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ANNUAL SURVEY OF TEXAS INSURANCE LAW 2022

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The editors welcome unsolicited lead articles written by practicing attorney, judges, professors, or other qualified individuals. Manuscript length should be approximately 15-30 typed, double-spaced pages. Endnotes should conform to the Sixteenth Edition of A Uniform System of Citation, published by the Harvard Law Review Association.

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Articles

Recent Developments

Annual Survey of TEXAS Insurance Law 2022

By Suzette E. Selden* & Henry Moore**

I. INTRODUCTION

This year the Texas Supreme Court declined to expand the duties owed by an insurer to its insured. In a case where an insured was killed taking pictures of a collision scene at the insurer's request, the court held the insurer had no duty to process the accident claim without requesting the insured take photographs or issue a safety warning to the insured.[1]

The Texas Supreme Court clarified when extrinsic evidence can be considered under an exception to the eight-corners rule.[2]

Several cases dealt with the discovery of information from hospitals on the negotiated rates the hospital charged private insurers and government payers. The courts in these cases are allowing this type of discovery holding the requests are relevant and not overbroad.[3]

And lastly, the courts continued to hear cases from businesses attempting to obtain coverage under their policies for COVID-related business shutdowns to no avail.[4]

II. FIRST PARTY INSURANCE POLICIES & PROVISIONS

A. Automobile

The issue in this auto policy dispute centers around the definition of "occupying." Appealing its denial of summary judgment, the insurer argued that the insured was not "occupying" the vehicle when she was leaning against it, pouring gas from a can into the car. Of note, the insured was an additional insured, not the named insured. "Occupying" the covered vehicle is not a condition of coverage for the named insured. The appellate court reversed the trial court's order granting summary judgment for the insurer and remanded as there was a genuine issue of material fact as to whether the insured was "occupying" the vehicle. *Hill v. Allstate Fire & Cas. Ins. Co.*, 652 S.W.3d 516 (Tex. App.—Houston [14th Dist.] July 28, 2022) (mem. op.).

In *Sentry Select Insurance Company v. Home State County Mutual Insurance Company v. Ortiz*, the opinion turns on the question of insurable interest in a recently purchased car. Sentry insured the seller of the car, and Home State insured the buyer. Shortly after purchase, the car insured by Home State was in the shop for repairs. The car in the accident was a loaner, while the insured car was in the shop. The Sentry policy contained a "step down" provision that it would pay only the minimum limits if other insurance was missing. Home State argued that it had no coverage since its insured, the buyer, had no control over the vehicle and hence no insurable interest.

The Fifth Circuit affirmed the trial court's granting Sentry's motion for summary judgment, holding that the loaner car was a "temporary substitute vehicle" under the Home State policy, therefore, an insured vehicle. Further, the buyer (insured

under the Home State policy) had an insurable interest in the car since she had made a down payment, procured insurance, and was under contract to purchase the car. Finally, the court denied Sentry's request for frivolous appeal sanctions, noting that Home State made a good faith, if unsuccessful, argument. No. 21-40371, 2022 WL 2800809 (5th Cir. July 18, 2022).

Under the terms of an automobile insurance policy, any family member not listed on the application was excluded from coverage. The policy excluded by name "Felicia Godoy." "Felicia Donias" was in a wreck and requested a defense from the insurer. The insurer declined after realizing that Felicia Godoy and Felicia Donias were the same person. After an adverse judgment, Felicia sued the insurer, alleging that the name change required a reformation of the policy which the insurer did not seek. The court's analysis was simple. The person in the wreck seeking coverage was the same person excluded in the policy. Therefore, the appellate court affirmed the trial court's judgment that the insurer did not owe automobile coverage to Felicia. Of note, the "named driver" policy at issue in this case is no longer permitted under Texas Insurance Code section 1952.353. *Donias v. Old Am. Cty. Mut. Fire Ins. Co., et al.*, 649 S.W.3d 789 (Tex. App.—El Paso June 14, 2022).

B. Homeowners

The insureds' home suffered damage after a hurricane, and they filed a claim with their insurer. The insurer denied the claim stating there were no visible signs of covered flood damage. Summary judgment was granted in favor of the insurer, and the insureds appealed. The Fifth Circuit affirmed the trial court's judgment and held the flood insurance policy obligated the insurer to cover only direct physical losses by or from a flood. The court noted "flood" was explicitly defined as, "[a] general and temporary condition of partial or complete inundation of two or more acres of normally dry land area or of two or more properties (one of which is your property) from: (a) overflow of inland or tidal waters (b) unusual and rapid accumulation of runoff of surface waters from any source, (c) mudflow." The Fifth Circuit stated the insureds' evidence failed to create a genuine fact issue about whether there was a flood as defined by the policy. *Shaw v. Am. Bankers Ins. Co. of Fl.*, No. 21-20455, 2022 WL 621694 (5th Cir. March 3, 2022) (per curiam).

In *Overstreet v. Allstate Vehicle and Property Insurance Company*, the Fifth Circuit certified three questions to the Texas Supreme Court to help further clarify the concurrent causation doctrine. The doctrine states when insured property is damaged by a combination of covered and uncovered causes, the insured must prove how much of the damage is solely attributable to the covered cause. In *Overstreet*, the insured argued that a hailstorm damaged his roof. His insurer argued the roof was damaged in a hailstorm prior to the policy period and by wear and tear. The district court granted summary judgment to the insurer because the insured did not prove what damages were solely attributable to the covered storm. The Fifth Circuit noted there are substantial gaps in the concurrent causation doctrine and that this case posed significant consequences for the Texas insurance market. The Fifth Circuit certified these three questions to the Texas Supreme Court:

> (1) Whether the concurrent cause doctrine applies where there is any non-covered damage, including "wear and tear" to an insured property, but such damage does not directly cause the particular loss eventually experienced by plaintiffs;
>
> (2) If so, whether plaintiffs alleging that their loss was entirely caused by a single, covered peril bear the burden of attributing losses between that peril and other, non-covered or excluded perils that plaintiffs contend did not cause the particular loss; and
>
> (3) If so, whether plaintiffs can meet that burden with evidence indicating that the covered peril caused the entirety of the loss (that is, by implicitly attributing one hundred percent of the loss to that peril).

34 F.4th 496 (5th Cir. 2022). The case was dismissed prior to the Texas Supreme Court answering these questions.

Another homeowner's case dealt with claims for damages following a hurricane. The policy excluded damage from flood waters. The covered roof damage was estimated by the insurer to be under the policy deductible, but the remaining flood damage was excluded so no payment was made. The insured homeowner sued, amending her claim before summary judgment to allege a different date of loss to avoid limitations. In the trial court, summary judgment was granted in favor of the insurer holding that the insured did not timely file suit and that flood and surface water damage were excluded from coverage. On appeal, the homeowner did not challenge the cause of loss – the excluded flood damage. The appellate court cites well-established case law and holds that where a sufficient, independent ground for summary judgment is not challenged, the summary judgment must be affirmed. *Sosa v. Auto Club Indem. Co.*, No. 01-21-00312-CV, 2022 WL 3722396 (Tex.App.— Houston [1st Dist.] September 1, 2022).

In *Overstreet v. Allstate Vehicle and Property Insurance Company*, the Fifth Circuit certified three questions to the Texas Supreme Court to help further clarify the concurrent causation doctrine.

C. Commercial Property

Following limitations placed on non-essential businesses during the COVID-19 pandemic, an insured restaurant tried to recover its losses through its commercial property insurer, which covered business interruption losses caused by "direct physical loss of or damage to property." The insurer determined the policy did not cover the claimed losses. The insured restaurant sued, and the district court granted judgment on the pleadings in favor of the insurer. The insured appealed.

The Fifth Circuit affirmed the lower court's ruling, holding the suspension of dine-in services during the COVID-19 pandemic was not a direct physical loss of or damage to property. Moreover, the restaurant extension endorsement that provided coverage for the suspension of operations at the premises due to civil authority had to result from the actual or alleged exposure of the premises to a contagious or infectious disease. The Fifth Circuit noted it was making an "*Erie* guess" as to how the Texas Supreme Court would decide the issue, as the Texas Supreme Court had not interpreted the policy language at issue or whether the relevant provisions cover business interruption losses due to

civil authority orders suspending nonessential businesses during the COVID-19 pandemic. The court noted the business income and extra expense provision only covered business interruption that is caused by loss or damage to the commercial property. While the insured argued the loss of use of its dining rooms for their intended purpose was a physical loss of use of the property, the Fifth Circuit disagreed, stating one could not read the policy to support that argument. A loss of *property* was required to recover, not the loss of *use* of property. Because the insured restaurant was not physically altered by the suspension of dine-in services and the civil authority orders were not caused by the insured restaurant's exposure to COVID-19, the Fifth Circuit affirmed the district court's ruling in favor of the insurer. *Terry Black's Barbecue, L.L.C. v. State Auto. Mut. Ins. Co.*, No. 21-50078, 2022 WL 43170 (5th Cir. Jan. 5, 2022).

An insured gift shop suffered a loss of revenue during the COVID-19 pandemic when limitations were placed by the government on the operations of nonessential businesses. The insured sought coverage from its insurer under its commercial property insurance policy which stated it covered losses "caused by direct physical loss of or damage to property at the described premises." The claim was denied, and the insured sued. The district court dismissed the claim stating the insured did not allege a direct physical loss of property, and the insured appealed arguing that "direct physical loss of property" could reasonably be interpreted to cover a "loss of use of property." The appellate court looked to its decision in *Terry Black's Barbecue, L.L.C. v. State Automobile Mutual Insurance Company,* No. 21-50078, 2022 WL 43170 (5th Cir. Jan. 5, 2022), when determining the insured had not alleged a covered loss of revenue due to the closing of its shop. The court held, "[w]hether a business is directed to cease one kind of service or all of its services, that order is not a tangible alteration or deprivation of property." Therefore, the appellate court affirmed the district court and stated nothing tangible happened to the insured's property and also held "physical loss of property" cannot reasonably be interpreted to mean loss of use. *Aggie Invs., L.L.C. v. Cont'l Cas. Co.*, No. 21-40382, 2022 WL 67333 (5th Cir. Jan. 26, 2022).

Another court followed the holding in *Terry Black's Barbecue*, 2022 WL 43170, related to a commercial insurance policy insuring a company that provided gift shop inventory to hospitals. The insured sought business interruption losses resulting from the COVID-19 pandemic arguing that the virus that causes COVID-19 physically damages property. The insurance policy covers, "accidental physical loss or accidental physical damage." The insurer moved to dismiss the suit asserting the insured failed to allege any direct physical loss or damage to property that would entitle coverage. The court agreed with the insurer and dismissed the lawsuit holding COVID-19 does not cause physical damage to property. *Lamacar, Inc. v. The Cincinnati Cas. Co.*, No. 3:21-CV-1396-S, 2022 WL 227162 (N.D. Tex. Jan. 26, 2022).

In *Bradford Realty Services, Inc. v. Hartford Fire Ins. Co.*, No. 21-11047, 2022 WL 1486779 (5th Cir. May 11, 2022), there was a property damage claim based on pooled rainwater on the roof of the insured premises. The issue in this case turned on the difference between "rain" and "water." The policy excluded rain as a covered hazard but covered water that backed up from a sewer or a drain. The court held that rainwater collecting on the roof fell within the rain exclusion, admitting that it was making an *Erie* guess since there was no "reservoir of precedent" to guide it. This is one of many plays on the word "water" the opinion indulges in, referring initially to water as "dihydrogen monoxide." The Fifth Circuit affirmed the district court's holding in favor of the insurer, agreeing that the rain exclusion applied while the backup drain coverage did not.

A commercial property was damaged in a hurricane by floodwater. The insurer paid the insured for the damage. The insured had also purchased a "deductible buyback policy," a type of policy that may cover all or part of the deductible required by the primary policy, as the underlying policy had a high deductible. The deductible buyback policy insurer argued its policy covered the specific perils of "Windstorm or Hail" that are "associated with a Named Storm," but not all the perils associated with a "Named Storm." The underlying policy was an all risks policy, but the buyback policy insurer argued that the language in its policy made it a "named perils" policy that did not include flooding. The district court ruled in favor of the insured on summary judgment, and the deductible buyback insurer appealed. The Fifth Circuit held that since the deductible buyback policy framed its coverage as applying to "specific perils," that were listed as windstorm or hail associated with a named storm, flooding was not covered under this policy. Therefore, the Fifth Circuit reversed the district court's grant of summary judgment in favor of the insured and rendered judgment in favor of the deductible buyback policy insurer. *Landmark Am. Ins. Co. v. SCD Mem'l Place II, L.L.C.*, No. 20-20389, 2022 WL 320316 (5th Cir. Feb. 3, 2022).

D. Other Policies

A smoked meat business insured its equipment from breakdown. Under the policy, vehicles were excluded from the definition of insured equipment. The equipment at issue was a storage trailer that was on the premises for excess storage. It was not attached to a towing vehicle at the time of its malfunction. The word "vehicle" was not a defined term in the policy. The Fifth Circuit affirmed the trial court's summary judgment for the insurer, holding that the malfunctioning equipment was a vehicle under the ordinary meaning of the word. The court noted that the smoked meat business did not offer authority for a different definition, hence, there was no ambiguity in the term. *Kiolbas-*

sa Provision Co., Inc. v. Travelers Prop. Cas. Co. of Am., No. 21-51033, 2022 WL 1800884 (5th Cir. June 2, 2022) (mem. op.).

III. FIRST PARTY THEORIES OF LIABILITY

A. Prompt Payment of Claims – Article 21.55

An insured sued his insurer for failing to timely pay personal injury protection (PIP) benefits. The parties agreed the $2,500.00 owed in benefits were paid prior to the lawsuit. The insurer argued this precluded statutory penalties. Insurer stated that ecause the benefits were paid before the lawsuit was filed, no statutory penalties were due. The trial court considered the issue in competing motions for summary judgment and ruled in favor of the insured. The appellate court agreed, holding the due date set by statute controlled, not the date of the lawsuit. The appellate court affirmed the award of a twelve percent penalty. Attorney's fees were agreed to by the parties before the appeal. *State Farm Mut. Ins. Co. v. Rumbaugh*, 642 S.W.3d 901 (Tex. App.—Texarkana 2022, pet. denied).

B. Negligence and Breach of the Duty of Good Faith and Fair Dealing

This case reached the appellate courts as a permissive interlocutory appeal under Section 51.014 of the Texas Civil Practices and Remedies Code.

The insured was in a one-car wreck. The insured's husband showed up at the scene and started taking pictures. The insured testified that her insurance carrier requested the photographs, and she passed this request to her husband. While taking the pictures, he was struck by another vehicle and killed.

In her wrongful death and survivor action, the insured argued that the carrier "owed the motorist and her husband a duty to process a single-vehicle accident claim without requesting that the insured take photographs or to issue a safety warning along with any such request." The court held there was no such duty.

In affirming the trial court's summary judgment for the insurer, and reversing the appellate court, the Texas Supreme Court held that to recognize a duty several factors are considered. Citing *Greater Houston Transportation Co. v. Phillips*, 801 S.W.2d 523 (Tex. 1990), the Court said:

> To determine whether a duty exists and what its parameters are, we apply what are commonly called the "Phillips" factors. This inquiry requires us to "weigh the risk, foreseeability, and likelihood of injury against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant." In making this assessment, we also consider "whether one party would generally have superior knowledge of the risk or a right to control the actor who caused the harm." Here, the relevant risk of harm is a car running over a pedestrian standing adjacent to a roadway taking pictures of an accident scene.

A plaintiff has standing to sue the liability carrier only after establishing the insured's liability by judgment or agreement, not by implication.

The court also rejected a duty based on good faith and fair dealing in this context, noting a special relationship between insurer and insured was not applicable to the conduct complained of in this case. Finally, the court rejected the insured's argument for liability under a negligent undertaking theory, noting that the insurer's instructions were not "necessary to protect the insureds or their property from harm." The trial court denied the insurer's motion for summary judgment on the insured's uninsured motorist claim, but that issue was not before the Texas Supreme Court, and no comment was made on it. *Elephant Ins. Co. v. Kenyon*, 644 S.W.3d 137 (Tex. 2022).

IV. AGENTS, AGENCY, AND VICARIOUS LIABILITY

A. Individual Lability of Agents, \Adjusters, and Others

This next case centers around the duties owed by an insurance agent to its customers. The insureds sought better and cheaper coverage through the insurance agent. They requested flood insurance as part of their purchase. The agent repeatedly asked for their existing flood insurance which they did not have and could not produce. Eventually, the policy was issued with "flood extension" coverage but not primary flood coverage.

A hurricane later flooded the insureds' home. When the insureds found out they had no flood insurance, they sued the agent. The jury found that the agent was not negligent, but the insureds were. Both parties acknowledged that an agent has two duties under the common law: (1) to use reasonable diligence in procuring the coverage their customer requests and (2) to inform their customer if they are unable to do so. The insureds argued at trial and on appeal for expanded duties to include: (1) a duty to keep their customer "fully informed so they could remain safely insured at all times, (2) a duty to know what they tell their customer is true, and (3) that the customer is entitled to rely upon its instruction being carried out."

The court analyzed existing precedent and concluded that no such duties exist in the context of this case. The court also noted that no Texas Deceptive Trade Practices-Consumer Protection Act or Texas Insurance Code causes of action were alleged. Finally, the court agreed with the trial court's submission of a comparative negligence question. *Garcia v. Hartwig Moss Ins. Agency, Ltd.*, No. 01-20-00420-CV, 2022 WL 1250564 (Tex. App.—Houston [1st Dist.] April 28, 2022) (mem. op.).

V. THIRD PARTY INSURANCE POLICIES & PROVISIONS

A. Homeowners Lability Insurance

This case is an appeal from a summary judgment in favor of the insurer on a declaratory judgment action. Two roommates were renting a house from Gonzales, the named insured under the policy. One roommate's dog bit the other roommate, so the injured roommate sued and took a default judgment against the roommate with the dog. The injured roommate later added the insurer and others associated with the insurer to the lawsuit seeking a declaratory judgment on its duty to defend the lawsuit, arguing that by implication the carrier had a duty to defend the roommate with the dog. Critical to the court's holding, the injured party never sued Gonzales, the named insured. The appellate court agreed with the trial court that the court lacked jurisdiction to hear the case. A plaintiff has standing to sue the liability carrier only after establishing the insured's liability by judgment or agreement, not by implication. There was simply no showing that the named insured was liable to the injured party, nor that the roommate with the dog was an insured under the policy. *Medrano v. Tafoya, et al.*, No. 04-21-00096-CV, 2022 WL 3638233 (Tex. App.—San Antonio Aug. 24, 2022).

B. Commercial General Liability Insurance

Tragically, a three-year-old child was left in a bus by a school employee and died of heat exhaustion. The commercial general liability policy contained an exclusion for claims arising from the use of a motor vehicle. The insured argued that this exclusion did not apply to the physical abuse form that was part of the liability policy. The court read the form's language, that "[c]overage is subject to this coverage form *and* the exclusions, conditions and other terms of this policy" as applying the automobile exclusion to this portion of the coverage. Of note, the insured did not challenge whether the injuries arose from the use of an automobile. The court noted the general rule that all portions of the policy are read together with each portion given meaning to avoid rendering any portion inoperative. The Fifth Circuit affirmed the district court's ruling to apply the exclusion and deny coverage. *Scottsdale Ins. Co. v. Discovering Me Acad., L.L.C.*, No. 21-20595, 2022 WL 3040663 (5th Cir. August 2, 2022).

C. Construction Liability Insurance

A worker was injured falling from a ladder while working for N. F. Painting, the named insured under the insurance policy. N. F. Painting was doing contract work for a homebuilding company at the time. The homebuilding company was an additional insured under the insurance policy. The policy had a standard exclusion for claims made by employees. Consequently, counsel for N. F. Painting did not believe there was coverage and did not demand a defense or indemnity from the insurer. The homebuilding company did demand a defense, and the insurer provided one. Subsequently, the injured worker amended his petition alleging independent contractor status. N. F. Painting did not send the amended petition to the insurer nor did it demand a defense under the amended pleading. After an agreed judgment, the injured worker sued the insurer as a third party beneficiary. In affirming summary judgment for the insurer, the Fifth Circuit held that under *Nat'l Union Fire Insurance Company of Pittsburgh, PA v. Crocker*, 246 S.W.3d 603, 608 (Tex. 2008), coverage was never triggered because no claim for a defense was made. The court shot down all the arguments of indirect notice, holding that the demand for a defense must come from the insured, not other sources. The court also noted that prejudice to the insurer is not required when notice is simply lacking. Late notice requires prejudice – no notice does not. *Moreno v. Sentinel Ins. Co., Ltd.*, 35 F. 4th 965 (5th Cir. 2022) (mem. op.).

VI. DUTIES OF LIABILITY INSURERS

A. Duty to Defend

A property owner sued an insured for breach of contract and negligence seeking damages resulting from drilling operations on his property. The pleading alleged damage in different ways but was silent as to when any of the alleged damage occurred. The insured demanded a defense from an insurer it had from 2013-2015 and an insurer it had from 2015-2016. The first insurer defended under a reservation of rights. The second insurer refused to defend arguing that any property damage occurred before its policy period began. The two insurers stipulated that the insured's drill bit stuck in the bore hole during drilling around November 2014. Both parties sought summary judgment on the issue of whether the second insurer owed a duty to defend. The district court held it could not consider the extrinsic evidence of when the drill bit stuck, and applied the eight-corners rule to conclude that the second insurer owed a duty to defend because the property damage could have occurred anytime between 2014-2016. The second insurer appealed, and the Fifth Circuit certified two questions to the Texas Supreme Court:

> (1) Is the exception to the eight-corners rule articulated in *Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523 (5th Cir. 2004), permissible under Texas law? and,
>
> (2) When applying such an exception, may a court consider extrinsic evidence of the date of an occurrence when (1) it is initially impossible to discern whether a duty to defend potentially exists from the eight-corners of the policy and pleadings alone; (2) the date goes solely to the issue of coverage and does not overlap with the merits of liability; and (3) the date does not engage the truth or falsity of any facts alleged in the third party pleadings?

In answer to the first certified question, the Texas Supreme Court held the eight-corners rule remains the initial inquiry to be used to determine whether a duty to defend exists, stating:

> If the underlying petition states a claim that could trigger the duty to defend, and the application of the eight-corners rule, due to a gap in the plaintiff's pleading, is not determinative of whether coverage exists, Texas law permits consideration of extrinsic evidence provided the evidence (1) goes solely to an issue of coverage and does not overlap with the merits of liability, (2) does not contradict facts alleged in the pleading, and (3) conclusively establishes the coverage fact to be proved.

In answer to the second certified question, the Texas Supreme Court held under the standard adopted in this opinion, a court may consider extrinsic evidence of the date of an occurrence but only if it goes solely to the issue of coverage and does not overlap with the merits of liability. The court held in this case, where there is continuing damage, evidence of the date of property damage overlaps with the merits of liability, and therefore, cannot be considered. *Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Corp.*, No. 21-0232, 2022 WL 413940 (Tex. Feb. 11, 2022).

An insured school obtained a new roof membrane system that was guaranteed to be watertight for 20 years. However, four years after the roof was installed, it began to leak. The roof manufacturer attempted to repair it a few times, but the roof continued to leak. A roof expert hired by the insured said a new roof was required. The insured sued the roof manufacturer and installing contractor. The roof manufacturer submitted a claim to its commercial liability insurer. For the policy to apply, the property damage must have been caused by an "occurrence," defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Two relevant exclusions were the "your product/your work exclusion" and the "contractual liability exclusion." The insurer denied coverage, including its duty to defend the insured, and the insured filed suit against its insurer asking for declaratory relief that the insurer provide a defense, and also asserted claims for breach of contract, violations of the Texas Insurance Code, and attorney's fees. The insurer filed a counterclaim for declaratory relief that it had no duty to defend or indemnify the insured. Both parties moved for summary judgment, and the district court granted the insurer's motion for summary judgment finding that while the complaint in the underlying lawsuit did allege property damage that was caused by an "occurrence" the alleged damage fit within the your product/your work exclusion. The insured appealed.

The Fifth Circuit held the underlying complaint did contain allegations of damage to the property other than the roof membrane. Therefore, the your product/your work exclusion did not apply, and the court held there was a duty to defend based on those allegations. The underlying complaint alleged there was "water damage in the ceiling tiles throughout the [school] after a rain storm" and the insured roofing manufacturer recommended the school contact a contractor to address the damage and leak. Therefore, the Fifth Circuit held there was a duty to defend and reversed the district court's ruling, rendering declaratory judgment in favor of the insured, requiring the insurer to defend the insured in the underlying lawsuit. *Siplast, Inc. v. Emp'rs Mut. Cas. Co.*, 23 F.4th 486 (5th Cir. 2022).

The Fifth Circuit held there was a duty to defend and reversed the district court's ruling, rendering declaratory judgment in favor of the insured, requiring the insurer to defend the insured in the underlying lawsuit.

VII. DAMAGES & OTHER ELEMENTS OF RECOVERY

A. Statutory Penalties and Additional Damages

An insured sued his insurer after the insurer failed to timely pay personal injury protection (PIP) benefits owed to the insured's son who was injured in a car accident. The claim was timely submitted, and the insurer did not dispute the claim. However, the insurer paid the benefits several days late. The insured sued the insurer for the twelve percent penalty, interest, and attorney's fees owed under Texas Insurance Code section 1952.157(b). In a summary judgment motion, the insurer argued that the twelve percent statutory penalty could be awarded only in a suit to recover benefits, and that because the PIP benefits were paid before suit was filed, the statutory penalty could not be recovered. The trial court disagreed, entering judgment in favor of the insured to recover the statutory penalty, interest, and all court costs. The insured appealed, contending that, "an order from [a] court requiring the insurer to pay policy benefits that it has previously failed to pay is a precondition to the imposition of the statutory penalty." The appellate court found that a lawsuit to recover PIP benefits is not a prerequisite to the statutory penalties described in Texas Insurance Code section 1952.157(b). The court stated, "[s]imply put, an insurer's obligation to pay benefits is not triggered by the lawsuit, it is triggered by the statutory deadline." Therefore, the appellate court affirmed the trial court's judgment in favor of the insured. *State Farm Mut. Auto. Ins. Co. v. Rumbaugh*, 642 S.W.3d 901 (Tex. App.—Texarkana 2022, pet. denied).

B. Attorney's Fees

Following a jury verdict in favor of the insured in an uninsured/underinsured motorist case, the insured requested attorney's fees under the Declaratory Judgment Act. The insurer objected to the insured's entitlement to attorney's fees as well as the evidence of attorney's fees since the insured had not disclosed an expert on the subject. The insurer claimed that the award of attorney's fees was not equitable under the facts of the case. While this case was pending, the Texas Supreme Court affirmed *Allstate Insurance Company v. Irwin*, 627 S.W.3d 263 (Tex. 2021) determining the insurer's first argument against it. The court allowed additional time for the insurer to produce rebuttal evidence on attorney's fees, which it failed to do. Therefore, the appellate court held that it was not an abuse of discretion to award equitable attorney's fees in the case. *Allstate Fire & Cas. Co. v. Howell—Herring*, No. 02-20-00175-CV, 2022 WL 1183336 (Tex. App.—Ft. Worth Apr. 21, 2022).

VIII. DEFENSES & COUNTERCLAIMS

A. Limitations

This case arises from a claim on a surety bond under the Miller Act. The US Army Corps of Engineers hired a company for a dredging project on the Texas coast. The Miller Act requires that a surety bond be in place, which the company obtained. The company doing the dredging project hired Diamond Services to repair a vessel it had chartered for the project. However, the company refused to pay Diamond who then submitted a claim to the insurer on the surety bond.

The Miller Act requires an action under the bond to be commenced within one year and a day from the last date labor was performed. This action was brought four days after that deadline. Diamond argued that estoppel tolled the limitations. The insurer sent a letter requesting additional information on the claim from Diamond. However, Diamond failed to plead the letter was a representation it reasonably relied on in deciding not to bring suit within the statutory limitation. The court noted that no allegations were made that the insurance company relied on representations that would justify estoppel. Therefore, the Fifth Circuit affirmed the district court's ruling in favor of the insurer dismissing the claim. The court held that reliance on the letter from the insurer in delaying filing suit was unreasonable and equitable estoppel could not rescue the claim. *Diamond Servs. Corp. v. Travelers Cas. & Surety Co. of Am.,* No. 22-40240, 2022 WL 4990416 (5th Cir. Oct. 3, 2022).

IX. PRACTICE & PROCEDURE

A. Jurisdiction

After a tornado struck several properties owned by an insured, the insured filed a lawsuit in state court against its insurer and its adjusters assigned to the claim. The adjusters were Texas citizens. The insurer accepted liability for the adjusters pursuant to Texas Insurance Code section 542A.006(a), and entered into a Rule 11 Agreement which stated the insured would effectuate the involuntary dismissal of the adjusters and in exchange, the insurer agreed not to remove the case to federal court. The insured then added several additional insurers, and non-suited the first insurer it sued. One of the new insurers attempted to remove the case to federal court stating there was diversity and more in controversy than $75,000. The new insurer argued the action became removable due to the insured's settlement and express release of its claims against the non-diverse insurer and adjusters. The insured argued the insurer could not rely on the diversity created by the involuntary removal of in-state adjusters, especially when counsel for the first insurer acknowledged dismissal of the adjusters would not affect removability of the matter. The court agreed with the insured, holding the settlement and non-suit of the first insurer did not make this action removable, and even if it did, the new insurer failed to show that the requirements for establishing diversity jurisdiction were satisfied. Additionally, the court held the insured's settlement agreement with the first insurer nor the notice of nonsuit were an "other paper" that made this action removable under 28 U.S.C. section 1446(c). Therefore, the insured's motion to remand the case to state court was granted. *Macey Prop. Mgmt. v. Starr Surplus Lines Ins. Co.*, No. H-21-3943, 2022 WL 540948 (S.D. Tex. Feb. 23, 2022) (mem. op.).

An insured sued the insurance carrier and the non-diverse agent. The court held that the allegations against the agent were insufficient to sustain an independent cause of action against the agent. Therefore, the insured's motion to remand was denied. Specifically, the court noted that claims for policy benefits and delay of payment were duties owed by the insurer, not the agent. The allegations against the agent were not specific enough to describe a cause of action independent of the carrier. *Go Green Botanicals, Inc. v. Drexler Ins. Serv., L.L.C. and Tri-State Ins. Co. of Minn.*, No. 5:22-CV-373-XR, 2022 WL 2286961 (W.D. Tex. June 23, 2022) (mem. op.).

B. Discovery

A discovery dispute arose out of a lawsuit where the injured party sought treatment at a hospital that did not bill his insurer but considered him a private pay patient. The defendant who hit the injured party sought information from the hospital through discovery on the negotiated rates the hospital charged private insurers and government payers for the services provided, but the hospital filed a motion for protective order and motion to quash, which the trial court granted. The defendant sought mandamus at the appellate court, which was granted. The appellate court cited to prior cases that held, "[e]vidence of a medical provider's negotiated rates for private insurers and public payers is relevant, though not dispositive, when considering the reasonableness of its chargemaster rates." (citing to *In re Exxon Mobil Corp.*, 635 S.W.3d 631, 633 (Tex. 2021) (orig. proceeding) (per curiam); *see also K&L Auto Crushers, LLC,* 627 S.W.3d 239, 248 (Tex. 2021) (orig. proceeding); *In re North Cypress Med. Ctr. Operating Co., Ltd.*, 559 S.W.3d 128 (Tex. 2018)). The discovery sought was similar to those allowed in the previous cited cases, asking for contracts where the hospital was a party with other insurance companies, an annual cost report required to provide to Medicare, and the Medicare and insurance company reimbursement rates for services provided to this plaintiff. The appellate court held these requests were relevant and not overbroad, and also held the information could not be withheld because it is publicly available or trade secret information. Therefore, the appellate court directed the trial court to vacate its motion for protective order and motion to quash, and to craft an order that protects the interests at stake and imposes reasonable conditions to comply with the subpoena. *In re Teran*, No. 04-21-00436-CV, 2022 WL 849764 (Tex. App.—San Antonio March 23, 2022, no pet.) (mem. op.).

People injured in a car accident sought medical treatment but did not bill their health insurance for the care. The injured party filed a lawsuit against the party who hit them to recover their past medical expenses. The defendants filed a motion to compel regarding the third-party medical providers for the fee schedules in effect for the procedures provided to the injured party. The court granted the motion to compel holding that the Texas Supreme Court recently clarified that medical providers' negotiated rates and fee schedules with private insurers and public-entity payors are relevant and discoverable in personal-injury litigation on the issue of the reasonableness of plaintiff's claimed damages. (citing to *In re K&L Auto Crushers, L.L.C.*, 627 S.W.3d 239, 258 (Tex. 2021)). Therefore, the court found that defendants were entitled to the fee schedule and reimbursement rates for the year of the injured party's treatment with the insurers who insured the injured party at the time the hospital performed the surgeries. *Acuna v. Covenant Trans., Inc., et al.*, No. SA-20-CV-01102-XR, 2022 WL 95241 (W.D. Tex. Jan. 10, 2022).

In this case mandamus was sought after the trial court ordered the corporate representative's deposition in an underinsured motorist case. Following last year's Texas Supreme Court opinion in *In re USAA General Indemnity Company*, 624 S.W.3d 782 (Tex. 2021) (orig. proceeding), the appellate court held it was an abuse of discretion for the trial court to order the deposition. Using a proportionality analysis, the court held, after reviewing the discovery documents produced in the case, the deposition would provide "little, if any, additional benefit in relation to the cost." *In re Home State Cty. Mut. Ins. Co. d/b/a Safeco & Sabour*, No. 05-21-00873-CV, 2022 WL 1467984 (Tex.

App.—Dallas May 10, 2022).

This next case closely mirrors *In re Home County Mutual Insurance Company* out of the Dallas Court of Appeals. Again, the insured sought the corporate representative's deposition in an underinsured motorist case, and again the trial court allowed the deposition. The Tyler Court of Appeals came to the opposite conclusion of the Dallas appellate court, and denied mandamus. The Tyler Court of Appeals reviewed previous case law on the issue, but did not cite *In re USAA General Indem. Co. In re Cent. Mut. Ins. Co.*, No. 12-22-00237-CV, 2022 WL 4394561 (Tex. App.—Tyler Sept. 22, 2022).

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1 *Elephant Ins. Co. v. Kenyon*, 644 S.W.3d 137 (Tex. 2022).

2 *Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Corp.*, No. 21-0232, 2022 WL 413940 (Tex. Feb. 11, 2022).

3 *See In re Teran*, No. 04-21-00436-CV, 2022 WL 849764 (Tex. App.—San Antonio March 23, 2022, no pet.) (mem. op.); *Acuna v. Covenant Transp., Inc., et al.*, No. SA-20-CV-01102-XR, 2022 WL 95241 (W.D.Tex. Jan. 10, 2022).

4 *Terry Black's Barbecue, L.L.C. v. State Auto. Mut. Ins. Co.*, No. 21-50078, 2022 WL 43170 (5th Cir. Jan. 5, 2022); *Aggie Invs., L.L.C. v. Con't Cas. Co.*, No. 21-40382, 2022 WL 67333 (5th Cir. Jan. 26, 2022); *Lamacar, Inc. v. The Cincinnati Cas. Co.*, No. 3:21-CV-1396-S, 2022 WL 227162 (N.D. Tex. Jan. 26, 2022).

MARKET TRENDS AND CONSUMER IMPACTS, CONSUMER FINANCIAL PROTECTION BUREAU

On September 15, 2022, the U.S .Consumer Financial Protection Bureau ("CFPB" or "Bureau") issued its long-anticipated report on the Buy Now Pay Later ("BNPL") industry (the "Report"). The Report describes the state of the BNPL market, including its recent growth, the impacts of BNPL on consumers, and potential legal issues. What follows is the Executive Summary, The complete Report may be found at:
https://files.consumerfinance.gov/f/documents/cfpb_buy-now-pay-later-market-trends-consumer-impacts_report_2022-09.pdf

1. Executive Summary

Consumers have long used credit instruments to purchase goods and services. In recent years, a fast-growing alternative to credit cards has emerged in a number of developed economies around the world, including in the United States. This alternative is marketed as "Buy Now, Pay Later" (BNPL). BNPL is a form of credit that allows a consumer to split a retail transaction into smaller, interest-free installments and repay over time.

The typical BNPL structure divides a $50 to $1,000 purchase into four equal installments, with the first installment paid as a down payment due at checkout, and the next three due in two-week intervals over six weeks. When a borrower does not make these payments, many BNPL lenders charge late fees, often around $7 per missed payment on an average loan size of $135.

In December 2021, the Consumer Financial Protection Bureau (CFPB) issued market monitoring orders to five lenders to provide data on their BNPL loans. This market report summarizes that data, individual and organizational submissions to the CFPB, and publicly available sources to provide a review of BNPL's marketplace importance and consumer impacts in the United States.

Important metrics from the report include:

- The BNPL industry is in the midst of rapid growth. From 2019 to 2021, the number of BNPL loans originated in the U.S. by the five lenders surveyed grew by 970 percent, from 16.8 to 180 million, while the dollar volume of those originations (commonly referred to as Gross Merchandise Volume, or GMV) grew by 1,092 percent, from $2 billion to $24.2 billion.

- The industry mix of BNPL usage is diversifying. Apparel and beauty merchants, who had combined to account for 80.1 percent of originations in 2019, only accounted for 58.6 percent in 2021.

- 73 percent of applicants were approved for credit in 2021, up from 69 percent in 2020.

- The average individual order value (i.e., average purchase amount financed by a BNPL loan) in 2021 was $135, up from $121 in 2020.

- 10.5 percent of borrowers were charged at least one late fee in 2021, up from 7.8 percent in 2020.

- 13.7 percent of individual loans in 2021 had at least some portion of the order that was returned, up from 12.2 percent in 2020.

- 3.8 percent of borrowers had a loan that was charged off in 2021, up from 2.9 percent in 2020.

The report identifies several competitive benefits of BNPL loans over legacy credit products. These benefits are both financial (i.e., no interest and sometimes no late fees) and operational (i.e., ubiquitous, easy to access, simple repayment structure).

The report also identifies several potential consumer risks, which fit into the three broad areas of concern noted in the CFPB's December 2021 market monitoring orders:

- **Discrete consumer harms.** The BNPL product is often structured in ways that may present borrowers with undesirable operational hurdles, including the lack of clear disclosures of loan terms, challenges in filing and resolving disputes, and a requirement to use autopay for all loan payments.

- **Data harvesting.** Similar to many other large tech platforms, BNPL lenders often collect consumer data—and deploy models, product features, and marketing campaigns based on that data—to increase the likelihood of incremental sales and maximize the lifetime value it can extract from each current, past, or potential borrower. These practices (which may become even more prevalent and profitable as third-party data tracking becomes more difficult on iOS6 and Android7 operating systems) may 4 Each lender has a slightly different definition of charge off, but at a high level this metric should be thought of as the percent of borrowers who had a portion of their loan balance that was considered "uncollectable" after significant time and collection efforts. 5 CFPB Opens Inquiry into 'Buy Now, Pay Later' Credit 6 National Public Radio, Apple Rolls Out Major New Privacy Protections For iPhones And iPads (April 26, 2021), available at https://www.npr.org/2021/04/26/990943261/apple-rolls-out-major-new-privacy-protections-foriphones-and-ipads 7 Google, Introducing the Privacy Sandbox on Android (February 16, 2022), available at https://blog.google/products/android/introducing-privacy-sandbox-android/ 5 compromise consumers' privacy and autonomy and contribute to the overextension risks described below.

- **Overextension.** The BNPL business model may encourage overextension, and in doing so present a pair of risks: loan stacking, which can cause borrowers to take out several loans within a short time frame at simultaneous lenders; and sustained usage, in which frequent BNPL consumption over a period of months and years may affect consumers' ability to meet non-BNPL obligations.

DECEPTIVE TRADE PRACTICES AND WARRANTY

BECAUSE THE LENDING OF MONEY IS NOT A GOOD OR SERVICE, A BORROWER WHOSE SOLE OBJECTIVE IS TO GET A LOAN DOES NOT BECOME A CONSUMER UNDER THE DTPA

Skipworth v. Reverse Mortg. Funding LLC, ___ F. Supp. 3d ___ (N.D. Tex. 2022).
https://scholar.google.com/scholar_case?case=259098141016377820&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Plaintiffs Patricia Skipworth and her husband (collectively, "the Skipworths") took out a reverse mortgage with Reverse Mortgage Solutions ("RMS"), a predecessor of Defendant Reverse Mortgage Funding LLC ("RMF"). The Skipworths secured the reverse mortgage by executing a Deed of Trust encumbering another property of theirs ("Property"). The Skipworths defaulted on the reverse mortgage by failing to pay the Property's taxes and insure the Property against casualty loss. RMS filed suit seeking judgment to authorize the foreclosure of the Property's lien. The court entered a final judgment in favor of RMS to authorize the foreclosure. RMF noticed the Property for foreclosure and scheduled the Property for sale.

The Skipworths sued RMF, alleging violations of the DTPA. RMF moved for summary judgment to dismiss the claim.
HOLDING: Granted.
REASONING: The Skipworths alleged that they were consumers under the DTPA because their objective in acquiring the reverse mortgage from RMS was to buy a home.

The court disagreed. The Skipworths' claim pertained to the reverse mortgage, which was not a good or service. The Skipworths entered into the reverse mortgage loan agreement with RMS, and the Deed of Trust prominently stated that it was a reverse mortgage. Moreover, no evidence showed that the Skipworths' objective to get the reverse mortgage was for the purchase of goods or services. Although one who borrows money to buy a house can be a consumer under the DTPA because that person's objective is to buy a home, subsequent actions related to mortgage accounts — for example, extensions of further credit or modifications of the original loan — do not satisfy the "goods and services" element of the DTPA. Because the lending of money was not a good or service, the Skipworths' sole objective of getting a loan excluded them as consumers under the DTPA.

DTPA PREEMPTED BY CARMACK AMENDMENT

Track Trading Co. v. YRC, Inc., ___ F. Supp. 3d. ___ (W.D. Tex. 2022). https://scholar.google.com/scholar_case?case=10982539146324209971&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Plaintiff Track Trading Co. d/b/a Exaco Trading Co. ("Exaco") contracted with Defendant YRC Freight ("YRC") to transport products and equipment for a trade show. YRC delivered the shipment late, causing Exaco to forgo participation in the out-of-state trade show. YRC refused to compensate Exaco because the shipment was neither damaged nor lost. Exaco filed suit in state court alleging violation of the DTPA. The district court referred the case to a magistrate judge for report and recommendation.

YRC moved to dismiss Exaco's claims as being preempted by the Carmack Amendment.
HOLDING: Recommended granting YRC's motion to dismiss.
REASONING: The Carmack Amendment establishes the standard for imposing liability on a motor carrier for the actual loss or injury to property transported through interstate commerce. Exaco argued that the Carmack Amendment did not preempt its claims because the amendment only applies to claims arising out of loss or damage to the shipped goods, and not to the failure of the delivery of goods. Exaco argued that the Carmack Amendment did not preempt its DTPA claim because the claim was not within the scope of the Amendment since it was based on misrepresentations YRC made before completing the bill of lading.

The magistrate judge disagreed. The magistrate judge looked to precedent to determine the meaning of "loss" under the Amendment and adopted the Fifth Circuit's broad interpretation of a "loss" encompassing all damages resulting from any failure of a carrier to transport or deliver goods. Thus, "loss" within the Carmack Amendment was interpreted to include claims for damages that were the result of delayed shipment including Exaco's claims.

Thus, "loss" within the Carmack Amendment was interpreted to include claims for damages that were the result of delayed shipment including Exaco's claims.

The magistrate judge also found Exaco's DTPA claim to be preempted by the Carmack Amendment despite the timing of the alleged misrepresentations. Although the Texas Supreme Court had previously held in *Brown v. Am. Transfer & Storage,* 601 S.W.2d 931, 938 (Tex. 1980) that a DTPA suit for misrepresentation made before the contract was not preempted by the Carmack Amendment, the magistrate judge pointed out that *Brown* has been called into doubt many times. District courts have repeatedly rejected arguments relying on *Brown.* See, e.g., *St. Pierre v. Ward*, 542 F. Supp. 3d 549, 554 (W.D. Tex. 2021) (rejecting plaintiff's argument that Brown controlled the preemption question because "the Court is bound by Fifth Circuit law—not Texas state law"); *Hayes v. Stevens Van Lines, Inc.*, 2015 WL 11023794, at *2 (N.D. Tex. 2015) (rejecting plaintiff's argument under Brown that Carmack Amendment does not apply to Texas DTPA claims premised on precontractual representations); *Franyutti*, 325 F. Supp. 2d at 777 n.1 (stating that because Brown "occurred prior to many of the Supreme Court and Fifth Circuit opinions relied upon, [its] holding has limited value").

The magistrate judge also relied on *Von Der Ahe v. 1-800-Pack-Rat, LLC,* 2022 WL 3579895, at *3 (N.D. Tex. 2022), which held that a misrepresentation that occurred before

a contract that did not result in a separate harm is not separate pre-contractual conduct. Thus, the Carmack Amendment applies regardless of when the misrepresentations were made.

A SELLER HAS NO DUTY TO DISCLOSE FACTS THAT HE DOES NOT KNOW AND IS NOT LIABLE FOR FAILING TO DISCLOSE "WHAT HE ONLY SHOULD HAVE KNOWN"

UNDER AN AGREEMENT TO PURCHASE SOMETHING "AS IS," THE BUYER AGREES TO MAKE HIS OWN APPRAISAL OF THE BARGAIN AND ACCEPTS THE RISK THAT HE MAY HAVE BEEN WRONG

MacPherson v. Aglony, ___ S.W.3d ___ (Tex. App. 2022).
https://casetext.com/case/macpherson-v-aglony

FACTS: Plaintiff-Appellant Colton MacPherson bought a home from Defendant-Appellee Leila Shahin Aglony that contained an "As Is" clause. After moving into the house, MacPherson found substantial structural problems with the ceiling, floors, and doors, even though Aglony had indicated on the Seller's Disclosure that she was unaware of any significant structural issues,
Aglony the , but MacPherson after moving into the house.

MacPherson then sued Aglony for violations of the DTPA, fraud, fraudulent inducement, fraud in a real estate transaction, negligence, breach of contract, and conspiracy. MacPherson also claimed that Aglony should be liable because of his reliance on the Seller's Disclosure and that he would not have bought the house had he known of the defects. The trial court found no evidence or insufficient evidence as to MacPherson's reliance on the Seller's Disclosure and entered a take-nothing judgment in favor of Aglony. MacPherson appealed.
HOLDING: Affirmed.
REASONING: MacPherson argued that the trial court erred in its findings because he did present enough evidence to show liability on Aglony. The court of appeals disagreed.
A Seller's Disclosure "shall be completed to the best of the seller's belief and knowledge as of the date the notice is completed and signed by the seller." Tex. Prop. Code Ann. § 5.008(a). Furthermore, "a buyer who purchases property 'As Is' chooses to rely entirely upon his own determination of the property's value and condition without any assurance from the seller." *Id.* Here, the court found strong evidence in the record that Aglony was unaware of any defects or malfunctions in the property except those disclosed in the Seller's disclosure. As such, the court held that nothing in the text of section 5.008(d) imposed liability on Aglony for failing to exceed the disclosure requirements. A seller has no duty to disclose facts that he does not know.

Additionally, the court held that the "As Is" clause negated the causation elements in MacPherson's DTPA, negligence, breach of contract, and fraud claims—all of which require the defendant's acts and/or omissions to cause a plaintiff's injury—because the buyer chooses "to rely entirely upon his own determination' of the property's value and condition without any assurances from the seller" and it removes "the possibility that the seller's conduct will cause him damage." When purchasing something "As Is," the buyer accepts the risk that his appraisal of the bargain may have been wrong. Thus, Aglony is not liable.

HEALTH CARE CLAIM IS NOT AUTOMATICALLY UNDER SECTION 74.051, CIVIL PRACTICE AND REMEDIES CODE
THE DTPA PROVIDES FOR AUTOMATIC ABATEMENT, BUT REQUIRES THE FILING OF A VERIFIED PLEA IN ABATEMENT

Marsh v. Haldankar, ___ S.W.3d ___ (Tex. App. — Houston [14th Dist.] 2022).
https://law.justia.com/cases/texas/fourteenth-court-of-appeals/2022/14-21-00049-cv.html

FACTS: Appellee-Defendant Pradanya Haldankar, M.D. ("Dr. Haldankar") provided general anesthesia to Appellant-Plaintiff Kenneth Marsh for cataract surgery. Marsh and his wife brought health care liability claims against Dr. Haldankar based on the administration of the anesthesia, which lead to post-operative complications for Marsh.

Dr. Haldankar filed his answer alleging the case was abated because the Marshes failed to provide a medical authorization in their pre-suit notice as required by Chapter 74 of the Texas Civil Practice and Remedies Codes. Dr. Haldankar's abatement notice was never verified, and the trial court never entered an order abating the case. The parties proceeded as if the case had not been abated and Dr. Haldankar filed three motions to dismiss the Marshes' claims. After three denied motions for summary judgment, Dr. Haldankar filed a hybrid motion that included a traditional summary judgment and a no-evidence summary judgment motion. The trial court granted Dr. Haldankar's hybrid summary judgment. The Marshes appealed.
HOLDING: Affirmed.
REASONING: Section 74.052 of the Texas Civil Practice and Remedies Codes states that notice of a health care claim under Section 74.051 "must be accompanied by a medical authorization" that meets the section's statutory requirements. Failure to do so results in a 60-day abatement period. The Marshes argued that the case was automatically abated when Dr. Haldankar invoked Section 74.052, making Dr. Haldankar's summary judgment order void. The court disagreed.

The Marshes provided no authority that supported an abatement under section 74.052 without proof, verification, a hearing, or a ruling.

The court explained that Section 74.052 does not operate in a vacuum and cannot occur automatically. Before a case is abated, a motion to abate or plea in abatement that relies upon facts outside the record must be verified and a trial court must order abatement. The court found that regardless of statutory silence on the failure to give notice, abatement is not automatic and a defendant must file a motion for abatement. The DTPA provides for automatic abatement, but still requires the filing of a verified plea in abatement. Dr. Haldankar's original abatement notice was never verified and no trial court order was entered on abatement. Both parties ignored the initial abatement. The Marshes provided no authority that supported an abatement

under section 74.052 without proof, verification, a hearing, or a ruling. Thus, no abatement occurred that would render the trial court's summary judgment void.

UNCONSCIONABILITY CLAIMS UNDER DTPA § 17.45(5) AND § 17.50(A)(3) AND DTPA § 17.46(B)(24) CLAIMS ARE "NOT AMENABLE TO A DETERMINATION ON A CLASS BASIS DUE TO THE INDIVIDUAL ISSUES INVOLVED"

Frisco Med. Ctr., L.L.P. v. Chestnut, ___ S.W.3d ___ (Tex. App. 2022).
https://law.justia.com/cases/texas/fifth-court-of-appeals/2022/05-22-00058-cv.html

FACTS: Paula Chestnut and Wendy Bolen ("Appellees") sought class certification in claims against Frisco Medical Center, L.L.P. and Texas Regional Medical Center, L.L.C. (collectively, "the Hospitals") for the addition of an evaluation and management fee ("E&M Fee") to patient's emergency room bill that was unique to services performed for the patient. The Hospitals did not discuss this fee with the patient prior to adding it to the total bill.

The Appellees argued that it was unconscionable for past, current, and future patients to pay the E&M Fee, and all patients that had previously paid the E&M Fee deserved restitution. The Hospitals argued that it would be overly cumbersome to determine restitution as a class because of the intricacies of each patient's bill. The trial court granted the class certification, and the Hospitals appealed.
HOLDING: Reversed and remanded.
REASONING: The court held that class certification was not appropriate for the unconscionability claims under DTPA § 17.45(5), § 17.50(A)(3), or DPTA §17.46(B)(24) because of the unique aspects of each patients' bill. The Hospitals showed that the E&M Fee calculation for each patient would be difficult because of the required insurance company data collection, the required subjective analysis of that collected data, and the calculation differences due to patients' varying insurance coverage plans.

The court held that nothing in the record demonstrated that the E&M Fee calculations could be done manageably. Because of the individual nature of the fee calculation, the demand for excessively cumbersome data analysis, and the lack of guidance from the trial court, the court held that class certification would not be appropriate for the unconscionability claims.

WHETHER DTPA ATTORNEY FEES ARE REASONABLE AND NECESSARY IS A QUESTION OF FACT TO BE DETERMINED BY THE FACT FINDER

Hernandez v. Duran, ___ S.W.3d ___ (Tex. App. 2022).
https://law.justia.com/cases/texas/eighth-court-of-appeals/2022/08-20-00131-cv.html

FACTS: Appellant-Plaintiff Horacio Hernandez took a semi-truck and two other vehicles to Defendant-Appellee Edgar Duran for repairs and improvements. Hernandez's insurance company issued payment for the work on the semi-truck. Duran demanded payment for the repairs on the other two vehicles before releasing all three vehicles. Despite Duran not having completed repairs on the semi-truck, Hernandez paid.

Hernandez filed suit, alleging, among other claims, deceptive trade practices. The trial court granted judgment for Hernandez for the amount of the amount paid for repairs, attorney's fees, and costs. However, of the $7,494.99 in attorney's fees requested by Hernandez, the trial court only awarded $1,000. Hernandez appealed, challenging the trial court's failure to award the full requested amount of attorney's fees.
HOLDING: Affirmed.
REASONING: Hernandez asserted that the trial court abused its discretion in awarding less in attorney's fees than what Hernandez requested at trial in the absence of rebuttal evidence. The court of appeals disagreed.

A trial court's award for attorney's fees is reviewed under an abuse-of-discretion standard. A court abuses its discretion when it acts in an arbitrary and unreasonable manner. The DTPA provides that the party seeking fees has the burden to show that the requested fees are both reasonable and necessary. Whether attorney's fees are reasonable and necessary is a question of fact to be determined by the fact finder. Here, no evidence was presented to rebut Hernandez's claim for attorney's fees. Only Hernandez's uncontroverted affidavit by his attorney regarding the amount of attorney's fees, which included contemporaneous billing records, information on his experience and background, and his opinion on customary fees for similar litigation was introduced. The court held that because the trier of fact will ultimately make determinations as to whether the uncontradicted attorney's fees evidence shows unreasonableness or credibility issues, any evidence to the contrary will similarly only raise a fact issue to be determined by the trier of fact. Therefore, the failure to offer contradicting evidence at trial is not dispositive, is only a factor to be considered by the trial court, and does not mandate an award of the requested damages.

A trial court's award for attorney's fees is reviewed under an abuse-of-discretion standard.

CONSUMER CANNOT RECOVER DAMAGES FROM INSURER ON ALLEGED EXTRACONTRACTUAL STATUTORY VIOLATION, SUCH AS DTPA OR TEXAS INSURANCE CODE, BECAUSE HE FAILED TO ESTABLISH RIGHT TO RECEIVE BENEFITS UNDER THE POLICY OR AN INDEPENDENT INJURY

Sentry Equities, Ltd. v. Allstate Life Ins. Co., ___ F.4d ___ (5th Cir. 2022).
https://casetext.com/case/sentry-equities-ltd-v-allstate-life-ins-co

FACTS: Plaintiffs-Appellants, Sentry Equities, Ltd., Sentry Holdings, LLC, and Robert Haas (collectively, "Haas"), purchased a life insurance policy from Defendants-Appellees, Allstate Life Insurance Co., et al (collectively "Allstate"), that promised a guaranteed cash value based on a guaranteed minimum interest rate declared by Allstate.

After Allstate unilaterally lowered the interest rate on the policy, Haas sued for breach of contract. Allstate removed the case to federal court. Haas moved for summary judgment. Allstate also

moved for summary judgment. The court denied Haas' motion and dismissed the suit, citing the policy's unambiguous terms. Haas appealed, arguing the court erred in failing to consider his arguments under the Texas Insurance Code and the DTPA.

HOLDING: Affirmed.

REASONING: Haas argued he was prevented from offering additional evidence related to the policy's cash value and extracontractual statutory violations because the district court dismissed the suit without sufficient notice.

Haas could not have prevailed in his suit against Allstate because Haas's breach of contract claims failed as a matter of law.

The court found that, even with more evidence, Haas could not have prevailed in his suit against Allstate because Haas's breach of contract claims failed as a matter of law. Allstate was not in breach of their performance because the policy unambiguously permitted them some discretion with the interest rate. The court held that Haas could not recover damages from Allstate based on an alleged extracontractual statutory violation, such as a DTPA or Texas Insurance Code violation, because he failed to establish a right to receive benefits under the policy or an injury independent of a right to benefits.

DEBT COLLECTION

NOT REMOVING DISPUTE NOTATION WHEN CONSUMER STATES HE IS NO LONGER DISPUTING THE ACCOUNT VIOLATES FDCPA

Samano v. LVNV Funding, LLC, ___ F. Supp.3d ___ (E.D. Cal. 2022).
https://casetext.com/case/samano-v-lvnv-funding-llc-3?sort=relevance&type=case&resultsNav=false&tab=keyword

FACTS: Defendant LVNV Funding, LLC, an acquirer and collector of delinquent consumer debts, received a letter from Plaintiff Luis Samano indicating that he was no longer disputing his accounts and wished them reported as such. Despite this, Defendant continued to report to credit reporting agencies that Plaintiff disputed his accounts. Plaintiff was denied a mortgage loan because of the disputed debt on his credit report. Plaintiff filed a complaint, alleging that Defendant violated the FDCPA by falsely reporting his debt as disputed.

A debt collector violates 15 US.C. §1692e when he communicates, or threatens to communicate knowingly, constructive or otherwise, false credit information.

Defendant's original motion to dismiss for failure to state a claim under the FDCPA was granted with leave to amend for failing to allege conduct in connection with the collection of any debt pursuant to 15 U.S.C. §1692e. Plaintiff's Second Amended Complaint was rejected on the same grounds and the Court granted one last opportunity to amend. Plaintiff filed his Third Amended Complaint. Defendant raised the same grounds for dismissal.
HOLDING: Denied.
REASONING: Plaintiff alleged that Defendant violated the FDCPA when it willfully communicated credit information that was known, or should have been known, to be false. Defendant countered that Plaintiff had failed to state a claim under the FDCPA.

The court disagreed with Defendant. 15 U.S.C. §1692e prohibits debt collectors from using false, deceptive, and misleading representations in connection with debt collection. A debt collector violates 15 US.C. §1692e when he communicates, or threatens to communicate knowingly, constructive or otherwise, false credit information. Neither the FDCPA nor the Ninth Circuit has defined the phrase "in connection with the collection of any debt" in this context. Still, other Circuit Courts of Appeals generally accept that the action must be done with the animating purpose of inducing payment by the debtor. Plaintiff alleged that Defendant misreported his dispute of the debts to induce him to pay so that he could obtain a mortgage loan. This assertion sufficiently meets the requirements for a valid claim because it is plausible on its face. The FDCPA does not strictly require Defendant to report a change in dispute status. However, Defendant's alleged choice to willfully communicate false information to credit reporting agencies by failing to remove the dispute notations when Plaintiff stated he was no longer disputing the account was a clear violation of the FDCPA.

ARTICLE III STANDING REQUIRES A CONCRETE INJURY EVEN IN THE CONTEXT OF A FDCPA VIOLATION

Perez v. McCreary, Veselka, Bragg, & Allen, P.C., ___ F.4th ___ (5th Cir. 2022).
https://law.justia.com/cases/federal/appellate-courts/ca5/21-50958/21-50958-2022-08-15.html

FACTS: Appellant McCreary, Veselka, Bragg & Allen, P.C. ("MVBA") sent a letter to Appellee Mariela Perez ("Perez") demanding payment of a delinquent debt. The limitations period on that debt had run but the letter did not disclose that.
Perez sued MVBA, alleging that MVBA violated the FDCPA by making a misrepresentation in connection with an attempt to collect her debts. Both parties moved for summary judgment. Although factual disputes precluded summary judgment, the trial court held that the violation of Perez's statutory rights under the FDCPA constituted a concrete injury-in-fact because those rights were substantive, not procedural. The district court reasoned that because the suit related to Perez's substantive right to be free from misleading information, her claim was therefore distinguishable from a "bare procedural violation" of the FDCPA that would not be cognizable under *Spokeo, Inc. v. Robins* 578 U.S. 330 (2016). MVBA appealed.
HOLDING: Reversed.
REASONING: Perez argued that the violation of her rights under the FDCPA itself qualified as a concrete injury-in-fact.

The court disagreed, noting that for purposes of Article III standing, *Spokeo* concluded that the "[d]eprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing." Similarly, under *Transunion v. Ramirez* 594 U.S.___ (2021), injuries are concrete only if they bear a "close relationship" to injuries that American courts have traditionally recognized as concrete.

Here, Perez did not show that she suffered any tangible loss or material risk of harm as a result of MVBA's debt-collection letter, nor did she offer a common-law analog to the injuries she claimed. Perez could not establish a concrete injury in connection with MVBA's alleged violation of the FDCPA. As such, the court held that Perez lacked Article III standing to bring suit.

FDCPA PLAINTIFF "SIMPLY NO WORSE OFF" AS A RESULT OF OUTSOURCING MAILING LIST

NO CONCRETE HARM WAS SUFFERED HERE UNDER *TRANSUNION V. RAMIREZ*

Hunstein v. Preferred Collection & Mgmt. Servs., Inc., ___ F.3d ___ (11th Cir. 2022).

https://media.ca11.uscourts.gov/opinions/pub/files/201914434.enb.pdf

FACTS: Plaintiff-Appellant Richard Hunstein incurred debt from his son's medical treatment. The hospital transferred the debt to Defendant-Appellee Preferred Collection & Management Services ("Preferred Collection") to collect the debt from Hunstein. Preferred Collection hired a commercial mail vendor to remind Hunstein of the debt via a dunning letter. In preparation for the letter, Preferred Collections electronically sent the mail vendor certain data about Hunstein, including his debtor status, the amount of debt owed, the fact that the debt arose from his son's medical treatment, and his son's name. The mail vendor then used that information to create and mail a dunning letter to Hunstein.

Hunstein filed suit, alleging that Preferred Collection violated the FDCPA by disclosing his information to a third-party vendor. The district court granted Preferred Collection's motion to dismiss, holding there was no FDCPA violation because the communication between Preferred Collection and the mail vendor was not made with respect to the collection of debt. Hunstein appealed.

HOLDING: Vacated and remanded.

REASONING: Hunstein alleged that Preferred Collection's disclosure of sensitive medical information to the mail vendor caused him a concrete injury and therefore, he had standing to sue.

The court rejected this argument, concluding there was no concrete harm because the disclosure was not public. The court used the approach outlined in *Transunion v. Ramirez* 594 U.S.___ (2021), and compared Hunstein's alleged reputational injury to an injury redressed in a traditional common-law tort. The court compared Hunstein's alleged harm to the common-law tort of public disclosure and concluded that the two were not analogous because the transmittal of Hunstein's information was not public. The court held that Hunstein was "simply no worse off" as a result of Preferred Collection outsourcing the mailing list data. Because Hunstein suffered no concrete harm, he lacked standing and the district court lacked jurisdiction to consider his claim.

PRO SE PLAINTIFF LACKS STANDING TO ASSERT THE FDCPA CLAIMS OF THE OTHER INDIVIDUAL

Young v. Portfolio Recovery Assocs., LLC, ___ F. Supp.3d ___ (E.D. Tex. 2022).
https://casetext.com/case/young-v-portfolio-recovery-assocs-2

FACTS: Plaintiff Bradley Young filed a pro se action against Defendant Portfolio Recovery Associates, LLC alleging violations of the FDCPA. Plaintiff's allegations related to an alleged debt owed by a Mr. Jim Baldwin, for which Plaintiff contended he had been assigned 100 percent of the claims. Plaintiff alleged that Baldwin disputed this debt, but that Defendant did not note his dispute, and as a result, his credit score was materially lowered.

Plaintiff asserted a claim pursuant to 15 U.S.C. § 1692e(8) of the FDCPA for Defendant's failure to disclose to the consumer reporting agencies that Baldwin's alleged debt was in dispute. Defendant filed an instant motion to dismiss pursuant to FRCP 12(b)(1), arguing that the complaint be dismissed for lack of standing.

HOLDING: Granted.

REASONING: Defendant argued that Baldwin's FDCPA claim is not assignable to Plaintiff, and thus Plaintiff cannot bring the case on Baldwin's behalf.

Constitutional Standing contains three elements: (1) the plaintiff must have suffered an injury in fact, which is concrete and particularized and actual or imminent; (2) there must be a causal connection between the injury and the conduct complained of; and (3) it is likely that a favorable decision will redress the injury. Here, the entirety of Plaintiff's allegations related to an alleged injury suffered by Baldwin, not Plaintiff. Plaintiff failed to allege he can stand in the shoes of Baldwin or that he had any "injurious exposure from Defendant's alleged actions." Therefore, Plaintiff, as pro se, lacked Article III standing for Baldwin's injuries. Furthermore, because Plaintiff did not have any standing and is not a licensed attorney, proceeding as a pro se for Baldwin's injuries would result in the unauthorized practice of law, as a layperson has the right to represent himself, but not others.

PLAINTIFF'S SELF-SERVING, UNCORROBORATED TESTIMONY MAY BE SUFFICIENT EVIDENCE DEBT COLLECTOR MOCKED OR BELITTLED PLAINTIFF IN VIOLATION OF FDCPA

MATERIALITY AND THE QUESTION OF WHETHER A PARTICULAR COMMUNICATION IS FALSE OR MISLEADING ARE GENERALLY MATTERS FOR THE JURY TO DECIDE

Higdon v. Francy Law Firm, P.C., ___ F. Supp. 3d. ____ (D. Colo. 2022).
https://scholar.google.com/scholar_case?case=6960890341518854334&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Plaintiff Kelsi Higdon ("Plaintiff") incurred a debt to Bellco Credit Union ("Bellco"). Bellco referred Plaintiff's account to Defendant Francy Law Firm P.C. ("Defendant") for collection. Defendant filed a lawsuit against Plaintiff to collect on Plaintiff's debt, and the parties executed a settlement agreement to which Plaintiff eventually ceased compliance.

The FDCPA provides that debt collectors may not engage in conduct that results in harassment, oppression, or abuse of any person in connection with the collection of a debt.

Plaintiff called Defendant to discuss a settlement and was connected to Janet Cruze, a legal assistant. Cruze explained that Defendant had been attempting to collect on Plaintiff's account for a long time, that there were pending costs that Bellco was unaware of, and that Cruze would have to contact Bellco. Based on these statements, Plaintiff testified that Cruze lectured, mocked, and belittled her, as well as made false misrepresentations as to the total debt amount.

Plaintiff brought a claim in violation of the FDCPA.

Defendant sought summary judgment on all claims.
HOLDING: Denied.
REASONING: The FDCPA provides that debt collectors may not engage in conduct that results in harassment, oppression, or abuse of any person in connection with the collection of a debt. These sections also prohibit the use of misleading representations or unconscionable means to collect, or attempt to collect, any debt. The court ruled that Plaintiff's self-serving, uncorroborated testimony may be sufficient evidence that Defendant mocked and belittled Plaintiff. Because the court must view the evidence in the light most favorable to Plaintiff as the non-moving party, the court concluded that a reasonable jury could find Defendant's conduct in violation of the FDCPA. Courts have held that whether certain conduct is annoying, abusive, or harassing is a fact question for the jury.

The determination of a misrepresentation and its materiality are generally matters for the jury to decide.

The court further argued that a misrepresentation must be material for it to violate the FDCPA. The determination of a misrepresentation and its materiality are generally matters for the jury to decide. The court denied Defendant's motion on this issue because a jury could find that the least sophisticated consumer would interpret the communications to mean that $1,400 was all Plaintiff owed.

A CLERK'S ENTRY OF DEFAULT DOES NOT CHANGE THE ANALYSIS THAT A DISTRICT COURT MUST UNDERTAKE IN DECIDING WHETHER TO CERTIFY A CLASS

McAllister v. Lake City Credit, LLC, ___ F. Supp.3d ___ (N.D. Miss. 2022).
https://www.accountsrecovery.net/wp-content/uploads/2022/10/McAllister-v.-Lake-City-Credit.pdf

FACTS: Plaintiff Melinda McAllister and other consumer debtors received collection letters from defendant Lake City Credit, LCC that failed to abide by the FDCPA notice requirements. McAllister filed a complaint against Lake City Credit that did not receive a timely response. As a result, the Clerk of Court granted McAllister's subsequent motion for default.

McAllister then filed a class action complaint and motion requesting certification, alleging that joinder of similar statewide complaints was appropriate pursuant to the requirements of FRCP Rule 23 ("Rule 23").
HOLDING: Granted.
REASONING: McAllister asserted that Lake City Credit's practice of subjecting consumers in Mississippi to similar letters satisfied the certification requirements pursuant to Rule 23. Rule 23(a) requires a party seeking class certification to prove that "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

The court agreed, concluding that the procedural analysis for determining certification under Rule 23 was not altered by Lake City Credit's default status. The court reasoned that exempting the motion from customary analysis due to Lake City Credit's default status might incentivize defendants to default to avoid a class action. Consequently, a district court may certify a class only after its own rigorous analysis of the Rule 23 prerequisites.

CONSUMER CREDIT

THIRD CIRCUIT ADOPTS A "REASONABLE READER" STANDARD FOR EVALUATING WHETHER A CREDIT REPORT WAS INACCURATE OR MISLEADING UNDER FAIR CREDIT REPORTING ACT

Bibbs v. Trans Union LLC, 43 F.4th 331 (3d Cir. 2022).
https://law.justia.com/cases/federal/appellate-courts/ca3/21-1350/21-1350-2022-08-08.html

FACTS: Trans Union LLC published credit reports for Marissa Bibbs, Michael Parke, and Fatoumata Samoura (collectively "Appellants") that included student loans borrowed from various lenders. Appellants were unable to continue making payments on their loans and their respective lenders closed their accounts and transferred their loans. The account balances with the Appellants' previous creditors went to zero. Trans Union published credit reports for the Appellants, and each contained a "negative pay status" notation stating that the account was 120 days past due. The reports also stated that the loans were closed, transferred, and had an account balance of zero. Appellants' attorney sent a letter to Trans Union claiming the reports were inaccurate and requested that the information be corrected. Trans Union launched an investigation and consequently stated that the account information was accurate. Trans Union did not update or correct the disputed information.

Appellants each sued Trans Union, alleging that Trans Union violated the Fair Credit Reporting Act ("FRCA") by issuing credit reports that contained inaccurate or misleading information and refusing to revise the reports in response to the Appellants' complaints. Trans Union was granted its motion for judgment on the pleadings in each suit. Each Appellant appealed and the matters were consolidated in the United States Court of Appeals for the Third Circuit.

HOLDING: Affirmed.

REASONING: Appellants argued that the district court erred in applying the "reasonable creditor" standard because the standard excludes unsophisticated creditors who make determinations on individuals using credit reports. Under Section 1691a(e) of the FCRA, the term "creditor" means "any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend renew, or continue credit." Section 1681a(b) of the FCRA defines "person" to include "any individual."

The court rejected Appellants' argument but explained that the "reasonable creditor" standard the Pennsylvania federal judges applied did not reflect how the FCRA contemplates various parties using the reports, such as employers and investors, not just creditors. The court clarified the statute's meaning by adopting a "reasonable reader" standard to determine whether credit reports issued by a credit reporting agency are inaccurate or misleading and how a reasonable reader would have comprehended a report in its entirety. The court's new reasonable reader standard does not exclude unsophisticated creditors. It instead includes any person who regularly extends, renews, or continues credit as a creditor.

CREDIT REPORTING AGENCY'S ACTIONS WERE NOT UNREASONABLE UNDER THE FAIR CREDIT REPORTING ACT WHEN IT FAILED TO CATCH A MISREPORTED BANKRUPTCY ON A CREDIT REPORT

Hammoud v. Equifax Info. Servs., LLC, 52 F.4th 669 (6th Cir. 2022).
https://www.opn.ca6.uscourts.gov/opinions.pdf/22a0234p-06.pdf

FACTS: Mohamad and Ahmed Hammoud filed Chapter 7 bankruptcy petitions just over a year apart using the same attorney. Both petitions contained their similar names, identical address, and only Ahmed's social security number. The attorney corrected the social security number on Mohamad's bankruptcy petition the day after it was filed, but Experian Information Solutions, Inc. failed to catch the amendment and erroneously reported Mohamad's bankruptcy on Ahmed's credit report for nine years.

A credit reporting agency's reliance on information gathered by outside entities is reasonable as long as it is not obtained from a source that is known to be unreliable, is not inaccurate on its face, and is not inconsistent with the information already on file.

Ahmed sued Experian and Equifax Information Services, Inc., alleging it had violated section 1681e(b) of the Fair Credit Reporting Act ("FCRA") by failing to "follow reasonable procedures to assure maximum possible accuracy" of his reported information. 15 U.S.C. § 1681e(b). Equifax and Ahmed settled. Experian moved to dismiss the claim for lack of subject matter jurisdiction, and then moved for summary judgment. Ahmed cross-moved for summary judgment. The district court denied Experian's motion to dismiss, denied Ahmed's motion for summary judgment, and granted Experian's motion for summary judgment. Ahmed appealed.

HOLDING: Affirmed.

REASONING: Ahmed argued that Experian's credit reporting procedures were unreasonable because it blindly relied on summary data from LexisNexis, rather than evaluating court documents. Ahmed also alleged that Experian's failure to implement a procedure to update or verify the status of the bankruptcy proceeding was unreasonable. The court disagreed.

The court reasoned that a credit reporting agency's reliance on information gathered by outside entities is reasonable as long as it is not obtained from a source that is known to be unreliable, is not inaccurate on its face, and is not inconsistent with the information already on file. The court held that LexisNexis has long been thought to provide accurate reliable information and

Experian had several safeguards in place to ensure the information it uses is accurate. The court rejected Ahmed's second argument because the docket entry listed the "Statement of Social Security Number" as not publicly available. Thus, Experian could not see it and to do so would have required a person with some legal training to manually review the docket. Section 1681e(b) of the FCRA does not require that level of investigation unless the credit agency has been alerted to the inaccuracy. Therefore, because Ahmed could not show Experian's procedures were unreasonable, his claim under § 1681e(b) failed and the court affirmed the district court's grant of summary judgment to Experian.

CREDIT UNION MAY CHARGE MULTIPLE INSUFFICIENT FUNDS FEES WHEN PRESENTED WITH THE SAME TRANSACTION MORE THAN ONCE

Page v. Alliant Credit Union, ___ F. 4th ___ (7th Cir. 2022).
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2022/D10-25/C:21-1983:J:St__Eve:aut:T:fnOp:N:2951555:S:0

FACTS: Alicia Page was a customer of Alliant Credit Union ("Alliant"). The parties' contract and fee schedule permitted Alliant to charge nonsufficient fund ("NSF") fees when it rejected an attempted debit to Page's account due to insufficient funds to cover the transaction. Page was charged an NSF fee when she attempted to pay a bill that was greater than her available balance. Eight days later, Alliant charged multiple NSF fees for the same transaction.

Page sued Alliant, claiming that Alliant breached its contract by charging more than one NSF fee for a single transaction. The district court granted Alliant's motion to dismiss. Page appealed.

HOLDING: Affirmed.

REASONING: Page argued that Alliant breached the contract by charging additional NSF fees after the merchant repeatedly attempted to debit her account for the same transaction. Page asserted that under the contract and fee schedule, the term "item" meant a "payment order that a *member* draws against insufficient funds," and because Page made just one payment, Alliant could have charged only one fee.

The court disagreed with Page's interpretation of the contract and fee schedule, holding that the agreement did not prohibit Alliant from charging multiple NSF fees for a transaction that is presented and rejected several times. It noted that, under the overdraft liability provision, Alliant was not required to notify Page if her account did not have funds to cover "checks, ACH debits, debit card transactions, fees or other posted items."

Because an ACH debit occurs when a payee debits a person's account, defining "item" by reference to the debit rather than the transaction or purchase rendered Page's reading untenable.

The contract also provided that her account may be subject to a charge set forth in the fee schedule whether the "item" was paid or returned. The court reasoned that the list ending with "other posted items" means that the previous terms are also "items," including ACH debits. Because an ACH debit occurs when a payee debits a person's account, defining "item" by reference to the debit rather than the transaction or purchase rendered Page's reading untenable. Thus, taken together, the contract and fee schedule permitted Alliant to charge an NSF fee each time it attempted to make an ACH debit from an account with insufficient funds, such as Page's.

ARBITRATION

CALIFORNIA LAW OBLIGATES A COMPANY OR BUSINESS WHO DRAFTS AN ARBITRATION AGREEMENT TO PAY ITS SHARE OF ARBITRATION FEES BY NO LATER THAN 30 DAYS AFTER THE DATE THEY ARE DUE

FAILURE TO PAY FEES AND SPECIFY THAT THE FAILURE TO DO SO CONSTITUTES A "MATERIAL BREACH OF THE ARBITRATION AGREEMENT"

CONSUMER OR EMPLOYEE IS ENTITLED TO A MANDATORY AWARD OF ATTORNEYS' FEES AND COSTS RELATED TO THE BREACH AND THE OPTIONS OF WITHDRAWING FROM ARBITRATION AND RESUMING LITIGATION

STATE LAW NOT PREEMPTED BY FEDERAL ARBITRATION ACT

Gallo v. Wood Ranch USA, Inc., 81 Cal. App. 5th 621 (2022).
https://law.justia.com/cases/california/court-of-appeal/2022/b311067.html

FACTS: Defendant-Appellant, Wood Ranch ("Wood Ranch") hired Plaintiff-Respondent Sunny Gallo ("Gallo") to work as a server for its restaurant chain. Gallo agreed to the terms of the employee handbook and signed an arbitration agreement as a condition of employment. Any dispute would be settled by binding arbitration and the arbitrator would heed the California Arbitration Act ("CAA") and federal law in administering proceedings.

After being terminated, Gallo sued Wood Ranch for damages relating to discriminatory causes of action. Wood Ranch moved to compel arbitration. Wood Ranch's motion was granted and the American Arbitration Association informed counsel for both parties of the due date for payment of the initial filing fees. Pursuant to the CAA, companies that mandate arbitration agreements with employees must pay the accompanying fees within thirty days of the deadline set by the arbitrator once a proceeding is initiated. Payment failure results in a "material breach of the arbitration agreement" that permits a plaintiff to vacate arbitration to pursue litigation or compel arbitration with the costs of attorney's fees and court proceedings assigned to the company. Gallo swiftly paid, but Wood Ranch did not pay in full until thirty-six days after the deadline, despite receiving reminders. The trial court granted Gallo's subsequent motion to vacate the order compelling arbitration and mandated the incurred costs and attorneys' fees be paid by Wood Ranch. Wood Ranch appealed.

The application of these regulations is consistent with the FAA's purpose of abiding by the mutual intent of parties and effectuating timely and cost-effective dispute resolution.

HOLDING: Affirmed.

REASONING: Wood Ranch argued that vacating the order compelling arbitration was erroneous because §1281.97 and §1281.99 of the CAA, which established the terms of material breach and withdrawal from arbitration, were preempted by the Federal Arbitration Act ("FAA"). Wood Ranch asserted that the provisions frustrated arbitration by returning the case to the court, dishonoring the parties' intent, misreading precedent, and inappropriately posing the question of CAA compliance to the court instead of the arbitrator.

The court rejected these arguments, explaining that the state law provisions "enforced rather than frustrated" the goals of the FAA, thus deeming them as not preempted. Furthermore, Wood Ranch lacked a viable excuse for late payment. The court clarified that the provisions at issue defined the date by which parties must pay arbitration fees and set forth consequences for late payment. Payment must be made within 30 days of the date of arbitration set by the arbitration provider. Failure to pay by the due date constitutes a "material breach of the arbitration agreement," qualifying as "a waiver of the right to compel arbitration," providing the consumer with options for remedy, such as a mandatory award of attorneys' fees and costs related to the breach, as well as the options of withdrawing from arbitration and resuming litigation over the matter. The application of these regulations is consistent with the FAA's purpose of abiding by the mutual intent of parties and effectuating timely and cost-effective dispute resolution.

DIRECTV WAIVED ITS RIGHT TO ARBITRATION BASED ON ITS PRIOR LITIGATION ACTIVITY

Vance et al. v. DirecTV LLC, ___ F. Supp.3d ___ (N.D. W. Va. 2022).
https://storage.courtlistener.com/recap/gov.uscourts.wvnd.42478/gov.uscourts.wvnd.42478.353.0_1.pdf

FACTS: Defendant DirecTV contracted with AC1 to market DirecTV's and AT&T Mobility's services. The agreement authorized AC1 to promote, market, advertise and take orders for DirecTV's systems. AC1 agreed to comply with Defendant's marketing guidelines, which prohibited cold calling. Plaintiffs David Vance, Roxie Vance, and Carla Shultz were AT&T Mobility customers. Plaintiffs alleged that AC1 made telemarketing calls to their phone numbers and motioned the court for a class certification, which was granted.

Defendant filed a motion to compel arbitration. Plaintiff Carla Shultz ("Shultz") filed an opposition to the Motion to Compel Arbitration. Defendant filed a Reply Memorandum of Law in support of its Motion to Compel Arbitration.

HOLDING: Denied.

REASONING: Plaintiffs argued that by litigating for months before filing a Motion, Defendant had waived its right to arbitrate. After Shultz was named a plaintiff and class representative, Defendant deposed her, litigated various discovery disputes,

The court ruled that these actions constituted waiver, holding that a party "knowingly relinquish[es] [its] right to arbitrate by acting inconsistently with that right."

and argued that she was not an adequate class representative. Defendant did not move to compel arbitration until more than five months after Shultz was added to the case. Prior to that, Defendant litigated the case as if no arbitration agreement existed.

The court ruled that these actions constituted waiver, holding that a party "knowingly relinquish[es] [its] right to arbitrate by acting inconsistently with that right." Citing *Morgan v. Sundance, Inc.,* the court reasoned that the proper inquiry for arbitration waiver focused solely on the actions of the person holding the right to arbitrate. Thus, the court found that Defendant waived any right to arbitrate based on its litigation activity and denied the Motion.

MISCELLANEOUS

FIFTH CIRCUIT RULES THAT THE CONSUMER FINANCIAL PROTECTION BUREAU'S INDEPENDENT FUNDING STRUCTURE IS UNCONSTITUTIONAL

Community Financial Services Association of America Ltd. v. Consumer Financial Protection Bureau, ___ F. 4th. ____ (5th. 2022).
https://scholar.google.com/scholar_case?case=10705294411988676288&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Community Financial Services Association of America and Consumer Service Alliance of Texas (collectively, "Plaintiffs") sued the Consumer Financial Protection Bureau ("Defendant") on behalf of payday lenders and credit access businesses, arguing that Defendant's Payday Lending Rule (the "Rule") was invalid because its funding structure is unconstitutional. Each year, Defendant, who is funded directly by the Federal Reserve instead of periodic congressional appropriations, requests an amount "determined by the Director to be reasonably necessary to carry out the" agency's functions. The Federal Reserve is required to transfer that amount so long as it does not exceed twelve percent of the Federal Reserve's "total operating expenses." Plaintiffs contend that Defendant's funding mechanism violates the Appropriations Clause of the Constitution and the separation of powers principles enshrined in it.

After Plaintiffs filed suit, Defendant announced it intended to engage in a "notice-and-comment rulemaking effort" to amend the Rule, and, as a result, the district court entered a stay. After revising the Rule, the court lifted its stay and Plaintiffs amended their complaint. Both parties filed cross-motions for summary judgment. The district court granted summary judgment for Defendant, concluding that Defendant's self-funding mechanism did not violate the Appropriations Clause because it was "expressly authorized by statute," and Congress enacted it. Plaintiffs appealed.

HOLDING: Reversed.

REASONING: Following the district court's holding, Defendant argued that its funding scheme was not unconstitutional because it was enacted by Congress. The court rejected this argument because the Appropriations Clause requires more than Congress's mere enactment of a law– it requires an appropriation. Using Defendant's reasoning, no federal statute could ever violate the Appropriations Clause because Congress enacted it. The court reasoned that our Constitution›s structural separation of powers requires the rejection of Defendant's argument. The Appropriation Clause gives Congress exclusive control over the federal purse and requires Congress to use this authority to "preserve individual liberty from the encroachments of executive power." The court concluded that Defendant's funding scheme violated the Appropriations Clause and the separation of powers required by it because Defendant requests, and receives, money directly from the Federal Reserve rather than relying on annual appropriations as other agencies are required to do.

This self-actualizing, perpetual funding mechanism gives Defendant power that the Constitution meant to belong to Congress. The constitutional problem is more acute because of Defendant's broad authority. First, a single director has all the power rather than a multi-member board or commission. Second, its ability to create substantive rules for various industries, prosecute violations, and levy penalties against private citizens, essentially allowing it to act as a legislature, prosecutor, and court.

The double-insulation structure essentially makes Defendant free from Congressional oversight, which is a violation of the Constitution's separation of powers.

Defendant also argued that the court should find its funding structure constitutional because every prior court that had considered its funding structure had found it to be constitutional. The court disagreed with the prior court's decisions, rejecting this argument. Prior courts that found Defendant's funding structure constitutional relied on the fact that a handful of other agencies are also self-funded when making their decisions. Here, the court here decided this was an unfair comparison because, when compared to other self-funded agencies, Defendant's funding structure goes a significant step further. Defendant has a double-insulated funding structure and is self-directed. This structure allows Defendant to wield more enforcement and regulatory authority than the other self-funded agencies previous courts have used as comparisons. The double-insulation structure essentially makes Defendant free from Congressional oversight, which is a violation of the Constitution's separation of powers. Thus Defendant, and its funding authority, the Federal Reserve, are outside of the appropriations process. This double-insulation led to the court vacating Defendant's Rule due to its unconstitutional funding scheme.

The immediate impact of this decision could be widespread, retroactively affecting all prior regulations set forth by Defendant by opening them to attack on the grounds of invalidity. However, if Defendant is able to rectify its funding structure to fall within the strictures of the Constitution, this case may prove to be an endorsement of Defendant's broad rulemaking power.

TEXAS FEDERAL COURT ISSUES STAY PENDING FIFTH CIRCUIT MANDATE

Consumer Fin. Prot. Bureau v. Populus Fin. Grp., Inc., ___ F. Supp.3d ___ (N.D. Tex. 2022).
https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2022/11/1544000-1544980-https-ecf-txnd-uscourts-gov-doc1-177115548931-1.pdf

FACTS: Plaintiff, Consumer Financial Protection Bureau ("CFPB"), and Defendant, Populus Financial Group, Inc. ("ACE"), agreed on a Motion for Entry of Order Staying Case Pending Final Resolution of Fifth Circuit Decision in

Community Financial Services Association of America Ltd v. CFPB (the "Motion").
HOLDING: Granted.
REASONING: The court ordered that all proceedings in this action should be stayed until after the Fifth Circuit issued its mandate in Community Financial Services Association of America Ltd v. CFPB. It also ordered that any party could move the court to extend the stay or to lift the stay before it expired on its own terms if they showed good cause. The parties must file a Joint Report within forty-five days of the conclusion of the stay showing how the parties wished to proceed.

NON-SIGNATORIES ARE BOUND TO THE CONTRACT'S CHOICE OF FORUM PROVISION UNDER THE EQUITABLE DOCTRINE THAT BINDS NON-SIGNATORIES WHO ARE "CLOSELY-RELATED" TO THE CONTRACT

Franlink Inc. v. BACE Servs., Inc., 50 F.4d 432 (5th Cir. 2022).
https://law.justia.com/cases/federal/appellate-courts/ca5/21-20316/21-20316-2022-09-28.html

FACTS: Amy and Craig Wells (collectively, "the Wells") contracted with Plaintiff Franlink Incorporated ("Link") under a franchise agreement to operate Defendant staffing company BACE Services ("BACE") in Florida. The agreement included a covenant not to compete and a non-solicitation provision. Link formally terminated the agreement upon discovering that the Wells were operating a competing staffing company, PayDay, and were diverting and soliciting former Link clients to it.

Link filed a complaint in the Southern District of Texas based on the forum selection provision of the franchise agreement. It named BACE, the Wells, and PayDay—all non-Texas residents—as defendants. Non-signatory PayDay filed a motion to dismiss for lack of personal jurisdiction. The district court denied the motion. PayDay appealed.
HOLDING: Affirmed.
REASONING: Payday argued that, as non-signatory, it was not bound to the agreement's forum selection clause. Without the forum selection clause, the district court lacked jurisdiction over PayDay. The appellate court disagreed.

The closely-related doctrine binds a non-signatory to a forum selection clause when the non-signatories enjoyed a sufficiently close nexus to the dispute

The closely-related doctrine binds a non-signatory to a forum selection clause when the non-signatories enjoyed a sufficiently close nexus to the dispute or another signatory such that it was foreseeable that they would be bound. The court had never recognized this doctrine until now, although every other circuit court had. The court decided to apply it on a case-by-case basis considering the following factors: (1) common ownership between the signatory and the non-signatory, (2) direct benefits obtained by the contract at issue, (3) knowledge of the agreement generally, and (4) awareness of the forum selection clause particularly. The court concluded that PayDay was bound by the agreement's forum selection clause under the closely-related doctrine because PayDay was fully owned and operated by the Wells, who were signatories to the franchise agreement through BACE. Moreover, PayDay, through the Wells, enjoyed a direct economic benefit from the contract and was aware of the agreement and the forum selection clause. Thus, since PayDay met the requirements of being closely related to the contract, it was bound to the choice of forum provision.

ARTICLE III STANDING REQUIRES A CONCRETE INJURY EVEN IN THE CONTEXT OF A STATUTORY VIOLATION

Perez v. McCreary, Veselka, Bragg, & Allen, P.C., ___ F.4th ___ (5th Cir. 2022).
https://law.justia.com/cases/federal/appellate-courts/ca5/21-50958/21-50958-2022-08-15.html

FACTS: Appellant McCreary, Veselka, Bragg & Allen, P.C. ("MVBA") sent a letter to Appellee Mariela Perez ("Perez") demanding payment of a delinquent debt. The limitations period on that debt had run but the letter did not disclose that.

Perez sued MVBA, alleging that MVBA violated the FDCPA by making a misrepresentation in connection with an attempt to collect her debts. Both parties moved for summary judgment. Although factual disputes precluded summary judgment, the trial court held that the violation of Perez's statutory rights under the FDCPA constituted a concrete injury-in-fact because those rights were substantive, not procedural. The district court reasoned that because the suit related to Perez's substantive right to be free from misleading information, her claim was therefore distinguishable from a "bare procedural violation" of the FDCPA that would not be cognizable under *Spokeo, Inc. v. Robins,* 578 U.S. 330 (2016). MVBA appealed.
HOLDING: Reversed.
REASONING: Perez argued that the violation of her rights under the FDCPA itself qualified as a concrete injury-in-fact.

The court disagreed, noting that for purposes of Article III standing, *Spokeo* concluded that the "[d]eprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing." Similarly, under *Transunion v. Ramirez* 594 U.S.___ (2021), injuries are concrete only if they bear a "close relationship" to injuries that American courts have traditionally recognized as concrete.

Here, Perez did not show that she suffered any tangible loss or material risk of harm as a result of MVBA's debt-collection letter, nor did she offer a common-law analog to the injuries she claimed. Perez could not establish a concrete injury in connection with MVBA's alleged violation of the FDCPA. As such, the court held that Perez lacked Article III standing to bring suit.

TELEPHONE CONSUMER PROTECTION ACT COVERS CALLS TO THE CELL PHONES OF BUSINESSES AS WELL AS INDIVIDUALS

Chennette et al. v. Porch.com Inc. et al., ___ F. 3d. ___ (9th Cir. 2022).
https://cdn.ca9.uscourts.gov/datastore/opinions/2022/10/12/20-35962.pdf

FACTS: Plaintiffs-Appellants Nathan Chennette and other home improvement contractors (collectively, "Plaintiffs") used their cell phone numbers for residential and business purposes. Some Plaintiffs registered their numbers on the national do-not-call ("DNC") registry. Defendants-Appellees GoSmith, Inc., and Porch.com, Inc., (collectively, "Defendants") sell client leads to home improvement contractors. Defendants solicited Plaintiffs by sending automated text messages via automatic telephone dialing systems ("ATDS") without Plaintiffs giving Defendants their cell phone numbers or consent to receive text messages from them.

Plaintiffs filed suit, alleging Defendants violated the Telephone Consumer Protection Act ("TCPA"). Specifically, Plaintiffs argued that Defendants' use of ATDS violated section 227(b) of the TCPA. They also alleged that Defendants' solicitation messages to Plaintiffs' numbers registered on the DNC registry violated section 227(c) of the TCPA. The district court dismissed Plaintiffs' cause of action for lack of statutory standing. Plaintiffs appealed.

HOLDING: Reversed and remanded.

REASONING: Defendants argued that since Plaintiffs were home improvement contractors, and not individuals, section 227(b) of the TCPA did not extend to Plaintiffs, and they were thus not "within the zone of interest protected by the law invoked" for statutory standing. Defendants further argued that because Plaintiffs used their cell phones both for personal calls and for calls associated with their home improvement business, they did not qualify as a "residential" subscriber under section 227(c) of the TCPA. The court disagreed with both of Defendants' arguments.

First, the court concluded that since section 227(b) of the TCPA prohibits the use of ATDS and provides that "a person or entity" may recover money damages or obtain injunctive relief, the most natural reading of "entity" includes a business. Therefore, the home improvement contractor Plaintiffs had statutory standing under the term "entity" in section 227(b) of the TCPA.

The court also concluded that Plaintiffs had standing under section 227(c) of the TCPA. Since the TCPA did not define "residential", the court reviewed the FCC's regulations, as well as the orders and opinions of other district courts. Noting FCC guidance and order from a majority of district courts, the court held that Plaintiffs' registered cell phones used for both personal and business purposes "are presumptively 'residential' within the meaning of section 227(c)." Though the FCC declined to provide precise guidance on whether the phone number used for both business and personal purposes could be residential, the FCC's 2003 TCPA Order presumed the number on the DNC registry as "residential" because wireless subscribers often used their wireless phones in the same manner as residential lines. Furthermore, the majority of the district courts decided a phone used for both personal and business purposes could be residential, depending on whether such presumption could be rebutted.

The court reasoned that Defendants could rebut the presumption after discovery by showing Plaintiffs' cell phones should be properly regarded as business rather than "residential lines. Specifically, the presumption could be rebutted by considering the following factors: (1) how plaintiffs hold their phone numbers out to the public; (2) whether plaintiffs' phones are registered with the telephone company as residential or business lines; (3) how much plaintiffs use their phones for business or employment; (4) who pays for the phone bills; and (5) other factors bearing on how a reasonable observer would view the phone line. Here, since the presumption could not yet be rebutted, Plaintiffs had standing under section 227(c).

Under the dissent's view, the court should have deferred to the FCC's limitations as to who can sue telemarketers under the TCPA.

The dissent favored the FCC's narrower interpretation of section 227(c). The dissenting opinion chastised the majority for usurping the role of the FCC by creating its own regulatory framework for determining whether a cell phone qualified as a residential line. Specifically, under the dissent's view, the court should have deferred to the FCC's limitations as to who can sue telemarketers under the TCPA because Congress had "explicitly left a gap for the agency to fill…." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). Indeed, when Congress enacted the TCPA, a cell phone was not "residential" under the dictionary definition, and common usage showed a residential line was distinct from a cell phone. Congress thus knew how to refer to a cell phone when it wanted to but chose not to use language referring to cell phones in section 227(c). Therefore, the dissent argued that because the FCC's 2003 TCPA Order suggesting the protection of privacy rights of wireless phones on the DNC registry was protected only if the wireless phones were used (1) in their homes and (2) in the same manner as residential lines, the majority incorrectly assumed the term "residential" referred to a purpose of how the cell phone was used.

WASHINGTON SUPREME COURT FINDS A CONTRACTUAL ONE-YEAR LIMITATION PERIOD IN A RESIDENTIAL CONSTRUCTION CONTRACT IS UNCONSCIONABLE AND VOID

Tadych v. Noble Ridge Constr., Inc., ___ P.3d ___ (Wash. 2022).
https://www.courts.wa.gov/opinions/pdf/1000499.pdf

FACTS: Petitioners-Appellants Gregory and Sue Tadych contracted Respondent-Appellee Noble Ridge Construction Inc. ("Noble Ridge"), to build a custom home. The contract's warranty provision had a one-year limitation barring the Tadychs from filing any claims arising from the construction after one year of occupancy. Two months prior to the warranty expiration date,

the Tadychs noticed shifting and unlevel flooring in their house. Noble Ridge assured them that those were minor issues and promised to repair them. Additional issues arose in the house after the one-year limitation period, but Noble Ridge never made any repairs. After a construction expert discovered severe defects in a thorough inspection, the Tadychs sued Noble Ridge for breach of contract.

The trial court granted summary judgment in favor of Noble Ridge and dismissed the Tadychs' complaint, concluding that the one-year limitation period had expired. The Court of Appeals affirmed. The Tadychs appealed to the Supreme Court of Washington.

HOLDING: Reversed and remanded.

REASONING: On appeal, the Tadychs argued that the one-year limitation clause was unconscionable. The court agreed.

The court held that the one-year limitation provision was unenforceable and void because it was substantively unconscionable. The court analyzed the unconscionability of the contract provision by applying a number of factors: (1) the expertise of the parties, (2) which party drafted the contract, and (3) whether the provision at issue was separately negotiated or bargained for. Here, all the factors weighed against Noble Ridge as the Tadychs had no expertise in legal contract drafting, the contract was drafted by Noble Ridge, and the one-year limitation provision was neither bargained for, nor negotiated separately. The limitation provision was included within the warranty section of the contract and had "little, if anything, to do with a warranty." The provision also deprived the Tadychs of the six-year statute of limitations to seek damages for faulty construction. Based on the factor analysis, the court concluded that the contract provision severely eliminated established statutory rights and therefore was unconscionable and void.

The one-year limitation provision was unenforceable and void because it was substantively unconscionable.

Happy New Year! And this issue of the *Journal* is a great way to get 2023 started.

As usual for the first issue of the year, it contains the "Insurance Law Update." Suzette E. Selden and Henry Moore do a great job discussing all of the recent significant insurance law cases. Among the many decisions is a Texas Supreme Court opinion considering whether an automobile insurer owed the motorist and her husband a duty to process an accident claim without requesting that the insured take photographs or to issue a safety warning along with any such request.

There also is the Executive Summary of the Consumer Financial Protection Bureau's "Buy Now Pay Later: Market Trends and Consumer Impacts" Report, and a link to view the entire Report. Of course, it would not be the *Journal* if we didn't discuss many recent consumer law decisions, all of interest to consumer and commercial lawyers.

And finally, this is the first issue that will be available only in digital format. Members of the Consumer Law Section will receive a link by email, and all issues of the *Journal* are available at http://www.jtexconsumerlaw.com/.

Wishing you a healthy and great 2023.

Richard M. Alderman
Editor-in-Chief