

RECENT DEVELOPMENTS

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.

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 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 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,

RECENT DEVELOPMENTS

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&cas_sdt=6&cas_vis=1&oi=scholar

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%2FqD9jqpJqJuPlSx6%2FUHu4ghmlpdIyruDsWzIzULbQVUt2NsDh1JyVAKJJ2Q7HLvFqefg%3D%3D?utm_medium=email&_hsmi=230781962&_hsenc=p2ANqtz_2f2_rPZlMnRnvjbcFlit0UA12xlcYOuGg1m0zh9jmybL9K9jbghdKDsrogIj9AdfATyAe-ZOOAn2w2

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_rPZlMnRnvjbcFlit0UA12xlcYOuGg1m0zh9jmybL9K9jbghdKDsrogIj9AdfATyAe-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 “pre-recorded 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 pre-recorded text messages were prohibited “pre-recorded voice[s].”

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

RECENT DEVELOPMENTS

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 protec-

tions. 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

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

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.

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.