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Social Media and Status Quo

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Consumers Don't Understand Arbitration Clauses

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Articles

Section 230, Social Media, and Status Quo: Considerations for Reform in the Digital Age
By Stacy L. Stevens 2

EDITORIAL: Important Study Finds Consumers Don't Understand Arbitration Clauses
By Jeff Sovern 15

NOTE: Supreme Court Says Bankruptcy Rules Apply to Tribes 17

NOTE: Texas Supreme Court Discusses Arbitration, Direct-Benefits Estoppel, and Breach of Warranty 19

NOTE: Eleventh Circuit Says One Text Message Justifies Telephone Consumer Protection Act Standing 21

Recent Developments

Deceptive Trade Practices and Warranty 25

Debt Collection 27

Consumer Credit 29

Insurance 30

Arbitration 32

Miscellaneous 34

The Last Word 38

Section 230, Social Media, and Status Quo: Considerations for Reform in the Digital Age

Winner of the Craig Jordan Consumer Protection Writing Competition

By Stacy L. Stevens*

I. INTRODUCTION

Section 230 of the Communications Decency Act, often credited with modernizing the Internet, is an instrumental piece of legislation shaping our twenty-first century information technologies. One of the critical consequences arising from Section 230 is the overwhelming prominence of social media platforms, made possible by provisions of the Section providing the platforms with immunity from liability for the actions of third-party users of their platforms. However, the expansive—and still growing—grasp of these platforms concerns many, producing a debate about what this dynamic and ever-changing technology means for the future of Section 230 and social media platforms. Today, society continues to grapple with urgent questions regarding whether social media platforms should possess the public authority to censor various forms of speech, and if not, what would be the most appropriate approach for reform.

This Article addresses these questions by examining Section 230, the current debate regarding its liability immunity, and various suggested modes of reform. More specifically, Part II of the Article provides a concise exploration of the historical context of free speech and its influence on the formation of Section 230. Part III covers the current state of the law by explaining Section 230's text and judicial interpretation. Part IV discusses the impact of Section 230, the current debate surrounding Section 230, and why the debate has such momentum at this particular time. Part V explores various proposed solutions to Section 230. Part VI analyzes these proposed solutions, the current state of the law, and what future reform should hold. Lastly, Part VII wraps up the arguments discussed about Section 230.

II. BACKGROUND OF SECTION 230

The First Amendment of the Constitution is one of the pillars of American life.[1] The First Amendment's Free Speech Clause is relatively straightforward, stating that "Congress shall make no law abridging the freedom of speech."[2] The Founding Fathers believed that "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; . . . that public discussion is a political duty; and that this should be a fundamental principle to the American government."[3] The "constitutional safeguard" of free speech "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people"[4] and is "a fundamental principle of our constitutional system."[5] While acknowledging the fundamental importance of freedom of speech and expression, it is crucial to note that the Clause's application is restricted solely to governmental actions and not to those of private entities.[6] Still, free speech is equally instrumental to American society today as it was at its founding. However, our landscape has distinctly changed, leaving many questions about the role of free speech in modern twenty-first century life.

Notably, the advent of the Internet and social media has created an environment and lifestyle unimaginable to our country's founders. Individuals all around the globe can share infor-

mation instantly, giving the impression of an increasingly boundaryless world. Smartphones, which became mainstream technology around the time of Section 230's drafting,[7] are now used by almost five billion people worldwide.[8] Additionally, today 93% of American adults use the Internet[9] and 72% use social media.[10] Social media giants like Facebook and Twitter have roughly 2.89 billion[11] and 330 million[12] global monthly active users respectively. More regionally, Facebook has approximately 261 million active monthly users in the United States and Canada combined,[13] and Twitter has roughly 68 million active monthly users in the United States.[14] Since the rise of modern technology and the consequential "information Big Bang,"[15] lawmakers and the courts have worked to apply free speech principles to this dynamic landscape.[16]

One of the most significant pieces of legislation is Section 230 of the Communications Decency Act of 1996, often referred to as "Section 230" or "230."[17] Congress enacted the Communications Decency Act (CDA) as part of the Telecommunications Act of 1996.[18] As a result of the rise of the Internet, Congress wanted to modernize the Telecommunications Act of 1996, which provided "protections against obscene, lewd, indecent, or harassing uses of a telephone."[19] While a few provisions of the CDA that "directly imposed liability for transmitting obscene or harassing material online" have been struck down by the U.S. Supreme Court as unconstitutional,[20] Section 230 remains standing and is extremely important to the development and use of the Internet as we know it.[21]

III. CURRENT STATE OF SECTION 230

A. Text of Section 230

The heart of Section 230 comes from two different protections in Section 230(c), which is captioned "Protection for 'Good Samaritan' blocking and screening of offensive material."[22] To understand Section 230 and its effect, one must take notice of the distinction between "interactive computer service" and "information content provider." Section 230(c)(1) states that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[23] "Interactive computer service" is defined in the statute as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet . . . ."[24] Courts consider social media platforms like Facebook and Twitter to be "interactive computer services,"[25] as well as other types of online platforms such as Yahoo! and Craigslist.[26] In contrast, an "information content provider" means "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."[27] Thus, Section 230 creates a distinction between "those who *create* content and those who *provide access* to that content[.]"[28] Ultimately, Section 230(c)(1) means that social media platforms and other online platforms—those who *provide access* to content—cannot be held liable as the *publishers* of the speech of their third-party users. In contrast, analog platforms (such as newspapers) can be held liable as publishers of a third party's speech.[29]

Section 230's second protection comes from Section 230(c)(2), which states:

> No provider or user of an interactive computer service shall be held [civilly] liable on account of—(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[30]

This provision "ensures that service providers may not be held liable for voluntarily acting to restrict access to objectionable material."[31] By protecting platforms from liability for "good faith" or "Good Samaritan" efforts to remove offensive material, Congress hoped to protect minors from obscene or indecent material on the Internet.[32]

While protecting minors from offensive material on the Internet was the primary purpose of Section 230, Congress also had many other objectives in mind when passing the legislation. Congress (albeit with a twentieth-century understanding of the Internet) *intentionally* created this broad immunity that is notably distinct from more traditional forms of media such as newspapers. Congress understood that "the rapidly developing array of Internet and other interactive computer services" represented an "extraordinary advance in the availability of educational and informational resources to [American] citizens," offered "a forum for true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity," and was relied on by Americans for "a variety of political, educational, cultural, and entertainment services."[33] Congress also noted that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, *with a minimum of government regulation*."[34] Thus, the broad immunity given to service providers was a purposeful effort to allow free speech and e-commerce on the internet to continue its growth.[35] Additionally, Congress also hoped that providing such immunity—and thus keeping platforms and other service providers from having to worry about liability constantly—would *incentivize* service providers to moderate their content.[36]

The statute also identifies five exceptions to the immunity it provides. Section 230 does not apply to (1) the enforcement of federal criminal law, (2) intellectual property law, (3) the enforcement of "any State law that is consistent with [Section 230]," (4) the Electronic Communications Privacy Act of 1986 and similar state law, and (5) various civil actions and state criminal prosecutions where the conduct underlying the charge violates sex trafficking law.[37] The fifth exception is the most recent amendment to Section 230; it was added by the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) in 2018.[38]

B. Judicial Interpretation of Section 230

Judicial interpretation of Section 230 has provided a broad scope of immunity to social media platforms and other service providers. This grant of immunity is vital because of

the considerable growth of the Internet since 1996. In *Zeran v. America Online, Inc.*, the seminal case covering the scope of Section 230, the Fourth Circuit rejected a claim that AOL was liable as a "notice-based" distributor for defamatory statements published on the online bulletin board.[39] The court held that Section 230's immunity for "publishers" included both original publishers and distributors because imposing "notice-based liability" against distributors would *deter* service providers from regulating and monitoring the content posted on its service, rather than incentivizing them to do so.[40] Moreover, the court emphasized that service providers' immunity from liability for the "exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content" is essential to maintaining freedom of speech "in the new and burgeoning Internet medium."[41] In sum, holding that service providers could be liable as "notice-based" distributors would effectively contradict Congress's goals of Section 230.

Section 230's most famous impact—and the focus of this article—is the role it plays in the context of social media platforms.

Zeran's interpretation of Section 230 is significant and many courts rely on it in Section 230 litigation. For example, in 2003, the Ninth Circuit ruled in *Batzel v. Smith* that Section 230's definition of "interactive computer services" included not only "services that provide access to the Internet as a whole" but also "'*any*' information services or systems" that "allow 'multiple users' to access 'a computer server.'"[42] *Batzel*'s rearticulated definition of "interactive computer services" and *Zeran*'s inclusion of distributors in Section 230's protection for publishers arguably paved the way for courts to hold that online platforms, including Twitter, Facebook, Yahoo, and Google are "internet service providers" and thus fall under the law's protections.[43]

IV. SECTION 230 LAW IN APPLICATION

A. Impact of Section 230

Section 230's most famous impact—and the focus of this article—is the role it plays in the context of social media platforms.[44] However, to understand the full significance of Section 230 and the gravity of its potential reform, it is crucial to realize the depth and breadth of its impact. When we say that Section 230 "created the Internet" as we know it today,[45] this goes beyond the existence of social media platforms. Section 230 and the Internet form an instrumental part of our economy. Section 230's liability protections "enable[] and protect[] a wide variety of businesses and business models."[46] Without Section 230's immunizations, the United States economy would lose roughly "$75 billion annually," employee earnings would lower "by some $23 billion annually," and "over 425,000 jobs" would be eliminated.[47] Moreover, Section 230 allows free discourse in discussion boards and product and business reviews, which is vital to industries such as ridesharing, vacation rental, and online shopping.[48] Thus, Section 230's impact extends beyond businesses and platforms, reaching ordinary individuals as users and consumers.[49]

Businesses affected by Section 230 include companies and platforms of all sizes, not just large and well-known names such as Google and Facebook. While large corporations—particularly social media platforms—are at the forefront of the discussion around Section 230,[50] small and mid-size companies should still be considered when examining the law's problems and potential solutions to those problems. Irrespective of their size, millions of "apps, websites, and platforms" reap Section 230's benefits.[51] Additionally, while Section 230 plays a significant role in the current free flow of discourse on social media giants,[52] such platforms would fair far better without Section 230's protections than small and mid-size platforms would.[53] Not only are Big Tech companies in a better place to afford the cost of wildly-increased litigation,[54] but developing such vast content moderation will be a more feasible task, both cost- and data-wise.[55] This inequity will severely harm existing non-Big Tech platforms and provide a significant barrier to entry for new companies, contributing to a Big Tech monopoly.[56]

B. Debate Surrounding Section 230 and Why It's an Issue Now

Section 230 is an extremely important piece of legislation with countless ripple effects. However, the resulting free reign of social media platforms to block or permit different kinds of speech is a topic of growing concern.[57] The debate surrounding Section 230 is simultaneously scattered and far-reaching, as complaints come from all angles. The problem with Section 230 appears to be two-fold: social media platforms are both regulating their content *too much*, resulting in biased and arbitrary censorship of social media users, and regulating their content *too little*, allowing hate speech and mis- and disinformation to permeate the platforms.[58] These concerns ultimately stem from the sheer amount of control platforms have, as Section 230 lets the platforms serve as the primary vehicle for creating, applying, and enforcing regulations. Thus, the platforms make the decisions and can do so without being transparent.[59] The lack of transparency among platforms' content moderation decisions (particularly among the Big Tech platforms) is one of the largest sources of frustration for Section 230 debaters.[60] Moreover, even if there is agreement that something in social media content moderation needs to change, there is further widespread debate about *what* this type of change should look like, *how* it should be enacted, and *who* is the best authority to enforce and implement it.[61]

It is also essential to understand the context of how and why Section 230 has become such a hot topic in the past several years. The time frame of Donald J. Trump's presidency plays a unique and significant role in Section 230's debate. Trump's unprecedented use of social media platforms throughout his campaigning and time in office—whether this be in response to growing social movements such as #MeToo[62] and #BlackLivesMatter,[63] to a global pandemic[64] or just everyday life[65]—represented a stark shift from how prior presidents have used social media.[66] The first noteworthy event especially relevant to the Section 230 discourse is the 2016 presidential election. Some have argued that the "primary trigger" for such reform-focused discussion is the Russian government's interference in the election.[67] The COVID-19 pandemic and the 2020 presidential election also pose essential contexts for the Section 230 debate, as social media giants such as Twitter and Facebook began labeling posts that potentially contained "fake news" or misinformation on these topics with warning messages.[68] In response, Trump took to Twitter and advocated for heightened regulation of social media platforms.[69] He further targeted Section 230 by issuing an "Executive Order on Preventing Online Censorship."[70] He later threatened to veto the National Defense Authorization Act (NDAA), an "annual defense funding bill," if Congress did not revoke Section 230.[71] These tensions reached their height in the January 6, 2021 insurrection, leading to several large platforms removing Trump's presidential and personal accounts.[72] This unexpected and unprecedented action left many questioning the scope of social media platforms' content moderation power.[73]

In the non-presidential context, it is also important to

recognize the general increase in trolling and disinformation in the past several years. Social media's ease of use—including anonymous usage—and vast quantities of use lends itself to an environment conducive to "trolling," hate speech, and mis- and disinformation.[74] Moreover, artificial intelligence is also capable of and does produce such content.[75] Concerns about this type of content have also contributed to the notion that social media platforms' content moderation needs to be more thoroughly regulated.[76]

V. PROPOSED SOLUTIONS

As a result of the discourse around Section 230, lawmakers and consumers have proposed various solutions to remedy the problems around social media content moderation. This Article discusses and provides commentary on four categories of these solutions: (1) revoking Section 230 in its entirety; (2) amending Section 230 by federal legislation; (3) intervention by individual state governments; and (4) avoiding government regulation entirely and instead relying on the platforms to self-regulate.

A. Revoking Section 230

President Biden and former President Trump have called to revoke Section 230.[77] Their advocation stems from different reasons, each representing one side of the two-fold problem[78] and reflecting the general dichotomy between the views of conservatives and liberals on Section 230.[79] Trump's basis for seeking revocation of Section 230 stems from platforms' supposed bias against conservative voices. In contrast, Biden's motive stems from the supposed problem of rampant misinformation on social media platforms, and he thus dislikes the law protecting social media platforms from liability for such misinformation.[80]

However, many argue that entirely revoking Section 230 would likely do more harm than good for the giants and smaller platforms.[81] Section 230's protections have contributed so widely to the existing Internet—and by extension, many facets of our economy[82]—that revoking the law would undoubtedly change our entire Internet and social media landscape.[83] Moreover, the consequences of repealing the law are unpredictable,[84] and it is unknown whether the lack of protection would cause social media platforms to regulate more or less.[85] And if platforms were required to regulate more, smaller platforms would be particularly disadvantaged, unable to compete with the resources of giant platforms.[86]

B. Amending Section 230

A much larger discussion revolves around *amending* Section 230 rather than repealing it entirely. Proposals to amend and reform Section 230 in various ways have been widespread and mainly gained steam after Congress enacted FOSTA in 2018.[87] Since then, at least twenty-six bills in Congress have spoken to Section 230, and the executive branch and outside commentators are also contributing to the dialogue.[88] Some of these proposals reflect the design of FOSTA, carving out certain kinds of claims as exceptions to Section 230's immunity.[89] Other recommendations inflict broader liability on service providers, requiring that offensive content be reported or removed within a specific time frame.[90] In particular, this article will examine two separate amendment proposals that primarily fall into the latter category: the Department of Justice's and Senator Josh Hawley's.

Section 230's protections have contributed so widely to the existing Internet—and by extension, many facets of our economy—that revoking the law would undoubtedly change our entire Internet and social media landscape.

The Department of Justice unveiled its proposal to reform Section 230 on September 23, 2020 on behalf of the Trump Administration.[91] The proposal predominantly inflicts broader liability but also includes some specific carve-outs. The DOJ argues that its reform is necessary because of the change from social media platforms "function[ing] as simple forums" to using "sophisticated algorithms to suggest and promote content and connect users."[92] This substantial increase in the power of platforms can be "abused" instead of used "for good."[93] The DOJ finds two main problems with the way Section 230 is functioning: (1) social media platforms are doing a poor job of "addressing criminal content on their services" and thus need more incentives, and (2) social media platforms are not sufficiently "transparent and accountable" in their current content moderation.[94]

Four categories of reform address these two problems.[95] First, the proposal "incentiviz[es] online platforms to address illicit content" by taking away Section 230's civil immunity from "Bad Samaritan" platforms—platforms that knowingly host illegal (by statutory or court-judgment means) content—and platforms that purposefully promote, facilitate, or solicit unlawful content.[96] The DOJ argues that the proposal's "heightened" mens rea requirement prevents the law from sweeping too broadly.[97] The proposal also includes two specific categories of claims that would be exempt from immunity: child sexual abuse, terrorism, and cyber-stalking; and actual knowledge or court judgments.[98]

Second, the proposal increases the federal government's role in content moderation by allowing the DOJ and other federal agencies to initiate *civil* enforcement actions rather than just criminal enforcement.[99] Third, the proposal "clarif[ies] that federal antitrust claims are not covered by Section 230 immunity."[100] The DOJ's articulated purpose for this revision includes promoting competition among Internet companies.[101]

Fourth, the proposal "promote[s] free and open discourse online and encourage[s] greater transparency between platforms and users" by taking away platforms' ability to use its discretion and remove content it deems objectionable and instead allowing platforms to remove only specific categories of content.[102] Additionally, the proposal inserts a definition of "good faith" that requires platforms to provide a "reasonable explanation" for content moderation actions.[103] The platform will receive Section 230 immunity only if the "reasonable explanation" is satisfactory.[104]

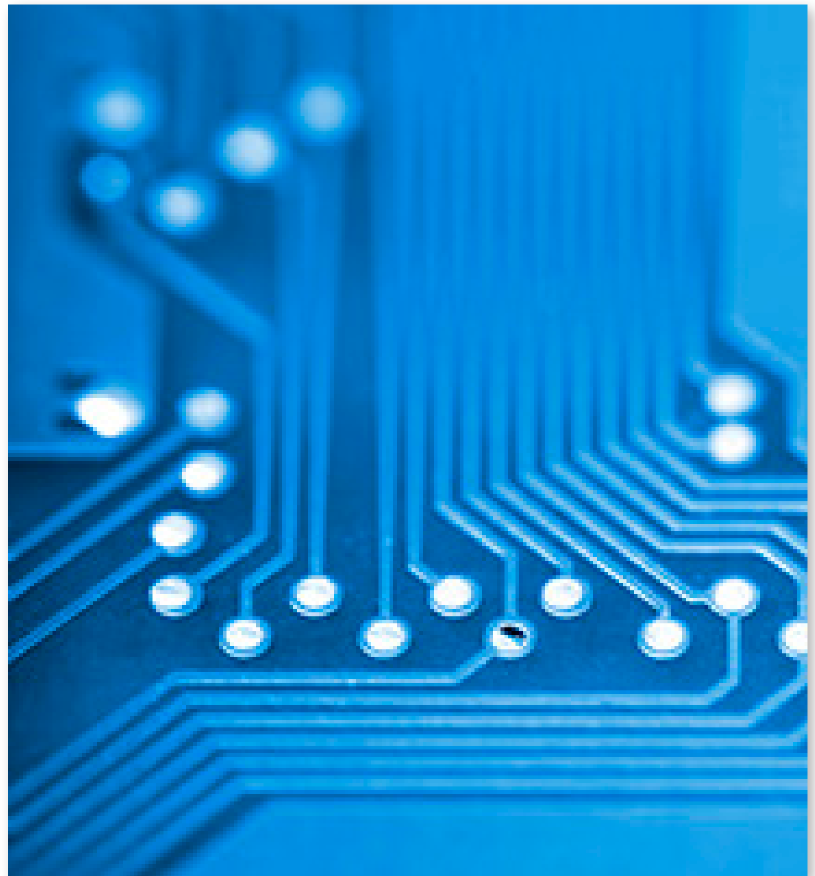
U.S. Senator Josh Hawley's Ending Support for Internet Censorship Act also proposes to amend Section 230.[105] Senator Hawley's proposal originates from the concern that platforms moderate their content with an anti-conservative bias.[106] The Act emphasizes that it only applies to "big tech companies," which it defines as those with more than: (A) thirty million active monthly users in the United States; (B) 300 million active monthly users globally, or (C) $500 million in global annual revenue.[107] The Act removes Section 230's automatic immunity for companies that fall under those parameters. It replaces it with the "ability to *earn* immunity through external audits" every two years that the companies themselves finance.[108] In these audits, companies must "prove to the FTC by clear and convincing evidence that their algorithms and content-removal practices are politically neutral."[109]

C. State Government Involvement

Another method of Section 230 re-

form involves regulation by state governments. Texas and Florida, attempting to reduce alleged censorship bias among social media platforms, passed laws regarding social media content moderation.[110] Both laws are currently the subject of litigation for their constitutionality.[111]

In September 2021, Texas enacted Texas House Bill 20 ("HB 20").[112] The bill makes it unlawful for social media platforms with more than fifty million active monthly users in the U.S. to "censor a user, a user's expression, or a user's ability to receive the expression of another person based on: (1) the viewpoint of the user or another person; (2) the viewpoint represented in the user's expression; or (3) a user's geographic location in this state or any part of this state."[113] The law provides two exceptions to this prohibition, allowing platforms to moderate expression that is (1) specifically requested by an organization aimed at preventing sexual abuse and sexual exploitation and (2) "directly incites criminal activity or consists of specific threats of violence targeted against a person or group" because of specific characteristics.[114] Thus, platforms would not be penalized for or prohibited from removing obscene or criminal content. HB 20 also requires these social media platforms to develop an "acceptable use policy."[115] The "acceptable use policy" requires that the platform develop an accessible complaint system, produce routine "transparency" reports of the removed content, and release its content regulation procedures.[116]



The law reflects conservatives' concern that social media companies possess an anti-conservative and anti-religious bias. In response to this concern, the regulation intends to "prohibit social media companies' ability to silence viewpoints on their platforms and allow users who were wrongly censored to seek recourse."[117] In December 2021, a federal district court blocked HB 20.[118] The court held that "social media platforms have a First Amendment right to moderate content disseminated on their platforms."[119]

Florida's law—Senate Bill 7072—goes even further than Texas's law. It prohibits social media platforms with more than 100 million active monthly users globally[120] from "barring from its site any candidate for office," "using an algorithm to put a candidate's post in the proper feeds—to put the post in the feed of a user who wishes to receive it or to exclude the candidate's post from the feed of a user who does not wish to receive it," and "taking action to 'censor, deplatform, or shadow ban' a 'journalistic enterprise'" based on its content.[121] The law also has various disclosure requirements.[122] These regulations are contrary to a private entity's typical free speech rights.[123] In June 2021, a federal district judge issued a preliminary injunction for the law, holding that the law violates the First Amendment.[124]

D. Avoiding Government Involvement and Relying on Self-Regulation

Another set of proposed solutions to social media content regulation advises steering clear of government regulation altogether and instead relying on the platforms themselves—individually or as an industry—to take further regulatory steps. First and foremost, because of the First Amendment, "American law and culture strongly circumscribe government power to regulate speech on the Internet and elsewhere."[125] There are few exceptions to free speech protection because "[t]he United States highly values individual speech in the public sphere."[126] Not only does the First Amendment's free speech protection allow users of platforms to post their viewpoints, but it—along with Section 230—allows social media platforms to decide what speech they want to have on their platforms.[127] Thus, many argue that government regulation of social media content poses too big a risk to this fundamental right; government officials are not the right players to deal with any content moderation problem, and any possible gains of government regulation are drastically outweighed by the dangers.[128] Instead, regulation is better left to the private sector.[129]

Self-regulation by social media platforms refers to "the steps companies or industry organizations take to preempt or supplement governmental rules and guidelines that govern their activities."[130] Self-regulation encompasses a variety of regulation forms at both the individual firm level and the industry level.[131] Proponents of self-regulation emphasize that such a solution is likely to be effective *now* because of the ongoing dialogue, as self-regulation works best when there are corresponding legitimate threats of government regulation[132] and when the long-term benefits outweigh the short-term costs.[133] Both of these factors are present for social media platforms: platforms are facing threats of government intervention at both the federal and state levels,[134] and prior instances of platforms engaging in self-regulation (specifically with terrorism and sexual exploitation) illustrate that they know content moderation actions can be ultimately worthwhile.[135] Moreover, given our current societal backdrop of a pandemic, and given areas such as "quality, health, [and] safety" are "likely to be better handled by self-regulation and platform governance rules . . . especially when the technology or platform operations are difficult for government regulators to understand and monitor,"[136] it is a possible time for self-regulation. While content moderation regarding hate speech and mis- and disinformation can be difficult because such topics involve more of a gray area than terrorism or sexual exploitation,[137] self-regulation is a possible alternative to government intervention.[138]

Another proposed avenue of self-regulation is *industry*

regulation among platforms rather than individual-platform regulation.[139] Self-regulation at the industry level often involves "forming collective institutions like industry associations"[140] or "self-regulatory councils ("SRC")"[141] that regulate with "common norms and standards."[142] These institutions often "develop standards and protocols that promote order and efficiency across the industry."[143] This type of industry regulation is particularly viable among the large social media platforms because they are in the same market, have "presumably similar business models and economic incentives,"[144] and are an industry where said regulation could enhance public trust.[145] The premise of industry-wide regulation may also reduce the deterrent effect of the cost of such rules because all platforms will endure the cost and thus be on equal footing.[146]

VI. ANALYSIS

To help ensure that reform will be realistic and successful, the discourse around Section 230 should take into consideration five points: (1) the Internet is exceptional and utterly unique; (2) the twenty-first-century backdrop of extreme political polarization and the rise of "cancel culture" is an unignorable component of the debate; (3) the vast impact of Section 230 and its proposed solutions on platforms of all sizes is a vital part of the law's influence; (4) the platforms, not government actors, are the experts on this topic, and accordingly they should be part of the conversation; and (5) if the government does take action, a standardized, federal approach seems the most reasonable.

A. The Internet's Exceptionalism

In some ways, Section 230's impact is almost an instance of a "happy accident"—its drafters, while understanding that the Internet would wield remarkable and unprecedented capabilities,[147] could not have imagined how far it would develop in less than thirty years. On the other hand, judicial interpretations indicate strong intentionality in the power Section 230 gives platforms. Furthermore, the notion of "internet exceptionalism" is a theme that the law's drafters recognized[148] and continues to be recognized by courts today.[149] Twenty-first-century information technologies—especially the Internet and accompanying social media platforms—play a key role in our society, largely due to Section 230.[150] Thus, in whatever form Section 230 reform takes place, legislators should ensure the notion of Internet exceptionalism is maintained. It would be a mistake to treat the Internet just like anything else—such as a newspaper or common carrier—because it is undeniable that the Internet is *not* like anything else. That does not mean platforms should receive a free pass from accountability but instead acknowledges the unique role that the Internet plays in our world. Keeping the exceptionalism of the Internet in mind not only keeps intact some of the drafters' goals for the legislation but also helps ensure that the ever-connected society that Section 230 helped create will get to continue.

B. Notable Twenty-First Century Backdrop of Political Polarization and Cancel Culture

Although Section 230 reform is necessary, legislators should take their time; Section 230 is too critical to the future of the Internet and social media platforms for legislators to fail to conduct reform deliberately and thoroughly. In the discourse around Section 230, especially with its problems being at least two-fold and divided by party lines,[151] it is vital to acknowledge the backdrop in which the Section 230 debate is occurring. Social and political polarization increasingly affects American society, with intense divisions *between* political parties and *within* political parties.[152] Such persistent and deep fractures hinder the chances of compromise or even authentic listening to the other side.[153]

While some contest the role of the Internet *in* such polarization,[154] the *existence* of this polarization is relevant to the Section 230 debate. Both political parties desire Section 230 reform but have differing views on what it should look like, who should undertake it, and what the problem is that requires reform.[155] These layers of disagreement can be attributed to our politically polarized state, as there is an increasing unwillingness to listen to the opposing side.[156] Therefore, without proper discussion and understanding between parties and all applicable players (including the platforms), Section 230 reform will mirror our polarized state and have unexpected consequences.

Additionally, "cancel culture" plays a unique role in the Section 230 debate. There has been much debate regarding the meaning of cancel culture.[157] One common understanding refers to it as "the practice or tendency of engaging in mass canceling as a way of expressing disapproval and exerting social pressure."[158] Cancel culture most commonly takes place over social media.[159] The primary conflict within the cancel culture phenomenon is whether it represents holding others accountable or a method for making snap judgments and doling out unnecessary punishment.[160] Viewpoints on this conflict also generally coincide with one's political party, with liberals often viewing it as a way to call attention to problematic behavior and conservatives often viewing it as a way to quickly judge and punish others without looking at the complete picture.[161]

Cancel culture is relevant to the Section 230 debate because many see it as contributing to an increasingly sensitive society that is intolerant of views in opposition to their own.[162] Many opposed to cancel culture understand it as a way to silence criticism rather than offensive material.[163] Moreover, it is significant that what is considered "offensive" can be subjective, which makes it difficult for platforms to respond to calls for content moderation when the topics are not necessarily black-and-white. Thus, cancel culture arguably creates an environment unconducive to open dialogue and discussion, fueling political polarization. Another platform obstacle is that the vast majority of speech is pro-

tected,[164] making the line "between free speech and feeling safe online" blurry.[165] Regardless of one's views towards cancel culture, its existence (especially on social media platforms) adds a noteworthy layer to the complaints about platforms over-or under-policing content. Thus it should be acknowledged as part of the Section 230 debate's backdrop.

C. Considering Section 230 and Proposed Solutions From the Perspective of Platforms of All Sizes

Section 230 reform would be incomplete without thoroughly considering how any proposed reform will impact platforms *of all sizes*. The problems with Section 230—namely that platforms simultaneously regulate their content too much and too little—primarily concern the social media giants, given the number of users on these platforms. However, reform proponents must remember that Section 230 impacts millions of smaller platforms. Lack of consideration will hurt these smaller platforms through a decreased chance of creation and survival, which will, in turn, damage the U.S. economy.

Small and mid-size platforms rely on Section 230's protections to develop and maintain their sites just as much or even more than the platform giants.[166] Thus, repeal of Section 230 would have disastrous consequences for these platforms. They would not have the financial means to handle an onslaught of litigation like larger platforms do. They would thus be incapable of maintaining their position in the marketplace.[167] Moreover, even if these platforms did have the resources to moderate content through artificial or human intelligence, such extreme content moderation is impractical—it would be nearly impossible to avoid overinclusiveness when using categories of speech as various proxies.[168] From this perspective, repeal of Section 230 is, therefore, the least favorable solution to platforms' content moderation problems.

Amending Section 230 through federal legislation has the potential to provide a more favorable outcome for small and mid-size platforms. Still, the standings between the platform giants and the rest indicate that a one-size-fits-all approach might be more harmful than helpful. This defect is seen in the DOJ's proposed amendment, as it applies to all platforms regardless of size.[169] The changes to Section 230 would also increase the amount of litigation platforms could face,[170] as the amendment would remove platforms' ability to remove content it deems objectionable, among other changes.[171] One of the proposal's goals is to promote competition among Internet companies,[172] but the disadvantage that increased litigation poses for smaller platforms contradicts this goal.

Additionally, the DOJ's proposal alters the law's "good faith" exception by including a definition of "good faith" that requires platforms to provide a "reasonable explanation" for their content moderation decisions.[173] This proposal is problematic for many reasons. Not only are smaller platforms less likely to have the resources to provide a "reasonable explanation" for every content moderation action, but the phrase "reasonable explanation" is also vague and subjective, leaving platforms without any actual guidelines. Moreover, platforms would have to expend time and money explaining content moderation choices that are typically uncontested.[174]

Current instances of state involvement in Section 230 regulations, although with its problems, reflect a more friendly strategy for small and mid-size platforms. The Texas and Florida legislation casts a narrower net, applying their restrictions only to platforms with more than 50 million active monthly users in the United States[175] and more than 100 million active monthly users globally.[176] Interestingly, Senator Hawley's proposal to amend Section 230 by federal legislation applies the smallest scope of these three, considering "Big Tech" to be companies that have more than 30 million active monthly users in the U.S. or more than 300 million active monthly users globally.[177] Although these numbers still cover a vast number of platforms—for context, traditional "Big Tech" platforms Facebook and Twitter respectively possess around 261 million and 68 million monthly active users in the United States[178] and 2.89 billion and 330 million active users globally[179]—the inclusion of specific benchmarks is more beneficial than an all-encompassing law. Thus, despite such legislation inevitably involving a line-drawing dilemma, platform giants' distinctiveness and incomparability suggest that perhaps Section 230 reform is most equitable *without* a one-size-fits-all approach.

D. Conversations Regarding Reform Should Involve Input From Platforms of Varying Sizes

Implementation is a necessary step of the reform process, and the best chance for successful implementation requires communication with and input from platforms of varying sizes. Government actors—at federal and state levels—are not experts in the technology industry, the Internet, or social media platform content moderation.[180] To avoid legislation changes that would upend the use of the Internet (either advertently or inadvertently), legislators should converse with the platforms themselves to understand implementation challenges, feasibility, and overall impact. That does not mean that any legislation or regulation procedures should greatly favor platforms, but just that the dialogue is incomplete without participation from and consideration of those directly involved. Furthermore, such conversations must be with more than just the platform giants, especially if the legislative efforts apply to all platforms. Large, mid-size, and small platforms have varying resources and capabilities, and a greater understanding of these features will help ensure that Section 230 reform does not spell extinction for smaller platforms.

From this perspective, self-regulation is the most promising solution for the time being because it gives platforms a chance to determine the best and most feasible methods for content moderation. Section 230 is such a foundational piece of the Internet's infrastructure that it is safest to leave it alone and see if the platforms—particularly the giants, since they are the ones from which the problems are stemming —can find realistic, probable solutions without running the risk of irreparably changing the Internet. Furthermore, the timing is particularly apt for self-regulation efforts, as platforms increasingly face government intervention threats and realize that self-regulation can improve content moderation processes.

Indeed, platform giants such as Facebook, Twitter, and YouTube have undertaken efforts to reduce hate speech and mis- and disinformation on their platforms and to provide more comprehensive and accessible transparency policies in recent years. For example, Facebook and Twitter both utilized labels and warnings about "misleading" or "provably false" claims in users' posts in response to the COVID-19 pandemic and the 2020 U.S. Presidential Election,[181] and they are continuing to develop these fact-checking procedures.[182]

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Thus, given the situation's newness, smaller steps are likely to be a better bet than more expansive ones.

These platforms are also developing their transparency procedures. YouTube has begun to release a new "Violative View Rate (VVR)" statistic that discloses "what percentage of views on YouTube comes from content that violates [their] policies."[183] The release of its VVR statistic is an addition to the platform's disclosure of its "Community Guidelines Enforcement Report" starting in 2018, which gave users an insight into what type of content violated the guidelines and the reasons for removal.[184] Twitter has shifted from producing a transparency report to a "more comprehensive Twitter Transparency Center," which Twitter designed to "cover a broader array of [the platform's] transparency efforts" in a format that is "increasingly interactive and intuitive**.**"[185] Facebook has undergone an independent audit of its Community Standards Enforcement Report metrics to ensure its transparency efforts accurately represent the platform's actions.[186] Most recently, Facebook created an "Oversight Board" to "ensur[e] respect for free expression" by "provid[ing] independent judgment" on the platform's content moderation decisions.[187] Inspired by the role of the U.S. Supreme Court,[188] the board is a "separate entity from the Facebook company." It comprises up to forty independent and diverse experts who will "uphold or reverse Facebook's content decisions" in a binding manner.[189] These efforts illustrate that platforms are attempting to self-regulate and are experimenting with various possible methods of problem resolution. Thus, time to determine the efficacy of these efforts should be allowed before legislators make drastic changes to Section 230.

E. If Government Action is Taken, Federal Legislation Seems the Most Reasonable

However, suppose government involvement ends up being the selected path. In that case, some form of federal legislation seems preferable over state legislation because the uniformity of federal legislation will help ensure that platforms follow the provided guidelines. As illustrated by the differing applicability standards in Texas's HB 20, Florida's SB 7072, and Senator Hawley's proposal,[190] there are many possible interpretations of "big tech" platforms. There are also infinite possible variations of disclosure requirements. These inconsistencies can make it difficult for platforms to comply with the stated requirements. By contrast, uniform legislation provides clarity and consistency to the players tasked with following and implementing the new standards.

With this in mind, legislators should focus more on the type of Section 230 amendment proposals that carve out individual exceptions to the law's liability shield instead of the proposals that operate as more of an overhaul. The prevalence of social media platforms is still very new, with Myspace, Facebook, and Twitter launching in the early- and mid-2000s.[191] Additionally, the current push for Section 230 reform largely stems from events beginning in 2016.[192] Thus, given the situation's newness, smaller steps are likely to be a better bet than more expansive ones because of how important Section 230 is and how unpredictable the consequences of Section 230 reform will be. Moreover, carving out specific exceptions to Section 230's protections will still make some headway on the two main problems resulting from the law's liability shield: platforms will be unable to apply any supposed bias towards the topics of the exceptions, and they will have to engage in further content moderation.

VII. CONCLUSION

The role of Section 230 in today's society cannot be understated. Accordingly, any reform to the law should result from deliberate and thorough research. Well-rounded and complete Section 230 debate requires bearing in mind the exceptionality of the Internet, the unique background in which the debate is currently taking place, the law's impact on and importance for platforms of all sizes, and the comparative ease of uniform legislation when it comes to implementation. What the future holds for the Internet and social media platforms is unknown, and the possibilities for reform are endless. Still, the choices that are part of the law's development should reflect its value and gravity.

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1 *See* U.S. Const. amend. I.

2 *Id.*

3 Whitney v. California, 274 U.S. 357, 375 (Brandeis, J., concurring).

4 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (quoting Roth v. United States, 354 U.S. 476, 484 (1957).

5 *Id.* (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)).

6 *See* The Civil Rights Cases, 109 U.S. 3, 18–19 (1883) (establishing the state action doctrine); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991) ("Although the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints. This is the jurisprudence of state action[.]"

7 *See* Steven Tweedie, *The World's First Smartphone, Simon, Was Created 15 Years Before the iPhone*, Business Insider (June 14, 2015), https://www.businessinsider.com/worlds-first-smartphone-simon-launched-before-iphone-2015-6 (noting that the first smartphone debuted in 1992).

8 Cameron F. Kerry, *Section 230 Reform Deserves Careful and Focused Consideration*, Brookings (May 14, 2021), https://www.brookings.edu/blog/techtank/2021/05/14/section-230-reform-deserves-careful-and-focused-consideration/.

9 *Internet/Broadband Fact Sheet*, Pew Rsch. Ctr. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/internet-broadband/.

10 *Social Media Fact Sheet*, Pew Rsch. Ctr. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/social-media/.

11 *Number of Monthly Active Facebook Users Worldwide as of 2nd Quarter 2021*, Statistica https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/.

12 *Number of Monetizable Daily Active Twitter Users (mDAU) Worldwide From 1st Quarter 2017 to 3rd Quarter 2021*, Statistica, https://www.statista.com/statistics/970920/monetizable-daily-active-twitter-users-worldwide/ ("The last published figure regarding monthly active Twitter users amounted to 330 million before the company discontinued reporting on the metric").

13 *Number of Monthly Active Facebook Users in the United States and Canada as of 3rd Quarter 2021*, Statistica, https://www.statista.com/statistics/247614/number-of-monthly-active-facebook-users-worldwide/.
14 *Number of Monthly Active Twitter Users in the United States From 1st Quarter 2010 to 1st Quarter 2019*, Statistica, https://www.statista.com/statistics/274564/monthly-active-twitter-users-in-the-united-states/.
15 Kerry, *supra* note 8.
16 *See, e.g.*, 47 U.S.C. § 230.
17 47 U.S.C. § 230.
18 Valerie C. Brannon & Eric N. Holmes, Cong. Rsch. Serv., R46751, Section 230: An Overview 1 (2021), https://crsreports.congress.gov/product/pdf/R/R46751.
19 *Id.* at 1–2.
20 *Id.* at 1; Reno v. ACLU, 521 U.S. 844, 849, 885 (1997).
21 *See, e.g.*, Ashley Johnson & Daniel Castro, *Overview of Section 230: What It Is, Why It Was Created, and What It Has Achieved*, Info. Tech. & Innovation Foundation (Feb. 22, 2021), https://itif.org/publications/2021/02/22/overview-section-230-what-it-why-it-was-created-and-what-it-has-achieved; Jeff Kosseff, *Op-Ed: Section 230 Created the Internet As We Know It. Don't Mess With It*, L.A. Times (Mar. 29, 2019, 3:05 AM), https://www.latimes.com/opinion/op-ed/la-oe-kosseff-section-230-internet-20190329-story.html; *Communications Decency Act Section 230*, Am. Civ. Liberties Union, https://www.aclu.org/issues/free-speech/internet-speech/communications-decency-act-section-230 (last visited Dec. 25, 2021).
22 47 U.S.C. § 230(c).
23 *Id.* § 230(c)(1).
24 47 U.S.C. § 230(f)(2). // *Id.* § 230(f)(2).
25 Valerie C. Brannon, Cong. Rsch. Serv., R45650, Free Speech and the Regulation of Social Media Content 10 (2019), https://sgp.fas.org/crs/misc/R45650.pdf.
26 Brannon & Holmes, *supra* note 18, at 6.
27 47 U.S.C. § 230(f)(3).
28 Brannon & Holmes, *supra* note 18, at 3 (emphasis added).
29 *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283–86 (1964) (ruling that a public official must show "actual malice" to win a defamation suit).
30 47 U.S.C. § 230(c)(2)
31 Brannon & Holmes, *supra* note 18, at 3.
32 *See* Tim Hwang, *Dealing with Disinformation: Evaluating the Case for Amendment of Section 230 of the Communications Decency Act*, *in* Social Media and Democracy: The State of the Field and Prospects for Reform 260 (Nathaniel Persily & Joshua A. Tucker, eds., 2020), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/665B952A40A6A5F244E2141A84CA45D8/9781108835558c11_252-285.pdf/dealing_with_disinformation_evaluating_the_case_for_amendment_of_section_230_of_the_communications_decency_act.pdf.
33 47 U.S.C. § 230(a).
34 *Id.* § 230(a)(4) (emphasis added).
35 *See* John A. LoNigro, *Deplatformed: Social Network Censorship, the First Amendment, and the Argument to Amend Section 230 of the Communications Decency Act*, 37 Touro L. Rev. 427, 431–32 (2021).
36 *See* Brannon & Holmes, *supra* note 18, at 6 (noting that Section 230 was created with the partial motivation of overruling *Stratton Oakmont, Inc. v. Prodigy Services*, a New York state trial court decision that had held an internet service provider liable as a publisher for libelous content).
37 47 U.S.C. § 230(e).
38 *See* Valerie C. Brannon, Cong. Rsch. Serv. Legal Sidebar, LSB10306, Liability for Content Hosts: An Overview of the Communication Decency Act's Section 230 3 (2019), https://sgp.fas.org/crs/misc/LSB10306.pdf.
39 Zeran v. America Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997).
40 *Id.*
41 *Id.* at 330.
42 Batzel v. Smith, 333 F.3d 1018, 1030 (9th Cir. 2003).
43 *See* Jeff Kosseff, *The Lawsuit Against America Online That Set Up Today's Internet Battles*, Slate (July 14, 2020, 5:45 AM), https://slate.com/technology/2020/07/section-230-america-online-ken-zeran.html.
44 *See, e.g.*, Kerry, *supra* note 8.
45 *See, e.g.*, Stephen Engelberg, *Twenty-Six Words Created the Internet. What Will It Take to Save It?*, ProPublica (Feb. 9, 2021, 2:00 PM), https://www.propublica.org/article/nsu-section-230.
46 Johnson & Castro, *supra* note 21.
47 Christian M. Dippon, *Economic Value of Internet Intermediaries and the Role of Liability Protections*, NERA Economic Consulting 18 (June 5, 2017), https://internetassociation.org/wp-content/uploads/2017/06/Economic-Value-of-Internet-Intermediaries-the-Role-of-Liability-Protections.pdf.
48 Johnson & Castro, *supra* note 21; Kerry, *supra* note 8.
49 Laurent Crenshaw, *What Would the Internet Look Like Without Section 230?*, Inside Sources (Dec. 1, 2021), https://insidesources.com/what-would-the-internet-look-like-without-section-230/.
50 *See, e.g.*, Kerry, *supra* note 8.
51 Kerry, *supra* note 8.
52 *See* Engelberg, *supra* note 45 ("Freed from the threat of being sued for libel, Facebook, Twitter, Reddit and other corners of cyberspace became places where literally billions of people felt free to say whatever they wanted . . . .").
53 *See, e.g.*, Ryan Nabil, *Why Repealing Section 230 Will Hurt Startups and Medium-Sized Online Businesses*, Competitive Enter. Inst. (Feb. 1, 2021), https://cei.org/blog/why-repealing-section-230-will-hurt-startups-and-medium-sized-online-businesses/; LoNigro, *supra* note 34, at 478.
54 Nabil, *supra* note 52; Mark Weinstein, *Small Sites Need Section 230 To Compete*, Wall St. J. (Jan. 25, 2021, 2:16 PM), https://www.wsj.com/articles/small-sites-need-section-230-to-compete-11611602173;
55 Nabil, *supra* note 53; *see* LoNigro, *supra* note 35, at 478.
56 *See, e.g.*, Nabil, *supra* note 53 ("By deterring small and medium-sized companies from hosting third-party content, this repeal will further entrench Big Tech's market dominance and protect them from future competition.").
57 *See* Kerry, *supra* note 8.
58 *See, e.g.*, David Morar & Chris Riley, *A Guide For Conceptualizing the Debate Over Section 230*, Brookings (Apr. 9, 2021), https://www.brookings.edu/techstream/a-guide-for-conceptualizing-the-debate-over-section-230/; Clyde Wayne Crews Jr., *Regulating Social Media Content Moderation Will Backfire and Make Big Tech More Powerful*, Forbes (June 28, 2020, 7:52 PM), https://www.forbes.com/sites/waynecrews/2020/06/28/regulating-social-media-content-moderation-will-backfire-and-make-big-tech-more-powerful/?sh=943f9079ffee ("The current social media debate centers around competing interventionist agendas. Conservatives want social media titans regulated to remain "neutral," while liberals tend to want them to eradicate harmful content and address other alleged societal ills.").
59 *See* James Pethokoukis, *Jeff Kosseff on the Twenty-Six Words That Creatd the Internet: A Long-Read Q&A*, AEI (July 3, 2019), https://www.aei.org/economics/jeff-kosseff-on-the-twenty-six-words-that-created-the-internet-a-long-read-qa/.
60 *See, e.g.*, *id.*; Carly Miller, *Can Congress Mandate Meaningful Transparency for Tech Platforms?*, Brookings (June 1, 2021),

https://www.brookings.edu/techstream/can-congress-mandate-meaningful-transparency-for-tech-platforms/.

61 *See* discussion *infra* Section V.

62 *See* Jaime Ducharme, *Trump Just Went After the #MeToo Movement: 'Lives Are Being Shattered*,*'* TIME (Feb. 10, 2018 12:20PM), https://time.com/5143101/donald-trump-tweet-allegations/ (reporting on one of Trump's tweets relating to the #MeToo movement).

63 *See* Sim Khanuja & Caroline Steidley, *Political Issue: How Trump Handled BLM (A Thread of Tweets*), The Kirkwood Call (Oct. 21, 2020), https://www.thekirkwoodcall.com/opinion/2020/10/21/political-issue-how-trump-handled-blm-a-thread-of-tweets/ (posting pictures of Trump's now-unavailable tweets that were made in response to the Black Lives Matter movement).

64 *See* Rem Rieder, *Trump's Statements About the Coronavirus*, FactCheck.org (Mar. 19, 2020), https://www.factcheck.org/2020/03/trumps-statements-about-the-coronavirus/ (recapping Trump's oral and digital statements about the COVID-19 pandemic).

65 *See* Michael D. Shear et al., *How Trump Reshaped the Presidency in Over 11,000 Tweets*, N.Y. Times (Nov. 2, 2019), https://www.nytimes.com/interactive/2019/11/02/us/politics/trump-twitter-presidency.html (discussing the timeline and content of Trump's Twitter account).

66 *Id.* (describing the noteworthiness of Trump's use of social media during his presidential campaign and term).

67 *See* Hwang, *supra* note 32, at 254.

68 *See* Megan Graham & Salvador Rodriguez, *Twitter and Facebook Race to Label a Slew of Posts Making False Election Claims Before All Votes Counted*, CNBC (Nov. 6, 2020, 12:51 PM), https://www.cnbc.com/2020/11/04/twitter-and-facebook-label-trump-posts-claiming-election-stolen.html; *Facebook to Label Vaccine Posts to Combat COVID-19 Misinfo*, AP News (Mar. 15, 2021), https://apnews.com/article/business-misinformation-coronavirus-pandemic-mark-zuckerberg-55583cb7cee4e6966f49f-8604d76a081.

69 *See* Jack Brewster, *'Close Them Down': Trump Threatens To Shut Down Social Media Platforms*, Forbes (May 27, 2020, 8:48 AM), https://www.forbes.com/sites/jackbrewster/2020/05/27/close-them-down-trump-threatens-to-shut-down-social-media-platforms/?sh=7dc5c690445e.

70 *See* Valerie C. Brannon, Nina M. Hart, Eric N. Holmes & Chris D. Linebaugh, Cong. Rsch. Serv.: Legal Sidebar, UPDATE: Section 230 and the Executive Order on Preventing Online Censorship 1, 3 (2020).

71 Anshu Siripurapu, *Trump and Section 230: What to Know*, Council on Foreign Rels. (Dec. 2, 2020, 7:00 AM), https://www.cfr.org/in-brief/trump-and-section-230-what-know.

72 *See* Billy Perrigo, *Facebook and Twitter Finally Locked Donald Trump's Accounts. Will They Ban Him Permanently?*, TIME (Jan 7, 2021 11:19 AM), https://time.com/5927398/facebook-twitter-trump-suspension-capitol/.

73 *See* Sara Morrison, *How The Capitol Riot Revived Calls to Reform Section 230*, Vox: Recode (Jan. 11, 2021, 4:55 PM), https://www.vox.com/recode/22221135/capitol-riot-section-230-twitter-hawley-democrats.

74 *See* Hwang, *supra* note 31, at 253–56; Lee Rainie, Janna Anderson & Jonathan Albright, *The Future of Free Speech, Trolls, Anonymity and Fake News Online*, Pew Rsch. Ctr. (Mar. 29, 2017), https://www.pewresearch.org/internet/2017/03/29/the-future-of-free-speech-trolls-anonymity-and-fake-news-online/.

75 *How is Fake News Spread? Bots, People Like You, Trolls, and Microtargeting*, Ctr. for Info. Tech. and Soc'y at UC Santa Barbara, https://www.cits.ucsb.edu/fake-news/spread (last visited Dec. 31, 2021).

76 *See* Hwang, *supra* note 32, at 253–54.

77 Trump repeatedly called for repeal of Section 230 during his time in office. *See supra* discussion Section IV.B. Biden, during his 2020 campaign, stated that Section 230 should be "immediately" revoked for social media giants such as Facebook because they are "not merely an internet company" and are "propagating falsehoods they know to be false. *Joe Biden: Former Vice President of the United States*, The N.Y. Times: Opinion (Jan. 17, 2020), https://www.nytimes.com/interactive/2020/01/17/opinion/joe-biden-nytimes-interview.html?smid=nytcore-ios-share.

78 *See* discussion *supra* Section IV.2.

79 *See, e.g.*, Bobby Allyn, *As Trump Targets Twitter's Legal Shield, Experts Have A Warning*, NPR (May 30, 2020, 11:36 AM), https://www.npr.org/2020/05/30/865813960/as-trump-targets-twitters-legal-shield-experts-have-a-warning (noting that some conservatives "accuse social media sites of muzzling conservative voices" and that some liberals "say Section 230 has created a fertile environment for the rampant spread of online misinformation, harassment, and abuse.").

80 *See* Betsy Klein, *White House Reviewing Section 230 Amid Efforts to Push Social Media Giants to Crack Down on Misinformation*, CNN (July 20, 2021, 10:31 AM), https://www.cnn.com/2021/07/20/politics/white-house-section-230-facebook/index.html.

81 *See, e.g.*, Kerry, *supra* note 8.

82 *See supra* discussion Section IV.A.

83 *See, e.g.*, Kerry, *supra* note 8; Allyn, *supra* note 79.

84 *See* Kerry, *supra* note 8; Allyn, *supra* note 79.

85 *See, e.g.*, Amirta Khalid, *Why Startups Have So Much Riding on Section 230's Future*, Inc. (Jan. 15, 2021), https://www.inc.com/amrita-khalid/section-230-communications-decency-act-tech-startups-donald-trump.html ("If you repeal Section 230, one of two things will happen. Either platforms will decide they don't want to moderate anything, or platforms will moderate everything.").

86 *See, e.g.*, Nabil, *supra* note 53.

87 Valerie C. Brannon & Eric N. Holmes, Cong. Rsch. Serv., R46751, Section 230: An Overview 30 (2021), https://crsreports.congress.gov/product/pdf/R/R46751.

88 *Id.*

89 *Id.*

90 *See id.* at 31 & n.318.

91 *The Justice Department Unveils Proposed Section 230 Legislation*, U.S. Dep't Just.: Off. Pub. Affairs (Sept. 23, 2020), https://www.justice.gov/opa/pr/justice-department-unveils-proposed-section-230-legislation.

92 Department of Justice Cover Letter to Congress, U.S. Dep't Just. Archives 1 (Sept. 23, 2020), https://www.justice.gov/file/1319346/download [hereinafter DOJ Cover Letter].

93 *Id.*

94 *Id.*

95 *Department of Justice's Review of Section 230 of the Communications Decency Act of 1996*, U.S. Dep't Just. Archives, https://www.justice.gov/archives/ag/department-justice-s-review-section-230-communications-decency-act-1996 (last visited Feb. 19, 2022).

96 DOJ Cover Letter, *supra* note 92, at 3.

97 *See id.*

98 *See Department of Justice's Review of Section 230 of the Communications Decency Act of 1996*, *supra* note 95.

99 *See The Justice Department Unveils Proposed Section 230 Legislation*, *supra* note 91.

100 *Department of Justice's Review of Section 230 of the Communications Decency Act of 1996*, *supra* note 95.

101 *See id.*
102 *Id.*; *see also Ramseyer Draft Legislative Reforms to Section 230 of the Communications Decency Act*, U.S. Dep't Just. 1, https://www.justice.gov/file/1319331/download (last visited Feb. 19, 2022) [hereinafter DOJ Proposal Redline].
103 *See Department of Justice's Review of Section 230 of the Communications Decency Act of 1996*, *supra* note 95.
104 *See id*.
105 *See* Ending Support for Internet Censorship Act, S. 1914, 116th Cong. (2019), https://www.congress.gov/116/bills/s1914/BILLS-116s1914is.pdf.
106 *See Senator Hawley Introduces Legislation to Amend Section 230 Immunity for Big Tech Companies*, Josh Hawley: U.S. Sen. for Mo. (June 19, 2019), https://www.hawley.senate.gov/senator-hawley-introduces-legislation-amend-section-230-immunity-big-tech-companies; *see also* Ending Support for Internet Censorship Act § 2.
107 *See Senator Hawley Introduces Legislation to Amend Section 230 Immunity for Big Tech Companies*, supra note 106.
108 *Id.* (emphasis added).
109 *Id.*
110 *See* H.B. 20, 87th Leg., 2nd Spec. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/872/billtext/pdf/HB00020F.pdf#navpanes=0; S.B. 7072, 2021 Leg., Reg. Sess. (Fla. 2021).
111 *See, e.g.*, John Villasenor, *Texas' New Social Media Law Is Blocked For Now, But That's Not The End of the Story*, Brookings (Dec. 14, 2021), https://www.brookings.edu/blog/techtank/2021/12/14/texas-new-social-media-law-is-blocked-for-now-but-thats-not-the-end-of-the-story/; *Arguments Slated on Florida Social Media Law*, CBS Mia. (Jan. 14, 2022, 2:42 PM), https://miami.cbslocal.com/2022/01/14/arguments-florida-social-media-law/.
112 H.B. 20.
113 *Id.*
114 *Id.*
115 *Id.*
116 *Id.*; *see also* Kailyn Rhone, *Social Media Companies Can't Ban Texans Over Political Viewpoints Under New Law*, Tex. Trib. (Sept. 2, 2021, 4:00 PM), https://www.texastribune.org/2021/09/02/texas-social-media-censorship-legislature/.
117 Rhone, *supra* note 116.
118 NetChoice, LLC v. Paxton, No. 1:21-CV-840-RP, 2021 WL 5755120, at *1 (W.D. Tex. Dec. 1, 2021).
119 *Id.* at *6—7.
120 S.B. 7072, 2021 Leg., Reg. Sess. (Fla. 2021).
121 NetChoice, LLC v. Moody, No. 4:21cv220-RH-MAF, 2021 WL 2690876, at *3–4 (N.D. Fla. June 30, 2021).
122 *See id.* at *5.
123 *Id.* at *1 ("This legislation compels providers to host speech that violates their standards—speech they otherwise would not host—and forbids providers from speaking as they otherwise would.").
124 *See id.* at *1.
125 John Samples, *Why the Government Should Not Regulate Content Moderation of Social Media*, Cato Inst. Pol'y Analysis No. 865, Apr. 9, 2019, at 1, 1, https://www.cato.org/sites/cato.org/files/pubs/pdf/pa_865.pdf.
126 *Id.* at 3.
127 *See, e.g.*, Casey Newton, *Everything You Need to Know About Section 230*, The Verge (Dec. 29, 2020, 4:50 PM), https://www.theverge.com/21273768/section-230-explained-internet-speech-law-definition-guide-free-moderation.
128 *See, e.g.*, Samples, *supra* note 125, at 23 ("The arguments advanced for a greater scope of government power do not stand up. Granting such power would gravely threaten free speech and the independence of the private sector. We have seen that these tech companies are grappling with many of the problems cited by those calling for public action. The companies are thus far more capable of dealing with these issues."); Michael A. Cusumano, Annabelle Gawer & David B. Yoffie, *Can Self-Regulation Save Digital Platforms?*, 30 Indus. and Corp. Change 1259, 1261 (2021), https://academic.oup.com/icc/article/30/5/1259/6355574 ("Due to their complex technology and rapidly evolving features and services, it may be difficult for governments to intervene effectively in the operations of digital platforms. Poorly designed interventions also could generate harmful side effects for consumers, ecosystem participants, and the global digital economy."); Nina Brown, *Regulatory Goldilocks: Finding the Just and Right Fit for Content Moderation on Social Platforms*, 8 Tex. A&M L. Rev. 451, 486 (2021); Crews Jr., *supra* note 58.
129 *See* Samples, *supra* note 125, at 23; Cusumano, *supra* note 128, at 20–22.
130 Cusumano et al., *supra* note 128, at 1262.
131 *Id.*
132 *Id.* at 1278–79.
133 *See id.* at 1263, 1278–79; Brown, *supra* note 128, at 483.
134 *See supra* discussion Section V.
135 *See* Cusumano et al., *supra* note 128, at 1275–80; Brown, *supra* note 128, at 483.
136 Cusumano et al., *supra* note 128, at 1280.
137 *Id.* at 1277.
138 *See* Cusumano et al., *supra* note 128, at 1278–80.
139 *See* Cusumano et al., *supra* note 128, at 1262, 1278; Brown, *supra* note 128, at 488–90.
140 Cusumano et al., *supra* note 128, at 1262.
141 Brown, *supra* note 128, at 488.
142 Cusumano et al., *supra* note 128, at 1278.
143 Brown, *supra* note 128, at 489.
144 Cusumano et al., *supra* note 128, at 1278.
145 *See* Brown, *supra* note 128, at 489 ("SRCs . . . can be particularly useful in industries—like social media—where public trust is low."); Cusumano et al., *supra* note 128, at 1259–61.
146 Cusumano et al., *supra* note 128, at 1278.
147 *See* discussion *supra* Section III.A.
148 *See* discussion *supra* Section III.A.
149 Neil Fried, *The Myth of Internet Exceptionalism: Bringing Section 230 Into the Real World*, Am. Affs. J. (2021), https://americanaffairsjournal.org/2021/05/the-myth-of-internet-exceptionalism-bringing-section-230-into-the-real-world/.
150 *See* discussion *supra* Section II.
151 *See supra* discussion Section V.A.
152 *See, e.g.*, *Beyond Red vs. Blue: The Political Typology*, Pew Rsch. Ctr (Nov. 9, 2021) https://www.pewresearch.org/politics/2021/11/09/beyond-red-vs-blue-the-political-typology-2/; Shanto Iyengar, Yphtach Lelkes, Matthew Levendusky, Neil Malhotra & Sean J. Westwood, *The Origins and Consequences of Affective Polarization in the United States*, 22 Ann. Rev. Pol. Sci. 129, 130 (2019), https://www.annualreviews.org/doi/pdf/10.1146/annurev-polisci-051117-073034; *Partisan Antipathy: More Intense, More Personal*, Pew Rsch. Ctr. (Oct. 10, 2019), https://www.pewresearch.org/politics/2019/10/10/partisan-antipathy-more-intense-more-personal/ ("Today the level of division and animosity—including negative sentiments among partisans toward the members of the opposing party—has only deepened.").
153 *See* Frank Newport, *The Impact of Increased Political Polarization*, Gallup: News (Dec. 5, 2019), https://news.gallup.com/opinion/polling-matters/268982/impact-increased-political-polarization.aspx ("These skeptical views of institutions and social structures skew us toward distrust, anger, and internal fighting—not actionable efforts to fix problems and address threats.").

154 *See e.g.*, Iyengar et al., supra note 152, at 134–35.
155 *See* Allyn, *supra* note 79; Ashley Johnson & Daniel Castro, *Proposals to Reform Section 230*, Info. Tech. & Innovation Foundation (Feb. 22, 2021), https://itif.org/publications/2021/02/22/proposals-reform-section-230.
156 *See* discussion *supra* Section V.
157 *See, e.g.*, Emily A. Vogels et al., *Americans and 'Cancel Culture': Where Some See Calls for Accountability, Others See Censorship, Punishment*, Pew Rsch. Ctr. (May 19, 2021), https://www.pewresearch.org/internet/2021/05/19/americans-and-cancel-culture-where-some-see-calls-for-accountability-others-see-censorship-punishment/.
158 *Cancel culture*, *Merriam-Webster.com*, https://www.merriam-webster.com/dictionary/cancel%20culture (last visited Dec. 28, 2021).
159 *See* Vogels et al., *supra* note 157.
160 *See id.*
161 *See id.*
162 *See, e.g.*, Alec Greven, *Cancel Culture Is a Threat to Everyone*, Inst. for Free Speech (Sept. 22, 2021), https://www.ifs.org/blog/cancel-culture-threat-to-everyone/; Ramesh Ponnuru, *Here's What Neera Tanden's Defeat Says About 'Cancel Culture,'* Seattle Times (Mar. 4, 2021, 11:31 AM), https://www.seattletimes.com/opinion/heres-what-neera-tandens-defeat-says-about-cancel-culture/.
163 *See* Ponnuru, *supra* note 162.
164 *See* Victoria L. Killion, Cong. Rsch. Serv., IF11072, The First Amendment: Categories of Speech 1 (2019), https://sgp.fas.org/crs/misc/IF11072.pdf ("Accordingly, speech is generally protected under the First Amendment unless it falls within one of the narrow categories of unprotected speech[.]").
165 Vogels et al., *supra* note 157.
166 *See, e.g.*, *id.*
167 *See, e.g.*, Nabil, *supra* note 53.
168 *See, e.g.*, Kerry, *supra* note 8 ("…much of what is online that we consider offensive speech or misinformation, in one way or another, requires contextual judgments by humans to identify the problems and decide what's over the line.").
169 *See* DOJ Proposal Redline, *supra* note 102.
170 Aaron Mackey, *Two Different Proposals to Amend Section 230 Share A Similar Goal: Damage Online Users' Speech*, Elec. Frontier Found. (June 18, 2020), https://www.eff.org/deeplinks/2020/06/two-different-proposals-amend-section-230-share-similar-goal-damage-online-users.
171 *Id.*
172 *See Department of Justice's Review of Section 230 of the Communications Decency Act of 1996*, *supra* note 94.
173 *Id.*
174 Mackey, *supra* note 171.
175 *See* H.B. 20, 87th Leg., 2nd Spec. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/872/billtext/pdf/HB00020F.pdf#navpanes=0.
176 *See* S.B. 7072, 2021 Leg., Reg. Sess. (Fla. 2021).
177 *See Senator Hawley Introduces Legislation to Amend Section 230 Immunity for Big Tech Companies*, *supra* note 105.
178 *See* sources cited *supra* notes 13–14.
179 *See* sources cited *supra* notes 11–12.
180 *See, e.g.*, Cusumano et al., *supra* note 128, at 1261 ("Due to their complex technology and rapidly evolving features and services, it may be difficult for governments to intervene effectively in the operations of digital platforms. Poorly designed interventions also could generate harmful side effects for consumers, ecosystem participants, and the global digital economy.").
181 *See, e.g.*, Yael Roth & Nick Pickles, *Updating Our Approach to Misleading Information*, Twitter (May 11, 2020), https://blog.twitter.com/en_us/topics/product/2020/updating-our-approach-to-misleading-information; *How Facebook's Third-Party Fact-Checking Program Works*, Meta: Meta Journalism Project (June 1, 2021), https://www.facebook.com/journalismproject/programs/third-party-fact-checking/how-it-works; and Shannon Bond, *Twitter Expands Warning Labels To Slow Spread of Election Misinformation*, NPR (Oct. 9, 2020, 12:00 PM), https://www.npr.org/2020/10/09/922028482/twitter-expands-warning-labels-to-slow-spread-of-election-misinformation.
182 *See* Guy Rosen, *An Update on Our Work to Keep People Informed and Limit Misinformation About COVID-19*, Meta (last updated May. 26, 2021, 3:30 PM), https://about.fb.com/news/2020/04/covid-19-misinfo-update/.
183 Jennifer O'Connor, *Building Greater Transparency and Accountability with the Violative View Rate*, YouTube Official Blog: Inside YouTube (Apr. 6, 2021), https://blog.youtube/inside-youtube/building-greater-transparency-and-accountability/.
184 *Id.*
185 *A Brief History of Twitter Transparency*, Twitter Transparency, https://transparency.twitter.com/en/about.html (last visited Dec. 28, 2021).
186 Vishwanath Sarang, *Independent Audit of Community Standards Enforcement Report Metrics*, Meta (last updated Oct. 20, 2021, 11:00 AM), https://about.fb.com/news/2020/08/independent-audit-of-enforcement-report-metrics/.
187 Oversight Board, https://oversightboard.com (last visited Dec. 25, 2021).
188 *See* Kate Klonick, *Inside the Making of Facebook's Supreme Court*, The New Yorker: Annals of Technology (Feb. 12, 2021), https://www.newyorker.com/tech/annals-of-technology/inside-the-making-of-facebooks-supreme-court (stating that Noah Feldman, the initiator of The Oversight Board, came up with the concept after realizing that "Facebook needs a Supreme Court.").
189 Oversight Board, https://oversightboard.com (last visited Dec. 25, 2021).
190 *See* discussion *supra* Section VI.C.
191 *See History of Social Media (It's Younger Than You Think)*, Broadband Search, https://www.broadbandsearch.net/blog/complete-history-social-media (last visited Dec. 28, 2021).
192 *See* discussion *supra* Section IV.B.

EDITORIAL

IMPORTANT STUDY FINDS CONSUMERS DON'T UNDERSTAND ARBITRATION CLAUSES

By Jeff Sovern*

Professor Roseanna Sommers of Michigan Law School has written an important new paper, *What do consumers understand about predispute arbitration agreements? An empirical investigation.* Here's the abstract:

> The results of a survey of 1,071 adults in the United States reveal that most consumers do not pay attention to let alone understand, arbitration clauses in their everyday lives. The vast majority of survey respondents (over 97%) report having opened an account with a company that requires disputes to be submitted to binding arbitration (e.g., Netflix, Hulu, Cash App, a phone or cable company), yet most are unaware that they have, in fact, agreed to mandatory arbitration (also known as "forced arbitration"). Indeed, over 99% of respondents who think they have never entered into an arbitration agreement likely have done so.
>
> Respondents overwhelmingly (over 92%) report that they have never based a decision to use a product or service on whether the terms and conditions contain an arbitration agreement. They largely endorse the following reasons: they were unaware of the arbitration clause, they did not read the terms and conditions, and they thought they had no choice but to agree to mandatory arbitration. Moreover, many respondents presume that if a dispute arises, they will still be able to access the public courts, notwithstanding that they agreed to the terms and conditions.
>
> Consumers are largely unaware of opportunities to opt out of mandatory arbitration. They generally do not pay attention to, let alone retain, information about the steps required to opt out successfully (e.g., contacting the company within a specified time period). Generally, consumers are unaware that companies like Cash App and Venmo (mobile payment systems utilized by nearly 60% of respondents) allow customers to opt out of mandatory arbitration if they act within a limited time period. Among the minority of respondents (21%) who stated that they had been given an opportunity to opt out, vanishingly few could name any of the steps that would have been required to opt out successfully.
>
> When presented with a run-of-the-mill contract, of the type consumers routinely encounter, most respondents did not take notice of the arbitration clause. Less than 5% of respondents could recall that the contract they were shown had said anything at all about arbitration.
>
> Furthermore, most consumers misperceive the consequences of signing a predispute arbitration agreement. Most mistakenly believe that, after agreeing to terms and conditions mandating binding arbitration, they can still: choose to settle their dispute in court, have a jury decide their case, join a class action, and appeal a decision made based on a legal error. For instance, less than 5% of respondents (n = 46) correctly reported that they could neither appeal an erroneous decision to another arbitrator (or set of arbitrators) nor start all over again in court. Indeed, less than 1% of respondents correctly understood the full significance of the arbitration agreement, as indicated by their responses to questions about whether they retained the rights to sue, have a jury decide their case, access the public courts, and appeal a decision based on a legal error.
>
> In summary, consumers are generally unaware of whether their contracts contain arbitration clauses, and consumers who have agreed to such clauses tend to hold mistaken beliefs about their procedural rights, including wrongly believing they can still sue in court.

The results of a survey of 1,071 adults in the United States reveal that most consumers do not pay attention to let alone understand, arbitration clauses in their everyday lives.

Only two respondents–about a fifth of one percent–were able to identify a company that permitted opt-outs and describe correctly a step needed to opt-out.

One point I want to highlight about the study is that it makes clear that consumers don't understand arbitration opt-outs at all. First, some background: some companies insert in their arbitration clauses a provision that allows consumers to opt out of arbitration if they notify the company in writing shortly after agreeing to the contact. Companies then use the opt-out provisions to claim that arbitration clauses are not unconscionable. I have previously argued that the opt-outs are a type of opaque (dark) pattern. The Sommers study offers much to confirm this view.

Professor Sommers showed consumers a contract including an arbitration clause and opt-out provision and asked them if it included an opt-out. More than twice as many respondents incorrectly said it didn't include such a provision as correctly said it did. Add in those who said they didn't know, and you have 4.5 times as many respondents saying either the contract didn't give them a right to opt-out, or that they didn't know if it did, as said that it did give them a right to opt-out. When asked how they could opt out, not even a third of one percent mentioned that they had a 60-day deadline for opting out.

The study also asked respondents whether they had agreed to contracts with companies, like Netflix, that provided for opt-outs and asked about opt-outs in connection with those companies. Only two respondents–about a fifth of one percent–were able to identify a company that permitted opt-outs and describe correctly a step needed to opt-out.

In short, the Sommers study makes a devastating case that consumers are not aware of arbitration opt-outs and that the opt-outs are no more than a fig leaf to protect companies, not consumers.

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NOTE

SUPREME COURT SAYS BANKRUPTCY RULES APPLY TO TRIBES

Lac du Flambeau Band of Lake Superior Chippewa Indians v. Brian W. Coughlin
143 S. Ct. 1689, 216 L. Ed. 2d 342 (2023).

I. INTRODUCTION

In *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Brian W. Coughlin*, the U.S. Supreme Court examined if the Bankruptcy Code overrides tribal sovereign immunity. The case required the Court to resolve the conflict between a tribe's intrinsic right to oversee activities on its land and federal law. It culminated in a jurisdictional tug-of-war, pitting tribal self-governance against state regulatory power, raising inquiries concerning the extent of state authority applicable to indigenous reservations.

The Court held that the Bankruptcy Code overrides all governmental bodies' sovereign immunity, including federally recognized Indian tribes. This holding permits legal actions, such as stays against debt-collectors stemming from Chapter 13 bankruptcy cases, to be brought against tribal entities, lifting their prior immunity protection.

II. RULES OF LAW

A. CHAPTER 13 BANKRUPTCY

Chapter 13 bankruptcy, often referred to as "reorganization bankruptcy," is a specific form of bankruptcy available to individuals.[1] It offers a structured approach for debtors to reorganize their financial affairs and develop a manageable plan to repay their debts over a period of time. Unlike Chapter 7 bankruptcy, which involves the liquidation of assets to satisfy debts, Chapter 13 focuses on debt repayment without liquidation.

The core principle of Chapter 13 bankruptcy is the formulation of a repayment plan. Debtors submit a comprehensive plan to the bankruptcy court, detailing how they intend to repay their creditors over a period usually ranging from three to five years. The plan must demonstrate the debtor's ability to make regular payments and adhere to the proposed terms.

Similar to other bankruptcy chapters, filing for Chapter 13 triggers an "automatic stay." This legal injunction immediately halts most creditor actions, including collection efforts, foreclosure proceedings, and repossessions. The automatic stay provides debtors with temporary relief from creditor actions, allowing them to work on their repayment plan without the threat of further financial pressure.

B. ABROGATION OF SOVEREIGN IMMUNITY

11 U.S.C. §106(a) waives the sovereign immunity of specific "governmental units" for enumerated purposes.[2] In essence, the statute details when sovereign immunity can be bypassed, permitting certain claims against governmental bodies.

To fully grasp the statute's waiver of sovereign immunity, it is necessary to consult the "governmental unit" definition in Chapter 11 of the United States Code.[3] This definition's broad reach encompasses entities ranging from federal to local levels and beyond. Notably, federally recognized Indian tribes are included within this expansive definition of "governmental unit" as detailed in §101(27).[4]

C. CONGRESSIONAL INTENT

To abrogate sovereign immunity, Congress must have unmistakably expressed its intent within the language of the statute. This requirement hinges on the clarity with which Congress articulates its intention to override the immunity that entities might otherwise possess.

Despite the broad language of the Bankruptcy Code, the question was whether it clearly intended to abrogate tribal sovereign immunity. The Court noted that while Congress need not employ specific phrases, it must nonetheless effectively convey its intention to strip immunity from tribal entities or any other governmental units.

III. *LAC DU FLAMBEAU V. BRIAN W. COUGHLIN*

A. FACTS

The Lac du Flambeau Band of Lake Superior Chippewa Indians ("the Band"), a federally recognized tribe, operated several businesses, including Lendgreen.[5] In 2019, Brian Coughlin ("Coughlin") secured a $1,100 loan from Lendgreen, a business owned by the Band. Following this transaction, Coughlin filed for Chapter 13 bankruptcy, triggering an automatic stay against his creditors. Despite the automatic stay, Coughlin alleged that Lendgreen persisted in its collection efforts to recover the outstanding loan amount.

B. ISSUE AND HOLDING

The crux of the case was the scope of the Bankruptcy Code's sovereign immunity abrogation provision. Specifically, this issue hinged on whether the Bankruptcy Code's abrogation provision[6] for "governmental unit[s]"[7] encompasses such tribes,

exemplified by the Lac du Flambeau Band of Lake Superior Chippewa Indians.

The Court underscored that the Bankruptcy Code's phrasing and structure indisputably overrode tribal immunity.[8] The term "governmental unit" was interpreted broadly, confirming tribes are considered governmental entities, thus subject to the Bankruptcy Code's stipulations. Justice Thomas concurred and advocated for the reevaluation of the sovereign immunity concept. Justice Gorsuch dissented, and pushed for clearer congressional wording to revoke tribal sovereign immunity.[9]

C. ANALYSIS

During its deliberations, the Court engaged in a thorough analysis of the Bankruptcy Code, meticulously examining its textual content, structural components, and legislative intent to unveil Congress's stance on the abrogation of sovereign immunity for various governmental units, tribes included.[10] The Court's examination revealed that the definition of "governmental unit" was deliberately inclusive, encompassing a wide spectrum of domestic and foreign governmental forms. The Court rejected arguments that advocated for the exclusion of tribes based on rigid foreign-domestic categorizations.

Delving into historical precedents and practices, the Court emphasized that Congress had historically recognized tribes as legitimate governing bodies. The Court also highlighted the comprehensive overhaul of bankruptcy law evident in the Code and underscored its intent to establish a coherent and unified framework. Consequently, the Court dismissed the notion of extending historical practices to inform interpretations of the new Code.

Delving into historical precedents and practices, the Court emphasized that Congress had historically recognized tribes as legitimate governing bodies.

The Court's determination reinforced its commitment to interpreting statutes based on clear language and legislative intent, ensuring legal predictability and coherence. The endorsement of the clear statement rule underscored that abrogation of tribal sovereign immunity requires explicit statutory language from Congress, preserving tribal uniqueness while acknowledging federal law's applicability.

IV. CONCLUSION

Lac du Flambeau Band of Lake Superior Chippewa Indians definitively addressed the inclusion of Indian tribes within the scope of the Bankruptcy Code's sovereign immunity abrogation. In doing so, it casted a spotlight on the intricate interplay between federal law and tribal sovereignty. Situated at the complex nexus of tribal self-governance and external commercial transactions, the case amplified the nuanced jurisdictional challenges faced and the intricacies of harmonizing tribal regulations with external legal frameworks.

The ruling notably established a clear precedent: the Bankruptcy Code unambiguously dismantled the sovereign immunity protection for all governmental entities, including tribes. Consequently, tribes may be subjected to bankruptcy proceedings and related obligations without the refuge of sovereign immunity. This definitive interpretation paved the way for a more equitable treatment of tribes alongside other governmental bodies in the context of bankruptcy law.

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1 11 U.S.C. §§1301-1330.
2 11 U.S.C. §106(a).
3 11 U.S.C. §101(27).
4 *Id.*
5 *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 143 S. Ct. 1689, 1694 (2023).
6 11 U.S.C. §106(a).
7 11 U.S.C. §101(27).
8 *Lac du Flambeau*, 143 S.Ct at 1696.
9 *Id.* at 1702-06.
10 *Id.* at 1696-1701.

NOTE

TEXAS SUPREME COURT DISCUSSES ARBITRATION, DIRECT-BENEFITS ESTOPPEL, AND BREACH OF WARRANTY

Lennar Homes of Texas Land and Construction, Ltd. and Lennar Homes of Texas Sales and Marketing, Ltd. v. Kara Whiteley, ___ S.W. 3d, ___, (Tex. 2023).
https://law.justia.com/cases/texas/supreme-court/2023/21-0783.html

The Supreme Court of Texas recently held that a subsequent purchaser of a home is bound by an arbitration clause in the purchase-and-sale agreement between the builder and the original purchaser.

Cody Isaacson, the purchaser of a Galveston, Texas home signed a purchase-and-sale agreement ("PSA") with the builders, Petitioners Lennar Homes of Texas Land and Construction, Ltd. and Lennar Homes of Texas Sales and Marketing Ltd. (together "Lennar") in May 2014. The PSA incorporated by reference the terms of Lennar's warranty booklet (the "Limited Warranty"), stating that Lennar was making only those express limited warranties set forth in the Limited Warranty, and disavowed any other warranties. Additionally, the PSA contained disclosures about the home including an Environmental Quality Disclosure concerning the likelihood of mold growth.

Finally, and most importantly in the instant case, the agreement contained two arbitration provisions. First, in the PSA the purchaser generally agreed to arbitrate any disputes in accordance with the American Arbitration Association's Home Construction Mediation Procedures ("the AAA rules.") This clause provided that the agreement was made on behalf of the purchaser's children and other occupants of the home with the intent that all such parties would be likewise bound. Second, the purchaser agreed to resolve all warranty disputes pursuant to the dispute settlement provisions provided by the Limited Warranty. Like the PSA, the Limited Warranty provided for arbitration of disputes in accordance with the AAA rules.

Lennar executed and recorded a Special Warranty Deed conveying title to the home and underlying property to Isaacson subject to "[a]ny and all restrictions, encumbrances, easements, covenants, conditions, outstanding mineral interests held by third parties, and reservations" for the property that had been recorded in the County Clerk's office, and also subject to an arbitration provision similar to the PSA and Limited Warranty. The attached provision specifically provided that it "shall run with the land and be binding upon the successors and assigns of" Isaacson.

Isaacson sold the property to Kara Whiteley about a year later, on July 31, 2015, conveying title through a General Warranty Deed that Isaacson executed and recorded in the county records. Whiteley later noticed a mold problem in the home. Whiteley provided notice to Lennar and participated in settlement negotiations, but ultimately sued Lennar on March 1, 2017. Whiteley asserted claims for negligent construction and breach of the implied warranties of habitability and good workmanship and sought actual damages.

Lennar filed to stay proceedings pending arbitration. Lennar argued that the PSA and Limited Warranty required Whiteley to arbitrate her disputes. Whiteley, however, argued that she was not a party to either agreement so was not bound under their terms. Lennar responded that: (1) Whiteley was Isaacson's successor and, under direct-benefits estoppel or because she assumed Isaacon's obligations under the PSA, Whiteley was bound to arbitrate her disputes; and (2) the court should refer questions of arbitrability to the arbitrator because the arbitration clauses incorporate AAA rules. The trial court granted Lennar's motion to stay and the parties proceeded to arbitration. The arbitrator issued an award in favor of Lennar.

The trial court vacated the arbitration award against Whiteley. Lennar appealed, and the court of appeals affirmed.

Subsequently, the parties returned to the trial court. Lennar filed a motion to confirm the arbitration award in its favor, and Whiteley filed a combined motion for the court to deny Lennar's request and vacate the arbitration award. In response, Lennar argued that Whiteley waived her objection to arbitration by failing to object to the arbitrator's jurisdiction during the arbitration proceedings, and that Whiteley was estopped from denying that she is subject to the PSA's arbitration provisions.

The trial court vacated the arbitration award against Whiteley. Lennar appealed, and the court of appeals affirmed. The court of appeals held that: (1) the attached arbitration clause was not a covenant running with the land because it does not "touch and concern" the land; (2) Whiteley did not assume the Special

Warranty Deed's arbitration agreement when she purchased the land; (3) Whiteley was not bound to arbitrate as a third-party beneficiary of the Limited Warranty; (4) direct-benefits estoppel does not apply to claims for breach of the implied warranties of good workmanship or habitability; and (5) Whiteley did not waive her objection to arbitration. The Supreme Court of Texas granted Lennar's petition for review.

Lennar argued to the Supreme Court that: (1) direct-benefits estoppel applied to estop Whiteley from avoiding the PSA's arbitration clause; (2) the arbitration clause attached to Isaacson's Special Warranty Deed was a covenant running with the land; or (3) Whiteley could be compelled to arbitrate as a third-party beneficiary of Lennar's Warranty. Alternatively, Lennar again asserted that Whiteley waived her objection to arbitration.

The court recognized that if a plaintiff's claims are based on a contract containing an agreement to arbitrate, the plaintiff may be compelled to arbitrate its claims even as a non-signatory to the contract. *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 739 (Tex. 2005); *see also In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 755 (Tex. 2001) ("[A] litigant who sues based on a contract subjects him or herself to the contract's terms."). If a non-signatory plaintiff "seeks, through the claim, to derive a direct benefit from the contract," direct-benefits estoppel applies, and the plaintiff may be compelled to arbitrate. *Kellogg*, 166 S.W.3d at 741.

The Texas Supreme Court held that for direct-benefit estoppel to apply, "the claim must depend on the existence of the contract . . . and be unable to stand independently without the contract."

To determine whether a claimant seeks to derive a direct benefit from the contract, courts generally look at whether the claim arises from a term of the contract or if it arises from general obligations imposed by law. *In re Vesta Ins. Grp., Inc.*, 192 S.W.3d 759, 761 (Tex. 2006). The Texas Supreme Court held that for direct-benefit estoppel to apply, "the claim must depend on the existence of the contract . . . and be unable to stand independently without the contract." *G.T. Leach Builders, LLC v. Sapphire V.P., L.P*, 458 S.W.3d 502, 527-28 (Tex. 2015) (quotation marks omitted).

Whiteley argued that direct-benefits estoppel did not apply because implied warranty claims derive from common law and the purchase of her home occurred through a separate contract with Isaacson, not the PSA. The Court rejected Whiteley's arguments.

The Court disagreed with Whiteley's argument that the implied warranty claims were not part of the PSA because they derive from common law. Instead, the Court pointed to its previous statement that "a warranty which the law implies from the existence of a written contract is as much a part of the writing as the express terms of the contract." *Certain-Teed Prods. Corp. v. Bell*, 422 S.W.2d 719, 721 (Tex. 1968). Because the implied warranties are considered part of the contract, they would not arise without the contract. Therefore, Whiteley's warranty claims would not exist without the PSA, and direct-benefits estoppel requires Whiteley to arbitrate her claims.

Further, even though the implied warranties of good workmanship and habitability do arise from common law, none of Whiteley's breach of warranty arguments can be evaluated without reference to the PSA. The court first noted that, although parties may not "disclaim this warranty outright, an express warranty in their contract can fill the gaps covered by the implied warranty and supersede it if the express warranty specifically describes the manner, performance, or quality of the services." *Gonzales v. Sw. Olshan Found. Repair Co.*, 400 S.W.3d 52, 59 (Tex. 2013). Because the implied warranty of good and workmanlike performance may be supplanted by the contract, it is necessary to review the contract to determine if the warranty claims exist.

> "In other words, although liability arises in part from the general law, nonliability arises from the terms of the express warranties described in Lennar's '1-2-10 Single-Family Warranty,' which the PSA incorporated by reference."

Accordingly, the warranty of good and workmanlike performance claim does not stand without reference to the parties' contract.

Similarly, the implied warranty of habitability cannot be determined apart from the PSA. The court noted that the PSA included: (1) a general disclaimer of the warranty of habitability, 2) a section of disclosures regarding the home, (3) an Indoor Environmental Quality Disclosure concerning the likelihood of mold growth in the home, and (4) Lennar's "1-2-10 Single-Family Warranty." Arguably, whether those provisions of the PSA were sufficient to negate any implied warranty of habitability with respect to mold growth will depend on the particulars of Lennar's express disclosures. The court concluded that "the implied warranty of habitability does not "arise[] solely from" the PSA, Lennar's liability still "must be determined by reference to it."

In conclusion, the court found that the implied warranties cannot be established independently from the contract and therefore direct-benefits estoppel cannot be used to defeat the arbitration clauses.

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NOTE

ELEVENTH CIRCUIT SAYS ONE TEXT MESSAGE JUSTIFIES TELEPHONE CONSUMER PROTECTION ACT STANDING

Susan Drazen v. Juan Pinto, No. 21-10199 (11th Cir. 2023).
https://law.justia.com/cases/federal/appellate-courts/ca11/21-10199/21-10199-2023-07-24.html

INTRODUCTION

In 1991, Congress enacted the Telephone Consumer Protection Act ("TCPA") to respond to numerous consumer complaints about unwanted robocalls.[1] The Act's provisions contained a restriction on using automated telephone dialing systems ("ATDS"). Specifically, 47 U.S.C. § 227(b)(1)(A)(iii) reads:

> "It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system …to any telephone number assigned to …a cellular telephone …."[2]

Although this provision forbides making any call using ATDS, such a broad limitation does not clarify whether a single call or even a text message falls within the type of calls prohibited by this provision to sufficiently raise Article III's case or controversy issue.

In the instant case, the central question of the appeal was whether receiving a single unsolicited, illegal telemarketing text constitutes a concrete injury for Article III standing. The district court held that "receipt of a single text message" was not a concrete injury based on the Eleventh Circuit's previous holding in Salcedo v. Hanna.[3] On appeal, the Eleventh Circuit reevaluated the Salcedo holding by reviewing two previous holdings. The first case, Cordoba v. DIRECTV, LLC,[4] held that receiving more than one unwanted telemarketing call constituted a harm. While Hunstein v. Preferred Collection & Mgmt. Servs., Inc.,[5] showed a common-law tort claim of intrusion upon seclusion, and other circuit's approach on whether the harm shares a close relationship in kind rather than degree. As a result, the Eleventh Circuit concurred with the approach of other Circuit's and held that a single text message caused a concrete injury for Article III standing.

BACKGROUND

Salcedo v. Hanna, 936 F.3d 1162 (11th Cir. 2019)

Salcedo was a former client of Florida attorney Alex Hanna and received an unsolicited text message from Hanna offering a ten percent discount on his legal services. Salcedo subsequently filed suit in the United States District Court for the Southern District of Florida, alleging Hanna violated the TCPA. Hanna moved to dismiss for lack of standing. The district court disagreed, but the Eleventh Circuit reversed the district court's decision because Salcedo's allegations did not state a concrete harm that meets the injury in fact requirement of Article III.

The Eleventh Circuit concluded that receiving a single text message is not a concrete injury by distinguishing it from receiving an unwanted phone call. The Eleventh Circuit found that Salcedo's assertion was not anything comparable to "enjoying dinner at home with his family and having the domestic peace shattered by the ringing of the telephone" and "[n]or has he alleged that his cell phone was searched, dispossessed, or seized for any length of time."[6] The Eleventh Circuit further noted that Salcedo's allegation is "categorically distinct from those kinds of real but intangible harms," because "receiving a single text message is more akin to walking down a busy sidewalk and having a flyer briefly waived in one's face." [7] Although the Eleventh Circuit acknowledged a text message may be annoying, it cannot justify invoking federal court jurisdiction. Yet, the Eleventh Circuit noted that its evaluation was qualitative, not quantitative. Even applying the criteria for an injury in fact from Spokeo, Inc. v. Robbins, 578 U.S. 330 (2016), the Eleventh Circuit could not find that the harm incurred from a single text message was concrete.

Cordoba v. DIRECTV, LLC, 942 F.3d 1259 (11th Cir. 2019)

DIRECTV hired Telecel Marketing Solutions, Inc., for telephone marketing purposes, and Telecel placed numerous marketing calls on behalf of DIRECTV. Cordoba personally began receiving unsolicited calls from DIRECTV at least eighteen times between April and November of 2015, despite having registered his number on the National Do Not Call Registry and repeatedly requesting that Telecel cease its calls. Cordoba even took the step of writing to DIRECTV, requesting it discontinue contacting him. Although DIRECTV responded, assuring him they would stop the calls, the unwanted calls continued.

Cordoba then commenced a class action lawsuit in the United States District Court for the Northern District of Geor-

gia, alleging DIRECTV and Telecel violated the TCPA. Cordoba represented all individuals 1) who received more than one telemarketing call from Telecel on behalf of DIRECTV and 2) whose telephone numbers were on the National Do Not Call Registry but received more than one DIRECTV marketing call from Telecel. The district court ordered certifying these classes and held that "the members of classes had standing because an unsolicited phone call is an injury in fact and that the proposed classes were ascertainable."8 DIRECTV appealed.

DIRECTV argued that absent class members lacked standing because they had not suffered an injury in fact under Spokeo, Inc. v. Robbins, 578 U.S. 330 (2016). However, the Eleventh Circuit held that "the receipt of more than one unwanted telemarketing call made in violation of the provisions enumerated in the TCPA is a concrete injury that meets the minimum requirements of Article III standing."[9] The Eleventh Circuit noted this holding aligned with the Third Circuit's reasoning that Congress recognized this injury under TCPA, closely resembling the type of harm that could give rise to the common law cause of action for "intrusion upon seclusion."[10]

The Eleventh Circuit distinguished this case from Salcedo v. Hanna. Unlike Salcedo, where the receipt of a single text message was "more akin to walking down a busy sidewalk and having a flyer briefly waived in one's face,"[11] receiving an unwanted phone call "intrudes upon the seclusion of the home, fully occupies the recipient's device for some time, and demands the recipient's immediate attention."[12] The Eleventh Circuit noted that although the injury from receiving an unwanted phone call might not be of great magnitude in the broader context, it possessed the requisite concreteness and particularity to meet Article III standing. Therefore, the Eleventh Circuit concluded Cordoba established the injury in fact component of standing for both Cordoba and all the absent class members who received calls from Telecel and where registered in the National Do Not call Registry.

Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 48 F.4th 1236 (11th Cir. 2022)

Hunstein failed to pay a medical bill related to his son's medical treatment to a hospital, which, in turn, handed over the incurred debt to a collection agency, Preferred Collection and Management Services.[13] Preferred Collection hired a commercial mail vendor to notify Hunstein of his debt by providing various details, including Hunstein's name, his son's name, the debt amount, and the fact that the debt was related to his son's medical treatment. The vendor then incorporated this information into a prewritten form letter and sent it to Hunstein. Shortly after receiving the letter, Hunstein filed suit in the United States District Court for the Middle District of Florida, alleging Preferred Collection had unlawfully divulged information about his debt to a third party, the mail vendor, thereby violating the FDCPA.[14] The district court granted Preferred Collection's motion for summary judgment, finding that the communication to the mail vendor did not fall under the FDCPA's criteria of being "in connection with the collection of any debt."[15] Hunstein appealed.

The Eleventh Circuit held that prohibiting a debt collector from communicating with a few individuals or entities in connection with the debt collection did not demonstrate a concrete injury. The Eleventh Circuit's reasoning rested on common-law tort's "publicity" element. Without publicity, there is no invasion of privacy and, consequently, no harm comparable to what one has to suffer after public disclosure. Publicity requires far more than just "any communication by the defendant to a third person."[16] That is, a matter must be "made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."[17]

The Eleventh Circuit further noted that the threshold criteria between public and private communication was a qualitative inquiry rather than a quantitative one.[18] For example, when someone communicates a trade secret to thousands of new employees after a merger, it does not become public information. Conversely, a disclosure to a single person could qualify as publicity, depending on that person's identity. The effect of sharing another person's private information with an online personality or a reporter matters more than the number of people to whom it is made.

As a result, the Eleventh Circuit held that Hunstein's complaint lacked any allegations suggestive of publicity to be a concrete injury because it merely stated that Preferred Collection furnished his personal information to an unauthorized third party, who subsequently populated some or all of this information into a pre-written template, printed, and mailed the letter to Hunstein cannot meet the criteria of a concrete injury.

Justice Newsom dissented, holding a contrasting view regarding how close the resemblance satisfies the "close enough" standard for Article III purpose. Justice Newsom found it challenging to create a circumstance in which a plaintiff's harm is similar in both kind and degree to a common-law tort and yet remains distinct, the majority had not presented such a case. Although Preferred Collection's disclosure of Hunstein's private information to third-party mail vendor employees might have been less widespread or public than typical disclosures leading to actionable public disclosure of private facts claims, this distinction was a matter of degree of harm. The dissemination of personal information to a third party's employees and the resulting harm remained similar in kind.

Susan Drazen v. Juan Pinto, 74 F.4th 1336 (11th Cir. 2023

Appellee Suzan Drazen filed a class action against Appellee GoDaddy in the United States District Court for the Southern District of Alabama, alleging GoDaddy violated the TCPA[19] by using prohibited ATDS to make promotional calls and text messages attempting to sell its services and products or to contact individuals who are no longer customers.

GoDaddy reached a settlement agreement[20] wherein they defined the class to include "all persons within the United States who received a call or text message to his or her cellular phone from" GoDaddy between November 2014 and December 2016. Drazen filed an unopposed motion for preliminary approval of that agreement. In response to this motion, the district court ordered the parties to brief on how this case is distinguishable from Salcedo v. Hanna, which held that the "receipt of a single text message" is not a concrete injury.[21] Upon considering the parties' briefing, the district court concluded only the named plaintiffs could have standing, disqualifying a plaintiff who received only one text from being a class representative.[22] Once counsel removed the disqualified plaintiff, the district court approved the fee award and an award of costs.

Appellant Juan Enrique Pinto filed an objection and moved to reconsider the fee award because GoDaddy vouchers

were subject to the 28 U.S.C. § 1712(e)[23] of the Class Action Fairness Act ("CAFA"). The district court overruled Pinto's objections and approved the class settlement. Pinto then appealed the CAFA issue and the approval of the class settlement.

Instead of addressing these issues, the panel of the Eleventh Circuit dismissed the case for lack of jurisdiction, because "the class definition does not meet Article III standing requirements." The panel noted the Supreme Court's guidance in TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2208 (2021), which stressed that every class member must have Article III standing in order to recover individual damages. However, the panel held that, under Salcedo, "a single unwanted text message is not sufficient to meet the concrete injury requirement for standing." The court concluded that "the class definition cannot stand to the extent that it allows standing for individuals who received a single text message from GoDaddy." Drazen moved for rehearing en banc to reevaluate the Salcedo holding and to clarify the law in order to pursue a TCPA claim (i.e., concreteness requirement for Article III standing).

ANALYSIS

Drazen and Pinto asserted that the class members who received only one unwanted text message from GoDaddy suffered a privacy invasion that shared a close relationship with the harm associated with intrusion upon seclusion. GoDaddy refuted the argument stating that receiving one text message falls short of that degree of harm.

The Eleventh Circuit, relying on TransUnion,[24] found Drazen and Pinto satisfied the concreteness requirement for Article III standing. The court did not consider the common-law essential elements of harm. Instead, the Eleventh Circuit broadened the scope to include intangible harm, as guided by Hunstein, Spokeo and TransUnion.[25] Particularly, the Eleventh Circuit focused on whether the harms share "a close relationship"[26] in kind, not degree. This approach was initially adopted from the opinion of the Seventh Circuit[27] and became popular among the Fourth, Fifth, Sixth, Ninth, and Tenth Circuits.[28] Sister Circuits declined to consider the degree of offensiveness required to state a claim for intrusion upon seclusion at common law. Instead, they held that receiving at least one unwanted text or phone call resembled the kind of harm associated with intrusion upon seclusion.[29] Similarly, the Eleven Circuit itself held previously in Cordoba v. DIRECTV that receiving "more than one unwanted telemarketing call" causes a harm that bears "a close relationship to the kind of harm" that intrusion upon seclusion inflicts—also, adopting the harms in kind aligned with Hunstein v. Preferred Collection & Mgmt. Servs, where the Eleventh Circuit concluded that the alleged harm was "entirely absent" of public disclosure in kind by lacking the fundamental element of publicity. Further, Circuit Judge Newsom in Hunstein v. Preferred Collection & Mgmt. Servs dissented stating that the harm in kind and degree be situated in a binary manner, finding it "hard to imagine a circumstance in which a plaintiff's harm is similar in both kind and degree to a common-law tort and yet is not precisely the same."[30]

While adopting this approach, the Eleventh Circuit distinguished this case from Hunstein v. Preferred Collection & Mgmt. Servs., because this case did not entirely miss all common-law tort elements for "intrusion upon seclusion." Intrusion upon seclusion consists of (i) intentional intrusion, (ii) into another's solitude or seclusion and (iii) which would be highly offensive to a reasonable person.[31] Unwanted phone calls are among the privacy intrusions that give rise to liability for "intrusion upon seclusion."[32] The Seventh Circuit stated that "[t]he undesired buzzing of a cell phone from a text message, like the unwanted ringing of a phone from a call, is an intrusion into peace and quiet in a realm that is private and personal."[33] While the Eleventh Circuit acknowledged that a single unwanted text message might not "be highly offensive to the ordinary reasonable man,"[34] an unwanted text message was nonetheless offensive to some degree to a reasonable person.[35] The Eleventh Circuit also considered the harm in degree, requiring it to draw a line, which was infeasible.[36]

The Eleventh Circuit also found that the harm in kind was supported by legislative authority. The Constitution empowers Congress to decide what degree of harm is enough so long as that harm is similar in kind to traditional harm. The court determined that was what Congress did in the TCPA when it provided a cause of action to redress the harm that unwanted telemarketing texts and phone calls cause.[37] The Third and Seventh Circuit found and supported the Congressional intent.[38] As a result, the Eleventh Circuit held that the receipt of an unwanted text message constituted a concrete injury and remanded this appeal to the panel to address the CAFA issues raised in Pinto's appeal.

CONCLUSION

Previously, the Eleventh Circuit had established that receiving a single unwanted text message did not meet the Article III standing for failing to be a concrete injury. In contrast, a single unwanted call did give standing in the instant case because it intruded upon one's seclusion as a tortious invasion of privacy. Here, the Eleventh Circuit reevaluated its standard toward a single text message. By looking at the alleged harm's close relationship in kind with the underlying tort of intrusion upon seclusion, the Eleventh Circuit held that a single unwanted text message could be a concrete injury, providing Article III standing. Although an unwanted text message may not be sufficiently offensive to satisfy the common law requirements, Congress, through its legislative authority, has established a lower injury threshold necessary to bring a claim under the TCPA.

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1 *See Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2344, 207 L. Ed. 2d 784 (2020).
2 *See* 47 U.S.C. § 227(b)(1)(A)(iii).
3 *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019)
4 *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259 (11th Cir. 2019)
5 *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 48 F.4th 1236 (11th Cir. 2022)
6 *Id*. at 1172.
7 *Id*.
8 *Id*. at 1266.
9 *Id*. at 1270.

10 *See Susinno v. Work Out World Inc.*, 862 F.3d 346, 351 (3d Cir. 2017).
11 *Salcedo*, 936 F.3d at 1172.
12 *Cordoba*, 942 F.3d at 1270.
13 Though this case arose from the Fair Debt Collection Practices Act ("FDCPA"), the Eleventh Circuit addressed a concrete injury to establish Article III standing for consumers to bring a lawsuit.
14 15 U.S.C. § 1692c(b) ("[]without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, *in connection with the collection of any debt*, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.").
15 *Hunstein*, 48 F.4th at 1240.
16 Restatement (Second) of Torts § 652D cmt. a (emphasis added).
17 *Id*.
18 *Id*.
19 47 U.S.C. § 227, *supra*.
20 The settlement occurred after consolidating litigation with the same claim in the District of Arizona. *See Bennett v. GoDaddy.Com, LLC*, No. 2:16-cv-03908 (D. Ariz. 2016). Also, another similar case was filed in the District of Arizona and was incorporated into and resolved by the same settlement agreement with GoDaddy. *See Herrick v. GoDaddy.com, LLC*, No. 2:16-cv-00254 (D. Ariz. 2016).
21 *Salcedo*, 936 F.3d at 1172.
22 Further, the district court noted that those class members who also received only one text and therefore lacked a viable claim in this Circuit under *Salcedo* "do have a viable claim in their respective Circuit."
23 In a proposed settlement under which class members would be awarded coupons, the court may approve the proposed settlement only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members. The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties. The distribution and redemption of any proceeds under this subsection shall not be used to calculate attorneys' fees under this section.
24 The Eleventh Circuit applied the comparable analysis in *TransUnion*. In *TransUnion*, the Supreme Court first looked at whether the class members had Article III standing for their claims and then turned to whether the class members demonstrated a "concrete harm" against defendant TransUnion. *See TransUnion LLC* at 2203.
25 The Eleventh Circuit stated that "[I]ntangible harms can satisfy Article III's concreteness requirement, too. Congress is 'well positioned to identify' those intangible harms. So when Congress identifies an intangible harm by enacting a law with a cause of action to redress that harm, we find its judgment 'instructive and important.' Yet at the same time, Congress "may not simply enact an injury into existence." Nor can Congress use 'its lawmaking power to transform something that is not remotely harmful into something that is.' So congressional judgment, though instructive, is not enough." *See Hunstein* at 1242-43; *Spokeo*, at 341; *TransUnion* at 2205.
26 The Eleventh Circuit further stated that the new harm need only be "similar to" the old harm rather than carbon copies of the old harm. (citing *Hunstein* at 1242); *see also TransUnion* at 2209 (2021) ("In looking to whether a plaintiff's asserted harm has a 'close relationship' to a harm traditionally recognized as providing a basis for lawsuit in American courts, we do not require an exact duplicate.").
27 *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 462 (7th Cir. 2020)
28 *See Krakauer v. Dish Network, LLC*, 925 F.3d 643, 654 (4th Cir. 2019); *accord Perez v. McCreary, Veselka, Bragg & Allen, P.C.*, 45 F.4th 816, 822 (5th Cir. 2022); *Ward v. NPAS, Inc.*, 63 F.4th 576, 580-81 (6th Cir. 2023); *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1115 (9th Cir. 2017); *Lupia v. Medicredit, Inc.*, 8 F.4th 1184, 1192 (10th Cir. 2021). The Second and Third Circuits similarly focused on the "character" of the new and old harms when determining whether the relationship is sufficiently close; *see Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 93 (2d Cir. 2019); *Thorne v. Pep Boys Manny Moe & Jack, Inc.*, 980 F.3d 879, 890 (3d Cir. 2020).
29 *See Gadelhak*, 950 F.3d at 463 & n.2 (one unwanted text message); *Melito*, 923 F.3d at 93 (same); *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1042-43 (9th Cir. 2017) (two unwanted text messages); *Susinno v. Work Out World Inc.*, 862 F.3d 346, 351-52 (3d Cir. 2017) (one unwanted phone call); *Ward*, 63 F.4th at 581 (same); *Lupia*, 8 F.4th at 1192 (same); *Krakauer*, 925 F.3d at 652-653 (two unwanted phone calls in one year).
30 *Hunstein*, 48 F.4th at 1267.
31 Restatement (Second) of Torts § 652B; *see also, e.g., Jackman v. Cebrink-Swartz*, 334 So. 3d 653, 656 (Fla. Dist. Ct. App. 2021).
32 *See* Restatement (Second) of Torts, *supra*, § 652B cmt. d; W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* 855 (5th ed. 1984).
33 *Gadelhak*, 950 F.3d at 462 n.1.
34 Restatement (Second) of Torts, *supra*, § 652B cmt. d.
35 Even GoDaddy conceded at oral argument that receiving one unwanted text message each day for thirty days would be enough to satisfy the offensiveness element; *see also* Restatement (Second) of Torts, *supra*, § 652B illus. 5.
36 The Eleventh Circuit stated that "[t]he argument that thirty unwanted text messages in thirty days are enough but one is not is an argument of *degree*, not *kind*. If thirty are enough, then are twenty-nine? Are twenty-eight? How about two? Drawing the line necessarily requires us to make a choice of degree."
37 *See* 47 U.S.C. § 227(b)(1)(A)(iii), *supra*.
38 *Susinno*, 862 F.3d at 352 ("Congress was not inventing a new theory of injury when it enacted the TCPA."); *Gadelhak*, 950 F.3d at 462 ("Congress identified a modern relative of a harm with long common law roots.").

RECENT DEVELOPMENTS

DECEPTIVE TRADE PRACTICES AND WARRANTY

BORROWING MONEY OR OBTAINING A CREDIT CARD DOES NOT CREATE DPTA CONSUMER STATUS

Dyer v. Capital One Nat'l Ass'n, 2023 U.S. Dist. LEXIS 88709 (S.D. Tex. 2023).
https://law.justia.com/cases/federal/district-courts/texas/txsdce/4:2020cv04230/1806474/86/

FACTS: Percival Dyer had multiple accounts with Capital One National Association. All of the accounts were subject to Capital One's user agreement that permitted account closure at any time for any reason permitted by law. Capital One noticed suspicious activity on three of Dyer's accounts and deemed it appropriate to close each one. Dyer asked Capital One to reopen her accounts, but Capital One refused to adhere to the request.

Dyer filed suit alleging violations of the Texas DPTA. Capital One moved for summary judgement, asserting Dyer had no evidence to support her claim.

HOLDING: Granted.

REASONING: To prevail on a DPTA claim, Dyer had to show that (1) she was a consumer, (2) Capital One engaged in false, misleading, or deceptive acts, and (3) the acts constituted a producing cause of Dyer's damages. The court held that the claim failed because Dyer's financial relationship with Capital One did not create the DTA's necessary "consumer" status.

The court held that borrowing money did not create consumer status because money is not a good, and the term "services" did not include credit or the borrowing of money. Even credit card accounts do not support the necessary DTPA consumer status required for standing. Further, Dyer presented no evidence of goods or services in connection with any of the accounts that could have potentially supported consumer status under Texas law. As such, the court granted Capital One's motion for summary judgement.

The court held that borrowing money did not create consumer status because money is not a good.

FRAUDULENT CONCEALMENT IS A DOCTRINE RELATING TO A STATUTE OF LIMITATIONS DEFENSE AND IS NOT AN INDEPENDENT CAUSE OF ACTION

NOT SEEKING ABATEMENT IS A WAIVER OF NOTICE UNDER THE DTPA

In re Recalled Abbott Infant Formula Prods. Liab. Litig., 2023 U.S. Dist. LEXIS 88881 (N.D. Ill. 2023).
https://www.aboutlawsuits.com/wp-content/uploads/2023-05-22-CMO-10.pdf

FACTS: Plaintiffs were consumers from different states who claimed they were harmed by certain infant formulas manufactured by Defendant Abbott, under the Similac, Alimentum, and EleCare brands. The FDA received reports of *Cronobacter* in an infant who had consumed the Abbott formula, which led to an inspection of Abbott's facility. Another report of the illness, including the death of an infant, led the FDA to inspect Abbott's facility again, where it tested positive for *Cronobacter*. Following the FDA's recommendation, Abbott recalled its infant formula and additional products after another reported infant death.

Abbott faced multiple lawsuits from Plaintiffs who claimed that its infant formula caused harm. The cases were consolidated and put before one judge. Abbott filed a motion to dismiss the personal injury complaints for lack of subject-matter jurisdiction and failure to state a claim. While Plaintiffs dismissed some of the claims, Abbott submitted appendices to support its motion, pointing out specific state laws that applied to each, including fraudulent concealment and DTPA claims.

HOLDING: Dismissed in part.

REASONING: Plaintiffs argued that if a defendant had a duty to disclose information, fraudulent concealment claims could be considered a valid cause of action in Texas. The court disagreed. The court held fraudulent concealment was an affirmative defense to a statute of limitation assertion, not an independent cause of action. Indeed, fraudulent concealment could only toll the statute of limitation against the defendant and is not an independent cause of action.

Abbott also argued that the Plaintiffs' DTPA claims should be dismissed because they did not provide requisite pre-suit notice. The court disagreed. The court held that insufficient notice should result in abatement, not dismissal. Therefore, Abbott's motion to dismiss was denied because Abbott's failure to seek abatement waived the notice requirement under the DTPA.

A MERE BREACH OF CONTRACT WITHOUT MORE, DOES NOT CONSTITUTE A "FALSE, MISLEADING OR DECEPTIVE ACT' IN VIOLATION OF THE DTPA."

Willis Alan Hizar & Roofmasters DFW, LLC v. Heflin, 2023 Tex. App. LEXIS 4933
https://caselaw.findlaw.com/court/tx-court-of-appeals/114579338.html

FACTS: Appellants Willis Hizar and his business, Roofmasters (collectively "Hizar"), entered a contract with Appellees Kenneth and Anna Heflin to refinish ceilings in their home. Halfway through the job, Hizar notified the Heflins that he could not complete the job without increasing the price. The Heflins requested Hizar complete the job using a different finish within the contracted price. Instead, Hizar abandoned the project without finishing. The Heflins paid another company to complete the job. When Hizar sought payment for the remainder of the contract, the Heflins disputed his provided balance and informed Hizar his incomplete work caused damage to their home.

The Heflins sued Hizar for breach of contract and violation of the DTPA. Hizar repeatedly provided inadequate discovery responses and failed to comply with court orders compelling discovery production. The trial court entered a default motion against Hizar and awarded the Heflins damages and attorney's fees. Hizar appealed.

HOLDING: Affirmed in part.

REASONING: Hizar argued the economic loss rule barred the Heflins from bringing or recovering on a DTPA claim by relying on a breach of contract claim. The Heflins argued the facts underlying their DTPA claim were distinguishable from those underlying their breach of contract claim.

The court reasoned that reliance on a mere breach of contract claim, without more, could not constitute a DTPA. However, because the Heflins based their DTPA claim on facts distinct from their breach of contract claim, the Heflins were entitled to recover damages and attorney's fees under both claims. The Heflins' DTPA claim against Hizar was premised upon Hizar breaching his duty not to make misrepresentations to the Heflins under the law, which the court identified as separate from Hizar's failure to perform under his contract. Furthermore, the court held the economic loss rule did not bar the Heflins' DTPA claims either since such allegations independently created DTPA liability regardless of whether a contract existed between the parties. Accordingly, the court affirmed the trial court's judgment awarding damages and attorney's fees for Hizar's alleged DTPA violation.

AIRBAG RECALL ENOUGH TO MOOT WARRANTY SUIT

Solak v. Ford Motor Co., No. 23-CV-10064, 2023 WL 4628456 (E.D. Mich. July 19, 2023)
https://caselaw.findlaw.com/court/us-dis-crt-e-d-mic-sou-div/114662232.html

FACTS: Plaintiff John Solak ("Solak") initiated a putative class action against Defendant Ford Motor Company ("Ford") on behalf of individuals who purchased or leased a 2022 Ford Maverick or any other Ford vehicle equipped with similar faulty safety canopy side-curtain bags. Before Solak filed suit, the National Highway Traffic Safety Admin ("NHTSA") assessed Ford's airbag systems and uncovered a breach of federal government standards characterized by excessive airbag displacement.

After conveying these findings to Ford, Ford issued a voluntary safety recall of the implicated vehicles. Ford then informed vehicle owners of its intention to conduct complimentary repairs and reimburse those who had incurred expenses for independent repairs. Following these actions, Ford subsequently filed a motion to dismiss, contending that the Court should deem the case prudentially moot because Solak filed suit after the safety recall's implementation.

HOLDING: Granted.

REASONING: Solak advanced the position that the recall did not render irrelevant the claims for monetary compensation arising from the excessive amounts the putative class had paid for the defective vehicles, bolstered by legal precedent from Michigan courts. However, the court rejected Solak's argument, holding that Ford's recall measures effectively rectified the defect upon which the claims of diminished-value injury rested.

The court embraced Ford's assertion, holding "[t]hese remedial measures, coupled with [the National Highway Traffic Safety Administration's] authority to ensure they are fully implemented, renders Solak's claims prudentially moot." The court observed that Ford's communication of the defect to NHTSA and its subsequent declaration of a recall should have sufficed to nullify the controversy.

VIOLATIONS OF THE INSURANCE CODE AND DTPA ACCRUE AT THE TIME OF THE PURCHASE OF POLICY.

IF ALLEGED INJURIES ARE NOT "INHERENTLY UNDISCOVERABLE" THE DISCOVERY RULE DOES NOT APPLY

Wooten v. The Nw. Mut. Life Ins. Co., No. 05-20-00798-CV (Tex. App.—Dallas 2023).
https://casetext.com/case/wooten-v-the-nw-mut-life-ins-co

FACTS: Appellant Wrenn Wooten purchased insurance policies from Northwestern Mutual Life Insurance Company through its employee and agent Jim Zara and Patrick Matthews (collectively "Appellees"). The policies included three disability income policies and four whole-life policies. Over a decade later, Wooten filed a lawsuit against Appellees for fraud, negligent misrepresentation, breach of fiduciary duty, and violations of the Texas Insurance Code and the DTPA. Wooten asserted that he filed his claims within a reasonable time after discovering his injury, so the applicable statute of limitations did not bar his claim under the discovery rule.

Appellees filed motions for summary judgment and the trial court granted the motions. Wooten appealed.

HOLDING: Affirmed.

REASONING: Wooten argued that the discovery rule delayed the accrual of his claims. The court rejected this argument, stating that Wooten's injury was not "inherently undiscoverable," and that the discovery rule did not apply because the policies did not provide the coverage or the payout appellees allegedly misrepresented. Summary judgment evidence demonstrated that Wooten had reviewed the policies, indicating that he knew or should have known at the time he bought the policies that they did not provide the coverage or benefits Appellees allegedly misrepresented.

Wooten also argued that he relied on Appellees, who were under their formal and informal fiduciary duties. The formal fiduciary argument failed because Wooten was responsible for ascertaining when an injury occurred. When Wooten purchased the policies, Wooten "knew, or exercising reasonable diligence, should have known of the facts giving rise to the cause of action." Additionally, Wooten's evidence of a long-standing business relationship with Appellees was not evidence of an informal fiduciary relationship of trust and confidence.

Wooten argued that the limitation provisions of the Texas Insurance Code and the DTPA allowed him to apply the discovery rule to his statutory claims. Although the statutes did not require the alleged injury to be "inherently undiscoverable" for the discovery rules to apply, the court concluded that Wooten "discovered" or by "the exercise of due diligence, should have discovered" the alleged misrepresentations when he received and reviewed the policies.

The court concluded that Wooten's claims accrued at the time Wooten purchased each policy. The court emphasized that an insured has a duty to read the policy and must be charged with knowledge of its terms and conditions if the insured failed to do so.

DEBT COLLECTION

A BARE STATUTORY VIOLATION DOES NOT SATISFY THE FDCPA INJURY-IN-FACT REQUIREMENT

A CLOUD THAT WAS PLACED ON TITLE OF A HOME CONSTITUTES AN INJURY-IN-FACT

UNDER FDCPA, A PLAINTIFF MAY RECOVER ACTUAL DAMAGES FOR EMOTIONAL DISTRESS AND MENTAL ANGUISH

Corbitt v. Old Republic Ins. Co., 2023 U.S. Dist. LEXIS 86147 (N.D. Tex. 2023).
https://law.justia.com/cases/federal/district-courts/texas/txndce/5:2022cv00031/359614/49/

FACTS: Old Republic Insurance Company ("Defendants") recorded an abstract of judgment before Chris and Amy Corbitt ("Plaintiffs") sold their home. The title company notified Plaintiffs that the sale could not close unless they removed the cloud from the title. Plaintiffs then filed a release of abstract that was recorded days before the closing.

Plaintiffs sued Defendants for alleged violations of the FDCPA and TDCA. Defendants moved for summary judgment.
HOLDING: Denied.
REASONING: Plaintiffs argued they were injured because the abstract of judgment put a cloud on the title to their home. Defendant argued that Plaintiffs did not have standing to assert their FDCPA claims because they did not suffer an injury-in-fact.

The court explained that Plaintiffs did not satisfy the injury-in-fact requirement under the FDCPA just from Defendants' violation of a purported statutory right as it was not a concrete injury. However, a cloud placed on Plaintiffs' title to property during the close of the sale of their home did constitute an injury-in-fact. This is because it is an actionable harm traditionally remedied by bringing a quite title claim, which requires that 1) Plaintiffs have an interest in a specific property, 2) their title to the property be affected by Defendant, and 3) Defendant's claim was invalid or unenforceable. The court ruled Plaintiffs met all three elements of the quite title action. Therefore Plaintiffs had standing to assert their FDCPA claims because they suffered an injury-in-fact.

Defendant argued that Plaintiffs did not have standing to assert their FDCPA claims because they did not suffer an injury-in-fact.

Further, Plaintiff were allowed to recover actual damages for emotional distress and mental anguish even after not specifically requesting them, because the "low bar of Rule 8(a)(3)" is satisfied by Plaintiffs' general prayer for "actual damages" only.

PROCEDURAL INJURIES THAT PLAINTIFF ASSERTED DID NOT BEAR A CLOSE RELATIONSHIP TO THE TRADITIONAL HARM HE POSITS

PLAINTIFF DID NOT DEMONSTRATE STANDING BASED ON THE STATUTORY VIOLATIONS ALONE

Van Vleck v. Leikin, Ingber & Winters, P.C., 2023 U.S. App. LEXIS 10455 (6th Cir. 2023).

FACTS: In 2020, Plaintiff Van Vleck was served with a summons in connection with a lawsuit filed by Defendant Leikin, Ingber, & Winters, P.C. The summons, served in person, indicated that Van Vleck had 21 days to answer the complaint, but did not notify Van Vleck that the Michigan Supreme Court had temporarily suspended the response deadline due to the COVID-19 pandemic.

Van Vleck sued Ingber for violations of the FDCPA and RCPA, alleging that in-person service of process during Michigan's COVID-19 state of emergency constituted harassment. Van Vleck also alleged the summons was false and misleading because it failed to inform him of the suspended deadline. Ingber moved to dismiss Van Vleck's complaint, arguing that it failed to allege standing to assert his claims sufficiently. The district court granted the motion. Van Vleck moved to vacate the court's dismissal, arguing that the court erred by ruling on the merits of his complaint when evaluating his standing. The district court denied his motion, reasoning that its previous order properly held that Van Vleck did not allege a concrete injury and that his alleged injury was not akin to the traditional harm of abuse of process. Van Vleck appealed.
HOLDING: Affirmed.
REASONING: Van Vleck had the burden of establishing standing by showing that he suffered an injury in fact, that the injury was traceable to Ingber's conduct and that the court would redress the injury vis-à-vis judicial relief. Van Vleck also had to establish an ulterior purpose and an improper use of process to plead an abuse of process claim sufficiently.

Ingber personally served Van Vleck when two pandemic regulations were in place: (1) the Michigan Supreme Court's requirement of electronic service of process and (2) the state-wide stay-at-home executive order. The court held that Ingber's use of personal service despite these requirements was not enough for Van Vleck to plausibly allege that the process server acted with an ulterior purpose. Van Vleck did not allege that the process server meant to deprive him of the knowledge of the suspended deadline. Ingber's summons also lacked an ulterior purpose because the State Court Administrative Office pre-printed the summons on a form. Van Vleck's allegation fell short of resembling abuse of process. Because the procedural injuries that Van Vleck asserted did not bear

Van Vleck had the burden of establishing standing by showing that he suffered an injury in fact.

a close relationship to the traditional harm he posited, he did not demonstrate standing based on the statutory violations alone.

CURRENT WAGES FOR PERSONAL SERVICES ARE EXEMPT FROM SEIZURE UNDER A TURNOVER ORDER

COMMISSION PAYMENTS WERE NOT EXEMPT FROM SEIZURE PURSUANT TO A TURNOVER ORDER BECAUSE THEY WERE NOT FOR PERSONAL SERVICES

Pamplin v. Stephenson, 2023 Tex. App. LEXIS 2006

FACTS: Plaintiff-Appellee Kelly Stephenson, trustee of the Coffee Time, Inc.'s 401k, was granted a default judgment against Defendant-Appellant Richard Pamplin and Networth Cashflow Systems, LLC (collectively Pamplin), in a Kansas district court.

Stephenson's collection efforts were unsuccessful and a trial court signed a turnover order and appointed a receiver. The Receiver seized funds payable to Pamplin from LifeVantage, a multilevel marketing company that uses independent distributors to sell products. The Receiver filed a Verified Motion to Approve Distributions, Fees, and Ongoing Receivership (Limited Receivership) to turn over funds to Stephenson. The motion asserted that the LifeVantage funds were not exempt from seizure, and it asked for permission to distribute the funds to Stephenson. Pamplin objected to the motion.

After a hearing, the trial court issued its order approving the distributions, fees, and ongoing receivership. Pamplin appealed.

HOLDING: Affirmed.

REASONING: Pamplin argued the LifeVantage payments were exempt from seizure because they were current wages for personal services, and they were unpaid commissions for personal services.

The court rejected both arguments holding that LifeVantage's payments to Pamplin were not current wages for personal services but instead commissions, which were not exempt from seizure under a turnover order. The tax returns in evidence showed LifeVantage did not treat its commission payments to Pamplin as wages for personal services because Pamplin reported his payments from LifeVantage as a business income on his Schedule C, not as salary or wages. Pamplin's testimony revealed that Pamplin was only paid for product sales, and he was acting as an independent LifeVantage distributor, not as a LifeVantage employee. Therefore, the evidence was legally and factually sufficient to support the trial court's implied finding that the payments were not compensation-either wages or commissions-for personal services.

BASED ON EVIDENCE OF EMOTIONAL DISTRESS, COURT FINDS EVIDENCE $4,000 IN ACTUAL DAMAGES UNDER THE FDCPA IS APPROPRIATE

UNDER THE FDCPA LOSS-OF-USE DAMAGES MAY BE MEASURED BY THE REASONABLE RENTAL VALUE OF A SUBSTITUTE VEHICLE, EVEN IN THE ABSENCE OF ACTUAL RENTAL

Espinosa v. Metcalf, ___ F. Supp. 3d ___ (D. Mass. 2023).
https://casetext.com/case/espinosa-v-metcalf-3

FACTS: Defendants Andrew Metcalf and Champion Funding wrongfully seized Plaintiffs' Sergio Espinosa Sr. ("Senior") and Sergio Espinosa Jr. ("Junior") cars after a default judgment was entered against Senior. Defendants were hoping to collect against Senior and impounded each of Plaintiffs' cars. Defendants seized Junior's car even though it had no connection to the judgment against Senior, and maintained it in their possession for sixteen days before returning it and taking possession of Senior's leased vehicle. Defendants soon released Senior's vehicle after learning it was a lease. However, Defendants continued to possess Senior's car for seven months, because Plaintiffs were unable to pay towing and storage fees for Senior's vehicle.

Plaintiffs filed suit against the Defendants with claims under the FDCPA and Massachusetts' conversion statute. Junior and Senior testified to the embarrassment and distress this situation caused them at the suit's bench trial. While the Defendants possessed the vehicles, the Plaintiffs made loan and lease payments despite being without their cars. While without their vehicles, Plaintiffs experienced shame, embarrassment, and trouble sleeping after having to walk to work and other destinations and having to reveal Senior's indebtedness to friends and family.

HOLDING: So ordered.

REASONING: The Plaintiffs argued they were entitled to actual damages under the FDCPA since the Defendants' noncompliance caused them embarrassment and emotional distress. The Plaintiffs claimed they were also entitled to loss-of-use damages for conversion when the Defendants wrongfully possessed their vehicles.

Owners of detained property are entitled to damages even when the owners do not rent replacement property.

The district court entered judgment for the Plaintiffs based on the evidence presented. Because the Plaintiffs suffered emotional distress with reasonable certainty due to the Defendants' noncompliance under the FDCPA, the court awarded $2,500 to Junior and $4,000 in actual damages related to the emotional distress and embarrassment they endured. After establishing their conversion claim with reasonable certainty, the court awarded Senior and Junior loss of use damages. When owners eventually retake converted property, they are also entitled to loss of use damages for the time their property was wrongfully detained. Damages are calculated by finding the daily fair rental value of the converted property and multiplying it by the number of days the property was wrongfully converted. The court held that owners of detained property are entitled to damages even when the owners do not rent replacement property. Here, the court awarded Junior $960 for the sixteen days the Defendants wrongfully possessed his car and Senior $12, 240 for the 204 days the Defendants wrongfully retained his car.

CONSUMER CREDIT

FRCA § 1681e(b) DOES NOT INCORPORATE A THRESHOLD INQUIRY AS TO WHETHER AN ALLEGED INACCURACY IS "LEGAL" OR "FACTUAL."

Sessa v. Trans Union, LLC, 74 F.4th 38 (2d Cir. 2023)
https://www.ca2.uscourts.gov/decisions/isysquery/b8d1a162-cb31-4889-85e1-22f76b4e5b6b/1/doc/22-87_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/b8d1a162-cb31-4889-85e1-22f76b4e5b6b/1/hilite/

FACTS: Plaintiff-Appellant ("Sessa") leased a Subaru Forester in 2018. Defendant-Appellee ("Trans Union") received details regarding the lease arrangement and subsequently included this information in Sessa's credit report. However, there was an inaccuracy in the report, as Trans Union indicated that the agreement required Sessa to make a balloon payment upon the lease's conclusion, despite the agreement stipulating no such requirement.

The court provided clarity by asserting that a dispute encompassing a legal question does not inherently render it immaterial within the scope of the FCRA.

Sessa initiated legal action against Trans Union under section 1681e(b) of the Fair Credit Reporting Act ("FCRA"). This section mandates that credit reporting agencies ("CRAs") must employ rational methods to ensure the utmost attainable precision of data presented in a consumer's credit report. In response, Trans Union filed a motion for summary judgment, contending that its reporting was based on the received information and that any inaccuracies stemmed from a matter of legal interpretation.

The district court granted Trans Union's motion for summary judgment, ruling that the alleged inaccuracy purporting to Sessa's balloon payment obligation constituted a legal disagreement rather than a factual one. Sessa subsequently filed an appeal.

HOLDING: Vacated and remanded.

REASONING: The court determined that the district court's analysis was flawed, as section 1681e(b) does not incorporate a threshold inquiry as to whether an alleged inaccuracy pertains to a "legal" or "factual" matter. After the district court's ruling, the second circuit set a significant precedent in *Mader v. Experian Information Solutions, Inc.,* 56 F.4th 264 (2d Cir. 2023) establishing that the definition of "accuracy" under the FCRA mandates a focus on information that is both objectively and verifiably substantiated. In *Mader*, the court clarified that information could be considered actionably "inaccurate" only when objectively ascertainable and easily verified by the CRA.

Here, the court provided clarity by asserting that a dispute encompassing a legal question does not inherently render it immaterial within the scope of the FCRA. Instead, CRAs are responsible for reporting information with precision, which entails the application of legal principles to readily ascertainable and uncomplicated facts. Consequently, the court vacated the district court's verdict and instructed the district court to ascertain whether the information in question is "objectively and readily verifiable" to be actionable under section 1681e(b).

Additionally, the court ruled that section 1681e(b) is violated only when a CRA fails to "follow reasonable procedures to assure maximum possible accuracy of the information" about an individual. Given the district court's failure to address this matter, the court remanded the case back to the district court for the purpose of conducting this specific analysis.

RECENT DEVELOPMENTS

INSURANCE

AN INSURED CANNOT RECOVER FEES UNDER CHAPTER 542A WHEN AN INSURER PAYS AN APPRAISAL AWARD AND ALL POSSIBLE TPPCA INTEREST PRETRIAL

Kester v. State Farm Lloyds, No. 02-22-00267-CV, 2023 WL 4359790 (Tex. App. July 6, 2023)
https://caselaw.findlaw.com/court/tx-court-of-appeals/114559974.html

FACTS: Appellant Paige A. Kester ("Kester") maintained an insurance policy providing coverage for property damage through Appellee State Farm Lloyds ("Lloyds"). Following the submission of a property damage claim, disputes arose between the two parties regarding the extent of the loss, prompting the initiation of an appraisal procedure. Concurrently with the appraisal proceedings, Kester filed suit against Lloyds. Before the trial commenced, a resolution was reached in favor of Kester through an appraisal award, which Lloyds expeditiously satisfied by disbursing the full award, including any potential interest as stipulated under the Texas Prompt Payment of Claims Act (TPPCA).

Following the disbursement to Kester, Lloyds moved for summary judgment on the suit. The court subsequently granted summary judgment in favor of Lloyds. Despite receiving the appraisal award and pretrial TPPCA interest, Kester lodged an appeal against the summary judgment, with the aim of securing attorney's fees under Chapter 542A of the Texas Insurance Code.

HOLDING: Affirmed.

REASONING: The court upheld the summary judgment favoring Lloyds, affirming that Kester was not entitled to attorney's fees. In its evaluation, the court examined Chapter 542A of the Texas Insurance Code, which delineates the circumstances governing an insured party's potential entitlement to attorney's fees as a component of their recovery. The court placed particular emphasis on a pivotal facet of Chapter 542A: the awarding of attorney's fees is explicitly linked to the existence of a definitive judgment amount. Within this context, the court construed Chapter 542A to signify that the grant of attorney's fees can solely transpire when a judgment has been rendered, thereby determining the quantum of policy benefits owed to the insured, *and* if these benefits have not been timely disbursed by the insurer.

The pivotal requirement of a judgment amount to seek recovery under Chapter 542A, was not fulfilled.

Here, a definitive judgment amount was absent, because the claim did not proceed to trial. Consequently, the pivotal requirement of a judgment amount to seek recovery under Chapter 542A, was not fulfilled. The court upheld the decision of the trial court, affirming that the absence of a judgment amount favoring Kester precluded her from recovering attorney's fees under Chapter 542A of the Texas Insurance Code.

VIOLATIONS OF THE INSURANCE CODE AND DTPA ACCRUE AT THE TIME OF THE PURCHASE OF POLICY.

IF ALLEGED INJURIES ARE NOT "INHERENTLY UNDISCOVERABLE" THE DISCOVERY RULE DOES NOT APPLY

Wooten v. The Nw. Mut. Life Ins. Co., No. 05-20-00798-CV (Tex. App.—Dallas 2023).
https://casetext.com/case/wooten-v-the-nw-mut-life-ins-co

FACTS: Appellant Wrenn Wooten purchased insurance policies from Northwestern Mutual Life Insurance Company through its employee and agent Jim Zara and Patrick Matthews (collectively "Appellees"). The policies included three disability income policies and four whole-life policies. Over a decade later, Wooten filed a lawsuit against Appellees for fraud, negligent misrepresentation, breach of fiduciary duty, and violations of the Texas Insurance Code and the DTPA. Wooten asserted that he filed his claims within a reasonable time after discovering his injury, so the applicable statute of limitations did not bar his claim under the discovery rule.

Appellees filed motions for summary judgment and the trial court granted the motions. Wooten appealed.

HOLDING: Affirmed.

REASONING: Wooten argued that the discovery rule delayed the accrual of his claims. The court rejected this argument, stating that Wooten's injury was not "inherently undiscoverable," and that the discovery rule did not apply because the policies did not provide the coverage or the payout appellees allegedly misrepresented. Summary judgment evidence demonstrated that Wooten had reviewed the policies, indicating that he knew or should have known at the time he bought the policies that they did not provide the coverage or benefits Appellees allegedly misrepresented.

Wooten also argued that he relied on Appellees, who were under their formal and informal fiduciary duties. The formal fiduciary argument failed because Wooten was responsible for ascertaining when an injury occurred. When Wooten purchased the policies, Wooten "knew, or exercising reasonable diligence, should have known of the facts giving rise to the cause of action." Additionally, Wooten's evidence of a long-standing business relationship with Appellees was not evidence of an informal fiduciary relationship of trust and confidence.

Wooten argued that the limitation provisions of the Texas Insurance Code and the DTPA allowed him to apply the discovery rule to his statutory claims. Although the statutes did not require the alleged injury to be "inherently undiscoverable" for the discovery rules to apply, the court concluded that Wooten "discovered" or by "the exercise of due diligence, should have discovered" the alleged misrepresentations when he received and reviewed the policies.

The court concluded that Wooten's claims accrued at the time Wooten purchased each policy. The court emphasized that an insured has a duty to read the policy and must be charged with knowledge of its terms and conditions if the insured failed to do so.

PAYMENT OF AN APPRAISAL AWARD AND ANY CONCEIVABLE INTEREST ON THAT AWARD HAS FULLY COMPENSATED INSURED FOR HER LOSS.

BY PAYING THE APPRAISAL AWARD IN FULL, INSURER FULLY COMPLIED WITH ITS CONTRACT.

INSURED MUST SHOW EVIDENCE DEMONSTRATING AN INDEPENDENT INJURY TO SUSTAIN ANY EXTRA-CONTRACTUAL CLAIMS.

McCall v. State Farm Lloyds, 2023 U.S. Dist. LEXIS 144089 (N.D. Tex. 2023).
https://cases.justia.com/federal/district-courts/texas/txndce/3:2022cv01712/365882/32/0.pdf?ts=1692375174

FACTS: Plaintiff Connie Brooks McCall filed a claim with Defendant State Farm Lloyds for her property damage caused by a fallen tree. State Farm paid McCall based on its initial inspection. McCall hired a public adjuster for a second inspection, leading to an additional payment from State Farm. Nevertheless, McCall disputed State Farm's decision and invoked the appraisal process under the terms of her policy. While the appraisal was pending, McCall filed a suit, alleging breach of contract, violations of Chapters 541 and 542 of the Texas Insurance Code, violations of the DTPA, bad faith insurance practices, and fraud. State Farm issued an appraisal award and interest payment to ensure it met the time requirements in Chapter 542. State Farm explicitly stated that these payments were not an admission of liability. State Farm filed a motion for summary judgment.
HOLDING: Granted.
REASONING: State Farm argued that its payment of the appraisal award estopped McCall from maintaining a breach of contract claim. McCall countered that the payment conclusively established its liability under the policy, entitling her to recover interest and attorney's fees. The court disagreed with McCall.

In re Allstate Ins. Co., 85 S.W.3d 193, 195 (Tex. 2002), made clear that an appraisal did not determine the rights and liabilities of the parties, and payment of an appraisal award did not determine liability. Moreover, McCall's insurance policy expressly stated that appraisers had no authority to decide any other questions of fact, law, or coverage. As such, because State Farm expressly disclaimed any liability when paying the appraisal award, its payment did not affect its liability under the claim. The court also emphasized that attorney's fees and costs incurred in the prosecution or defense of a claim were not damages under Texas law. Even if McCall prevailed on her claim and was entitled to attorney's fees, Chapter 542 of the Texas Insurance Code would limit her attorney's fees to zero.

Attorney's fees and costs incurred in the prosecution or defense of a claim were not damages under Texas law.

State Farm argued that McCall's extra-contractual claims must fail because McCall did not allege any damages independent of her claim for policy benefits. McCall claimed she was entitled to actual damages other than the policy benefits, specifically attorney's fees and possibly additional interest. The court explained that McCall failed to show an injury independent of the benefits owed under her policy for two reasons. First, McCall's extra-contractual claims were all based on State Farm's alleged mishandling of her claim, and she already received all the benefits to which she was entitled under the claim through the appraisal. Second, the only damages McCall asserted were attorney's fees and additional interest under Chapter 542 of the Insurance Code, which could not constitute independent injury. Even if State Farm was found liable under McCall's policy, her claim became moot because State Farm had already paid her potential interest, covering the period from State Farm's initial inspection. McCall did not explain why State Farm's interest payment was not sufficient. In addition, the court noted that because McCall was not entitled to attorney's fees, she could not use this as a basis for her interest claim.

Ultimately, the court concluded that McCall could not maintain a breach of contract claim against State Farm because she had received all owed benefits. Further, her extra-contractual claims failed because she presented no evidence of an injury independent of the recovered policy benefits.

RECENT DEVELOPMENTS

ARBITRATION

SUPREME COURT REQUIRES STAY OF PROCEEDINGS IN DISTRICT COURT PENDING APPEAL OF A DENIAL OF A MOTION TO COMPEL ARBITRATION

Coinbase v. Bielski, 599 U.S. ___ (2023).
https://www.supremecourt.gov/opinions/22pdf/22-105_5536.pdf

FACTS: Petitioner Coinbase operates an online marketplace where users buy and sell cryptocurrencies and government-issued currencies. Respondent Abraham Bielski agreed to the Coinbase User Agreement ("Agreement") to access this marketplace. The Agreement directed disputes arising under the Agreement be resolved through binding arbitration. When Bielski filed a putative class action on behalf of Coinbase users, Coinbase filed a motion to compel arbitration, citing its binding arbitration provision. The district court denied Coinbase's motion to compel. Coinbase filed an interlocutory appeal to the Ninth Circuit under 9 U.S.C. §16(a).

Simultaneously, Coinbase filed a motion to stay proceedings in the district court. The court declined to stay proceedings, and Coinbase filed the same motion to stay in the Ninth Circuit. The Ninth Circuit refused to stay the district court's proceedings. Unlike other Circuits, the Ninth Circuit reiterated its precedent did not automatically grant a stay upon interlocutory appeal of a court's denial of a motion to compel arbitration. Coinbase then filed a petition for a writ of certiorari to the Supreme Court, which the Court granted to resolve circuit disagreement.
HOLDING: Reversed and remanded.
REASONING: Bielski argued against the *Griggs* principle that allowed an automatic staying of proceedings upon appeal of the court's denial to compel arbitration. Because the discretionary stay adequately protected parties' rights, Bielski asserted an automatic stay was unnecessary and created a special procedural rule favoring arbitration. Bielski argued that automatically granting stays upon interlocutory appeals for arbitrability would encourage frivolous appeals and cause improper delays. Bielski contrasted §16(a) with other sections enacted by Congress containing explicit stay requirements. Bielski suggested Congress would only do this if Congress understood that an interlocutory appeal on arbitrability did not ordinarily stay proceedings. Bielski relied on the Court's precedent holding questions on arbitrability as severable from the disputes in the case.

While acknowledging that §16(a) was silent on whether stays were automatically required, the Court stressed that §16(a) was enacted alongside the Court's ruling in *Griggs*. In *Griggs*, the Court held that an appeal divests district courts of jurisdiction over any aspects of the case involved or at issue in the appeal. Here, the Court held that *Griggs* demanded district courts stay proceedings when the issue on appeal concerned whether the case be bound to arbitration or the district court.

The Court reasoned Congress' non-stay provisions indicated Congress' understanding that an interlocutory appeal would ordinarily stay proceedings. Furthermore, the Court noted the existing ability of lower courts to track and sanction those appealing frivolously and rejected the assertion that their holding would generate frivolous appeals. The Court added that the lower court's current discretionary four-factor standard often disfavored granting stays upon arbitrability appeals, which highlighted the need for their ruling in their eyes. To the Court, it defied common sense to permit interlocutory appeals on arbitrability as of right without granting to stay proceedings in tandem.

SUBSCRIBER AGREED TO ARBITRATION PROVISION BY CONTINUING TO USE ESPN AFTER THE COMPANY SENT HIM EMAILS REGARDING UPDATES

Sadlock v. The Walt Disney Co., No. 22-cv-09155-EMC (N.D. Cal. July 31, 2023). https://casetext.com/case/Sadlock-v-the-walt-disney-co

FACTS: Joshua Sadlock created an account with ESPN.com, a company owned by The Walt Disney Co. As a regular practice, Disney collected information about users' interactions with its websites. Disney collected information from Sadlock's interactions with the ESPN.com website. Sadlock created a Disney streaming account and subscribed to a Disney Bundle subscription that included ESPN+. He agreed to a Subscriber Agreement upon registration. Disney later sent Sadlock two emails with notice of an updated Subscriber Agreement. The emails had clear language, encouraged Sadlock to review the agreement, and highlighted specific changes to the agreement, including the arbitration provision. Sadlock brought a class action lawsuit against Disney for violation of the Pennsylvania Wiretapping and Electronic Surveillance Control Act for people whose electronic communications were intercepted or recorded on behalf of Disney.

Disney filed a motion to compel arbitration by the agreement between Sadlock and Disney. Sadlock challenged Disney's motion.
HOLDING: Granted.
REASONING: Disney argued that Sadlock was bound to the arbitration agreement because he met the criteria of an inquiry notice by registering for an ESPN account and subscribing to ESPN+. An inquiry notice is met, and a consumer manifests assent to the terms, if the website provided reasonably conspicuous notice of the terms to which the consumer will be bound and the consumer took some action, such clicking a button or checking a box. The court rejected Disney's argument that registering for an ESPN account created an inquiry notice but accepted the argument that continuing use after receiving emails of an updated Subscriber Agreement created an inquiry notice.

Sadlock unambiguously manifested his assent by continuing to use the service after he received emails updating the Subscriber Agreement.

The court reasoned that Sadlock did not unambiguously manifest his assent to the terms of the initial Subscriber Agreement because the screen format could be interpreted to imply an agreement to pay Disney in exchange for the subscription to the

service. However, Sadlock unambiguously manifested his assent by continuing to use the service after he received emails updating the Subscriber Agreement because the emails gave conspicuous notice and Sadlock continued to use the service after receiving the notice. The emails had a clear and relevant subject line, linked the Subscriber Agreement, and clearly outlined changes to the agreement. The court concluded that Sadlock was bound to the arbitration agreement because he had an opportunity to discontinue use of the service before the changes were effective and by continuing use, he agreed to the terms.

TEXAS SUPREME COURT DISCUSSES DIRECT BENEFITS ESTOPPEL

Lennar Homes of Tex. Land & Constr., Ltd. v. Whiteley, ___ S. W. 3d ___ (Tex. 2023).
https://cases.justia.com/texas/supreme-court/2023-21-0783.pdf?ts=1683900566

FACTS: Respondent Kara Whiteley purchased a home built by Petitioner Lennar Homes of Texas ("Lennar") from its original purchaser, Cody Isaacson. When Isaacson bought the house, he executed a Purchase and Sale Agreement ("PSA") and Special Warranty Deed with Lennar. The PSA incorporated the terms of Lennar's warranty booklet. The booklet stated Lennar was only making the express warranties outlined while disavowing warranties of workmanship and habitability. Any disputes arising under the PSA were bound to arbitration. The arbitration clause stated Isaacson executed the agreement on behalf of his children and any other home occupants with the intent that all such parties would likewise be bound. When Isaacson sold the home to Whiteley, he did not assign the PSA or Special Warranty to Whiteley but conveyed title via a General Warranty Deed.

Shortly after purchasing the home, Whiteley discovered mold growing in the house and sued Lennar and brought claims for negligent construction and breach of implied warranties of habitability and good workmanship. Lennar filed an application to stay proceedings pending arbitration, relying on clauses within the PSA and Special Warranty Deed. The trial court granted Lennar's request for a stay, and the parties proceeded to arbitration. Whiteley was denied all relief sought in arbitration. Lennar was awarded costs and attorney's fees. Lennar returned to the trial court filing a Motion to Confirm Arbitration Award, which Whiteley opposed by filing a Motion to Vacate in response. The trial court denied Lennar's motion and vacated the arbitration award against her. Lennar appealed. After the appellate court affirmed, Lennar filed a petition for review, which the supreme court granted.

HOLDING: Reversed and remanded.

REASONING: Lennar argued the trial court erred in vacating the arbitration award because the PSA's arbitration clause compelled Whiteley to arbitration as a third-party beneficiary and because the doctrine of direct-benefits estoppel applied to estop Whiteley from avoiding the PSA's arbitration clause. Whiteley argued the direct-benefits estoppel was inapplicable since her implied warranty claims were derived from common law.

Relying on its precedent, the court stated a non-signatory plaintiff could be bound to arbitrate when their claim's basis of liability was based on a contract with an arbitration clause. Although implied warranties are imposed by operation of law, the obligation only arose when a contract was present, and the implied warranties were not waived. A contract's express warranty could supersede an implied warranty of good workmanship if the agreement provided how the builder was to perform. An implied warranty of habitability could be waived where the buyer had express and complete knowledge of the defects affecting the home's habitability.

Although Lennar's liability did not arise solely under its PSA, Lennar's liability could only be determined by reference to it. For both implied warranty claims, the court must review the Limited Warranty in the PSA. For an implied warranty of habitability, the court must review disclosures regarding the home and the likelihood of mold growth in the house. Because Lennar's nonliability could only be determined with reference to its PSA, the court held that Whiteley's claims were not independent of the PSA and must be bound to the PSA's arbitration provision under the doctrine of direct benefits estoppel.

Relying on its precedent, the court stated a non-signatory plaintiff could be bound to arbitrate when their claim's basis of liability was based on a contract with an arbitration clause.

MISCELLANEOUS

FRAUDULENT CONCEALMENT IS A DOCTRINE RELATING TO A STATUTE OF LIMITATIONS DEFENSE AND IS NOT AN INDEPENDENT CAUSE OF ACTION

NOT SEEKING ABATEMENT IS A WAIVER OF NOTICE UNDER THE DTPA

In re Recalled Abbott Infant Formula Prods. Liab. Litig., No. 22 C 4148, 2023 U.S. Dist. LEXIS 88881 (N.D. Ill. May 22, 2023). https://www.aboutlawsuits.com/wp-content/uploads/2023-05-22-CMO-10.pdf

FACTS: Plaintiffs were consumers from different states who claimed they were harmed by certain infant formulas manufactured by Defendant Abbott, under the Similac, Alimentum, and EleCare brands. The FDA received reports of *Cronobacter* in an infant who had consumed the Abbott formula, which led to an inspection of Abbott's facility. Another report of the illness, including the death of an infant, led the FDA to inspect Abbott's facility again, where it tested positive for *Cronobacter*. Following the FDA's recommendation, Abbott recalled its infant formula and additional products after another reported infant death.

Abbott faced multiple lawsuits from Plaintiffs who claimed that its infant formula caused harm. The cases were consolidated and put before one judge. Abbott filed a motion to dismiss the personal injury complaints for lack of subject-matter jurisdiction and failure to state a claim. While Plaintiffs dismissed some of the claims, Abbott submitted appendices to support its motion, pointing out specific state laws that applied to each, including fraudulent concealment and DTPA claims

HOLDING: Dismissed in part.

REASONING: Plaintiffs argued that if a defendant had a duty to disclose information, fraudulent concealment claims could be considered a valid cause of action in Texas. The court disagreed. The court held fraudulent concealment was an affirmative defense to a statute of limitation assertion, not an independent cause of action. Indeed, fraudulent concealment could only toll the statute of limitation against the defendant and is not an independent cause of action.

> **Plaintiffs argued that if a defendant had a duty to disclose information, fraudulent concealment claims could be considered a valid cause of action in Texas.**

Abbott also argued that the Plaintiffs' DTPA claims should be dismissed because they did not provide requisite pre-suit notice. The court disagreed. The court reasoned that insufficient notice should result in abatement, not dismissal. Therefore, Abbott's motion to dismiss was denied because Abbott's failure to seek abatement waived the notice requirement under the DTPA.

THE MEASURING DATE-THE DATE "FROM" OR "AFTER" A PERSON IS TO BE MEASURED-IS EXCLUDED IN CALCULATING TIME PERIODS

A PERIOD MEASURED IN YEARS "FROM" OR "AFTER" JUNE 30 (THE MEASURING DATE) WILL END ON A FUTURE JUNE 30, NOT A FUTURE JUNE 29

Apache Corporation v. Apollo Exploration, LLC; Cogent Exploration, Ltd., Co.; and SellmoCo, LLC, 670 S.W.3d 319 (Tex. 2023).
https://law.justia.com/cases/texas/supreme-court/2023/21-0587.html

FACTS: In 2011, Apollo Exploration, Cogent Exploration, and SellmoCo (collectively, Sellers), along with Gunn Oil Company, entered into purchase-and-sale agreements with Apache. Respondents ("Sellers") entered an oil-and-gas lease for the Bivins Ranch, and Petitioner Apache later acquired a substantial interest in the Bivins Ranch. The Bivins Ranch lease stated that its effective date was January 1, 2007, "from which date the anniversary dates of this Lease shall be computed." The lease also provided it would "be in force for a Primary Term of three years from the effective date of this Lease." The parties executed and recorded a memorandum of lease, but the memorandum clearly stated that the lease, not the memorandum, governed the parties' relationship. The memorandum listed December 31, 2009, as the primary term's expiration date. The end of the primary term did not necessarily mean the end of the lease. The Bivins Ranch lease allowed the lease to continue after the expiration of the primary term under certain conditions. The lease was later divided into three required blocks, one of them being the North Block.

Apache and Sellers agreed that the North Block expired in 2015, but they disagreed on the precise date it expired. Sellers believed the North Block expired on December 31, 2015, and Apache believed the North Block expired on January 1, 2016. The trial court agreed with Apache, but the court of appeals reversed and held that a fact issue existed as to the date the North Block expired or was released. Apache appealed.

HOLDING: Reversed and remanded.

REASONING: Apache argued that the North Block of the Bivins Ranch lease expired on January 1, 2016. The court accepted this argument based on common-law precedent and the lease's plain language.

The court recognized a common-law rule regarding parties who choose to measure dates by using language like the lease in question. The rule provides that the measuring date—the date "from" or "after" a period is to be measured—is excluded in calculating time periods. For periods of years, the period ends on the anniversary of the measuring date, not the day before the anniversary.

Because the Ranch lease used the word "from" to calculate the expiration date of the primary term, so the common-law rule applied, the court held the Bivins Ranch lease did not clearly manifest any intent to depart from the default rule, and concluded the primary term of the lease ended on January 1,

2010. Therefore, the court held the North Block lease expired on January 1, 2016.

CURRENT WAGES FOR PERSONAL SERVICES ARE EXEMPT FROM SEIZURE UNDER A TURNOVER ORDER

COMMISSION PAYMENTS WERE NOT EXEMPT FROM SEIZURE PURSUANT TO A TURNOVER ORDER BECAUSE THEY WERE NOT FOR PERSONAL SERVICES

Pamplin v. Stephenson, 2023 Tex. App. LEXIS 2006 (Tex. App—San Antonio 2023)
https://scholar.google.com/scholar_case?case=13218871972922540942&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Plaintiff-Appellee Kelly Stephenson, trustee of the Coffee Time, Inc.'s 401k, was granted a default judgment against Defendant-Appellant Richard Pamplin and Networth Cashflow Systems, LLC (collectively Pamplin), in a Kansas district court.

Stephenson's collection efforts were unsuccessful and a trial court signed a turnover order and appointed a receiver. The Receiver seized funds payable to Pamplin from LifeVantage, a multilevel marketing company that uses independent distributors to sell products. The Receiver filed a Verified Motion to Approve Distributions, Fees, and Ongoing Receivership (Limited Receivership) to turn over funds to Stephenson. The motion asserted that the LifeVantage funds were not exempt from seizure, and it asked for permission to distribute the funds to Stephenson. Pamplin objected to the motion.

After a hearing, the trial court issued its order approving the distributions, fees, and ongoing receivership. Pamplin appealed.

HOLDING: Affirmed.

REASONING: Pamplin argued the LifeVantage payments were exempt from seizure because they were current wages for personal services, and they were unpaid commissions for personal services.

The court rejected both arguments holding that LifeVantage's payments to Pamplin were not current wages for personal services but instead commissions, which were not exempt from seizure under a turnover order. The tax returns in evidence showed LifeVantage did not treat its commission payments to Pamplin as wages for personal services because Pamplin reported his payments from LifeVantage as a business income on his Schedule C, not as salary or wages. Pamplin's testimony revealed that Pamplin was only paid for product sales, and he was acting as an independent LifeVantage distributor, not as a LifeVantage employee. Therefore, the evidence was legally and factually sufficient to support the trial court's implied finding that the payments were not compensation-either wages or commissions-for personal services.

LifeVantage's payments to Pamplin were not current wages for personal services but instead commissions, which were not exempt from seizure under a turnover order.

PROCEDURAL INJURIES THAT PLAINTIFF ASSERTED DID NOT BEAR A CLOSE RELATIONSHIP TO THE TRADITIONAL HARM HE POSITS

PLAINTIFF DID NOT DEMONSTRATE STANDING BASED ON THE STATUTORY VIOLATIONS ALONE

Van Vleck v. Leikin, Ingber & Winters, P.C., 2023 U.S. App. LEXIS 10455 (6th Cir. 2023).
https://law.justia.com/cases/federal/appellate-courts/ca6/22-1859/22-1859-2023-04-27.html

FACTS: In 2020, Plaintiff Van Vleck was served with a summons in connection with a lawsuit filed by Defendant Leikin, Ingber, & Winters, P.C. The summons, served in person, indicated that Van Vleck had 21 days to answer the complaint, but did not notify Van Vleck that the Michigan Supreme Court had temporarily suspended the response deadline due to the COVID-19 pandemic.

Van Vleck sued Ingber for violations of the FDCPA and RCPA, alleging that in-person service of process during Michigan's COVID-19 state of emergency constituted harassment. Van Vleck also alleged the summons was false and misleading because it failed to inform him of the suspended deadline. Ingber moved to dismiss Van Vleck's complaint, arguing that it failed to allege standing to assert his claims sufficiently. The district court granted the motion. Van Vleck moved to vacate the court's dismissal, arguing that the court erred by ruling on the merits of his complaint when evaluating his standing. The district court denied his motion, reasoning that its previous order properly held that Van Vleck did not allege a concrete injury and that his alleged injury was not akin to the traditional harm of abuse of process. Van Vleck appealed.

HOLDING: Affirmed.

REASONING: Van Vleck had the burden of establishing standing by showing that he suffered an injury in fact, that the injury was traceable to Ingber's conduct and that the court would redress the injury vis-à-vis judicial relief. Van Vleck also had to establish an ulterior purpose and an improper use of process to plead an abuse of process claim sufficiently.

Ingber personally served Van Vleck when two pandemic regulations were in place: (1) the Michigan Supreme Court's requirement of electronic service of process and (2) the state-wide stay-at-home executive order. The court held that Ingber's use of personal service despite these requirements was not enough for Van Vleck to plausibly allege that the process server acted with an ulterior purpose. Van Vleck did not allege that the process server meant to deprive him of the knowledge of the suspended deadline. Ingber's summons also lacked an ulterior purpose because the State Court Administrative Office pre-printed the summons on a form. Van Vleck's allegation fell short of resembling abuse of process. Because the procedural injuries that Van Vleck asserted did not bear a close relationship to the traditional harm he posited, he did not demonstrate standing based on the statutory violations alone.

RECENT DEVELOPMENTS

A SECURED PARTY HAS THE RIGHT TO TAKE POSSESSION OF COLLATERAL AFTER A DEFAULT, SELL IT, AND SUE FOR ANY DEFICIENCY

TO RECOVER THE DEFICIENCY, IT MUST PROVE THAT IT ACTED IN A "COMMERCIALLY REASONABLE" MANNER WHEN DISPOSING OF THAT COLLATERAL

Regent Gen. Contractors v. Mintaka Fin., No. 07-23-00061-CV, (Tex. App.—Amarillo 2023). https://public.fastcase.com/ZZhmr5v9wN%2FXOe5IsQ%2FqD6I%2Bs6wyPPIKy59rOWN8l2idiUjdQsUQnyKnF4gsB%2F2DPFQeE%2FN8d2omZaK70IPrOA%3D%3D?utm_medium=email&_hsmi=230782250&_hsenc=p2ANqtz81sk1WdeVEq1HttBbgnu0EQeKQBqOk76zgDEDNs1zO2PdS_jvmNdgzwcauChrjp_mjcEbei9fetdryFVmIYHVJB3IW_A&utm_content=230782250&utm_source=hs_email

FACTS: Appellee Mintaka executed a foreclosure on Appellants Regent and subsequently liquidated their truck, which was held as collateral, to recover the outstanding debt. Originally procured by Regent for approximately $87,000 in 2019, Mintaka proceeded to auction the vehicle through an online platform in 2020, achieving a sales price of $26,000. The trial court rendered a summary judgment in Mintaka's favor against Regent. In response, Regent filed an appeal, contending that Mintaka inadequately demonstrated the "commercial reasonableness" of the truck's sale in relation to debt collection.
HOLDING: Reversed and remanded.
REASONING: The court elucidated that determining the "commercial reasonableness" in the disposal of collateral is a fact-based inquiry harmonizing dual objectives: forestalling creditor misconduct and minimizing disruptions to legitimate transactions. While the court considers an array of nonexclusive factors for assessing "commercial reasonableness," the ultimate aim remains ensuring the creditor garners an equitable value. Consequently, the evidence presented must substantiate the "commercial reasonableness" concept and cannot be cursory or lacking in a summary judgment context.

Here, the court identified several shortcomings with Mintaka's handling of the truck's disposition of the truck, which was pivotal in establishing "commercial reasonableness." First, Mintaka furnished scant details behind fixing the sales price at $26,000, even though the truck's recent acquisition was at $87,000 just a year prior. Second, whether a two-day auction period properly adhered to re-marketing industry standards remained unaddressed and unclarified by Mintaka. Third, the assertion that the auction house held widespread recognition lacked substantiated facts and rested on conclusory statements. Lastly, contrary to Mintaka's claim of many bids, only two bidders participated in the auction.

The court held Mintaka fell short of meeting its summary judgment burden, given that the sale of a truck for $26,000 (having been acquired for $87,000 merely a year earlier), coupled with minimal supporting details, cannot be deemed "commercially reasonable" as a matter of law. The court sustained Regent's arguments, reversed the summary judgment, and remanded the case to the trial court.

STATUTE OF LIMITATIONS IS NOT TOLLED WHEN IDENTIFYING THE PROPER DEFENDANT CONSTITUTES MISIDENTIFICATION

Argo v. USAA Cas. Ins. Co.___S.W.3d___(Tex. App. 2023). https://public.fastcase.com/ZZhmr5v9wN%2FXOe5IsQ%2FqD9jqPjqJuPlSx6%2FUHu4ghmlpdIyruDsWzIzULbQVUt2NsDh1JyVAkJJ2Q7HLvFqefg%3D%3D?utm_medium=email&_hsmi=230781962&_hsenc=p2ANqtz__2f2_rPZlmRnvijbCfIit_0UA12xlcyOuGg1m0zh9jmybL9K9jbghdKDsroglj9AdfATyAe-ZOOAn2w2

FACTS: Appellant J.R. Argo owned property that USAA insured. Argo filed a claim when his property suffered storm damage. USAA rejected the claim. Argo sued USAA for breach of contract. Although Argo named USAA as the defendant, he served USAA Casualty Insurance Company ("USAA-CIC").

USAA-CIC filed a motion for summary judgment. The trial court granted summary judgment in favor of USAA-CIC and ordered that Argo take nothing on his claims. Argo appealed.
HOLDING: Affirmed.
REASONING: USAA-CIC argued that it was entitled to judgment as a matter of law "because the claims [were] barred by [the applicable statute of] limitations." USAA-CIC also noted that the statute of limitations could not have tolled under the equitable tolling doctrine because Argo's initial failure to identify the proper defendant constituted misidentification, not misnomer, and limitations is not tolled when a plaintiff sues the wrong party.

Argo argued that his error in suing USAA-CIC instead of USAA was a case of misnomer because he served the correct agent and clearly referenced the USAA policy in his petition. Thus, Argo asserted that his original petition's filing date, which was within the statute of limitations period, should apply to his amended petition.

A TEXT CAN BE A "CALL" FOR PURPOSES OF THE TELEPHONE CONSUMER PROTECTION ACT. A TEXT MESSAGE, HOWEVER, IT GENERALLY WILL NOT BE WITHIN THE SCOPE OF TCPA, AS THE WORD "VOICE" "ENCOMPASSES ONLY AUDIBLE SOUNDS."

Trim v. Reward Zone USA LLC, ___ F.3d ___ (9th Cir. 2023). https://cdn.ca9.uscourts.gov/datastore/opinions/2023/08/08/22-55517.pdf

FACTS: Appellant Lucine Trim brought a class action lawsuit against Appellee Reward Zone USA LLC, under the Telephone Consumer Protection Act ("TCPA"). Trim alleged that she received multiple mass marketing text messages from Reward Zone, which she claimed utilized "prerecorded voices." The district court dismissed Trim's cause of action. Trim appealed.
HOLDING: Affirmed.
REASONING: The parties disputed whether the term "voice" in the TCPA encompassed text messages. Trim argued that "voice" could also symbolically refer to an "instrument or medium of expression," so the prerecorded text messages were prohibited "prerecorded voice[s]."

The court held that Congress intended the term "voice" in the TCPA to refer exclusively to audible sounds and not sym-

bolic mediums of expression. The court relied on the ordinary meaning of "voice" at the time the statute was enacted, which was a sound produced by the human larynx during speech. The court reasoned that the statutory context and legislative history supported its interpretation that Congress intended "voice" to refer to audible components.

The court rejected Trim's arguments that legislative history and FCC rules indicated a broader definition of "voice." The court clarified that its interpretation was consistent with previous case law differentiating "voice calls" and "text messages" under the TCPA.

The court concluded that the text messages sent by Reward Zone to Trim did not violate the TCPA's prohibition on "prerecorded voices" because, in line with the ordinary meaning and statutory context of the term "voice," they lacked audible components.

The court rejected Argo's argument. It clarified the distinction between misnomer and misidentification. Misnomer occurs when parties are misnamed but the correct parties are involved, while misidentification happens when separate legal entities are involved and the plaintiff mistakenly sues the entity with a similar name. In this case, USAA-CIC and USAA were separate legal entities, making it a case of misidentification.

The court considered whether an equitable exception to the general rule for misidentification cases could apply. Such an exception tolls the statute of limitations if related entities have similar trade names, the correct entity had notice of the suit, and the correct entity was not misled or disadvantaged by the mistake. However, Argo failed to prove that USAA had actual notice of the suit within the limitations period, which was a requirement for this exception to apply. Additionally, Argo's delay in serving USAA-CIC with citation further undermined the argument that USAA had notice within the limitations period.

Consequently, the court of appeals upheld the trial court's grant of summary judgment based on the statute of limitations.

ELECTRONIC HARASSMENT STATUTE IS CONSTITUTIONAL

Ordonez v. Texas, ___S.W.3d___, (Tex. App.—Houston [14th Dist.] 2023).
https://law.justia.com/cases/texas/fourteenth-court-of-appeals/2023/14-19-01005-cr.html

FACTS: Lyla Ordonez was charged with violating Section 42.07(a)(7) of the Texas Penal Code, the electronic harassment statute, for sending repeated text messages to another person with the intent to harass, annoy, alarm, abuse, torment or embarrass them. Ordonez challenged the constitutionality of the electronic harassment statute under the First Amendment and sought a pretrial writ of habeas corpus. The trial court denied habeas relief. Appellant appealed.
HOLDING: Affirmed.
REASONING: Ordonez argued that the statute infringed her constitutional right to free speech and failed to satisfy the strict scrutiny standard. The court disagreed.

The court held the electronic harassment statute as constitutional and that it did not violate First Amendment protections. The court relied on the rational basis test that it previously used in *Ex parte Barton* and *Ex parte Sanders* to justify its holding because the statute prohibited conduct other than speech. The court explained that the core of the offense was the repeated sending of electronic communications that were noncommunicative in nature, such as text messages, regardless of whether they were accompanied by speech. Although this non-speech conduct contained some speech, it did not automatically become subject to First Amendment scrutiny since sending the messages was the core issue. The court concluded such noncommunicative conduct was not protected by the First Amendment.

The court determined that the statute was valid because it was rationally related to a legitimate state interest in protecting individuals' privacy from harassment.

Under the rational basis test, the court determined that the statute was valid because it was rationally related to a legitimate state interest in protecting individuals' privacy from harassment. The court also rejected Ordonez's overbreadth and vagueness challenges because the statute did not regulate speech and the Ordonez had to demonstrate vagueness through her own conduct.

Accordingly, the court rejected the contention that the statute unconstitutionally targeted multiple means of electronic communication because the Ordonez was only charged with sending text messages. Thus, the court affirmed the trial court's judgment and denied the appellant's pretrial application for habeas relief.

THE LAST WORD

Happy summer solstice! September 21st is when the sun is exactly above Earth's equator and day and night are the same length of time. The longest day of the year. And with all that extra time, you can start reading this issue of the *Journal,* beginning with an award-winning article.

Stacy L Stevens' article, dealing with section 230 and social media, is this year's winner of the Section's *Craig Jordan Consumer Protection Writing Competition*. It also has been nominated by SMU, where she attended law school, for one of the Burton Awards for writing excellence. Congratulations Stacy!

And I am sure all of you understand how wide-spread arbitration clauses are in consumer contracts, but you may not appreciate how little consumers really understand about them. Jeff Sovern's editorial, *Opaque (formerly Dark) Patterns and Arbitration Opt-Outs*, discusses why giving consumers a choice to opt-out may help prevent legal challenges, but does very little to help consumers.

As usual, this issue includes digests and notes on the most recent consumer law cases. More than twenty-five cases are discussed. The *Journal's* new Board, headed by student Editor-in-Chief Pablo Lopez, has done an excellent job providing the members of the Section with an informative source for news and discussions about consumer and commercial law issues.

Richard M. Alderman
Editor-in-Chief