions/2021/08/10/20-56014.pdf

Fifth Circuit holds receipt of a single, unsolicited text message is sufficient to establish Telephone Consumer Protection Act standing under Article III. The court noted Article III of the United States Constitution limits judicial power to "Cases" and "Controversies."

To invoke that power, a plaintiff must satisfy the tripartite "irreducible constitutional minimum" for standing. The plaintiff must have an injury in fact; that injury must be traceable to the challenged conduct of the defendant; and a favorable judgment must be likely to redress that injury.

This is a case about standing's first requirement—injury in fact. To establish injury in fact, a plaintiff must show he "suffered an invasion of a legally protected interest that is concrete and particularized." But concrete does not mean tangible. "Although tangible injuries are perhaps easier to recognize[,] . . . intangible injuries can nevertheless be concrete."

When a plaintiff asserts harm to an intangible interest, courts look to "both history and the judgment of Congress" to determine whether that injury satisfies Article III's constitutional minimum. The Fifth Circuit concluded Cranor has alleged a cognizable injury in fact: nuisance arising out of an unsolicited text advertisement.
Cranor v. 5 Star Nutrition, L.L.C., 998 F.3d 686 (5th Cir. 2021).
https://www.ca5.uscourts.gov/opinions/pub/19/19-51173-CV0.pdf

Former employee must arbitrate gateway questions. A plaintiff sued his former employer, Charter Communications, asserting Kentucky state law claims arising out of his termination. After the case was removed to federal court in the Western District of Kentucky, Charter moved to compel arbitration and dismiss, or in the alternative, stay the lawsuit.

Before the plaintiff's termination, Charter had announced a dispute resolution program that would require all employees to arbitrate any employment dispute with Charter unless the employee opted out within 30 days. The plaintiff did not opt out, and as a result, the district court dismissed the plaintiff's suit against Charter and compelled him to arbitrate his employment claims.

Plaintiff appealed to the Sixth Circuit Court of Appeals, arguing that an arbitration agreement did not cover his employment claims, that it was unconscionable, and that defendant failed to give adequate consideration in return for his agreement to arbitrate.

The court affirmed the district court's decision to compel arbitration, holding that the arbitration agreement expressly reserved these "gateway" questions concerning coverage and enforceability of the arbitration agreement for the arbitrator to resolve.
Anderson v. Charter Commc'ns, Inc., ___ F. App'x ___ (6th Cir. 2021).
https://www.opn.ca6.uscourts.gov/opinions.pdf/21a0285n-06.pdf

Boiler plate language does not trigger protections of Fair Debt Collection Practices Act pertaining to communications that were not in connection with collection of a debt. The Eighth Circuit recently affirmed summary judgment in favor of a mortgage loan servicer,

finding that the communications from the mortgage loan servicer were not communications "in connection with the collection of a debt" as required under the Fair Debt Collection Practices Act ("FDCPA") because they did not contain any information about the loan, such as the principal amount remaining due, the past due amount, or a request for payment.

The court also held that although each letter included a "Mini-Miranda" statement in the disclosures section, which stated that "[t]his communication is from a debt collector and it is for the purpose of collecting a debt and any information obtained will be used for that purpose," the inclusion of such boilerplate language "[does] not automatically trigger the protections of the FDCPA, just as the absence of such [disclosures] does not have dispositive significance."

Heinz v. Carrington Mortg. Servs., LLC, 3 F.4th 1107 (8th 2021).
https://law.justia.com/cases/federal/appellate-courts/ca8/19-3717/19-3717-2021-07-09.html

The Second Circuit affirmed the district court's decision to deny a motion by Donald Trump, the Trump Corporation, and other Trump family members to compel arbitration of claims related to the multilevel marketing scheme ACN. Defendants argued that, because the plaintiffs had agreed to arbitrate any claim they might have against ACN, the same arbitration clause should force arbitration of any claims against the Trump defendants related to their endorsement of ACN.

The Second Circuit agreed that equitable estoppel did not apply, noting:

> In order to establish equitable estoppel in the present context so as to bind a signatory of a contract (here, the plaintiffs) to arbitrate with one or more nonsignatories (here, the defendants), there must be a close relationship among the signatories and non-signatories such that it can reasonably be inferred that the signatories had knowledge of, and consented to, the extension of their agreement to arbitrate to the non-signatories. Here, there neither is nor was such a relationship. There was no corporate relationship between the defendants and ACN of which the plaintiffs had knowledge, the defendants do not own or control ACN, and the defendants are not named in the IBO agreements between ACN and the plaintiffs.

Doe v. Trump Corp., 6 F.4th 400 (2d Cir. 2021).
https://www.sdnyblog.com/files/2021/08/20-1228_opn-1.pdf

FEDERAL DISTRICT COURTS

Judge reverses class certification and ends debt collection suit. An Illinois federal judge walked back class certification for consumers accusing a Texas debt collector of illegally sending misleading debt collection notices and dismissed the action.

The judge said the fact that recent Seventh Circuit precedent dictates confusion is not injury enough to support litigation.

Tataru v. RGS Fin., Inc., ___ F. Supp. 3d ___ (N.D. Ill. 2021).
https://law.justia.com/cases/federal/district-courts/illinois/ilndce/1:2018cv06106/356249/109/

Spouse may not sue husband's employer over COVID infection. A California federal judge dismissed an amended suit brought by a spouse looking to hold her husband's employer responsible for her COVID-19 infection.

The judge found that the state's workers' compensation law bars her argument, further noting that the employer's duty to provide a safe work environment does not extend to non-employees. "Such claims are subject to dismissal for the reason that defendant's duty to provide a safe workplace to its employees does not extend to nonemployees who, like Corby Kuciemba, contract a viral infection away from those premises," the judge wrote in her order.

Kuciemba v. Victory Woodworks, Inc., ___ F. Supp. 3d ___ (N.D. Cal. 2021).
https://www.govinfo.gov/content/pkg/USCOURTS-cand-3_20-cv-09355/pdf/USCOURTS-cand-3_20-cv-09355-1.pdf

Employee handbook does not create enforceable arbitration clause. A judge in the Western District of Wisconsin found no valid arbitration agreement existed, because of a disclaimer in a 48-page employee handbook.

An employee of Pember Companies Inc. brought a proposed class action under the Fair Labor Standards Act and Wisconsin law for unpaid wages. Pember responded with a motion to compel arbitration based on a dispute resolution procedure contained in its handbook, which provides:

> I agree that all problems, claims and disputes experienced by me or Pember . . . related to my employment shall be resolved as outlined below. I agree to submit all such disputes to final and binding arbitration. Arbitration shall be the sole and exclusive forum and remedy for all covered disputes of either Pember . . . or me.

The dispute resolution policy limited employees to individual claims and not class or collective actions. Further, the policy declared that it is "binding" and provided that the employee has read the entire provision and understands its restrictions and that the provision can only be revised by Pember's president.

But the handbook did not conclude with that language and also contained an employee acknowledgment form on its last page, which O'Bryan signed. The bolded text of the acknowledgment form seemed to undo any agreement to arbitrate. It declared in pertinent part:

> **Unless I have an individual written employment contract, my employment relationship with Pember . . . is at will.**
> **I acknowledge that this handbook is neither a contract of employment nor a legal document.**

The court had to determine "which statement should control" – the handbook's statement that the arbitration provision was "binding" or the acknowledgment's contract disclaimer. The disclaimer did not merely say the handbook was not an employment contract but instead declared it was not "a legal document." The phrase's plain meaning, according to the court, was "that the handbook created no enforceable right for either Pember or its employees."

O'Bryan v. Pember Cos., ___ F. Supp. 3d ___ (N.D. Wis. 2021).
https://www.employmentclassactionreport.com/wp-content/uploads/sites/8/2021/05/Opinion-and-Order.pdf

Plaintiff's subjective interpretation of a debt collection letter is insufficient to confer FDCPA standing. Defendant United Holding Group, LLC purchased a debt owed by the plaintiff and hired defendant Eastpoint Recovery Group, Inc. ("Eastpoint") to help collect it. Eastpoint sent the plaintiff a letter identifying the account and stated:

> The account listed above has been assigned to this agency for collection. We are a professional collection agency attempting to collect a debt. Any information

> we obtain will be used as a basis to *enforce* collection of this debt. (Emphasis supplied by the court).

Plaintiff filed a claim under the FDCPA, alleging that the letter was misleading and that the inclusion of the word "enforce" made the letter threatening and confusing to him.

In granting Eastpoint's motion to dismiss, the district court for the Southern District of Florida noted that "confusion – on its own – is not an injury in fact." Rather, the plaintiff's "subjective interpretation of the word 'enforce' did not result in a concrete and particularized injury necessary to confer Article III standing."

Further, the court held that even if the plaintiff had suffered a concrete injury, he lacked standing because the alleged harm—fear and emotional distress based on the use of the word "enforce" in the collection letter—was not traceable to the claimed violations of the FDCPA. Rather, the court found that the plaintiff's distress was caused by his default on his debt and concern over the consequences.

Preisler v. Eastpoint Recovery Grp., ___ F. Supp. 3d ___ (S.D. Fla. 2021).
https://casetext.com/case/preisler-v-eastpoint-recovery-grp

Harvard students' COVID-19 suit dismissed. U.S. District Judge Indira Talwani found Harvard's promotional materials touting the benefits of its Cambridge, Massachusetts, campus, hands-on learning, networking opportunities, and other perks of attending the renowned Ivy League school do not amount to a binding contract to offer these services regardless of the circumstances. She said:

> Where plaintiffs have provided virtually no direct language from the promotional and other materials, and have not alleged that Harvard charged less money for online instruction in degree-granting programs, the amended complaint fails to plausibly allege facts suggesting that Harvard would reasonably expect students to understand from such material that Harvard had promised to provide in-person instruction.

Judge Talwani wrote, "even where, during a global pandemic, the governor and public health officials dictated otherwise."

Barkhordar v. President and Fellows of Harvard Coll., ___ F. Supp. 3d. ___ (D. Mass. 2021).
https://www.forbes.com/sites/michaeltnietzel/2021/06/21/harvard-wins-dismissal-of-lawsuit-seeking-covid-19-tuition-refund/?sh=64c8020274a7
https://storage.courtlistener.com/recap/gov.uscourts.mad.221627/gov.uscourts.mad.221627.94.0.pdf

The Bankruptcy Court for the District of Maryland resolved a conflict between the strong presumption in favor of enforcing arbitration agreements and the Bankruptcy Code's emphasis on centralization of claims. Based on an analysis of the two statutory schemes and their underlying policies and concerns, the court decided to lift the automatic stay to allow the prepetition arbitration proceeding to go forward with respect to non-core claims.

In the context of bankruptcy proceedings, a cause of action is constitutionally core when it stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process. The court found that, with respect to constitutionally core proceedings, the bankruptcy court has the discretion to retain the proceeding and refuse to enforce the parties' arbitration agreement, but its discretion is far more limited with respect to non-core proceedings.

The court held that the bankruptcy claims were non-arbitrable because they would not exist absent the bankruptcy case and thus extended from the bankruptcy itself. The court recognized that a debtor may be able to plead an action in a way that transforms certain pure state law claims into claims under the Bankruptcy Code but found that those concerns were not warranted in this case. Because the FDCPA non-bankruptcy claims and the contract claims were claims that existed prior to and independently of the bankruptcy proceedings, the court held that these categories of claims were non-core and lifted the stay to allow the arbitration proceedings to continue.

In re McPherson, ___ B.R. ___ (Bankr. D. Md. 2021).
https://www.govinfo.gov/content/pkg/USCOURTS-mdb-1_21-bk-10205/pdf/USCOURTS-mdb-1_21-bk-10205-0.pdf

Ticket buyers' class action denied. A Florida federal court determined that a plaintiff suing StubHub's parent company over its pandemic-related refund policy cannot bring a class action representing ticket buyers in over 50,000 transactions because the case would be unwieldy.

U.S. District Judge James S. Moody Jr. agreed with the company that a class action would pose "glaring" issues related to damages and liability. "For example, if a buyer prefers a voucher to a refund, how could she have been deceived . . . and how would that amount to any breach of contract or unjust enrichment?" the judge wrote Friday. "The court agrees with defendant that all of these uncertainties render the proposed classes unmanageable."

Shiflett v. Viagogo Ent. Inc., ___ F. Supp. 3d ___ (M.D. Fla. 2021).
https://www.docketbird.com/court-documents/Shiflett-v-Viagogo-Entertainment-Inc/ORDER-Plaintiff-s-Motion-for-Class-Certification-Dkt-50-is-denied-Signed-by-Judge-James-S-Moody-Jr-on-7-16-2021/flmd-8:2020-cv-01880-00058

STATE COURTS

Supreme Court of Texas discusses the burden of proof for enforcing a disputed electronic signature and the importance of the authentication process. Plaintiffs, employees of Aerotek, sued for wrongful termination. Based upon an electronically executed arbitration agreement, Aerotek moved to compel arbitration. The trial court denied the motion to compel, and an appellate court affirmed.

The Texas Supreme Court reversed, finding:

> Aerotek's evidence showing the security procedures its hiring application used to verify that a candidate electronically signed his MAA was uncontroverted. To enter the application, a candidate was required to create for himself a unique identifier, a user ID, a password, and security questions, all unknown to Aerotek. The candidate was required to enter personal information and sign documents by clicking on them. The application recorded and timestamped the candidate's every action. The application's business rules made it so that the application could not be submitted until all steps were completed and all required signatures provided, including on the MAA. Once a candidate submitted his application, Aerotek could not modify its contents. Aerotek provided the signed MAAs marked with timestamps identical to those in its database records showing each Employee's progress through the application.

Aerotek, Inc. v. Boyd, 624 S.W.3d 199 (Tex. 2021).
https://law.justia.com/cases/texas/supreme-court/2021/20-0290.html

Lawsuit challenging Austin's payday loan ordinance may proceed. A

Texas appellate court has revived TitleMax of Texas Inc.'s lawsuit against the city of Austin challenging ordinances that place restrictions on payday loans and repayment plans. The court pointed to a recent Texas Supreme Court decision it said cleared the way for the suit to proceed.

The panel found that based on the Texas Supreme Court's ruling in *Texas Propane Gas Association v. City of Houston*, TitleMax can bring the challenge because the "essence" of the ordinances is civil even though the ordinances carry criminal penalties.

TitleMax of Tex., Inc. v. City of Austin, ___ S.W.3d ___ (Tex. App.—Amarillo 2021).
https://law.justia.com/cases/texas/seventh-court-of-appeals/2021/07-20-00305-cv.html

Texas Insurance Code incorporates part of the DTPA by providing a cause of action for unlawful deceptive trade practice[s] defined under DTPA section 17.46. It is generally true that only consumers can state DTPA claims. However, Plaintiff's DTPA claim was asserted pursuant to Chapter 541 of the Texas Insurance Code. Tex. Ins. Code § 541.151 which "incorporates part of the DTPA by providing a cause of action for 'unlawful deceptive trade practice[s]' defined under DTPA section 17.46."

Riverstone Corp. Cap. Ltd. v. Frank Swingle & Assocs., Inc., ___ F. Supp. 3d. ___ (N.D. Tex. 2021). https://www.govinfo.gov/content/pkg/USCOURTS-txnd-3_20-cv-02509/pdf/USCOURTS-txnd-3_20-cv-02509-0.pdf

FEDERAL NEWS

New rights for homeowners. A new VA final rule, effective July 27, provides substantial new rights for qualified homeowners exiting a COVID-19 related forbearance program.

Regular payments must resume, but forborne payments will not be due until the end of mortgage term and are interest-free. A new NCLC Digital Library article describes both this new right to defer forborne payments and options for homeowners who cannot afford their regular monthly payments that become due after exiting forbearance. Read the article here.

Of special note, links to NCLC's Mortgage Servicing and Loan Modifications § 12.3 for a limited time are all open to the public.

DECEPTIVE TRADE PRACTICES AND WARRANTY

DECEPTIVE TRADE PRACTICES CLAIM IS NOT A REAL PROPERTY CLAIM UNDER THE LIS PENDENS STATUTE

In re Gaudet, ___S.W.3d ___ (Tex. App. 2021).
https://casetext.com/case/in-re-gaudet-22208

FACTS: Robert Gaudet and his wife entered into negotiations with Icon Custom Home Builder, L.L.C, (and Juana Garcia to purchase a lot and build a custom home. The parties could not agree on a building design or the cost. Gaudet sent a letter to Icon and Garcia demanding a custom home design and price orally discussed prior to signing the Builders Deposit Receipt. Garcia and Icon requested a meeting, but Gaudet did not respond. A year passed, and Icon sold the lot to a third party and built a custom home.

Gaudet filed a lawsuit asserting various claims, including violation of the DTPA, and filed a notice of lis pendens. Icon moved to expunge because it prevented the third party's real estate transaction from closing. The trial court granted the order to expunge the lis pendens. Gaudet brought mandamus action challenging expungement of lis pendens.

HOLDING: Mandamus Denied.

REASONING: Gaudet pleaded multiple claims under the lis pendens statute, one of them being that Icon and Garcia violated the DTPA.

The court disagreed with Gaudet that the DTPA claim could be the basis for the lis pendens. The court found that a DTPA claim is not a real property claim at all; it neither establishes an interest or an incumbrance upon real property nor does it involve title to real property. Rather, a DTPA claim punishes conduct in the course of a business transaction by allowing for the award of damages. The court held that the purpose of a notice of lis pendens is to put those interested in a particular tract of land on inquiry about the facts and issues involved in the suit and to put prospective buyers on notice that they acquire any interest subject to the outcome of the pending litigation. The court further held that the trial court may expunge a notice of lis pendens if the pleading on which the original expungement order rests does not include a real property claim. Therefore, the court ruled that a DTPA claim cannot form the basis for a valid lis pendens.

TEX. INS. CODE INCORPORATES PART OF THE DTPA BY PROVIDING A CAUSE OF ACTION FOR UNLAWFUL DECEPTIVE TRADE PRACTICES DEFINED UNDER DTPA SECTION 17.46

Riverstone Corp. Capital Ltd. v. Frank Swingle & Assocs., ___ F. Supp. 3d ___ (N.D. Tex. 2021)
https://www.leagle.com/decision/infdco20210804d19

FACTS: Plaintiff is Riverstone Corp. Capital Ltd. ("Riverstone"), and its predecessor in interest underwrote a commercial property insurance policy that Defendant Frank Swingle and Assocs. ("Swingle") sold to a condominium homeowners association ("Bluffs Lakewood"). After a fire occurred at the condominium community, Riverstone discovered that over one third of the units were rentals, which would have excluded Bluffs Lakewood from its insurance program. Riverstone alleged that Swingle submitted to its predecessor an insurance application that included incorrect material information as to the number of rental units at the condominium community for Bluffs Lakewood to qualify for the insurance program.

Riverstone paid Bluffs Lakewood due to the fire damage and sued Swingle for violations of the Deceptive Trade Practices Act (DTPA). Swingle filed a motion to dismiss for failure to state a claim.

The court cited section 541.141, which "incorporates part of the DTPA by providing a cause of action for 'unlawful deceptive practice[s]' defined under DTPA section 17.46."

HOLDING: Motion denied.

REASONING: Swingle argued that Riverstone is not a "consumer" so it could not assert a DTPA claim.

The court rejected Swingle's argument, recognizing that Riverside asserted its DTPA claim under Chapter 541 of the Texas Insurance Code. Generally, only consumers can state DTPA claims. However, the court cited section 541.141, which "incorporates part of the DTPA by providing a cause of action for 'unlawful deceptive practice[s]' defined under DTPA section 17.46." Because this section of chapter 541 authorizes private actions for damages for alleged violations of DTPA section 17.46(b), the court held Riverside's claim was sufficient.

DTPA DOES NOT APPLY TO LARGE TRANSACTIONS

DTPA DOES NOT APPLY TO COMMERCIAL PROPERTY

In re Briar Bldg. Hous. LLC, ___ B.R. ___ (Bankr. S.D. Tex. 2021).
https://www.leagle.com/decision/inbco20210617543

FACTS: In August of 2013, Ali Choudhri personally guaranteed Jetall Companies, Inc. ("Jetall") commercial contract (the "Contract") for the deed to purchase the Rivercrest Property ("Property"). The Contract was modified and extended with the written consent and approval of Choudhri. In August of 2017, George M. Lee ("Lee") alleged that Jetall failed to pay Lee all amounts due and owing under the Contract by its termination date of August 12, 2017. In 2018, Briar Building Houston, LLC ("Debtor") filed a Chapter 11 petition. At the time of filing, Debtor's main asset was the Property. Lee owns one hundred percent of the membership interests of the Debtor. Lee previously owned the Property individually but transferred the Property to Debtor under a Special Warranty Deed. The bankruptcy case was dismissed, then Lee filied two separate lawsuits against Choudhri; those cases were removed to bankruptcy court.

Choudhri filed a counterclaim to which Lee filed a motion to dimiss.
HOLDING: Motion Granted
REASONING: Lee argued that Choudhri's counterclaim alleging violation under the DTPA should be dismissed because such claims were expressly excluded from the ambit of the DTPA as a matter of law.

The court agreed with Lee, holding that the DTPA expressly excludes from its coverage a cause of action arising from a transaction, a project, or a set of transactions relating to the same project involving total consideration by the consumer of more than $500,000.00, other than a cause of action involving the consumer's residence. Here, the plain language of the Contract revealed that the underlying consideration for the transaction was, at a minimum, $1,500,000.

Furthermore, the court held that "the plain language of the Contract places the transaction involving the Rivercrest Property outside the protections of the DTPA as a matter of law because it involves a commercial property, not a residential property." Therefore, Lee's Motion was granted because the alleged DTPA violation did not hold up since the transaction was too large and involved commercial property.

DTPA STATUTE OF LIMITATIONS RUNS FROM WHEN CONSUMER DISCOVERED OR SHOULD HAVE DISCOVERED THE DEFECT

Robinson v. Gen. Motors LLC, ___ F. Supp. 2d___ (D. Del. 2021).
https://www.leagle.com/decision/infdco20210722734

FACTS: Plaintiffs were owners of Cadillac vehicles sold by Defendant General Motors LLC ("GM"). The vehicles at issue were built with a two-layer interface system in the front panel that controlled built-in media through a single touch screen. Over time, plaintiffs noticed that the space between both layers was too broad and eventually made the touch screen system unresponsive.

Plaintiffs brought a class action suit for violations of the Deceptive Trade Practices Act. Plaintiffs alleged that these defects were within the knowledge of GM at the time it sold the vehicles to them based on pre-release testing data and "Technical Service Bulletins" circulated internally that acknowledged the defect. GM moved to dismiss on the grounds of being time-barred.
HOLDING: Motion denied.
REASONING: GM argued that the claims Plaintiffs made in certain states were based on alleged omissions by GM and an injury suffered at the time of purchase, and therefore, these claims had exceeded the statute of limitation.

The court disagreed, holding that the statute of limitations begins to run when the deceptive act or practice occurs or, if the deception is concealed, when the plaintiff, in the exercise of reasonable diligence, should have discovered the occurrence of the misrepresentation made the basis of the complaint. Therefore, based on the time when Plaintiffs discovered or should have discovered the defect, the claims were not time-barred.

SELLERS DID NOT HAVE A DUTY TO DISCLOSE FACTS THAT THEY WERE UNAWARE OF OR THAT THE BUYERS COULD HAVE DISCOVERED DURING A REASONABLE INVESTIGATION

BY PURCHASING A HOME "AS IS," BUYERS AGREE TO MAKE THEIR OWN APPRAISAL OF THE BARGAIN AND TO ACCEPT THE RISK AS TO THE QUALITY OF THE HOUSE AND ANY RESULTING LOSS

Rohrs v. Hartz, ___ S.W.3d ___, (Tex. App. 2021)
https://law.justia.com/cases/texas/ninth-court-of-appeals/2021/09-19-00196-cv.html

FACTS: Defendants-Appellees Maureen and George Hartz ("Hartzes") sold their home to Plaintiffs-Appellants Joyce and Jeremy Rohrs ("Rohrses") in 2017. The Rohrses conducted a home inspection and accepted the property "As Is" in its present condition. The Hartzes, while not at home for the 2016 Memorial Day Flood, indicated that they estimated one inch of water had flooded the home for one hour and reaffirmed that in the Seller's Disclosure Notice. During Hurricane Harvey, the house was flooded with twenty-two inches of water. After the hurricane, the Rohrses discovered the original baseboards had mold and plugged drill holes made to remediate any water penetration issues. The report from the mold inspection expert led the Rohrses to believe the 2016 Memorial Day Flood caused the mold.

The Rohrses sued Hartzes for fraudulent nondisclosure and breach of contract. The trial court issued a take-nothing judgment against the Rohrses. The Rohrses appealed.
HOLDING: Affirmed.
REASONING: The Rohrses argued that the Seller's Disclosure Notice was false and that the Hartzes had a duty to disclose the truth about the property's flooding history and repairs. They further argued that the Hartzes hid facts from them and misled them in order to sell the property.

The court rejected the argument, holding that the Hartzes had no duty to disclose anything beyond the seller's belief and knowledge of the property's condition as of the date signed, as stipulated in Section 5.008 of the Texas Property Code. Because the Hartzes provided the Rohrses a Seller's Disclosure Notice, which was completed to the best of their belief and knowledge, and the Rohrses failed to show how a reasonable investigation would not have disclosed the remediation repairs, the court overruled the issue of fraud by nondisclosure.

The court similarly disposed of the Rohrses' contention that the Hartzes breached the contract by failing to disclose the truth about the property's flooding history and completed repairs. The court emphasized the validity of the contract's "As Is" clause, which is defined in the contract to mean the property's present condition with any and all defects and without warranty except for the warranties of title and those in the contract. The court reasoned that an "As Is" clause is invalid and unenforceable if it is the product of fraudulent concealment by the seller or if the seller obstructs the buyer's ability to inspect the property. Because the Rohrses failed to present more than a scintilla of evidence as to fraud by nondisclosure or that the Hartzes obstructed their ability to inspect the property, the "As Is" clause is valid and enforceable.

DEBT COLLECTION

DEBT COLLECTION SUIT OVER DISCLOSURE OF INFORMATION

A DEBT COLLECTOR'S COMMUNICATION OF A CONSUMER'S PERSONAL INFORMATION TO A THIRD-PARTY PRINT VENDOR VIOLATED THE FAIR DEBT COLLECTION PRACTICES ACT'S PROHIBITION ON THIRD-PARTY COMMUNICATIONS IN CONNECTION WITH DEBT COLLECTION

Hunstein v. Preferred Collection & Mgmt. Servs. Inc., ___ F.3d ___ (11th Cir. 2021).
https://scholar.google.com/scholar_case?case=16964404624440555939&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Plaintiff-Appellant Hunstein sued Defendant-Appellee Preferred Collection and Management Services, Inc. (Preferred) claiming Preferred electronically transmitted data concerning a consumer's debt to a third party vendor. The third party vendor then used the data to create, print and mail a letter to Hunstein. Huntstien filed suit alleging that by sending his personal information to the vendor, Preferred had violated the 15 U.S.C. §1692c(b).

The court found that Preferred's communication to Compumail was clearly in connection to debt collection.

The District Court rejected the Hunstein's reading of §1692c(b) and dismissed his suit. Hunstein appealed.
HOLDING: Reversed and remanded.
REASONING: Hunstein argued for a plain meaning statutory interpretation of the phrase "in connection with the collection of any debt." Preferred, conversely, argued a "factor-based analysis" that show that the communication with Compumail was not "in connection with the collection of any debt."

The court found that Preferred's communication to Compumail was clearly in connection to debt collection. The court disagreed with Preferred's arguments because the demand-for-payment interpretation rendered superfluous the exceptions spelled out in §1692c(b), the language "in connection with" would have no independent meaning or force, and operationally §§ 1692c(b) and 1692e involve different parties. Preferred made an industry practice argument citing the lack of FDCPA suits against mail vendors like Compumail. The court rejected the argument holding a lack of cases similar to this one does not prove such disclosures are lawful.

JUDGE REVERSES CLASS CERTIFICATION AND ENDS DEBT COLLECTION SUIT

Tataru v. RGS Fin. Inc.,___ F. Supp. 3d ___ (N.D. Ill. 2021).
https://law.justia.com/cases/federal/district-courts/illinois/ilndce/1:2018cv06106/356249/109/

FACTS: Defendant debt collector, RGS, sent Plaintiff Gabriel Tataru a letter that incorrectly identified his creditor. On behalf of himself and others similarly situated, Tataru sued RGS claiming the letter's inaccurate disclosure of creditor's identity violated 15 U.S.C. § 1692g(a). Tataru believed the letter might be from a scammer and thus claimed his ability to use the information to address his debt as protected by the statute would have been threatened.
The Court granted Tataru's motion for summary judgement. RGS moved for reconsideration of their motion for summary judgement.
HOLDING: Motion Granted
REASONING: Taturu argued that RGS violated 15 U.S.C. § 1692g(a), which requires debt collectors to disclose the identity of the creditor to whom the debt is owed. RGS's letter misidentified his creditor as "FNB Omaha II," a non-existent entity, instead of his actual creditor, the First National Bank of Omaha, which caused him to suspect fraud.

The court reconsidered and reversed its decision in light of numerous Seventh Circuit cases making it clear that to establish standing FDCPA plaintiffs must show that they took detrimental steps resulting in a mishandling of their debt due to the statutory violation, establishing an injury. Cases have made it crystal clear that the state of confusion is not itself an injury.

In the light of the Seventh Circuit's recent decisions, the court held that Tataru needed to do more than demonstrate a threat that he would fail to exercise his rights because he deemed the letter a scam. He must have actually failed to exercise those rights and suffered some tangible adverse consequence as a result. Because Tatru failed to demonstrate that he suffered a concrete injury, RGS's motion for summary judgement was granted.

PLAINTIFF'S SUBJECTIVE INTERPRETATION OF A DEBT COLLECTION LETTER INSUFFICIENT TO CONFER FDCPA STANDING

Preisler v. Eastpoint Recovery Grp., (S.D. Fla. May 25, 2021).
https://www.consumerfinancialserviceslawmonitor.com/wp-content/uploads/sites/501/2021/06/Preisler-v.-Eastpoint-Recovery-Grp.-No.-20-CV-62268-RAR-S.D.-Fla.-May-25-2021.pdf

FACTS: Plaintiff Amir Preisler ("Preisler"), representing a class of similarly situated Florida debtors, owed a debt to Pentagon Federal Credit Union ("PFCU"). After PFCU sold the debt to another corporation, Defendant Eastpoint Recovery Group ("Eastpoint") sent Preisler a collection letter. The letter informed Preisler that Eastpoint was a debt collection agency and would be using any information obtained to enforce collection of the debt. Preisler felt the language used by Eastpoint in the letter emphasized demanding payment rather than notice of the debt collection process itself.

Preisler filed suit one year after receiving the letter, alleging multiple FDCPA violations against Eastpoint. Eastpoint filed a motion to dismiss based on standing and failing to state a claim upon which relief can be granted.
HOLDING: Granted.

REASONING: Eastpoint argued that Preisler has not alleged an injury-in-fact sufficient to confer standing**.** Preisler argued that he suffered concrete injury because of the inclusion of the word “enforce” in Eastpoint’s collection letter. Preisler claimed the language of the letter led him to feel threatened and confused as to the purpose of the letter, constituting a concrete injury sufficient to confer standing.

The court agreed with Eastpoint, concluding that Preisler had not suffered sufficient injury to establish standing for a FDCPA violation. Preisler lacked standing because of his subjective interpretation of the word “enforce” which did not result in a concrete and particularized injury necessary to confer Article III standing. Preisler’s claims of misleading representation based on the language of the letter without claiming actual damages did not meet standing, nor were they traceable to the alleged FDCPA violations

FDCPA BOILER PLATE LANGUAGE DOES NOT TRIGGER PROTECTIONS OF FAIR DEBT COLLECTION PRACTICES ACT

COMMUNICATIONS WERE NOT IN CONNECTION WITH COLLECTION OF A DEBT

Heinz v. Carrington Mortg. Servs., LLC, ___ F.3d ___ (8th Cir. 2021).
https://consumerfinancialserviceslawmonitor.lexblogplatform.com/wp-content/uploads/sites/501/2021/07/Heinz-v.-Carrington-Mortgage-Services-LLC.pdf

FACTS: Defendant-Appellee Carrington Mortgage Services, LLC (“Carrington”) was the servicer of Plaintiff-Appellee David Heinz’s loan. In 2008, Heinz took out a $247,344 loan, evidenced by a promissory note and a mortgage on Heinz’s home. Heinz defaulted multiple times over the following years but was given loan modifications to cure his defaults. Bank of America, who was assigned both Heinz’s mortgage and note, initiated the foreclosure process in 2016 after another default. Heinz applied for loss mitigation assistance but received two separate letters stating his application was incomplete due to his failure to provide the required documents to complete the application. In 2017, Carrington became the servicer of Heinz’s loan. Heinz was represented by the Minnesota Attorney General’s Office, who assisted him with his loan mitigation application and communicating with Carrington. In late 2017, a Carrington representative mistakenly told Heinz that his file had been considered complete, and as a result, the foreclosure sale would be postponed. This information was false, and Carrington proceeded with the foreclosure, selling Heinz’s property to Bank of America. Carrington sent Heinz a cancellation notice regarding his loss mitigation application after the foreclosure; it also sent a letter stating the sale would not be rescinded after the redemption period for the foreclosure expired.

In 2018, Heinz filed suit against Carrington in Minnesota state court, alleging violations of both Minnesota law and the FDCPA. Carrington removed the action to federal court, and only the FDCPA claim remained. The district court granted summary judgment in favor of Carrington. Heinz appealed.
HOLDING: Affirmed.
REASONING: Heinz argued that the district court erred in granting summary judgement to Carrington because the evidence Heinz presented was sufficient to allow a jury to conclude that Carrington used false, deceptive, and misleading representations and unfair and unconscionable means to collect on the underlying mortgage debt.

The court held that to be in connection with the collection of a debt, each communications’ purpose must have been to “induce payment” by the debtor. Heinz tried to argue that the letters and phone calls from and to Carrington contained false, deceptive, and misleading representations in order to collect on his debt. The court rejected Heinz’s argument, pointing to the fact that Carrington’s letters did not contain any information about his loan, and did not include demands for payment. Therefore, the animating purpose of these communications was not to collect payment. Although the letters contained a “Mini-Miranda” statement that stated “this communication is from a debt collector and is for the purpose of collecting a debt,” the language did not trigger FDCPA protections. The substance of the letters did not focus on collecting on a debt, and some of the letters were sent after Carrington had already sold the house and there was no debt left to collect. Thus, the boilerplate language did not turn the communications into attempts to collect on a debt, and the FDCPA protections were not triggered.

The court held that to be in connection with the collection of a debt, each communications’ purpose must have been to “induce payment” by the debtor.

WHETHER CONDUCT VIOLATES FAIR DEBT COLLECTION PRACTICES ACT REQUIRES AN OBJECTIVE ANALYSIS THAT CONSIDERS WHETHER THE LEAST SOPHISTICATED DEBTOR WOULD LIKELY BE MISLED BY A COMMUNICATION

Mott v. PNC Fin. Servs. Grp., Inc., ___ F.3d ___ (9th Cir. 2021).
https://www.leagle.com/decision/infco20210528170

FACTS: Trinity Financial Services and Trojan Capital Investments (“Defendants”) attempted to foreclose on the home of the Plaintiff, Rodney Mott. Mott sued Defendants claiming violations of the FDCPA. Mott claimed that Trojan misrepresented the interest rate to him in letters specifying an 8.63 percent interest rate when the rate was 8.625 percent based on the mortgage note.

The district court granted summary judgment in favor of Defendants. Mott appealed.
HOLDING: Affirmed.
REASONING: Mott argued that Defendants violated the FDCPA by misrepresenting the interest rate and late fees in the letters sent to him.

The court disagreed, stating that Denfendants’ minor misrepresentations were immaterial. Since Mott did not contend a material effect upon his debt quantity, and the erroneous letters were followed by subsequently correct ones, Mott could

not have reasonably been misled by the letters. Objectively, the court found the misrepresentations were unlikely to mislead the least sophisticated consumer and thus were unactionable under FDCPA.

UNDER TEXAS DEBT COLLECTION LAW, FORECLOSURE OR THE THREAT OF FORECLOSURE IS NOT AN ACTION PROHIBITED BY LAW

Stricker v. Deutsche Bank Nat'l Tr. Co., ___ F. Supp. 3d ___ (W.D. Tex. 2021).
https://casetext.com/case/stricker-v-deutsche-bank-national-trust-co

FACTS: In 2006, a buyer who had taken out a loan and secured it with a promissory note in the amount of $144,000 purchased a residential property. Defendant Deutsche Bank National Trust Co. ("Defendant") later became the mortgage loan owner and the promissory note holder.

The original buyer transferred her interest in the property as part of a divorce proceeding, although she remained the borrower on the note. She defaulted on the note in April of 2015, and in May of that year, Defendant provided her with a notice of default which included the amount owed and a warning regarding foreclosure being a possible result of failure to pay.

In 2017, Plaintiff Robert Stricker executed an Affidavit of Adverse Possession, in which he argued that he held an interest in the property derived from possession "due to abandonment." Defendant foreclosed on the property anyway in 2019, prompting Plaintiff to file suit alleging wrongful foreclosure and violation of the Texas Finance Code for threatening to foreclose. Defendant filed a motion for summary judgment.
HOLDING: Motion granted.
REASONING: Stricker argued that Defendant foreclosed on the home without notice and committed a deceptive practice in wrongful foreclosure, a violation of Texas Finance Code. He further argued that Defendant then had no authority to collect on the note or hold a substitute trustee sale because of this violation.

The court disagreed with Sticker, stating that under Section 329.301 of the Texas Finance Code, foreclosure, or the threat of foreclosure is not an action prohibited by law when a plaintiff defaults on their mortgage. Since Defendant was the owner of the loan at the time of foreclosure and was in possession of the promissory note, it was entitled to the contractual right of seizure, repossession, or sale that are expressly permitted by the TDCA.

MONTHLY STATEMENTS FROM A DEBT COLLECTOR CAN SUPPORT A MISREPRESENTATION CLAIM UNDER THE TEXAS DEBT COLLECTION ACT

Doyle v. Nationstar Mortg., LLC, ___ F. Supp. 3d ___ (S.D. Tex. 2021).
https://lawsintexas.com/wp-content/uploads/2021/06/Doyle-v.-Nationstar-Mortg.pdf

FACTS: Plaintiffs Kelly Doyle and Walter Doyle (the "Doyles") alleged that Defendant Nationstar Mortgage LLC ("Nationstar"), their mortgage servicer, had been improperly withholding amounts from their loan payments for property taxes and insurance that were not escrowed, improperly crediting their payments, and improperly threatening foreclosure. Nationstar claimed the Doyles did not pay their property taxes, resulting in increased monthly payments from penalties and interest, and the Doyles claimed they paid their property taxes.

Nationstar's representations of default and threat of foreclosure could be material false statements that could violate TDCA.

The Doyles sued Nationstar for violation of Texas Debt Collection Act and Nationstar moved to dismiss.
HOLDING: Motion denied.
REASONING: The Doyles alleged that Nationstar violated TDCA by misrepresenting the character, extent, or amount of a consumer debt, and that Nationstar sent a "balance statement" inappropriately assessing escrow balances, penalties, and interest and improperly increased the amount owed under the mortgage.

The court agreed with the Doyles because they properly alleged facts that show that the debt collector made a misrepresentation that led them to be unaware (1) that they had a mortgage debt, (2) of the specific amount they owed, or (3) that they had defaulted. Taking the allegation that the Doyles made proper payments under the loan documents as true for the purposes of Nationstar's motion, Nationstar's representations of default and threat of foreclosure could be material false statements that could violate TDCA.

CONSUMER CREDIT

SUPREME COURT HOLDS FCRA CLASS ACTION REQUIRES CLASS MEMBERS SUFFER "INJURY IN FACT"

TransUnion LLC v. Ramirez, ___ U.S. ___ (2021).
https://www.supremecourt.gov/opinions/20pdf/20-297_4g25.pdf

FACTS: Defendant TransUnion LLC was a credit reporting agency, and it introduced an add-on product called OFAC Name Screen Alert. OFAC is the U.S. Treasury Department's Office of Foreign Assets Control, which maintains a list of terrorists, drug traffickers, and other serious criminals. This product helped businesses avoid transacting with individuals on OFAC's list. If the consumer's first and last name matched the first and last name of an individual on OFAC's list, then TransUnion would place an alert on the credit report indicating that the consumer's name was a "potential match" to a name on the OFAC list.

The Court held that class members whose credit reports were not provided to third parties had no Article III standing.

A class of 8,185 individuals with OFAC alerts in their credit sued TransUnion under the Fair Credit Reporting Act for failing to use reasonable procedures to ensure the accuracy of their credit files. Only some class members had their misleading credit reports containing OFAC alerts provided to third parties during the 7-month period specified in the class definition. The internal credit files of the other class members were not provided to third parties during the relevant period.

The district court ruled that all class members had Article III standing on their claims. The Ninth Circuit affirmed, and TransUnion petitioned to the Supreme Court.

HOLDING: Reversed and remanded.

REASONING: Plaintiffs argued that the existence of misleading OFAC alerts in TransUnion's internal credit files exposed them to a material risk that provided them standing to seek damages.

The Court agreed that class members whose credit reports were provided to third parties suffered a concrete harm that qualified as an injury in fact, because their injury was "closely related" to a traditionally recognized harm—reputational harm associated with the tort defamation.

However, the Court held that class members whose credit reports were not provided to third parties had no Article III standing. Because the class members sought retrospective damages instead of injunctive relief to prevent imminent and substantial future harm, and these class members did not present evidence that their exposure to the risk itself independently harmed them, the risk of future harm could not supply the basis for their standing. The Court agreed with TransUnion that mere risk of future harm, without more, could not qualify as a concrete harm in a suit for damages.

FAIR CREDIT REPORTING ACT NOTICE OF DISPUTE DOES NOT REQUIRE PRECISE LANGUAGE

AN INADEQUATE NOTICE DOES NOT ELIMINATE THE DUTY TO REINVESTIGATE ALTOGETHER

Davis v. Experian Info. Sols. Inc., 849 Fed.Appx. 690 (9th Cir. 2021).
https://cdn.ca9.uscourts.gov/datastore/memoranda/2021/06/10/20-15667.pdf

FACTS: Plaintiff-Appellant Cheryl Davis filed for Chapter 13 bankruptcy in 2011 and received a discharge in 2013. Davis's Chapter 13 plan obliged her to "pay the ongoing contract installment payment" on her Class 1 mortgage. In 2017, Defendant-Appellee, Experian Information Solutions Inc. ("Experian") sent Davis a consumer disclosure that indicated her mortgage was discharged through Chapter 13 bankruptcy/never late. Davis filed a dispute with Experian including her prior bankruptcy petition, a letter from her mortgage servicer about the disputed mortgage, and her bankruptcy discharge order. Experian denied Davis's request due to "limited amount of information regarding [her] dispute."

Davis filed suit, alleging Experian violated section 1681i of the Fair Credit Reporting Act by failing to conduct a reasonable reinvestigation of her account to correct misinformation. The district court granted Experian's motion to dismiss. Davis appealed.

HOLDING: Reversed and remanded.

REASONING: The district court argued that Davis failed to notify Experian of the nature of her dispute, thus Experian was not obliged to reinvestigate her bankruptcy and mortgage account.

The Ninth Circuit Court disagreed. The court held that "a notice of dispute does not require precise language, and an inadequate notification does not eliminate the duty to reinvestigate altogether." Davis's dispute letter and documents provided to Experian allow one to plausibly infer that Davis disputed the accuracy of her mortgage debt as discharged. On a motion to dismiss, the court must "construe all inferences in the plaintiff's favor," therefore, the district court erred in finding Davis did not plausibly claim she gave sufficient notice to Experian.

On a motion to dismiss, the court must "construe all inferences in the plaintiff's favor."

ARBITRATION

EMPLOYEE HANDBOOK DOES NOT CREATE ENFORCEABLE ARBITRATION CLAUSE

O'Bryan v. Pember Cos., Inc., ___ F. Supp. 3d ___ (N.D. Wisc. 2021)
https://www.employmentclassactionreport.com/wp-content/uploads/sites/8/2021/05/Opinion-and-Order.pdf

FACTS: Plaintiff, Randy O'Bryan brought a proposed class and collective action against Defendant, Pember Companies, Inc., for unpaid wages under the Fair Labor Standards Act and Wisconsin wage laws. O'Bryan contends that his former employer, Pember, violated his and other employees' rights by failing to pay for travel time and failing to include nondiscretionary payments in the regular rate of pay for the purpose of calculating overtime rate..

The words "neither a contract of employment nor a legal document." provided more than just the disclaimer that this was not an employment contract.

After O'Bryan filed suit, Pember moved to compel O'Bryan to arbitrate their claims based on the dispute-resolution policy contained in Defendant's employee handbook.
HOLDING: Motion denied.
REASONING: Pember contends that the handbook's dispute-resolution section requires O'Bryan to arbitrate his claims on an individual basis. O'Bryan contends that the parites did not have a valid agreement to arbitrate because of the acknowledgement form's disclaimer.

The court agreed with O'Bryan. They reasoned that the words "neither a contract of employment nor a legal document." provided more than just the disclaimer that this was not an employment contract. It provided that neither Pember nor Pember's employees had any enforceable rights under the employee handbook. Thus, the court held that the written acknowledgment disclaimed any intent that the handbook created a binding contract.

AMAZON CANNOT FORCE ARBITRATION OF MINOR'S PRIVACY SUIT

B.F. v. Amazon.com Inc., ___ F.3d ___ (9th Cir. 2021).
https://law.justia.com/cases/federal/appellate-courts/ca9/20-35359/20-35359-2021-04-23.html

FACTS: Plaintiffs, who are minor children, alleged that Defendant Amazon's Alexa service had intercepted or recorded their communications without their consent, in violation of various wiretapping laws. Plaintiffs themselves did not sign any arbitration agreement with Amazon, but their parents signed the agreements when they activated their Amazon accounts.

Amazon moved to compel arbitration, and the district court denied the motion. Amazon appealed.
HOLDING: Affirmed.
REASONING: Amazon argued that because Plaintiffs' parents had signed the arbitration agreements when they activated their Amazon accounts, Plaintiffs who had close relationships with the signatories should also be subject to compel arbitration.

The court rejected this argument by holding that when non-signatories did not knowingly exploit the contract, and when non-signatories brought claims that did not arise out of the contract, they were not bound to arbitrate. In this case, Plaintiffs were not asserting any right or looking to enforce any duty created by the contracts between their parents and Amazon. Instead, Plaintiffs brought only state statutory claims that did not depend on their parents' agreements. Further, the close relationship argument failed because it was generally used only by non-signatories to bind signatories, not the reverse.

THE SECOND CIRCUIT AFFIRMS DECISION TO DENY A MOTION BY DONALD TRUMP TO COMPEL ARBITRATION OF CLAIMS RELATED TO THE MULTI-LEVEL MARKETING SCHEME ACN

Doe v. Trump Corp., ___ F.3d ___ (2d Cir. 2021).
https://www.sdnyblog.com/files/2021/08/20-1228_opn-1.pdf

FACTS: Plaintiffs-Appellees ("the Does") are an anonymous group of individuals who felt they were fraudulently induced to enter into business with non-party appellant, ACN Opportunity, LLC ("ACN") as a result of statements made by Defendants-Appellants the Trump Corporation, Donald J. Trump, and members of the Trump family ("Trumps"). ACN, a multi-level marketing company, enlists individuals to work as "Independent Business Owners." The Trumps allegedly received large payments from ACN to endorse ACN as a business opportunity that would likely result in a "reasonable probability of success." Based off statements made by the Trumps regarding ACN, the Does entered into business relationships with ACN by paying an enrollment fee and agreeing to submit any disputes to arbitration. Each of the Does lost a significant amount of money as a result of the relationship with ACN.

Plaintiffs-Appellees filed a class action suit, alleging claims of racketeering violations, conspiracy to conduct racketeering, and numerous violations of California, Maryland, and Pennsylvania law. Defendants-appellants moved first to compel arbitration under the principles of equitable estoppel and then to compel arbitration generally. The district court denied both motions. Defendants-appellants appealed.
HOLDING: Affirmed.
REASONING: Defendants argue that the district court erred in denying their motion because (1) the question of arbitrability must be decided by the arbitrator; (2) they are entitled to enforce the arbitration agreement under principles of equitable estoppel; and (3) they did not waive their right to arbitration.

The court disagreed by holding that the defendants were not entitled to have their arbitration agreement enforced under equitable estoppel principles and that there was no jurisdiction in the district court over ACN's motion to compel. The court's

reasoning focused heavily on whether the case should have been resolved in district court or arbitration. Does entered into an Independent Business Owners agreement with ACN that contained an arbitration clause for any disputes between the parties. The court held that the Trumps failed to meet the "close relationship among the signatories to the arbitration agreement" requirement of the doctrine of equitable estoppel, as the signatories were only the Does and ACN. Second, the Trumps did not raise that the issue of arbitrability was to be determined by the arbitrator, and they did not offer a compelling reason for the court to consider their forfeited argument for it. Additionally, since the Trumps were non-signatories, there was no sufficient relationship to compel the Does to arbitrate the matter. Finally, because ACN did not raise the argument that they were entitled to invoke equitable estoppel to compel the Does to arbitrate their claims in district court, ACN forfeited their right to raise the argument on appeal.

The court held that the Trumps failed to meet the "close relationship among the signatories to the arbitration agreement" requirement of the doctrine of equitable estoppel.

FORMER EMPLOYEE MUST ARBITRATE GATEWAY QUESTIONS

Anderson v. Charter Commc'ns, Inc., ___ F.3d ___ (6th Cir. 2021).
https://www.opn.ca6.uscourts.gov/opinions.pdf/21a0285n-06.pdf

FACTS: Plaintiff-Appellant Peter W. Anderson, Jr. was a former employee of Defendant-Appellee Charter Communications, Inc., dba Spectrum ("Charter"). Anderson was an employee at Charter for 18 years before being fired in 2018 after co-workers reported him using offensive language at work. In 2017, Charter began a "Solution Channel" dispute-resolution program, which allowed employees to arbitrate employment disputes with the company in the event of termination. Notice of the program was sent via email, and employees were given a choice to opt-out within 30 days. If an employee did not opt-out, they agreed to arbitrate any employment disputes with Charter. Anderson did not choose to opt-out within the given 30-day time period.

Anderson alleged his co-workers' allegations of inappropriate language were false, and he brought several state-law claims against Charter in state court. Charter removed Anderson's suit to federal court, then moved to compel arbitration. The district court held that Anderson had to arbitrate his claims and dismissed Anderson's case with prejudice. Anderson appealed.

HOLDING: Affirmed.

REASONING: Anderson argued that the arbitration agreement did not cover his claims and was unenforceable because it was "unconscionable." He also argued that the arbitration agreement did not have adequate consideration to be valid.

The court rejected Anderson's reasoning, holding that Anderson was properly compelled to arbitrate his claims against Charter under the Federal Arbitration Act ("Act"). Anderson's claims that the arbitration agreement did not cover his claims were incorrect because the language of the agreement "unambiguously" left the coverage issue for the arbitrator to resolve. The agreement stated "all disputes related to the arbitrability of any claim or controversy" against Charter should be submitted to arbitration. Second, his claim that the agreement was "unconscionable" also must be left to the arbitrator to decide. Anderson never attempted to challenge the district court's holding that the agreement delegates the enforceability of the agreement to the arbitrator. Also, his argument was against the agreement as a whole, not a specific provision. If Anderson had attacked the delegation clause instead of the whole agreement, the court would have resolved that claim before compelling arbitration. Finally, the agreement had adequate consideration because both parties agreed to arbitrate, and each party gave up the right to litigate claims against each other.

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After O'Bryan filed suit, Pember moved to compel O'Bryan to arbitrate their claims based on the dispute-resolution policy contained in Defendant's employee handbook.

HOLDING: Motion denied.

REASONING: Pember argued that the handbook's dispute-resolution section required O'Bryan to arbitrate his claims on an individual basis.

The court rejected Pember's argument, holding that the parties did not have a valid agreement to arbitrate because of the acknowledgment form's disclaimer. The words "nor a legal document" provided more than just the disclaimer that this was not an employment contract. It provided that neither Pember nor Pember's employees had any enforceable rights under the employee handbook. Thus, the court concluded that the written acknowledgment denied any intent that the handbook created a binding contract.

THE BANKRUPTCY COURT FOR THE DISTRICT OF MARYLAND RESOLVED A CONFLICT BETWEEN THE STRONG PRESUMPTION IN FAVOR OF ENFORCING ARBITRATION AGREEMENTS AND THE BANKRUPTCY CODE'S EMPHASIS ON CENTRALIZATION OF CLAIMS

In re McPherson, ___ B.R. ___ (Bankr. E.D. Md. 2021).
https://www.govinfo.gov/content/pkg/USCOURTS-mdb-1_21-bk-10205/pdf/USCOURTS-mdb-1_21-bk-10205-0.pdf

FACTS: Before filing his chapter 11 bankruptcy, John McDonnell McPherson (the "Debtor"), and Camac Fund, L.P. ("Camac") entered into a Litigation Funding Agreement (the "Funding Agreement"). Under the Funding Agreement, Camac was to extend financing to the Debtor in exchange for a percentage of the Debtor's interest in certain whistleblower litigation cases. Disputes arose between the parties under the Funding Agreement, and Camac invoked its rights under the Funding Agreement's arbitration clause.

The Debtor filed a response disputing the validity of the arbitration and a stay motion after filing his chapter 11 case.

HOLDING: Motion denied.

REASONING: The Debtor argued that the arbitration clause's application to this case inherently conflicted with key objectives of the bankruptcy code. The Debtor further argued that that the court could resolve all of the parties' disputes within the context of the Debtor's chapter 11 plan of reorganization and the related claims administration process.

The Bankruptcy claims were non-arbitrable because they would not exist absent the bankruptcy case and thus extended from the bankruptcy itself.

The court rejected this argument and observed that the arbitration clause in the Funding Agreement was arguably narrow in scope and would not encompass all of the claims asserted by the parties in either the arbitration proceeding or the Chapter 11 case.

The court held that it must bifurcate the disputes in this matter with the Bankruptcy Claims staying in the bankruptcy case and the Contract and Non-Bankruptcy Claims remaining subject to arbitration. The Bankruptcy claims were non-arbitrable because they would not exist absent the bankruptcy case and thus extended from the bankruptcy itself. The court recognized that a debtor might be able to plead an action in a way that transforms certain pure state law claims into claims under the Bankruptcy Code but found that those concerns were not warranted in this case. Because the FDCPA non-bankruptcy claims and the contract claims were claims that existed prior to and independently of the bankruptcy proceedings, the court held that these categories of claims were non-core and lifted the stay to allow the arbitration proceedings to continue.

MISCELLANEOUS

LAWSUIT CHALLENGING AUSTIN'S PAYDAY LOAN ORDINANCE MAY PROCEED

TitleMax of Texas, Inc. v. City of Austin, ___ S.W. 3d ___ (Tex. App. 2021).
https://law.justia.com/cases/texas/seventh-court-of-appeals/2021/07-20-00305-cv.html

FACTS: Appellant, TitleMax of Texas, Inc. (TitleMax) sought declaratory judgment and injunctive relief against Appellee, City of Austin (City). The City passed an ordinance which established substantive regulations, including fee limits, on unsecured credit service organizations transactions; extended existing regulations on credit access businesses to apply to credit service organizations; limited the terms of repayment of these transactions to no more than four payments; and imposed criminal fines to enforce the provisions of the ordinance. TitleMax argued the ordinance was preempted by state law, violates its due process and due course of law rights, impairs its existing contracts, and violates its right to equal protection under the law.

The City filed a plea to the jurisdiction alleging that the ordinance is a penal law that cannot be challenged in a civil court. The trial court granted the City's plea and dismissed TitleMax's lawsuit. TitleMax appealed.
HOLDING: Order vacated and remanded.
REASONING: While the appeal was pending, the Texas Supreme Court decided Texas Propane Gas Association v. City of Houston, 622 S.W.3d 791 TEX. 2021). In that case, the court held that a law containing civil and criminal aspects could be challenged in a civil court if the "essence" of the law is civil. The City of Austin conceded that the "essence" of the case was civil and, therefore, the trial court had jurisdiction to decide the merits of the case.

The court agreed with the decision in *Texas Propane*, stating that it is dispositive of the issue in this case.

SUPREME COURT OF TEXAS DISCUSSES THE BURDEN OF PROOF FOR ENFORCING A DISPUTED ELECTRONIC SIGNATURE AND THE IMPORTANCE OF THE AUTHENTICATION PROCESS

Aerotek, Inc. v. Boyd, 2021 WL 2172538 (Tx. 2021).
https://law.justia.com/cases/texas/supreme-court/2021/20-0290.html

FACTS: Plaintiffs-Respondents Trojuan Cornett, Michael Marshall, Lerone Boyd, and Jimmy Allen ("Employees") sued Defendant-Petitioner Aerotek, Inc. for racial discrimination and retaliation after being terminated. Aerotek moved to compel arbitration attaching to its motion each Employee's timestamped and electronically signed Mutual Arbitration Agreement (MAA), which had to have been executed before being allowed to complete the online-only hiring application ("onboarding"). The Employees opposed Aerotek's motion, and each submitted a sworn declaration acknowledging they had completed onboarding but denied having seen, signed, or been presented with the MAA. The trial court conducted an avidentiary hearing on Aerotek's motion to compel at which the program manager of the onboarding process demonstrated how the MAA had to be completed before finalizing and submitting the application.

The trial court denied Aerotek's motion to compel arbitration. The Court of Appeals affirmed. Aerotek filed a petition for review, which the Texas Supreme Court granted.
HOLDING: Reversed and remanded.
REASONING: Employees argued they did not consent to the MAAs because the electronic signatures on them were not theirs. Aside from denying having signed the MAAs, Employees offered no evidence to support their allegation. Employees also argued Aerotek's evidence did not prove the efficacy of its onboarding security procedures.

The court disagreed citing the language of the Texas Uniform Electronic Transactions Act, stating that proof of the efficacy of the security procedures used in generating a contract can prove that an electronic signature is attributable to an alleged signatory.

The court disagreed citing the language of the Texas Uniform Electronic Transactions Act, stating that proof of the efficacy of the security procedures used in generating a contract can prove that an electronic signature is attributable to an alleged signatory. The burden then shifts to the opposing party to prove otherwise by offering evidence that security procedures lack integrity or effectiveness. Mere denial is insufficient.

ORAL MODIFICATIONS OF A LOAN AGREEMENT ARE UNENFORCEABLE UNDER THE TEXAS STATUTE OF FRAUDS

Dean v. Crosscountry Mortg. Inc., ___ F.3d ___ (5th Cir. 2021).
http://www.ca5.uscourts.gov/opinions/unpub/20/20-40365.0.pdf

FACTS: Plaintiff-Appellants, Dustin Dean and Lori Dean ("the Deans") fell behind on their mortgage payments. Defendant-Appellee, Crosscountry Mortgage, Inc. ("Crosscountry") thus sent the Deans a notice to inform the Deans that their loan would be accelerated unless they paid the past-due amount by a deadline. The Deans made no payment by this deadline, so Crosscountry sent a Notice of Acceleration, foreclosed on the property, and sold it to Defendant-Appellee, Federal National Mortgage Association ("Fannie Mae").

The Deans brought suit to reverse Crosscountry's foreclosure and alleged Crosscountry violated the Texas Debt Collection Act. The district court rejected the Deans' argument. The Deans appealed.
HOLDING: Affirmed.
REASONING: The Deans argued that the loan agreement was orally modified when Crosscountry allegedly told the Deans a

new amount was due and that by Crosscountry not accepting the Deans' check for the new amount, Crosscountry breached the contract. The court rejected this argument because the Statute of Frauds bars considering an alleged oral modification of a loan agreement under the TDCA.

The Deans attempted to counter this argument claiming that the Statute of Frauds does not apply given their "partial performance" of the oral agreement. The court rejected this argument because, under the partial performance equitable exception, an oral agreement that does not satisfy the traditional statute of frauds but that has been partially performed may be enforced if denying enforcement would itself amount to a fraud. But the actions asserted to constitute partial performance must be "unequivocally referable" to the alleged oral agreement and corroborate the existence of that agreement. The Deans pointed to no action that "unequivocally" referred to an alleged oral agreement to modify the loan; therefore, the court affirmed the lower court's ruling.

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In re McPherson, ___ B.R. ___ (Bankr. E.D. Md. 2021).
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The Debtor filed a response disputing the validity of the arbitration and a stay motion after filing his chapter 11 case.

HOLDING: Motion denied.

REASONING: The Debtor argued that the arbitration clause's application to this case inherently conflicted with key objectives of the bankruptcy code. The Debtor further argued that that the court could resolve all of the parties' disputes within the context of the Debtor's chapter 11 plan of reorganization and the related claims administration process.

The court rejected this argument and observed that the arbitration clause in the Funding Agreement was arguably narrow in scope and would not encompass all of the claims asserted by the parties in either the arbitration proceeding or the Chapter 11 case.

The court held that it must bifurcate the disputes in this matter with the Bankruptcy Claims staying in the bankruptcy case and the Contract and Non-Bankruptcy Claims remaining subject to arbitration. The Bankruptcy claims were non-arbitrable because they would not exist absent the bankruptcy case and thus extended from the bankruptcy itself. The court recognized that a debtor might be able to plead an action in a way that transforms certain pure state law claims into claims under the Bankruptcy Code but found that those concerns were not warranted in this case. Because the FDCPA non-bankruptcy claims and the contract claims were claims that existed prior to and independently of the bankruptcy proceedings, the court held that these categories of claims were non-core and lifted the stay to allow the arbitration proceedings to continue.

ASTROS FANS' SIGN-STEALING SUIT DISMISSED

In re Hous. Astros, LLC, ___ S.W.3d ___ (Tex. App. 2021).
https://law.justia.com/cases/texas/fourteenth-court-of-appeals/2021/14-20-00769-cv.html

FACTS: In January of 2020, Major League Baseball ("MLB") concluded that the Houston Astros had at some point been involved in stealing opposing teams' signs by electronic means. The MLB imposed sanctions on the Houston Astros for violating these rules. Plaintiffs sued Houston Astros, LLC and Houston Astros Management, Inc. (collectively, "the Astros") for intentionally, and deceptively selling season tickets with full knowledge that Astros employees and representatives were surreptitiously engaged in a sign stealing scheme in violation of MLB rules. They alleged that they would not have purchased season tickets, postseason tickets, or other goods and/or services from the Astros had they known about the sign-stealing scheme. The Astros filed a motion to dismiss. They argued that the Plaintiffs have no justiciable interest in a baseball game of a particular nature and quality and free from violations of MLB rules.

The trial court denied the Astros motion to dismiss. Astros filed a petition for writ of mandamus seeking to compel the trial court to set aside the order denying the motion to dismiss.

HOLDING: Petition granted.

REASONING: The Astros argue that the plantiffs' claims based on the sign stealing controversy and not legally recognized causes of action. Specifically, the Astros assert that the plaintiffs' claims are based on what happened on the field of play. The plaintiffs argue that their claims are based on statements off the field of falsely portraying the Astros as a team that has integrity instead of a team that had been cheating for years.

The Astros argue that the plantiffs' claims based on the sign stealing controversy and not legally recognized causes of action.

The court held that claims based on how a sport team plays the game are not cognizable. Therefore, plaintiffs did not allege legally cognizable claims on which they may recover damages. Further, the court held that plaintiffs cannot maintain their claims because they were only granted a revocable license to enter Minute Maid Park to watch the games in the seats for which they had purchased ticket and do not allege that they were denied those rights.

Based on this holding the court conditionally granted the Astros' petition for writ of mandamus and directed the trial court to set aside the order from the trial court denying the motion to dismiss.

TELEPHONE CONSUMER PROTECTION ACT APPLIES TO JOB RECRUITING ROBOCALLS

Loyhayem v. Fraser Fin. & Ins., ___ F.3d ___ (9th Cir 2021). https://cdn.ca9.uscourts.gov/datastore/opinions/2021/08/10/20-56014.pdf

FACTS: Plaintiff-Appellant Jonathan Loyhayem received an automated job-recruitment robocall voicemail from Defendants-Appellees Fraser Financial and Insurance Services, Inc. ("Fraser"). The voicemail was allegedly made using an "automated telephone dialing system" and a pre-recorded voice without Loyhayem's prior express consent to receive calls from Fraser. The voicemail stated Fraser was looking to partner with advisors in the Los Angeles area and they believed Loyhayem would be a good fit with the company. Fraser left their phone number for Loyhayem to call them back regarding the job opportunity.

Loyhayem filed suit in district court, alleging that Fraser violated the TCPA. The district court dismissed Loyhayem's suit for failure to state a claim. Loyhayem appealed.

HOLDING: Reversed and remanded.

REASONING: The district court held that the TCPA did not prohibit job-recruitment robocalls to cell phones, and that TCPA only prohibited robocalls that included advertisements or constituted telemarketing, as defined by the FCC. Since Loyhayem had admitted the voicemail did not include either of these, the district court dismissed the claim.

The court rejected this holding, stating that the district court wrongfully narrowed the language of the TCPA to prohibit robocalls only pertaining to advertising or telemarketing. The correct interpretation was that "any call" made to a cell phone using an automatic dialing system or an artificial or pre-recorded voice was prohibited, unless the call was made for an emergency or prior express consent from the individual being called. Because the call was not an emergency and Loyhayem had not previously consented to the call, his TCPA claim was valid. The district court also erred when interpreting TCPA by overlooking Section 64.1200(a)(1) of the TCPA, which provides a caveat for prohibited communications under the Act; instead, the district court relied on Section 64.1200(a)(2), which prohibited a subset of robocalls: those involving advertising or telemarketing. The court relied on Section 64.1200(a)(1), which requires prior express consent to receive robocalls, whether given in writing or orally. Therefore, Loyhayem's claims should have survived the motion to dismiss.

FIFTH CIRCUIT HOLDS RECEIPT OF A SINGLE, UNSOLICITED TEXT MESSAGE IS SUFFICIENT TO ESTABLISH TELEPHONE CONSUMER PROTECTION ACT STANDING UNDER ARTICLE III

Cranor v. 5 Star Nutrition, L.L.C., ___ F.3d ___ (5th Cir. 2021). https://www.ca5.uscourts.gov/opinions/pub/19/19-51173-CV0.pdf

FACTS: Plaintiff-Appellant Lucas Cranor purchased at one of Defendant-Appellee 5 Star Nutrition, L.L.C.'s ("5 Star") locations where he provided the business with his cell phone number. Cranor began receiving unsolicited text messages from 5 Star regarding joining a rewards program and advertising special sales. Cranor responded with a "STOP" text that opted him out of receiving future messages. A dispute followed, and the parties entered into a pre-suit settlement agreement, with 5 Star agreeing to pay Cranor $1,000 in exchange for a waiver of any causes of action or claims against the company relating to the dispute and a settlement was executed. After this, Cranor continued receiving unsolicited text messages from 5 Star, and he responded with a "STOP" request again. 5 Star dutifully stopped.

Cranor nonetheless filed suit alleding 5 Star violated the Telephone Consumer Protection Act of 1991 ("TCPA"). The district court dismissed Cranor's complaint for lack of standing. Cranor appealed.

HOLDING: Reversed and remanded.

REASONING: The district court held that while text messages are a sufficient form of injury in fact under the standing requirements of Article III, a single text message, as in Cranor's case, did not constitute an injury in fact.

The court rejected this holding, stating that while a plaintiff must show he suffered an invasion of legally protected interest that is concrete and particularized, concrete did not mean tangible and that intangible injuries could nevertheless be concrete. Because the TCPA "expressly covers cellular phones," it does not solely protect nuisances inside the home. The language of the TCPA also demonstrates the Act's purpose was to address "nuisance and invasion of privacy," even when applied to cell phones. Moreover, Congress' delegation of authority to the FCC allowed it to expand the protection of nuisances to cell phones. The court then concluded that TCPA could not be read to regulate unsolicited telemarketing only when it affected home.

The language of the TCPA also demonstrates the Act's purpose was to address "nuisance and invasion of privacy," even when applied to cell phones.

Additionally, Cranor's injury was different than the kind suffered by the general public. He was subject to the nuisance of receiving unsolicited text messages after opting out. Therefore, the court further held that a single text message could constitute an injury in fact.