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.