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Texas Civil Procedure Update

In *Morgan v. Sundance*, The Supreme Court Strikes a Blow

RECENT DEVELOPMENTS

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Articles

Recent Developments

Texas Civil Procedure Update

By Mark E. Steiner*

I. Introduction

This article examines recent changes to the Rules of Civil Procedure and relevant caselaw on Texas civil procedure since January 2020 or so. I have emphasized recent decisions on Texas Rule of Civil Procedure 91a and on responsible third parties.

II. Recent Amendments to Texas Rules of Civil Procedure

A. Rule 106

Texas now allows for substituted service through "social media, email, or other technology."[1] The impetus for this change came from the Texas Legislature in 2019 when it added section 17.033 to the Civil Practice and Remedies Code. It states:

> (a) If substituted service of citation is authorized under the Texas Rules of Civil Procedure, the court, in accordance with the rules adopted by the supreme court under Subsection (b), may prescribe as a method of service an electronic communication sent to the defendant through a social media presence.
>
> (b) The supreme court shall adopt rules to provide for the substituted service of citation by an electronic communication sent to a defendant through a social media presence.[2]

The Texas Supreme Court subsequently revised Rule 106 to allow alternative service by electronic communication by court order "in any other manner, including electronically by social media, email, or other technology, that the statement or other evidence shows will be reasonably effective to give the defendant notice of the suit."[3] Electronic service is permitted only if traditional means of service have been unsuccessful. The supreme court recognized that there are problems with serving someone through social media, providing this comment to the new provision:

> Rule 106 is revised in response to section 17.033 of the Civil Practice and Remedies Code, which calls for rules to provide for substituted service of citation by social media. Amended Rule 106(b)(2) clarifies that a court may, in proper circumstances, permit service of citation electronically by social media, email, or other technology. In determining whether to permit electronic service of process, a court should consider whether the technology actually belongs to the defendant and whether the defendant regularly uses or recently used the technology.[4]

Under the rule, a plaintiff will have to convince the court that electronic service will be "reasonably effective to give the defendant notice of the suit." The plaintiff will need to show that the account belongs to the defendant and the defendant regularly or recently looks at the account.[5]

Courts in other jurisdictions already have addressed the concerns about fake accounts. An excellent paper by Sarah A. Nicolas, Anne M. Johnson, and Keenon L. Wooten gathered several cases on this topic.[6] In one federal district court case, the plaintiff sued a bank over credit card debt and the bank then sought to bring in the plaintiff's estranged daughter as the bank suspected the daughter had opened the account in her mother's name. The bank couldn't find the daughter because of her "history of providing fictional or out of date addresses to various state and private parties" and asked the court to allow alternate methods of service, including service of process by email and Facebook message. Service via Facebook troubled the court:

> Chase has not set forth any facts that would give the Court a degree of certainty that the Facebook profile its investigator located is in fact maintained by Nicole or that the email address listed on the Facebook profile is operational and accessed by Nicole. Indeed, the Court's understanding is that anyone can make a Facebook profile using real, fake, or incomplete information, and thus, there is no way for the Court to confirm whether the Nicole Fortunato the investigator found is in fact the third-party Defendant to be served.[7]

In several recent federal district court cases, courts have denied the motion for alternative service. In *Osio v. Maduro Moros*, the plaintiff had sued, among others, individual Venezuelans for kidnapping, torture, and murder. The plaintiffs sought alternative service via email, text message, or social media. To serve individuals outside of the United States, a plaintiff can use "any internationally agreed means of service that is reasonably calculated to give notice" such as the Hague Convention.[8] A court can order alternate means of service as long as the signatory nation has not expressly objected to those means and the alternate method of service comports with constitutional notions of due process.[9] There, the court found the plaintiffs had not established that the individual defendants had successfully evaded service. Moreover, the court expressed concerns about the reliability of service via email, text message, social media outlets, or weblinks. While the plaintiffs said that electronic messages to the defendants did not "bounce back," the court noted that "this did not mean that the email accounts, social media accounts, or phone numbers are actively monitored or that the messages or weblinks will be opened or read."[10] The court also was concerned that the plaintiffs wanted to serve the individual defendants "*only* through social media, whether Facebook or Twitter, which raises due process concerns."[11] The court recognized that other district courts had allowed alternative electronic service but explained those circumstances were "distinctly different."[12]

In *Capturion Network, LLC v. Liantronics, LLC*, the district court denied the motion for alternate service via email because the plaintiff failed to establish that the defendant would receive the summons and complaint through email addresses. A plaintiff has to show that an email account "is a reliable form of contact" with the defendant. The court denied the motion because the plaintiff did not present any information showing the defendant "regularly uses the email accounts to conduct business or that the accounts are actively monitored."[13]

A good example of what is needed to show the electronic communication will be reasonably effective to give notice is found in *CKR Law LLP v. Anderson Investments International, LLC*.[14] There, the district court granted the motion for alternative service using email and WhatsApp using a particular phone number for one defendant because the plaintiff showed that the email had been used to communicate with the defendant and the plaintiff had recently received messages via WhatsApp from the defendant from that number. But the court rejected using email for another defendant where the plaintiff alleged that was the defendant's last known email and messages sent to it didn't bounce back. The court concluded that "the mere fact that it is an operative email address is plainly insufficient without some allegation that the email is somehow associated" with the defendant. Because the plaintiff also failed to allege having ever communicated with the defendant through that email address, the court found that that service through that address would not be reasonably calculated to apprise the defendant of the pendency of the action.[15]

In the federal district court cases, the concerns about whether the alternative service is reasonably effective to give notice or meet due process concerns were raised by the courts *sua sponte* when faced with motions for alternate service. In Texas state courts, these concerns undoubtedly will be raised by defendants attempting to overturn default judgments. Plaintiffs will have to build a record in the trial court that will be able to meet these attacks. One federal district court has nicely summarized when electronic service will satisfy due process:

> There does not appear to be any specific criteria that

must be satisfied in order for electronic service on a foreign defendant to satisfy due process. However, courts that have permitted electronic service have found it complied with due process when, for example: (i) the plaintiff provided the e-mail address, account, and/or website through which the plaintiff intends to contact the defendant; (ii) the plaintiff provided facts indicating the defendant to be served would likely receive the summons and complaint; (iii) the e-mail address used was for the defendant's retained attorney; (iv) the summons and complaint were translated into the language spoken in the nation in which service was effectuated; and/or (v) multiple valid forms of service were attempted.[16]

B. Expedited Actions: Rules 47, 169, 190.2

The Texas Supreme Court also has revised the rules pertaining to expedited actions. The Texas Legislature was again the impetus for these changes, although the court went beyond what the legislature mandated. The Legislature added subsection h-1 to section 22.004 of the Texas Government Code:

> In addition to the rules adopted under Subsection (h), the supreme court shall adopt rules to promote the prompt, efficient, and cost-effective resolution of civil actions filed in county courts at law in which the amount in controversy does not exceed $250,000. The rules shall balance the need for lowering discovery costs in these actions against the complexity of and discovery needs in these actions. The supreme court may not adopt rules under this subsection that conflict with other statutory law.[17]

The Texas Supreme Court subsequently revised rules that affected more than county courts at law. The court explained its rationale in a comment to Rule 169:

> Rule 169 is amended to implement section 22.004(h-1) of the Texas Government Code—which calls for rules to promote the prompt, efficient, and cost-effective resolution of civil actions filed in county courts at law in which the amount in controversy does not exceed $250,000—and changes to section 22.004(h) of the Texas Government Code. To ensure uniformity, and pursuant to section 22.004(b) of the Texas Government Code, Rule 169's application is not limited to suits filed in county courts at law; any suit that falls within the definition of subsection (a) is subject to the provisions of the rule.[18]

Rule 47 contains pleading requirements for claims for relief (i.e., petitions). Among those requirements is a list of ranges of damages from which a plaintiff must select; one of those selections triggers the procedures for expedited actions. The list of available options changed because the upper limit of an expedited action was increased. Rule 47(c) now reads:

> (c) except in suits governed by the Family Code, a statement that the party seeks:
> (1) only monetary relief of $250,000 or less, excluding interest, statutory or punitive damages and penalties, and attorney fees and costs;
> (2) monetary relief of $250,000 or less and non-monetary relief;
> (3) monetary relief over $250,000 but not more than $1,000,000;
> (4) monetary relief over $1,000,000; or
> (5) only non-monetary relief [19]

A plaintiff pleading Rule 47 (c)(1) puts the case in the expedited action procedure.[20]

Rule 169 was dramatically expanded. Old Rule 169 said expedited actions only applied to claims of "monetary relief aggregating $100,000 or less, *including* damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney fees."[21] Rule 169 now states, "The expedited actions process in this rule applies to a suit in which all claimants, other than counter-claimants, affirmatively plead that they seek only monetary relief aggregating $250,000 or less, *excluding* interest, statutory or punitive damages and penalties, and attorney fees and costs."[22] Not only has monetary relief number increased from $100,000 to $250,000, interest and attorney's fees were included in the old amount and are excluded in the increased amount. The requirement that the plaintiff can't seek non-monetary damages still remains. The court also removed the language that categorically excluded claims "governed by the Family Code, the Property Code, the Tax Code, or Chapter 74 of the Civil Practice & Remedies Code."[23] The court warned in its comment to Rule 169 that "certain suits are exempt from Rule 169's application by statute."[24]

Reflecting the heavy influence of Federal Rule of Civil Procedure 26, disclosures are now required, not requested.

Rule 190.2 also was revised. The discovery period was changed. The prior version stated that the discovery period "begins when the suit is filed and continues until 180 days after the date the first request for discovery of any kind is served on a party."[25] The discovery period for expedited action now "begins when the first initial disclosures are due and continues for 180 days."[26] The previous rule limited depositions for each party to "no more than six hours in total to examine and cross-examine all witnesses in oral depositions" and permitted parties to go up to ten hours in total by agreement."[27] The new version provides, "Each party may have no more than 20 hours in total to examine and cross-examine all witnesses in oral depositions."[28] The provision on requests for disclosure was changed to reflect the new rule on required disclosures, as we shall soon see.

The court provided a comment that explains the changes to Rule 190.2:

> Rule 190.2 is amended to implement section 22.004(h-1) of the Texas Government Code. Under amended Rule 190.2, Level 1 discovery limitations now apply to a broader subset of civil actions: expedited actions under Rule 169, which is also amended to implement section 22.004(h-1) of the Texas Government Code, and divorces not involving children in which the value of the marital estate is not more than $250,000. Level 1 limitations are revised to impose a twenty-hour limit on oral deposition. Disclosure requests under Rule 190.2(b)(6) and Rule 194 are now replaced by required disclosures under Rule 194, as amended. The discovery periods under Rules 190.2(b)(1) and 190.3(b)(1) are revised to reference the required disclosures.[29]

C. Disclosures: Rules 194 and 195

Disclosures have been overhauled. Reflecting the heavy influence of Federal Rule of Civil Procedure 26, disclosures are now required, not requested.[30] Rule 194 mandates a "duty to disclose" without waiting for a discovery request.[31] Rule 194 also requires a party either produce "copies of all responsive documents, electronically stored information, and tangible things" in its response or state a "reasonable time

and method for the production of these items."[32]

The amended rule also stipulates when a party must make its initial disclosures—"within 30 days after the filing of the first answer or general appearance unless a different time is set by the parties' agreement or court order."[33] Rule 192.2 (a) says, "Unless otherwise agreed to by the parties or ordered by the court, a party cannot serve discovery on another party until after the other party's initial disclosures are due." This means that a plaintiff can no longer serve discovery with or in its petition; all the references to discovery requests served before the defendant's answer "need not respond until 50 days after service of the request" have been excised.[34]

There are now three categories of required disclosures: (1) initial disclosures, (2) expert disclosures, and (3) pretrial disclosures.[35] Initial disclosures are largely the same disclosures as listed in the earlier version of Rule 194. Initial disclosures excludes expert disclosures and adds copies of "all documents, electronically stored information, and tangible things that the responding party has in its possession, custody, or control, and may use to support its claims or defenses, unless the use would be solely for impeachment."[36] The comment admits that this change is "based on Federal Rule of Civil Procedure 26(a) to require disclosure of basic discovery automatically, without awaiting a discovery request."[37]

The second category of required disclosures pertains to testifying experts. Rule 194.3 says, "In addition to the disclosures required by Rule 194.2, a party must disclose to the other parties testifying expert information as provided by Rule 195." Rule 195.5 now contains the expert disclosures formerly found in Rule 195.2. It adds three additional disclosures, which it borrowed from Federal Rule of Civil Procedure 26(a)(2)(B). These disclosures require a party to provide:

> (C) the expert's qualifications, including a list of all publications authored in the previous 10 years;
> (D) except when the expert is the responding party's attorney and is testifying to attorney fees, a list of all other cases in which, during the previous four years, the expert testified as an expert at trial or by deposition; and
> (E) a statement of the compensation to be paid for the expert's study and testimony in the case.[38]

Draft expert reports or disclosures are now protected from discovery, "regardless of the form in which the draft is recorded."[39]

The third category of required disclosures are pretrial disclosures. This new section says,

> In addition to the disclosures required by Rule 194.2 and 194.3, a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:
> (1) the name and, if not previously provided, the address, and telephone number of each witness–separately identifying those the party expects to present and those it may call if the need arises;
> (2) an identification of each document or other exhibits, including summaries of other evidence–separately identifying those items the party expects to offer and those it may offer if the need arises.[40]

Unless the court orders otherwise, these disclosures are due at least 30 days before trial.[41]

The timing of discovery periods under Level 1 and 2 now refer to the required disclosures. The Level 1 discovery period begins "when the first initial disclosures are due and continues for 180 days."[42] The Level 2 discovery period begins "when the first initial disclosures are due" and continues—in non-Family Code cases—until "the earlier of (i) 30 days before the date set for trial, or (ii) nine months after the first initial disclosures are due."[43]

Another ripple effect of required disclosures: citations now must "notify the defendant that the defendant may be required to make initial disclosures."[44] A citation must include this notice to a defendant (the last three sentences are new):

> You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you. *In addition to filing a written answer with the clerk, you may be required to make initial disclosures to the other parties of this suit. These disclosures generally must be made no later than 30 days after you file your answer with the clerk. Find out more at TexasLawHelp.org.*[45]

A plaintiff needs to ensure that the citation has the new language. Strict compliance with the rules for service of citation must affirmatively appear on the record in order for a default judgment to withstand direct attack.[46]

III. Recent Texas Supreme Court Cases

In this section I will discuss some recent cases from the Texas Supreme Court. Decisions on Rule 91a motions to dismiss and on responsible third parties will be discussed separately below.

A. Personal Jurisdiction

In *Luciano v. SprayFoamPolymers.Com, LLC*, the Texas Supreme Court held a Texas court could exercise personal jurisdiction over a manufacturer. The court was guided by a United States Supreme Court opinion from earlier that year. The court quoted that opinion when it announced its holding: "We reverse and hold that when a manufacturer like SprayFoam 'serves a market for a product in a State and that product causes injury in the State to one of its residents, the State's courts may entertain the resulting suit.'"[47] The Lucianos allegedly got sick from the spray foam insulation installed in their new home. They sued the installer, Old World Cast Stone, and the manufacturer, SprayFoam. The trial court denied SprayFoam's special appearance; however, the court of appeals reversed, concluding the Lucianos had not shown SprayFoam had minimum contacts with Texas. The Texas Supreme Court reversed, finding the Lucianos' lawsuit conferred specific jurisdiction over SprayFoam. After reviewing SprayFoam's contacts with Texas, the court concluded SprayFoam's "conduct in Texas resulted not in a mere dribble, but in a stream of activity that allowed it to enjoy the benefits of doing business in this state."[48]

The supreme court concluded that SprayFoam placing its product into the stream of commerce along with its "additional conduct" of soliciting business and distributing its product in Texas is "sufficient to hold SprayFoam purposefully availed itself of the Texas market." But a nonresident defendant's flood of purposeful contacts with the forum state won't suffice if the lawsuit doesn't arise out of or relate to the defendant's contacts with the forum. The court also looked at whether the contacts with Texas were related to the operative facts of the litigation. SprayFoam argued that a direct causal connection was required to satisfy the relatedness prong. In other words, according to SprayFoam, the Lucianos had to show they selected the installer "because of a known, preexisting relationship with SprayFoam, that the Lu-

cianos specifically chose Thermoseal 500, or that the Lucianos knew that the Thermoseal 500 installed in their home originated from its Texas warehouse" to show the lawsuit was related to the contacts. Here, the Lucianos were saved by the United States Supreme Court's opinion in *Ford Motor Co*. earlier that spring. The United States Supreme Court explained, "None of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do."[49]

B. Standing

Lawyers interested in how the Texas Supreme Court will look at consumer cases fleeing to state court because of standing issues raised by *TransUnion* should read *Grassroots Leadership, Inc. v. Texas Department of Family and Protective Services.*[50] There, plaintiffs—detained mothers, their children, a daycare operator, and an organization representing their interests—challenged a Department of Family and Protective Services licensing rule governing immigration detention centers. The court of appeals held that the plaintiffs lacked standing to sue. The supreme court reversed, holding that the plaintiffs have standing because "the detained mothers and children allege concrete personal injuries traceable to the adoption of the rule." For consumer and commercial lawyers, the opinion sheds light on how standing will be analyzed in FDCPA or FCRA cases filed in Texas district courts. It seems like those cases may not find a safe harbor in state court. The court noted that "Texas's standing requirements parallel federal standing doctrine" and favorably cited *TransUnion*.[51]

C. Summary Judgment and Limitations Defenses

The Texas Supreme Court also has re-affirmed its rule that a defendant moving for summary judgment on limitations must conclusively establish the elements of the affirmative defense and must conclusively negate application of the discovery rule and any tolling doctrines pled as an exception to limitations.[52] Johnson sued to evict her nephew Draughon from the house he was living in. Draughon claimed that he had inherited the house and that his later conveyance to his aunt was void because of his mental incapacity. The justice of the peace ordered Draughon to vacate; he appealed that decision and also filed a separate declaratory judgment action to quiet title. Johnson pled the affirmative defense of limitations because the deed transferring the property was recorded over eleven years before Draughon's lawsuit; Johnson subsequently moved for summary judgment. After the trial court struck Draughon's affidavits, it granted Johnson's motion.[53]

The court of appeals upheld the summary judgment. Because the courts of appeals were divided about which party has the burden when unsound-mind tolling is asserted, the supreme court granted review. Draughon argued to the supreme court that "when a traditional motion for summary judgment is based on the statute of limitations and the non-movant asserts that a tolling provision applies, it is the movant's burden to conclusively negate the application of the tolling provision."[54] The supreme court agreed with Draughon. The court explained that a defendant has the burden about any issues that "affect which days count toward the running of limitations," which would include accrual, the discovery rule, and tolling. The plaintiff has the burden to raise a fact issue on equitable defenses that would defeat limitations even though it has run, e.g., fraudulent concealment, estoppel, or diligent service.[55] Four judges dissented, arguing that the plaintiff should respond with some evidence of unsound mind to defeat summary judgment.[56]

D. Summary Judgment and Mandamus

In another summary judgment case, the supreme court granted mandamus relief from the trial court's denial of a summary judgment.[57] The plaintiffs had sued Academy Sports + Outdoors because it was the retailer that sold the weapon used in the Sutherland Springs Church shooting. Academy moved for summary judgment based upon the federal Protection of Lawful Commerce in Arms Act (PLCAA), which protects firearm retailers from lawsuits seeking damages arising out of the criminal conduct of third parties. The trial court denied the motion, and Academy unsuccessfully sought mandamus relief in the court of appeals.

Mandamus relief is supposed to be an extraordinary remedy that requires the relator to show (1) a clear abuse of discretion by the trial court and (2) an inadequate remedy by appeal. A trial court abuses its discretion when it fails to properly apply the law. After a lengthy discussion of the PLCAA, the supreme court found that the trial court abused its discretion when it denied the summary judgment motion. Because Congress intended retailers to be immune from such liability lawsuits, the supreme court held that congressional intent is not served by allowing a lawsuit "barred by the PLCAA to proceed to trial only to be inevitably reversed on appeal." Requiring Academy to proceed to trial would defeat the substantive right granted it by the PLCAA. The supreme court relied upon its decision in *In re United Services Automobile Association*, where it also had granted mandamus relief from the denial of a summary judgment motion.[58] The court concluded, "Absent mandamus relief, Academy will be obligated to continue defending itself against multiple suits barred by federal law. As in *United Services*, this case presents extraordinary circumstances that warrant such relief."[59]

E. Pleadings as Summary Judgment Proof

While pleadings generally do not qualify as summary judgment proof, the supreme court has held that courts may nonetheless grant summary judgment based on deficiencies in an opposing party's pleadings and parties moving for summary judgment may rely on allegations in an opposing party's pleadings that constitute judicial admissions.[60]

F. Discovery Requests

In law, unlike life, fishing expeditions are a bad thing. The supreme court has re-affirmed its disdain for fishing in discovery in several recent opinions. In the underlying vehicle-collision lawsuit of one recent mandamus, the plaintiffs served five interrogatories on the defendant trucking company, including one that asked for a list of every one of defendant's motor vehicle col-

lision lawsuits for the last ten years (defendants always seem to argue such a request is burdensome, which, in other circumstances, wouldn't seem like the best play). Defendants objected, and the trial court scaled back the request to the last five years of rear-end collisions. Defendants again objected, and the trial court denied the motion to quash. The defendants unsuccessfully sought a writ of mandamus in the court of appeals and then filed a mandamus petition in the supreme court. The plaintiffs then informed defendant that it had withdrawn the offending interrogatory; however, the plaintiffs did not inform the trial court, and its order on discovery stood. The plaintiffs nonetheless moved to dismiss the mandamus petition as moot.[61]

The supreme court held that the dispute was not moot. The court noted that the plaintiffs "have provided no enforceable assurances via a Rule 11 agreement, a binding covenant, or anything else that would provide sufficient certainty that they would not refile the same or similar requests" once the coast was clear. The court held, "Unilateral and unenforceable withdrawal of discovery, without any assurances that the withdrawal is definite, and at the very hour 'appellate courts are looking,' does not moot a discovery dispute." The court then found that the plaintiffs' requests were impermissibly broad.[62]

In another discovery mandamus, the supreme court held that requests were overbroad and "tantamount to a fishing expedition." The plaintiff in the underlying lawsuit had sued UPS and its driver for wrongful death. Post-accident drug testing for the UPS driver was positive for THC and the driver has admitted to using marijuana. To bolster her theory that UPS knowingly failed to properly drug test the driver, knowingly allowed him to drive under the influence of drugs, and knowing failed to comply with its own policies and federal law, plaintiff requested all documentation of all alcohol and drug testing for all commercial vehicle drivers at the same facility for the previous 11 years. After two trips to the court of appeals resulting in the trial court revising its discovery order to limit the requests, UPS filed a mandamus petition in the supreme court.[63]

The supreme court held that the drug-test results for UPS drivers who were neither involved nor implicated in the accident are irrelevant because "they do not make any fact consequential to [plaintiff's] claims more or less probable than it would be without the results."[64]

G. TCPA Procedure

The Texas Supreme Court and the courts of appeals have issued a lot of opinions on the Texas Citizens Participation Act in the last few years. The courts' expansive view of the TCPA led to more defendants pleading this defense and moving to dismiss, which led to more appeals. I only want to discuss one such case because of the procedural issues that are involved.[65] The underlying facts suggest why the Texas legislature reined in the courts in 2019.[66] Plaintiffs attended defendant's seminars on real estate and later sued the defendant for DTPA violations and other related claims. After the defendant filed a Rule 91a motion to dismiss, plaintiffs amended their petition, adding new claims for fraud and fraudulent concealment. The defendant then filed a TCPA dismissal motion, which, on its face, seems a little farfetched. The trial court denied the motion and the defendant filed an interlocutory appeal. The issue on appeal was the effect of the amended petition on the TCPA's requirement to file a motion to dismiss within 60 days after the party is served with the legal action.

The supreme court granted the petition for review to decide, as a matter of first impression, "when amended and supplemental pleadings constitute or assert a new 'legal action' that starts a new sixty-day period for filing a TCPA dismissal motion."[67] The supreme court first outlined previous holdings of the courts of appeal with which it agreed:

> The courts have consistently agreed that an amended or supplemental pleading does not constitute or assert a new legal action if it asserts the same legal claims or causes of action by and against the same parties based on the same essential factual allegations. If, however, the new pleading adds a new party as a claimant or defendant, the courts have agreed that the pleading asserts a new legal action and starts a new sixty-day period to file a dismissal motion, but only as to the claims asserted by or against the new party. And the courts have also consistently agreed that an amended pleading constitutes or asserts a new legal action if it includes new "essential factual allegations" that were not included in the prior pleading, allowing a new sixty-day period to seek dismissal of claims to the extent they are based on those new factual allegations.[68]

The supreme court disagreed with prior courts of appeals decisions that held that an amended petition that asserted a new claim or theory based upon the same essential factual allegations included in a prior petition did not assert a new "legal action." The court instead held that "an amended or supplemental pleading that asserts a new claim involving different elements than a previously asserted claim also asserts a new legal action that triggers a new sixty-day period for filing a motion to dismiss that new claim."[69]

H. Preservation of Error

While denying Browder's petition for review and motion for rehearing, the supreme disapproved the court of appeals' holding that a party also must object after the trial court denies a jury demand to preserve error.[70] The trial court denied Browder's demand for a jury trial because Browder had waived his jury demand by filing it after the bench trial had begun (Browder also disputed when the bench trial had started). The court of appeals affirmed for a different reason: Browder didn't preserve error because he didn't object to the denial of his request when the trial resumed at a later date and he didn't otherwise raise the issue.

The supreme court disagreed with the court of appeals holding on preservation because it conflicted with *Citizens State Bank v. Caney Investments*, 746 S.W.2d 477 (Tex. 1988). The court concluded, "[N]either our procedural rules nor this Court's decisions require a party that has obtained an adverse ruling from the trial court to take the further step of objecting to that ruling to preserve it for appellate review. Once the trial court denied Browder's request for a jury trial, Browder had no choice but to go forward with the bench trial."[71]

I. Declaratory Judgments

The supreme court has further clarified the procedure for recovering under a Underinsured Motorist (UIM) policy. In 2006, the court in *Brainard* held that an underinsured motorist carrier "is under no contractual duty to pay benefits until the insured obtains a judgment establishing the liability and underinsured status of the other motorist."[72] The *Brainard* court did not say what form this litigation should take. The supreme court has now held that an insurance carrier's liability for benefits under the UIM policy may be established in a declaratory judgment action. The court further held that the plaintiff may recover attorney's fees under the Uniform Declaratory Judgments Act (UDJA).[73] The dissent argued that a claim for UIM should be brought as a contract claim subject to the attorney's fees provision of Chapter 38. The dissent warned that the majority opinion has opened the way for the UDJA to be used

promiscuously, providing "an avenue for attorney-fee awards not just in UIM cases, but in all tort cases."[74] And all plaintiffs' lawyer said, "From your lips to God's ears."

J. Depositions of Corporate Representatives

After settling with defendant driver, plaintiff next sued his insurer for breach of contract and a declaratory judgment, seeking recovery for his policy's UIM provisions. He also asserted bad-faith and other extracontractual claims. After the plaintiff gave notice of his intent to depose a corporate representative, the insurer filed a motion to quash, arguing that the investigation and evaluation of the claim wasn't probative of any relevant issue and were overbroad. The trial court denied the motion and the court of appeals denied the subsequent petition for writ of mandamus. The supreme court held that "relevance considerations do not categorically foreclose the deposition, although they do inform its scope."[75] The court noted that the insurer was taking an unusual position by arguing the plaintiff "is not entitled to depose the only party defendant in this suit." The court also rejected the insurer's argument that "a lack of personal knowledge necessarily equates to a lack of relevant knowledge."[76] The court did find that some of the noticed topics exceeded the permissible scope of the deposition.

K. Default Judgments

The supreme court issued several opinions overturning default judgments. In the first, the husband in a divorce case defaulted and then filed a motion for new trial. The trial court denied the motion after sustaining a hearsay objection. The court of appeals affirmed on different grounds, concluding that formal defects rendered the husband's affidavit inadmissible. The supreme court reversed and remanded because "the content of husband's affidavit was sufficient to satisfy the *Craddock* standard for obtaining a new trial and was not based on hearsay, and because no formal defects were raised in the trial court (where they might have been cured)."[77]

The second decision underscores the importance of obtaining proper service "by the book" to protect a default judgment from an otherwise inevitable attack. The plaintiff tenant sued its limited partnership landlord. A limited partnership's agents for service of process are its general partner and its registered agent. The plaintiff served a limited partnership employee variously described as its "owner," "president," and "CEO"—but not its general agent nor its registered agent. For a default judgment to withstand direct attack, strict compliance with the rules for service of citation must affirmatively appear on the record. The limited partnership was able to show that there was no evidence that either the general partner or the registered agent was served.[78]

In *Spanton v. Bellah*, the Texas Supreme Court once again construed "strict compliance" with the rules for service of process to mean just that.[79] Bellah sued the Spantons for personal injuries. In her petition she said they could be served at a specific address on "Heather Hills Dr." in Dripping Springs. After several unsuccessful attempts at service, Bellah moved for substituted service. The district court granted the motion, authorizing substituted service by first-class and certified mail and by attaching a copy of the citation and petition to the gate at the specified address on "Heathers Hill," not Heather Hills. The process server filed a return stating he had executed substituted service by posting a copy to the gate and by sending a copy by certified mail at the specified address on "Heather Hills." The court granted the motion for default judgment.

The defendants filed a notice of restrictive appeal. The court of appeals held that the face of the record failed to demonstrate error. It reasoned that the discrepancy between the trial court's order granting substituted service on "Heathers Hill" and the process server's return for "Heather Hills" did not require reversal because strict compliance with the rules for service does not mean "obeisance to the minutest detail." The supreme court disagreed that the discrepancy here could be overlooked: "Because no-answer default judgments are disfavored and because trial courts lack jurisdiction over a defendant who was not properly served with process, we have construed 'strict compliance' to mean just that."[80] The supreme court noted, "Discrepancies in addresses may be mere details when the order authorizes substitute service wherever the defendant could be found or when the defendant is indisputably personally served. But otherwise, this Court has repeatedly held that discrepancies in the defendant's name or address prevent any implication or presumption of proper substitute service." Here, the trial court's order authorized substituted service at a house number on Heathers Hill Drive in Dripping Springs but the return stated that service was executed on Heather Hills Drive. Therefore, the substituted service "did not strictly comply with the trial court's order."[81] If you want to keep a default judgment on appeal, you really need to mind your Heathers and Hills.

If you want to keep a default judgment on appeal, you really need to mind your Heathers and Hills.

IV. Rule 91a Motions to Dismiss

A. Timing of Motion

Rule 91a has a narrow window of availability as it must "be filed within 60 days after the first pleading containing the challenged cause of action is served on the movant."[82] The trial court must rule on the motion to dismiss "within 45 days after the motion is filed."[83] The courts of appeals have held that the "must" language about the timing of the filing of the motion and the court's acting on the motion is merely directory, following Texas Supreme Court precedent that holds "must" is "given a mandatory meaning when followed by a noncompliance penalty."[84]

Because Rule 91a doesn't have a noncompliance penalty, the courts of appeals have concluded both the 60-day filing requirement and the 45-day period for acting on the motion are directory.[85] In *Medfin Manager*, the San Antonio Court of Appeals held that the 45 days the trial court is given to rule isn't jurisdictional. A trial court can still rule on the motion after 45 days. On appeal, a party must show harm.[86] In *Malik*, the First Court of Appeals found the pro se plaintiff waived the argument about the motion's untimeliness because the record didn't establish he had objected to its tardiness.[87]

B. Evidence

Rule 91a.6 says that "the court may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59."[88] The Texas Supreme Court noted the practical impact of this limitation in assessing the insured's claim breach of the indemnity provision of the policy: "Because this case comes to us on a Rule 91a motion, we may not consider evidence regarding what Farmers' reasons were for non-payment or whether those reasons implicate other policy provisions or legal doctrines that would prevent any liability for breach. . . . The entire policy is not before us because it was neither quoted in Longoria's petition nor attached as an exhibit. On remand, Farmers is free to offer evidence that it did not breach the policy."[89]

In one recent court of appeals case, the defendant filed a Rule 91a motion to dismiss and, alternatively, a motion for summary judgment. The trial court's order stated, "After examining the pleadings, the Court's file and previous holdings, of which the Court took judicial notice, the motions before the Court, including any responses thereto, together with applicable authorities, the Court determined that Defendants Gaines County, Texas, Ken Ketron, and Clint Low are entitled to the relief requested." The court of appeals concluded, "This statement clearly indicates that the trial court considered evidence beyond the pleadings, which it could only do if it granted summary judgment, not a Rule 91a motion."[90] Although the court didn't address the issue of attorney's fees, language like that in an order should wipe out any attorney's fees since the prevailing party may be entitled to attorney's fees for a Rule 91a motion to dismiss, but not for obtaining a summary judgment.

The attorney's fees award is against the party, not the party's attorney. The Dallas Court of Appeals reversed the trial court's award of attorney's fees and costs to the defendant jointly and severally against plaintiffs and their attorney. The court of appeals reasoned that Rule 91a.7 doesn't "expressly state that fees may be awarded against a party's attorney" and attorneys generally aren't liable to the opposing party for representing their client. If the rule intended to allow the award of attorney's fees against an attorney representing a party, the rule would expressly state that intent like Rules 13 and 215.[91]

C. Affirmative Defenses

The Texas Supreme Court has held that Rule 91a "permits motions to dismiss based on affirmative defenses if the allegations, taken as true, together with the inferences reasonably drawn from them, do not entitle the claimants to the relief sought."[92] Some affirmative defenses won't be conclusively established by the facts given in a plaintiff's petition: "Because Rule 91a does not allow consideration of evidence, such defenses are not a proper basis for a motion to dismiss."[93] The Dallas Court of Appeals recently granted mandamus relief over the trial court's failure to grant a motion to dismiss based on the affirmative defense of release.[94] The Fourteenth Court of Appeals reversed the trial court's grant of motion to dismiss based on collateral estoppel and res judicata. The problem with these affirmative defenses is that "evidence is usually required to prove a collateral estoppel or res judicata defense." Moreover, a court can't use judicial notice of prior proceedings because judicial notice is a matter of evidence.[95]

D. Attorney's Fees

Rule 91a originally mandated attorney's fees to the prevailing party.[96] In 2019, the attorney's fees provision was amended and the award is no longer mandatory.[97] The amendments to Rule 91a "apply only to civil actions commenced on or after September 1, 2019."[98] The date the lawsuit was filed may matter. This February, one court appeals quoted the old language because the lawsuit preceded the change to the rule and then said, "Because we have sustained the Housing Authority and the Commissioners' issues, we conclude they are entitled to attorney's fees."[99]

Even before the 2019 change, courts usually didn't award attorney's fees where the dismissal resulted from a plea to the jurisdiction. [100] A defendant calling a plea to the jurisdiction a Rule 91a motion to dismiss doesn't make it so: courts should look to the substance of the motion, not just what the lawyer called it. [101] The *Lexington* court re-affirmed this approach. It treated the Rule 91a motion as a plea to the jurisdiction and upheld the trial court's determination on subject-matter jurisdiction. It then sustained appellant's attack on the award of attorney's fees: "[I]f a trial court lacks jurisdiction to reach the merits, it does not reach a rule 91a motion." That meant the appellees were not prevailing parties on their Rule 91a motion and the trial court erred in awarding attorney's fees.[102]

A party can recover appellate attorney's fees; however, proof of appellate attorney's fees "must be offered in the trial court to provide the fact finder with an opportunity to calculate an award of reasonable and necessary attorney's fees." A request for appellate attorney's fees in the appellate court "comes too late."[103] Rule 91a states, "Any award of costs or fees must be based on evidence."[104] In this post-*El Apple* world, attorneys must be very mindful on presenting sufficient evidence on attorney's fees.[105]

E. Appellate Review

A defendant can seek review of the trial court's denial of a Rule 91a motion by mandamus.[106] A plaintiff can seek review of the grant of a Rule 91a motion by appeal when the granting of the motion results in a final judgment.

Plaintiffs seeking review of the granting of a Rule 91a motion to dismiss must be appealing a final judgment. For example, the Dallas Court of Appeals dismissed an appeal where the granted Rule 91a motion had asked for attorney's fees but the judgment didn't address that aspect of the requested relief. The court concluded there wasn't a final judgment that disposed of all parties and claims.[107] Other appeals have been dismissed when the plaintiff sued several defendants but not all the defendants had filed Rule 91 motions to dismiss, leaving several defendants unaccounted for in the trial court's order.[108] In those situations, a plaintiff wanting to appeal the granting of a Rule 91a motion to dismiss should ask the court to sever the dismissed claims from the other claims to render an otherwise interlocutory judgment final and appealable.[109]

The Fort Worth Court of Appeals dismissed an appeal because the order granting the motion to dismiss did not "order, adjudge, or decree anything." The signed order merely said that motion to dismiss "should be granted." The court of appeals noticed that the challenged order lacked decretal language that disposed of the motion and the case and "thus does not appear to be a final judgment for purposes of appeal." The court explained:

> The order before us has no decretal language. It recites that the trial court has reviewed the documents on file and believes Appellees' motion has merit and should be granted, but the order accomplishes nothing. It takes no judicial action. It neither grants nor denies relief on the motion, and it does not dispose of the case. Accordingly, we hold that the order is not a final judgment.[110]

A party is entitled to interlocutory review when a trial court "grants or denies a plea to the jurisdiction by a governmental unit."[111] But in a case where a plea to the jurisdiction by a governmental unit isn't disguised as Rule 91a motion to dismiss, parties won't be entitled to an interlocutory appeal. One Rule 91a movant unsuccessfully petitioned for a permissive appeal from an interlocutory order denying his Rule 91a motion. The court of appeals concluded the plaintiff "did not establish the statutory requirements for a permissive appeal."[112] It seems like asking for a permissive appeal adds a level of difficulty that could be avoided by going the mandamus route.

F. Rule 91a and Pro Se Litigants

While researching this update, I noticed that a seemingly disproportionate number of appeals from Rule 91a dismissals were by pro se litigants.[113] This shouldn't be too surprising. Unrepresented litigants are at a great disadvantage where there is procedural complexity in litigation. In a meta-analysis of published studies of the impact of lawyer representation, sociologist

Rebecca L. Sandefur found "lawyers affect case outcomes less by knowing substantive law than by being familiar with basic procedures." Lawyers "gain an advantage independent of the merits of any particular case, through their greater knowledge of the rules of the game."[114] After the United States Supreme Court announced more stringent pleading requirements in *Twombly* and *Iqbal*, William H. J. Hubbard found that plaintiffs' lawyers in federal courts were able to adapt to the new requirements—there has been no effect for represented plaintiffs, apparently because their lawyers "are consistently able to respond to a motion to dismiss by repleading in greater detail." But there has been "a statistically significant rise in the rate at which courts dismissed cases brought by pro se plaintiffs."[115] The number of pro se appeals of Rule 91a dismissals may reflect a similar phenomenon.

But the beatdown of pro se litigants over formalistic and technical pleading requirements may be waning. In *Li v. Pemberton Park Community Association*, the Texas Supreme Court reviewed its pleading standards for pro se litigants. The court noted that it had said in 1978 that there cannot be "two sets of procedural rules, one for litigants with counsel and the other for litigants representing themselves."[116] But, the court noted, "its more recent cases" have explained that "the application of a procedural rule—particularly one that 'turns on an actor's state of mind'—'may require a different result when the actor is not a lawyer. [This] does not create a separate rule, but recognizes the differences the rule itself contains.'"[117] The court further noted that, "This principle is applicable here, because courts' construction of a party's filings in part 'turns on [a litigant's] state of mind.'"[118] While the court was addressing the pro se litigant's response to a motion for summary judgment, this approach could also apply to Rule 91a dismissals. One court of appeals has reversed a Rule 91a dismissal against a pro se litigant (who also handled the appeal), noting the fair-notice standard governing pleadings and citing *Li*.[119]

V. Responsible Third Parties

A. Unknown Persons

The Texas Supreme Court has clarified when an unknown person may be designated as a responsible third party.[120] The defendant driver moved to designate John Doe as an unknown RTP, which the trial granted. The plaintiff filed a no-evidence and traditional summary-judgment motion, arguing that the defendant did not satisfy the pleadings requirements under Chapter 33 of the Civil Practice and Remedies Code. The trial court denied plaintiff's summary judgment motion and plaintiff unsuccessfully sought mandamus relief in the court of appeals. The plaintiff's luck changed in the Texas Supreme Court, which is a combination of words I don't often use.

The supreme court carefully reviewed the requirements for designating an "unknown person" as an RTP under section 33.004. While regular RTP's are to be designated by defendants 60 days before trial, defendants must initiate the process for designating an unknown RTP by alleging "not later than 60 days after the filing of the defendant's original answer" that "an unknown person committed a criminal act that was a cause of the loss or injury that is the subject of the lawsuit."[121] The trial court must grant the motion to designate the unknown RTP if:

> (1) the court determines that the defendant has pleaded facts sufficient for the court to determine that there is a reasonable probability that the act of the unknown person was criminal;
> (2) the defendant has stated in the answer all identifying characteristics of the unknown person, known at the time of the answer; and
> (3) the allegation satisfies the pleading requirements of the Texas Rules of Civil Procedure.[122]

The supreme court held that the defendant driver did not meet the subsection (j) predicate requirements because it had waited nearly two years and nine months before it first alleged in its second amended answer that an unknown person cause the accident, and it did not allege that John Doe committed any criminal act. [123] The defendant driver had argued that subsection (j) was not the exclusive means for designating an unknown person as an RTP. The court disagreed because "Subsection (j) is the only subsection that addresses the requirements for designating an 'unknown' person as a responsible third party, and it expressly provides that it applies '[n]otwithstanding' any other provision.[124]

The court also held that mandamus was an appropriate remedy, citing two of its opinions involving the designation of RPT's where it had granted petitions for mandamus. [125] Since the trial court abused its discretion, the issue was whether there was an adequate remedy by appeal. Following *Dawson*, the court held that "an ordinary appeal would be inadequate to protect the rights of a *plaintiff* when the trial court erroneously *grants* a defendant's belated motion for leave to designate a time-barred responsible third party."[126] The court concluded that "mandamus was appropriate to protect a plaintiff's right 'to not have to try her case against an empty chair' when the defendant fails to timely designate a third party."[127]

B. Time-Barred Responsible Third Parties

The empty chair argument is a reminder of the recurring problem with RTP's: defendants can reduce their liability by blaming a third party, but plaintiffs often cannot recover from that party. [128] The statute initially allowed a plaintiff to sue a designated RTP after limitations had run. That was too doctrinally weird and the statute was amended to generally allow the designation of time-barred RTP's. However,

> A defendant may not designate a person as a responsible third party with respect to a claimant's cause of action after the applicable limitations period on the cause of action has expired with respect to the responsible third party if the defendant has failed to comply with its obligations, if any, to timely disclose that the person may be designated as a responsible third party under the Texas Rules of Civil Procedure. [129]

Theoretically, the amendment would allow plaintiffs to sue timely disclosed RTP's directly once defendants disclose those potential RTP's. Practically, since most plaintiffs wait until the last minute to file suit, disclosures will almost always come too late.

In 2020, the Texas Supreme Court granted mandamus relief when the trial court denied a timely filed motion to designate an RTP.[130] The plaintiff was injured by the door of a construction trailer. Mobile Mini owned the trailer but had leased it to Nolana Self Storage. At the time of the accident, Nolana's contractor, Anar Construction, had exclusive control of the trailer. Nineteen days before limitations ran on tort claims arising from the accident, plaintiff sued Anar and Mobile Mini but not Nolana. The plaintiff served requests for disclosures with his petition. Mobile Mini timely filed an answer and timely served its discovery responses; however, both were due after the two-year limitations period had run. Mobile Mini identified Nolana as a potential RTP. Plaintiff subsequently amended his petition to add Nolana as a defendant; the next day Mobile Mini moved to designate Nolana as an RTP. The trial court ruled that the plaintiff's

tort claims against Nolana were time-barred. The plaintiff and Nolana then objected to Mobile Mini's motion to designate, arguing that Nolana could not be an RTP "once the limitations had expired."[131] The trial court agreed, denying Mobile Mini's request to designate Nolana. The court of appeals denied Mobile Mini's mandamus petition. The supreme court held that Mobile Mini was entitled to mandamus relief because (1) the trial court abused its discretion in denying the motion to designate and (2) Mobile Mini lacked an adequate remedy by appeal.[132]

The plaintiff, in essence, argued that Mobile Mini's "disclosure of Nolana as a responsible third party was not timely for section 33.004(d) purposes, even though Mobile Mini served its discovery responses within the time required by the Texas Rules of Civil Procedure, because Mobile Mini could have made the disclosure earlier than the due date."[133] The supreme court rejected this argument, holding the disclosure was timely under the rules. Mobile Mini "was not obligated to disclose potentially responsible third parties until its discovery responses were due."[134] The courts of appeals have also faced similar fact patterns and have held similarly, both before and after *Mobile Mini* was issued.[135]

The caselaw is pretty clear: plaintiffs' lawyers who wait until the last minute to file their lawsuits are the authors of their own misfortune. As the supreme court noted in *Mobile Mini*, "Mobile Mini's failure to disclose Nolana's identity before limitations expired was the natural consequence" of the plaintiff waiting "to file suit until limitations were nearing terminus…. Plaintiffs who wait until days before limitations expire to file suit do so at their peril." [136]

In another decision, the supreme court found the "applicable limitations period" language inapplicable, allowing defendants to designate the plaintiff's employer as a RTP more than five years after the injury to plaintiff. The defendants sought to designate the employer 62 days before the third trial setting and more than five years after the injury. The supreme court held that the designation 62 days before the trial setting, following *In re Coppola*, 535 S.W.3d 506 (Tex. 2017). And the designation wasn't filed after the applicable limitations period because there was no applicable limitations period against the plaintiff's employer—plaintiff's exclusive remedy against his subscriber employer would have been workers' compensation.[137]

C. Motions to Strike

Once an RTP has been designated and after adequate time for discovery, a party can move to strike the designation because "there is no evidence that the designated person is responsible for any portion of the claimant's alleged injury or damage. The court shall grant the motion to strike unless a defendant produces sufficient evidence to raise a genuine issue of fact regarding the designated person's responsibility for the claimant's injury or damage."[138] It's been a mixed bag on appellate review of grants and denials of motions to strike.[139]

D. Contribution and the Jury Charge

The Dallas Court of Appeals issued a very instructive opinion on what's needed in the jury charge for a contribution claim.[140] Ziehl, the driver of a vehicle, sued bus company and bus driver for his injuries. The bus driver sued Ziehl and his employer in another county; that lawsuit was consolidated with Ziehl's lawsuit in Dallas County. Ziehl's injured passengers then intervened in the Dallas County lawsuit. The case went to trial. The charge contained a comparative fault question; the jury determined the bus driver was 65% responsible and Ziehl was 35% responsible. The final judgment said the bus company and driver were entitled to contribution from Ziehl for 35% of all amounts awarded to Ziehl's passengers. On appeal, Ziehl argued that the charge was improper because jury had to determine each contribution defendant's percentage of responsibility. The bus company argued that the comparative fault question served both as a proportionate responsibility question for Ziehl's claims as a plaintiff and as a separate determination of responsibility for contribution. The wording of the statute directly contradicted the bus company's argument. Section 33.016 (c) states:

> The trier of fact shall determine as a separate issue or finding of fact the percentage of responsibility with respect to each contribution defendant and these findings shall be solely for purposes of this section and Section 33.015 and not as a part of the percentages of responsibility determined under Section 33.003. Only the percentage of responsibility of each defendant and contribution defendant shall be included in this determination.[141]

The court of appeals concluded that the Legislature's using "shall" three times in subsection 33.016(c) meant something:

> [T]he Legislature specifically and clearly imposed an obligation on the trier of fact to make a separate finding of the percentage of responsibility for each contribution defendant. The finding must be solely for the purpose of section 33.016 and cannot be part of the percentage of responsibility determined pursuant to section 33.003. Additionally, the statute requires that only the defendant and contribution defendant be included in this percentage of responsibility determination.[142]

Here, the bus company didn't ask for an instruction on section 33.016 (c) and the jury wasn't asked to make a determination on contribution. The statute specifically says that the comparative fault determination under section 33.003 can't be used when making the section 33.016 determination. The court concluded that the theory of recovery was waived and the bus company wasn't entitled to contribution because "the statute makes the question mandatory and the question was neither requested nor given."[143] After the bus company petitioned for review, the parties settled.

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1 Tex. R. Civ. P. 106.
2 Act of May 27, 2019, 86th Leg., R.S., Ch. 606 (S.B. 891), Sec. 10.04 (a).
3 Tex. R. Civ. P. 106.
4 Tex. R. Civ. P. 106 Cmt.
5 *Id.*
6 Sarah A. Nicolas, Anne M. Johnson, & Keenon L. Wooten, *Rules Update*, State Bar of Texas, 13th Annual Damages in Civil Litigation Course (Feb. 25, 2021).
7 *Fortunato v. Chase Bank USA, N.A.*, 2012 WL 2086950 (S.D.N.Y. June 7, 2012).
8 FED. R. CIV. P. 4(F)(3).
9 *Osio v. Maduro Moros*, 2021 WL 1564359 (S.D. Fla. April 21, 2021).
10 *Id.*
11 *Id.*
12 *Id.* (citing *Federal Trade Commission v. PCCare247 Inc.*, 2013 WL 841037 (S.D.N.Y. Mar. 7, 2013) (where the court permitted service via Facebook "to backstop the service upon each defendant at his, or its, known email address," and "not as the sole method of service").
13 *Capturion Network, LLC v. Liantronics, LLC*, 2021 WL 2697368 (S.D. Miss. June 30, 2021).
14 525 F. Supp.3d 518 (S.D. N.Y. 2021).
15 *Id.* at 525; *see also Convergen Energy LLC v. Brooks,* 2020 WL 4038353 (S.D.N.Y. July 17, 2020) (service by email approved for one defendant where plaintiffs showed it was reasonably calculated to notify that defendant of the lawsuit but denied for another defendant where plaintiffs failed to provide an email address or show that email was likely to reach that defendant).
16 *Parsons v. Shenzen Fest Technology Co., Ltd.*, 2021 WL 767620 (N.D. Ill. Feb. 26, 2021). In another federal district court case, the court allowed substituted service, ordering "substituted service by a variety of means: email, service by publication in three different newspapers, service by first class mail to all known addresses, service by first-class mail on Defendant Baca's mother, service by first-class mail on Charla Hicks, and notice by text message to Defendants' previously used phone." In subsequently granting a default judgment, the court found that the defendants had actual notice of the lawsuit as defendant Baca responded by text indicating receipt of the text from plaintiff notifying him of the lawsuit. *Viacom Int'l Inc. v. Baca*, 2018 WL 6003539 (D.N.M. Nov. 15, 2018).
17 Act of May 26, 2019, 86th Leg., R.S., Ch. 696 (S.B. 2342), Sec. 1.
18 Tex. R. Civ. P. 169 Cmt.
19 Tex. R. Civ. P. 47(c).
20 *Id.*
21 Tex. R. Civ. P. 169 (a)(1) (2013) (emphasis added).
22 Tex. R. Civ. P. 169 (a)(1).
23 Tex. R. Civ. P. 169(a)(2) (2013).
24 *See*, *e.g.*, Tex. Estates Code §§ 53.107, 1053.105.
25 Tex. R. Civ. P. 190.2 (b)(1) (2013).
26 Tex. R. Civ. P. 190.2 (b)(1).
27 Tex. R. Civ. P. 190.2 (b)(2) (2013).
28 Tex. R. Civ. P. 190.2 (b)(2).
29 Tex. R. Civ. P. 190 Cmt.
30 Tex. R. Civ. P. 194 Cmt. ("Rule 194 is amended based on Federal Rule of Civil Procedure 26(a) to require disclosure of basic discovery automatically, without awaiting a discovery request.").
31 Tex. R. Civ. P. 194.1 (a).
32 Tex. R. Civ. P. 194.1(b).
33 Tex. R. Civ. P. 194.2(b).
34 *See, e.g.,* Tex. R. Civ. P. 196.2.
35 Tex. R. Civ. P. 194.2-194.4.
36 Tex. R. Civ. P. 194.2(b)(6).
37 Tex. R. Civ. P. 194 Cmt.
38 Tex. R. Civ. P. 195.5.
39 Tex. R. Civ. P. 195.5(d).
40 Tex. R. Civ. P. 194.4(a).
41 Tex. R. Civ. P. 194.4(b).
42 Tex. R. Civ. P. 190.2(b)(1).
43 Tex. R. Civ. P. 190.3(b)(1).
44 Tex. R. Civ. P. 99(b).
45 Tex. R. Civ. P. 99(c) (emphasis added).
46 *Primate Construction, Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994) (per curiam).
47 *Luciano v. SprayFoamPolymers.Com, LLC*, 625 S.W.3d 1, 6 (Tex. 2021) (quoting *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1022 (2021)).
48 *Id.* at 10.
49 141 S. Ct. at 1026.
50 *Grassroots Leadership, Inc. v. Texas Dep't Fam. & Protect. Servs.,* No. 19-0092 (Tex. June 17, 2022) (per curiam).
51 *Id.* at *2-3 (citing *TransUnion LLC v. Ramirez,* 141 S. Ct. 2190 (2021).
52 *Draughon v. Johnson*, 631 S.W.3d 81 (Tex. 2021).
53 *Id.* at 85-86.
54 *Id.* at 87.
55 *Id.* at 88-89.
56 *Id.* at 97 (dissenting op.).
57 *In re Academy, Ltd.*, 625 S.W.3d 19 (Tex. 2021).
58 *In re United Services Automobile Ass'n*, 307 S.W.3d 299 (Tex. 2010) (orig. proceeding).
59 *In re Academy, Ltd.*, 625 S.W.3d at 36.
60 *Weekley Homes, LLC v. Paniagua*, No. 21-0197 (Tex. June 17, 2022) (per curiam); *Energen Res. Corp. v. Wallace*, 642 S.W.3d 502, 508-09 (Tex. 2022); *Regency Field Servs., LLC v. Swift Energy Operating, LLC*, 622 S.W.3d 807, 818-20 (Tex. 2021).

61 *In re Contract Freighters, Inc.,* No. 21-0134 (Tex. June 17, 2022) (per curiam).
62 *Id.* at *2.
63 *In re UPS Ground Freight, Inc.,* No. 20-0827 (Tex. June 17, 2022) (per curiam).
64 *Id.* at *3.
65 *Montelongo v. Abrea*, 622 S.W.3d 290 (Tex. 2021).
66 *See James W. Walker & Benjamin L. Wallen, Reining in the Texas Citizens Participation Act, 83* Tex. B. J. 234 (April 2020).
67 *Montelongo v. Abrea,* 622 S.W.3d at 295.
68 *Id*. at 296-297.
69 *Id.* at 301.
70 *Browder v. Moree,* No. 21-0691 (Tex. June 24, 2022) (per curiam) (op. on reh'g).
71 *Id.* at *2.
72 *Brainard v. Trinity Universal Ins. Co.,* 216 S.W.3d 809, 818 (Tex. 2006).
73 *Allstate Ins. Co. v. Irwin,* 627 S.W.3d 263, 270-271 (Tex. 2021).
74 *Id.* at 277 (dissenting op.)
75 *In re USAA Gen'l Indemnity Co.,* 624 S.W.3d 782, 790 (Tex. 2021) (orig. proceeding).
76 *Id.* at 791.
77 *In re Sandoval,* 619 S.W. 3d 716, 719-720 (Tex. 2021) (per curiam).
78 *WWLC Investment, L.P. v. Miraki,* 624 S.W.3d 796 (Tex. 2021) (per curiam).
79 *Spanton v. Bellah,* 612 S.W.3d 314 (Tex. 2020) (per curiam).
80 *Id.* at 316 (citations omitted).
81 *Id.* at 317-318.
82 Tex. R. Civ. P. 91a.3.
83 *Id.*
84 *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001).
85 *Malik v. GEICO Advantage Ins. Co*., No. 01-19-00489-CV (Tex. App.—Houston [1st Dist.] April 15, 2021, pet. denied) (mem. op.); *Medfin Manager, LLC v. Stone*, 613 S.W.3d 624 (Tex. App.—San Antonio 2020, rule 57.3 motion filed).
86 *Medfin Manager, LLC v. Stone,* 613 S.W.3d at 628-629.
87 *Malik v. GEICO Advantage Ins. Co.* at *5.
88 Tex. R. Civ. P. 91a.6.
89 *In re Farmers Texas County Mutual Ins. Co*., 621 S.W.3d 261, 272 (Tex. 2021) (citations omitted).
90 *Klassen v. Gaines County*, No. 11-19-00266-CV (Tex. App.—Eastland July 15, 2021, no pet.) (mem. op.).
91 *Envision Realty Group, LLC v. Chen*, No. 05-18-00613-CV (Tex. App.—Dallas March 5, 2020, no pet.) (mem. op.).
92 *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 656 (Tex. 2020).
93 *Id.*
94 *In re Commercial Credit Group Inc.,* No. 05-21-00115-CV (Tex. App.—Dallas May 11, 2021, orig. proceeding) (mem. op.).
95 *Reynolds v. Quantlab Trading Partners US*, 608 S.W.3d 549, 556-557 (Tex. App.—Houston 4th Dist.] 2021, no pet.).
96 Tex. R. Civ. P. 91a (2013) ("the court *must award* the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court").
97 Tex. R. Civ. P. 91a ("the court *may award* the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court").
98 Texas Supreme Court, Final Approval of Amendments to Texas Rule of Civil Procedure 91a.7, Misc. Docket No. 19-9108 (Nov. 12, 2019).
99 *Edinburg Housing Authority v. Ramirez*, No. 13-19-00269-CV (Tex. App.—Corpus Christi Feb. 25, 2021, no pet.) (mem. op.).
100 *Dallas County Republican Party v. Dallas County Democratic Party*, No. 05-18-00916-CV (Tex. App.—Dallas Aug. 26, 2019, pet denied) (mem. op.); *but see Edinburg Housing Authority v. Ramirez*, No. 13-19-00269-CV (Tex. App.—Corpus Christi Feb. 25, 2021, no pet.) (mem. op.).
101 *Lexington v. Treece*, No. 01-17-00228-CV (Tex. App.—Houston [1st Dist.] July 13, 2021, pet. filed) (mem. op).
102 *Id.* at *19.
103 *Lecody v. Anderson*, No. 07-20-00020-CV (Tex. App.—Amarillo March 30, 2021, no pet.) (mem. op.).
104 Tex. R. Civ. P. 91a.
105 *See* Mark E. Steiner, *Will* El Apple *Today Keep Attorney's Fees Away*?, 19 Journal of Consumer and Commercial Law 114 (2016), *trashed by, Rohrmoos Venture v. UTSW DVA Healthcare*, 578 S.W. 3d 469, 499-500 (Tex. 2019).
106 *In re Farmers Tex. County Mut. Ins*., 621 S.W.3d 261, 266 (Tex. 2021) (orig. proceeding); *In re Houston Astros, LLC*, No. 14-20-00769 (Tex. App.—Houston [14th Dist.] July 15, 2021, orig. proceeding) (per curiam) (mem. op.); *In re Commercial Credit Group, Inc*., No. 05-21-00115-CV (Tex. App.—Dallas May 11, 2021, orig. proceeding) (mem. op.).
107 *Day Invest. Group, LLC v. Dauch,* No. 05-20-00625-CV (Tex. App.—Dallas April 19, 2021, no pet.) (mem. op.).
108 *See, e.g., Tamborello v. Town of Highland Park*, No. 05-20-00755-CV (Tex. App.—Dallas April 20, 2021, no pet.) (mem. op.); *Gettings v. Goosehead Ins. Agency*, No. 02-21-00012-CV (Tex. App.—Fort Worth March 11, 2021, no pet.) (per curiam) (mem. op.).
109 *See Tamborello v. Town of Highland Park* at *1.
110 *Shetewy v. Mediation Inst. of North Texas, LLC*, 624 S.W.3d 285, 288 (Tex. App.—Fort Worth 2021, no pet.).
111 Tex. Civ. Prac. & Rem. Code § 51.014 (a) (8); *see also San Jacinto River Auth. v. Medina*, 627 S.W.3d 618 (Tex. 2021).
112 *Bird v. Anderson*, No. 03-21-00140 (Tex. App.—Austin June 24, 2021, pet. denied) (mem. op.).
113 *See, e.g., In re R.N.F,* No. 13-21-00007-CV (Tex. App.—Corpus Christi April 28, 2022, no pet.) (mem. op.); *Sammour v. Adler,* No. 02-21-00086-CV (Tex. App.—Fort Worth March 31, 2022, no pet.) (mem. op.); *Light v. Vistra Energy,* No. 10-18-00330-CV (Tex. App.—Waco Oct. 13, 2021, no pet.) (mem. op.); *Tamborello v. Town of Highland Park,* No. 05-20-00755-CV (Tex. App.—Dallas April 20, 2021, no pet.) (mem. op.); *Malik v. GEICO Advantage Ins. Co.,* No. 01-19-00489-CV (Tex. App.—Houston [1st Dist.] April 15, 2021, pet. denied) (mem. op.); *Gettings v. Goosehead Ins. Agency,* No. 02-21-00012-CV (Tex. App.—Fort Worth March 11, 2021, no pet.) (per curiam) (mem. op.).
114 Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers' Impact,* 80 Am. Sociological Rev. 909, 910 (2015).
115 William H. J. Hubbard, *The Effects of Twombly and Iqbal, 14* J. Empirical Studs. 474, 498, 507 (2017).
116 *Li v. Pemberton Park Community Ass'n,* 631 S.W.3d 701, 705-706 (Tex. 2021) (per curiam) (quoting *Mansfield State Bank v. Cohn,* 573 S.W.2d 181, 184-85 (Tex. 1978)).
117 *Id.* at 706 (quoting *Wheeler v. Green,* 157 S.W.3d 439, 444 (Tex. 2005)).
118 *Id.*
119 *Minor v. Diverse Facility Solutions, Inc.,* No. 04-20-00526-CV (Tex. App.—San Antonio Nov. 10, 2021, no pet.) (mem. op.).
120 *In re Gonzales*, 619 S.W. 3d 259 (Tex. 2021).
121 Tex. Civ. Prac. & Rem. Code §33.004(j).

122 *Id.*
123 *In re Gonzales*, 619 S.W. 3d at 262.
124 *Id.* at 262-263.
125 *Id.* at 264-265 (citing *In re Dawson*, 550 S.W.3d 625 (Tex. 2018) (orig. proceeding); *In re Coppola*, 535 S. W. 3d 506 (Tex. 2017) (orig. proceeding)).
126 *Id*. at 265 (citing *Dawson*, 550 S.W.3d at 630).
127 *Id.* at 265 (quoting *Dawson*, 550 S.W.3d at 629).
128 *See id.* at 264.
129 Tex. Civ. Prac. & Rem. Code §33.004(d).
130 *In re Mobile Mini, Inc.*, 596 S.W. 3d 781 (Tex. 2020) (per curiam).
131 *Id.* at 783.
132 *Id.*
133 *Id*. at 784.
134 *Id.*
135 *See, e.g., In re VC PalmsWestheimer*, 615 S.W.3d 655 (Tex. App.—Houston [1st Dist.] 2020, orig. proceeding); *In re Bertrand*, 602 S.W.3d 691 (Tex. App.—Fort Worth 2020, orig. proceeding); *In re MAF Indus.*, No. 13-20-00255-CV (Tex. App.—Corpus Christi Oct. 19, 2020, orig. proceeding) (mem. op.); *Sanchez v. Castillo*, No. 05-18-01033-CV (Tex. App.—Dallas March 4, 2020, no pet.) (mem. op.).
136 *In re Mobile Mini, Inc*., 596 S.W. 3d at 785.
137 *In re YRC Inc.,* No. 21-0846 (Tex. June 17, 2022) (per curiam).
138 Tex. Civ. Prac. & Rem. Code §33.004 (l)
139 *See, e.g., In re Kilmer*, No. 05-20-00814-CV (Tex. App.—Dallas April 7, 2021, orig. proceeding) (mem. op.); *Gregory v. Chosan*, 615 S.W.3d 277 (Tex. App.—Dallas 2020, orig. proceeding); *In re Eagleridge Operating, LLC*, No. 05-19-01171-CV (Tex. App.—Dallas Jan. 24, 2020, orig. proceeding) (mem. op.).
140 *Ziehl v. Tornado Bus Co*., No. 05-19-00901-CV (Tex. App.—Dallas April 22, 2021, pet. granted & judgment vacated) (mem. op.).
141 Tex. Civ. Prac. & Rem. Code §33.016(c).
142 *Ziehl v. Tornado Bus Co*. (citations omitted).
143 *Id.*

In *Morgan v. Sundance*, the Supreme Court Strikes a Blow Against Arbitration Exceptionalism

By Karla Gilbride*

For a court that hears only around 80 argued cases each term,[1] the U.S. Supreme Court has had a great deal to say in the past forty years about arbitration, deciding over 180 cases on that topic since 1982. Many articles have been written about the Court's arbitration jurisprudence over these decades, but for the sake of brevity, it can be boiled down to the following key themes: the Federal Arbitration Act ("FAA") covers lots of contracts[2] and applies in lots of courts,[3] requiring arbitration of all types of disputes.[4] And if a state law, whether of legislative or judicial origin, limits arbitration or interferes with one of its fundamental attributes, then the FAA probably preempts it.[5]

But in the past three years, a shift in the Supreme Court's approach to arbitration under the FAA has begun to emerge, rooted in the strong textualist leanings of many of its current members. First, in 2019, Justice Gorsuch wrote an opinion for a unanimous Court, with Justice Ginsburg writing a separate concurrence, in which he held that the exemption in the FAA for "contracts of employment" of transportation workers applied regardless of whether the person performing the work was an employee or an independent contractor.[6] In rejecting the employer's argument that the exemption should be read more narrowly because the FAA embodies a "liberal federal policy favoring arbitration agreements," Justice Gorsuch noted that courts may not "pave over bumpy statutory text in the name of more expeditiously advancing a policy goal."[7]

Then, earlier this year, in another unanimous opinion, this time written by Justice Kagan, the Court knocked this federal pro-arbitration policy off of its pedestal once and for all. Though that case, *Morgan v. Sundance*, was about the rules governing waiver of the right to compel arbitration, it will have implications far beyond that context. That's because it reconciled two tenets of the Supreme Court's FAA jurisprudence that have sometimes seemed at odds with one another: that agreements to arbitrate must be placed on the same footing as other contracts,[8] and that there is a liberal federal policy favoring arbitration.[9] Justice Kagan explained that these two concepts are not in tension with each other at all, but instead are two different ways of saying the same thing.[10]

Waiver and the Prejudice Requirement: An Arbitration Exceptionalism Case study

Waiver is the "intentional relinquishment or abandonment of a known right."[11] While the concept may be most familiar in the context of Constitutional rights, rights afforded by contract can be waived as well. And when most courts analyze waiver of most contractual rights, they impose a two-part test: did the waiving party know about the right at issue, and did he or she act in a manner inconsistent with an intent of enforcing it—in other words, did the statements or actions indicate an intent to relinquish the right?[12]

But when the contractual right at issue was the right to require disputes to be resolved in arbitration rather than court, most federal and many state courts had added a third element to the waiver test. Even if a defendant knew of its right to compel arbitration and acted inconsistently with that right by filing dispositive motions and engaging in discovery in court, none of this would constitute a waiver of that party's right to later insist on compliance with an arbitration agreement *unless* the plaintiff could also prove that the defendant's inconsistent actions in court had caused the plaintiff harm or prejudice. And the party asserting waiver had the burden of proving they had been prejudiced. This was a marked departure from the common-law standard of contractual waiver outside the arbitration context, which courts and commentators both describe as a unilateral inquiry focused only on the actions of the waiving party.[13]

The party asserting waiver had the burden of proving they had been prejudiced. This was a marked departure from the common-law standard of contractual waiver outside the arbitration context.

In explaining why they were treating waiver of the right to arbitrate differently from waiver of other contractual rights, courts cited over and over again to the liberal federal policy favoring arbitration embodied by the FAA. They reasoned that because of that pro-arbitration policy, it should be harder for parties to waive the right to insist on arbitration than to waive other contractual rights.[14]

This legal landscape was already well-established when Robyn Morgan began working for Taco Bell franchise Sundance Inc. as an hourly employee in 2015.[15] After realizing that Sundance was manipulating her and other workers' time records by moving hours from one pay period to another so that the federal threshold for overtime was never triggered, regardless of how many hours they actually worked, Morgan filed suit under the Fair Labor Standards Act.[16]

Sundance had required Morgan to commit, as part of her job application, that she would resolve any disputes with the company in arbitration, but once Morgan filed her lawsuit Sundance did not promptly invoke that provision and move to compel arbitration under the FAA. Instead Sundance moved to dismiss the lawsuit or combine it with an earlier lawsuit filed in Michigan; answered the complaint (listing fourteen affirmative defenses, none of which mentioned arbitration); and tried to settle the lawsuit on a nationwide basis.[17] Only after all of these tactics failed, eight months into the litigation, did Sundance move to enforce its arbitration provision.[18]

Morgan responded that Sundance had waived its right to compel arbitration by actively engaging in litigation for months, and the district court agreed. But the Eighth Circuit reversed, because like eight other federal courts of appeals and many state high courts, it had previously adopted the arbitration-specific prejudice requirement for waiver, and concluded that Morgan failed to prove she was prejudiced.[19]

And so, the stage was set for the petition for certiorari my colleague Leah Nicholls and I filed in 2021.[20] In that petition, we argued that the arbitration-specific prejudice requirement violates the text of the FAA. In November of 2021, the Court took the case, and I argued it in March of 2022.

Equal Means Equal: The FAA Does Not Permit Special Rules to Favor Arbitration

Section 2 of the FAA states that written agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any contract*."[21] The Supreme Court has described this language in § 2 as "the FAA's substantive command that arbitration agreements be treated like all other contracts."[22] So, we argued in our opening brief on behalf of Ms. Morgan, the Eighth Circuit and other courts that require prejudice as an element of waiver for arbitration agreements but not for other types of contracts were violating this substantive command of the FAA, which has often been described as its "equal-treatment" or "equal-footing" principle.[23]

Sundance responded that the equal-treatment principle was in fact

simply a command that arbitration agreements not be treated *worse than* other types of contracts.[24] Indeed, Sundance reasoned, because the Supreme Court's opinion in *Concepcion* described the equal-footing principle as being "in line with" the liberal federal policy favoring arbitration, § 2 should be understood as adopting a "most-favored-nations-clause approach to arbitration, rather than a strict regime of equal treatment."[25] In other words, Sundance's view was that § 2 provides only a floor below which treatment of arbitration agreements cannot sink. And because of the liberal policy favoring arbitration, courts could craft any arbitration-favoring rules at all, including the arbitration-specific prejudice rule at issue in *Morgan*, without running afoul of the FAA.

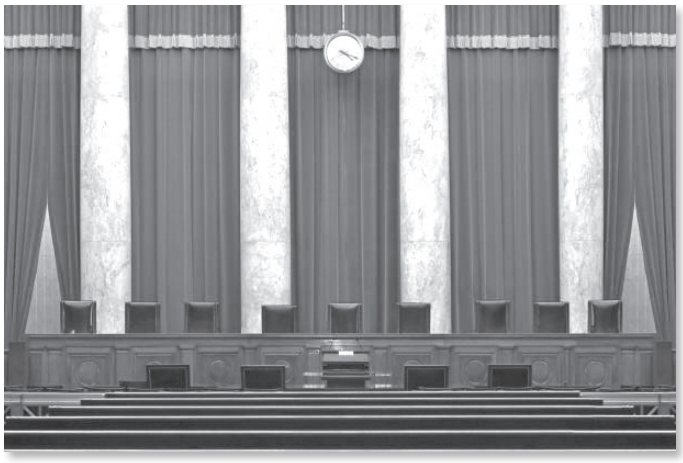
In its opinion, the Supreme Court soundly rejected the notion that the FAA could justify such arbitration-favoring rules. In the process, it abrogated numerous federal court opinions from nine circuits that explicitly required prejudice as an element of waiver in the arbitration context.[26]

This, in itself, is a significant change in the law. It means that from now on, when parties know they have arbitration clauses but think they might want to litigate in court for a while to see if they can get a dispositive ruling on the merits or gain additional information through discovery not available in arbitration, they will have to think carefully about whether to engage in such tactics in court, lest they risk waiving their right to insist on arbitration later. In short, parties will no longer be able to use their arbitration provisions as a get-out-of-court-free card to be played only when things go badly in the judicial forum, counting on the prejudice requirement as the ripcord that will ensure their parachute to the arbitral forum deploys successfully. Arbitration rights will be treated like all other contractual rights, subject to waiver based on the inconsistent actions of the waiving party alone.

But what's even more significant about the opinion in *Morgan* is what it said about why the federal courts that had crafted this "bespoke rule of waiver for arbitration"[27] were wrong to do so. Justice Kagan explained that the federal policy favoring arbitration, on which these courts had relied, "' "is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts.'"[28] In other words, arbitration had been disfavored as a method of dispute resolution prior to the FAA's enactment, and the FAA was intended to end that least-favored-nation status by placing arbitration agreements on terms of equality with other contracts. Understood in this context, the "policy favoring arbitration" that the FAA embodies is a policy to end the historical stigma against arbitration, thus favoring it more than it had been favored previously; it is neither a policy favoring arbitration over litigation nor a policy favoring arbitration agreements over other types of contracts.

In case the historical explanation and the extended quotation from *Teamsters* hadn't made this point about the federal policy favoring arbitration and its limits sufficiently clear, Justice Kagan repeated it, several times, in different eminently quotable formulations. "The federal policy is about treating arbitration contracts like all others, not about fostering arbitration."[29] And "a court may not devise novel rules to favor arbitration over litigation."[30] Finally, lifting up a line from an earlier Supreme Court opinion that had previously been relegated to relative obscurity in a footnote, the Court in Morgan put an end, once and for all, to the idea that the FAA confers most-favored-clause status on agreements to arbitrate: rather, the federal policy of the FAA "is to make 'arbitration agreements as enforceable as other contracts, *but not more so*.'"[31]

Defendants seeking to enforce agreements to arbitrate have relied heavily on the federal policy favoring arbitration over



the years, and have sometimes imbued it with talismanic powers to overcome other evidentiary or legal shortcomings. Questions about whether there was sufficient notice of an online arbitration agreement or whether the ambiguous act of clicking a "continue" or "subscribe" button manifested assent? Liberal federal policy favoring arbitration![32] Doubts about whether an ambiguously worded arbitration clause covers a particular dispute? Liberal federal policy favoring arbitration![33] The defendant debt collector wasn't a party to the original loan agreement and can't enforce it through traditional, generally-applicable doctrines like agency or third-party beneficiary status! Make up a new, arbitration-specific rule, pair it with the liberal federal policy favoring arbitration, and call it something like "direct benefits estoppel" or "intertwined claims estoppel!"[34]

In the wake of the Supreme Court's opinion in *Morgan*, with the liberal federal policy favoring arbitration explained as merely another formulation of the equal-treatment principle, defendants will still be able to use the FAA's substantive command in § 2, along with generally-applicable contract principles, to seek enforcement of their arbitration provisions. But they will no longer be able to use the liberal federal policy as an all-powerful tiebreaker, or a mechanism for throwing out existing contract rules and creating new ones specific to the arbitration context. Arbitration clauses are neither most-favored nor least-favored but must be equally-favored to other contract provisions, treated no worse but also no better. And if a court—whether federal or state, trial or appellate—seems inclined to lose sight of this teaching from *Morgan*, it should be reminded that "a court may not devise novel rules to favor arbitration over litigation."[35]

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1 https://www.supremecourt.gov/about/courtatwork.aspx (last visited Aug. 23, 2022).

2 *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) (FAA covers employment contracts, except those of transportation workers); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 282 (1995) (FAA covered contract for termite extermination because Congress invoked the far limits of its Commerce Clause power in enacting the FAA).

3 *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (FAA applies in state as well as federal court).

4 *E.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27 (1991) (requiring arbitration, under contract governed by FAA, of federal civil rights claims); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985) (requiring arbitration, in accordance with contract, of Sherman Act antitrust claims).
5 *E.g.*, *Kindred Nursing Ctrs. Ltd. P'Ship v. Clark*, 137 S. Ct. 1421, 1428 (2017) (Kentucky court rule that required "clear statement" before an agent could sign contracts that waived principal's Constitutional rights was preempted by FAA); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342-44 (2011) (California court rule prohibiting class-action waivers in consumer contracts was preempted because it interfered with arbitration's fundamental attribute of streamlined, bilateral proceedings).
6 *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539-41 (2019).
7 *Id.* at 543.
8 *E.g.*, *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 475 (1989).
9 *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).
10 *Morgan v. Sundance Inc.*, 142 S. Ct. 1708, 1713 (2022).
11 *United States v. Olano*, 507 U.S. 725, 733 (1993).
12 *See Loan Mountain Prod. Co. v. Nat. Gas Pipeline Co. of Am.*, 984 F.2d 1551, 1557 (10th Cir. 1992) ("Waiver can be express or implied, and exists when one has an intent not to require strict compliance with a contractual duty[.]").
13 *E.g.*, *Best Place, Inc. v. Penn Am. Ins. Co.*, 920 P.2d 334, 353 (Haw. 1996) ("Waiver is essentially unilateral in character, focusing only upon the acts and conduct of the [waiving party]."); *Old Republic Ins. Co. v. FSR Brokerage, Inc.*, 80 Cal. App. 4th 666, 678 (Cal. Ct. App. 2000) ("*pivotal* issue in a claim of waiver is the intention of the party who allegedly relinquished the known legal right" as waiver "does not require any act or conduct by the other party" (emphasis in original)); 28 Am. Jur. 2d Estoppel and Waiver § 35 (2011) ("The intent to relinquish a right is a necessary element of waiver but not of estoppel while detrimental reliance is a necessary element of estoppel but not of waiver.").
14 *Carcich v. Rederi A/B Nordie*, 389 F.2d 692, 696 (2d Cir. 1968) (first federal court opinion to impose a prejudice requirement and attributing that new requirement to the "overriding federal policy favoring arbitration"); *Carolina Throwing Co. v. S & E Novelty Corp.*, 442 F.2d 329, 331 (4th Cir. 1971) (describing prejudice requirement as "[t] he modern rule based on a liberal national policy favoring arbitration"); *Perry Homes v. Cull*, 258 S.W.3d 580, 594-95 (Tex. 2008) (requiring prejudice for waiver by litigation conduct of right to arbitrate) (noting that Texas law does not require prejudice for waiver of other contractual rights but requiring it for arbitration); *David v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 440 N.W.2d 269, 274 (N.D. 1989) ("More is required [for waiver] than action inconsistent with the arbitration provision" because of the "federal policy favoring arbitration").
15 *Morgan*, 142 S. Ct. at 1711.
16 *Id.*
17 *Id.*
18 *Id.*
19 *Id.* at 1712 (citing 992 F.3d 711, 713-715 (2021)).
20 2021 WL 3931342 (Aug. 27, 2021). Also available at https://www.scotusblog.com/case-files/cases/morgan-v-sundance-inc/ (last visited Aug. 24, 2022).
21 9 U.S.C. § 2 (emphasis added).
22 *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440, 447 (2006).
23 2021 WL 6286090 (Dec. 30, 2021). Also available at https://www.scotusblog.com/case-files/cases/morgan-v-sundance-inc/ (last visited Aug. 24, 2022).
24 2022 WL 41395 8(Feb. 4, 2022). Also available at https://www.scotusblog.com/case-files/cases/morgan-v-sundance-inc/ (last visited Aug. 24, 2022).
25 *Id.* ("As long as arbitration agreements are enforced *at least as favorably* as other contracts, Section 2 is not offended.") (emphasis added).
26 *Morgan*, 142 S. Ct. at 1712 and n.1.
27 *Id.* at 1713.
28 *Id.* (quoting *Granite Rock Co. v. Int'l Bhd. Of Teamsters*, 561 U.S. 287, 302 (2010)).
29 *Id.*
30 *Id.*
31 *Id.* (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967)) (emphasis added).
32 Courts have actually held for some time that the federal pro-arbitration policy has no bearing on whether a contract to arbitrate was formed in the first place or whether that contract was valid, *see Fleetwood Enters. Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002)*, but this has not stopped litigants from invoking it to attempt to place a thumb on the scale in such contract formation disputes.,*
33 *Calderon v. sixt Rent a Car LLC*, 5 F.4th 1204, 1215-20 (11th Cir. 2021) (Newsom, J., concurring).
34 *Hays v. HCA Holdings, Inc.*, 838 F.3d 605, 609-10 (5th Cir. 2016) (applying Texas law).
35 *Morgan*, 142 S. Ct. at 1713.

DECEPTIVE TRADE PRACTICES AND WARRANTY

DTPA CLAIM IS BARRED BY THE ECONOMIC LOSS DOCTRINE

Holubets v. Forest River, Inc., ___ F. Supp.3d ___ (W.D. Tex. 2022).
https://www.govinfo.gov/content/pkg/USCOURTS-txwd-1_21-cv-01004/pdf/USCOURTS-txwd-1_21-cv-01004-0.pdf

FACTS: Plaintiff Paul Holubets ("Holubets") purchased a new recreational vehicle ("RV") from a third-party seller. After purchase, he experienced defects with the materials and quality of the RV. Holubets sent the RV back to the manufacturer, Defendant Forest River, Inc. ("Forest River") three times for repairs. After the second repair, Holubets identified six repairs that were not addressed and sent the vehicle back to Forest River for a third and final time. As a result of the defects rendering the vehicle unavailable for use, Holubets and his wife rented a studio apartment. Holubets brought six causes of action against Forest River, including violation of the DTPA, seeking economic and actual damages. Additionally, Holubets sought to rescind the original sales contract. However, Forest River was not a party to the sales contract because it was merely the manufacturer of the RV.

Forest River moved to dismiss Holubets' claims under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Forest River further argued that Holubets' claims were barred by the economic loss doctrine.

HOLDING: Grant recommended.

REASONING: Forest River argued that Holubets' claims, including the DTPA claim, fell within the economic loss doctrine because the only loss or damage arising from these claims was the subject matter of the contract itself. Here, the subject matter at issue was the warranty and repair agreements included in the contract.

The court held these are claims that fall under a breach of contract, not violations of the DTPA.

The court held that Holubets' DTPA claim was barred by the economic loss doctrine because his claim rested on allegations that Forest River falsely advertised the RV to be both functioning and of high quality. The court held these are claims that fall under a breach of contract, not violations of the DTPA. The economic loss doctrine precludes recovery for economic losses resulting from the failure of a party to perform under a contract. The doctrine also precludes recovering from losses that are the subject matter of a contract between the parties. More specifically, the court emphasized the importance of the distinction between claims under a breach of contract and a claim constituting a deceptive act in violation of the DTPA. Without a clear distinction between the two, every breach of contract claim could convert into a DTPA claim. Thus, the court held the DTPA claim was barred by the economic loss doctrine because the only loss or damage arising from these claims were to the warranty and repair agreements.

DTPA AND INSURANCE CODE CLAIMS FAIL TO COMPLY WITH RULE 9(b)

Finger Oil & Gas, Inc. v. Mid-Continent Cas. Co. & Marsh USA, Inc., ___ F. Supp.3d ___ (W.D. Tex. 2022).
https://casetext.com/case/finger-oil-gas-inc-v-mid-continent-cas-co-2

FACTS: Plaintiff Finger Oil & Gas, Inc. ("Finger Oil") purchased an insurance policy with a coverage-modifying Oil and Gas Endorsement from Defendant Mid-Continent Causality Company ("Mid-Continent"). Co-Defendant Marsh USA, Inc. ("Marsh") brokered the insurance transaction. After one of Finger Oil's wells experienced a blow-out, Finger Oil inquired with Marsh about coverage of the incident. A commercial-lines manager with Marsh sent an email to Finger Oil confirming the "blowout and cratering coverage" included in the insurance policy, and its limits. Before coverage of the claim was final approved by Mid-Continent, Finger Oil interpreted Marsh's email as a representation of coverage for the claim and contracted to retain services for repairs. Mid-Continent subsequently denied Finger Oil's coverage claim, citing the policy's general exclusion of property damage and the Endorsement's exclusion. Finger Oil sued Mid-Continent and Marsh for misrepresentation in violation of the Texas Insurance Code and DTPA.

The district court ordered Finger Oil to file an amended complaint to clarify its factual allegations and conform with federal pleading requirements. Finger Oil failed to timely file an amended complaint. Marsh and Mid-Continent moved for summary judgment. The district court granted Marsh's motion in full and granted Mid-Continent's in part. Specifically, the district court dismissed Finger Oil's DTPA and Insurance Code claims against both defendants, for failure to comply with Federal Rule of Civil Procedure 9(b). Finger Oil filed a motion to reconsider its DTPA and Insurance Code claims premised on Mid-Continent's alleged misrepresentations.

HOLDING: Re-affirmed.

REASONING: Finger Oil alleged it had contacted a commercial lines account manager for Marsh prior to contracting for repairs and that the manager had stated that the "blowout and cratering coverages" were included within the limits of insurance.

The district court found Finger Oil's pleadings insufficient, holding that Finger Oil's Original Petition, without more, failed to comply with Rule 9(b). Rule 9(b) requires plaintiffs to (1) articulate elements of fraud with particularity, (2) specify the statements contended to be fraudulent, (3) identify the speaker, (4) state when and where the statements were made, and (5) explain why the statements were fraudulent. The court determined Finger Oil's Original Petition did not comport with Rule 9(b) because it did not specify when Mid-Continent made the alleged misrepresentation or why it was false. Because the Original Petition did not include more detailed allegations, Finger Oil's DTPA and Insurance Code Claims were improperly pleaded under Rule 9(b), and the judgment was re-affirmed.

DTPA CLAIM IS PREEMPTED BY THE CARMACK AMENDMENT

Ahe v. 1-800-Pack-Rat, LLC, ___ F. Supp.3d ___ (N.D. Tex. 2022).
https://casetext.com/case/von-der-ahe-v-1-800-pack-rat-llc

FACTS: Tommy Von Der Ahe ("Tommy") and his mother, Emmy Von Der Ahe ("Emmy") (collectively, "the Von Der Ahes"), contracted with Defendant Zippy Shell for moving services from Alabama to Texas. The contract with Zippy Shell included an extra "Contents Protection Plan." Per the agreement, Zippy Shell would deliver a pod to Tommy's Alabama residence, where it would be loaded with belongings and then transported to Texas. The pod was to be delivered to an intermediary location and partially unloaded. Afterwards, the pod was to be stored in Dallas County until Tommy needed the pod at his new residence in Dallas.

The court agreed with Zippy Shell, citing previous Fifth Circuit precedent, holding claims for damages under the DTPA were preempted by the Carmack Amendment.

The pod was successfully delivered to the intermediary location where it was partially unloaded and then stored locally. Weeks later, the Von Der Ahes requested that the pod be delivered to Tommy's new residence. However, Zippy Shell could not locate the pod or Tommy's belongings. The Von Der Ahes received an email from a "1-800-Pack-Rat" email address that contained a photo of a pod found at Zippy Shell's Carrollton, Texas location with a request to confirm if the pictured pod belonged to the Von Der Ahes. When Tommy visited the Carrollton, Texas location and inspected the pod, all items of monetary value were missing.

The Von Der Ahes filed their original petition in state court claiming DTPA violations. Zippy Shell removed the action to federal district court and filed a motion to dismiss the original petition for failure to state a claim.

HOLDING: Granted.

REASONING: The Von Der Ahes' claimed Zippy Shell violated the Texas DTPA by "misrepresenting that the Contract conferred or involved rights and remedies it did not, and failing to disclose information about services that w[ere] known at the time of the transaction." Namely, misrepresenting the storage location as "safe and secure" and that the "content protection" was in place at the time of the transaction. Zippy Shell however, contended the claims arose out of a contract for shipment of interstate goods and were preempted by the Carmack Amendment, which holds a common carrier liable for actual loss or damages to goods arising from interstate transport of goods under 49. U.S.C. § 14706, not the DTPA.

The court agreed with Zippy Shell, citing previous Fifth Circuit precedent, holding claims for damages under the DTPA were preempted by the Carmack Amendment. Although some courts have found exceptions to the preemptions of DTPA claims by the Carmack Amendment, the exceptions are specific, statutory exceptions for when false, misleading, or deceptive practices occur before there is contract for interstate shipment of goods.

Here, the court finds that the Von Der Ahes' state law DTPA claim is preempted by the Carmack Amendment because, as presently pleaded, it arises from the interstate shipment of household goods. The Von Der Ahes' allegations that Zippy Shell was aware that the storage facility would not be safe and secure cannot be accepted as true because the claim is not backed by supporting facts. With no additional facts, the Von Der Ahes' DTPA claims do not meet any of the exceptions. Because the Von Der Ahes' DTPA claims did not meet any of the limited and narrowly applied exceptions, the court concluded the Von Der Ahes' DTPA claim was preempted by the Carmack Amendment.

DEBT COLLECTION

PLAINTIFF LACKS ARTICLE III STANDING IN DEBT COLLECTION SUIT

Sexton v. Target Corp. Servs., ___ F. Supp.3d ___ (E.D. Wis. Jul. 19, 2022).
https://casetext.com/case/sexton-v-target-corp-servs

FACTS: Plaintiff Tamara Sexton ("Sexton") received a letter about a debt she allegedly owed to TD Bank, an issuer of Target store-branded credit cards. The debt collection letter purportedly accelerated the installment payment due, described the installment as late, and placed Sexton's account into default, even though the letter was mailed two weeks before the payment was due.

Sexton filed a class action in state court against TD Bank and Target (collectively, "Defendants") alleging violations of the Wisconsin Consumer Act ("WCA"), which requires that a merchant provide a customer with notice of default and the customer's right to cure the default before a lender may accelerate the balance of a consumer credit transaction. The Defendants removed the action to federal court under the Class Action Fairness Act ("CAFA"). Sexton moved to remand the case back to state court for lack of subject matter jurisdiction.
HOLDING: Granted.
REASONING: Sexton argued her complaint fails to allege a concrete injury in fact and thus lacked Article III standing to pursue her WCA claims in federal court. The court agreed, holding that a case removed from state court must be remanded if it appears that the district court lacks subject matter jurisdiction.

Under the Supreme Court's ruling in *Trans Union LLC v. Ramirez,* a case or controversy under Article III requires a plaintiff to have a personal stake in the case. Under the Court's landmark decision in Lujan v. Defenders of Wildlife, standing requires: (1) a concrete and particularized injury in fact, (2) fairly traceable to the challenged conduct of the Defendant, and (3) likely redressable by a favorable judicial decision.

Sexton's complaint failed to allege she suffered a concrete injury in fact.

The court determined Sexton's complaint failed to allege she suffered a concrete injury in fact, mainly because an FDCPA violation must have presented an appreciable risk of harm to the underlying concrete interest that Congress sought to protect. Since Sexton's allegations regarding Defendants' alleged violations of the WCA were indistinguishable from those held as insufficient by the Seventh Circuit to allege a concrete injury in fact for Article III standing in the FDCPA context, i.e., that Defendant's letter was "misleading, deceptive and unconscionable, and did not fairly provide consumers with notice of their right to cure default," Sexton lacked Article III standing in her debt collection suit.

NONSIGNATORY TO CREDIT CARD AGREEMENT CANNOT COMPEL ARBITRATION IN DEBT COLLECTION CASE

Estrada v. The Moore Law Group, APC, ___ F. Supp.3d ___ (C.D. Cal. July 11, 2022).
https://buckleyfirm.com/sites/default/files/Buckley%20Infobytes%20-%20Estrada%20vs.%20The%20Moore%20Law%20Group-%20Order%20-%202022.07.11.pdf

FACTS: Allison Estrada ("Estrada") entered into a credit card agreement ("Agreement") with Citibank. Estrada's credit card was stolen and accrued charges she did not make. Citibank did not investigate or remove the charges. Citibank retained The Moore Law Group, APC ("TMLG") to collect the purported debt from Estrada. Estrada sued TMLG for violating the FDCPA and California's Rosenthal Fair Debt Collection Practices Act ("RFDCPA") in an unlawful debt collection attempt.

TMLG moved to compel arbitration on Estrada's claims based on the arbitration provision in the Agreement.
HOLDING: Denied.
REASONING: The concerted-misconduct test does not involve causation, but rather, considers whether a plaintiff is asserting claims against a nonsignatory that also implicates the signatory. TMLG argued that it was covered under the scope of the Agreement's arbitration provision as an "agent" of Citibank and could enforce the provision against Estrada. The court disagreed.

The court held Estrada did not allege "substantially interdependent and concerted misconduct" such that would allow TMLG, a nonsignatory, to enforce the arbitration provision against her. First, Estrada relied solely on TMLG's obligations pursuant to the RFDCPA and FDCPA and TMLG's debt collection practices. Second, Estrada did not rely on the Agreement in making her claims against TMLG. Lastly, Estrada's claims against TMLG were independent of her claims against Citibank and did not reference the Agreement. Therefore, since the presence of allegations common to both the signatory and nonsignatory is not enough to satisfy the concerted-misconduct test, TMLG could not compel arbitration in its debt collection case.

REQUIRED MONTHLY MORTGAGE STATEMENTS SENT BY SERVICER MAY BE SUBJECT TO THE FEDERAL FAIR DEBT COLLECTION PRACTICES ACT

Daniels v. Select Portfolio Servicing, Inc., 34 F.4th 1260 (11th Cir. 2022).
https://media.ca11.uscourts.gov/opinions/pub/files/201910204.pdf

FACTS: After falling behind on her monthly mortgage payments, Constance Daniels ("Daniels") entered into a mortgage modification agreement with Countrywide. She agreed to make interest-only monthly payments (plus escrow amounts) for 10 years, with the principal balance remaining at $189,911. For over a year, Daniels made her interest-only monthly payments on time. Countrywide then sold the mortgage to Wells Fargo

which refused to accept the interest-only payments and filed a foreclosure for default on the note and mortgage. The state court granted Daniels' motion to enforce the earlier mortgage modification agreement.

Following the conclusion of the foreclosure action, Select Portfolio Servicing, Inc. ("Select Portfolio"), the mortgage servicer, sent Daniels numerous monthly mortgage statements, varying in format, language, and amount. The statements included language such as "This is an attempt to collect a debt. All information obtained will be used for that purpose" and "You are late on your mortgage payments. Failure to bring your loan current may result in fees and foreclosure – the loss of your home." Daniels alleged that the statements significantly misstated the deferred principal balance, the outstanding principal balance, and the amount due for the interest-only payment.

Daniels sued Select Portfolio, arguing that by sending her the incorrect mortgage statements, it had violated the FDCPA's prohibitions on harassment or abuse, false or misleading representations, and unfair practices. The district court dismissed Daniels' complaint with prejudice, agreeing with Select Portfolio that the mortgage statements in question were not communications in connection with the collection of a debt and therefore were not covered by the FDCPA.

HOLDING: Reversed and remanded.

REASONING: Mortgage statements required by the TILA may constitute communications in connection with the collection of a debt under the FDCPA when the communications contain debt-collection language that is not required by the TILA or its regulations and when the context suggests that they are attempts to collect or induce payment on a debt. Select Portfolio asserted that the mortgage statements were required by the TILA and its regulations and therefore did not constitute communications "in connection with the collection of a[ ] debt" under the FDCPA or in connection with "collecting [a] . . . debt[ ]" under the FCCPA. The court disagreed.

The court held the communication by Select Portfolio labeled as "for the purposes of collecting a debt," and asking for payment of a certain amount by a certain date and assessing a late fee if the payment is not made on time was plausibly sent in connection with the collection of a debt. Therefore, such communications were in connection with the collection of a debt under the FDCPA. Importantly, monthly mortgage statements required by the TILA and its regulations do not automatically lead to liability under the substantive provisions of the FDCPA or the FCCPA.

THE TEXAS DEBT COLLECTION ACT DOESN'T CONTAIN A STATUTE OF LIMITATION

IT IS APPROPRIATE TO APPLY A TWO-YEAR LIMITATION PERIOD TO THE TEXAS DEBT COLLECTION ACT

Williams v. PHH Mortg. Corp., 2022, ____ F. Supp.3d ____ (S.D. Tex. 2022).
https://casetext.com/case/williams-v-phh-mortg-corp-1

FACTS: Plaintiffs Ursula N. Williams, Melbourne Poff, and Barbara Poff ("Plaintiffs") sued Defendant PHH Mortgage Corporation ("PHH") for violations of the Texas Debt Collection Act, as well as for declaratory and injunctive relief. The TDCA does not contain a statute of limitations, and the parties disputed whether a two- or four-year limitations period applied to the TDCA claims. The Plaintiffs' claims would be barred by a two-year limitations period but not a four-year limitations period.

PHH moved to dismiss all claims. The court granted the motion as to the claims for declaratory and injunctive relief but denied the TDCA claims. After Plaintiffs and PHH were ordered to undertake expedited discovery on the issue of limitations, PHH moved for summary judgment.

HOLDING: Granted.

REASONING: In the absence of a state law decision by a state's highest court, a federal court relies on intermediate state appellate court decisions to predict what would have been the outcome. The state's highest court had not spoken on the issue and lower courts had reached different conclusions on whether a two or four-year limitations period applies to TDCA claims.

Opinions applying a four-year limitations period rely on the Texas Civil Practice and Remedies Code § 16.051. Opinions applying a two-year limitations period rely on the Texas Civil Practice and Remedies Code § 16.003(a). However, none of those opinions provided thorough explanations for their reasoning.

The state's highest court had not spoken on the issue and lower courts had reached different conclusions on whether a two or four-year limitations period applies to TDCA claims.

The Texas Supreme Court previously instructed courts to resolve this type of issue by looking to an analogous cause of action with an express limitations period. In the instant case, the court determined either an action arising under the Texas Deceptive Trade Practices Act or the common-law intentional tort of unreasonable collection to be the analogous cause of action, which are both subject to a two-year limitations period. Thus, the court decided it was appropriate to apply a two-year limitations period to Plaintiffs' TDCA claims. Because the two-year limitations period barred Plaintiffs' claims, the court granted PHH's motion for summary judgment.

SECTION 392.202 OF TEXAS DEBT COLLECTION ACT DOES NOT PLACE A DUTY ON A "CREDIT BUREAU"

Black v. Experian Info. Sols., Inc., ____ F. Supp.3d ____ (S.D. Tex. 2022).
https://casetext.com/case/black-v-experian-info-sols-4

FACTS: Plaintiff, J.B. Black ("Black"), in the process of purchasing a home, was denied financing. Defendant Early Warning Services, LLC ("EWS") and all other Defendants are either banks, creditors, or credit reporting agencies. Black claims that he "would have closed the deal but for Defendants' statutory violations, breaching of contract, and other tortious acts." Black provided a list of ways in which EWS and/or other defendants violated the TDCA, the Texas DTPA, and the federal FCRA.

Black also contended that the defendants' actions, collectively, constituted defamation and libel.

EWS filed a motion for judgment on the pleadings, asserting Black's claims failed because he did not plead any facts showing that EWS violated the statutes or committed defamation or libel. Black failed to respond to the motion. The failure to respond was taken by the court as a representation of no opposition.
HOLDING: Granted.

REASONING: EWS argued that Black's TDCA claims did not survive because the statute applies only to debt collectors, and Black made no allegation that EWS was a debt collector. Rather, Black asserted EWS was a "credit reporting agency" as defined in the Texas Finance Code § 392.001(4). But that section defines a "credit bureau," not a "credit reporting agency."

Indeed, Black alleged that EWS violated § 392.202 by "failing to properly investigate disputed matters on Plaintiffs' credit bureau [report] and further failed to accurately report Plaintiffs' dispute on Plaintiffs' credit bureau [report]." But the statute does not place a duty on a "credit bureau." Instead, it requires an individual who notices an inaccuracy in the credit bureau's file to notify in writing the third-party debt collector of the inaccuracy. The third-party debt collector then has a duty to investigate and advise parties that have received inaccurate reports of any inaccuracy. As such, the court found the burden or duty on "credit bureaus" outlined in the TDCA not applicable to the allegations in this case, mainly because § 392.202 does not place a duty on a "credit bureau." Thus, there are no obligations for credit bureaus under § 392.202 and Black failed to state a claim against EWS under the TDCA.

PLAINTIFF SUFFERED JUST THE SORTS OF INTANGIBLE BUT REAL INJURIES—INCLUDING EMOTIONAL DISTRESS, ANXIETY, FEAR, AND CONFUSION—THAT CONGRESS FORESAW AND FOR WHICH IT ENACTED FDCPA STATUTORY REMEDIES

DISSENT ARGUES PLAINTIFF SATISFIED THE CONSTITUTIONAL REQUIREMENTS OF *SPOKEO* AND *TRANSUNION*

Pierre v. Midland Credit Mgmt., ___ F.3d ___ (7th Cir. 2022).
https://law.justia.com/cases/federal/appellate-courts/ca7/19-2993/19-2993-2022-04-01.html

FACTS: In 2006, Plaintiff-Appellee Renetrice Pierre ("Pierre") opened a credit card account with Target National Bank. Pierre defaulted on the debt accumulated on the account. Midland Funding, LLC, bought the debt and sued Pierre in 2010, later voluntarily dismissing the lawsuit. In 2015, Defendant-Appellant Midland Credit Management, Inc. ("Midland"), the collector of debts for Midland Funding, LLC, sent Pierre a letter seeking payment of the debt although the statute of limitations had already run. The letter included payment plans, the date of expiration for the offer, and a statement at the end informing Pierre that she would not be sued for non-payment of the debt due to the statute of limitations.

Pierre filed suit, alleging that Midland violated various provisions of the FDCPA by falsely representing the character and legal status of the debt, deceptively attempting to collect the debt, and using unfair or unconscionable means to attempt to collect the debt. The district court granted summary judgment in favor of Pierre. The court twice declined Midland's motion to dismiss for lack of Article III standing. Both parties cross-appealed and the court denied a hearing en banc. Four judges dissented from the denial, noting this case presents an important question on the extent of Congress's power under the Constitution to regulate interstate commerce—its power to authorize private civil remedies for statutory violations that cause intangible but concrete injuries, including emotional distress, fear, and confusion.
HOLDING: Vacated and remanded.
REASONING: Pierre argued that Midland's letter created the risk of her paying on a time-barred debt that would have restarted the statute of limitations period and that she suffered emotional distress, anxiety, and worry as a result of the letter. The court held that Pierre's "worry" and "confusion" were not legally cognizable harms sufficient to meet the concreteness requirement for Article III standing.

The FDCPA was meant to protect consumers against the very stress and fear Plaintiff experienced due to Midland's letter.

The dissent rejected this reasoning, relying on *Spokeo, Inc. v. Robins*, where the Supreme Court held that an intangible injury, such as emotional distress, could be concrete for purposes of standing under Article III. The dissent also relied on *TransUnion LLC v. Ramirez*, where the Supreme Court held that intangible harms close to those "traditionally recognized in the law" were sufficiently concrete for standing and that courts must respect Congress's creation of a private right of action for statutory violations. The dissent argued that Pierre satisfied the Constitutional requirements of *Spokeo* and *TransUnion* with evidence of harms foreseen by Congress when it enacted the FDCPA. The FDCPA was meant to protect consumers against the very stress and fear Plaintiff experienced due to Midland's letter. Pierre's injuries also bore close relationships to harms long recognized in both common and constitutional law. Thus, the dissent argued that Pierre's claims were concrete enough to meet the Article III standing requirement.

FDCPA IS A STRICT LIABILITY STATUTE, AND AS SUCH, IT "MAKES DEBT COLLECTORS LIABLE FOR VIOLATIONS THAT ARE NOT KNOWING OR INTENTIONAL"

Creager v. Columbia Debt Recovery, ___ F. Supp.3d ___ (W.D. Wash. 2022).
https://www.accountsrecovery.net/wp-content/uploads/2022/08/Creager-v.-Columbia-Debt-Recovery.pdf

FACTS: Plaintiff Meagan Creager ("Creager") rented an apartment from FSC Riverstone Associates, LLC ("Riverstone"). After Creager informed Riverstone that she was moving out early, Riverstone transferred a collections account to Defendant Columbia Debt Recovery d/b/a Genesis Credit Management, LLC ("Genesis"). The collections account consisted of Creager's remaining

balance and included her $1,250 security deposit ("Balance"). Throughout the next few years, Genesis contacted Creager to collect the Balance and accumulated interest, but Creager did not believe that her lease permitted Riverstone to forfeit her security deposit and disputed the inclusion of the $1,250 in the Balance. Creager sued Genesis for violations of the FDCPA and the CAA.

Genesis did not dispute that Riverstone unlawfully withheld Creager's security deposit. Creager filed a motion for partial summary judgment on the issue of liability.

HOLDING: Granted in part.

REASONING: Creager alleged that Genesis unlawfully collected amounts that Creager did not owe. Genesis, on the other hand, argued that it cannot be held liable because it reasonably relied on Riverstone's interpretation of the lease agreement.

The court rejected Genesis' argument because the FDCPA imposes strict liability, and makes debt collectors liable for violations that are not knowing or intentional. Indeed, determining whether conduct violates the FDCPA requires an objective analysis and does not inquire into the defendant's knowledge. Here, Genesis was objectively representing an incorrect amount of debt owed by Creager each time it contacted her. Likewise, Genesis objectively attempted to collect principal and interest that were not owed. As such, Genesis's "reasonable belief" in the Balance's accuracy did not matter.

MESSAGE SENT AS A RESULT OF COVID-19, REMINDING CONSUMERS OF ALTERNATIVE METHODS TO RECEIVE INFORMATION ABOUT THEIR ACCOUNT, OR TO MAKE PAYMENTS, DOES NOT VIOLATE FDCPA

James Hurster v. Specialized Loan Servicing, LLC, ___ F. Supp.3d ___ (E.D. Mo. 2022).
https://www.accountsrecovery.net/wp-content/uploads/2022/08/Hurtser-v.-Specialized-Loan-Servicing.pdf

FACTS: Plaintiff James Hurster ("Plaintiff") took out a home mortgage loan with U.S Bank N.A ("U.S. Bank"). U.S. Bank transferred Plaintiff's mortgage and deed of trust to Selene Finance, LP ("Selene Finance"). Plaintiff defaulted on his mortgage debt. Selene Finance transferred Plaintiff's defaulted mortgage debt to Specialized Loan Servicing ("SLS"). At that time, Plaintiff was in Chapter 13 bankruptcy. Plaintiff received a pre-recorded voice message from SLS reminding customers of alternative methods to receive information on their accounts and make payments. Due to the COVID-19 pandemic, wait lines for the customer service phone line were longer than usual, so these alternative methods were encouraged to serve customers more quickly through self-service via the website.

Plaintiff filed a class action lawsuit alleging SLS violated the FDCPA by failing to disclose in its voice messages that it was a debt collector attempting to collect a debt. SLS moved for summary judgment.

HOLDING: Granted.

REASONING: SLS argued that it was not liable under the FDCPA because informational communications, such as a voicemail message, were not communications in connection with the collection of a debt. The court agreed.

To establish an FDCPA violation, a plaintiff must show that (1) he is a consumer, (2) the defendant is a debt collector, and (3) the defendant violated, by an act or omission, a provision of the FDCPA to collect a debt. Here, the court reasoned that the voicemail did not communicate "in connection with the collection of a debt," but rather, merely communicated alternative methods of accessing accounts and making payments. Further, because there was no mention of Plaintiff's debt, nor was there a request or demand for payment, the court held that no reasonable jury could find that the purpose of SLS's voicemail message was to induce payment. Therefore, SLS did not violate the FDCPA.

MONTHLY MORTGAGE STATEMENTS REQUIRED BY THE TRUTH IN LENDING ACT, CAN CONSTITUTE COMMUNICATIONS IN CONNECTION WITH THE COLLECTION OF A DEBT UNDER THE FDCPA

Daniels v. Select Portfolio Servicing, Inc. 34 F.4th 1260 (11th Cir. 2022).
https://media.ca11.uscourts.gov/opinions/pub/files/201910204.pdf

FACTS: Appellant Constance Daniels ("Daniels") received mortgage statements from Select Portfolio Servicing, Inc. ("Select Portfolio") that contained inaccurate invoice amounts and debt collection language. Daniels entered into a mortgage modification agreement with Countrywide Home Loans ("Countrywide") that enabled her to make interest-only payments for ten years, with the principal balance remaining unchanged. Daniels' mortgage account was assigned to Wells Fargo who declined to accept interest-only payments. The company filed a foreclosure action asserting Daniels defaulted on her note and mortgage. The state court ruled for Daniels and reinstated the mortgage modification agreement. Select Portfolio, the mortgage servicer, proceeded to send Daniels monthly mortgage statements that miscalculated the principal balance and interest due, including a "delinquency notice," payment coupons, and debt collection language.

The mortgage statements expressed an attempt to collect a debt and included loan and payment due dates and interest-bearing and deferred principal balances.

Daniels sued Select Portfolio for unfair debt collection practices, alleging that the erroneous monthly mortgage statements were harassing, misleading, and false. The district court dismissed the claims with prejudice, holding that the mortgage statements complied with TILA regulations and were not debt collection communications subject to the FDCPA. Daniels appealed.

HOLDING: Reversed and remanded.

REASONING: Daniels argued that Select Portfolio's mailings were subject to regulation under the FDCPA due to the monthly statements containing incorrect debt information, such as increased balances and past due amounts. She asserted that this constituted harassment or abuse, false or misleading representations, and unfair practices of collection.

The court agreed, noting that the mortgage statements expressed an attempt to collect a debt and included loan and payment due dates and interest-bearing and deferred principal balances, alongside an attached payment coupon that specified a mailing address, late fee information, and payment instructions. Select Portfolio's incorporation of unpaid loan sums on the statements influenced the court's decision. The court noted that the mailed mortgage communications could be related to debt collection, that such communications could have multiple purposes, and one such objective could be providing information. Consistent with precedent, the court held that mortgage statements that comply with mandated TILA regulations can plausibly constitute debt communications under the FDCPA when they include debt collection language, request payment by a certain date, solicit late fees, and when the history between parties suggests the correspondence attempts to collect debt. The court reversed the district court's dismissal of Daniels' complaint and remanded the case for further proceedings under the least sophisticated consumer standard.

CONSUMER CREDIT

CONSUMERS CAN BRING PRIVATE SUITS FOR VIOLATIONS OF FAIR CREDIT REPORTING ACT § 1681s-2(b)

Spencer v. Experian Info. Sols., Inc., ___ F. Supp. 3d ___ (E.D. Tex. 2022).
https://casetext.com/case/spencer-v-experian-info-sols

FACTS: Plaintiff Karen Spencer ("Spencer") obtained her credit file from Defendant Experian Information Solutions, Inc. ("Experian") and discovered that Defendant Mountain Run Solutions LLC ("Mountain Run") was reporting a tradeline for a debt that Spencer alleged did not belong to her. Spencer's attorney sent a letter to Experian explaining that the debt did not belong to Spencer, as she was a victim of identity theft. Experian forwarded Spencer's dispute to Mountain Run. Mountain Run received the notice but did not conduct a proper investigation or delete the false tradeline from Spencer's credit report.

Spencer sued Mountain Run, alleging that it violated the FCRA by reporting a false tradeline on her Experian credit disclosure. Mountain Run failed to file an answer or provide a defense. Spencer filed a motion for default judgment.

HOLDING: Granted in part.

REASONING: Spencer argued Mountain Run violated the FCRA by willful and negligent failure to comply with the requirements of § 1681s-2(b). Courts in the Fifth Circuit have previously held that consumers can bring private suits for violations of § 1681s-2(b). This section requires a "furnisher of information," upon receiving notice of a dispute from a consumer reporting agency ("CRA") regarding information provided to that agency to (1) conduct a reasonable investigation of the disputed information; (2) review all relevant information provided in the notification; (3) report the results of its investigation to the CRA; (4) report the investigation results to other CRAs if the information furnished is incomplete or inaccurate; and (5) modify, delete, or block reporting of inaccurate or incomplete information.

Courts in the Fifth Circuit have previously held that consumers can bring private suits for violations of § 1681s-2(b).

The court accepted this argument, reasoning that Spencer proved all the required elements to recover on a claim against a furnisher of credit information. A plaintiff must prove that (1) the furnisher provided inaccurate credit information about plaintiff to a CRA; (2) plaintiff notified a CRA that the information in her credit report was inaccurate; (3) the CRA notified the furnisher of the dispute; and (4) after receiving this notice, the furnisher failed to conduct a reasonable investigation and provide notice to the CRA to correct the reporting errors. Because these elements were included in Spencer's pleadings, the court found that Spencer had sufficiently stated a claim against Mountain Run under the FCRA and granted her motion for default judgment with respect to the issue of liability.

ARBITRATION

FEDERAL COURTS MAY NOT CREATE ARBITRATION-SPECIFIC VARIANTS OF FEDERAL PROCEDURAL RULES, LIKE THOSE CONCERNING WAIVER, BASED ON THE FAA'S "POLICY FAVORING ARBITRATION"

Morgan v. Sundance, Inc., 596 U.S. ___ (2022).
https://www.supremecourt.gov/opinions/21pdf/21-328_m6ho.pdf

FACTS: Petitioner Robyn Morgan worked as an hourly employee at a Taco Bell franchise owned by respondent Sundance, Inc.. As part of her employment, Morgan was a party to an arbitration agreement for any employment disputes. Nevertheless, Morgan brought a nationwide collective action against Sundance in federal court for violations of the Fair Labor Standards Act, alleging Sundance circumvented paying mandatory overtime by recording hours worked in one week as instead worked in another to prevent exceeding a total of forty hours.

Sundance initially defended Morgan's suit as if no arbitration agreement existed. Sundance moved to dismiss the suit, but was denied by the district court. Sundance answered Morgan's complaint with 14 defenses with no reference to the arbitration agreement. Sundance moved to stay the litigation and compel arbitration under Sections 3 and 4 of the FAA. The district court found that Sundance had waived its right to arbitration. The court of appeals disagreed and sent Morgan's case to arbitration.
HOLDING: Vacated and remanded.
REASONING: Morgan argued that Sundance waived its right to arbitrate by litigating for so long. The district court applied a test that finds waiver of arbitration when a party knowingly acts inconsistently with its right to arbitrate, therefore prejudicing the other party with its inconsistent actions. The circuit court adopted this prejudice requirement based on the FAA's federal policy favoring arbitration. Waiver outside of the arbitration context does not involve an inquiry into prejudice. The rule that prejudice be a condition to waiver of arbitration is not found in other circuit courts.

The Court held that federal courts may not create arbitration-specific variants of federal procedural rules based on the FAA's policy favoring arbitration. The circuit court was wrong to condition a waiver of the right to arbitrate on a showing of prejudice. Finally, the FAA bars the use of custom-made rules to tilt the playing field in favor of, or against, arbitration. It instructs that prejudice is not a condition of finding that a party, by litigating too long, waived its right to stay litigation or compel arbitration under the FAA.

SUPREME COURT RULES WORKERS WHO LOAD AND UNLOAD CARGO ARE "ENGAGED IN FOREIGN OR INTERSTATE COMMERCE," AND FEDERAL ARBITRAION ACT DOES NOT APPLY

Southwest Airlines Co. v. Saxon, 596 U.S. ___ (2022).
https://www.supremecourt.gov/opinions/21pdf/21-309_o758.pdf

FACTS: Respondent, Latrice Saxon ("Saxon"), is a ramp supervisor for Plaintiff, Southwest Airlines ("Southwest"). Southwest employs "ramp agents" that physically load and unload baggage, along with "ramp supervisors," who train and supervise ramp agents. Ramp supervisors also frequently load and unload cargo alongside the ramp agents. As part of Saxon's employment contract, she agreed to arbitration for wage disputes individually. Saxon brought a putative class action against Southwest under the Fair Labor Standards Act of 1938. Southwest moved to dismiss by enforcing the employment agreement arbitration provision under the Federal Arbitration Act ("FAA"). Saxon responded by claiming that ramp supervisors were a "class of workers engaged in foreign or interstate commerce" and, therefore, were exempt from the FAA's coverage.

The Court found that any class of workers directly involved in transporting goods across state or international borders fell within the exemption.

The district court held that only those involved in actual transportation, rather than just the mere handling of goods, fell within the exemption. The court of appeals reversed, holding that at the time of the FAA's enactment it was understood that loading cargo onto a vehicle to be transported interstate was itself commerce. Because the Seventh Circuit's decision conflicted with a previous decision of the Fifth Circuit, the Supreme Court granted certiorari.
HOLDING: Affirmed.
REASONING: Saxon argued that ramp supervisors were exempt from the FAA because they fell within a "class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1.

The Court utilized a plain meaning interpretation of 9 U.S.C. § 1. The Court found that the phrase "class of workers" was to be based upon what Saxon did at Southwest, rather than what Southwest did as a whole. They found that Saxon, as a ramp supervisor, belonged to a class of workers who physically load and unload cargo, since Southwest did not meaningfully contest that ramp supervisors did this.

The Court found that airplane cargo loaders were engaged in foreign or interstate commerce. In determining this issue, it deployed a statutory interpretation that equated "engaged in" with "occupied," "employed," or "involved in." The Court interpreted "commerce" to mean, among other things, "the transportation of. . . goods, both by land and by sea." Thus, the Court found that any class of workers directly involved in transporting goods across state or international borders fell within the exemption. Because Saxon frequently loaded and unloaded cargo on and off airplanes that traveled in interstate commerce, she belonged to a "class of workers engaged in foreign or interstate commerce." Thus, the FAA did not apply, and the Court affirmed the judgment of the court of appeals.

DETERMINING WHETHER A CLAIM INVOLVING A NONSIGNATORY MUST BE ARBITRATED IS A GATEWAY MATTER FOR THE TRIAL COURT

DIRECT BENEFITS ESTOPPEL APPLIES TO PARTIES WHO SEEK TO DERIVE A DIRECT BENEFIT FROM A CONTRACT WITH AN ARBITRATION AGREEMENT

TO INVOKE DIRECT BENEFITS ESTOPPEL BASED ON A NONSIGNATORY'S ACTIONS APART FROM THE LITIGATION, A PARTY MUST SHOW THAT THE NONSIGNATORY "DELIBERATELY S[OUGHT] AND OBTAIN[ED] SUBSTANTIAL BENEFITS FROM THE CONTRACT"

Travelers Indem. Co. v. Alto ISD, ___ S.W.3d ___ (Tex. App. 2022).
https://casetext.com/case/travelers-indem-co-v-alto-isd

FACTS: Plaintiff-Appellee Alto ISD ("Alto ISD") entered into a property insurance policy ("Policy") with Texas Rural Education Association Risk Management Cooperation ("TREA"). TREA subsequently obtained reinsurance from Defendant-Appellant, Travelers Indemnity Company ("Travelers"). The contract ("Reinsurance Contract") between TREA and Travelers conditioned any right of action under the contract to compelled arbitration. The insured property of Alto ISD was damaged and after Alto ISD received what they deemed to be inadequate funds from Travelers, it filed claims against Travelers and TREA. Alto ISD claimed against Travelers common law fraud, conspiracy to commit fraud, misrepresentation, negligence, and violation of the Texas Unfair Compensation and Unfair Practices Act and the DTPA. The trial court denied Travelers' motion to dismiss or stay the litigation. Travelers appealed.
HOLDING: Affirmed.
REASONING: Travelers argued that Alto ISD's claims were subject to arbitration per the Reinsurance Contract because direct benefits estoppel applied and the claims arose out of the Reinsurance Contract. The court deferred to the trial court's factual determinations but reviewed the legal determinations de novo because "determining whether a claim involving a nonsignatory must be arbitrated is a gateway matter for the trial court." This means the determination is reviewed de novo.

Generally, no party may be compelled to arbitrate unless they assented to arbitration. However, under direct benefits estoppel, arbitration is compelled on a nonsignatory who (1) sought to derive a direct benefit from the contract through the lawsuit or (2) deliberately s[ought] and obtain[ed] substantial direct benefit from the contract[.]" Here, because all of Alto ISD's claims were rooted in extracontractual statutory and common law torts committed by Travelers under the Policy, the court held Alto ISD did not seek to derive direct benefit from the Reinsurance Contract through the lawsuit. Further, the court held that Alto ISD did not deliberately seek and obtain substantial benefits from the Reinsurance Contract because prior to receiving Travelers Funds pursuant to the Policy Alto ISD had not sought direct benefits from the Reinsurance Contract. Therefore, direct benefits estoppel could not be invoked.

INTRASTATE DELIVERY DRIVERS BOUND BY THEIR ARBITRATION AGREEMENTS

Archer v. GrubHub, Inc., 596 U.S. ___ (2022).
https://casetext.com/case/archer-v-grubhub-inc

FACTS: Grubhub, Inc., ("Defendant") distributed an arbitration agreement to its delivery drivers ("Plaintiffs") through an online portal. The arbitration agreement included a provision requiring Plaintiffs to submit all past and present disputes related to employment or separation of employment, including claims of retaliation and wages or other compensation, to final and binding arbitration. The arbitration agreement provided that the terms of the agreement were governed by the FAA and included a class action waiver.

Plaintiffs filed suit against Defendant in the Massachusetts Superior Court, alleging violations of the Wage Act, the Tips Act, and the Minimum Wage Act, and that Defendant unlawfully retaliated against drivers who complained about their wages. Defendant filed a motion to compel arbitration and to dismiss the complaint. The court denied Defendant's motions. The court found that Plaintiffs entered into the arbitration agreement, but concluded that Plaintiffs, by virtue of their transportation and delivery of prepackaged food items, some of which were manufactured outside Massachusetts, fell within the definition of "any other class of workers engaged in foreign or interstate commerce" who are exempt from arbitration under § 1 of the FAA. Defendant appealed and the court, sua sponte, transferred the case from the Appeals court to the United States Supreme Court.

The Court reasoned that the subsequent journey of the goods in the hands of Defendant's drivers was not part of the ongoing and continuous interstate flow of such goods.

HOLDING: Reversed and remanded.
REASONING: Plaintiffs argued they were within the residual category of §1 of the FAA because they are transportation workers who transport and deliver goods, such as prepackaged chips or soda, in the flow of interstate commerce. The Court rejected both arguments.

One is engaged in interstate commerce when actively engaged in the transportation of goods across borders via the channels of foreign or interstate commerce. Here, Plaintiffs transported goods that had already completed the interstate journey by the time the goods arrived at the restaurant, delicatessen, or convenience store to which they were sent. The Court reasoned that the subsequent journey of the goods in the hands of Defendant's drivers was not part of the ongoing and continuous interstate flow of such goods. As such, Plaintiffs do not fall within the exclusion of §1 of the FAA.

ARBITRATOR DID NOT "MANIFESTLY DISREGARDED" THE LAW OR THE PARTIES' AGREEMENT, AND DID NOT EXCEED HIS POWERS

Bayside Constr. LLC v. Smith, ____ F.3d ____ (3d Cir. 2022).
https://cases.justia.com/federal/appellate-courts/ca3/21-2716/21-2716-2022-07-08.pdf

FACTS: Defendants-Appellants John and Sarah Smith owned a house in the U.S. Virgin Islands and hired Plaintiff-Appellee Bayside Construction LLC ("Bayside") to repair hurricane damage on their home. Their contract ("Agreement") obligated Bayside to provide labor, material, and equipment for the repair work in exchange for the Smiths' progress payments. After Bayside began the work and collected the first two progress payments, the Smiths expressed their dissatisfaction with the work and refused to pay Bayside the remaining progress payments. Bayside filed a contractor's lien for the balance of the contract price. The Smiths alleged Bayside was in default for defective work and did not allow Bayside to cure the default, as required by the Agreement.

Bayside filed an arbitration demand, claiming damages for the termination of the Agreement and the arbitrator concluded the Smiths breached the Agreement and awarded Bayside damages. Bayside petitioned the district court to confirm the award while the Smiths moved to vacate it. The court granted Bayside's petition and denied the Smiths' motion. The Smiths appealed.
HOLDING: Affirmed.
REASONING: The Smiths claimed that the arbitrator manifestly disregarded Virgin Islands law and exceeded his powers by awarding Bayside damages. The Smiths asserted that the award did not cite Virgin Islands law. Virgin Islands law would excuse the Smiths' duty to pay the award to Bayside because Bayside's partial breach affected the entirety of the work contemplated in the Agreement.

The court disagreed, identifying two reasons why the arbitrator correctly awarded Bayside damages, although the award did not cite Virgin Islands law. First, under Virgin Islands law, Bayside's partial breach did not justify the non-performance of the Smiths' remaining duty because the breach was not material and Bayside was not allowed to cure the purported default.

Second, the arbitrator did not exceed his power to issue an award because the Agreement allowed Bayside to be made whole for its completed work, even if some of the work was substandard. The arbitrator appropriately deducted the costs the Smiths would incur to redo the "shoddy" work. The award was consistent with the authority of the Virgin Islands and rationally derived from the Agreement.

PRO SE PLAINTIFF IS REQUIRED TO ARBITRATE

Fayez-Olabi v. Credit Acceptance Corp., ____ F. Supp.3d____ (E.D.N.Y. 2022).
https://law.justia.com/cases/federal/district-courts/new-york/nyedce/2:2021cv05443/470132/10/

FACTS: Pro se plaintiff Donovan Fayez-Olabi ("Plaintiff") bought a used vehicle from the Credit Acceptance Corporation ("Defendant"). Plaintiff made a $3,000 down payment and signed a contract with Defendant to establish a payment plan for the remaining balance. The contract included an arbitration clause that had been expressly ratified by Plaintiff. Plaintiff failed to follow the payment schedule in the contract and as a result of its past-due status, Defendant closed Plaintiff's account.

Plaintiff filed claims against Defendant under the FDCPA and the Fair Credit Reporting ("FCRA"). The case was transferred to the district court. Defendant moved to enforce the arbitration clause.
HOLDING: Granted.
REASONING: Plaintiff did not file a response to Defendant's motion to enforce arbitration, so there was no clear objection to the arbitration. However, the court had to determine if the claims brought by Plaintiff were appropriate for arbitration as a legal matter, or if they must be litigated in front of the court. The court considered three questions: (1) did the parties agree to arbitrate, (2) was the dispute within the scope of the arbitration agreement, and (3) did Congress carve out an exception for the dispute, excluding it from arbitration?

The court determined that Plaintiff's claims were within the scope of the arbitration clause because the plain language used by the parties conveyed their intent.

First, the court found that the parties did have an agreement to arbitrate. Defendant's compelling of arbitration met the required preponderance of evidence standard under New York law in providing a signed copy of the agreement to arbitrate. Second, the court determined that Plaintiff's claims were within the scope of the arbitration clause because the plain language used by the parties conveyed their intent. The court found that the expansive language in the arbitration clause encompassed Plaintiff's FDCPA and FCRA claims. The court additionally found that there was no legislative preemption for Plaintiff's claims to prevent arbitration because Congress had not exempted FDCPA and FCRA claims from arbitration. Third, the court found that the arbitration clause was not invalidated by Plaintiff's fraud allegations. The fraud-in-the-inducement claim did not prevent arbitration because the contract allowed for claims against the validity of the contract to be solved in arbitration. The fraud-in-the-factum claim did not prevent arbitration because Plaintiff failed to sufficiently allege an issue of material fact about the existence of the contract.

MISCELLANEOUS

BANK'S AUTOMATED REPLY TEXT MESSAGES DID NOT VIOLATE TELEPHONE CONSUMER PROTECTION ACT

Moskowitz v. Am. Sav. Bank, F.S.B., 37 F.4th 538 (9th Cir. 2022). https://cdn.ca9.uscourts.gov/datastore/opinions/2022/06/10/20-15024.pdf

FACTS: Plaintiff-Appellant Craig Moskowitz was an unenrolled banking customer of Defendant-Appellee American Savings Bank, F.S.B. ("ASB"). ASB offered mobile text banking services by automatically replying to text messages from a sender that was an enrolled or unenrolled customer. ASB's automatic reply texts followed one of two standards. The first standard was to respond on how to contact ASB or stop communications from ASB. The second standard was to respond that the sender was no longer subscribed to ASB and would not receive alerts when the sender texted "STOP." Moskowitz was not a customer of ASB during the relevant period. Moskowitz received the first standard reply texts from ASB for ten messages unrelated to ASB or its services. Moskowitz received ASB's second standard reply text when he texted "STOP."

Moskowitz filed suit, alleging ASB's reply texts violated the Telephone Consumer Protection Act ("TCPA"). The district court granted summary judgment for ASB, concluding that each text message from Moskowitz's mobile phone constituted prior express consent for each of ASB's reply texts to his mobile phone. Moskowitz appealed.

HOLDING: Affirmed.

REASONING: In asserting a TCPA violation, Moskowitz alleged that the TCPA prohibited ASB from replying to texts because ASB called a mobile phone automatically without a recipient's "prior express consent." 47 U.S.C. §227(b).

The court held that Moskowitz's initial text message contact with ASB constituted "prior express consent" and did not violate the TCPA. The court recognized that the TCPA did not define "prior express consent," so it relied on the FCC's interpretation of "prior express consent" in *Van Patten v. Vertical Fitness Group*, which held that "a person who knowingly releases his number consents to be called at that number, and that consent is "effective" where the responsive messages relate to the same subject or type of transaction as the messages that led to the response." Moskowitz argued that the court had the discretion to refuse the FCC's interpretation.

The court rejected Moskowitz's argument for two reasons. First, *Van Patten* was a published opinion and binding precedent. Second, the FCC's interpretation was directly applicable to the facts of this case. Moskowitz initiated contact with ASB by sending text messages to ASB. ASB automatically replied to each contact with a single responsive text message to confirm receipt and provide information on how to stop or continue communication with ASB. Moskowitz's initial text messages gave ASB express consent to receive reply text messages. Therefore, because each informative and confirmatory reply text message from ASB fell within the scope of Moskowitz's "prior express consent," ASB's automated reply text message did not violate the TCPA.

CLAIMS BASED ON THE SAME FACTS AS A PLAINTIFF'S HEALTH CARE LIABILITY CLAIM CANNOT ALTERNATIVELY BE BROUGHT AS OTHER TYPES OF CLAIMS

Velasco v. Noe, 645 S.W.3d 850 (Tex. App.—El Paso 2022). https://law.justia.com/cases/texas/eighth-court-of-appeals/2022/08-19-00287-cv.html

FACTS: Shortly before giving birth to her third child, appellant Grissel Velasco ("Velasco") paid Sun City Women's Health Care ("Sun City") $400 for a tubal ligation to be performed after her upcoming Cesarean delivery. The procedure would have prevented Velasco from conceiving a fourth child. Velasco never signed an informed consent form granting Dr. Michiel R. Noe ("Dr. Noe") permission to perform the procedure, and Dr. Noe never discussed the procedure with Velasco during delivery. After a positive test confirmed Velasco was pregnant with her fourth child, the Sun City staff acknowledged that Dr. Noe did not perform a tubal ligation. Sun City issued Velasco a $400 refund check. Velasco filed suit against Sun City.

Velasco asserted a health care liability claim for negligence and alternative claims for violation of the DTPA, breach of express warranty, fraud, and intentional infliction of emotional distress. Sun City filed seven traditional and no-evidence motions for summary judgment challenging all of Velasco's claims. Velasco responded to five of the motions. After a hearing, the trial court granted Sun City's motion for summary judgment. On appeal, Velasco contended that the trial court should not have dismissed her alternative claims because they were not impermissibly recast health care liability claims. Sun City argued that Velasco's claims all derived from the same core allegations that Velasco's unwanted fourth pregnancy resulted from Sun City's failure to inform her that she did not receive the tubal ligation she had paid for.

A plaintiff cannot avoid the application of the TMLA by artful pleading.

HOLDING: Affirmed.

REASONING: The Texas Medical Liability Act ("TMLA") creates a presumption that a claim constitutes a health care liability claim if it is against a (1) physician or health care provider and (2) is based on facts implicating the defendant's conduct (3) during a patient's care or treatment. A plaintiff cannot avoid the application of the TMLA by artful pleading, such as bringing alternative claims based on the same facts as a health care liability claim.

To determine if the causes of action were health care liability claims, the court looked for three elements under the TMLA: (1) a physician or health care provider must be a defendant, (2) the claim or claims at issue must concern treatment, lack of treatment, or a departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care, and (3) the defendant's act or omission complained of must proximately cause the injury to the claimant. The court held that Velasco's alternative claims were

health care liability claims, as her alternative claims were based on the same facts as her health care liability claims. More specifically, the claims (1) concerned pre-surgical communications, consents, and authorizations between Sun City and Velasco, (2) the medical information Sun City relayed to Velasco concerning the results of the procedure Dr. Noe performed on July 16, 2014, (3) the interpretation and accuracy of the medical records Sun City kept, and (4) the parties knowledge of the contents of those medical records. Therefore, the trial court's judgment was affirmed and Velasco's claims were dismissed.

NYU PREVAILS IN STUDENT'S COVID REFUND CLASS ACTION

De Leon v. N.Y. Univ., ___ F. Supp.3d ___ (S.D.N.Y. 2022).
https://casetext.com/case/de-leon-v-ny-univ-2

FACTS: Plaintiff Nelcy Mabel Garcia De Leon ("Plaintiff") was a full-time graduate student enrolled in a Master's program at New York University ("NYU") at the Rockland Campus located an hour north of the main New York City campus ("main campus"). Plaintiff and other students based at the Rockland campus had access to all the services and opportunities that NYU offered, including services and amenities offered at the main campus.

In accordance with state and local requirements imposed to stop the spread of the COVID-19 pandemic, NYU moved classes to an online format, canceling on-campus services. Plaintiff brought claims for breach of contract, unjust enrichment, and New York general business law violations and sought a pro-rata refund of tuition and fees. NYU did not refund any of these fees, including the Registration and Services fees, described as "non-returnable" on NYU's website.

Plaintiff moved to certify a class of all persons who paid fees for or on behalf of students enrolled at NYU for the spring 2020 semester that were not provided in whole or in part in accordance with Rule 23 of the Federal Rules of Civil Procedure.
HOLDING: Denied.
REASONING: To obtain class certification under Rule 23(a), the class proponent bears the burden of showing the four requirements are met: (1) the proposed class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

The court denied Plaintiff's motion because Plaintiff's claims were atypical of those of the proposed class members. Plaintiff was a student at the Rockland Campus, which was located at a much smaller satellite campus, never took a class on the main campus, and never tried to utilize NYU's on-campus services. The court held Plaintiff was an inadequate representative of the main campus students' proposed punitive class. Additionally, the court found the Plaintiff unreliable due to inconsistent testimonies about her presence on the main campus.

ALLEGATIONS CONTRACTOR FAILED TO PERFORM AND LEFT WORK DEFECTIVE, DEFICIENT, AND OTHERWISE INCOMPLETE, FALL SQUARELY WITHIN THE EXCEPTION TO THE RCLA's COVERAGE

NOTICE IS NOT REQUIRED UNDER RCLA FOR "A CONTRACTOR'S WRONGFUL ABANDONMENT OF AN IMPROVEMENT PROJECT BEFORE COMPLETION"

Flores v. Chang, _____ S.W.3d. ____ (Tex. App.—Houston [1st Dist.] 2022).
https://casetext.com/case/flores-v-hun-chang

FACTS: Plaintiffs-Appellees Hun Chang and David Moon ("Appellees") entered into a contract with Defendant-Appellant Ignacio E. Flores ("Appellant"), individually and doing business as Texas Foundation and Remodeling LLC, Texas Foundation & Renovation LLC, and Neat Home Investors LLC ("Flores and the LLC defendants") for renovation and remodeling work on Appellee's two homes. Appellees paid Appellant and the LLC defendants around $88,000 for labor and materials. Appellees allege Flores and the LLC defendants did not complete the required work in a good and workmanlike manner, abandoned the projects, and left the work defective, deficient, and otherwise incomplete. After Flores and the LLC defendants refused to respond to communication attempts, Appellees terminated the contract for cause. Appellees incurred additional damages in securing another contractor to complete the work.

RCLA does not apply to "an action to recover damages that arise from . . . a contractor's wrongful abandonment of an improvement project before completion."

Appellees brought claims for breach of contract, fraudulent inducement, and unjust enrichment. After Appellant did not answer or otherwise appear, Appellees moved for an interlocutory default judgment against Appellant. The trial court granted the motion, issuing final judgment in favor of Appellees. A restricted appeal followed.
HOLDING: Affirmed and reversed and remanded in part.
REASONING: Generally, the Residential Construction Liability Act ("RCLA") requires homeowners to provide written notice of a claim to the contractor specifying the construction defects before initiating any action. However, the RCLA does not apply to "an action to recover damages that arise from . . . a contractor's wrongful abandonment of an improvement project before completion." Tex. Prop. Code Ann. § 27.002(d). Appellant argued that the trial court erred in entering judgment in favor of Appellees because Appellees' pleadings were insufficient to show that they complied with the notice requirements of the RCLA. The court disagreed.

The court held that, since Appellees sought damages for the unfinished renovation and remodeling project, and not from any construction defect, Appellees' allegations fell squarely within the RCLA exception. Indeed, Flores and the LLC defendants did

not complete the required work in a good and workmanlike manner, abandoned the projects, and left the work defective, deficient, and otherwise incomplete. As such, Appellees were not required to provide notice because claims for wrongful abandonment of an improvement project before completion fall within the RCLA exception.

STAY OF FORECLOSURE DOES NOT SUPPORT "AMOUNT IN CONTROVERSY"

Durbois v. Deutsche Bank Nat'l Tr. Co., 37 F.4th 1053 (5th Cir. 2022).
https://www.ca5.uscourts.gov/opinions/pub/20/20-11082-CV0.pdf

FACTS: Plaintiff-Appellant Michael Durbois ("Durbois") took out a home equity loan on a house ("Property"). Defendant-Appellee Deutsche Bank National Trust Company ("Deutsche Bank") pursued a non-judicial foreclosure order on the Property. Durbois sued Deutsche Bank in state court and "stipulated" damages not in excess of $74,500 for alleged violations of the Texas Debt Collection Act ("TDCA"), fraud, negligent misrepresentation and breach of duty of cooperation. Deutsche Bank removed the case to federal district court, contending that Durbois's suit stayed the non-judicial foreclosure sale, consequently putting the value of the house, around $427,000, in dispute.

The district court denied Durbois's subsequent motion to remand the case to state court. The district court concluded Durbois's lawsuit triggered an automatic stay of the Property's foreclosure, bringing the value of the lawsuit above the jurisdictional threshold of $75,000. Durbois appealed.

HOLDING: Reversed and remanded.

REASONING: Texas Rules of Civil Procedure 736.11(a) automatically triggers the stay of a non-judicial foreclosure sale when a relevant party files a suit involving the foreclosure. Durbois argued that the stay of the Property's foreclosure was collateral to the object of the litigation and irrelevant to the amount in controversy. The court agreed and held the automatic stay as collateral because of the way it was triggered, its purpose, and its avoidable nature.

First, Durbois' suit triggered a stay as a collateral effect detached from the suit's outcome. Second, the stay did not determine ownership of or title to the Property and was temporary regardless of the suit's outcome. Lastly, Texas state law permits property foreclosure via various methods and Deutsche Bank chose to pursue a non-judicial procedure. Citing state law, the court determined Durbois' total damages stipulation was legally binding and limited his acceptance of monetary awards from the suit. Deutsche Bank failed to establish that the amount in controversy exceeded $75,000. The court held that the district court's denial of Durbois' motion to remand was erroneous and concluded it lacked subject-matter jurisdiction when it entered final judgment. The court reversed and remanded the case to state court.

BANKRUPTCY COURT LACKS JURISDICTION TO ADJUDICATE PLAINTIFF'S FDCPA CLAIMS ARISING POST-DISCHARGE

In re Santangelo, ___ B.R. ___ (Bankr. M.D. Ala. 2022).
https://www.leagle.com/decision/inbco20220808554

FACTS: Semantha Santangelo ("Santangelo") hired Defendant Richard Clarvit ("Clarvit") as counsel in a state court defamation action. The contract between Santangelo and Clarvit included the payment of attorney's fees contingent on a recovery in the suit. When the action settled in Santangelo's favor, an initial disbursement was paid to Santangelo. The remaining proceeds were paid incrementally to co-Defendant Lilas Ayundeh ("Ayundeh"), who held the funds in trust.

Santangelo then filed Chapter 7 bankruptcy and listed the undisbursed settlement proceeds as an asset. One month after Santangelo received her discharge, she moved to reopen her Chapter 7 case to compel Defendants to release the remaining settlement proceeds held in trust. The court denied the motion. Santangelo filed a motion to compel, and the court entered an order finding that Clarvit had a valid lien on the settlement proceeds.

The court determined it lacked jurisdiction to adjudicate Santangelo's FDCPA claims because the alleged actions giving rise to those claims occurred post-discharge.

Santangelo then filed a complaint in the United States Bankruptcy Court alleging, among other claims, that Defendants violated the FDCPA by failing to release the remaining settlement proceeds following Santangelo's Chapter 7 discharge. Defendants filed a motion to dismiss. The court converted the motion to dismiss to one for summary judgment.

HOLDING: Granted.

REASONING: The court determined it lacked jurisdiction to adjudicate Santangelo's FDCPA claims because the alleged actions giving rise to those claims occurred post-discharge. A bankruptcy court's jurisdiction is limited to cases and to proceedings "arising under," "arising in," or "related to" a title 11 case.

Santangelo's FDCPA claims do not invoke substantive rights created by the Bankruptcy code, so the court is without "arising under" jurisdiction. The court is also unable to exercise jurisdiction by way of its "arising in" jurisdiction because the FDCPA claims could be brought independently of a bankruptcy proceeding, and are not administrative matters that could arise only in the bankruptcy context. Because the FDCPA claims arose post-discharge and the prosecution of these claims would have no conceivable impact on Santangelo's bankruptcy estate, the court cannot exercise jurisdiction through its "related to" jurisdiction. The court dismissed the FDCPA claims because it lacked the jurisdiction to adjudicate them.

RULE 68 PROVIDES A CLEAR PATH FOR A DEFENDANT WHO WANTS TO REDUCE THE RISK OF A HIGH FEE AWARD

A DISTRICT COURT SHOULD NOT IMPOSE THE HARSHEST CONSEQUENCES OF A REJECTED RULE 68 OFFER WHEN THE OFFERING PARTY HAS NOT ALSO COMPLIED WITH THE PROCEDURAL PROTECTIONS OF THE RULE

DISTRICT COURT'S REFUSAL TO GRANT ANY POST-OFFER FEES WAS AN ABUSE OF DISCRETION BECAUSE ITS ONLY JUSTIFICATION WAS THAT COOPER REJECTED AN ORAL NON-RULE 68 OFFER

Cooper v. Retrieval-Masters Creditors Bureau, Inc., ___ F.3d ___ (7th Cir. 2022).
https://casetext.com/case/cooper-v-retrieval-masters-creditors-bureau-inc-3

FACTS: Defendant-Appellee Retrieval-Masters Creditors Bureau ("RMCB") sent a debt collection letter to Plaintiff-Appellant Jack Cooper asking Cooper to provide certain information along with his payment to update the credit bureau. Cooper sued RMCB under the FDCPA, alleging that the letter falsely threatened to report his debt to credit bureaus.

After rejecting several oral settlement offers from RMCB, Cooper filed a motion for summary judgment as to liability. The district court granted summary judgment as to liability and awarded Cooper's requested costs and only a tenth in attorney's fees sought. The court based its decision on Rule 68 of the Federal Rules of Civil Procedure, holding that all the hours Cooper's attorneys spent working on the case after rejecting RMCB's oral offers were unreasonable. Cooper appealed to the Seventh Circuit.

HOLDING: Vacated and remanded.

REASONING: Cooper argued that the district court abused its discretion when it relied on Cooper's rejection of RMCB's oral settlement to deny fees for his attorneys' post-offer work.

The court agreed, listing the procedural difference between Rule 68 offers and oral non-Rule 68 offers as one of the factors that the district court should have considered in determining attorney fees. Rule 68 provides a clear path for defendants to reduce the risk of a high fee award by limiting the cost that a prevailing party may recover after rejecting written pre-trial offers. In the instant case, the settlement offer proposed by RMCB was an oral offer as opposed to the written offers prescribed under Rule 68. Because RMCB did not comply with the procedural requirements of Rule 68, the court concluded that the district court should not impose "harsh consequences" on Cooper. The district court's refusal to grant any post-offer fees was an abuse of discretion because its only justification was that Cooper rejected an oral non-Rule 68 offer.

CLASS DEFINITION IN CLASS ACTION SETTLEMENT MUST BE LIMITED TO CLASS MEMBERS THAT HAVE ARTICLE III STANDING

Drazen v. Pinto, ___ F.3d ___ (11th Cir. 2022).
https://scholar.google.com/scholar_case?case=5103329392309172236&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Susan Drazen filed a complaint against GoDaddy.com, LLC ("GoDaddy") claiming GoDaddy violated the Telephone Consumer Protection Act ("TCPA") when it allegedly called and texted Drazen through a prohibited telephone dialing system. Drazen's case was consolidated with the cases of Jason Bennett and John Herrick. Drazen, Bennett, and Herrick (the "Parties") brought a class action suit on behalf of similarly situated individuals.

The Parties submitted a proposed class definition to the district court that included "[a]ll persons within the United States who received a call or text message to his or her cellular phone . . . " In response to the Parties' original class definition, the district court ordered briefing on the application of the Eleventh Circuit's holding that receipt of a single unwanted text message is not a sufficiently concrete injury to give to rise to Article III standing. Salcedo v. Hanna, 936 F.3d 1162, 1168 (11th Cir. 2019). The Parties submitted an amended class definition that included all persons within the United States to whom GoDaddy placed a voice or text message call. The district court accepted the Parties amended class definition and held that only named plaintiffs must have standing, and individuals who lacked Article III standing may remain in the class definition.

The Parties' class definition must be further limited to only include individuals with Article III standing.

HOLDING: Vacated and remanded.

REASONING: The Parties assumed their class definition passed Article III standing muster and did not brief the issue. The court held that a class definition must satisfy two key factors to meet Article III standing requirements. First, plaintiffs must demonstrate a concrete injury when alleging a statutory violation. The court noted a single unwanted text message is not enough to demonstrate a concrete injury for Article III standing purposes. Second, every class member must have Article III standing to recover individual damages regardless of the procedural posture of the case.

Here, the amended class definition included individuals who received only one unwanted text message from GoDaddy. The court noted it has not recognized a single unwanted text as a concrete injury. The Parties' amended class definition included individuals that did not meet the concrete injury requirement for standing. Therefore, the Parties' class definition must be further limited to only include individuals with Article III standing.

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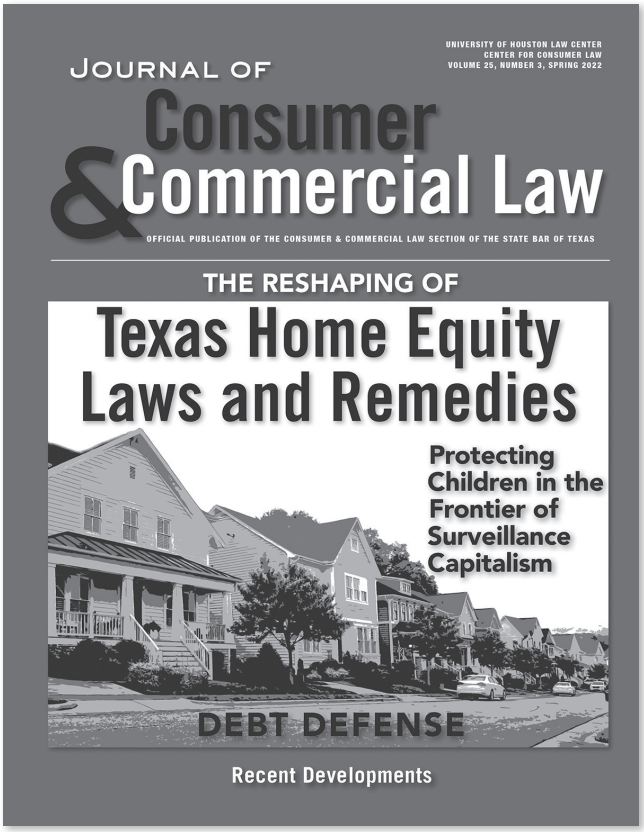

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Welcome Back Autumn!

I hope everyone is enjoying the beginning of autumn, and the cooler temperatures, less rain and colorful leaves. It also marks the first issue of the *Journal* for the new Editorial Board. This year's Board, led by Student Editor-in-Chief Libby Spann, has done an excellent job writing and editing all the Digests, and editing the articles. They did this while meeting all of the deadlines that had been set. My congratulations to them all.

This issue also contains two significant articles. The first, by Mark Steiner, reviews all of the recent changes to Texas Civil Procedure, from both the legislature and the courts. The second, by Karla Glibride is a comprehensive discussion of *Morgan v. Sundance.* As I said in the last issue of the *Journal*, I believe this is the most significant Supreme Court decision dealing with arbitration in a very long time. And there is no one better than Karla to discuss this case, as she filed the petition for certiorari, and in March of 2022 argued the case before the Supreme Court.

And of course, there are almost thirty decisions discussed in the "Recent Developments" section. Many deal with issues that have not been fully discussed or resolved by the courts.

I hope you enjoy reading this issue as much as the new Editorial Board and I did preparing it.

Richard M. Alderman
Editor-in-Chief

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