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THE RESHAPING OF Texas Home Equity Laws and Remedies

Protecting Children in the Frontier of Surveillance Capitalism

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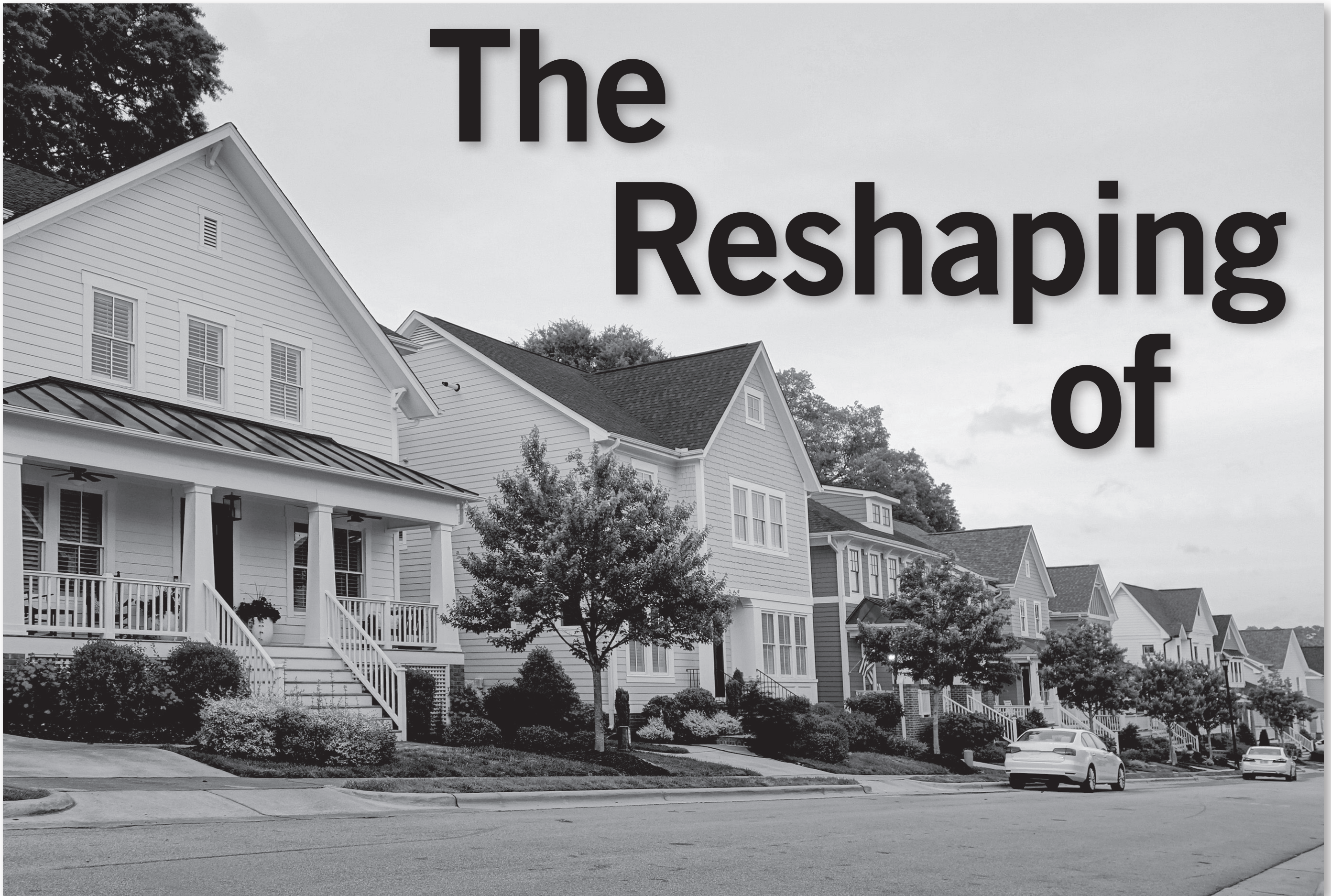

The Reshaping of Texas Home Equity Laws and Remedies*

Paul Kellogg** and Sabrina Neff***

There are few areas of state law anywhere in the United States that are as arcane and complicated as the laws governing home equity loans and lines of credit in Texas.[1] It does not help that the text of the law—actually an amendment to the Texas Constitution[2]—is at points inconsistent, imprecise, and perhaps contradictory. This has led to long-standing issues of interpretation. Faced with a lack of regulatory guidance or court cases, lawyers and lenders have been forced to make difficult and uncertain choices—sometimes, as it turns out, the wrong choices.

Fortunately for lenders, borrowers, and their attorneys, the Texas Supreme Court has provided more clarity—and a few surprises—in several recent decisions. These decisions upended some long-existing practices while making the life of the lender somewhat easier. This Article will focus on those decisions and the implications for modifying and extending existing loans. This topic is particularly timely in light of the need to modify and extend loans for borrowers who suffered as a result of the Covid-19 epidemic or our periodic natural disasters.

I. The Sacrosanct Texas Homestead

Texas has always had strong protections for the family homestead.[3] These protections are enshrined in the Texas Constitution: "The homestead of a family, or of a single adult person, shall be, and is hereby *protected from forced sale*, for the payment of all debts except for: . . . (6) an extension of credit" that meets twenty-seven distinct conditions.[4]

(b) "An owner . . . may not sell or abandon the homestead without the consent of each owner and the spouse of each owner . . . ."[5]

(c) "No mortgage, trust deed, or other lien on the homestead shall ever be valid unless it secures a debt described by this [Section 50]. . . . All pretended sales of the homestead involving any condition of defeasance shall be void."[6]

(d) "A purchaser or lender for value without actual knowledge may conclusively rely on an affidavit that designates other property as the homestead of the affiant and that states that the property to be conveyed or encumbered is not the homestead of the affiant."

(e) A refinance of debt described by (a)(1)-(a)(5) above that includes additional funds will "not be secured by a valid lien" unless:
(1) the refinance of the debt is a home equity loan; or
(2) "the advance of all the additional funds is for reasonable costs necessary to refinance such debt or for [payment of taxes on the homestead, an owelty of partition, or home improvements]."

(f) "A refinance of debt secured by the homestead, any portion of which is [a home equity loan], may not be secured by a valid lien" unless the refinance is a home equity loan.

Subsection (t) provides additional rules for HELOCs.[7]

There are a host of issues embedded in these provisions and many a trap for the unwary lender and its legal counsel. Two of the most lasting and important issues have been (1) whether a defective home equity loan is void or voidable, and (2) what statute of limitations (SOL) applies to claims by borrowers. In the following sections of this article, we will explore how the Texas Supreme Court has recently brought some of these provisions into harmony with each other while upending several accepted lending practices.

II. Modifications Are Not (Completely) Covered by 50(a)(6)

Given the Draconian remedies for Constitutional violations, it can be no surprise that the treatment of a nonperforming home equity loan is a veritable minefield for lenders. The traditional solution has been to offer refinancing. But what happens if a refinance is not feasible? For example, what if it would fail the underwriting standards of the lender or does not comply with the federal ability-to-repay rules? The alternative to refinancing is to modify the loan's terms to make the payments more affordable for the borrower. A long-standing gray area of Texas home equity lending has been whether, and on what terms, a lender may modify a home equity loan. Can a lender ever alter the terms of a Texas home equity loan without endangering its lien? We now turn to the perennial question of how a lender can best assist defaulting borrowers to bring their Texas home equity loans into performance, and whether such loss mitigation assistance exposes a lender to liability, including lien cancellation and forfeiture of principal and interest.

In *Sims v. Carrington Mortgage Services, L.L.C.*,[8] the Texas Supreme Court articulated a three-part test to determine if the restructuring of a home equity loan was an extension of new credit required to comply with constitutional requirements for new home equity loans.

The borrowers obtained a thirty-year home equity loan in 2003.[9] The borrowers fell behind on payments and, in 2009, entered into a loan modification agreement, "capitalizing past-due interest and other charges, including fees and unpaid taxes and insurance premiums, and reducing the interest rate and monthly payments."[10] The borrowers fell behind again, and the mortgage servicer sought foreclosure. In response, the borrowers asserted that the 2009 loan modification violated the Texas Constitution.[11] However, the borrowers entered into a second loan modification in 2011, further reducing the interest rate and payments.[12] Both the 2009 and 2011 loan modification agreements provided that the borrowers' obligations and all the loan documents remained unchanged.[13]

Two months after entering into the 2011 loan modification, the borrowers brought a class action suit in federal district court against the mortgage servicer alleging that the loan modifications violated Article XVI, Section 50 of the Texas Constitution.[14] On appeal, the Fifth Circuit certified four questions to the Texas Supreme Court, the first of which was:

> After an initial extension of credit, if a home equity lender enters into a new agreement with the borrower that capitalizes past-due interest, fees, property taxes, or insurance premiums into the principal of the loan . . . , is the transaction a modification or a refinance for purposes of Section 50 of Article XVI of the Texas Constitution?[15]

The Texas Supreme Court began its response by noting the certified question's distinction between *modification* and *refinance*, and whether the Texas Constitution draws a distinction, which is a question of how each of these terms is used in the Texas Constitution and by the Texas Finance Commission and Texas Credit Union Commission in Chapter 153 of the Texas Administrative Code.[16] In its analysis, the court noted that the commissions have prohibited a "refinancing" like a "new equity loan" but not a "modification," which does not involve the satisfaction or replacement of the original note.[17] The court's analysis of the distinction between *refinance* and *modification* found that the threshold question is whether there has been a new extension of credit.[18] In light of this conclusion, the court reframed the certified question as follows: "[if the new agreement] . . . neither satisfies nor replaces the original note, is the transaction a new extension of credit for purposes of Section 50 of Article XVI of the Texas Constitution?"[19]

The extension of credit consists not merely of the "the creation of a principal debt but includes all the terms of the loan transaction" including "requiring the borrower to pay taxes, insurance premiums, and other such expenses." [20] The court found these obligations to be as integral to the extension of credit as terms requiring timely payment of principal and interest.[21] Although the borrowers argued that the capitalization of past-due interest, taxes, and insurance premiums represent an advance of additional funds, the court noted that these amounts do not represent a new extension of credit but rather are terms of the original extension of credit.[22]

The servicer argued that the test for whether restructuring a loan involves a new extension of credit is whether (1) "the borrower's note is satisfied or replaced" and (2) "new money is extended."[23] The court agreed but opined that these two factors alone are insufficient and that the test should include a third factor—whether "the secured obligations are those incurred under

the terms of the original loan."[24]

> In answer to the Fifth Circuit's certified question, the Texas Supreme Court responded that:
>
> [T]he restructuring of a home equity loan that, as in the context from which the question arises, involves capitalization of past-due amounts owed under the terms of the initial loan and a lowering of the interest rate and the amount of installment payments, but does not involve the satisfaction or replacement of the original note, an advancement of new funds, or an increase in the obligations created by the original note, is not a new extension of credit that must meet the requirements of Section 50.[25]

Ultimately, the court concluded that modifications to home equity loans permit lenders to lower monthly payments for struggling borrowers, which gives lenders a meaningful alternative to foreclosure and further serves the public policy underlying Section 50—to protect homesteads in Texas.

Lenders should be aware, however, that *Sims* does not hold that any and all modifications would be compliant with the law. During the Covid-19 epidemic, the quartet of state agencies that issue official interpretations of the constitutional provisions[26] issued formal guidance on the modification of existing home equity loans in light of *Sims*:

> An existing home equity loan may be modified at the request of the homeowner without violating the Texas Constitution if the modification is consistent with the opinion of the Texas Supreme Court in *Sims v. Carrington Mortg. Services, L.L.C.* 440 S.W.3d 10 (2014). In the context of an existing home equity loan in default, the court held that a new agreement with the borrower that capitalizes past-due interest, fees (late charges), property taxes, and insurance premiums into the principal of the loan (all past-due amounts owed under the terms of the initial loan) and lowers the interest rate and amount of installment payments, but does not involve the satisfaction or replacement of the original note, an advancement of new funds, or an increase in the obligations created by the original note, is not a new extension of credit for purposes of Section 50(a)(6). Further, the court held that the capitalization of past-due interest, taxes, insurance premiums, and fees was not an "advance of additional funds" within the meaning of Section 50(a)(6) if those amounts were among the obligations assumed by the borrower under the terms of the original loan.

In response to the *Sims* case, the commissions adopted amended 7 Tex. Admin. Code §153.11(1), explaining that Section 50(a)(6)(L)(i) does not prohibit a modification that does not satisfy and replace the original home equity loan and does not create a new extension of credit. The amendment also explains that the modification may include a deferment of the borrower's original obligation and may include amounts that are past due under the home equity loan (e.g., accrued but unpaid interest, taxes[,] and insurance).

> As noted in 7 Texas Admin. Code §153.14(2), a home equity loan and a subsequent modification are considered a single transaction for purposes of the home equity lending requirements of Section 50(a)(6), including the percentage cap on loan fees.[27]

Later in the Covid-19 epidemic, the same quartet of state agencies further noted:

> Although the *Sims* case did not explicitly involve traditional payment deferrals or an extension of the term of the original note, we believe these to be permissible under the Court's holding that "[t]he Constitution does not prohibit the restructuring of a home equity loan that already meets its requirements in order to avoid foreclosure while maintaining the terms of the original extension of credit."[28]

Lenders should note that Rule §153.11 and Rule §153.14(2) were amended effective November 26, 2020.[29] Rule §153.11 was amended to add language adopting the result in *Sims*. Perhaps more important is what was not changed: the (renumbered) paragraph 4 that says a balloon payment is prohibited. The same is true of Rule §153.14 which states that "a modification of an equity loan may not provide for new terms that would not have been permitted by applicable law at the date of closing of the extension of credit."[30]

During the Covid-19 epidemic, a substantial number of borrowers sought a forbearance of their mortgage payments pursuant to the CARES Act.[31] The Consumer Financial Protection Bureau and the Federal Housing Finance Administration announced that "[t]he missed payments can be added to the normal monthly payments, paid back all at once, tacked on to the end of the loan, or the borrower can have the term of the loan extended."[32] Note that two of these options involve a lump-sum payment—at the end of the forbearance period or at the end of the loan term. But that is not consistent with Texas law. A balloon payment would not have been permitted as of the date the existing loan closed, and nothing in *Sims* should be interpreted to authorize such a payment. The modification at issue in *Sims* involved monthly payments that were restructured in "tiers"; the modification called for a set of reduced equal successive periodic installments for a set number of months, followed by substantially equal payments for the remainder of the loan term that would fully amortize the debt. *Sims* and the amended regulations are limited to the specific actions that were taken by the defendant lender; subsequent court decisions have validated that view. [33] In that sense, Section 50(a)(6) does continue to apply to modifications. The forborne amounts should be recapitalized at the end of the forbearance period so that the balance is paid off in a manner that is consistent with the constitutional requirement that the loan must be "scheduled to be repaid in substantially equal successive periodic installments, . . . each of which equals or exceeds the amount of accrued interest as of the date of the scheduled installment [if the loan is a close-end home equity loan]"; or "regular periodic installments," each of which "equals or exceeds the amount of accrued interest" during the draw period, and is "substantially equal" during the repayment period.[34] The "tiers" of rates in the *Sims* case are consistent with that requirement, in that they were substantially equal in between each adjustment; a lump-sum repayment is not.

III. Neither Void or Voidable; the Lien Is Invalid Until Cured

Historically, trial courts and appellate courts in Texas, as well as the Fifth Circuit, concluded that a defective home equity loan was voidable and that a claim seeking to void the lien was subject to a four-year statute of limitations.[35] The cure provisions seemed to suggest as much.[36] In that light, if the lender found a defect in the loan documentation or process (e.g., in an audit of the loan file), it made sense not to cure a defect until the borrower gave notice of the defect. It was better to "let sleeping dogs lie" while the statute of limitations ticked away.

Wood v. HSBC Bank USA, N.A proved the error of that strategy.[37] The Woods obtained a home equity loan in 2004. Eight years later, they notified the note holder and the servicer

In response to the *Sims* case, the commissions adopted amended 7 Tex. Admin. Code §153.11(1), explaining that Section 50(a)(6)(L)(i) does not prohibit a modification that does not satisfy and replace the original home equity loan and does not create a new extension of credit.

that the loan provisions did not comply with the home equity laws. Neither the holder nor the servicer attempted to cure the alleged defects. In 2012, the Woods sued both parties "seeking to quiet title and asserting claims for constitutional violations, breach of contract, fraud, and a declaratory judgment that the lien securing the home-equity loan is void, that all principal and interest paid must be forfeited, and that the Woods have no further obligation to pay."[38] The holder and servicer moved for summary judgment on the grounds that the lien was voidable and that the statute of limitations barred the Woods' claims. The trial court granted summary judgment for the holder and servicer. The only issue the Woods raised on appeal was whether their claims were subject to a statute of limitations. The court of appeals affirmed holding that home equity liens are voidable and that the residual four-year statute of limitations applied to the Woods' claims, accruing from the date of closing.

The Woods had argued that a home-equity lien securing a noncompliant loan is invalid until the defect is cured, citing Section 50(c).[39] If a lender chooses not to cure after notice (i.e., as provided in Section 50(a)(6)(Q)), the defect is no longer curable, and the lien becomes absolutely void. The Woods asserted that no statute of limitations applies to actions seeking to declare the status of an already-invalid lien. The holder and servicer responded that a lien securing an uncured home-equity loan is voidable, because only voidable liens can be validated, and thus the four-year residual statute of limitations should apply.[40]

The Texas Supreme Court agreed with the Woods that "a lien securing a constitutionally noncompliant home-equity loan is not valid before the defect is cured," and that "no statute of limitations applies to an action to quiet title on an invalid home-equity lien."[41] The court clarified that its holding in *Doody* was meant to reconcile strict invalidity under Section 50(c) with the lender's right to cure under Section 50(a)(6)(Q).[42] In so doing, the court abandoned the common-law notion of void versus voidable. As the court stated:

> [C]ourts faced with this issue have typically confined their analysis to the common-law concept of void-versus-voidable liens. As the dissent notes, these courts have generally concluded that because *Doody* held that an invalid lien could later be made valid, the lien could never have been absolutely void and thus must be voidable. . . . A voidable lien is presumed valid unless later invalidated . . . while [S]ection 50 and *Doody* contemplate precisely the opposite: that noncompliant liens are invalid until made valid.[43]

The court later explained that:

> Constitutional mandates need not be shoehorned into common-law concepts when those concepts conflict with the Constitution's plain text. . . . Section 50(c) starts with the premise that a lien securing a noncompliant loan is never valid. Implementing a [S]ection 50(a)(6)(Q)(x) cure provision brings the loan into constitutional compliance, thereby validating the accompanying lien. . . . A lien that was invalid from origination remains invalid until it is cured. In so holding, we do not create a new common-law category of liens that are "void until cured." We are merely interpreting the plain language of the Constitution, which defies common-law categorization.[44]

The court held that treating a noncompliant lien as "valid unless later invalidated" would contravene Section 50(c), and neither the cure provisions in Section 50(a)(6)(Q) or the disclosure given to borrowers before closing[45] evince an intent to do that. "Further, lenders are permitted, and indeed should be encouraged, to cure constitutional noncompliance on their own, without notice from the borrower, as the lender did in *Doody.*"[46] In other words, don't let sleeping dogs lie.

The court then turned to the question of whether a statute of limitations should apply to the borrower's right to challenge the validity of the lien. The court noted that the cure provisions in Section 50(a)(6)(Q) give the lender sixty days in which to respond to notice from the borrower, but there is no corresponding time limit on the borrower's notice.[47] The court concluded that, in light of the fact that the lien remains invalid until cured, no statute of limitations applies to cut off a homeowner's right to quiet title to real property encumbered by an invalid lien under Section 50(c).

> We have held that as long as an injury clouding the title remains, so too does an equitable action to remove the cloud; therefore, a suit to remove the cloud is not time-barred." . . . Indeed, it would make little sense to cut off a homeowner's claim merely because of the passage of time when the constitutional protections do not contemplate such a limitation. The Constitution's plain text compels [the conclusion] that homeowners' right to seek a declaration of an invalid lien not be bound by a statute of limitations. As such, no statute of limitations applies to this type of quiet-title action.[48]

Note that this holding appears to be limited to lien defects that put a cloud on title. Other types of claims—such as breach of contract, negligence, violations of the Fair Debt Collection Practices Act, usury, or fraud—have been held to be subject to the statute of limitations applicable to such claims.[49]

What lender would gamble that a defect will go unnoticed for up to thirty years? It is clear that lenders should be proactive and cure defects found through loan audits or other means.

The Woods petitioned the court for forfeiture of all principal and interest paid on their home equity loan—the nightmare of every lender. The court responded to the petition by referring to its holding in a companion case, *Garofolo v. Ocwen Loan Servicing, L.L.C.*,[50] which we now consider.

IV. The Remedy of Forfeiture Is Strictly Limited

Fortunately, most home equity loan defects can be cured. The law provides for five types of cures for five categories of defects, and a sixth "catch-all" or "do-over" cure for defects that don't fit within the other categories. The "catch-all" allows the lender to cure

> the failure to comply by a refund or credit to the owner of $1,000 and offering the owner the right to refinance the extension of credit with the lender or holder for the remaining term of the loan at no cost to the owner on the same terms, including interest, as the original extension of credit with any modifications necessary to com

ply with this section or on terms on which the owner and the lender or holder otherwise agree that comply with this section.[51]

But what if none of the cures are applicable, even the "catch-all"? For example, what if the borrower has paid off the loan and the lender fails to comply with some requirement in the statute (such as by failing to provide the cancelled note and a release of lien document)? The Texas Supreme Court decided this issue in *Garofolo.* One of the requirements for a home equity loan to create a valid lien on the homestead is the following:

> within a reasonable time after termination and full payment of the extension of credit, the lender [will] cancel and return the promissory note to the owner of the homestead and give the owner, in recordable form, a release of the lien securing the extension of credit or a copy of an endorsement and assignment of the lien to a lender that is refinancing the extension of credit.[52]

The holder of the loan (Ocwen) failed to give Ms. Garofolo a release of lien upon payment in full of her loan. Ms. Garofolo notified Ocwen of its failure to comply with the statute. When 60 days passed after that notice, ostensibly cutting off Ocwen's ability to cure the defect, Garofolo sued Ocwen in federal court for violation of the Texas Constitution and breach of contract. She asked for forfeiture of all principal and interest paid on the loan, which would have been quite the windfall. At first glance, this seemed to present the court with an interesting predicament. The statute reads as follows:

> [T]he lender or any holder of the note for the extension of credit shall forfeit all principal and interest of the extension of credit if the lender or holder fails to comply with the lender's or holder's obligations under the extension of credit and fails to correct the failure to comply not later than the 60th day after the date the lender or holder is notified by the borrower of the lender's failure to comply by [performing one of the cures applicable to specific types of violations or the "catch-all" cure for violations that are not covered by the specific cures].[53]

If the court agreed with the plaintiff that the holder failed to give her a release of lien as required by the loan's terms (i.e., failed "to comply with the . . . holder's obligations under the extension of credit"), and failed to correct the failure to comply within sixty days after notice from the borrower, the statute would seem to require the forfeiture of "all principal and interest of the extension of credit."[54] For twenty years, lenders have been terrified by the possibility that they might have to disgorge all principal and interest paid and forfeit the right to any future payments if the lender failed to cure a defect in a home equity loan.[55] And now, thanks to the *Wood* case, the risk would persist for as long as the loan remained in place. This possibility has undoubtedly stunted home equity lending in Texas and has almost certainly kept some lenders out of the market entirely.

The court heard the case on referral of two certified questions from the Fifth Circuit Court of Appeals, which was reviewing the dismissal of Garofolo's case by the district court. The questions were as follows:

> (1) Does a lender or holder violate Article XVI, Section 50(a)(6)(Q)(vii) of the Texas Constitution, becoming liable for forfeiture of principal and interest, when the loan agreement incorporates the protections of Section 50(a)(6)(Q)(vii), but the lender or holder fails to return the cancelled note and release of lien upon full payment of the note and within 60 days after the borrower informs the lender or holder of the failure to comply?
> (2) If the answer to Question 1 is "no," then, in the absence of actual damages, does a lender or holder become liable for forfeiture of principal and interest under a breach of contract theory when the loan agreement incorporates the protections of Section 50(a)(6)(Q)(vii), but the lender or holder, although filing a release of lien in the deed records, fails to return the cancelled note and release of lien upon full payment of the note and within 60 days after the borrower informs the lender or holder of the failure to comply?[56]

The Supreme Court of Texas began its analysis by noting:

> if the failure to deliver a release of lien amounts to a constitutional violation for which a constitutional forfeiture remedy applies[,] . . . the myriad terms and conditions required for a home-equity loan to be foreclosure-eligible would amount to substantive constitutional rights and obligations. As such, a lender's failure to honor them would give rise to not just a breach-of-contract claim, but a violation of the constitution itself. Our constitution's plain language, however, compels us to answer "no."[57]

As in *Wood*, the court asserted that the Texas Constitution "lays out the terms and conditions a home-equity loan must include if the lender wishes to foreclose. . . ."[58] In other words, what is necessary to create a valid and enforceable lien on a homestead. The Constitution "does not, however, create a constitutional cause of action or remedy for a lender's subsequent breach of those terms or conditions. A post-origination breach of those terms and conditions may give rise to a breach-of-contract claim for which forfeiture can sometimes be an appropriate remedy. But when forfeiture is unavailable, . . . the borrower must show actual damages or seek some other remedy such as specific performance to maintain her suit."[59]

Later in the opinion, the court states that:

> [S]ection 50(a) does not directly create, allow, or regulate home-equity lending. Nowhere does it say all home-equity loans must include the constitutional terms and conditions, nor does it prohibit loans made on other terms. It simply describes what a home-equity loan must look like if a lender wants the option to foreclose on a homestead upon borrower default. . . . Those terms and conditions *are not constitutional rights* and obligations unto themselves. They only assume constitutional significance when their absence in a loan's terms is used as a shield from foreclosure. . . . A lender that includes the terms and conditions in the loan at origination but subsequently fails to honor them might have broken its word, but it has not violated the constitution.[60]

The forfeiture remedy is one of those "terms and conditions", and as such, it is not a constitutional right either.[61] In other words, a valid home equity loan must include the condition that the lender shall forfeit all principal and interest if it fails to cure a constitutional defect in a timely manner. The subsequent failure to forfeit principal and interest would be a breach of contract, but the ultimate remedy for that breach might not be forfeiture.

This result is clearly shown in *Garofolo*. The plaintiff had paid the loan in full. The holder never had any reason to foreclose. The court acknowledged that the plaintiff probably could have successfully defended against foreclosure based on the uncured violation of the constitutional provisions, but in this

case, there was no foreclosure to fend off. As the court put it: "Section 50(a) simply has no applicability outside foreclosure. . . . [B]orrowers are not without recourse when a lender fails to meet its obligations, they are just without *constitutional* recourse."[62] Therefore, the court answered "no" to the first certified question.[63] This is a remarkable conclusion. In one stroke, the court strictly limited the availability, and therefore the risk, of the forfeiture remedy. Lenders are not entirely out of the woods, however. As the court noted, a breach of the terms or conditions of the loan "may give rise to a breach-of-contract claim for which forfeiture can sometimes be an appropriate remedy."[64]

The court then turned to the second certified question—in the absence of actual damages, does a holder become liable for forfeiture of principal and interest under a breach of contract theory? The court noted that the plaintiff's contract contained both constitutional terms—the holder's obligation to provide a release of lien and the right to the forfeiture remedy if the holder fails to correct the defect within 60 days after notice thereof.[65] The plaintiff conceded that she had not suffered any actual damages as a result of the failure to provide a release of lien but argued that actual damages are not required when the parties have contracted for a forfeiture remedy that was not made contingent on proof of actual damages.[66]

The court gave a close reading of the forfeiture provision in the statute: the holder "shall forfeit all principal and interest of the extension of credit" if the holder "fails to correct the failure to comply" by performing one of the cures applicable to specific types of violations or the "catch-all" cure for violations that are not covered by the specific cures.

In Garofolo's case, none of the cures for specific violations were applicable, and the "catch-all" cure was unworkable. If the failure to comply cannot be cured by any specific cure, the "catch-all" cure requires the holder to give

> a refund or credit to the owner of $1,000 and offer[] the owner the right to refinance the extension of credit with the lender or holder for the remaining term of the loan at no cost to the owner on the same terms, including interest, as the original extension of credit with any modifications necessary to comply with [Section 50(a)] or on terms on which the owner and the lender or holder otherwise agree that comply with [Section 50(a)].[67]

The plaintiff's loan had been paid in full and the lien extinguished. There was no extension of credit to refinance.

Garafalo argued that the "catch-all" cure should have been performed by the holder, even if it would have only partially remedied the violation and would not have actually resulted in her receiving the release of lien that was the basis of her lawsuit.[68] The court, however, calling the forfeiture remedy "Draconian,"[69] went to great lengths to avoid that result for a technical violation of the home equity requirements by parsing very closely the language of the holder's obligation to cure—"to correct the failure to comply."

First, the court invoked "consumer protection" as a legal shield for lenders to use against forfeiture:

> The obvious intent behind the forfeiture remedy as a whole is to encourage lenders to correct loan infirmities under the threat of the stiff punishment of forfeiture. . . . Allowing lenders to avoid punishment by performing an irrelevant corrective measure at the expense of directly addressing the borrower's complaint frustrates this intent. It follows that the six specific corrective measures exist to give lenders avenues to avoid forfeiture by fixing problems rather than furnishing technicalities that can be manipulated to avoid them. . . . [T]he constitution insists not on technical compliance with a corrective measure but on actually fixing the problem.[70]

Unfortunately, as we shall see, if none of the cures "directly address" the borrower's complaint or "fix the problem," the consumer may be left without any form of remedy or relief whatsoever, which is almost certainly not the intent behind the cure provisions.

The court continued its argument that "to correct" something meant to actually fix the problem; the "performance of an irrelevant corrective measure [such as the "catch-all"] in wil[l]ful blindness to whether it addresses the borrower's complaint can hardly be said to 'correct' anything."[71] Second, the court determined that the "failure to comply" refers to its original obligation, i.e., to provide a release of lien. The "catch-all" remedy would not correct that failure to comply, and therefore the "catch-all" remedy was an "irrelevant corrective measure."[72] Finally, the court concluded that the forfeiture remedy is limited to the context of the constitutional provision. Forfeiture is available only when a lender fails to correct its "failure to comply" by performing one of the corrective measures provided in the statutes. "If none of those measures actually correct the lender's failure to meet its obligations, the lender cannot correct its failure to comply 'by' performing one of them, *and therefore forfeiture is simply unavailable*."[73] This is another remarkable conclusion in the court's campaign to limit the "Draconian" remedy.

On the other hand, the result in *Garofolo* is a very narrow exception. In almost any other situation, if there had been any remaining balance due on the loan there would have been an applicable cure that the lender was obligated to undertake. The failure to provide the release of lien (which is required by subpart (Q)(vii)) is one of the very few defects that is not addressed by subpart (Q)(x).

The court held that Garofolo had other remedies—a suit for breach of contract and the remedies of actual damages or specific performance (subject to the general four-year statute of limitations that applies to contracts in Texas)—but only if

Unfortunately, as we shall see, if none of the cures "directly address" the borrower's complaint or "fix the problem," the consumer may be left without any form of remedy or relief whatsoever, which is almost certainly not the intent behind the cure provisions.

she could show actual damages.[74] In the end, she was entitled to nothing.

And how did the decision in *Garofolo* affect the holding in *Wood*? The Woods had sought a declaratory judgment for forfeiture of principal and interest under the provisions of the Texas Constitution. Because *Garofolo* held that there is no such cause of action available under the constitution, they had no right to seek forfeiture on that basis, but they could still purse their suit to quiet title.

In a subsequent case applying the holding in *Wood*,[75] the Fifth Circuit noted that *Wood* had eliminated the statute of limitations on a suit to quiet title, but the decision did not address when such a cause of action accrues. The appellants in *Fueuerbacher* asserted a quiet title action and a breach of contract claim, but the court held that those claims accrued at the time the breach occurred and therefore were barred, noting that:

> [A]s Texas courts have explained, a breach of contract claim (the cause of action) is distinct from the availability of forfeiture (the remedy). *See* Garofolo v. Ocwen Loan Servicing, L.L.C., 497 S.W.3d 474, 482 (Tex. 2016) (explaining that the "constitution invokes forfeiture when a lender 'fails to correct the failure to comply' ... [but that] 'failure to comply' is a reference to the lender's original transgression: its 'fail[ure] to comply with the lender's or holder's obligations under the extension of credit'"); Wells Fargo Bank, N.A. v. Robinson, 391 S.W.3d 590, 595 (Tex. App.—Dallas 2012, no pet.) ("A borrower's recourse for a lender's failure to abide by the terms of his loan agreement is to assert traditional tort and breach of contract causes of action, not constitutionally mandated forfeiture.").[76]

It is important to understand the implications of these decisions. The Texas Supreme Court held that, to be a valid lien, the loan documents must provide for the remedy of forfeiture. But that remedy is only available if the borrower timely files a cause of action to quiet title or for breach of contract.[77] For example, in *Inge v. Bank of America, N.A.*,[78] the court held that the plaintiff's "breach of contract claim was not premised on BoA's failure to make the terms of the note and Deed of Trust compliant with the constitutional requirements for creation of a valid lien," but rather on the original lender's failure to comply with those contractual obligations.[79] Therefore, the four-year statute of limitations applied to the breach-of-contract claim (which continued in effect after the loan was assigned to Bank of America), which barred the plaintiff's claim because it was filed six years after the loan closed. Similarly, in *Priester v. Long Beach Mortgage Co.*, ("Priester II"),[80] plaintiffs alleged that *Wood* and *Garofolo* represented change in substantive law that would preclude the application of res judicata to their claims. However, as the court noted:

> Furthermore, even assuming *arguendo* that a change in decisional law entitles Plaintiffs to relitigate their claims, Plaintiffs have not established that *Wood* and *Garofolo* would mandate a different outcome. In *Wood*, the Texas Supreme Court held that no statute of limitations applies to an action to quiet title on a constitutionally invalid home equity lien. *See Wood*, 505 S.W.3d at 547. Although Plaintiffs are correct that *Wood* reflects a change in decisional law regarding the statute of limitations on claims arising from an alleged void lien, the holding in *Wood* is not as broad as Plaintiffs argue. *See generally* Dkt. 148. *Wood* only addressed the issue of *whether* the statute of limitations applies to a quiet-title action and did not address *when* a quiet-title action accrues. *See Johnson v. Citigroup Mortg. Loan Tr. Inc.*, 2017 WL 3337268, at *9 (W.D. Tex. 2017). Moreover, the Texas Supreme Court did not hold in *Wood* that *any* challenge to a constitutional defect avoids the applicable statute of limitations for that cause of action.
>
> As explained in *Garofolo*, Section 50(a) does not create substantive rights beyond a defense to foreclosure, and there is no separate right of action. *Garofolo*, 497 S.W.3d at 484; *see also Wood*, 505 S.W.3d at 546. Instead, the Texas Supreme Court emphasized that borrowers may assert constitutional violations as a defense to foreclosure actions brought by lienholders or by filing their own substantive cause of action, such as a breach of contract or a quiet title action. *Garofolo*, 497 S.W.3d at 484. Thus, a plaintiff does not state a claim merely by alleging constitutional violations of Section 50(a). *See Johnson*, 2017 WL 3337268, at *9. To state a claim, a plaintiff must plead such violations in the context of a properly pleaded cause of action, and the relevant statute of limitations for those causes of action control.[81]

V. Other Notable Cases

State and federal courts in Texas have addressed a number of other interesting issues in recent cases:

- In *Mulvey v. U.S. Bank National Association*, [82] the plaintiff alleged that bank personnel made oral statements that he did not have to make loan payments while his application for a loan modification was pending. The court held that, because the amount in controversy exceeded $50,000, the claims were subject to the Texas statute of frauds requiring such statements to be writing to be enforceable, and therefore, plaintiff could not assert a claim based on those oral statements.[83]
- In *Biedryck v. U.S. Bank National Association*, [84] the court dismissed the plaintiff's argument on appeal that the loan modification agreement was invalid "because it failed to state that it was a security instrument; increased the lien against the property to more than eighty percent of the property value; added fees that could have exceeded the three percent limit; was not preceded by a twelve-day notice; and was signed at his home."[85] The court did not undertake a detailed analysis of these claims; rather, it noted that the new balance included the unpaid principal balance, plus interest "and other amounts capitalized", and that "prior obligations under the note and security instrument were still in force."[86] However, it is worth noting that a loan modification agreement is not "an extension of credit" under Section 50(a)(6) and therefore is not required to be—or be secured by—a written security instrument, preceded by a 12-Day Notice, or signed at the office of the lender, an attorney, or a title company.[87] Secondly, the 80% cumulative loan-to-value ratio only applies as of the closing date

of the original loan.[88] Finally, the state agencies that issue interpretations of the constitutional provisions have made it clear that the cap on fees and charges–despite being applicable to "maintaining" and "servicing" the loan applies only "if the charges are paid at the inception of the loan, or if the charges are customarily paid at the inception of an equity loan but are deferred for later payment after closing."[89]

- In *Hill v. Sword*,[90] the plaintiffs had obtained two loans from a private lender, apparently before the property became their homestead. After plaintiffs defaulted on the notes, the lender obtained a declaratory judgement in the amount of the unpaid principal balance plus prejudgment interest, attorney's fees, and court costs. The plaintiffs and lender then entered into a third promissory note and deed of trust for the amount of the judgment.[91] The plaintiffs contended that this third note constituted a satisfaction and replacement of the prior debts which would make the third note a new extension of credit. The court disagreed, noting that the declaratory judgment was not a foreclosure of the first two deed of trust liens and that the judgment was not paid or satisfied and replaced by the third note and deed of trust; rather, the latter constituted a renewal and extension (without extinguishment) of the existing debts.[92]

Next, the court somewhat extended the reach of *Sims*. First, it held that the capitalization of attorney's fees into the third loan was valid, even though the loan was not a home equity loan, because the lender's right to do that was stated in the loan documents for the first two loans.[93] Second, the court held that various non-monetary obligations that were added in the third deed of trust were valid because they did not involve a new extension of credit under the *Sims* rationale. Arguably, *Sims* is inapplicable to either issue.

VI. Conclusion

The Texas home equity loan statute has always been complex and intimidating, especially in light of the seemingly Draconian penalties that may apply if the statute's requirements are violated. Fortunately for lenders and their attorneys, the Texas Supreme Court has rendered the most Draconian penalty much less toothsome by limiting a borrower's ability to obtain forfeiture of principal and interest. Nonetheless, the cases discussed in this Article should put lenders on notice that they need to have operational processes in place that recognize when a claim of noncompliance is being made and to respond to such claims as promptly as possible. A borrower's claim can still be fatal if it is timely, and the lender does not take prompt and effective steps to cure the alleged defect(s).

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1 For simplicity's sake, we will refer to (closed-end) home equity loans and (open-end) home equity lines of credit (HELOCs) jointly as "home equity loans."

2 Tex. Const. art. XVI, § 50(a)(6).

3 Many early settlers in the area that is now Texas came west because they had lost their homes in the eastern states as a result of unwise borrowing, land speculation, and harsh lending practices. The founders of Texas were determined to prevent that from happening again, especially because the establishment and continuance of homesteads was crucial to the effort to populate and "win" the West. The protections also meant that a widow and her children could keep the home if the paterfamilias abandoned them or died, which was a constant danger on the frontier.

4 Tex. Const. art. XVI, § 50(a)(6) (emphasis added). Forced sale is also permitted for seven other types of liens: (1) purchase money loans and (2) refinances of those loans; (3) taxes due on the homestead; (4) an owelty of partition; (5) home improvements and repairs, including new improvements; (6) reverse mortgages; and (7) the refinance of a lien on a manufactured home that is converted from personal property to real property by "attachment" to the land. Other types of personal debts, judgments, and loans not connected to the homestead are invalid, at least until the property is no longer the debtor's homestead.

5 The implications of this subsection are enormous. For example, an individual buys a home while single. After marriage, their spouse, who is not an owner, moves in, and they establish a family homestead. Now the original owner cannot sell or abandon that homestead without the consent of the spouse. The spouse gains homestead rights (and community property rights), despite the fact that the spouse has no legal title. For another example, suppose the old family home has passed from mom and dad to their kids, who all inherited an equal share. Junior and his wife have moved into the home. Junior cannot sell or "abandon" his homestead without the consent of his siblings *and their spouses*. Apparently, the point of this provision was to prevent a descendant from letting go of the old family home unless none of the siblings *or their spouses* want to live there.

6 This provision will play a key role in one of the Texas Supreme Court decisions discussed below.

7 Each debit or advance must be no less than $4,000; the owner may "not use a credit card, debit card, or similar device," or unsolicited preprinted check to obtain an advance; "any fees described by Subsection (a)(6)(E) are charged and collected only at the time the extension of credit is established and no fee is charged or collected in connection with any debit or advance"; the cumulative loan-to-value (CLTV) of the HELOC and all other debt secured by the homestead as of the date the HELOC closes is not more than 80% of the homestead's fair market value as of the date of closing; the lender or holder may not unilaterally amend the extension of credit; and "repayment is to be made in regular periodic installments, not more often than every 14 days and not less often than monthly, beginning not later than two months from the date the extension of credit is established, and:
(A) during the period during which the owner may request advances, each installment equals or exceeds the amount of accrued interest; and
(B) after the period during which the owner may request advances, installments are substantially equal."

8 Sims v. Carrington Mort. Servs., L.L.C., 440 S.W.3d 10 (Tex. 2014).

9 *Id.* at 12.
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.* at 12–13. *See* Sims v. Carrington Mort. Servs, L.L.C., 889 F. Supp. 2d 883, 884 (N.D. Tex. 2012).
15 *Sims*, 440 S.W.3d at 13.
16 *Id.* at 13–15.
17 *Id.* at 14–15 (citing Tex. Admin. Code § 153.14).
18 *Id.* at 15.
19*Id.*
20 *Id.* at 16.
21 *Id.*
22 *Id.*
23 *Id.*
24 *Id.*
25 *Id.* at 17.
26 The Department of Banking, Department of Savings and Mortgage Lending, Office of Consumer Credit Commissioner, and Credit Union Department.
27 *Home Equity Lending Guidance: COVID-19 Emergency Measures*, State of Tex. Joint Fin. Regul. Agencies (Nov. 30, 2020) (emphasis added), https://www.fc.texas.gov/sites/default/files/2020-11/jfra_he_covid_emerg_guide.pdf [https://perma.cc/FG76-YA4D].
28 *Home Equity Lending Guidance: Coronavirus Emergency Measures*, State of Tex. Joint Fin. Regul. Agencies (Apr. 22, 2021), https://www.ibat.org/files/PDFs/Home-Equity-Lending-Guidance-Coronavirus-Emergency-Measures.pdf [https://perma.cc/UQ3E-JFS7].
29 45 Tex. Reg. 8307 (Nov. 20, 2020) (amendments to 7 Tex. Admin. Code §§153.11, 153.14).
30 7 Tex. Admin. Code § 153.14(2)(C).
31 Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 4022, 134 Stat. 281, 490 (2020).
32 Press Release, CFPB and FHFA Announce Borrower Protection Program (Apr. 15, 2020), https://www.consumerfinance.gov [https://perma.cc/VT3P-KDQM].
33 *See, e.g.*, Graze v. Nationstar Mortg., LLC, No. 03-15-00329-CV, 2015 WL 6459597, at *5 (Tex. App.—Austin, 2015, pet. denied) ("The modifications at issue in this case did not expand the scope or amount of the debt secured by the original lien, impose additional personal liability on [plaintiffs], or require additional security beyond the existing liens. . . . [The] modified loans do not constitute a new extension of credit under the three elements of the *Sims* test. Consequently, the constitutional requirements of [S]ection 50(a)(6) for new home-equity loans do not apply.").
34 Tex. Const. art. XVI, §§ 50(a)(6)(L), (t)(8).
35 *See, e.g.*, Priester v. JP Morgan Chase Bank, N.A., 708 F.3d 667, 674 (5th Cir. 2013), *abrogated by* Bynane v. Bank of N.Y. Mellon, 866 F.3d 351 (5th Cir. 2017). That panel cited an earlier Texas Supreme Court case that held that a non-compliant lien "can be made valid at a later date." Doody v. Ameriquest Mortg. Co., 49 S.W.3d 342, 346 (Tex. 2001). The panel reasoned that a lien that is void cannot be subsequently validated, so defective home equity liens must be voidable. The Texas Supreme Court expressly disavowed that construction of the statute in the *Wood* case. The panel also noted that "numerous district and bankruptcy courts have . . . applied the four-year limitations period" to defective home equity liens and adopted that position in its own opinion; *see also* Williams v. Wachovia Mortg. Corp., 407 S.W.3d 391, 396–97 (Tex. App.—Dallas, no pet.) (citing *Priester* and numerous other decisions for its conclusion that defective liens are voidable and a four-year statute of limitations applies to claims of defects).
36 Tex. Const. art. XVI, §50(a)(6)(Q) ("[T]he lender or any holder of the note for the extension of credit shall forfeit all principal and interest of the extension of credit if the lender or holder fails to comply with the lender's or holder's obligations under the extension of credit and fails to correct the failure to comply not later than the 60th day after the date the lender or holder *is notified by the borrower of the lender's failure to comply*.") (emphasis added).
37 505 S.W.3d 542 (Tex. 2016).
38 *Id*. at 544.
39 "No mortgage, trust deed, or other lien on the homestead shall ever be valid unless it secures a debt described by this [Section 50] . . . ." Tex. Const. art. XVI, § 50(c).
40 *Wood*, 505 S.W.3d at 547.
41 *Id.*
42 *Id*. at 548.
43 *Id*. at 548–49 (internal citation omitted).
44 *Id*. (internal citations omitted). The court also pointed out that another provision of the Constitution, Section 50(i), overturns the common-law rule that a void deed in the chain of title cuts off the bona-fide purchaser defense. Section 50(i) states that "a purchaser for value without actual knowledge may conclusively presume that a lien securing an extension of credit described by Subsection (a)(6) of this [S]ection was a valid lien securing the extension of credit with homestead property if [certain conditions are met]." *Id*. at 549–50.
45 The "12-Day Notice"; *see* Tex. Const. art. XVI, §§ 50(a)(6)(M)(i), (50)(g).
46 *Wood*, 505 S.W.3d at 549.
47 *Id*.
48 *Id*. at 550 (quoting Ditta v. Conte, 298 S.W.3d 187, 192 (Tex. 2009)).
49 *See, e.g.*, Alexander v. Wells Fargo Bank, N.A., 867 F.3d 593, 603–04 (5th Cir. 2017) (reversing the trial court's refusal to amend its judgment in light of *Wood* as to the plaintiff's claim for quiet title, but affirming the refusal to amend with respect to plaintiff's breach of contract claim that was time-barred); Johnson v. Citigroup Mortg. Loan Tr. Inc., No. 5:16-cv-1114-RCL, 2017 WL 3337268, at *10 (W.D. Tex. Aug 3, 2017) (dismissing claims of breach of contract, negligence, collections violations, usury, and fraud for being time-barred).
50 Garofolo v. Ocwen Loan Servicing, L.L.C., 497 S.W.3d 474 (Tex. 2016).
51 One should also note that the "catch-all" requires only an *offer* to refinance the loan on compliant terms at no cost to the borrower. The refinance does not have to occur. The lender has met its obligation, even if the borrower declines the offer or refuses "to cooperate fully" with the offer. *See* 7 Tex. Admin. Code § 153.95(c) ("A borrower›s refusal to cooperate fully with an offer that complies with Section 50(a)(6)(Q)(x) to modify or refinance an equity loan does not invalidate the lender›s protection for correcting a failure to comply").
52 Tex. Const., art. XVI, § 50(a)(6)(Q)(vii).
53 *Id*. at § 50(a)(6)(Q)(x).
54 *Garofolo*, 497 S.W.3d at 480 (noting that the Court and the Fifth Circuit Court of Appeals both assumed these facts to be true).
55 The Court noted that it had previously described the forfeiture remedy as "Draconian" (citing Fin. Comm'n of Tex. v. Norwood, 418 S.W.3d 566, 572 (Tex. 2013) (the "ACORN" case)). *Id.* at 478. Fortunately, in the case where the lender has refinanced an existing lien, the lender can rely on equitable subrogation to

recover the amount of the debt that was refinanced, whether or not the lender's own lien is invalid. Fed. Home Loan Mortg. Corp. v. Zepeda, 601 S.W.3d 763, 766 (Tex. 2020) ("The doctrine allows a lender who discharges a valid lien on the property of another to step into the prior lienholder's shoes and assume that lienholder's security interest in the property, even though the lender cannot foreclose on its own lien.") (citing LaSalle Bank Nat'l Ass'n v. White, 246 S.W.3d 616, 619 (Tex. 2007) (per curiam)).
56 *Garofolo*, 497 S.W.3d at 476.
57 *Id*. at 476–77; *see also* Kyle v. Strasburger, 522 S.W.3d 461, 466 (Tex. 2017).
58 *Garofolo*, 497 S.W.3d at 475.
59 *Id*.
60 *Id*. at 478 (emphasis added). Tex. Const. art. XVI, § 50(a)(6)(Q).
61 *Garofolo*, 497 S.W.3d at 475. In relevant part, the requirement for a valid lien under subsection (Q) states that the extension of credit must be "made *on the condition that* . . . the lender . . . shall forfeit all principal and interest" if the lender fails to cure the defect in a timely manner (emphasis added).
62 *Id.* (emphasis in the original).
63 *Id.* The first certified question was:

> Does a lender or holder violate Article XVI, Section 50(a)(6)(Q)(vii) of the Texas Constitution, becoming liable for forfeiture of principal and interest, when the loan agreement incorporates the protections of Section 50(a)(6)(Q)(vii), but the lender or holder fails to return the cancelled note and release of lien upon full payment of the note and within 60 days after the borrower informs the lender or holder of the failure to comply?

Id. at 476.
64 *Id.*
65 *Id.*
66 *Id*. at 480. Query how this might be decided in light of *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016).
67 Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(f); *See also Garofolo*, 497 S.W.3d at 481.
68 *Garofolo*, 497 S.W.3d at 481.
69 *Id.* at 478 (quoting *Norwood*, 418 S.W.3d at 573).
70 *Id.* at 481–82.
71 *Id*. at 482.
72 *Id.*
73 *Id.* (emphasis added).
74 *Id.* at 479.
75 Feuerbacher v. Wells Fargo Bank Nat'l Assoc., 701 Fed. Appx. 297 (5th Cir. 2017).
76 *Id.* at 300–301.
77 Inge III v. Bank of Am., N.A., No. 02-17-00386-CV, 2018 WL 5993329, at *5 (Tex. App.—Fort Worth Nov. 15, 2018).
78 *Id.*
79 *Id.*
80 Priester v. Long Beach Mortg. Co., No. 4:16-CV-449-ALM-KPJ, 2018 WL 1833255 (E.D. Tex. Jan. 23, 2018), *report and recommendation adopted*, No. 4:16-CV-00449, 2018 WL 1081248 (E.D. Tex. Feb. 28, 2018), *on reconsideration in part*, No. 4:16-CV-449, 2018 WL 4469679 (E.D. Tex. Sept. 18, 2018).
81 *Priester II*, 2018 WL 1833255, at *12.
82 Mulvey v. U.S. Bank Nat'l Ass'n, 570 S.W.3d 355 (Tex. App.—El Paso 2018).
83 *Id.* at 363.
84 Biedryck v. U.S. Bank Nat'l Ass'n, No. 01-14-00017-CV, 2015 WL 2228447 (Tex. App.—Houston [1st Dist.] May 12, 2015, no pet.).
85 *Id.* at *6.
86 *Id.* at *7.
87 *See* Tex. Const. art. XVI, §§§ 50(a)(6)(A), (M)(i), (N).
88 *Id.* at § 50(a)(6)(B).
89 7 Tex. Admin. Code § 153.5(9) and (12).
90 Hill v. Sword, 454 S.W.3d 698 (Tex. App.—Tyler 2015, no pet.).
91 *Id.* at 700–701.
92 *Id.* at 703.
93 *Id.*

Protecting Children in the Frontier of Surveillance Capitalism*

By Cole F. Watson**

I. Introduction

Modernity has precipitously arrived. Consider this paragraph describing "Internet" usage in 2002:

Every day after school, millions of children come home and immediately log onto the Internet. They happily click onto the websites of all their favorite TV shows and musical groups. As they surf these sites, the familiar fill-in-the-blank questionnaires pop up on the screen and request their names, ages, genders, addresses and phone numbers. Children plug in the necessary information and continue to click away.[1]

This once-relevant documentation of children's internet usage is now antiquated—a relic of days long gone, never to return. Today, more personal data is collected from an individual's smart phone than any "familiar fill-in-the-blank questionnaire" could reasonably solicit. A wider audience is beginning to understand that personal data is constantly collected, and controlled by companies (whether to benefit the user, shape buying habits,[2] manipulate political philosophies,[3] or something in between).[4] Even though children's internet usage is vastly different than two decades ago, the privacy protections afforded to children remain unchanged.

Society sits at an unprecedented juncture of data collection and privacy rights. Millennials will be the last generation to recall a time before the internet's proliferation. The lives of today's consumers (including children) are captured, confined, and commoditized on the internet. Because of the unprecedented acceleration of the digital frontier, we may not fully understand the repercussions of this proliferation until it is too late. As the most vulnerable and impressionable population in our society, children deserve the highest levels of legal protection.

II. Reclaiming Privacy

Privacy is a long-established right.[5] However, in comparison, consumer-protection rights are relatively new. President Woodrow Wilson created the Federal Trade Commission (FTC) in 1914 to prevent unfair competition. Additional legislation broadened the FTC's regulatory power to protect the privacy rights of consumers by prohibiting deceptive practices involving consumers' personal information.[6]

a. History of COPPA

Toward the end of the twentieth century, as more children began accessing the internet, Congress enacted the Children's Online Privacy Protection Act (COPPA).[7] COPPA requires the FTC to issue and enforce regulations concerning online privacy for children under the age of thirteen. COPPA strives to provide parental control over information collected from their children online. COPPA applies to operators of commercial websites for kids and websites that have "actual knowledge" of collecting, using, or disclosing "personal information" from children under the age of thirteen. Regarding teenage users, the FTC further explains:

> In enacting [COPPA], Congress determined to apply the statute's protections only to children under 13, recognizing that younger children are particularly vulnerable to overreaching by marketers and may not understand the safety and privacy issues created by the online collection of personal information. Although COPPA does not apply to teenagers, the FTC is concerned about teen privacy and does believe that strong, more flexible, protections may be appropriate for this age group.[8]

Notably, COPPA does not apply to information collected *about* children, only *from* children.[9] Operators must post a clear privacy policy, obtain verifiable parental consent, provide parents the ability to delete their child's information, and maintain the confidentiality of collected information. COPPA does not inhibit a child's access to certain websites; a child's parent, guardian, or school is responsible for filtering internet access.

After collecting a child's personal information and using it for its intended purpose, operators must destroy the information to prevent unauthorized access. Violators of COPPA can be liable for civil penalties up to $43,280 per violation depending on "the egregiousness of the violations, whether the operator has previously violated [COPPA], the number of children involved, the amount and type of personal information collected, how the information was used, whether it was shared with third parties, and the size of the company." Foreign-based websites that collect information from children in the U.S. and U.S.-based websites that collect information from children in foreign countries must also comply with COPPA.[10]

b. Ongoing Privacy Violations

Although some Big Tech companies pay tremendous amounts of money to settle allegations with the FTC, the quasi-punishment (which these companies agree to) may not fit the alleged crime. As such, online privacy violations continually occur.

Take for example Facebook's 2019 settlement with the FTC. The FTC determined that "Facebook repeatedly used deceptive disclosures and settings to undermine users' privacy preferences" in violation of a previous FTC order.[11] Facebook failed to inform its users that third-party apps collected data from Facebook users' "friends" without receiving proper consent. In response to the allegations that Facebook violated the previous FTC privacy order, Facebook agreed to an unprecedented $5 billion settlement with the FTC. However, to not misstate the obvious, Facebook is still alive and well, with a market capitalization of over $630 billion in March of 2022.

Also in 2019, YouTube paid $170 million to the FTC after the FTC alleged that the company illegally collected personal information from children without their parents' consent.[12] Persistent identifiers ("cookies") were used to track children who viewed child-directed channels across the internet without receiving meaningful consent from parents. Much to parents' chagrin, today's children *can* aspire to become (and sometimes already are) so-called "Youtubers." Youtubers can monetize their channel by allowing YouTube to disseminate "behaviorally targeted advertisements" to their viewers.

Today, more personal data is collected from an individual's smart phone than any "familiar fill-in-the-blank questionnaire" could reasonably solicit.

According to the FTC complaint, even though YouTube manually reviewed children's content in its "YouTube Kids" application, it still collected a child's personal data to display targeted advertisements on these channels. Despite the ubiquity of its underage viewers, YouTube denied its need to comply with COPPA. The settlement also required YouTube—and Google as its parent company—to develop, implement, and maintain a system that allows channel owners to notify YouTube of any child-directed content on their channels.

Newer companies, such as TikTok, are just as likely to violate privacy protection laws as well. For example, ByteDance, Ltd., TikTok's parent company, paid $5.7 million to the FTC after the FTC alleged that the company violated COPPA.[13] Many are familiar with the trendy TikTok dances that are used in marketing campaigns and as media memes.[14] After launching in 2016, TikTok has accumulated more than 1 billion monthly active users worldwide (many of which are children, tweens, and teenagers), with an estimated value of $75 billion in March of 2022. TikTok collects a plethora of user information: location, internet address, copied clipboard content (including text, images, and video), browsing history, messages, phone and social network contacts, and even a user's "likeness."[15] A *Wall Street Journal* analysis found that TikTok also collected unique identifiers (called "media access control" (MAC) addresses) from millions of users, which allowed the application to track these users online without the user's ability to opt out.[16] Despite the fines and flagrant data collection from

children, these platforms are socially acceptable and desirable.[17]

III. Contextualizing the Diminution of Privacy within the Framework of Surveillance Capitalism

The right to privacy transforms with each generation. George Orwell's *1984* is often cited when discussing the intersection of technology and privacy rights.[18] The issue is thinking that Orwell's imagination is still a way away: in the future, close but not quite here, or otherwise confined to its pages written decades ago. In reality, "Big Tech" replaced "Big Brother" a generation ago. While older generations gradually discover their online activity is under constant surveillance, younger generations' right to online protection is vaporizing.

a. Surveillance Capitalism Defined

In her seminal work, *The Age of Surveillance Capitalism*, Professor Shoshana Zuboff defines "surveillance capitalism" as "the new logic of accumulation."[19] Professor Zuboff elaborates:

> Surveillance capitalism unilaterally claims human experience as free raw material for translation into behavioral data. Although some of these data are applied to product or service improvements, the rest are declared as a proprietary *behavioral surplus*, fed into advanced manufacturing processes known as 'machine intelligence,' and fabricated into *prediction products* that anticipate what you will do now, soon, and later. Finally, these prediction products are traded in a new kind of marketplace for behavioral predictions that I call *behavioral futures markets*. Surveillance capitalists have grown immensely wealthy from these trading operations, for many companies are eager to lay bets on our future behavior.[20]

Professor Zuboff provides a framework for understanding the novelty of surveillance capitalism: (i) the logic, (ii) the means of production, (iii) the products, and (iv) the marketplace. Google is considered the pioneer of surveillance capitalism and its success can be traced through the proliferation of its online-advertising business model.

i. The Logic

A basic tenant of industrial capitalism is that a company operates by receiving revenue from its customers—not by considering the rights and dignity of its raw materials. Google's discovery of "behavioral surplus" allowed it to "translate its non-market interactions" into "prediction products" readily available for advertisers. Prediction products are "surveillance assets" which ultimately produce "surveillance revenues" and "surveillance capital." The adage "If a service is free, then you're the product" echoes truth. "Instead, we are the *objects* from which raw materials are extracted and expropriated for Google's prediction factories. Predictions about our behavior are Google's products . . . . *We are the means to others' ends*."[21]

Whereas industrial capitalism expropriates nature's raw material (e.g., wood, stone, crude oil, etc.) and cuts, cleaves, and compounds commodities (e.g., lumber, countertops, plastics, etc.), surveillance capitalism captures human nature (e.g., patterns, behaviors, inclinations, etc.) and contrives "prediction products."

Customers are often the "users" of a company's product. For example, a customer of a tire shop is a customer of that tire shop precisely because he *uses* its tires. However, the logic of surveillance capitalism separates "user" from "customer": those who scroll are the users; the ads that are scrolled are the customers.

When a "user" scrolls her Instagram feed, she is "using" Instagram, but she is not Instagram's customer; she is not paying Instagram for the right to scroll; rather, advertisers are paying Instagram for the right to "use" *her* attention, time, and behavior. Instagram captures its users' attention, time, and behavior (i.e., the raw material defined as "behavioral surplus) and packages this "raw material" into "production products" which are then sold (as both the statistical likelihood of whether a user will click on an advertisement and the digital space on a user's Instagram feed) to the highest bidder. How does Instagram (or any other surveillance capitalist) do this? Through its means of production involving complex algorithms developed by teams of brilliant computer scientists.

ii. The Means of Production

Machine learning and artificial intelligence are the new means of production. As surveillance capitalists accumulate more data, their "machine intelligence" evolves and their algorithms and "prediction products" become more accurate.[22]

For a simplistic example, picture the last product you googled. Say you were searching for a new baseball glove for little Johnny. When you googled "baseball glove," did links to purchase dog food or a new oven show up at the top of the search results? Or did links for the stores that sell baseball gloves compete for your attention? This is a subset of Google's machine intelligence: Google "knows" that a user searching for "baseball glove" is most likely in the market to purchase one; with this "knowledge," Google runs a microsecond auction for companies (e.g., Academy, Dick's Sporting Goods, Amazon, Wilson, etc.) to bid for your attention in hopes of your dollars. These companies are Google's customers because they pay (and compete) for your attention which Google owns while you search.

iii. The Products

Viable "prediction products" forecast our thoughts, feelings, and anticipated actions based on data that are processed by machine intelligence. These products are heavily guarded from competitors and the general public. The goal is pseudo-certainty: as prediction products become more certain, more online commerce and other activity will occur.

For example, suppose a Facebook user follows several professional golfers. Suppose further that the other Facebook users this user interacts with the most (i.e., his "friends") also follow professional golfers. Facebook, using its machine intelligence, can likely predict that this user is more likely to purchase the latest golf gadget than a Facebook user who never interacts with any golf-related pages. If a company, say Gertrude's Great Golf Gadgets, wants to advertise its products on Facebook, it will purchase this prediction (i.e., the likelihood that a given number of users will click on its advertisements) from Facebook. In turn, Facebook will sell this prediction and the accompanying space on a user's newsfeed to the purchasing company.

These companies want to advertise to Facebook users with the highest likelihood of clicking on their advertisement and purchasing their products; they want the most click-through bang for their Facebook buck. Thus, it is in Facebook's best interest to know its users and predict their behavior. By refining their "prediction products" through additional surveillance and more users' data, Facebook can provide better "prediction products" to its customers.

iv. The Marketplace

Although surveillance capitalism was initially limited to advertisers, "behavioral futures markets" are now open to anyone—advertiser, businessperson, politician, etc.—keenly interested in influencing future behavior. In the same way that mass production was not confined to automobile manufacturers, sur-

veillance capitalism will not be limited to online advertising.

At its fundamental level, a marketplace connects buyers and sellers. A parent desires to purchase milk for his child without raising a dairy cow; a dairy farmer wishes to sell its milk in bulk without dealing with customers individually. Solution: the dairy farmer sells its milk to the grocery store (operating as the marketplace) and the parent purchases the milk on his way home from work.

Surveillance capitalists are both the marketplace and the seller. As discussed, when a user interacts on Facebook (post, like, share, scroll, click, etc.) he or she creates "behavioral surplus" that Facebook can capture and package into "prediction products." Facebook, operating as a seller, then sells these "prediction products" (i.e., advertisement space on a user's newsfeed) to the highest bidder. However, Facebook, operating as the marketplace, decides when, where, and how often to display this advertisement. Just like the grocery store decided to place the milk in the very back of the store,[23] so too can Facebook strategically place these advertisements on its users' newsfeeds.

In sum, surveillance capitalists capture the "behavioral surplus" created by its users, manufacture this raw material into "production products," and ultimately control the "behavioral surplus marketplace" where these "production products" are sold to the highest bidder. The wilderness of the 5:53-P.M.-grocery-store crowd seems tame compared to the frontier of surveillance capitalism.

b. A Whole New Problem: Welcome to the Frontier of Surveillance Capitalism

Congress' twentieth-century understanding of the internet is no longer applicable to today's Orwellian milieu. Children have shifted from "familiar fill-in-the-blank questionnaires" to today's trendy—and entrenched—social media sites. This shift represents much more than a "kids will be kids" market analysis; this is more than scoffing about how today's children are glued to their screens; it represents a vast, unsettled frontier. A child's every movement across the internet—from a Santa-gifted iPad to a school-issued Chromebook—is hunted, captured, prodded, and aggregated before being shipped off to the highest bidder.

Researchers have shown that members of Generation Z depend on four to five social media platforms for "psychological sustenance." Countless studies have documented the adverse effects social media has on children and teenagers (particularly on young women) including anxiety, body-image issues, and loneliness. Though today's children and teenagers are spending more time online and "connected" to their peers, this "connection" has ultimately deteriorated any sense of actual connection to themselves or the outside world; such disconnect encourages users to scroll, post, interact, and share even more, thus perpetuating the cycle. This vicious cycle is all by design.[24]

Moreover, internet users are generally unaware of how tech companies use their data. Out of blissful ignorance, users often trust that the tech companies are acting in the users' best interest. Even users that are aware of the persistent data collection are indifferent toward these companies, often claiming that such collection is necessary for our beloved phones and apps to work as well as we expect them to.

IV. Proposed Adjustments

Current and future generations deserve protection from surveillance capitalists. Reevaluating the framework by which today's social media use and online activity is understood will contribute to the burgeoning activism surrounding online privacy protection. As the previous section outlined, surveillance capitalism fundamentally alters the way we interact online and presents unprecedented problems for today's children. As COPPA enters its third decade, updating its provisions in light of surveillance capitalism becomes imperative.

The issue has been framed, the stage set, the gauntlet laid. The following three proposals address the need for more protection for children and are offered in hopes of advancing the online-privacy rights conversation. Given the gradual regulation of the internet's rapid metamorphosis, these proposals will undoubtedly contain overlooked and outdated issues in the coming years.

However, the conversation must continue—not only to educate the uninformed, but to protect the unaware.

1. Increase the Penalty

Until the monetary penalties exceed the profiteering of children's behavioral data, companies will continue to violate COPPA, and the associated penalties will remain just another cost of doing business. Discovering the monetary value of children's online behavioral data is the main barrier from determining the appropriate penalty. A framework shift from basic data collection to "behavioral surplus" is required to properly regulate these companies. In the absence of such information, Congress could adopt a two-tiered approach to fines: a set dollar amount or a percentage of the perpetrator's annual revenue, whichever is greater, with increasing percentages for repeat offenders. Without severe penalties, "surveillance capitalists are impelled to pursue lawlessness" and "vigorously lobby to kill online privacy protection . . . because such laws are existential threats to the frictionless flow of behavior surplus."[25]

2. Increase the Age

COPPA's minimum age requirement should be increased to eighteen. There is a reason that children are not allowed to vote, enlist in the military, drive, consume tobacco, or drink alcohol: a child's capacity to understand consequences develops with time. As such, companies should not exploit a child's behavioral data until he or she has turned eighteen. Adults can protect themselves from online manipulation, but society must protect children.

3. Increase the Stakes

The manufacturing of "prediction products" from children's behavioral data should be criminalized as another form of child abuse. In the seminal case, *Packingham v. North Carolina*, the U.S. Supreme Court held that a North Carolina law prohibiting registered sex offenders from accessing a "commercial social networking Web site" was too broad and therefore violated the First Amendment.[26] However, the Court noted:

> While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.[27]

The Court further observed that all new technologies, including social media, will be "exploited by the criminal mind" and "become instruments used to commit serious crimes."[28] The Court suggested that a more narrowly tailored law prohibiting registered sex offenders or other bad actors from abusing children online would not be unconstitutional.[29]

The concurring opinion takes a step further by stating that safeguarding the psychological well-being of a minor is necessary even if laws must contravene constitutional rights.[30] Moreover, States have a compelling interest to prohibit online child abuse because bad actors can—and will continue to—use the internet to exploit children.[31]

V. Current Exemplar and Concluding Thoughts

Currently, there is a bill in the United States Senate entitled "Kids Online Safety Act," which strives to provide more online protection for children.[32] The bill addresses many of the concerns discussed in this article and is a welcomed attempt to foster more conversation around this issue. Legislators cannot adequately regulate the "new logic of accumulation" without understanding how online behavioral data are manipulated into "prediction products." This bill requires online platforms to provide either minors or their parents (or both) the ability to "opt out of algorithmic recommendation systems that use a minor's personal data" and is certainly a step in the right direction.

The California Consumer Privacy Act (CCPA) is a current exemplar of how governments should respond to the ascension of surveillance capitalism.[33] The CCPA creates a statutory right for consumers to request any personal information that a business collects and requires the business to disclose that information to the consumer. Furthermore, the CCPA allows the consumer to opt-out of having such personal information sold to third parties.

Surveillance capitalists freely capture our attention, patterns, and other "behavioral surplus" as raw materials.

Surveillance capitalists freely capture our attention, patterns, and other "behavioral surplus" as raw materials. They then manufacture these raw materials in "prediction products" by using highly sophisticated algorithms. Finally, these tech companies sell their "prediction products" (digital space and click-through proclivity) to the highest bidder, leaving us with apps to update, pages to refresh, and newsfeeds to scroll. These companies will ultimately become better at capturing additional "behavioral surplus" and refining their ability to influence our emotions and actions.

Children must be protected as society begins surveying the frontier of surveillance capitalism. Leaders in every sector of society must continue discussing the issues related to internet usage and social media. Despite the constant connection to today's online world, we are discontent and disconnected. Children are no different; they will soon enter the "real world," knowing no other world aside from their screens. Understanding the "new logic of accumulation" is imperative to effectuate meaningful change for today's consumers and tomorrow's leaders.

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1 Rachael Malkin, Comment, *How the Children's Online Privacy Protection Act Affects Online Businesses and Consumers of Today and Tomorrow*, 14 Loy. Consumer L. Rev. 153, 153 (2002).

2 *See generally Rebecca Lipman, Online Privacy and the Invisible Market for Our Data, 120* Pa. State L. Rev. 777 (2016) (explaining how data brokers aggregate data about consumers to create relevant ads).

3 *See, e.g.*, Matthew Rosenberg et al., *How Trump Consultants Ex-*

ploited the Facebook Data of Millions, N.Y. Times (Mar. 17, 2018), https://www.nytimes.com/2018/03/17/us/politics/cambridge-analytica-trump-campaign.html [https://perma.cc/4QEH-LP59] (describing how Cambridge Analytica harvested data from the Facebook profiles of more than 50 million users to enable the Trump campaign to target key voters).
4 *Watch generally* The Social Dilemma (Exposure Labs 2020). If prone to distraction, visit https://www.thesocialdilemma.com.
5 *See generally* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 204–05 (1890).
6 *About the FTC,* Fed. Trade Comm'n, https://www.ftc.gov/about-ftc [https://perma.cc/56F6-VVV9].
7 Children's Online Privacy Protection Act, 15 U.S.C. § 6502; 16 C.F.R. § 312.1–.13; *Complying with COPPA: Frequently Asked Questions*, Fed. Trade Comm'n § A(1) (July 2020), https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions-0 [https://perma.cc/9C9K-BN5V] [hereinafter *COPPA FAQs*].
8 *COPPA FAQs,* § A(9) (citations omitted).
9 *See* 16 C.F.R. §§ 312.2–312.3 (emphasizing that the information must come from the child in order to fall under the statutory requirements).
10 *COPPA FAQs.*
11 *FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook*, Fed. Trade Comm'n (July 24, 2019) https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions [https://perma.cc/2YTJ-G684].
12 *Google and YouTube Will Pay Record $170 Million for Alleged Violations of Children's Privacy Law,* Fed. Trade Comm'n (Sept. 4, 2019), https://www.ftc.gov/news-events/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations [https://perma.cc/2LMU-ZWXN].
13 Patrick Thomas, *TikTok Settles with FTC Over Data Collection from Children*, Wall St. J. (Feb. 27, 2019, 4:36 PM), https://www.wsj.com/articles/tiktok-settles-with-ftc-over-data-collection-from-children-11551303390 [https://perma.cc/3W47-AJP8].
14 If not, it's okay to come out from under your rock now. Well, on second thought…
15 *Privacy Policy*, TikTok (June 2, 2021) https://www.tiktok.com/legal/privacy-policy?lang=en#privacy-us.
16 Kevin Poulsen & Robert McMillan, *TikTok Tracked User Data Using Tactic Banned by Google*, Wall St. J. (Aug. 11, 2020), https://www.wsj.com/articles/tiktok-tracked-user-data-using-tactic-banned-by-google-11597176738 [https://perma.cc/HU7J-SECU] ("The MAC address is useful to advertising-driven apps because it can't be reset or altered, allowing app makers and third-party analytics firms to build profiles of consumer behavior that persist through any privacy measure short of the owner getting a new phone. The [FTC] has said MAC addresses are considered personally identifiable information under the Children's Online Privacy Protection Act.").
17 Content moderation is also a huge issue for these companies. *See, e.g.,* Bobby Allen*, Former TikTok moderators sue over emotional toll of 'extremely disturbing' videos,* NPR (March 24, 2022), https://www.npr.org/2022/03/24/1088343332/tiktok-lawsuit-content-moderators
18 *See generally* George Orwell, *1984* 332 (1949) ("We know that no one ever seizes power with the intention of relinquishing it. Power is not a means; it is an end. One does not establish a dictatorship in order to safeguard a revolution; one makes the revolution in order to establish the dictatorship.").
19 Shoshana Zuboff, The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power (2019).
20 Zuboff, at 93–96.
21 Zuboff, at 94.
22 *See generally Investigation: How TikTok's Algorithm Figures Out Your Deepest Desires,* Wall Street Journal (July 21, 2021), https://www.wsj.com/video/series/inside-tiktoks-highly-secretive-algorithm/investigation-how-tiktok-algorithm-figures-out-your-deepest-desires.
23 Grumble, grumble.
24 Zuboff, at 448–450.
25 Zuboff, at 105.
26 Packingham v. North Carolina, 137 S. Ct. 1730, 1738 (2017).
27 *Id.* at 1736.
28 *Id.*
29 *See id.* at 1737 ("Though the issue is not before the Court, it can be assumed that the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor.")
30 *See id.* at 1739 (Alito, J., concurring).
31 *Id.* at 1740 (Alito, J., concurring).
32 Text - S.3663 - 117th Congress (2021-2022): Kids Online Safety Act, S.3663, 117th Cong. (2022), https://www.congress.gov/bill/117th-congress/senate-bill/3663/text.
33 *See* Cal. Civ. Code *§§* 1798.100-.199. The EU General Data Protection Regulation (GDPR) is also another exemplar for regulating personal data and online privacy rights.

DEBT DEFENSE

By James Foley*

I. INTRODUCTION

I got my start in debt defense as an associate attorney at the Law Firm of Ross & Matthews in 2007. We had to defend members of Pre-Paid legal on a variety of issues, most of which related to debt. After a short stint with an oil and gas broker I decided to go on my own in the fall of 2008. I was remodeling the house and a friend who was helping me got sued by North Star Capital Acquisition LLC, represented by Michael J. Scott in a local Justice of the Peace Court. It was one of the few things I knew how to do at the time so I helped him out. When they failed to answer discovery, I threatened a motion to compel. Shortly after that I got plaintiff's motion for non-suit and I've been doing them ever since.

II. TYPES OF CASES

Debt Defense falls primarily into three categories: Debt Buyers (Midland Credit Management, Portfolio Recovery Associates, Troy Capital etc.); Original Creditors (Discover, Bank of America, Capital One Bank, etc.); and UCC Article 9/Post Repossession Deficiency cases (These can be brought by both Original Creditors and Debt Buyers).

III. DEFENDING THE SUITS

A. Preliminary Concerns

1. ***Venue:*** The case must be brought in the proper county, Texas Civil Practice and Remedies Code§15.002 and Precinct (for Justice of Peace Courts), Texas Civil Practice and Remedies Code §15.002. Failing to sue in correct the Justice Precinct Violates the Federal Fair Debt Collection Practices Act, 15 U.S.C. l692i. Failing to sue in proper County also Violates the Texas Deceptive Trade Practices Act, Tex. Bus. & Com. Code § 7.46b(23).

Calling the court may verify venue. Some Counties will have a venue map on their websites. Often you can look them up by voter registration. A voter registration card will list all of the voting precincts that your client lives in. When accompanied by a short affidavit it's usually all that you need to prove venue. I've been to one venue hearing in 12 years, so in my experience it's rarely challenged and usually results in a quick non-suit.

2. ***Licensing:*** While this does not apply to original creditors, all third-party debt collectors are required to have a bond on file with the Texas Secretary of State. (Texas Finance Code 392.101.) While the big boys that you've heard of probably have this, if it's the new kid on the block they may not. Search here on the Texas Secretary of State's website https://direct.sos.state.tx.us/debtcollectors/DCSearch.asp. The Secretary of State's website, as well as the Comptroller's website can provide evidence that one entity is not the same as another (might be helpful in a case like Conn's).

If your case is a post repossession deficiency lawsuit all holders of Motor Vehicle Retail Installment Sales Contracts must be licensed by the Texas Office of Consumer Credit Commissioner. Texas Finance Code 348.501 and 342.051. Search here: https://alecs.occc.texas.gov/Generic/AdvanceSearch#

3. ***Imbedded Discovery:*** If the case is in County or District Court you may have imbedded discovery. You may have less than 50 days to get those answered. If your client procrastinates before hiring you then you may have deemed admissions. Usually these can be dealt with by a Tex. R. Civ. P. Rule 11 agreement with opposing counsel. If not, you can do a sworn motion to withdraw deemed admissions. The standard for withdrawing deemed admissions is a showing of (1) good cause (2) no undue prejudice. *Wheeler v. Green,* 157 S.W.3d 439, 442 (Tex. 2005). Good cause is established by showing the failure involved was an accident or mistake, not intentional or the result of conscious indifference. *Stelly v. Papania,* 927 S.W.2d 620, 622 (Tex. 1996). Good cause also exists when due process concerns are implicated by deemed admissions that act as a merits preclusive discovery sanction, absent bad faith or callous disregard on the part of the party requesting withdrawal. *Marino v. King,* 355 S.W.3d 629, 634 (Tex. 2011) (per curiam).

B. Discovery

Most of these cases are governed by Level 1 discovery so you are limited in the number of things that you can ask. A few basic things you need:

1. Identity and Disclosure of witnesses. (Many collectors screw this up.) *See also* Texas Rules of Civil Procedure 194.2; and,

2. Contract formation, terms and conditions of contract (many of the balances sought are nothing but interest and fees), purchases and payments, assignments of the debt and any pre-suit correspondence.

IV. CHALLENGING THE BUSINESS RECORDS AFFIDAVIT

This is where many of these cases are won or lost. Thirteen years ago, when I began, it was rare for an affidavit of a third-party to be allowed, even in Justice of the Peace Court. Luckily in Tarrant County, most County Courts prefer the *Martinez/Riddle* line of cases over the *Simien* philosophy. Unfortunately, almost everything I am going to show you in this paper has a counterpoint.

1. Has the Business Records Affidavit been submitted 14 days prior to trial?

2. Does it follow the language of Texas Rule Evidence 902(10). Many affidavits either fail to make important statements like the records being made at or near the time of the event or by someone with personal knowledge. Others falsely attribute the record keeping to the debt buyer rather than the original creditor.

3. Has the Affiant been disclosed by name, address, and telephone number? See Texas Rule of Civil Procedure 194.2(b)(5). Failing to disclose is an automatic exclusion unless they can demonstrate good cause or lack of undue prejudice. See *Gibbs v. Bureaus Inv. Grp. Porifolio No. 14, LLC,* 441 S.W.3d 764 (Tex. App.—El Paso 2014).

4. Research your affiant. In one particular case the affiant had been held by a prior court to not have personal knowledge of American Express procedures.

5. Is the affiant qualified? This is a huge area of contention. For background knowledge read *Duncan Development, Inc. v. Haney,* 634 S.W.2d 811 (Tex. 1982). Here, the Court found that a contractor was qualified to authenticate the documents of his subcontractors. Contrast this with the average Original Creditor-Debt Buyer relationship. Although Rule 803(6) does not require the predicate witness to be the record's creator or have personal knowledge of the content of the record, the witness must have personal knowledge of the manner in which the records were prepared. *In re K.C.P.,* 142 S.W.3d 574,578 (Tex. App.—Texarkana 2004, no pet.). Documents received from another entity are not admissible under Rule 803(6), if the witness is not qualified to testify about the entity's record keeping. *Martinez v. Midland Credit Mgmt.,* 250 S.W.3d 481 (Tex. App.—El Paso 2008). A document can comprise the records of another business if the second business determines the accuracy of the information generated by the first business. *Riddle v. Unifund CCR Partners,* 298 S.W.3d 780 (Tex. App. El Paso 2009).

V. THE SIMIEN STANDARD

The opposite side of the coin from *Martinez/Riddle* is *Simien v. Unifund CCR Ptnrs,* 321 S.W.3d 235 (Tex. App.—Houston [1st Dist.] 2010), which held a document authored or created by a third party may be admissible as business records of a different business if:

(a) the document is incorporated and kept in the course of the testifying witness's business; (b) that business typically relies upon the accuracy of the contents of the document; and (c) the circumstances otherwise indicate the trustworthiness of the document.

This rule seems to have been adopted by a number of Jurisdictions including: the Fifth, *Diaz v. Circuit Multi Serv. Tech. Sols. Corp.*, 2018 Tex. App. LEXIS 10262 (Dallas 2018), the Fourteenth, *Rogers v. RREF II CB Acquisitions, LLC,* 533 S.W.3d 419 (Tex. App [Houston 14th Dist.] 2016); *Ainsworth v. CACH, LLC,* No. 14-11-00502-CV, 2012 Tex.App. LEXIS 2798 (Houston [14th Dist.] 2012); the Fourth, *Dodeka,L.L.C. v. Campos,* 377 S.W.3d 726 *(Tex.* App—San Antonio 2012), and the Third, *Ekpe v. CACH. LLC,* 2011 Tex. App. LEXIS 2080 (Tex. App.—Austin 2011).

This three-part test was taken from a criminal case, *Bell v. State,* 176 S.W.3d 90 (Tex. App. Houston [1st Dist.] 2004) where a witness and a crime victim were brought together by the criminal activity of a third party. Under the circumstances it made sense to let one entity authenticate someone else's documents as they were working together. The *Simien* case allowed third party affidavits to authenticate the original creditors records. While I won't go into my numerous personal objections to *Simien,* it does create a standard which frankly a lot of creditors cannot measure up to. Unfortunately, the judges I've argued in front of that consider *Simien* good law see is it as an excuse to rubber stamp things and let everything in. Rarely is there any evidence of incorporation and frequently circumstances do not always indicate trustworthiness as frequently the accounts are sold as is with no guarantees or recourse, and the assignment documents are heavily redacted.

These affidavits invariable include extraneous language above and beyond the requirements of a business records affidavit.

1. Narrowing *Simien: Educap, Inc. v. Mendoza,* 2019 Tex. App. LEXIS 8694 (Austin 2019). Here the Third Circuit Court of Appeals ruled that the third-party documents should be excluded because there was no evidence that they had been incorporated into those of the debt collector.

VI. LIMIT THE BUSINESS RECORDS AFFIDAVIT

These affidavits invariable include extraneous language above and beyond the requirements of a business records affidavit. They often will testify as to assignments, amounts due, and other facts of the case not to mention legal and factual conclusions. A number of Courts have held that such extraneous language is inadmissible hearsay, so even if the affidavit itself comes in, object to all of the extraneous language. *Kenny v. Porifolio Recovery Assocs., LLC,* 464 S.W.3d 29 (Tex. App. 2015), *Saum v. Am. Express Nat'l Bank,* 2021 Tex. App. LEXIS 2071(Fort Worth 2021), *Educap, Inc. v. Mendoza,* 2019 Tex. App. LEXIS 8694 (Austin 2019).

VII. CHALLENGE THE ASSIGNMENT

I can't stress this enough. This is frequently where I win debt buyer cases, and one of the only ways I win in Justice of the Peace Courts. They have to prove ownership of the debt. To recover on an assigned cause of action, the party claiming the assigned right must prove a cause of action existed that was capable of assignment and the cause was in fact assigned to the party seeking recovery. *Ceramic Tile Int'l, Inc. v. Balusek,* 137 S.W.3d 722 (Tex. App.—San Antonio 2004).

These accounts are often sold in huge bundles. What frequently happens is that they will have some kind of document showing that a sale of some sort took place between the original creditor and the debt buyer. That document will not reference the debtor's particular account, but it will refer you to some other document that is not included. The next thing that you will see is a populated data sheet with your client's information. Often there is little to nothing explaining what that information is, who generated the form, or how it relates to the overarching assignment document.

This issue has been heavily litigated, and several appeals courts have ruled for the debtor on a lack of assignment. See *Gillespie v. Nat'! Collegiate Student Loan Tr. 2005-3,* 2017 Tex. App. LEXIS 5957 (Fort Worth 2017), *Jenkins v. CACH, LLC,* 2014 Tex. App. LEXIS 9483 (Houston [14th Dist.] 2014), *Jackson v. CACH, LLC,* 2016 Tex. App. LEXIS 8262 (Houston [14th Dist.] 2016). *See also Unifund CCR Partners v. Laco,* 2009 Tex. App. LEXIS 9642 (Dallas 2009) (no evidence of an assignment), and *Nat'! Collegiate Student Loan Tr. 2006-2 v. Ramirez,* 2017 Tex. App. LEXIS 2030 (Fort Worth 2017).

ADVERSE CASE LAW: There are several courts that have ruled the other way on the assignment issue. *See, e.g., Eaves v. Unifund CCR Partners,* 301 S.W.3d 402 (Tex. App.—El Paso 2009). *Wood v. Pharia L.L.C.,* 2010 Tex. App. LEXIS 9819 (Houston [1st Dist] 2010). These cases have held that an overarching assignment does not have to list a specific account.

VIII. SPECIFIC CAUSES OF ACTION

A. Breach of Contract: A lot of the creditors have punted on this issue as they struggle to prove up the terms and conditions of the contract. While a number of courts have found that showing some activity is enough to hold that a contract does exist *Jaramillo v. Portfolio Acquisitions, LLC,* 2010 Tex. App. LEXIS 2219 (Houston [14th [Dist.] 2010), *Winchek v. Am. Express Travel Related Servs. Co.,* 232 S.W.3d 197 (Houston [1st Dist.] 2007) on the other hand some courts have been sticklers for proving up terms and conditions. *See, e.g., Preston State Bank v. Jordan,* 692 S.W.2d 740 (Tex. App.—Fort Worth 1985). "Material terms of a contract must be agreed upon before a court can enforce the contract. Where an essential term is open for future negotiation, there is no binding contract." *Stanley Boot Co. v. Bank of El Paso,* 847 S.W.2d 218 (Tex. 1992). Most show interest rates authorized. *See Tully v. Citibank, NA.,* 173 S.W.3d 212 (Tex. App.—Texarkana 2005).

B. Account Stated: Because of their difficulties in proving up contracts many creditors plead a cause of action for account stated. To recover under an account stated claim, a creditor has to prove (1) transactions between it and the debtor gave rise to the indebtedness; (2) an agreement, express or implied, between the parties that fixed the amount due; and (3) the debtor made an express or implied promise to pay the indebtedness. *Compton v. Citibank (SD.), NA.,* 364 S.W.3d 415 (Tex. App.—Dallas 2012). The theory is based on the consumer's failure to dispute the last few statements. Once this theory of recovery started to get traction I stopped getting the thick stacks of discovery I would sometimes get. That's unfortunate because a lot of times the thick stacks of docs showed that most of the balance was interest and fees. I have actually won a couple of these in Justice of the Peace Court where they only had one statement and there was no activity on it. I used *Tully* and *Morrison v. Citibank (SD.) NA.,* 2008 Tex. App. LEXIS 1692 (Fort Worth 2008) which states that there was no evidence that the account statements were received.

IX. UCC 9 POST REPOSSESSION DEFICIENCIES

This primarily relates to vehicles but the UCC Article 9 governs all personal property. I once defended a case on a mobile home which the creditor ultimately non-suited. The usual scenario involves a default on a car note, followed by either a forceful

repossession or a voluntary surrender, then a sale at an auction, after which the proceeds are offset against the balance and then if applicable a lawsuit is filed to attempt to collect the balance.

There are a number of hoops a creditor has to jump through. Self Help Repossession must be done without a breach of the peace. Tex. Bus. & Com. Code § 9.609(b). The creditor must notify the consumer of their right to redeem the collateral. Failing to do so is a bar to collection and a sizeable claim/counterclaim. Tex. Bus. & Com. Code §9.61 l(c). The collateral must be disposed of in a commercially reasonable fashion. Tex. Bus. & Com. Code§ 9.610(a). The creditor must notify the debtor of any post disposition deficiency or surplus. Tex. Bus. & Com. Code § 9.626.

1. *Commercially Reasonable Disposition*

The collateral must be disposed of in a commercially reasonable fashion. This is usually where I beat these guys. "Every aspect of a disposition of collateral, including the method, manner, time, place and other terms, must be commercially reasonable." Tex. Bus. & Com. Code § 9.610(b). "A commercially reasonable disposition of collateral is in the nature of a condition to a creditor's recovery in a deficiency suit." We suggested this in Tanenbaum v. Economics Lab., Inc., 628 S.W.2d 769, 771 (Tex. 1982) *Greathouse v. Charter Nat'l Bank-Southwest,* 851S.W.2d 173, 176 (Tex. 1992). "Once the debtor has specifically raised the issue, the court held, the burden of proof is upon the creditor." *Greathouse* at 174

Whether collateral has been sold in a commercially reasonable manner is generally a question of fact. *Daniel v Citizens Bank* 754 S.W.2d 407,410 (Tex. App—Corpus Christi 1988). This requirement derives from the common law rule, applicable to all contracts, including leases, that an injured party has the duty to mitigate his damages." *Myers v. Ginsburg,* 735 S.W.2d 600, 605 (Tex. App.—Dallas 1987)

Courts have considered a number of non-exclusive factors when addressing commercial reasonableness, including whether: (1) the secured party endeavored to obtain the best price possible; (2) the collateral was sold in bulk or piecemeal; (3) the collateral was sold via private or public sale; (4) the collateral was available for inspection before the sale; (5) the collateral was sold at a propitious time; (6) the expenses incurred during the sale were reasonable and necessary; (7) the sale was advertised; and (8) multiple bids were received. *See, e.g., Havins v. First Nat'l Bank of Paducah,* 919 S.W.2d 177, 181 (Tex. App.—Amarillo 1996, no writ). Courts also have considered the collateral's condition and where the sale was conducted. *Tex Star Motors, Inc. v. Regal Fin. Co.,* 401 S.W.3d 190 (Tex. App.—Houston [14th Dist.] 2012). "In general, expert testimony is required to establish the commercial reasonableness of a sale." *ITT Commercial Fin. Corp. v. Riehn,* 796 S.W.2d 248 (Tex. App.—Dallas 1990). That being said, I've never gotten much traction from this argument. I have, however, won a take nothing judgment the one time that I used an expert to say that it was not commercially reasonable to let over 2 years lapse before getting the car to auction.

Usually when I win one of these it is because there is an almost complete lack of any documentation between the preauction notice and the sale itself. Very little relating to clean up, make ready, advertising, or the conduct of the sale of the auction. Some of the documentation accompanying the evidence is from the towing company, a repair place, the auction yard, or even a printout from a service like Kelly Blue Book, attempting to show what the reasonable market value is. I have started to object to hearsay to these and have had some success. As stated earlier often the documentary evidence is scarce. That said, watch for certain safe harbors.

2. *Safe Harbors (Caselaw)*

"If a court is convinced that collateral sold for accepted market value, questions of method, manner, time, place, and terms probably will be considered irrelevant and the sale will be held to have been commercially reasonable." *Pruske v. National Bank of Commerce,* 533 S.W.2d 931(Tex. App.—San Antonio 1976, no writ). If they drew a significant windfall at the auction the court may very well find that they were commercially reasonable. I once lost one of these cases despite virtually no documentation and a very evasive corporate representative. The judge got him more than once for his not answering but still held for the plaintiff. As I was gathering my things the judge made a comment about how they got almost the full pre-interest sale value of the truck when they sold it at auction.

3. *Safe Harbors under Texas Business & Commerce Code § 9.627*

1) Texas Business & Commerce Code §9.627(b) states a disposition of collateral is made in a commercially reasonable manner if the disposition is made in the usual manner on any recognized market;
2) at the price current in any recognized market at the time of the disposition; or
3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

Most of the above would require an expert, which I rarely see in this field.

** James Foley PLLC, Fort Worth. James graduated from Texas Wesleyan University May 1992 with a degree in Mass Communication. He started with the Tarrant County Sheriff's Department October 1994. Worked midnights and went to school in the morning to get through the police academy, getting licensed in October, 1994.Watching the Prosecutors and Defense Attorneys make their arguments convinced him to go to Law School. He went full time at South Texas of Law, graduating July, 2006.*
James started his own practice in September 2008. He says he was a nervous wreck; the only thing he knew was debt defense. Since then he has learned Bankruptcy, Fair Debt Collection, Fair Credit Reporting as well as some occasional Estate Planning and Probate. One of the things he likes about this job is that he is always learning new things. He wants to thank those who helped him, including Jerry Jarzombek, Dana Karni, Bud Hibbs, and Bonner Walsh.

DECEPTIVE TRADE PRACTICES AND WARRANTY

COURT AWARDS THREE TIMES ECONOMIC DAMAGES UNDER DTPA

UNDER DTPA, "NO RECOVERY SHALL BE PERMITTED UNDER BOTH THIS SUBCHAPTER AND ANOTHER LAW OF BOTH DAMAGES AND PENALTIES FOR THE SAME ACT OR PRACTICE"

Eminent Commercial, LLC v. Digitalight Sys., Inc., ___ F. Supp. 3d ___ (W.D. Tex. 2021).
https://docs.justia.com/cases/federal/district-courts/texas/txwdce/1:2020cv00680/1099931/38

FACTS: Plaintiff, Eminent Commercial, LLC ("Eminent") ordered KN-95 masks from Defendant, Digitalight Systems, Inc. ("Digitalight"), to resell to the State of Texas. A portion of the order was non-conforming. Eminent did not accept the non-conforming masks but allowed Digitalight to cure. Digitalight failed to cure. Eminent demanded a refund. Digitalight refused to refund Eminent. Eminent brought suit alleging breach of contract, fraud, negligent misrepresentation, and DTPA violation.

Digitalight removed the case to federal court. After Digitalight's counsel withdrew from representation and Digitalight did not replace counsel, Eminent motioned to compel discovery and strike pleadings. Digitalight did not respond, and the court ordered Eminent to move for default judgment.

> **"Eminent is entitled to $900,000.00 in its out-of pocket economic damages. … Eminent is also entitled to $2,700,000.00 in additional damages for its DTPA claim, based on Digitalight's knowing and intentional conduct."**

HOLDING: Motion for default judgement granted.
REASONING: The court held that default judgment was warranted procedurally because Eminent was clearly prejudiced and harmed by the lacking of response and continued delay and Digitalight had abandoned its defense. The court specified that when a default has been entered, the factual allegations of the complaint are taken as true. Since Eminent's allegations were uncontested, Eminent was entitled to its out-of-pocket economic damages for the DTPA violations and treble damages based on Digitalight's knowing and intentional conduct. The court stated, "Eminent is entitled to $900,000.00 in its out-of pocket economic damages. … Eminent is also entitled to $2,700,000.00 in additional damages for its DTPA claim, based on Digitalight's knowing and intentional conduct."

The court denied recovery to Eminent for breach of contract damages because the DTPA prohibits recovery under its "subchapter and another law of damages and penalties for the same act or practice." Tex. Bus. & Com. Code § 17.43. Because the Eminent's DPTA claim and breach of contract claim gave rise to the same operative facts, Eminent might only recover under the DTPA.

CONSUMER IS NOT BOUND BY AN AS-IS CONTRACT, IF THE CONTRACT IS A PRODUCT OF FRAUDULENT REPRESENTATION OR CONCEALMENT BY THE SELLER

Ivy v. Garcia, ___S.W.3d___ (Tex. App.—Austin 2022).
https://law.justia.com/cases/texas/third-court-of-appeals/2022/03-20-00448-cv.html

FACTS: Plaintiff-Appellant Marlonia Ivy purchased a property from Defendant-Appellees Victor and Wanda Garcia (the "Garcias") under an "as-is" contract. Ivy later filed suit against the Garcias, alleging common-law fraud and DTPA violations. The trial court granted Garcias traditional summary judgment on the ground that the "as-is" clause precluded Ivy from recovery on all claims. The appellate court reversed because Ivy produced evidence showing Garcias' awareness of the fire and their intentional non-disclosure, and Ivy's would not have entered into the contract but for the alleged misrepresentation or fraudulent non-disclosure. On remand, the trial court again granted Garcias's no-evidence motion for summary judgment, and Ivy appealed.
HOLDING: Reversed and remanded.
REASONING: Garcias argued that Ivy failed to produce evidence of Garcias' intent to induce Ivy's on the as-is clause, and consequently, the requirement of the fraud element could not be sufficed.

The court rejected this argument and followed its decision in the first appeal. In the first appeal, the court determined that because Ivy had produced more than a scintilla of evidence to support her assertion that she was fraudulently induced to enter into the as-is contract, a genuine issue of material fact existed as to the enforceability of the as-is clause with respect to alleged defects not identified in the inspection report. Because Garcias' awareness of and non-disclosure of the fire was sufficient circumstantial evidence, and there was a fact issue as to "intent" thus making summary judgment of the trial court improper, the original appellate decision was not clearly erroneous. Therefore, under the law-of-the-case doctrine, the court would follow its original decision in subsequent appeals.

CLAIMS ALLEGING VIOLATIONS OF THE DTPA ARE SUBJECT TO THE REQUIREMENTS OF FCPA RULE 9(b)

Lawrence v. Corin Grp., PLC, ___ F. Supp. 3d ___ (E.D. Tex. 2021). https://www.leagle.com/decision/infdco20211216e59

FACTS: Plaintiff Don Lawrence had Defendant's Corin revival stem (the "product") surgically implanted in his hip. Eventually, the product broke while still in his hip and Plaintiff had it surgically removed.

Plaintiff filed suit against Defendants Corin Group, PLC, and Corin USA Limited for deceptive trade practices under

the DTPA, among other claims. Defendants filed a motion to dismiss, asserting that Plaintiff had not stated a claim.
HOLDING: Dismissed.
REASONING: Defendants argued Plaintiff's DTPA claim failed because Plaintiff didn't satisfy the heightened Fed. R. Civ. P. 9(b) pleading standard.

The court agreed with the argument and held that Plaintiff's unqualified exhibit attachments to the motion without reference to the allegations were insufficient to meet the 9(b) standard. Rule 9(b) requires that the pleading standard must be heightened and include "who, what, when, where, and how" for claims of fraud. Plaintiff's DTPA claim was a claim of fraud and thus subject to the requirements of Rule 9(b), but Plaintiff didn't specify any statements by Defendants, indicate when they were made, or allege who made them. Therefore, the court found that Plaintiff failed to state a claim under the DTPA and granted Defendant's motion.

CONSUMER AWARDED A DEFAULT JUDGMENT UNDER DTPA MUST STILL PROVE DAMAGES

Lopez v. Aqua Fin., ___ F. Supp. 3d ___ (W.D. Tex. 2022).
https://www.casemine.com/judgement/us/61f295cf714d58535aaf647c

FACTS: Plaintiffs, three individual San Antonio homeowners (together "Lopez"), purchased water-treatment systems from Defendant Enerfuze LLC d/b/a Enerfuze Water Technologies ("Enerfuze"). This purchase was financed by Defendants Aqua Finance, Inc. ("Aqua Finance") and Connexus Credit Union. Lopez claimed Enerfuze performed misleading water-treatment tests, and falsely promised him greater safety and better water taste if he "purchased" a water-treatment system. The water-treatment system was marketed as being no added cost to Lopez. Enerfuze promised to cover the cost of the systems if Lopez permitted Enerfuze to use his yard for advertising. However, Enerfuze only intended to cover one such payment and failed to disclose that the water-treatment system would be financed through a loan with Aqua Finance taken out in Lopez's name.

Lopez sued and asserted DTPA violations, among other claims. Defendants did not answer or respond to the complaint. Lopez moved for default judgment against Defendants. The court ordered Lopez to file an amended motion that adequately briefed the factual and legal bases entitling them to the relief sought. Lopez amended their motion.
HOLDING: Denied.
REASONING: The court determined that Lopez must fully brief the legal and factual bases for their damage requests.

Though courts accept as true the complaint's well-pleaded factual allegations, damages are excepted. Generally, unliquidated damages are not awarded without an evidentiary hearing under a default judgment. Lopez's brief should identify: (1) the theory of recovery each Plaintiff seeks damages for against each Defendant, keeping in mind Texas's one-satisfaction rule; (2) the category of damages each Plaintiff requests against each Defendant along with a citation to the relevant legal authority that permits such a recovery and a brief explanation where necessary; (3) the amount requested against each Defendant for each category of damages; and (4) the evidence Plaintiffs will be presenting to support each category of requested damages broken down by category of damages where possible. As the party seeking relief, Lopez had the burden to fully brief the precise relief requested, as well as the legal and factual bases for it. Until the matter was briefed, the court could not hold an evidentiary hearing. Lopez's failure to fully brief the matter was detrimental to the outcome of his claims.

Unliquidated damages are not awarded without an evidentiary hearing under a default judgment.

DTPA CLAIM PROPERLY DISMISSED WHEN BASED ON $1MILLION PURCHASE

AN AWARD OF NO FEES IS IMPROPER IN THE ABSENCE OF EVIDENCE AFFIRMATIVELY SHOWING THAT NO ATTORNEY'S SERVICES WERE NEEDED OR THAT ANY SERVICES PROVIDED WERE OF NO VALUE

Murphey v. Old Dollar Props., LLC, ___ S.W.3d ___ (Tex. App.—Dallas 2022).
https://casetext.com/case/murphey-v-old-dollar-props-1

FACTS: Appellee/Cross-Appellant, Old Dollar Properties, LLC ("Old Dollar") purchased a mobile home park from Appellant/Cross-Appellee, Lyle B. Murphey. Murphey failed to disclose that the septic system serving the subject property lacked sufficient capacity to accommodate the mobile homes and feed store on the property.

Old Dollar filed suit against Murphey, alleging fraud, breach of contract, and violations of the Texas Deceptive Trade Practices Act ("DTPA"). The trial court entered a judgment in favor of Old Dollar. Murphey appealed. On cross-issue, Old Dollar argued that the trial court erred in failing to award Old Dollar's attorney's fees.
HOLDING: Reversed and remanded in part.
REASONING: Murphy argued that Old Dollar was not entitled to recover on its DTPA claim as a matter of law because the total considerations of the parties' transactions exceeded $500,000.

The court agreed with this argument, stating that because Old Dollar's $1 million purchase exceeded the limit of $500,000, the claim was not viable. The DTPA generally allows a consumer to sue for damages caused by certain false, misleading, or deceptive acts or practices. However, the statute does not apply to a cause of action of more than $500,000. The purpose of this exemption is to maintain the DTPA as a viable source of relief for consumers in small transactions and to remove litigation between businesses over large transactions from the scope of the DTPA.

Old Dollar argued that, at trial, it presented sufficient evidence showing its requested fees were reasonable and necessary.

The court rejected this argument because Old Dollar did not submit any billing or time-keeping records detailing how many hours various tasks required. However, although the evidence was legally insufficient to establish an award of fees

under the lodestar method, the evidence did establish that the attorney's services were needed and of some value. Therefore, the court determined that the trial court erred in no attorney's fees to Old Dollar, and thus remanded the case.

COURT FINDS EVIDENCE WAS FACTUALLY SUFFICIENT TO SUPPORT DTPA CLAIM

Forst v. Neal, ___ S.W.3d. ___ (Tex. App. 2022).
https://casetext.com/case/forst-v-neal-5

FACTS: Appellant, Charlotte Forst, hired Appellee, Ava Neal d/b/a Texas Treasures Estate Sales ("Neal"), to sell her collectible items in 2018. The parties signed a contract that outlined Neal's commission, objectives, and the sale location. The parties later orally agreed to change the sale location, which was at Neal's house. The contract did not provide for the pricing of any of Forst's items, nor did the parties discuss it. This ultimately led to a disagreement over the method of pricing for the items, and Forst claimed that the pricing method difference caused $23,500 damage due to Neal's use of a daily discounting system.

Forst filed suit, alleging claims of four violations of the Texas Deceptive Trade Practices Act ("DTPA") and conversion by Neal. Neal filed a counterclaim for breach of contract. The trial court entered a take-nothing judgment. Forst appealed.
HOLDING: Affirmed.
REASONING: Forst argued that the trial court erred by failing to rule on her DTPA and conversion claims, as the evidence was factually insufficient to support this judgment.

The court disagreed with Forst, holding that each of the challenged findings was supported by evidence presented at trial. To prove a DTPA violation, one must show that (1) the plaintiff is a consumer, (2) the defendant committed a wrongful act by engaging in a false, misleading, or deceptive act that is enumerated in section 17.46(b) of the Texas Business and Commerce Code, or breached an express or implied warranty, or engaged in an unconscionable action or course of action; and (3) the act was a producing cause of the plaintiff's damages. To determine whether the evidence for the claim elements were sufficient, the court relied on the factual-sufficiency challenge standard. The standard states that the factual-sufficiency challenge will be sustained only if the trial court's findings are so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Applying this standard, by reviewing the contract and trial testimonies, the court held that the trial court's findings were not against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Thus, the evidence presented at trial was factually sufficient to support the trial court's finding that Forst failed to prove Neal violated any DTPA provisions.

CLAIM FOR BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING SHOWED ONLY A BONA FIDE COVERAGE DISPUTE

ABSENT AN AFFIRMATIVE MISREPRESENTATION, AN INSURED'S MISTAKEN BELIEF ABOUT THE SCOPE OF COVERAGE IS NOT ACTIONABLE UNDER THE DTPA OR THE TEXAS INSURANCE CODE

Jajou v. Safeco Ins. Co., ___ F. Supp. 3d ___ (W.D. Tex. 2022).
https://law.justia.com/cases/federal/districtcourts/texas/txwdce/5:2020cv00839/1102398/58/

FACTS: Plaintiff Nasrin Jajou purchased property insurance from Defendant Safeco Insurance Company of Indiana ("Safeco"). This insurance covered hail and windstorm damage but excluded nonstructural cosmetic damage or loss. Jajou's property was damaged after a hailstorm. Safeco sent multiple adjusters to inspect the roof, and they all determined the damage was cosmetic in nature; therefore, Jajou's claim to replace the roof was denied

Jajou brought suit against Safeco, claiming the inspections were made in bad faith and did not constitute fair dealing. Jajou also claimed that Safeco affirmatively misrepresented the extent of coverage under the policy by failing to include a cosmetic-damage exclusion in the quote.
HOLDING: Dismissed.
REASONING: Jajou argued that Safeco breached the duty of good faith and fair dealing and violated certain provisions of the DTPA and Texas Insurance Code by conducting an unreasonable investigation, because Safeco failed to reasonably inspect the roof and attic, it was unreasonable to inspect the roof with a drone rather than a lift, and Safeco violated its own inspection policy for inspecting hailstorm damage.

Jajou had many opportunities to read and question the policy before she signed the contract.

The court disagreed, finding that Safeco acted reasonably in all of these instances and the evidence showed a bona fide coverage dispute. Because evidence establishing only a bona fide coverage dispute does not demonstrate bad faith, there was no genuine issue for trial on Jajou's claim for breach of the common law duty of good faith and fair dealing based on her argument that Safeco conducted an unreasonable investigation.

Jajou also argued that Safeco made an affirmative representation when it sent her an insurance quote containing material terms of the policy without a cosmetic damage exclusion included.

The court disagreed, holding that the evidence failed to show that Safeco's omission of a cosmetic-damage exclusion provision in the quote constituted an affirmative misrepresentation. Although Jajou claimed that she would not sign the contract if she had been informed that the policy would not cover cosmetic damages, the policy itself contained an explicit and clear exclusion statement, and Jajou had many opportunities to read and question the policy before she signed the contract. Therefore, the evidence indicated that Jajou was simply mistaken about the

scope of coverage, and this was a mistake not actionable under the DTPA or Texas Insurance Code.

JUDGE REJECTS ASSERTION THAT THE PHRASE "REEF FRIENDLY" LABELS WAS "MERE PUFFERY"

White v. Kroger Co., ___ F. Supp. 3d ___ (N.D. Cal. 2022).
https://casetext.com/case/white-v-the-kroger-co

FACTS: Plaintiff White, in a class action, alleged that sunscreen products sold by defendant The Kroger Co. (Kroger) were misleadingly labeled as being "reef friendly" despite the fact that the products contained ingredients that could potentially damage reefs. Plaintiff brought suit under the California Unfair Competition Law (UCL) and the California False Advertising Law (FAL), as well as the California Consumers Legal Remedies Act (CLRA).

Kroger moved to dismiss, arguing that the claim "reef friendly" was unactionable because it was "mere puffery."
HOLDING: Motion to dismiss denied.
REASONING: Kroger relied on cases where product labels such as "pet-friendly," "user-friendly," and "environmentally friendly" were held to be unactionable as mere puffery because they were so generalized, subjective, or exaggerated, that it would have been unreasonable for a consumer to rely on them.

The court rejected this argument based on the California Legislature codified the Green Guides, making it "unlawful for a person to make an untruthful, deceptive, or misleading environmental claim." The existence of the Green Guides undermined any argument that "reef friendly" could be dismissed as mere puffery, due to the apparent concern of the California Legislature with ensuring that no false statements related to the environment on product labels should be allowed. Given this context, "reef friendly" could reasonably be understood as implying defendants' products met such criteria. Accordingly, the complaint was not subject to dismissal because the alleged misrepresentations were mere puffery.

TWO OR MORE ENTITIES CAN BE HELD LIABLE FOR A CONSPIRACY TO VIOLATE THE DTPA BUT ANTICOMPETITION ALLEGATIONS RAISED IN A DTPA CLAIM MUST "BE HARMONIZED WITH FEDERAL ANTITRUST LAW"

Harris County v. Eli Lilly & Co., ___ F. Supp. 3d. ___ (S.D. Tex. 2022).
https://casetext.com/case/harris-cnty-v-eli-lilly-co-2

FACTS: Defendant, Eli Lilly, joined Novo Nordisk and Sanofi as one of three principal companies that manufactured, promoted, and distributed pharmaceutical drugs, including insulin ("Manufacturer Defendants"). These three principal companies produced the majority of diabetes medication. The diabetes products only cost the manufacturers $5 to produce, but they charge between $300 and $700. Plaintiff Harris County alleged the manufacturer Defendants had "in lockstep raised the reported prices of their respective diabetes drugs." Harris County alleged that together, Manufacturer Defendants created a secret spread known as the Insulin Pricing Scheme.

Harris County sued the Manufacturer Defendants for claims under the federal Racketeering Influenced and Corrupt Organization Act ("RICO"), the Sherman Act, the Texas Free Enterprise and Antitrust Act ("TFEAA"), the Texas Deceptive Trades Practices Consumer Protection Act, common law fraud, money had and money received, unjust enrichment, and civil conspiracy. Defendant moved to dismiss all of Plaintiff's claims.
HOLDING: Dismissed.
REASONING: Defendants argued that Plaintiff no longer alleged an underlying DTPA violation against it because it "no longer allege[d] that it had a relationship with [Defendants]." Plaintiff appeared to concede this, but it argued that its DTPA claim against Defendant might still proceed because it had sufficiently alleged that Defendant conspired with the other Defendants.

The court disagreed, stating, Plaintiff's conspiracy allegations "masquerade" as "consumer protection" claims despite mirroring "prohibited antitrust" claims under federal law. For Plaintiff's anticompetition DTPA conspiracy claims against Defendant to survive, there would have to be a co-conspirator exception to the indirect purchaser bar. No co-conspirator exception was recognized by the Fifth Circuit or the Supreme Court, so the claim was dismissed.

"AS IS" DEFENSE DOES NOT PRECLUDE CAUSES OF ACTION IF THERE IS PROOF OF FRAUDULENT MISREPRESENTATION, CONCEALMENT OF INFORMATION, OR IMPAIRMENT OF INSPECTION

DEFENDANT REPRESENTED AN AGREEMENT CONFERS OR INVOLVES RIGHTS OR REMEDIES, WHICH IT DOES NOT HAVE OR INVOLVE AND FAILED TO DISCLOSE INFORMATION CONCERNING GOODS WHICH WERE KNOWN AT THE TIME OF THE TRANSACTION

CONSUMER ALLEGED MORE THAN A MERE BREACH OF CONTRACT

AN INDIVIDUAL—EVEN ONE WHO ALSO SERVES AS AN INDEPENDENT EXECUTOR—CAN BE HELD LIABLE FOR HIS OWN FRAUDULENT ACTS OR VIOLATIONS OF THE DTPA

Christians v. Flores, ___ S.W.3d ___ (Tex. App.—Houston [1st Dist.] 2022).
https://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=f4e164c4-a5de-4e6c-b860-1d8cc756381f&coa=coa01&DT=Opinion&MediaID=c31a91ac-221e-4cbe-b050-9427114bda7e

FACTS: Appellee Sergio Flores was gifted one-third interest in a property from his mother, and he then entered into an agreement with Appellant, the Estate of Dale Christians, to purchase the remaining two-thirds. Appellant Douglas Christians maintained the exterior of the property, including the roof. The property had a storm-damaged roof, and it was accepted "As Is." Flores was unaware of the roof damage and was told that an inspection was a waste because his family would tell him if anything was wrong with the house. Flores asked Douglas to file an insurance claim for the roof with USAA. USAA had determined that the roof could not be repaired and needed to be replaced, but Douglas did

not tell Flores. Consequently, Flores did not discover the USAA recommendations until after closing, when he requested them directly from USAA himself.

Flores filed suit against Douglas Christians and in his capacity as executor for the Estate of Dale K. Christians, and the Estate of Dale K. Christians (collectively, "Christians"), alleging breach of contract, violations of the DTPA, negligent misrepresentation and misrepresentation by nondisclosure, fraud in a real-estate transaction and fraud in the inducement, among others. Christians filed a counterclaim alleging frivolous and groundless lawsuit. The trial court found in favor of Flores and rendered judgment awarding him actual damages, exemplary damages under the DTPA, and attorney's fees. Christians appealed.

HOLDING: Affirmed.

REASONING: Christians argued that the "as-is" provision in the Purchase Agreement barred Flores's recovery by negating the essential element of causation in his DTPA claim. The court disagreed, reasoning that the "as-is" clause was not binding because Christians fraudulently represented information. Because Douglas had actual knowledge of the damage and failed to disclose it to Flores before entering into a contract, he fraudulently induced Flores to purchase the property. This fraudulent conduct made the as-is provision nonbinding.

Christians next argued that the trial court erred in rendering judgment under the DTPA. The court disagreed, confirming that the evidence of his actual knowledge and fraudulent conduct was sufficient to show that Christians "represented that an agreement confers or involves rights or remedies, which it does not have or involve" pursuant to section 17.46(b)(12).

Douglas Christians argued that he couldn't be found personally liable as a matter of law under the purchase contract because he was acting solely as the executor of the Estate.

Christians then argued that no DTPA violation occurred because Flores' claims constituted a breach-of-contract action and not a DTPA violation. The court disagreed, reasoning that Flores alleged more than a mere breach of the oral agreement to use the USAA proceeds to repair the roof. Flores provided evidence indicating that Christians concealed the damaged condition of the roof, fraudulently induced Flores into closing on the sale by promising to use insurance proceeds to fix the roof, concealed communications from the insurance company, and misused the funds from the insurance company. The court concluded that these facts rose above the allegation of a mere failure to perform a promise and that Douglas's misrepresentations caused more damage than just a breach of the agreement.

Finally, Douglas Christians argued that he couldn't be found personally liable as a matter of law under the purchase contract because he was acting solely as the executor of the Estate. The court disagreed, holding that Douglas was personally liable because, at times, he acted on his own behalf and not as executor of the Estate. The court specified that an individual—even one who also serves as an independent executor—can be held liable for his own fraudulent acts or violations of the DTPA. Moreover, Flores did not assert that Douglas owed him a duty regarding handling Estate funds; instead, Flores argued that Douglas, both individually and in his capacity as executor for the Estate, committed DTPA violations.

A LENDING TRANSACTION IN WHICH A BORROWER SEEKS ONLY TO REFINANCE A LOAN CANNOT GIVE RISE TO A DTPA CLAIM

Aguocha v. Newrez LLC, ___ S.W.3d ___ (Tex. App.—Houston [14th Dist.] 2022).
https://law.justia.com/cases/texas/fourteenth-court-of-appeals/2022/14-20-00797-cv.html

FACTS: Plaintiff-Appellant Samuel Aguocha executed a note after refinancing his home mortgage loan secured by a deed of trust made for the benefit of Defendant-Appellee, Newrez LLC f/k/a New Penn Financial, LLC d/b/a Shellpoint Mortgage Servicing ("Newrez"). The assignee of the deed of trust was The Bank of New York Mellon ("Bank"). Aguocha defaulted on the loan, and the Bank sent Aguocha a Repayment Plan Agreement including terms that required six monthly payments followed by a seventh larger lump sum payment. Aguocha made the first six payments but missed the seventh. After other attempts to cure Aguocha's delinquency failed, the Bank sent him a notice that his home would be sold at a foreclosure sale.

Aguocha filed suit seeking a permanent injunction to stop the foreclosure, alleging breach of contract and violation of the DTPA, among other claims. The Bank moved for summary judgment, and the trial court granted the Bank's motion. Aguocha then appealed by challenging the trial court's ruling on the Bank's motion for summary judgement.

HOLDING: Affirmed.

REASONING: Aguocha alleged that the Bank made certain misrepresentations that were actionable under the DTPA. In the Bank's motion for summary judgment, the Bank argued that Aguocha was not a consumer under the DTPA because his claim did not arise out of any transaction where goods or services were sought or acquired.

The court agreed with the Bank, confirming that Aguocha must have sought or acquired either "goods" or "services " to qualify for consumer status." For purposes of the DTPA, "goods" is defined as "tangible chattels or real property," and "services" is defined as "work, labor, or service purchased or leased for use." Money is neither a good nor a service under these definitions, and therefore, a lending transaction in which a borrower only seeks to refinance a loan cannot give rise to a DTPA claim.

The Bank produced sufficient evidence that Aguocha did not seek or acquire any services and Aguocha did not argue in his brief that his claim arose out of a transaction where he sought anything other than money. Because of this, the court concluded that Aguocha failed to raise a fact issue and that the trial court correctly granted summary judgment in favor of the Bank on Aguocha's DTPA claim.

THE ECONOMIC LOSS RULE GENERALLY PRECLUDES RECOVERY IN TORT FOR ECONOMIC LOSSES RESULTING FROM A PARTY'S FAILURE TO PERFORM UNDER A CONTRACT WHEN THE HARM CONSISTS ONLY OF THE ECONOMIC LOSS OF A CONTRACTUAL EXPECTANCY

THE ECONOMIC LOSS RULE DOES NOT APPLY IF A PERSON NEGLIGENTLY PERFORMS A CONTRACT IN A WAY THAT INJURES PROPERTY OR PERSONS INCIDENTAL TO THE CONTRACT WORK BEING DONE

THE DTPA DOES NOT DEFINE THE TERM "ENTITY" IN § 17.45(4)

TEXAS LAW HAS NOT DEVELOPED SUFFICIENTLY FOR THE COURT TO REASONABLY CONCLUDE THAT AN INDIVIDUAL QUALIFIES AS AN "ENTITY" WITHIN THE MEANING OF THE STATUTE

Aircraft Holding Sols., LLC v. Learjet, Inc., ___ F. Supp. 3d ___ (N.D. Tex. 2022).
https://casetext.com/case/aircraft-holding-sols-v-learjet-inc-1

FACTS: Plaintiffs Aircraft Holding Solutions, LLC ("AHS") and CH300, LLC ("CH300") executed a proposal with Defendant Learjet Inc. d/b/a Bombardier Aircraft Services ("BAS") for routine maintenance and inspection services to be performed on Plaintiff's Bombardier Challenger 300 aircraft. While Defendants were in possession of the aircraft for maintenance, the aircraft fell off its maintenance jacks, resulting in "substantial damage" to the fuselage and wings. Defendants concluded that high wind gusts caused the aircraft to lift, resulting in the failure of the jacks. Defendants entered into a Services Agreement with Plaintiffs that allowed Defendants to complete the work necessary to return the aircraft to service. While making the repairs, Defendants caused further damage to the aircraft. Plaintiffs refused to allow Defendants to complete any further repairs and sold the aircraft to a third party.

Plaintiffs filed suit against Defendants and Bombardier Aerospace Corporation, alleging various claims under Texas law. After Defendants removed the case to District Court, Plaintiffs filed a second amended complaint, alleging claims for breach of contract, DTPA violations, negligence, gross negligence, and breach of implied bailment. Defendants asserted counterclaims against Plaintiffs for breach of contract, quantum meruit/unjust enrichment, and declaratory judgment, along with affirmative defenses such as the economic loss doctrine and contractual limitations.

HOLDING: Motion denied.

REASONING: Defendants argued that Plaintiff's claim against them for negligence and gross negligence was barred by the economic loss rule. Defendants also argued that the DTPA claim was barred because CH300 is a business consumer, owned and controlled by Ricardo Orrantia, who qualified under the statute as an entity with assets of $25 million or more, as his net worth exceeds $25 million.

The court disagreed with Defendants' economic loss rule argument. The economic loss rule generally precludes recovery in tort for economic losses resulting from a party's failure to perform under a contract when the harm consists only of the economic loss of a contractual expectancy. To determine whether the economic rule loss bars a tort claim, the court must analyze both (1) the source of the duty and (2) the nature of the remedy. However, the rule does not apply if a person negligently performs a contract in a way that injures property or persons incidental to the contract work being done. Here, the court held that the source of the duty allegedly breached was tort-based and not contract-based. The damage was caused by negligent conducted unrelated to Defendant's performance of the contracted-for services. Thus, the economic loss rule does not bar Plaintiff's claim for negligence and gross negligence against Defendants.

The court also disagreed with Defendant's argument that the DTPA claim was barred. A plaintiff must be a "consumer" to maintain a private action under the DTPA. The DTPA statute states that the term consumer does not include a business consumer with assets of $25 million or more, or one owned or controlled by a corporation or entity with assets of $25 million or more. However, the DTPA does not define the term "entity" in § 17.45(4). The court held that since Texas law has not developed sufficiently for the court to reasonably conclude that Orrantia qualifies as an "entity" within the meaning of the DTPA statute, the court would not grant Defendant's summary judgment dismissing the DTPA claim.

Douglas Christians argued that he couldn't be found personally liable as a matter of law under the purchase contract because he was acting solely as the executor of the Estate.

DEBT COLLECTION

FAIR DEBT COLLECTION PRACTICES ACT DOES NOT REQUIRE ABSOLUTE CERTAINTY OF A CONSUMER DEBT.

A JURY NEED ONLY FIND IT MORE LIKELY THAN NOT THAT THE BALANCE ON THE CREDIT CARD WAS A CONSUMER DEBT

Woods v. LVNV Funding, LLC, 27 F.4th 544 (7th Cir. 2022). http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2022/D02-28/C:21-1981:J:Scudder:aut:T:fnOp:N:2839828:S:0

FACTS: Plaintiff Kevin Woods had a fraudulent credit card opened in his name that went into default, and the debt was sold to defendants, LVNV Funding, LLC, who hired debt collector Resurgent Capital Services, L.P. (together, "Resurgent"). The identity thief opened a credit card in Woods's name and purchased a one-way airline ticket. The thief used Woods' old address and an unknown email to open the account. Woods disputed the account with Resurgent, filed a police report, and disputed the debt with the credit reporting agencies. Resurgent informed Woods that their investigation concluded the debt belonged to him.

Where the nature of a disputed debt permitted a reasonable inference that it was undertaken "for personal, family, or household purposes," an FDCPA plaintiff has met his burden.

Woods sued Resurgent for violating FDCPA, among others. The district court granted summary judgment for Resurgent. Woods appealed.

HOLDING: Affirmed.

REASONING: Resurgent argued that Woods did not meet his burden of proving that the debt fell within the statutory definition of FDCPA consumer debts because he did not subpoena the airline company to identify the person who took the flight.

The court disagreed with Resurgent yet affirmed that there was no FDCPA violation on other grounds. FDCPA defines consumer debts as any obligation to pay money arising out of a transaction entered into primarily for personal, family, or household purposes. To make out a cause of action under the FDCPA, a plaintiff must offer evidence permitting a jury to conclude that the debt at issue falls within this statutory definition. The court stated that Congress would not expect consumers to hunt down identity thieves and depose them. Where the nature of a disputed debt permitted a reasonable inference that it was undertaken "for personal, family, or household purposes," an FDCPA plaintiff has met his burden.

Here, because common sense could provide that business travelers do not often purchase one-way airline tickets, a reasonable jury could conclude that it was more likely than not that the purchase was made for consumer purposes. Therefore, the plaintiff met his burden under FDCPA.

INSURANCE

ABSENT A BREACH OF THE POLICY, THERE IS NO VIOLATION OF THE INSURER'S DUTY TO ACT IN GOOD FAITH AND DEAL FAIRLY WITH THE INSURED

Long v. Dearborn Nat'l Life Ins. Co., ___ F.4th ___ (5th. Cir. 2022).
https://law.justia.com/cases/federal/appellate-courts/ca5/21-20246/21-20246-2022-03-15.html

FACTS: Plaintiff Steven Long was a registered nurse at the University of Texas Medical Branch-Galveston (UTMB). He participated in the long-term disability insurance benefit plan through Dearborn National Life Insurance Company (Dearborn). In 2016, Long stopped working due to disability while he was covered by the policy. Long suffered from degenerative disc disease. He applied for benefits under the policy, and his claim was approved. Long received monthly benefits from the policy for 24 months. After that, Dearborn terminated Long's disability benefits based on a determination that Long had not submitted sufficient evidence to show his inability to perform sedentary work. Dearborn found that he could have done work as a nurse consultant, nurse case manager, or telephonic nurse.

Long brought suit alleging a breach of the duty of good faith and fair dealing, among other claims. The district court dismissed Long's complaint, concluding that he had pleaded vague conclusions and statutory language with no facts of how Dearborn breached the policy. Long appealed.

HOLDING: Affirmed.

REASONING: Long argued that Dearborn breached a duty of good faith and fair dealing because Dearborn conducted an unreasonable and incomplete investigation, seeking to find ways to deny his claim rather than fairly evaluate it.

Texas law imposes no duty on the insurer to act in good faith and deal fairly with the insured beyond the contract itself.

The court disagreed, stating that the materials attached to Long's complaint showed that Dearborn did not breach the policy's terms when it made the denial of his long-term disability claim after the initial 24-month period. The policy stated that after the first 24 months, Long would have to show that he was not able to perform not only his original job, but another occupation that he was or could be qualified for.

Under Texas law, a claim for breach of duty of good faith and fair dealing exists when the insurer has no reasonable basis for denying or delaying payment of a claim. Texas law imposes no duty on the insurer to act in good faith and deal fairly with the insured beyond the contract itself. Thus, absent a breach of the policy, there could be no violation of the insurer's duty to act in good faith and deal fairly. The court concluded that Long's allegations were too conclusory to survive dismissal because he provided only general allegations of bias and bad faith, but no facts showing that Dearborn had breached the policy.

INSURANCE CODE SECTIONS 542.003(2), (3) (UNFAIR SETTLEMENT PRACTICES), 542.153 (NOTICE REQUIREMENTS), 543.001(b)(1)(A), (B) (MISREPRESENTATION), AND 544.002(a)(2) (GENDER DISCRIMINATION) DO NOT CREATE PRIVATE CAUSES OF ACTION

Altecor v. United Prop. & Cas. Ins. Co., ___ S.W.3d ___ (Tex. App. 2022).
https://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=fa85a57a-0c0e-47f4-bc34-273a7c72e36b&coa=coa13&DT=Opinion&MediaID=c08cc46b-ab49-41ee-b847-787f19a91dff

FACTS: Pro se appellant, Tatiyana Geneva Altecor, had a homeowners insurance policy through appellee, United Property and Casualty Insurance Company ("UPC"). The policy included a $500,000 personal liability coverage. Altecor's ex-husband sued her and Altecor countersued. Altecor turned over the suit to UPC for defense and coverage. UPC settled the claims with ex-husband who agreed to nonsuit all claims with prejudice. Altecor was dissatisfied with the settlement and filed crossclaims against UPC for deceptive trade practices, breach of contract, fraud in the inducement, gender discrimination, and civil conspiracy.

UPC filed a combined no-evidence and traditional motion for summary judgment. Altecor filed her traditional motion for summary judgment against UPC. The trial court granted UPC's motion and denied Altecor's motion. Altecor filed several subsequent pleadings. The trial court severed Altecor's claims against UPC from her claims against her ex-husband. Altecor appealed for the court's order granting UPC's summary judgment motions.

HOLDING: Affirmed.

REASONING: Altecor argued that she maintained a private right of action because the statutes she sued provided remedies to a "damaged by violations person who is described in similar language of statute 541".

The court disagreed with this argument presuming that Altecor argued she could bring an action under Chapter 541, but the court noted it was limited to actions prohibited by §§541.051–.061 (Subchapter B of Chapter 541) or violations of the DTPA laundry list. Altecor did not raise any claims under those statutes. Without a private cause of action, Altecor lacked standing to bring the claims under the statutes she specified.

The court held Tex. Ins. Code §542.003 prohibited insurers from engaging in certain unfair claim settlement practices. Tex. Ins. Code §542.153 imposed certain deadlines on insurers to communicate settlement offers and acceptance. Tex. Ins. Code §543.001(b)(1)(A), (B) prohibited insurers from misrepresenting policy terms. Also, Tex. Ins. Code §544.002 prohibited insurers from refusing to insure or provide cover based on gender. However, only the Texas Department of Insurance Commissioner might penalize insurers, and violating Subchapter A constituted a Class A misdemeanor. The court found that none of these sections create a private cause of action, and therefore, Altecor did not have standing for these claims.

CONSUMER CREDIT

CREDIT REPORTING AGENCY NOT LIABLE UNDER THE FAIR CREDIT REPORTING ACT FOR INCLUDING A DECADE-OLD CRIMINAL CHARGE IN A BACKGROUND CHECK

Moran v. Screening Pros, LLC, 25 F.4th 722 (9th Cir. 2022). https://cdn.ca9.uscourts.gov/datastore/opinions/2022/02/08/20-55908.pdf

FACTS: In 2010, Plaintiff Gabriel Moran submitted a housing application to Maple Square, a low-income housing development in California. Maple Square hired Defendant Screening Pros LLC to conduct a background check on Plaintiff. The background check revealed that Plaintiff had three dismissed criminal charges and a conviction. Two of the dismissed charges and the conviction were filed in 2006, but the oldest charge was filed in 2000 and dismissed in 2004.

Plaintiff brought suit claiming that Defendant committed negligent and willful violations of section 1681c(a) of the Federal Credit Reporting Act ("FCRA") by reporting certain criminal information older than seven years. On remand, the district court held Defendant's violation of section 1681c(a) was neither willful nor negligent, and therefore, the district court granted Defendant's motion for summary judgment. Plaintiff appealed.

HOLDING: Affirmed.

REASONING: Plaintiff argued that Defendant was negligent because the section of the statute in dispute was unambiguous regarding the reporting period, and that Defendant interpreted the commentary on the statute wrong.

The court disagreed, holding that Defendant's interpretation of the statute was not unreasonable, and that a reasonable factfinder could not find that Defendant's violation of §1681c(a)(5) was negligent, much less willful. The court reasoned that Defendant's interpretation was consistent with industry norms; the Federal Trade Commission's only guidance on the question at the time appeared to permit reporting the criminal charge; the district court changed its ruling on reconsideration; and the opinion in the previous appeal was not unanimous. Therefore, the court affirmed the district court's granting of summary judgment to Defendant on Plaintiff's FCRA claims.

The court disagreed, holding that Defendant's interpretation of the statute was not unreasonable, and that a reasonable factfinder could not find that Defendant's violation of §1681c(a)(5) was negligent, much less willful.

ARBITRATION

PARTIES CANNOT DELEGATE ISSUES OF FORMATION TO THE ARBITRATOR, EVEN WHERE A DELEGATION CLAUSE EXISTS

Ahlstrom v. DHI Mortg. Co., Ltd., L.P., 21 F.4th 631 (9th Cir. 2021).
https://cdn.ca9.uscourts.gov/datastore/opinions/2021/12/29/20-15114.pdf

FACTS: Plaintiff-Appellant Robert W. Ahlstrom was a loan officer for Defendant-Appellee DHI Mortgage Company, Ltd. ("DHIM"), a subsidiary of nonparty D.R. Horton, Inc. (the "Company"). Ahlstrom signed a Mutual Arbitration Agreement ("MAA") that required all legal disputes be exclusively determined by binding arbitration. The MAA delegated to the arbitrator "exclusive authority to resolve any dispute relating to the formation, enforceability, applicability, or interpretation" of the MAA.

Ahlstrom filed suit against DHIM, alleging multiple employment-related claims. The district court granted DHIM's motion to compel arbitration and dismissed Ahlstrom's claims. Ahlstrom filed a putative state court class action alleging identical causes of action against DHIM. The district court again granted DHIM's motion to compel arbitration and dismissed Ahlstrom's claims. Ahlstrom appealed.
HOLDING: Reversed and remanded.
REASONING: DHIM argued that parties could agree to delegate issues of the formation of an arbitration agreement, like the MAA, to an arbitrator. DHIM also argued that the court did not have the authority to decide whether an agreement to arbitrate existed when the parties "clearly and unmistakably delegated the arbitrability issues to the arbitrator."

The court disagreed and held that courts must resolve disagreements regarding the formation of an arbitration agreement. The court held that when a party contests the formation, enforceability, or applicability of an arbitration agreement, a court must resolve the disagreement. If a court is "convinced" an agreement to arbitrate was formed, then it may order arbitration of disputing parties. Because Ahlstrom was challenging the existence of the MAA itself, the district court was required to determine whether the agreement existed, not the arbitrator.

BANK CAN'T BIND HOME MORTGAGE LOAN CONSUMERS TO ARBITRATION AGREEMENTS BECAUSE OF A PROVISION OF THE DODD-FRANK ACT AMENDING THE FEDERAL TRUTH AND LENDING ACT

Lyons v. PNC Bank, 26 F.4th 180 (4th Cir. 2022).
https://www.govinfo.gov/content/pkg/USCOURTS-ca4-21-01289/pdf/USCOURTS-ca4-21-01289-0.pdf

FACTS: Plaintiff William Lyons, Jr. ("Lyons") opened a HELOC with Defendant PNC Bank ("PNC") and the associated agreement did not contain an arbitration provision. Lyons later opened several deposit accounts at PNC and the associated agreement included a provision authorizing PNC to set off funds from the accounts to pay any of Lyons's debts to PNC. PNC later added an arbitration clause to the deposit accounts agreement. Even though Lyons was given the option to opt out of arbitration, he did not.

Dodd-Frank Act amended TILA by restricting mandatory arbitration agreements in mortgage-related transactions.

Lyons filed suit against PNC Bank alleging TILA violations when PNC set-off funds in the amounts from his deposit accounts to pay the outstanding HELOC balance. PNC moved to compel arbitration. The district court found that amendments made by the Dodd-Frank Act to TILA barred arbitration of one of the claims because that deposit account agreement was effective after the Dodd-Frank amendment was enacted. PNC appealed.
HOLDING: Affirmed.
REASONING: PNC argued that Dodd-Frank Act was not intended to restrict agreements to arbitrate.

The court disagreed based on the plain language of the TILA. The court found that Congress intended the provision to prohibit pre-dispute arbitration agreements because the Dodd-Frank Act amended TILA by restricting mandatory arbitration agreements in mortgage-related transactions. TILA does not allow consumer-creditor agreements on a HELOC or those related to a HELOC to include arbitration clauses. Because Lyons's deposit account agreement was related to his HELOC agreement based on the set-off provision, TILA barred arbitration as amended by the Dodd-Frank.

MISCELLANEOUS

SURVEY INVITATION DOES NOT CONSTITUTE AN ADVERTISEMENT UNDER TCPA

Katz v. Focus Forward LLC, 22 F.4th 368 (2d Cir. 2022).
https://law.justia.com/cases/federal/appellate-courts/ca2/21-1224/21-1224-2022-01-06.html

FACTS: Bruce Katz, M.D., P.C. ("Plaintiff") provided medical services, and Focus Forward, LLC ("Defendant") was a market research company that conducted market surveys and received payment from its clients for providing them with the information it gathered. Plaintiff alleged that Defendant sent Plaintiff two unsolicited faxes seeking participants in market research surveys and offered financial compensation for recipient's participation in a telephone interview. Plaintiff filed a putative class action alleging violations of the Telephone Consumer Protection Act of 1991 ("TCPA"). The District Court granted Defendant's motion to dismiss. Plaintiff appealed.
HOLDING: Affirmed.
REASONING: Plaintiff argued that a fax offering payments in exchange for market survey participation was an advertisement under the TCPA. The court disagreed and used the plain meaning statutory interpretation and its legislative history to interpret the TCPA. The statute defines "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services" transmitted without express permission or invitation to a person. Because faxes seeking a recipient's survey participation do not advertise the availability of any "property, goods, or services," they are not "advertisements" under the TCPA. The court also stated that Congress did not intend the term "telephone solicitation" to include market surveys and research. Therefore, the faxes in question were insufficient to warrant a TCPA violation and summary judgment for the Defendant was proper.

The court disagreed and used the plain meaning statutory interpretation and its legislative history to interpret the TCPA.

ALLEGATIONS OF A STATE STATUTORY VIOLATION AND RISK OF FUTURE HARM ARE INSUFFICIENT TO ESTABLISH ARTICLE III STANDING ABSENT ALLEGATIONS OF CONCRETE HARM

Maddox v. Bank of N.Y. Mellon Tr. Co., N.A., 19 F.4th 58 (2nd Cir. 2021).
https://www.leagle.com/decision/infco20211117094

FACTS: Plaintiffs-Appellees Sandra Maddox and Tometta Maddox Holley (the "Maddoxes") entered into a mortgage loan later assigned to Defendant-Appellant The Bank of New York Mellon Trust Company ("BNY Mellon"). In 2014, the Loan was fully paid and the debt discharged. However, BNY Mellon failed to file a satisfaction of mortgage with the county clerk's office until nearly one year later. BNY Mellon's failure to record the discharge within thirty days of payment violated New York's mortgage-satisfaction-recording statutes. The Maddoxes brought a class action suit against BNY Mellon for violation of New York's mortgage-satisfaction-recording statutes and risk of future harm.

The district court held that the Maddoxes had Article III standing to sue BNY Mellon for violating the timely recordation requirements. BNY Mellon appealed.
HOLDING: Reversed and remanded.
REASONING: In order to have Article III standing, a plaintiff must show an injury in fact, among other elements. Citing TransUnion LLC v. Ramirez, ___ U.S. ___, 141 S.Ct. 2190 (2021), the court held that the Maddoxes did not suffer the concrete harm required to satisfy the first element of Article III standing. Maddox did not satisfy the Article III injury in fact element because their claims either were not asserted, not materialized, or not supported by enough facts to make plausible an injury giving rise to relief. Because there was no injury, there was no concrete harm and, therefore no Article III standing.

PLAINTIFF WHO DOES NOT ALLEGE OR PRESENT FACTS SUGGESTING THAT ANY ACTUAL PERSON SAW OR READ ANY PRIVATE INFORMATION DOES NOT HAVE ARTICLE III STANDING UNDER *TRANSUNION LLC V. RAMIREZ*

Stewart v. Healthcare Revenue Recovery Grp., ___ F. Supp. 3d ___ (M.D. Tenn. 2022).
https://www.govinfo.gov/content/pkg/USCOURTS-tnmd-3_20-cv-00679/pdf/USCOURTS-tnmd-3_20-cv-00679-1.pdf

FACTS: Plaintiff, Angela Stewart, owed a debt to Defendant, Healthcare Revenue Recovery Group, LLC ("HRRG"), because of two hospital visits for her minor child in 2018. HRRG, a debt collector, had two accounts for Stewart relating to unpaid debts for the medical services resulting from the hospital visits. HRRG used Nordis, a third-party vendor, to send all its letters regarding debt to consumer debtors. HRRG provided Nordis with the data necessary to send letters in connection to the debts. HRRG also used a telephone dialing system called "GC Dialer" to place telephone calls to debtors, which left a prerecorded message on voicemail regarding debt collection attempts. HRRG left 62 voicemails using a prerecorded voice through GC dialer in connection with the collection of her debt.

Stewart filed suit, alleging that HRRG violated the Fair Debt Collection Practices Act ("FDCPA") and the Telephone Consumer Protection Act ("TCPA"). Stewart also filed a Motion for Partial Summary Judgment.
HOLDING: Dismissed.
REASONING: Stewart argued HRRG violated the TCPA by calling and leaving 62 voicemails on her cell phone using an artificial or recorded voice. Stewart also argued HRRG violated the FDCPA by disclosing information regarding her debt to a third party without her consent.

The court focused on Stewart's lack of Article III standing and rejected her arguments. When moving for summary judgment, a plaintiff must set forth specific facts demonstrating his standing and may not "rely on mere allegations." The court, relying on *TransUnion LLC v. Ramirez*, held that Stewart would need to present evidence that the defendant had brought an idea to the perception of another and that the document was actually read and not merely processed. Stewart did not allege or provide evidence that HRRG actually communicated sensitive facts to Nordis, nor did she prove that any real people in general actually read and not merely processed the information sent by HRRG. Thus, the court held that Stewart did not have standing under Article III to bring her claims against HRRG.

PRIVATE STUDENT LOANS ARE DISCHARGEABLE IN BANKRUPTCY

Homaidan v. Sallie Mae, Inc., 3 F.4th 595 (2d Cir. 2021).
https://www.govinfo.gov/content/pkg/USCOURTS-ca2-20-01981/pdf/USCOURTS-ca2-20-01981-0.pdf

FACTS: Plaintiff-Appellee, Hilal K. Homaidan, took out private direct-to-consumer educational loans from Defendant-Appellants, Sallie Mae Inc., Navient Solutions, LLC, and Navient Credit Finance Corporation (collectively, "Navient"), to finance his education, among other expenses. The loans were not made through the school's financial aid office; instead, they went straight to Homaidan's bank account, and the loan proceeds exceeded the cost of tuition. After graduation, Homaidan filed for Chapter 7 bankruptcy and obtained from the bankruptcy court a discharge order that was ambiguous as to whether the loans were discharged. Navient pursued repayment after the discharge order was issued, and Homaidan complied, assuming the Navient loans had not been discharged. Hamaidan moved to reopen his bankruptcy case to seek a determination that the loans were discharged during the original proceeding.

Homaidan commenced an adversary proceeding alleging Navient violated the discharge order. Navient filed a motion to dismiss, arguing that the loans were excepted from discharge under 11 U.S.C. §523(a)(8)(A)(ii). The bankruptcy court rejected that argument and denied the motion. The district court then certified the bankruptcy court's order for interlocutory appeal.
HOLDING: Affirmed.
REASONING: Navient argued that its student loans were excepted from discharge because the loan agreement constitutes an "obligation to repay funds," and Homaidan obtained those funds to advance his education, thereby deriving from them an "educational benefit" under §523(a)(8)(A)(ii).

The court rejected Navient's argument based on the rules of statutory construction. First, it explained that Navient's interpretation was unsupported by plain meaning because student loans were not ordinarily defined as "obligations to repay funds received as an educational benefit." If Congress had intended to exclude all educational loans from discharge under §523(a)(8)(A)(ii), it would have said so clearly. Then, the court reined in Navient's broad reading in light of the canon against surplusage. Because Congress constructed the statute into three separate subsections, it intended each one to target different kinds of debt. Navient's interpretation of §523(a)(8)(A)(ii) would make any loan for educational purposes nondischargable and render the other two subsections superfluous. Lastly, the court employed *noscitur a sociis* to determine the meaning of "educational benefit" by reference to its listed companions: "scholarship" and "stipend." Because both "scholarship" and "stipend" describe conditional grant payments not required to be repaid by the recipient, interpreting "educational benefit" to cover all private student loans and except them from discharge would improperly broaden § 523(a)(8)(A)(ii)'s scope. For these reasons, the court held that the Navient loans were dischargeable in bankruptcy.

SOUTHERN DISTRICT OF TEXAS ENTERS AN INJUNCTION AGAINST A CREDIT REPAIR ORGANIZATION FOR ALLEGED VIOLATIONS OF THE FTC ACT, CROA, AND THE FTC'S TSR

United States v. Turbo Sols. Inc., ___ F. Supp. 3d ___ (S.D. Tex. 2022).
https://www.ftc.gov/system/files/ftc_gov/pdf/Injunction%20Alex%20Miller%20Turbo%20Solutions%2003.18.2022.pdf

FACTS: Defendant Turbo Solutions Inc operated a credit repair scam that claimed they could improve consumers' credit scores for a fee. Defendant routinely solicited and accepted prohibited advanced fees and failed to make required disclosures regarding their services. Plaintiff, the United States of America, alleged that Defendant's scam was unlawful and harmed vulnerable consumers nationwide.

The United States brought multiple charges against Defendant for violations of the Credit Repair Organizations Act, Telemarketing and Consumer Fraud and Abuse Prevention Act, and the Federal Trade Commission Act. The United States also filed for a permanent injunction of Turbo Solutions business activities while final relief was being sought.
HOLDING: Injunction ordered.
REASONING: The United States alleged that Defendant falsely claimed they could improve consumers' credit scores by removing all negative items from their credit reports and adding credit building products, and this should be a violation of the FTC Act. Also, the United States alleged that when Defendants filed fake identity theft reports on the FTC's identitytheft.gov website, Defendants engaged in a violation of CROA; and when Defendant routinely took prohibited advanced fees for their credit repair services and had not made required disclosures regarding those services, Defendants violated the FTC's Telemarketing Sales Rule (TSR).

The court agreed and determined that there was a substantial threat of immediate and irreparable injury to the United States if the court did not enter the injunction, and the entry of this permanent injunction would not disserve the public interest. The court further stated that absent an injunction, Defendant might continue operations or take actions to conceal wrongdoings which would cause immediate and irreparable damage to the court's ability to grant effective final relief. As these risks were greater than the burden imposed on Defendant, it was proper to restrain and enjoin Defendant from continuing operations during the pendency of this action.

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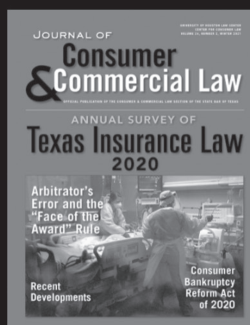

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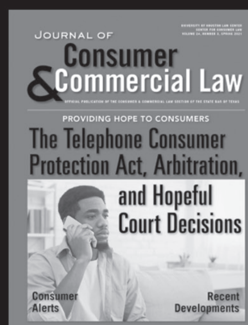

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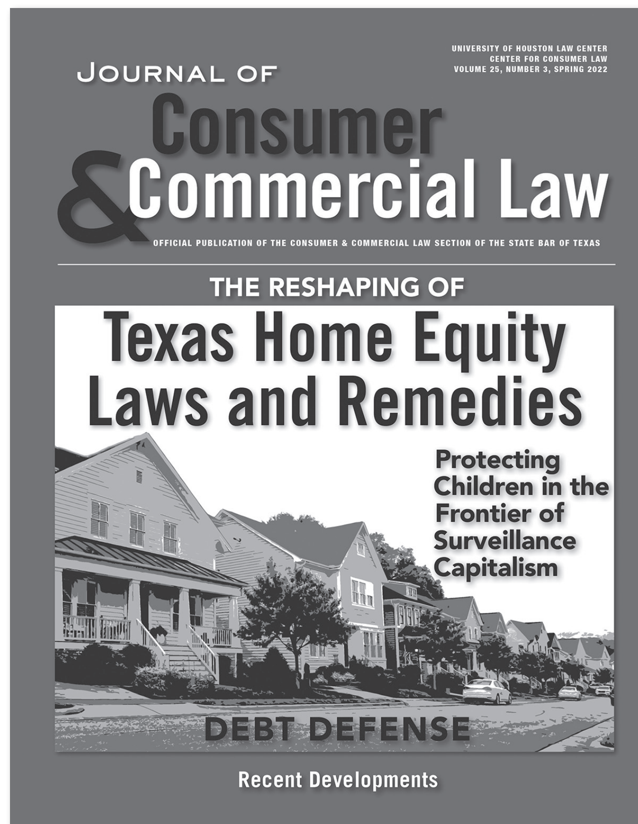

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Happy spring season!

After a bad winter in most of the state, I know you all are excited about getting out and enjoying some nice weather. You can even sit outside and read this issue of the *Journal*. In it you will find articles on Home Equity Loans, Protecting Children, and Debt Defense. And, of course, there are more than twenty cases discussed in the Recent Developments Section.

And speaking about recent developments, there is a very recent Supreme Court decision you should be aware of. The Supreme Court issued a unanimous opinion in *Morgan v. Sundance*, a case that presented the question of whether an arbitration-specific waiver rule that imposes different requirements for those arguing waiver of the contractual right to compel arbitration than for waiver of other contractual rights violates the Federal Arbitration Act.

The Supreme Court took this case to determine whether the Eighth Circuit, along with eight other circuits and many state supreme courts, erred by including a prejudice requirement in its test for arbitration waiver even though prejudice doesn't have to be shown to establish waiver of other contractual rights. Today's unanimous opinion, written by Justice Kagan, answers that question with an emphatic "yes!"

The Court noted, "But the FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules." "Accordingly, a court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation." "If an ordinary procedural rule—whether of waiver or forfeiture or what-have-you—would counsel against enforcement of an arbitration contract, then so be it. The federal policy is about treating arbitration contracts like all others, not about fostering arbitration."

This is a very significant opinion that may have ramifications in many areas besides waiver. The opinion may be found here, https://www.supremecourt.gov/opinions/21pdf/21-328_m6ho.pdf.

Finally, this is the last issue of the 25-3 Board, written by Xiong "Jady" Yujie and her staff. I congratulate all of them for doing an outstanding job. The new Student Editor-in-Chief, Libby Spann and her staff, will have some big shoes to fill.

Richard M. Alderman
Editor-in-Chief