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Articles

Recent Developments

The Content of Consumer Law Classes III

By Jeff Sovern*

ABSTRACT

This paper reports on a 2018 survey of law professors teaching consumer protection, and follows up on similar 2010 and 2008 surveys, which appeared in Jeff Sovern, The Content of Consumer Law Classes II, *14 J. Consumer & Commercial L. 16 (No. 1 2010), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1657624 and Jeff Sovern, The Content of Consumer Law Classes, 12 J. Consumer & Commercial L. 48 (No. 1 2008), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1139894, respectively. As reported in previous surveys, professors teaching consumer law report considerable variation in coverage. Professors want to cover relatively current subjects within their courses, such as FinTech, credit invisibles, and mortgage servicing. They also continue to cover topics traditionally explored in consumer law courses, such as common law fraud and the Magnuson-Moss Warranty Act. The 2018 survey also found considerable interest in some topics that did not generate any interest in the 2010 survey, including the Consumer Product Safety Commission and student loan servicing.*

The survey also asked professors whether they read contracts before agreeing to them and read required disclosures before entering into consumer transactions. Not one professor reported always doing so, while 57% said they rarely or never read contracts and 48% said they rarely or never read required disclosures. It thus appears that not even consumer law professors routinely read consumer contracts and disclosures.

In 2008, I surveyed attendees at the University of Houston Law Center Conference titled Teaching Consumer Law: The Who, What, Where, Why, When and How (the "2008 Conference") about the topics they covered in consumer protection courses.[1] The 2010 iteration of the conference (the "2010 Conference") presented a second opportunity to conduct such a survey.[2] This article reports on the results of a similar poll conducted at the 2018 edition of the conference, held May 18-19 in Santa Fe, New Mexico under the aegis of the University of Houston Law Center.[3]

Much has changed in consumer law since the 2010 survey. At the time of the 2010 conference, Congress was still two months shy of enacting the Dodd-Frank Act, which created the Consumer Financial Protection Bureau.[4] The Bureau enforces many of the laws covered in consumer law classes, and has issued or amended regulations explored in the course.[5] Terms that are new to the 2018 survey include FinTech, mortgage servicing, student loan servicing, cryptocurrency, Bitcoin, blockchain, WhyNotLeaseIt, and robosigning.

Law schools have also changed in the last eight years. In the fall of 2010, 87,900 people applied to law schools.[6] In contrast, during 2017, only 56,400 people applied to law school,[7] a 36 % drop, which has affected the resources available to law schools. In particular, the decline in the number of students has led to a reduction in the number of full-time law professors, which might mean fewer full-time professors teaching consumer law.[8]

Methodology

The use of technology in law schools has also evolved. Consequently, I conducted the 2018 poll during the conference using an online platform, PollEverywhere, which permitted instant display of the survey results during the panel discussion. Respondents answered the questions either by sending texts or using a web browser on their phones or laptops. But the ability to present the responses during the discussion came with limits: the number of topics listed in questions was constrained by the size of the display screen. Time limits also cut down the number of questions I could pose. I was able to ask eight questions during the conference. A screenshot of one of the questions appears as Appendix A. Six of the questions were about course coverage and the other two pertained to reading contracts and disclosures. The course coverage questions asked about 23 topics that professors might already cover or want to cover.

The number of people who responded to the questions during the conference varied. One question elicited responses from 27 people. Three others drew answers from at least 20 persons. Three questions generated responses from 15 to 17 people, while on one, only eleven people answered.[9]

Because some consumer law professors who did not attend the conference might have wanted to reply to the survey, I also posted a copy of the survey on the Consumer Law and Policy Blog,[10] and distributed copies via email. Ultimately, six people emailed responses to the questions posed at the conference, meaning that a total of 33 professors answered at least one question. A copy of the first three questions in the paper version appears as Appendix B.[11]

Respondents were instructed to indicate every item they either already cover or would like to cover for at least twenty minutes. One contrast with previous surveys has to do with the number of topics the survey asked about. The 2010 survey instrument inquired about 51 topics. The 2018 survey asked about only 23.[12]

Because of the change from a paper survey to an electronic one, and the limited number of choices that could appear on a screen, I decided to forego asking about subjects that I anticipated all or nearly all consumer law professors would cover and limited the survey to topics that my co-authors and I could plausibly add to or subtract from the forthcoming fifth edition of our casebook.[13] Accordingly, the survey did not ask about coverage of, for example, the Truth in Lending Act, UDAP statutes, or debt collection, standard subjects in a consumer law casebook. Readers wishing to learn more about coverage of those subjects should consult the 2010 survey.

Methodological Limits

The survey obviously has several limits as a guide to course coverage decisions. First, the number of respondents is small, though that is in part a function of the fact that many law schools do not offer a course in consumer law. My 2014 survey of law schools teaching consumer law found "53 schools offer the basic course, 21 have a consumer law clinic, and 12 have both a clinic and a basic course. That leaves about two-thirds of the ABA-accredited law school with neither."[14] While neither I, nor as far as I know, anyone else has updated that survey, it seems likely that no more, and perhaps fewer, schools are offering the course during the current school year, given the contraction of law school faculties. Thus, the number of survey respondents actually appears likely to represent a substantial share of those who teach consumer law in United States law schools. It also nearly doubles the seventeen respondents to the 2010 survey.

A second limit derives from the fact that most respondents were attendees at a conference on teaching consumer law. Such a conference probably draws more full-time professors than adjuncts—and consumer law is a course often taught by adjuncts—which means the poll is less likely to display the coverage decisions of adjuncts. Adjuncts might choose to explore different topics than full-time faculty might. For example, an adjunct professor who represents clients in litigation might prefer to focus on laws that are more frequently litigated, if only because such a practitioner is more likely to be familiar with them. Similarly, an adjunct who works for a government agency might devote more attention to laws the agency enforces. Even among full-time professors, the conference is likely to appeal most to those who focus more on consumer law than other subjects and to those who teach it more often because such professors will reap greater benefits from attending the conference.[15] That type of professor may make different coverage choices than someone who is less engaged with the topic. For example, a professor whose scholarship focuses on consumer law might choose more cutting-edge topics because they connect better with the professor's scholarship. Or such a professor might vary coverage more than someone who teaches the subject infrequently because covering the same topics over and over might come to seem stale.[16] On the other hand, professors who are more engaged with consumer law are also likely to know more about it and so might make more considered coverage choices, in consequences of which their coverage selections might be more worthy of emulation.

The number of survey respondents actually appears likely to represent a substantial share of those who teach consumer law in United States law schools.

Finally, one professor at the conference complained about difficulties registering responses to the survey because of wifi problems. That may account for the fact that only eleven people responded to one question, while other questions elicited more than twice as many respondents. The topics on that question are starred in Figure One to indicate that the actual number of professors covering them might have been higher but for the wifi problems.

Coverage Results

Every topic of the 23 on the survey was selected by at least three professors, though no topic was chosen by all the respondents, suggesting that the professors teaching consumer law differ over what should be covered. Previous surveys have also found considerable variation in coverage.[17]

Professors Want to Cover New Subjects

Three of the four most popular topics did not appear on earlier surveys and show that consumer law coverage continues to evolve. Thus, the second, third, and fourth most selected topics were mortgage servicing issues (e.g., robosigning, foreclosure issues), issues involving "credit invisibles" (people without conventional credit records who might want access to credit, such as some low-income consumers or young consumers), and FinTech (e.g., FinTech privacy issues, obtaining loans via a smartphone, and FinTech usury issues). Other topics new to the survey that elicited at least ten selections included student loan servicing issues (e.g., the duties of servicers to notify borrowers of their ability to reduce their payments), advanced aspects of the TCPA, such as how consumers can revoke consent and the application of the TCPA to debt collection calls to cell phones, and the role of a compliance attorney in consumer law.

Professors Want to Cover or Have Recently Covered the Same Subjects

More respondents selected common law fraud than any other subject. Other topics that are staples of consumer protection that at least ten respondents chose include the Magnuson-Moss Warranty Act, issues involving unauthorized use of credit cards, holder in due course, spam and CANSPAM, constitutional limits on advertising regulation, and issues involving debit cards.

Changes from Previous Studies

This year, sixteen people selected "the Consumer Product Safety Commission and related consumer law issues" as a topic they either cover or want to cover. In contrast, not one person stated that they wanted to cover the Consumer Product Safety Commission on the 2010 survey. The questions were worded slightly differently in a couple of respects: first, the 2010 survey did not refer to "related consumer law issues" but this difference seems unlikely to account for the change. In addition, the 2010 survey asked first if the respondents already covered the CPSC, and separately, if they would add it to their course if it appeared in the casebook they used. The 2018 survey asked if the respondents "already cover or would like to cover" the item. Conceivably, some respondents interpreted that phrase as asking if they would like to cover an item regardless of whether they could fit it in their course, but that seems improbable. The most plausible explanation is that the respondents already cover or would try to fit in something on the CPSC if it were in the materials they use.

Three of the four most popular topics did not appear on earlier surveys and show that consumer law coverage continues to evolve.

Interest in several other topics increased. For example, fifteen 2018 respondents cover or want to cover student loan servicing issues (e.g., the duties of servicers to notify borrowers of their ability to reduce their payments), while not one respondent expressed interest in covering any aspect of student loans in 2010. Similarly, nineteen respondents to the 2018 survey selected the Magnuson-Moss Act, a 171% increase over the seven who chose it in 2010. If the percentage of respondents who had selected that item stayed the same from 2010 to 2018, we would have expected it to be chosen by thirteen or fourteen respondents. Still another example: the number of professors who selected spam more than tripled, from four in 2010 to thirteen in 2018 (the 2018 survey referred to "spam and CANSPAM" while the 2010 survey referred only to "spam," but that seems unlikely to have affected the results). In addition, while eleven respondents to the 2018 survey chose constitutional limits on advertising regulation, only four of the 2010 respondents picked constitutionality of regulating commercial speech.

But other items seemed more stable. In both the 2018 and 2010 surveys, common law fraud was among the top vote-getters. Interest in the holder in due course doctrine seemed to be consistent, when taking into account that the 2018 survey had more respondents.[18] The same appears to be true for comparative consumer law.[19]

Results on Reading Contracts and Disclosures

For the first time, the survey asked respondents if they read contracts before agreeing to them or if they read required disclosures before entering into consumer transactions. Considerable evidence establishes that ordinary consumers do not read consumer contracts or disclosures.[20] Nor are ordinary consumers unique in this regard: among those who have confessed to not reading contract terms are Chief Justice Roberts,[21] Judge Richard Posner,[22] and former United States Secretary of State and presidential candidate Hillary R. Clinton.[23] I wondered if consumer law professors are different both because we devote more attention to consumer contract terms and disclosures than most and have a professional interest, and so I asked two related questions in the survey. The first (n = 21) was "How often do you read contracts before agreeing to them (e.g., before clicking "I agree" on a web site or to obtain wifi access; a rental car contract; a credit card contract)?" The answers appear in Figure Two. The second question (n = 23) was "Do you read required disclosures before entering into consumer transactions?," and the answers appear in Figure Three.

Not one professor reported always reading contracts or disclosures. In contrast, 57% said they rarely or never read contracts and 48% said they rarely or never read required disclosures. Less than one professor in six said they usually read contracts or disclosures, and about a third said they sometimes read them.

The claim that consumer law professors often skip mandated disclosures is somewhat corroborated by the response to a question I was unable to pose during the conference but that five professors responded to via email. The question asked whether the credit card's periodic statement (typically, monthly) the respondent used most often included a "phone number to call for credit counseling services." Not one of the five said that it did. Credit card statements are in fact required to include such a disclosure,[24] and the CFPB's model form for a periodic statement includes that disclosure in close proximity to items likely to be of great interest to the cardholder, including the balance due, the payment due date, and the minimum payment amount.[25] While I do not know whether the credit card statements the professors receive follow the model form, or even whether the statements include the required disclosure, it is very likely that the credit card issuer does indeed conform to the model form. In other words, the professors probably did not recall seeing something that has been on every credit card statement they have received for years and that was near other items that they examined.[26] To be sure, a sample of five professors is too small to draw any conclusions, but it offers a slight amount of support to the claim that not even consumer law professors routinely read mandated disclosures. The support may be undermined to some degree by the results to another part of the question that asked whether the statements included one other mandated disclosure; three of the five professors stated that theirs did.[27]

One explanation sometimes given for the failure of consumers to read contracts is that they expect not to understand them even if they do read them,[28] an expectation that empirical research has shown is justified.[29] But consumer law professors are far less likely to suffer from that disability than most.[30]

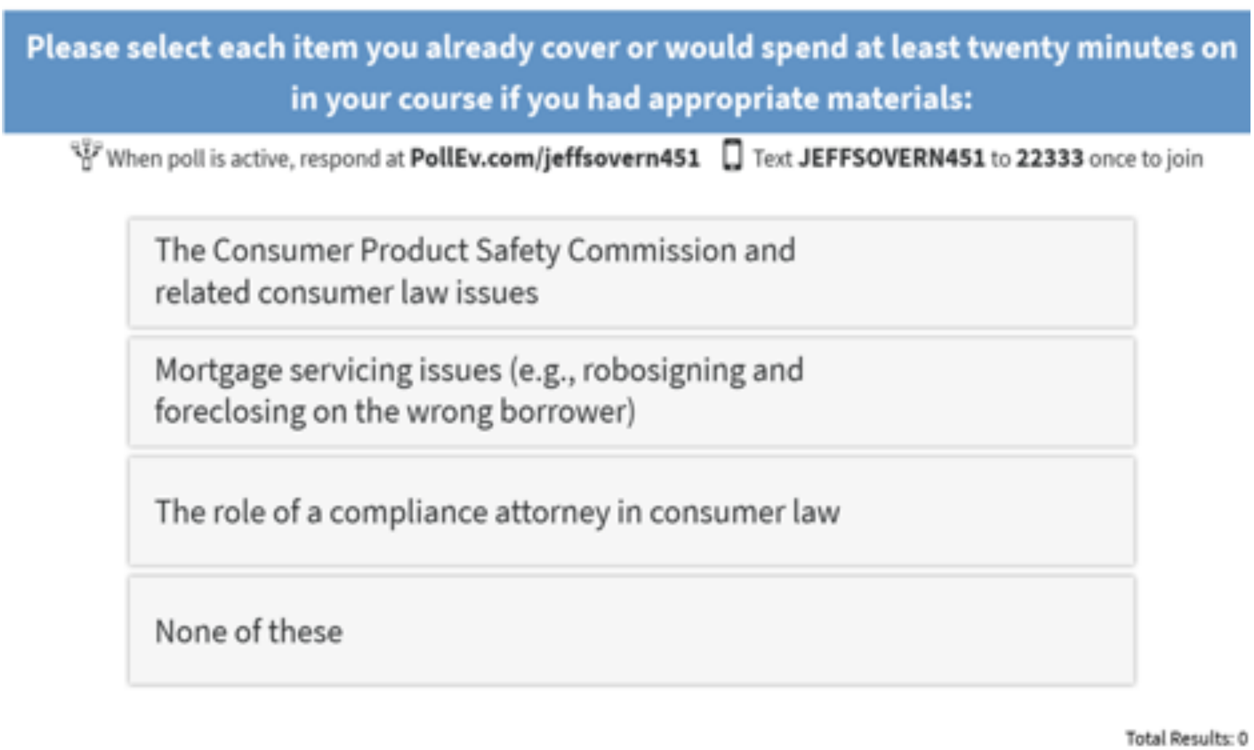
While the survey questions about course coverage did not explicitly inquire about devoting time to consumer disclosures and contracts, the findings reported in this section suggest that class time could fruitfully be spent on whether consumers read such writings or indeed whether anyone does—and if not, what the consequences of that failure are and should be.

Conclusion

In both the 2008 and 2010 surveys, I commented that "course coverage decisions appear not to be static." That continues to be true. Consumer law professors are interested in updating their courses to reflect changes in the law and in the types of issues consumers confront. At the same time, consumer law coverage decisions reflect considerable diversity of opinion. It thus appears that those of us crafting casebooks should include a broad array of topics.

As for whether consumer law professors read consumer contracts and disclosures, it is likely that they read more of them than ordinary consumers, but about half admit to rarely or never reading consumer contracts and disclosures in their personal lives. If so few consumer law professors read contracts, it is hard to imagine who might. Most writing is written to be read. Consumer contracts and disclosures are apparently written for some other purpose.

Appendix A
Screenshot of Question Posed at Conference



APPENDIX B
Paper Version of the Survey Questions

1. Please indicate each item you already cover or would like to cover for at least twenty minutes by putting an x on the line (assume any casebook you use includes relevant materials):

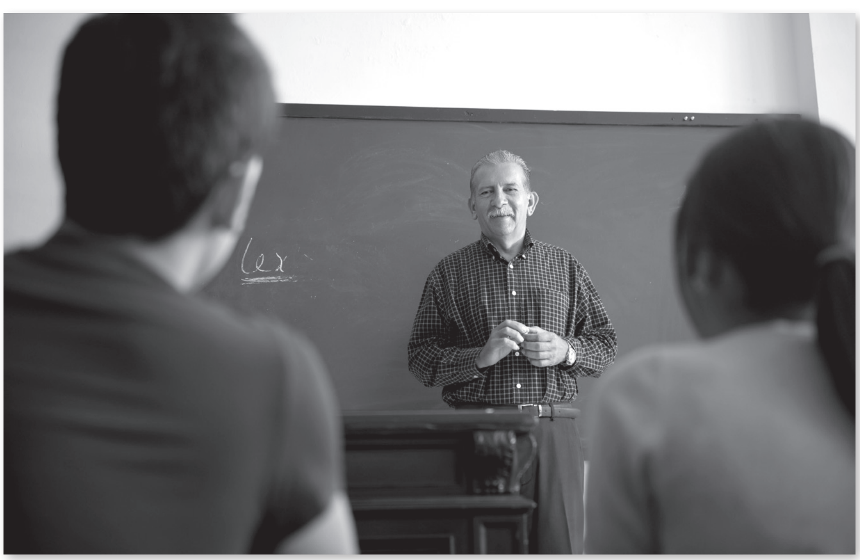
__ The Consumer Product Safety Commission and related consumer law issues
__ Mortgage servicing issues (e.g., robosigning, foreclosure issues)
__ The role of a compliance attorney in consumer law
__ The Food and Drug Administration and related consumer law issues
__ Comparative consumer law (i.e., the law of other countries on consumer law issues)
__ Spam and CANSPAM
__ FinTech (e.g., FinTech privacy issues, obtaining loans via a smartphone, and FinTech usury issues)
__ Magnuson-Moss Warranty Act
__ Holder in due Course
__ Constitutional limits on advertising regulation
__ Advanced aspects of the TCPA, such how consumers can revoke consent and the application of the TCPA to debt collection calls to cell phones
__ Credit insurance
__ Cryptocurrency, such as Bitcoin or blockchain issues
__ Issues involving "credit invisibles" (people without conventional credit records who might want access to credit, such as some low-income consumers or young consumers)
__ Common law fraud
__ Modern versions of consumer leasing, such as WhyNotLeaseIt or in-store kiosks.
__ Cooling-off periods
__ Gramm-Leach-Bliley financial privacy disclosures
__ Health care consumer issues (e.g., the problem of unexpected out-of-network bills, the issue of whether networks can drop doctors in the middle of treating a patient, whether patients have a right to itemized bills)
__ Issues involving debit cards
__ Issues involving unauthorized use of credit cards
__ The FTC Credit Practices Rule
__ Student loan servicing issues (e.g., the duties of servicers to notify borrowers of their ability to reduce their payments)
__ None of these.

2. How often do you read contracts before agreeing to them (e.g., before clicking "I agree" on a web site or to obtain wifi access; a rental car contract; a credit card contract)?

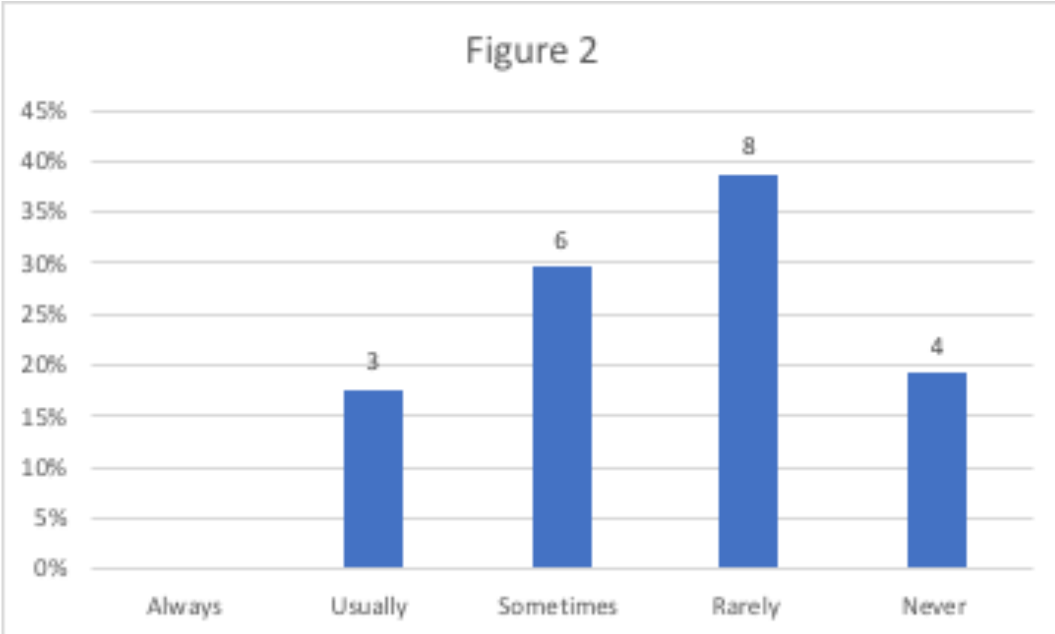
__ Always
__ Usually
__ Sometimes
__ Rarely
__ Never

3. Do you read required disclosures before entering into consumer transactions?

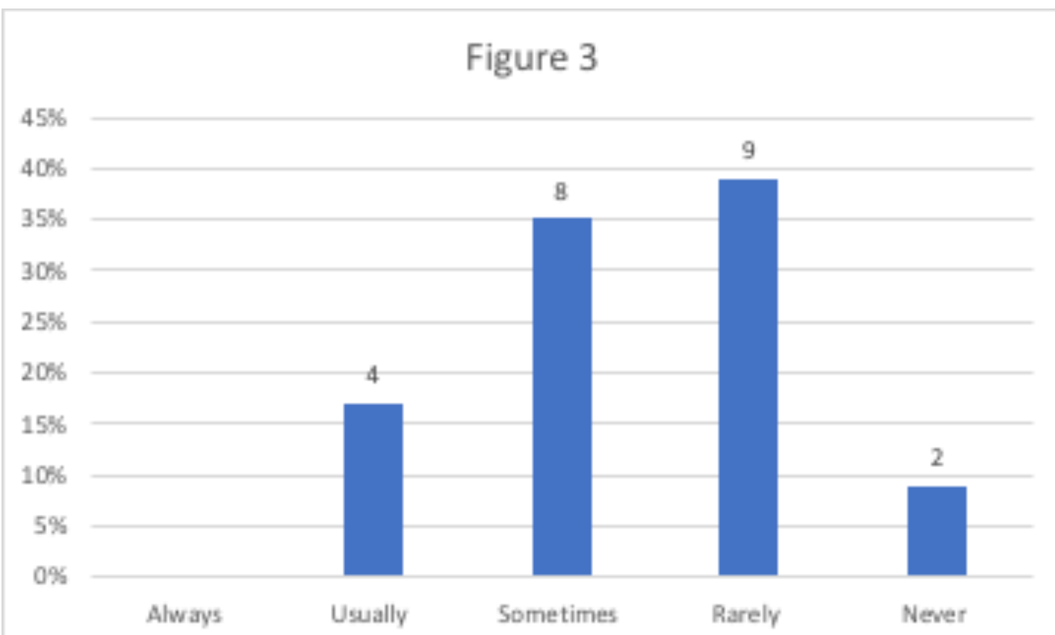
__ Always
__ Usually
__ Sometimes
__ Rarely
__ Never



*The actual number of respondents selecting starred items might have been higher but for WiFi problems.



How often do you read contracts before agreeing to them (e.g., before clicking
“I agree” on a web site or to obtain wifi access; a rental car contract; a credit card contract)?
(N =21)



How Often Respondents Read Required Disclosures Before Entering Into Consumer Contracts.
(N =23)

** Professor of Law, St. John's University School of Law and co-coordinator, Consumer Law and Policy Blog. The author thanks Professor Dee Pridgen, whose idea it was in 2008 to employ a written survey and who also made helpful suggestions on both the 2018 questionaire and this article; Richard Alderman, who presided over the 2008 conference, the 2010 conference, and, together with Nathalie Martin, the 2018 conference, and who gave permission to conduct the surveys at the three conferences; and Kathleen Engel, for helping to distribute copies of the paper version of the questionnaire.*

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1 The results are available in Jeff Sovern, *The Content of Consumer Law Classes,* 12 J. Consumer & Commercial L. 48 (No. 1 2008), available at http://papers.ssrn.com/sol3/papers. cfm?abstract_id=1139894 (hereinafter, Content I)

2 See Jeff Sovern, *The Content of Consumer Law Classes II*, J. Consumer & Commercial L. 16 (2010).

3 The title of the conference was "Teaching Consumer Law--Where We've Been--Where We're Going."

4 The 2010 conference took place on May 21 and 22. President Obama signed the Dodd-Frank Act on July 21, 2010. Pub. L. No. 111–203.

5 See e.g., Truth in Lending (Regulation Z) 12 C.F.R. Part 1026; Equal Credit Opportunity (Regulation B), 12 C.F.R. Part 1002.

6 See LSAC, ABA End-of-Year Summary—Applicants, Admitted Applicants & Applications, https://www.lsac.org/lsacresources/data/aba-eoy/archive.

7 LSAC, ABA End-of-Year Summary—Applicants, Admitted Applicants & Applications, https://www.lsac.org/lsacresources/data/aba-eoy.

8 See Ashby Jones *and* Jennifer Smith, *Amid Falling Enrollment, Law Schools Are Cutting Faculty*, Wall St. J. (July 15, 2013); Debra Cassens Weiss, *Law school faculty numbers shrink 11 percent since 2010; which schools shed the most full-timers?*, ABA J. (Dec. 22, 2014), HTTP://WWW.ABAJOURNAL.COM/NEWS/ARTICLE/LAW_SCHOOL_FACULTY_NUMBERS_SHRINK_11_PERCENT_SINCE_2010_WHICH_SCHOOLS_SHED/.

9 After the panel finished, one professor described difficulties responding to the survey at times because of the quality of the wifi in the conference room, and it is possible that that problem contributed to the paucity of responses on the question on which only eleven professors weighed in. The matter is discussed more fully infra in the section on methodological limits.

10 See Jeff Sovern, Consumer Law Professors, Please Take My Survey About Coverage, http://pubcit.typepad.com/clpblog/2018/05/consumer-law-professors-please-take-my-survey-about-coverage.html (May 22, 2018).

11 I had prepared more questions to pose at the conference than time permitted me to ask, and those who responded to the paper version of the survey also responded to the additional questions, but I received so few responses to those questions that it generally does not seem useful to report them here.

12 The 2008 survey asked about 32 topics.

13 Dee Pridgen, Jeff Sovern & Christopher L. Peterson, Consumer Law (5th ed. 2020) (forthcoming).

14 See Jeff Sovern, Revised List of Schools Teaching Consumer Law This Year, http://pubcit.typepad.com/clpblog/2014/04/revised-list-of-schools-teaching-consumer-law-this-year.html (Apr. 18, 2014).

15 Alternatively, the conference might attract those who have not previously taught consumer law but intend to and so wish to learn from those who are experienced in teaching it.

16 Conversely, such a professor might stay with the same coverage decisions to eliminate the work required to teach something new, and so such a professor might resist changing coverage decisions made long ago despite the fact that intervening developments might have rendered them suboptimal.

17 See Content I, supra note 1 ("The responses indicate considerable variation among syllabi. . . . [E]ach of the 32 listed topics was taught by at least four professors.").

18 A dozen 2018 respondents chose that item, as opposed to six in 2010.

19 Four 2018 respondents selected that item, versus eight in 2018.

20 See generally Omri Ben-Shahar & Carl E. Schneider, More Than You Wanted to Know: The Failure of Mandated Disclosure (2014); Jonathan A. Obar & Anne Oeldorf-Hirsch, *The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services* (2016), TPRC 44: The 44th Research Conference on Communication, Information and Internet Policy *(2016)*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2757465 Jeff Sovern, Elayne Greenberg, Paul Kirgis, & Yuxiang Liu, *'Whimsy Little Contracts' with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements,* 75 Maryland L. Rev. 1 (2015); Yannis Bakos, Florencia Marotta-Wurgler, & David R. Trossen, *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts*, 43 J. Legal Stud. 1 (2014); Debra Pogrund Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities,* 5 N.Y.U. J.L. & Bus. 617, 679-82 (2009); James M. Lacko & Janis K. Pappalardo, Federal Trade Commission Bureau of Economics, Staff Report, Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Mortgage Disclosure Forms 122 (2007), http://www.ftc.gov/os/2007/06/P025505MortgageDisclosurereport.pdf.

21 See Debra Cassens Weiss, *Chief Justice Roberts Admits He Doesn't Read the Computer Fine Print,* A.B.A. J. (Oct. 20, 2010), http://www.abajournal.com/news/article/ chief_justice_roberts_admits_he_doesnt_read_the_computer_fine_print.

22 See Debra Cassens Weiss, *Judge Posner Admits He Didn't Read Boilerplate for Home Equity Loan*, A.B.A. J. (June 23, 2010), http://www.abajournal.com/news/article/ judge_posner_admits_he_didnt_read_boilerplate_for_home_equity_loan

23 Daniel White, *Read Hillary Clinton's Remarks from a Rally in Toledo, Ohio*, TIME (Oct. 3, 2016), http://time.com/4517335/hillary-clinton-transcript-toledo-ohio (quoting Hillary R. Clinton saying: "You know, who reads all that fine print? I don't. And you get defrauded or you get mistreated and then all the sudden they, well you can't sue us.").

24 See 12 C.F.R. § 1026.7(b)(12)(E).

25 See 12 C.F.R. App. G, Form G-18(F).

26 Professors also had the option of indicating that they did not have a credit card but no one selected that response.

27 The additional disclosure was:

> Either the name of the balance computation method (e.g., adjusted balance method) and a phone number to call for more information about the method or a description of how the issuer calculates the balance on which the finance charge is calculated.

28 See, e.g., Melvin Aron Eisenberg, *Text Anxiety,* 59 S. Cal. L. Rev. 305, 309 (1986) ("The average consumer knows that he probably will be unable to fully understand the dense text of a form contract . . . ."); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. Rev. 429, 436 (2002) ("[T]he consumer would not understand much of the language of the boilerplate even if she took the time to read it."); See Tess Wilkinson-Ryan, *A Psychological Account of*

Consent to Fine Print, 99 Iowa L. Rev. 1745, 1749 (2014) "[n]ot only are form contracts unread, they are functionally unreadable (or at least indigestible) for consumers with bounded cognitive capacity—i.e., everyone.").

29 See, e.g., Sovern, Kirgis, Greenberg & Liu, supra note 20 at 20-24, 81.

30 But see Ben-Shahar & Schneider, supra note 20, at 8 (quoting Elizabeth Warren, the creator of the Consumer Financial Protection Bureau, as saying about a credit card contract: "I teach contract law at Harvard, and I can't understand half of what it says."); Thomas A. Durkin & Gregory Elliehausen, *Disclosure as a Consumer Protection*, in The Impact of Public Policy on Consumer Credit 109, 145-46 (Thomas A. Durkin & Michael E. Staten eds., 2002) (discussant Joan Warrington, an attorney for Citigroup stating, "[e]ven with a law degree and a career in consumer credit, I still have problems understanding many of the disclosures that I see.").

Using Consumer Law Against Notorious *Notarios*

By Mark E. Steiner*

I. Introduction

The goal of most immigrants living in the United States is to improve their legal status. If they are undocumented, they would like to have lawful status. If they have temporary visas, they often want a permanent adjustment of status. If they are lawful permanent residents, they want to be become naturalized citizens. The United States Citizenship and Immigration Services reports it processes approximately 6 million petitions and applications annually from individuals and employers.[1] With millions of immigrants seeking help, many are victims of scam artists who promise benefits but can't deliver.[2] In Texas, like most states, efforts to remedy the harm caused to immigrants by deceptive and incompetent *notarios* or "immigration consultants" have been dominated by the Attorney General, local district attorneys, and the state bar.[3]

With millions of immigrants seeking help, many are victims of scam artists who promise benefits but can't deliver.

This paper presents an alternative: using the Texas Deceptive Trade Practices Act (DTPA), Tex. Bus. Com. Code §17.41 *et seq*. and the Texas Notary Act in private lawsuits against *notarios* or "immigration consultants" whose deceit or incompetence have harmed immigrants. Texas is one of 27 states that have enacted laws that specifically create a private right of action for immigration fraud.[4]

Section 17.50 (a) of the DTPA creates a private right of action for the injured consumer:

> A consumer may maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish:
> (1) the use or employment by any person of a false, misleading, or deceptive act or practice that is:
> (A) specifically enumerated in a subdivision of Subsection (b) of Section 17.46 of this subchapter; and
> (B) relied on by a consumer to the consumer's detriment;
> (2) breach of an express or implied warranty;
> (3) any unconscionable action or course of action by any person; or
> (4) the use or employment by any person of an act or practice in violation of Chapter 541, Insurance Code.[5]

The DTPA provides for these damages: economic damages, mental anguish, additional damages, and attorney's fees. If the consumer establishes a "tie-in" violation (a violation of a statute independent of the DTPA that can be pled as a DTPA violation), then the consumer can recover actual damages (anything recoverable under common law), additional damages, and attorney's fees.

II. Pre-Suit Notice

Before any DTPA lawsuit can be filed, the consumer must give the would-be defendant the required statutory notice.[6] The purpose of the notice is to encourage settlement of the action before trial. The statute thus allows the defendant 60 days after receipt of the notice to agree to the plaintiff's demand. The notice letter must provide "reasonable detail of the consumer's specific complaint" and the amount of economic damages, damages for mental anguish, and attorney's fees incurred up to that point. The defendant can pay the demanded amount, reject the claim, or make a counter-offer. The consumer's giving of notice is not jurisdictional.[7] Failing to provide this notice only allows the defendant to seek an abatement of the action until the required notice is given.

The Fort Worth Court of Appeals has noted, "The requirements establish a fairly low threshold for a notice letter."[8] A DTPA notice letter must advise the defendant in reasonable detail of (1) the consumer's specific complaint and (2) the amount of economic damages, damages for mental anguish, and expenses, including attorney's fees, if any, reasonably incurred by the consumer in asserting the claim against the defendant.[9] The notice does have to provide specific factual allegations and not just parrot specific DTPA violations.[10]

III. Consumer Status

Texas courts have described a DTPA cause of action as comprising three elements: (1) the plaintiff is a "consumer" as defined in the statute; (2) the defendant committed one of the four defined violations; and (3) the violation was the producing cause of economic or mental anguish damages.

A private party who wishes to sue under the DTPA must establish what is called "consumer status." In other words, "consumer status" gives the plaintiff standing to sue under the DTPA; without it, no DTPA action exists. The starting point for determining consumer status is the definition section of the act, section 17.45, which contains many definitions to be used in interpreting the statute. The definition of "consumer" is found in subsection (4):

> "Consumer" means an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of $25 million or more, or that is owned or controlled by a corporation or entity with assets of $25 million or more.[11]

Subsections (1) and (2) of § 17.45 provide further guidance by defining "goods" and "services," respectively:

> (1) "Goods" means tangible chattels or real property purchased or leased for use.
> (2) "Services" means work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods.[12]

Texas courts have established a two-part test: (1) the person must have sought or acquired goods or services by purchase or lease and (2) the goods or services purchased or leased must form the basis of the complaint.[13] Establishing consumer status in a *notario* fraud case is relatively easy, the individual purchased the services of the *notario* and those services are the basis of the individual's complaint.

If an individual purchased the *notario*'s services for somebody else, then that third person may be able to sue as a consumer under the DTPA as a third-party beneficiary. A consumer need not be the actual purchaser or lessor of goods or services; a beneficiary of goods or services may be a consumer for purposes of the DTPA.[14] The Fort Worth Court of Appeals has explained:

> Thus, a person need not be a direct purchaser to satisfy the requirement that he seek or acquire goods or services by purchase or lease; in very limited situations, a third-party beneficiary may qualify as a consumer of goods or services as long as the transaction was specifically required by or intended to benefit the third-party and the good or service was rendered to benefit the third party.[15]

IV. Venue

Venue isn't going to be a big issue in a *notario* fraud case. The plaintiff can sue in the county where the deceptive conduct giving rise to the claim occurred or the county where the *notario* resides.

The general rule for venue in the Civil Practice and Remedies Code provides that all lawsuits shall be brought:

> (1) in the county in which all or a substantial part of the events or omissions giving rise to the claim occurred;
> (2) in the county of defendant's residence at the time the cause of action accrued if defendant is a natural person;
> (3) in the county of the defendant's principal office in this state, if the defendant is not a natural person.[16]

The DTPA has its own venue provision, which generally incorporates the Texas venue statute found in the Texas Civil Practice and Remedies Code but also adds the county where "the defendant or an authorized agent of the defendant solicited the transaction made the subject of the action at bar." [17]

V. DTPA Violations

Three of the four types of statutory violations might apply in a DTPA claim based upon *notario* fraud: so-called "laundry-list" violations, breach of warranty, and unconscionability.

A. Laundry-List Violations

The DTPA "laundry list" enumerates thirty-four violations. What makes many DTPA violations easier to prove than actual fraud is proof of intent or knowledge of the deceit isn't necessary to prove liability for most laundry-list violations (knowledge or intent might affect recovery of damages). Thus, in a *notario* fraud case, the plaintiff suing under the DTPA wouldn't have to meet the higher proof required for fraud.[18] The plaintiff will have to show that he or she detrimentally relied upon the defendant's misrepresentation. [19]

Here are the "laundry-list violations that would be most useful in a *notario* fraud case:

(5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which the person does not;

(7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(12) representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;

(24) failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed;

(28) using the translation into a foreign language of a title or other word, including "attorney," "lawyer," "licensed," "notary," and "notary public," in any written or electronic material, including an advertisement, a business card, a letterhead, stationery, a website, or an online video, in reference to a person who is not an attorney in order to imply that the person is authorized to practice law in the United States[20]

The violations for misrepresenting the "characteristics" or "quality" of a service are very broad and pliable. The Texas Supreme Court has held, "misrepresentations, so long as they are of a material fact and not merely 'puffing' or opinion, are nevertheless actionable even though they are broad descriptions." [21]

The violation for misrepresenting that an agreement involves rights or remedies that it doesn't have might apply to what the *notario* has promised for his or her services.

The "failing to disclose" violation might apply if the *notario* failed to disclose he or she wasn't an attorney if the *notario* intended to induce the consumer into a transaction the consumer otherwise wouldn't have entered. This violation would require proof of intent.

The last violation is one that is specifically aimed at *notarios*. It is a DTPA violation to use the word *notario* in advertisements or business cards or letterhead "in order to imply that the person is authorized to practice law in the United States." This provision was added by the Texas legislature in 2015. While this provision certainly can be used in a private lawsuit, the focus of bill's sponsors was to provide a tool for district and county attorneys. The House Bill Analysis for H.B. 2573 states:

> Interested parties contend that it is difficult to prosecute certain kinds of immigration consulting fraud, including the practice of notaries public, or *notarios*, who take advantage of a misconception some Spanish speakers have that notaries public are licensed to provide legal services. The parties also report that local district, county, and city attorneys would prosecute these offenses if they were provided with the tools to do so. H.B. 2573 seeks to address this issue.[22]

Similarly, the Senate Bill Analysis for H.B. 2573 noted, "The type of immigration consulting fraud covered under this bill is not currently an explicit offense under the Texas Deceptive Trade Practices Act. This bill would expand authority and streamline the process in order to assist *agencies* who do not have the capacity to prosecute all immigration services fraud" (emphasis added).[23] The Senate Bill Analysis also noted that a committee substitute bill included "advertising by electronic communications, such as websites and online videos, in the list of deceptive trade acts where many brazen *notarios* advertise almost exclusively in the United States."

B. Warranty

A DTPA consumer can sue for breach of an express or implied warranty. "The DTPA does not define the term 'warranty.' Furthermore, the act does not create any warranties; therefore any warranty must be established independently of the act." [24] Only service warranties would apply in DTPA lawsuit against a *notario*. Implied warranties for services are very limited in Texas, and no implied warranties appear to apply. However, express warranties are available for services.[25] Express warranties would functionally be the same as the laundry-list misrepresentations of "characteristics." A plaintiff would have to prove the express warranty was an affirmation of fact or promise.

C. Unconscionability

Section 17.50 (a)(3) proscribes "any unconscionable action or course of action by any person." Section § 17.45(5) defines "unconscionable conduct or course of conduct" as "an act or practice which, to a consumer's detriment, takes advantage of

Many Texas statutes are tied into the DTPA—a violation of the statute can be treated as a violation of the DTPA.[78] There is one such relevant tie-in statute for *notario* fraud.

the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree." The resulting unfairness must be "glaringly noticeable, flagrant, complete and unmitigated." [26]

A typical *notario* fraud case should be rife with unconscionability. Immigrants in these situations often have been taken advantage because of their lack of knowledge to a grossly unfair degree. In a typical *notario* fraud case, the *notario* has preyed upon the immigrant's confusion surrounding the term *notario*.[27]

The Texas Supreme Court addressed unconscionability in a case where a lawyer had lied to his clients about filing a wrongful death lawsuit when, in fact, he had missed the statute of limitations. The plaintiffs had asserted that their lawyer acted unconscionably in falsely representing that he was actively prosecuting their medical malpractice claim for their child's death. The court noted that the plaintiffs had depended on the lawyer to file suit. One of the plaintiffs testified, "You trust in a professional because they know more than you." The supreme court concluded that the lawyer "took advantage of the trust the [plaintiffs] placed in him as an attorney. Therefore, the [plaintiffs] have presented some evidence that they were taken advantage of to a grossly unfair degree."[28]

VI. Notary Act Violations

Many Texas statutes are tied into the DTPA—a violation of the statute can be treated as a violation of the DTPA.[29] There is one such relevant tie-in statute for *notario* fraud. In the section of the Texas Government Code regulating notaries public, a statutory violation is established for "representation as attorney." This section states:

> (a) A person commits an offense if the person is a notary public and the person:
>
> (1) states or implies that the person is an attorney licensed to practice law in this state;
>
> (2) solicits or accepts compensation to prepare documents for or otherwise represent the interest of another in a judicial or administrative proceeding, including a proceeding relating to immigration or admission to the United States, United States citizenship, or related matters;
>
> (3) solicits or accepts compensation to obtain relief of any kind on behalf of another from any officer, agency, or employee of this state or the United States;
>
> (4) uses the phrase "*notario*" or "*notario publico*" to advertise the services of a notary public, whether by signs, pamphlets, stationery, or other written communication or by radio or television; or
>
> (5) advertises the services of a notary public in a language other than English, whether by signs, pamphlets, stationery, or other written communication or by radio or television, if the person does not post or otherwise include with the advertisement a notice that complies with Subsection (b).
>
> (a-1) A person does not violate this section by offering or providing language translation or typing services and accepting compensation.
>
> (b) The notice required by Subsection (a)(5) must state that the notary public is not an attorney and must be in English and in the language of the advertisement and in letters of a conspicuous size. If the advertisement is by radio or television, the statement may be modified, but must include substantially the same message. The notice must include the fees that a notary public may charge and the following statement:
> "I AM NOT AN ATTORNEY LICENSED TO PRACTICE LAW IN TEXAS AND MAY NOT GIVE LEGAL ADVICE OR ACCEPT FEES FOR LEGAL ADVICE."
>
> (c) It is an exception to prosecution under this section that, at the time of the conduct charged, the person is licensed to practice law in this state and in good standing with the State Bar of Texas.
>
> (d) Except as provided by Subsection (e) of this section, an offense under this section is a Class A misdemeanor.
>
> (e) An offense under this section is a felony of the third degree if it is shown on the trial of the offense that the defendant has previously been convicted under this section.
>
> (f) Failure to comply with this section is, in addition to a violation of any other applicable law of this state, a deceptive trade practice actionable under Chapter 17, Business & Commerce Code.[30]

These Notary Act violations are better claims than the new specific DTPA laundry-list violation aimed at *notarios*. An immigrant could sue because the *notario* stated or implied that he or she was an attorney. An immigrant could sue for the *notario* preparing the documents to be filed "in a proceeding" that related to immigration or citizenship. These violations are broader than the specific violation in the DTPA. Moreover, the tie-in violation will afford better remedies, as explained below.

VII. Remedies

A. Producing Cause

Section 17.50 of the DTPA requires the violation "constitute a producing cause of economic damages or damages for mental anguish." Tex. Bus. & Com. Code § 17.50 (a). Producing cause is different than proximate cause as it only requires showing the violation was the cause in fact of the damages; it doesn't require showing the damages were foreseeable. [31] The Texas Supreme Court has explained:

> For DTPA violations, only producing cause must be shown. The element common to both proximate cause and producing cause is actual causation in fact. This requires proof that an act or omission was a substantial factor in bringing about injury which would not otherwise have occurred. [32]

The supreme court also has noted:

> Defining producing cause as being a substantial factor in bringing about an injury, and without which the injury

would not have occurred, is easily understood and conveys the essential components of producing cause that (1) the cause must be a substantial cause of the event in issue and (2) it must be a but-for cause, namely one without which the event would not have occurred.[33]

If damages are too remote, too uncertain, or purely conjectural, they cannot be recovered.[34]

B. Remedies for DTPA Violations

1. Economic Damages

A DTPA consumer can recover economic damages. Economic damages are defined as "compensatory damages for pecuniary loss, including costs of repair and replacement. The term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society."[35] At the very least, a plaintiff could recover the fees paid to the *notario* or "immigration consultant." It seems possible that legal fees that resulted from cleaning up the mess created by a *notario* or immigration consultant's shoddy work would be recoverable as economic damages. While the DTPA allows the consumer to recover either the "out-of-pocket" measure or the "benefit-of-the bargain" measure, these damages aren't exclusive and other damages may be allowed to ensure that the plaintiff is made whole.[36] The Texas Supreme Court has noted that "the object of awarding a plaintiff recovery is to compensate for the actual loss sustained as a result of the defendant's conduct. The DTPA embraces this concept by permitting the injured consumer to recover the greatest amount of actual damages alleged and factually established to have been caused by the deceptive practice, including related and reasonably necessary expenses."[37] The subsequent remedial work done by an immigration lawyer seems like recoverable expenses.

2. Mental Anguish

DTPA plaintiffs can recover mental anguish if they can show the defendant acted knowingly and they can meet the evidentiary standard for mental anguish.

"Knowingly" is defined in the DTPA as "actual awareness, at the time of the act or practice complained of, of the falsity, deception, or unfairness of the act or practice giving rise to the consumer's claim."[38]

The plaintiff also will have to meet the *Parkway* standard. In *Parkway Co. v. Woodruff*, the Texas Supreme Court established the evidentiary requirements for recovery of mental anguish damages. To survive a legal sufficiency challenge, plaintiffs must present "direct evidence of the nature, duration, and severity of their mental anguish, thus establishing a substantial disruption in the plaintiffs' daily routine."[39] If there is no direct evidence, the reviewing court will apply "traditional 'no evidence' standards to determine whether the record reveals any evidence of 'a high degree of mental pain and distress' that is 'more than mere worry, anxiety, vexation, embarrassment, or anger' to support any award of damages."[40]

3. Additional Damages

The factfinder also can award "additional damages," which are discretionary (they aren't technically "treble" damages because the award is discretionary). The upper limit for such award depends upon the predicate finding that is made. If the factfinder determines the defendant acted "knowingly," then "the trier of fact may award not more than three times the amount of economic damages."[41] If the factfinder finds the defendant acted "intentionally," then "the trier of fact may award not more than three times the amount of damages for mental anguish and economic damages."[42] "Intentionally" means:

> actual awareness of the falsity, deception, or unfairness of the act or practice, or the condition, defect, or failure constituting a breach of warranty giving rise to the consumer's claim, coupled with the specific intent that the consumer act in detrimental reliance on the falsity or deception or in detrimental ignorance of the unfairness. Intention may be inferred from objective manifestations that indicate that the person acted intentionally or from facts showing that a defendant acted with flagrant disregard of prudent and fair business practices to the extent that the defendant should be treated as having acted intentionally.[43]

4. Attorney's Fees

If a consumer prevails, the DTPA mandates an award of attorney's fees.[44] In these types of cases, the lodestar method, rather than a contingent fee, would probably be the basis of the fee award. Attorneys will have to be mindful of recent case law that requires contemporaneous records to establish their reasonable hours.[45]

C. Remedies for Tie-In Violations

The remedial scheme for a tie-in statute is different than that afforded an ordinary DTPA violation. Remedies for a tie-in statute violation are essentially what DTPA remedies were before tort reform: actual damages, additional damages based upon actual damages, and attorney's fees. Consequently, tie-in statute violations afford better remedies.

Section 17.50 (h) outlines the remedies available for tie-in provisions.

> Notwithstanding any other provision of this subchapter, if a claimant is granted the right to bring a cause of action under this subchapter by another law, the claimant is not limited to recovery of economic damages only, but may recover any actual damages incurred by the claimant, without regard to whether the conduct of the defendant was committed intentionally. For the purpose of the recovery of damages for a cause of action described

by this subsection only, a reference in this subchapter to economic damages means actual damages. In applying Subsection (b)(1) to an award of damages under this subsection, the trier of fact is authorized to award a total of not more than three times actual damages, in accordance with that subsection.[46]

"Actual damages," as used in the DTPA, means those recoverable at common law.[47] That allows plaintiffs to recover any item of damages available under the common law. It might be possible, for example, for the plaintiff to recover for loss of consortium or loss of society damages.

Additional damages under a tie-in statute are based upon actual damages, not just economic or mental anguish damages, and only require the knowingly predicate— and the prevailing consumer also will recover attorney's fees.

VIII. Relevant Case Law

Apparently, there aren't any reported cases in Texas involving private lawsuits against *notarios*. There is a very instructive case involving an attorney's mishandling of an N-400 naturalization application. In *McLeod v. Gyr*, the Dallas Court of Appeals affirmed a judgment against an attorney based upon the attorney's misrepresentations about his ability to handle an N-400 application.[48] The court of appeals affirmed a judgment that included $23,000 in actual damages, $46,000 in additional damages, and $28,000 in attorney's fees. Gyr, a lawful permanent resident, contacted McLeod about handling his naturalization application. McLeod told Gyr that he "specialized in immigration matters" and "handled immigration matters," including N-400 applications. McLeod unsuccessfully submitted four N-400 applications, charging $23,000 for his fruitless efforts. Among other things, McLeod checked "No" to these questions in the application: (1) Do you support the Constitution and form of government of the United States?, (2) Are you willing to take the full Oath of Allegiance to the United States?; and, (3) If the law requires it, are you willing to bear arms on behalf of the United States? Gyr ultimately hired another lawyer, who charged him $2000 to prepare the N-400 application. Gyr became a citizen three months later.

It is worth noting that the court of appeals had very little difficulty affirming the additional damages award. McLeod "knowingly" misrepresented that he "specialized" in immigration matters and handled N-400 applications because he previously had never filed a N-400 application, which he admitted in his deposition.[49]

While there are not any reported cases involving individual consumers as plaintiffs, there are cases brought by the Office of the Attorney General and by the Unauthorized Practice of Law Committee of the State Bar of Texas. The Consumer Protection Division of the Office of the Attorney General has successfully prosecuted several DTPA lawsuits on behalf of immigrants against fraudsters.[50] In *Avila*, the State obtained a judgment ordering $60,000 in restitution, $100,000 in penalties, and $28,500 in attorney's fees.[51] In *Morano*, the State obtained a judgment ordering ordering $10,000 in restitution, $10,000 in penalties, and $15,000 in attorney's fees.[52] In *Thomas*, the State obtained a judgment ordering $469,416 in damages, assessing $20,000 in penalties against each defendant, and awarding $22,000 in attorney's fees against each defendant.[53]

In *Avila*, Samuel and Nilsa Avila ran a business called Mundo Latino in Tyler, where they assisted Spanish-speaking individuals with immigration and federal income tax matters. The Office of the Attorney General of the State of Texas sued Avilas alleging they violated the DTPA, claiming the Avilas counseled consumers on immigration matters without legal authorization or qualification. The State claimed the Avilas engaged in false, misleading, and deceptive acts and practices because they did not have the certification or qualifications necessary to counsel people about their rights under immigration law or to represent them in immigration matters. The State also alleged that the Avilas violated the Texas Notary Act by stating or implying that Samuel Avila, a notary public, was an attorney licensed to practice law and by soliciting or accepting compensation for preparing documents for, or otherwise representing the interests of another in proceedings relating to immigration to the United States. At trial, the jury found:

> Samuel and Nilsa Avila interviewed consumers or filled out immigration forms for consumers or advised consumers as to whether they were qualified to file petitions and applications, or determined whether immigration forms should be filed for consumers, when neither was licensed to practice law; accepted compensation to prepare documents for and to represent consumers regarding immigration to the United States, United States citizenship, or related matters when not licensed to practice law, not law students, or working for a nonprofit organization accredited by the Board of Immigration Appeals; engaged in false, misleading, or deceptive acts or practices in the conduct of trade or commerce; and that both, while notary publics, solicited or accepted compensation to prepare documents for or otherwise represent the interest of another in a proceeding relating to immigration to the United States, United States citizenship, or related matters.[54]

The court of appeals affirmed, holding that the defendants engaged in the unauthorized practice of law, which constituted a deceptive trade practice, and also violated the Notary Act.[55]

The leading case on unauthorized practice of law in immigration matters was decided by the Texas Supreme Court in 1985.[56] There, the defendants regularly assisted immigrants with I-130 petitions for family relatives. The Unauthorized Practice Committee obtained a permanent injunction proscribing the defendants from advising clients whether to file immigration petitions or applications. After the court of appeals reversed, the Texas Supreme Court affirmed the trial court's judgment. The court differentiated between recording client's responses to the questions in the I-130 form, which doesn't require special legal skills, and determining whether the I-130 should be filed at all, which does require special legal skills. The court noted,

> The Cortezes often filed I-130 forms which reflected that the alien seeking a visa was in this country illegally and furnished the immigration authorities with the alien's address, thus making deportation more likely. Therefore, advising a client as to whether to file an I-130 requires a careful determination of legal consequences.
>
> Another danger is also presented by the manner in which the Cortezes conduct their business. When Mrs. Cortez was asked what she would do if the client did not qualify for a preference under the form instructions, she testi-

The DTPA has limited statutory defenses, most of which would not apply to a claim brought against a *notario*.

> fied that she would say that there was no way she could help. This act, when combined with the advertisement representing experience in every kind of immigration case, could likely mislead a customer to believe there is nowhere else to seek help and no other possibility for obtaining permanent residency. This is a type of occurrence which is sought to be prevented by prohibiting the unauthorized practice of law. We therefore hold that the undisputed activities of the Cortezes in selecting and preparing the various immigration forms required legal skill and knowledge.[57]

IX. Defenses

A. DTPA and Notary Act Defenses

The DTPA has limited statutory defenses, most of which would not apply to a claim brought against a *notario* (e.g., an exemption for claims for bodily injury). One defense, if pled, would essentially prove liability under the Notary Act. The DTPA exempts "professional services," the "essence of which is the providing of advice, judgment, opinion, or similar professional skill."[58] The plaintiff can overcome this exemption by showing (1) an express misrepresentation of a material fact that can't be characterized as advice, judgment, or opinion; (2) a failure to disclose information; (3) an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion; or (4) breach of an express warranty that cannot be characterized as advice, judgment, or opinion. *Id.* If a *notario* pled this exemption, he or she would be admitting liability under the Notary Act because it prohibits notaries from giving legal advice or preparing documents for an immigration proceeding.[59] A notary or "immigration consultant" would not be able to claim an exemption for rendering professional services when the notary was not supposed to be rendering professional services in the first place.

The only defense that seems plausible in a *notario* fraud case pled under the DTPA is limitations. The statute of limitations for a DTPA claim is two years.[60] The period begins to run within two years after the date on which the false, misleading, or deceptive act or practice occurred or "within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice."[61] Section 17.565 states:

> All actions brought under this subchapter must be commenced within two years after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice. The period of limitation provided in this section may be extended for a period of 180 days if the plaintiff proves that failure timely to commence the action was caused by the defendant's knowingly engaging in conduct solely calculated to induce the plaintiff to refrain from or postpone the commencement of the action.

The discovery rule tolls the statute of limitations for fraudulent misrepresentations until the claimant discovers the falsity of the representations.[62]

Although the DTPA is the optimal consumer cause of action against a *notario*, fraud nonetheless could still be available if the DTPA claim is stale because fraud has a four-year statute of limitations.[63] Moreover, limitations cannot be raised in an action brought by the State of Texas.[64]

The Notary Act includes the defense that the notary does not commit a violation "by offering or providing language translation or typing services and accepting compensation."[65] But this defense does not apply if the defendants chose the applicable forms or completed the forms themselves.

B. Common-Law Defenses

The case law is inconsistent about whether common-law defenses can apply in a DTPA claim. Early cases suggested that common-law defenses were not available. The Texas Supreme Court in 1980 explained, "The DTPA does not represent a codification of the common law. A primary purpose of the enactment of the DTPA was to provide consumers a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in a common law fraud or breach of warranty suit."[66] In 1999, the Texas Supreme Court held that the affirmative defense of mitigation was available in a DTPA case.[67] The court failed to cite *Smith v. Baldwin*, which appears to conflict with its holding. It asserted instead, "Nothing in the DTPA evidences a legislative intent to withdraw mitigation of damages as an affirmative defense, even when a defendant alleges that the consumer failed to mitigate by failing to accept the defendant's offer to mitigate. Nor does the concept of mitigation inherently conflict with the DTPA."[68] In 2012, the supreme court held that the common-law requirements for restoration did not apply to a restoration order sought under the DTPA, favorably citing *Smith v. Baldwin.*[69] Accordingly, it is unclear when common-law defenses are viable.

It is also unclear whether any common-law defenses would benefit *notarios*. In other jurisdictions, common-law or non-statutory defenses have failed in claims brought against *notarios*. In one case where undocumented immigrants were the plaintiffs, the Illinois court of appeals rejected the defense of illegality of contract as the plaintiffs were not suing to enforce the contract.[70] In another case involving undocumented plaintiffs, the Wisconsin Court of Appeals rejected the notion that an undocumented immigrant lacked "standing" to sue *notarios*.[71] A California Court of Appeal held that the "unclean hands" doctrine may not be raised as an affirmative defense to claim brought under that state's Immigration Consultants Act.[72] Undocumented immigrants would be among those victimized by *notarios*. Their status should not affect recovery.[73] Texas courts have permitted undocumented immigrants to sue for personal injuries and wage claims.[74]

X. Collecting the Judgment

Both clients and lawyers might be hesitant about bringing suit against a *notario* if collecting on a judgment is uncertain. However, a notary is required to have a $10,000 bond. Section 406.010 of the Notary Act provides:

> (a) Each person to be appointed a notary public shall, before entering the official duties of office, execute a bond in the amount of $10,000 with a solvent surety company authorized to do business in this state as a surety. The bond must be approved by the secretary of state, payable to the governor, and conditioned on the faithful performance of the duties of office. The secretary of state has the authority to accept an electronic fil-

ing of the notary public bond if an agreement has been made with the surety company.

(b) The notary bond shall be deposited in the office of the secretary of state, is not void on first recovery, and may be sued on in the name of the injured party from time to time until the whole amount of the bond is recovered.[75]

The surety of the notary bond can be found by conducting a search at the Secretary of State website. The only necessary information required for the search is the name of the notary.[76]

XI. Conclusion

Private lawsuits under the DTPA and Notary Act offer an opportunity for those harmed by an immigration scam to obtain redress. These lawsuits could also have a deterrent effect against future scams. Getting victims to pursue such remedies may be the biggest obstacle to recovery. Undocumented immigrants may be afraid of coming out of the shadows. Because of highly publicized enforcement actions by ICE at courthouses, those victims may be reluctant litigants.[77]

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1 *See Generally* Immigration and Citizenship Data, United States Citizenship and Immigration Services (July 2, 2018) https://www.uscis.gov/tools/reports-studies/immigration-forms-data.

2 There are many helpful articles on notario fraud. *See, e.g.*, Bianca Carvajal, *Combating California's Notario Fraud*, 35 Chicana/o-Latina/o L. Rev. 1 (2017); Joseph M. Gietl, *Like Lambs to the Slaughter: How Unregulated Immigration Practitioners Harm Immigrants*, 19 Pub. Int. L. Rep. 66 (2013); Mary Dolores Guerra, *Lost in Translation:* Notario *Fraud–Immigration Fraud*, 26 J. Civil Rights & Econ. Developments 23 (2011); Anne E. Langford, *What's in a Name?:* Notarios *in the United States and the Exploitation of a Vulnerable Latino Immigrant Population*, 7 Harv. Latino L. Rev. 115 (Spring 2004); Travis B. Olsen, *Combating "*Notario *Fraud" Locally*, 22 Berkeley La Raza L. J. 383 (2012); Andrew F. Moore, *Fraud, the Unauthorized Practice of Law and Unmet Needs: A Look at State Laws Regulating Immigration Assistants*, 19 Geo. Immigr. L.J. 1 (2004); Monica Schurtman, & Monique C. Lillard, *Remedial and Preventive Responses to the Unauthorized Practice of Immigration Law*, 20 Tex. Hisp. J. L. & Pol'y 47 (2014).

3 *See, e.g.*, *Unauthorized Practice Comm. v. Cortez*, 692 S.W.2d 47 (Tex. 1985) (injunctive relief); *Dominguez v. State*, No. 06-17-00170-CR (Tex. App.—Texarkana May 14, 2018, no pet. h.) (eight years' imprisonment for theft by deception); *Avila v. State*, 252 S.W. 3d 632 (Tex. App.—Tyler 2008, no pet.) (damages and civil penalties).

4 american university & catholic legal immigration network, inc., *Stopping Immigration Services Scams: A Tool for Advocates and Lawmakers 26 (2017)*, https://cliniclegal.org/resources/stopping-immigration-services-scams-tool-advocates-and-lawmakers

5 Tex. Bus. & Com. Code § 17.50. All Texas statutory provisions were located at the Texas Legislature's Texas Constitution and Statutes database, <https://statutes.capitol.texas.gov/Index.aspx>.

6 The notice requirement of the DTPA is set forth in section 17.505, as follows:

(a) As a prerequisite to filing a suit seeking damages under Subdivision (1) of Subsection (b) of Section 17.50 of this subchapter against any person, a consumer shall give written notice to the person at least 60 days before filing the suit advising the person in reasonable detail of the consumer's specific complaint and the amount of economic damages, damages for mental anguish, and expenses, including attorneys' fees, if any, reasonably incurred by the consumer in asserting the claim against the defendant. During the 60-day period a written request to inspect, in a reasonable manner and at a reasonable time and place, the goods that are the subject of the consumer's action or claim may be presented to the consumer.

(b) If the giving of 60 days' written notice is rendered impracticable by reason of the necessity of filing suit in order to prevent the expiration of the statute of limitations or if the consumer's claim is asserted by way of counterclaim, the notice provided for in Subsection (a) of this section is not required, but the tender provided for by Subsection (d), Section 17.506 of this subchapter may be made within 60 days after service of the suit or counterclaim.

(c) A person against whom a suit is pending who does not receive written notice, as required by Subsection (a), may file a plea in abatement not later than the 30th day after the date the person files an original answer in the court in which the suit is pending. This subsection does not apply if Subsection (b) applies.

(d) The court shall abate the suit if the court, after a hearing, finds that the person is entitled to an abatement because notice was not provided as required by this section. A suit is automatically abated without the order of the court beginning on the 11th day after the date a plea in abatement is filed under Subsection (c) if the plea in abatement:

(1) is verified and alleges that the person against whom the suit is pending did not receive the written notice as required by Subsection (a); and

(2) is not controverted by an affidavit filed by the consumer before the 11th day after the date on which the plea in abatement is filed.

(e) An abatement under Subsection (d) continues until the 60th day after the date that written notice is served in compliance with Subsection (a).

7 *Hines v. Hash*, 843 S.W.2d 464, 469 (Tex. 1992); *Kyle v. Zepeda*, No. 01-11-00388-CV (Tex. App.—Houston [1st Dist.] May 21, 2013, no pet.) (mem. op.).

8 *Richardson v. Foster & Sear, L.L.P.*, 257 S.W.3d 782, 786 (Tex. App.—Fort Worth 2008, no pet.).

9 *Id.*

10 *In re Liberty Mut. Fire Ins. Co.*, No. 14–09–00876–CV (Tex. App.—Houston [14th Dist.] Apr. 27, 2010, orig. proceeding) (mem. op.).

11 Tex. Bus. & Com. Code § 17.45 (4).

12 Tex. Bus. & Com. Code § 17.45 (1), (2).

13 *Cameron v. Terrell & Garrett, Inc.*, 618 S.W. 2d 535, 539 (Tex. 1981).

14 *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 815 (Tex. 1997).

15 *Okland v. Travelocity.com, Inc.*, No. 2-08-260-CV (Tex. App.—Fort Worth June 18, 2009, pet. denied)(mem. op.); *see also Lukasik v. San Antonio Blue Haven Pools*, 21 S.W. 3d 394, 401 (Tex. App.—San Antonio 2009, no pet.)*; Bohls v. Oakes*, 75 S.W.3d 473, 479 (Tex. App.—San Antonio 2002, pet. denied).

16 Tex. Civ. Prac. & Rem. Code § 15.002.

17 Tex. Bus. & Com. Code § 17.56.
18 The elements of fraud are: (1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury. *In re FirstMerit Bank*, 52 S.W. 3d 749, 758 (Tex. 2001).
19 Tex. Bus. & Com. Code § 17.50 (a)(1)(B).
20 Tex. Bus. & Com. Code § 17.46(b).
21 *Pennington v. Singleton*, 606 S.W. 2d 682, 687 (Tex. 1980).
22 Judiciary & Civil Jurisprudence Committee Report, House Bill Analysis, *available at* https://capitol.texas.gov/tlodocs/84R/analysis/pdf/HB02573H.pdf#navpanes=0.
23 State Affairs Committee Report, House Bill Analysis, *available at* https://capitol.texas.gov/tlodocs/84R/analysis/pdf/HB02573S.pdf#navpanes=0.
24 *La Sara Grain Co. v. First Nat'l Bank of Mercedes*, 673 S.W.2d 558, 565 (Tex. 1984).
25 *Southwestern Bell Tel. Co. v. FDP Corp.*, 811 S.W.2d 572, 575-76 (Tex. 1991).
26 *Chastain v. Koonce*, 700 S.W.2d 579, 584 (Tex. 1985).
27 *See* Mary Dolores Guerra, *Lost in Translation:* Notario *Fraud–Immigration Fraud*, 26 J. Civil Rights & Econ. Development 23, 25-28 (2011); Travis B. Olsen, *Combating* Notario *Fraud" Locally*, 22 Berkeley La Raza L. J. 383, 385-388 (2012); Lori Rodriguez, Notarios Publicos *Exploit Name*, Houston Chronicle (Aug. 5, 2005).
28 *Latham v. Castillo*, 972 S.W.2d 66, 68-69 (Tex. 1998).
29 *See generally* richard m. Alderman, *The Lawyer's Guide to the Texas Deceptive Trade Practices Act* §10.4 (Matthew Bender 2017).
30 Tex. Gov't Code § 406.017.
31 *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 816 (Tex. 1997) ("Of course, foreseeability is not an element of producing cause under the DTPA.")
32 *Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 161 (Tex. 1995).
33 *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 46 (Tex. 2007).
34 *Arthur Andersen v. Perry Equipment Corp*., 945 S.W.2d at 816.
35 Tex. Bus. & Com. Code § 17.45 (11).
36 *Matheus v. Sasser*, 164 S.W.3d 453, 459 (Tex. App.—Fort Worth 2005, no pet.).
37 *Kish v. Van Note*, 692 S.W.2d 463, 466 (Tex. 1985).
38 Tex. Bus. & Com. Code § 17.45 (9).
39 901 S.W.2d 434, 444 (Tex. 1995).
40 *Id*.
41 Tex. Bus. & Com. Code § 17.50 (b)(1).
42 *Id.*
43 Tex. Bus. & Com. Code § 17.45 (13).
44 Tex. Bus. & Com. Code § 17.50 (d) ("Each consumer who prevails shall be awarded court costs and reasonable and necessary attorneys' fees.").
45 *See* Mark E. Steiner, *Will* El Apple *Today Keep Attorney's Fees Away?*, 19 J. Consumer & Com. L. 114 (2016).
46 Tex. Bus. & Com. Code § 17.50 (h).
47 *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 939 (Tex. 1980).
48 *McLeod v. Gyr*, 439 S.W. 3d 639 (Tex. App.—Dallas 2014, pet. denied).
49 *Id*. at 652.
50 *See, e,g., Avila v. State*, 252 S.W. 3d 632 (Tex. App.—Tyler 2008, no pet.); *Molano v. State*, 262 S.W.3d 554 (Tex. App.—Corpus Christi 2008, no pet.); *Thomas v. State*, 226 S.W.3d 697 (Tex. App.—Tyler 2008, pet dism'd).
51 *Avila v. State*, 252 S.W.3d at 636.
52 *Molano v. State*, 262 S.W.3d at 562-563.
53 *Thomas v. State*, 226 S.W.3d at 710-711.
54 *Avila v. State*, 252 S.W. 3d at 636.
55 *Id*. at 645.
56 *Unauthorized Practice Comm. v. Cortez*, 692 S.W.2d 47 (Tex. 1985).
57 *Id*. at 50.
58 Tex. Bus. & Com. Code § 17.49(c).
59 Tex. Gov't Code § 406.017.
60 Tex. Bus. & Com. Code § 17.565.
61 *Id.*
62 *Galindo v. Snoddy*, 415 S.W.3d 905, 910 (Tex. App.—Texarkana 2013, no pet.).
63 Tex. Civ. Prac. & Rem. Code § 16.004(4).
64 *Molano v. State*, 13-10-00477-CV (Tex. App.—Corpus Christi Aug. 18, 2011, no pet.) (mem. op.).
65 Tex. Gov't Code § 406.017 (a-1).
66 *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980) (defense of substantial performance doesn't apply to DTPA claim); *see also Weitzel v. Barnes*, 691 S.W. 2d 598, 599-600 (Tex. 1985) (parol evidence rule doesn't apply to DTPA misrepresentations).
67 *Gunn Infiniti, Inc. v. O'Byrne*, 996 S.W.2d 854 (Tex. 1999).
68 *Id*. at 856-857.
69 *Cruz v. Andrews Restoration, Inc*., 364 S.W.3d 817, 826 (Tex. 2012).
70 *Gamboa v. Alvarado*, 941 N.E.2d 1012, 1016-1017 (Ill. App. 2011).
71 *Enciso-Lopez v. Monteagudo*, No. 2010AP1519 (Wisc. Ct. App. June 1, 2011).
72 *Mendoza v. Ruesga*, 169 Cal. App. 4th 270, 282, 86 Cal. Rptr. 3d 610 (Cal. Ct. App. 2008).
73 *See* Claudia M. Cano, *Representing an Undocumented Plaintiff*, Univ. Tex. Car Crash Seminar 2-3 (2011).
74 *Republic Waste Services, Ltd. v. Martinez,* 335 S.W.3d 401, 408-09 (Tex. App.—Houston [1st Dist.] 2011, no pet.)*; Tyson Foods, Inc. v. Guzman*, 116 S.W.3d 233, 244 (Tex. App.—Tyler 2003, no writ); *Wal-Mart Stores, Inc. v. Cordova,* 56 S.W.2d 768, 770 n. 1 (Tex. App.—El Paso 1993, writ denied); *Comm. Std. Fire & Marine Co. v. Galindo*, 484 S.W.2d 635, 636 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.).
75 Tex. Gov't Code § 406.010.
76 To search for a notary's surety, *See* Notary Search, https://direct.sos.state.tx.us/notaries/NotarySearch.asp.
77 Directive No. 11072.1, Civil Immigration Enforcement Actions Inside Courtrooms, U.S. Immigration and Customs Enforcement (Jan. 10, 2018), *available at* https://www.ice.gov/factsheets/civil-immigration-enforcement-actions-courthouses-directive; ICE has suggested that it will "generally" avoid arrests in civil courtrooms. FAQ on Sensitive Locations and Courthouse Arrests, *available at* https://www.ice.gov/ero/enforcement/sensitive-loc ("ICE officers and agents will generally avoid enforcement actions in courthouses, or areas within courthouses, that are dedicated to non-criminal (e.g., family court, small claims court) proceedings."); *see also* Scott Martelle, *A new ICE directive limiting arrests in courthouses is a silver lining in a dark cloud*, Los Angeles Times (Feb. 1, 2018).

SCOTUS to Decide FDCPA Coverage of Non-Judicial Foreclosures

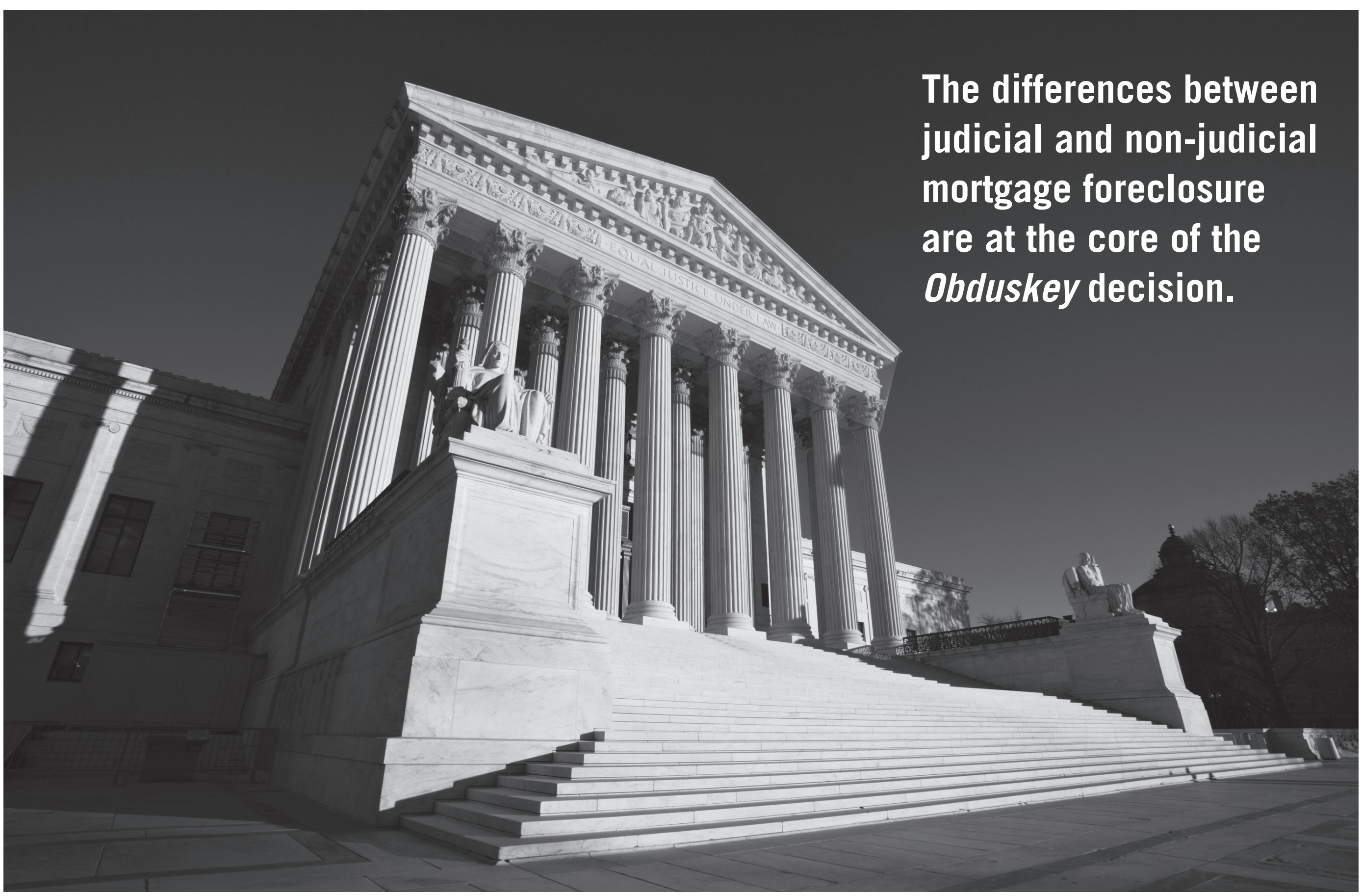
By Richard J. Rubin*

The Supreme Court will resolve a lower court split by deciding next term whether non-judicial foreclosures are within the type of debt collection practices regulated by the federal Fair Debt Collection Practices Act (FDCPA).[1] The Court granted certiorari to review the *Obduskey* opinion from the Tenth Circuit.[2]

The Tenth Circuit's Ruling

Obduskey ruled that a law firm pursuing non-judicial foreclosure did not meet the statutory definition of a "debt collector" because it was not seeking to recover money from the homeowner but only to recover and sell the secured property. Specifically, the court concluded, quoting from the statutory definition of a "debt,"[3] that "[b]ecause enforcing a security interest is not an attempt to collect money from the debtor, and the consumer has no 'obligation. . .to pay money,' non-judicial foreclosure is not covered under the FDCPA."[4]

The differences between judicial and non-judicial mortgage foreclosure are at the core of the *Obduskey* decision. All circuits have consistently held that judicial foreclosure constitutes debt collection and is, therefore, covered by the FDCPA.[5] The *Obduskey* opinion explained that non-judicial foreclosure "differs



from a judicial foreclosure in that the sale does not preserve to the trustee the right to collect any deficiency in the loan amount personally against the mortgagor. Colorado follows this general rule and allows a creditor to collect a deficiency only after the non-judicial foreclosure sale and through a separate action."[6]

The Tenth Circuit emphasized that its rationale centered on the absence of the collection of money and limited its ruling "to the facts of the case" by observing that the defendant, McCarthy law firm, never sought any payment from the homeowner, instead simply referenced in its introductory letter the amount owed and identified its client:

> Whether or not more aggressive collection efforts leveraging the threat of foreclosure into the payment of money constitute "debt collection" is left for another day.. .. In this case, however, the answer is clear—McCarthy did not demand payment nor use foreclosure as a threat to elicit payment. It sent only one letter notifying Mr. Obduskey that it was hired to commence foreclosure proceedings.[7]

Undermining this observation is the fact that the established FDCPA jurisprudence holds, as the *Obduskey* decision itself stated, that a specific or direct demand for payment is "just one of several factors" in determining whether a communication occurs in connection with the collection of a debt.[8] The court did not pursue this jurisprudence further and conspicuously did not address whether the law firm's letter, while "not itself a collection attempt," would "make such an attempt more likely to succeed."[9] Indeed, proof that an actual demand for payment is not essential to establish FDCPA coverage is that the applicable prong of the definition of a covered "debt collector" expressly reaches any person "who regularly collects or attempts to collect, *directly or indirectly*, debts owed or due. . .another."[10] Requiring an actual demand for payment would eliminate this statutory inclusion of those who "indirectly" collect or attempt to collect debts.[11] The *Obduskey* court in fact acknowledged that other Circuits "have expressed concern that if the FDCPA does not apply to non-judicial foreclosure proceedings, it would immunize debt secured by real property where foreclosure was used to collect the debt;" yet, its only answer to that concern was the quoted observation and the conclusory statement that the "mere act of enforcing a security interest through a non-judicial foreclosure proceeding does not fall under the FDCPA."[12]

The Split Among the Circuits

The Fourth and Sixth Circuits previously reached the opposite result from the Tenth Circuit.[13] These courts accordingly reject the Tenth Circuit's stated limited purpose of non-judicial foreclosure and narrow view of debt collection by recognizing that non-judicial foreclosure is simply one step in pursuing the ultimate goal of recovering the full amount owed. The Sixth Circuit's explanation of its reasoning succinctly captures the essence of the current split:

> In fact, *every* mortgage foreclosure, judicial or otherwise, is undertaken for the very purpose of obtaining payment on the underlying debt, either by persuasion (*i.e.,* forcing a settlement) or compulsion (*i.e.,* obtaining a judgment of foreclosure, selling the home at auction, and applying the proceeds from the sale to pay down the outstanding debt). . .[T]he existence of redemption rights and the potential for deficiency judgments demonstrate that the purpose of foreclosure is to obtain payment on the underlying home loan. Such remedies would not exist if foreclosure were not undertaken for the purpose of obtaining payment.[14]

The only other circuit court that has decided this question of non-judicial foreclosure FDCPA coverage is the Ninth Circuit, which foreshadowed the Tenth Circuit's ruling when it carved out a narrow exception limited solely to jurisdictions that prohibit any deficiency following a non-judicial foreclosure.[15] Even then, the bar against a later deficiency ignores the right of redemption and the practical effect of a pending foreclosure on a homeowner to bring the mortgage current or otherwise to make satisfactory payment arrangements, as well as the undeniable fact that the single ultimate purpose of every foreclosure is to pay the mortgage note, all as explained by other Circuits and further echoed by the vigorous dissent in the initial Ninth Circuit opinion.[16] The Ninth Circuit rule, while of course less drastic in scope and impact than *Obduskey*, still cannot be reconciled with the statutory language or with generally applicable established FDCPA jurisprudence.

The *Obduskey* court professed to be following the Ninth Circuit and specifically cited its jurisprudence for the proposition that "non-judicial foreclosure proceedings are not covered under the FDCPA."[17] However, the Tenth Circuit misapplied the Ninth Circuit precedent that it supposedly was following by parting ways with it in two important respects, thereby further showing why the Tenth Circuit's rule of complete exclusion is indefensible.

The Tenth Circuit misapplied the Ninth Circuit precedent that it supposedly was following by parting ways with it in two important respects.

First, the *Obduskey* court's explanation that Colorado law allowed a deficiency, but only "through a separate action" from the non-judicial foreclosure proceeding, ignored the fact that the linchpin of the Ninth Circuit rulings was their express reliance on the fact that California and Nevada law extinguished any right of the mortgagee to ever recover a deficiency by resorting to non-judicial foreclosure.[18] The Tenth Circuit's explanation of the differences between judicial and non-judicial foreclosure – that the latter purportedly "does not preserve" the right to pursue a deficiency – is belied by its own recognition that a deficiency is an integral part of the Colorado non-judicial foreclosure scheme where the next step is to file the "separate action" to recover the deficiency. The fact that another step may sometimes be required to obtain money from the homeowner merely highlights the reasons that every other Circuit opinion has concluded that non-judicial foreclosure is covered by the FDCPA under these circumstances. The *Obduskey* court's unqualified statement that the "Ninth Circuit. . .has held that non-judicial foreclosure proceedings are not covered under the FDCPA"[19] is an objectively false representation of the Ninth Circuit's holdings given the Ninth Circuit's emphasis that the result rested solely on the absolute legal bar to collecting a deficiency under state law.[20] This irreconcilable deviation from the Ninth Circuit's rulings leaves the Tenth Circuit alone among the federal appellate courts and has created a three-way split among the Circuits on non-judicial foreclosure coverage: the all-inclusive majority rule, the Tenth Circuit's rule of categorical exclusion, and the Ninth Circuit's middle ground of full coverage except where a deficiency is prohibited by law.

The second significant departure from the Ninth Circuit jurisprudence that the *Obduskey* court claimed to be following is that both seminal Ninth Circuit opinions carefully and explicitly held that non-judicial foreclosure, although not triggering all of the general protections of the FDCPA when a deficiency is prohibited, is still subject to § 1692f(6), the single restriction that

Congress adopted expressly to regulate "nonjudicial action to effect dispossession or disablement of property."[21] These Ninth Circuit opinions emphatically stated and explained that conclusion.[22] Nevertheless, the *Obduskey* court stated in a footnote with reference to § 1692f(6) that a "non-judicial foreclosure proceeding does not fit this bill."[23] Thus again the Tenth Circuit mischaracterized the position of the Ninth Circuit "that non-judicial foreclosure proceedings are not covered under the FDCPA": the Ninth Circuit expressly held that non-judicial foreclosure proceedings are always covered at least by §1692f(6).

An important reason that all circuits agree that judicial foreclosures fall within the ambit of the FDCPA is that Congress enacted one provision directed specifically at the practice.

The fact that the FDCPA includes the §1692f(6) prohibition against unlawfully or falsely "[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property " as one per se illustration of an "unfair or unconscionable means to collect or attempt to collect any debt" demonstrates that Congress necessarily understood that such non-judicial action is one path that debt collectors follow to collect a debt. The presence of § 1692f(6) therefore contradicts the Tenth Circuit's rationale that "enforcing a security interest is not an attempt to collect money from the debtor." Congress legislated the opposite conclusion. As a result, it is incumbent on the Supreme Court to preserve the § 1692f(6) violation and to integrate into its analysis the baseline reality that "nonjudicial action to effect dispossession" of property such as non-judicial foreclosure is a "means to collect or attempt to collect any debt."

An important reason that all circuits agree that judicial foreclosures fall within the ambit of the FDCPA is that Congress enacted one provision directed specifically at the practice, i.e. § 1692i(a)(1), which mandates that mortgage foreclosure actions must be filed in the local venue.[24] The same conclusion is true with regard to non-judicial foreclosure and § 1692f(6), as stated by the Fifth Circuit with regard to the venue provision when confronted by the converse argument from the foreclosing defendant there that judicial foreclosure was exempt from the FDCPA because only § 1692f(6) covered enforcement of security interests: "Unless we conclude that the FDCPA's regulation of the enforcement of security interests by those actors that meet the more general definition of 'debt collector' extends beyond the purview of § 1692f(6), then § 1692i(a)(1) would be without effect."[25]

Not surprisingly, these circuit opinions show that defendants engaged in judicial and non-judicial foreclosure each have argued that the FDCPA applies only to the other and that the inclusion of §§1692f(6) and 1692i(a)(1) disproves both arguments. Indeed, the most recent appellate court contribution to this debate, issued by the Second Circuit in July 2018, saw no basis on which to differentiate between judicial and non-judicial foreclosure. The court cited both groups of extant Circuit opinions when it "join[ed] those of our sister circuits that have concluded that a foreclosure action is an 'attempt to collect a debt' as defined by the FDCPA."[26] The sole delineation that the Second Circuit contemplated was between foreclosure efforts where a deficiency could or could not be legally available, highlighting the reasoning of the Ninth Circuit.[27] But because New York law "permits mortgagees to seek deficiency judgments," the Second Circuit concluded that it had "no occasion to decide here if we would follow" the Ninth Circuit's critical rationale.[28] The Supreme Court similarly will have no occasion to make that determination in view of Colorado's preservation of the right to seek a deficiency.

The Tenth Circuit failed to explain how its ruling could be reconciled with the singular purpose and effect of foreclosure, to wit, to recover payment of the mortgage debt, or with the inclusion of indirect collection efforts in the FDCPA's definition of a "debt collector." The Tenth Circuit's silence on these points might signal its disagreement with the seemingly universal recognition that one normal consequence of foreclosing is to elicit the debtor's voluntary payment of the mortgage; if so, then the court erred in affirming this dismissal on a motion to dismiss without permitting the plaintiff to develop a record to prove that fact. The complaint alleged that the foreclosing law firm engaged "regularly" in performing non-judicial foreclosures, and normal discovery would reveal the incidence of its foreclosure filings that ended with the homeowner paying the debt or bringing the mortgage current. On the current record, it would appear that the *Obduskey* court either rejected the plausibility of any such result or deemed such a possibility to be immaterial. Both options undercut the basis for its holding that non-judicial foreclosures do not constitute debt collection.

The Tenth Circuit supported its ruling with so-called "policy considerations," including "start[ing] with the assumptions that (1) in areas of traditional state regulation a federal statute has not supplanted state law unless Congress has made such an intention clear and manifest, and (2) that mortgage foreclosure is an essential state interest;" observing that "the word 'foreclosure' is not mentioned once in either the statute or the legislative history;" and "find[ing] no clear and manifest intention on the part of Congress to supplant state non-judicial foreclosure law."[29] For one thing, the Tenth Circuit performed the wrong word search when it stated that "foreclosure" is not mentioned in the FDCPA legislative history. Contradicting its unequivocal supposition that Congress showed no intent that the FDCPA would regulate this area, the legislative history unequivocally shows that Congress fully intended to put mortgage debt on an equal footing with other consumer debts when it referred to both "mortgage. . . loans" and "mortgage service companies" to illustrate two separate points (one of inclusion and one of exclusion) flowing from the definition of "debt collector."[30] To the extent that legislative history is relevant to clear up any uncertainty, as the Tenth Circuit apparently deemed appropriate to consult notwithstanding the presence

of both §§ 1692f(6) and 1692i(a)(1), the FDCPA Senate Report leaves no doubt that a person collecting mortgage debt, "directly or indirectly," is subject to coverage.

Nevertheless, taking the court at its word that judicial foreclosure is so substantially different from non-judicial foreclosure so as to support the conclusion that Congress intended to regulate one but not the other, logic would dictate that the opposite result would attain: it is an odd federal policy that would exempt non-judicial foreclosure but not judicial foreclosure when non-judicial foreclosure does not even provide the modicum of due process and state judicial oversight that at least may be available to constrain some aspects of the overreaching and abuse that can accompany mortgage foreclosure efforts. Why would Congress provide a full panoply of federal regulation and remedies when a foreclosing entity acts in a judicial foreclosure without a "present right to possession of the property claimed as collateral" but not when the same misconduct occurs in a non-judicial foreclosure? Section 1692f(6) renders that question nonsensical.

Finally, the Tenth Circuit's concern that FDCPA coverage of non-judicial foreclosure would impermissibly infringe on a traditional state interest is nothing less than a wholesale challenge to the Congressional determination to federalize consumer debt collection practices. Congress specifically recounted in its statutory Findings and Declaration of Purpose the extent of the injuries that are visited upon ordinary consumers and their families as a result of "the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." Further, Congress documented the cause of this unhappy state of affairs that necessitated federal intervention: "Existing laws and procedures for redressing these injuries are inadequate to protect consumers."[31] The Senate Report was blunt in explaining this finding: "The primary reason why debt collection abuse is so widespread is the lack of meaningful legislation on the State level."[32] Congress accordingly had ample reason to adopt the FDCPA and to act in order to achieve one of its express purposes: "to promote consistent State action to protect consumers against debt collection abuses."[33]

The Federal Trade Commission has shown that state judicial systems have continued over the decades since the FDCPA was enacted to often be a cause of the problem rather than meeting their obligation to be an antidote.[34] Non-judicial foreclosures are even more prone to abuse than judicial foreclosures in the absence of any direct state judicial oversight, and foreclosures in general present particular targets of opportunity for unscrupulous actors given the high dollar value of real estate and the extraordinary stakes involved for consumers faced with the prospect of losing their home. The "clear and manifest intention on the part of Congress to supplant state non-judicial foreclosure law" that troubled the Tenth Circuit is evident in the FDCPA's legislative history, the Congressional Findings, and the statutory text, including § 1692n, entitled Relation to State Law, which expressly protects state law to the extent that "the protection such law affords any consumer is greater than the protection provided by this subchapter" and preempts state laws that "are inconsistent with any provision of this subchapter." Congress has answered the Tenth Circuit's concerns, and therefore federalism has no legitimate place in resolving the current Circuit split.

Conclusion

For these reasons, the Tenth Circuit ruling cannot be justified. To summarize, first, as both a practical and legal matter, filing a foreclosure action, whether judicial or non-judicial, naturally and inevitably will lead to payment of the underlying mortgage debt from the sale of the property, if not from the homeowner. Second, whether that payment is the immediate result of the filing is immaterial since Congress made "indirectly" collecting a money debt an element of its definition of a covered "debt collector." And third, every precedent recognizes that the absence of a demand for payment is not dispositive to determine whether in context a communication or conduct is undertaken in connection with the collection of a debt. Other aspects of the *Obduskey* opinion also undermine its reasoning and render its specific holding untenable. But these three points should persuade the Supreme Court to conclude that a law firm engaged in foreclosure, whether judicial or non-judicial, is a "debt collector" whose conduct is subject to FDCPA regulation, irrespective of the availability of a deficiency. And where as here state law expressly permits a deficiency, the Tenth Circuit's treatment of the issue cannot stand.

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1 15 U.S.C. §§ 1692-1692p.
2 Obduskey v. McCarthy & Holthus LLP, cert. granted, ___S. Ct. ___ (2018); Obduskey v. Wells Fargo, 879 F.3d 1216 (10th Cir. 2018).
3 15 U.S.C. §1692a(5).
4 879 F.3d at 1221.
5 Cohen v. Rosicki, Rosicki & Assoc., P.C., ___F.3d ___ (2d Cir. July 2018); Kaymark v. Bank of Am., N.A., 783 F.3d 168, 174–79 (3d Cir. 2015); Glazer v. Chase Home Fin. LLC, 704 F.3d 453, 460–65 (6th Cir. 2013); Reese v. Ellis, Painter, Ratterree & Adams, LLP, 678 F.3d 1211, 1216–18 (11th Cir. 2012); Kaltenbach v. Richards, 464 F.3d 524, 527–29 (5th Cir. 2006).
6 879 F.3d at 1221 (internal quote and citations omitted).
7 879 F.3d at 1223.
8 *Id.*, quoting Gburek v. Litton Loan Servicing LP, 614 F.3d 380, 385 (7th Cir. 2010); see also Grden v. Leikin Ingber & Winters PC, 643 F.3d 169, 173 (6th Cir. 2011) ("So the question is where to draw the line. We draw it at the same place the Seventh Circuit did in *Gburek:* for a communication to be in connection with the collection of a debt, an animating purpose of the communication must be to induce payment by the debtor. . . Thus, to use the language of § 1692e, a letter that is not itself a collection attempt, but that aims to make such an attempt more likely to succeed, is one that has the requisite connection.").
9 *Id.*
10 15 U.S.C. § 1692a(6) (emphasis added).
11 The FDCPA uses the identical expansive language to define a "communication" (§ 1692a(2): "directly or indirectly" conveying information regarding a debt) in order to avoid the same kind of evasion regarding that key term as the foreclosing entities have been urging with regard to the definition of a "debt collector."
12 879 F.3d at 1223.
13 *See* Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373 (4th Cir. 2006); McCray v. Fed. Home Loan Mortg. Corp., 839 F.3d 354 (4th Cir. 2016); Glazer v. Chase Home Fin. LLC, 704 F.3d

453 (6th Cir. 2013).
14 Glazer v. Chase Home Fin. LLC, 704 F.3d 453, 461 (6th Cir. 2013) (emphasis in original); see also Cohen v. Rosicki, Rosicki & Associates, P.C., ___ F.3d ___ (2d Cir. 2018) (same).
15 Ho v. ReconTrust Co., NA, 858 F.3d 568 (9th Cir. 2017) (California law); Dowers v. Nationstar Mortg., LLC, 852 F.3d 964 (9th Cir. 2017) (Nevada law).
16 Ho v. ReconTrust Co., NA, 858 F.3d at 577-90 (Korman, J., dissenting).
17 879 F.3d at 1220.
18 Ho v. ReconTrust Co., NA, 858 F.3d at 571; Dowers, 852 F.3d at 970 n.2.
19 879 F.3d at 1220.
20 *See Dowers*, 852 F.3d at 970 n.2 ("In *Ho*, the inability under California law to obtain a deficiency judgment following non-judicial foreclosure was integral to our conclusion that ReconTrust's actions taken to facilitate a non-judicial foreclosure were not attempts to collect debt.").
21 § 1692f(6) states in full:

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: … (6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if--

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.

22 Ho v. ReconTrust Co., NA, 858 F.3d at 572-74; *Dowers*, 852 F.3d at 971.
23 879 F.3d at 1221 n.4.
24 *See e.g.* Cohen v. Rosicki, Rosicki & Associates, P.C., ___ F.3d ___ (2d Cir. 2018) ("Moreover, mortgage foreclosure is contemplated in another portion of the statute").
25 Kaltenbach v. Richards, 464 F.3d 524, 528 (5th Cir. 2006).
26 Cohen v. Rosicki, Rosicki & Associates, P.C., ___ F.3d ___, (2d Cir. 2018).
27 *Id.*
28 *Id.*
29 879 F.3d at 1222-23 (citations, internal quotes, and ellipsis omitted).
30 S. REP. No. 95-382, at 3-4, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1698.
31 § 1692(a) and (b).
32 S. REP. No. 95-382, at 2, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696.
33 § 1692(e).
34 *See* Repairing A Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration (FTC July 2010).

SWIFT Bank Heists and Article 4A

By Julie Andersen Hill[•]

The days when an enterprising bank robber could make a living with a ski mask and pistol are over. Thanks to security protocols implemented by banks, the typical bank hold-up nets only about $6,500 dollars.[1] Moreover, the FBI is incredibly good at tracking down these criminals. About half of these bank robbers are eventually identified by the FBI.[2]

But a new breed of bank robber has emerged. Computer hackers are capable of anonymously stealing billions of dollars through fraudulent wire transfers. Banks in Ecuador, Bangladesh, Vietnam, Nepal, India, Russia, and elsewhere have been attacked.[3]

When law enforcement is unsuccessful in tracking down the hackers, parties to the fraudulent transactions turn to the law to determine who must bear the loss. In the United States, responsibility for fraudulent wire transfers is governed by Article 4A of the Uniform Commercial Code. Because wire transfers are often routed through the United States or transferred pursuant to contracts with U.S. choice of law provisions, Article 4A will ultimately apportion the loss of at least some international cyber bank heists. This article explains how Article 4A works by considering the facts of a 2016 heist at Bangladesh Bank.[4]

I. The Bangladesh Bank Heist

In 2016, hackers infiltrated the computers at Bangladesh Bank, the central bank of the country of Bangladesh.[5] The hackers instructed the Federal Reserve Bank of New York ("New York Fed") to wire nearly $1 billion dollars from Bangladesh Bank's account to accounts in Sri Lanka and the Philippines.[6] Some of the payment orders were stopped, but $81 million in fraudulent wires were processed and lost.[7]

A. The Infiltration

The point of attack was the SWIFT system at Bangladesh Bank.[8] SWIFT (Society for Worldwide Interbank Financial Telecommunications) is a bank-to-bank electronic messaging system that is the primary means for communicating international wire transfers.[9] SWIFT processes billions of wire transfers every year.[10]

It is not clear exactly how the hackers got access to the SWIFT system at Bangladesh Bank. Some have suggested the hackers likely sent a scam e-mail to an employee at the bank. When the employee opened the e-mail, it installed a virus. The virus recorded keystrokes and captured passwords.[11] Other sources speculate that Bangladesh Bank employees may have intentionally compromised the computer system.[12]

At any rate, computer security was lax. The computers running the SWIFT system were connecting to the internet and had no firewall. In what might be considered the understatement of the year, one Bangladesh Bank official said: "There might have been a deficiency in the system in the SWIFT room."[13]

Once in the system, hackers installed software that would bypass some of the security features in SWIFT and make it more difficult for the bank to discover the theft. For example, the malware prevented the printer from automatically printing a copy of outgoing payment orders. [14]

B. The Attack

After installing the malware, the thieves waited until the bank closed for the day on Thursday, February 4, 2016 to attack. Then they logged onto the Bangladesh Bank system and begin sending payment orders – thirty-five in all. They instructed the New York Fed to send money from Bangladesh Bank's account there, to banks in other countries. The payment orders totaled nearly $1 billion.[15]

The New York Fed flagged thirty of the payment orders because it needed more information to confirm that the orders did not implicate sanctioned countries or people.[16] The New York Fed began sending messages to the Bangladesh Bank for clarification on these orders. However, the New York Fed had already processed five orders when it discovered the red flags and began investigating the payment orders.[17]

Once in the system, hackers installed software that would bypass some of the security features in SWIFT and make it more difficult for the bank to discover the theft.

One of the orders that went through sent $20 million to Pan Asian Bank in Sri Lanka. The Sri Lankan bank thought the payment seemed unusually large for a country the size of Sri Lanka. It also noticed that the name of the account holder appeared to be misspelled – it said "Fandation" instead of "Foundation." Pan Asian Bank held the funds while it checked with a correspondent bank to confirm that it had received the order correctly. This delay meant that Bangladesh Bank was ultimately able to recover the $20 million sent through that order.[18]

The other four orders, however, were successfully sent to Rizal Commercial Banking Corporation ("RCBC") in the Philippines.[19]

C. The Getaway

At RCBC, the money was deposited into accounts that had been set up with fake names and fake addresses. From the bank, the money was stuffed into bags and transferred to Philippine casinos. There "high rollers" gambled the money playing baccarat. This method of money laundering was effective. Investigators have been unable to trace the money any farther than the casinos. [20]

D. The Discovery

Meanwhile, bank officials were slow to notice and respond to the theft. The theft seems to have been timed to coincide with the weekend in Bangladesh. On Friday, an employee arrived at Bangladesh Bank and noticed no payment orders had printed. When he was unable to get the orders to print, he asked someone else to fix the printer, and he went home.[21]

On Saturday, the employee returned to Bangladesh Bank to find that the printer still was not working. This time when he tried to log onto the SWIFT system, he got an error message. Bangladesh Bank employees worked to fix the software. A few hours later they got the orders to print out and realized that something horrible had happened.[22]

With their SWIFT system not working, Bangladesh Bank employees looked for a way to contact the New York Fed. They found an e-mail address online and sent three messages stating that their account had been hacked. But that e-mail address at the Fed was not monitored on the weekend. They also called and sent a fax, but those communication channels similarly were not monitored over the weekend.[23]

By Monday the New York Fed was open and Bangladesh Bank had its SWIFT system operational again. Bangladesh Bank sent more than 100 SWIFT messages to RCBC in the Philippines,[24] but RCBC was closed because it was the Chinese New Year. By the time RCBC finally acted, the money was gone.[25]

II. Who Bears the Loss?

Who will bear this $81 million dollar loss? If the thieves and the money could be located they would be responsible for the crime. But the chances of catching the mastermind behind this attack seem slim and the chances of recovering the money even slimmer. Authorities suspect the North Korean government was ultimately responsible for the theft.[26]

The question then becomes who among the banks will bear the loss for the theft. The possibilities include:

- Bangladesh Bank – the purported "originator"[27] and "sender"[28] of the payment orders.
- The Federal Reserve Bank of New York – the "receiving bank" because it received the payment orders purportedly from Bangladesh Bank.[29]
- Rizal Commercial Bank Corporation in the Philippines – the "beneficiary's bank."[30]

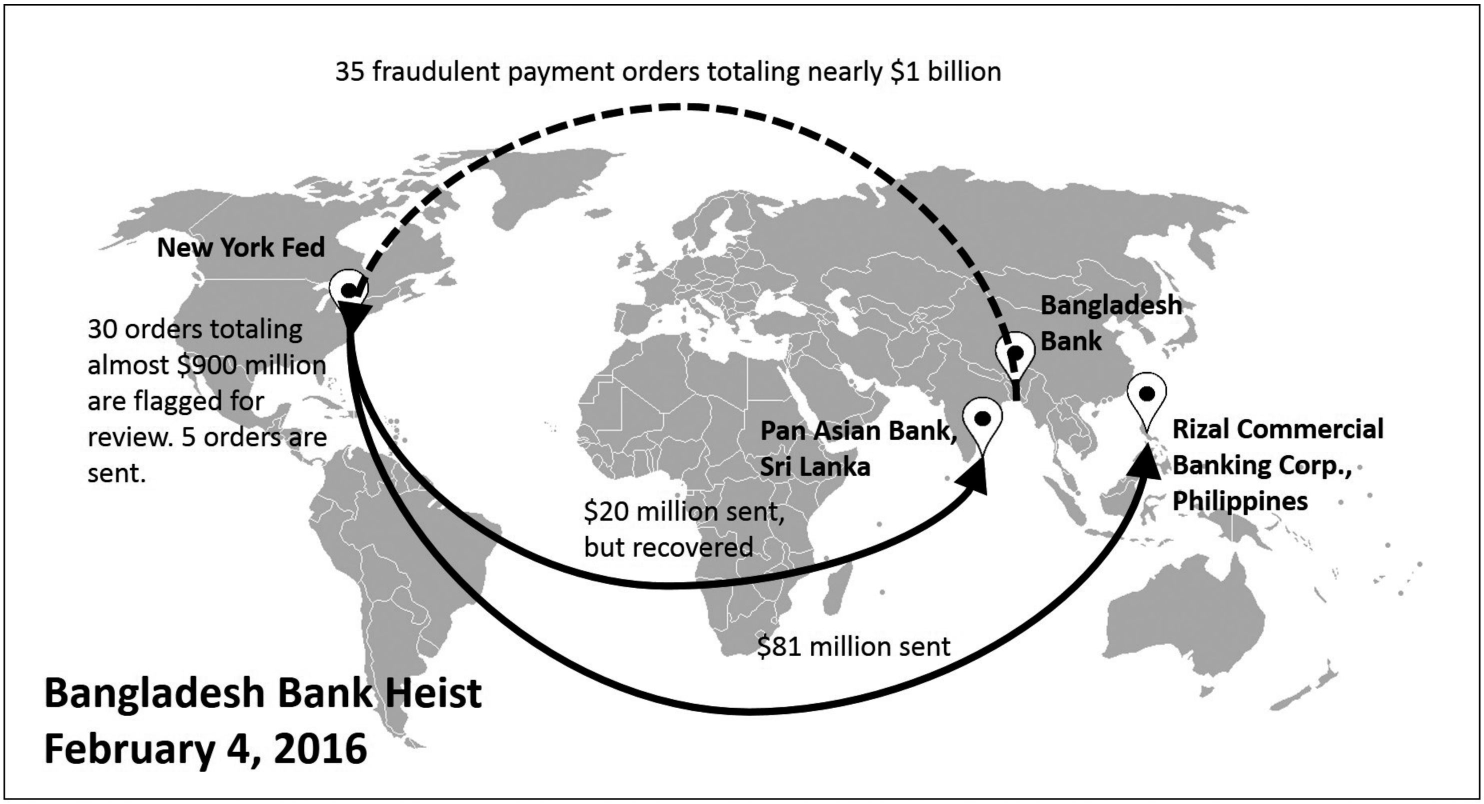
Deciding what law applies to multi-bank, multi-country wire transfers can be tricky.[31] There is, however, reason to believe U.S. law may apply in this and other similar cases. Here the money was sent from a bank in the United States. In addition, Bangladesh Bank signed an agreement with the New York Fed that likely provided that New York law governs wires from its account.[32] New York, like all U.S. states, has adopted Article 4A of the Uniform Commercial Code. [33]

A. The Receiving Bank

Initially, Bangladesh Bank announced that it planned to sue the New York Fed for processing the fraudulent payment orders.[34] The UCC rule for apportioning loss between a sender (here Bangladesh Bank) and a receiving bank (the New York Fed) provides:

> If a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to a security procedure, a payment order received by the receiving bank is effective as the order of the customer, whether or not authorized, if (i) the security procedure is a commercially reasonable method of providing security against unauthorized payment orders, and (ii) the bank proves that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer restricting acceptance of payment orders issued in the name of the customer. . . .[35]

Assuming Bangladesh Bank signed the standard agreement with the New York Fed, the Bank agreed to authentication of payment orders through SWIFT alone.[36] SWIFT authentication meets the



requirements of a security procedure.[37] This leaves two questions. First, is SWIFT authentication alone a "commercially reasonable" security procedure? Second, did the New York Fed act in "good faith" and in compliance with the security procedure?

1. Commercially Reasonable

Whether a security procedure is commercially reasonable is a question of law.[38] In deciding the question, a court should consider "the wishes of the customer . . . , the circumstances of the customer . . ., including the size, type, and frequency of payment orders normally issued by the customer to the bank, alternative security procedures offered to the customer, and security procedures in general use by customers and receiving banks similarly situated."[39]

One recent case considered whether SWIFT authentication alone was commercially reasonable under the UCC.[40] There hackers gained access to the SWIFT system of a bank in Ecuador. The hackers instructed Wells Fargo Bank to transfer $12 million from the Ecuadorian bank's account at Wells Fargo to various accounts in Hong Kong, Dubai, and elsewhere.[41] The Ecuadorian bank sued Wells Fargo in federal court in New York alleging that it was not commercially reasonable for Wells Fargo to authenticate the wires with SWIFT only.[42] Wells Fargo asked the court to dismiss the case for failure to state a claim.[43] The court did not dismiss the case noting the "fact-intensive nature of the commercial reasonableness inquiry."[44] Thus, the court left open the possibility that SWIFT authentication could be commercially unreasonable. But we do not know what the court would have decided if it had reached the merits of the claim. The parties reached a confidential settlement dismissing the case.[45]

If a court were to conclude that SWIFT alone is not a commercially reasonable method of providing security against unauthorized payment orders, the decision would have widespread ramifications. "The vast majority of both commercial banks and central banks around the world rely on SWIFT's secure communication channel and authentication protocols as their primary method of verifying the banking instructions received from counterparties are authentic."[46] Adding additional security procedures would be costly and would increase the time it takes to process payments. Senders of payment orders are unlikely to welcome the idea of slower, more expensive wire transfers.

For example, after the Bangladesh Bank heist, the New York Fed and Bangladesh Bank implemented additional security protocols including voice authentication to confirm authorization of payments. "Fed officials had to call one or two or three Bangladesh Bank officials whose voice samples were shared with the Fed."[47] Bangladesh Bank found the process "delayed genuine transfer instructions."[48] To free itself from the cumbersome process, Bangladesh Bank improved the security of its computers so it could once again send payments authenticated solely by SWIFT.[49]

This return to SWIFT authentication probably explains why Bangladesh Bank seems to have abandoned the idea of suing the New York Fed. It would seem inconsistent for the Bank to argue in court that SWIFT authentication is insufficient, after persuading the Fed to return to the practice of using only SWIFT authentication. [50]

2. Good Faith

The remaining question under UCC Article 4A-202 is whether the New York Fed "accepted the payment order in good faith and in compliance with the security procedure."[51] Good faith under the UCC means "honesty in fact and observance of reasonable commercial standards of fair dealing."[52] In the Bangladesh Bank heist case, the New York Fed followed the SWIFT authentication protocols[53] and there have been no press reports that the New York Fed was not honest. Thus, the question under the good faith prong of 4A-202 is whether the New York Fed followed reasonable commercial standards in processing the transactions.

This is technically a different question than the previously addressed question of whether the security procedure itself was commercially reasonable.[54] As the United States Court of Appeals for the Eighth Circuit has explained:

> While the commercial reasonableness inquiry concerns the adequacy of a bank's security procedures, the objective good faith inquiry concerns a bank's acceptance of payment orders in accordance with those security procedures. In other words, technical compliance with a security procedure is not enough under Article 4A; instead, as the above-quoted materials indicate, the bank must abide by its procedures in a way that reflects the parties' reasonable expectations as to how those procedures will operate.[55]

Nevertheless, in cases where the receiving bank's authorization protocol is automated[56] and "there is no plausible allegation that the authorizing bank failed to adhere to the agreed-upon security procedure . . .[,] the two inquiries largely collapse."[57] Because the SWIFT system is largely automated, in most cases resulting from a hack into the sender's SWIFT system, the receiving bank will be able to show that it acted in good faith. This may be another reason Bangladesh Bank ultimately decided not to sue the New York Fed.[58]

B. The Beneficiary Bank

Bangladesh Bank, however, is still exploring its claims against the Philippine bank RCBC. Bangladesh Bank has threatened to sue RCBC in the United States[59] and is reportedly considering an out-of-court settlement.[60] RCBC has repeatedly denied any responsibility to Bangladesh Bank,[61] but it may also be contemplating a settlement.[62] The main point of contention appears to be whether RCBC should have cancelled the payment orders before allowing the thieves to withdraw the money from the bank.[63]

Under the UCC "a communication by the sender cancelling . . . a payment order is effective to cancel . . . the order if notice of the communication is received at a time and in a manner affording the receiving bank a reasonable opportunity to act on the communication before the bank accepts the payment order."[64] If, however, the receiving bank has already accepted a payment order, "cancellation . . . is not effective unless the receiving bank agrees."[65]

Delayed detection often means the money will have disappeared forever.

Thus the preliminary question is whether the beneficiary bank accepted the payment order before the order was cancelled. Under the UCC, there are several ways that a beneficiary bank can accept a payment order. For example, a beneficiary bank accepts the order when "(i) the beneficiary is notified of the right to withdraw the credit, (ii) the bank lawfully applies the credit to a debt of the beneficiary, or (iii) funds with respect to the order are otherwise made available to the beneficiary by the bank." [66]

Press reports in the Bangladesh Bank heist leave some question as to whether RCBC received the cancellation orders in enough time to act before it accepted the orders. Although money was withdrawn from RCBC on Tuesday, it could have been in the beneficiary accounts and available for withdrawal on Monday or before. It is also difficult to determine when RCBC can be deemed to have received requests to cancel the payment. RCBC was closed on Monday and the messages it received on Tuesday were not sent as urgent. RCBC claims its employees did not read the orders until after the money had already been withdrawn.[67]

If a court found that RCBC received the cancellation messages in enough time to act before accepting the orders, then RCBC would be responsible for the loss under the UCC. If, however, RCBC had already accepted the payment orders, RCBC would have to agree to cancel the wires.

If RCBC had already accepted the payment orders, it is not hard to see why it did not agree to cancel the orders. Under the UCC, if a beneficiary bank agrees to cancel an order, the beneficiary bank can recover the money from the beneficiary "to the extent allowed by the law governing mistake and restitution."[68] Of course, to recover from the beneficiary, RCBC would have to find the beneficiary and the money. So far the best law enforcement on two continents has been unsuccessfully in tracking down the thieves or the money. Most banks would not want to sign up for that task.

III. Conclusion

In sum, it is unlikely that UCC Article 4A will help most originators who find their SWIFT systems have been hacked. Originators of payment orders should carefully consider security procedures used to authenticate payment orders. If an originator agrees to a payment order, it may be an uphill battle to later convince a court that the agreed upon procedure was commercially unreasonable. Originators should also vigilantly watch for evidence that their payment systems may have been compromised. If fraudulent orders are detected early, the originator may be able to cancel the order and recover the money. Delayed detection often means the money will have disappeared forever.

* *©Julie Andersen Hill, Alton C. and Cecile Cunningham Craig Professor of Law, University of Alabama.*

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1 Justin Jouvenal, *A Quintessentially American Crime Declines: Robbing Banks Doesn't Pay as It Used To*, Wash. Post, Oct. 6, 2016, *available at* 2016 WLNR 30691475.

2 U.S. Dep't of Just. & Fed. Bureau of Investigation, Bank Crime Statistics (2016), *available at* https://www.fbi.gov/file-repository/bank-crime-statistics-2016.pdf/view.

3 *See* Tom Bergin & Jim Finkle, *SWIFT Confirms New Cyber Thefts, Hacking Tactics*, Reuters, Dec. 12, 2016, https://www.reuters.com/article/us-usa-cyber-swift-exclusive-idUSKBN1412NT (Bangladesh, Ecuador, and Vietnam); Gopal Sharma, *Nepal Recovers "Most" of the Money Hacked from Bank*, Reuters, Nov. 7, 2017, https://www.reuters.com/article/us-cyber-heist-nepal/nepal-recovers-most-of-the-money-hacked-from-bank-idUSKBN1D72JP; Devidutta Tripathy, *India's City Union Bank Says Suffered Cyber Hack Via SWIFT System*, Reuters, Feb. 18, 2018, https://www.reuters.com/article/us-city-union-bank-swift/indias-city-union-bank-ceo-says-suffered-cyber-hack-via-swift-system-idUSKCN1G20AF; Jack Stubbs, *Hackers Stole $6 Million from Russian Bank Via SWIFT System: Central Bank*, Reuters, Feb. 16, 2018, https://www.reuters.com/article/us-russia-cyber-swift/hackers-stole-6-million-from-russian-bank-via-swift-system-central-bank-idUSKCN1G00DV; Joshua Hammer, *The Billion-Dollar Bank Job*, N.Y Times, May 6, 2018, at MM43 (stating that banks in Taiwan and Poland had also been targeted by cyber attacks).

4 This article is not meant as a definitive evaluation of legal liability for the Bangladesh Bank heist. Because investigations into the heist are still ongoing and no claims have been litigated, determining liability now would premature. This article seeks only to use publicly released information about the Bangladesh Bank heist to illustrate the operation of UCC Article 4A.

5 Hammer, *supra* note 3.

6 Raju Gopalakrishnan & Manuel Mogato, B*angladesh Bank Of-*

ficial's Computer Was Hacked to Carry Out $81 Million Heist: Diplomat, Reuters, May 19, 2016, https://www.reuters.com/article/us-cyber-heist-philippines/bangladesh-bank-officials-computer-was-hacked-to-carry-out-81-million-heist-diplomat-idUSKCN0YA0CH.

7 *Id*.

8 Jim Finkle, *Bangladesh Bank Hackers Compromised SWIFT Software, Warning Issued*, Reuters, Apr. 25, 2016, https://www.reuters.com/article/us-usa-nyfed-bangladesh-malware-exclusiv/bangladesh-bank-hackers-compromised-swift-software-warning-issued-idUSKCN0XM0DR.

9 Ronald J. Mann, Payment Systems and Other Financial Transactions 213 (6th ed. 2016)("SWIFT (the Society for Worldwide Interbank Financial Telecommunications) is an automated international system for sending funds-transfer messages that is the predominant method for completing international transfers that are not denominated in dollars.").

10 SWIFT, Annual Review 4 (2017), *available at* https://www.swift.com/file/51966/download?token=0UogFJo6.

11 Chelsea Allison, *Anatomy of a Bank Heist*, FIN, June 1, 2018, https://fin.plaid.com/articles/anatomy-of-a-bank-heist; Victor Mallet & Avantika Chilkoti, *How Cyber Criminals Targeted Almost $1bn in Bangladesh Bank Heist*, Fin. Times, Mar. 18, 2016, https://www.ft.com/content/39ec1e84-ec45-11e5-bb79-2303682345c8.

12 Devlin Barrett & Kate O'Keeffe, *FBI Suspects Insider Involvement in $82 Million Bangladesh Central-Bank Heist*, Wall St. J., May 11, 2016, at C1.

13 Serajul Quadir, *Malware Suspected in Bangladesh Bank Heist: Officials*, Reuters, Mar. 11, 2016, https://www.reuters.com/article/us-usa-fed-bangladesh-idUSKCN0XI1UO.

14 Finkle, *supra* note 8 (noting that the software could also "manipulate account balances on logs to prevent the heist from being discovered until after the funds had been laundered").

15 Krishna N. Das & Jonathan Spicer, *How the New York Fed Fumbled Over the Bangladesh Bank Cyber-Heist*, Reuters, July 21, 2016, https://www.reuters.com/investigates/special-report/cyber-heist-federal/.

16 *Id*. (noting that the "Jupiter" name of the Philippine bank branch raised a red flag because an unrelated oil tanker named Jupiter was under trade sanctions with Iran).

17 Letter from Thomas C. Baxter, Jr., Gen. Couns. and Executive V.P., Fed. Res. Bank of New York, to Carolyn B. Maloney, Representative, U.S. Congress, Apr. 14, 2016 [hereinafter Baxter Letter] (discussing the 30 orders held for further investigation).

18 Serajul Quadir, *How a Hacker's Typo Helped Stop a Billion Dollar Bank Heist*, Reuters, Mar. 10, 2016, https://www.reuters.com/article/us-usa-fed-bangladesh-typo-insight/how-a-hackers-typo-helped-stop-a-billion-dollar-bank-heist-idUSKCN0WC0TC.

19 Hammer, *supra* note 3.

20 *See id*.; Alan Katz & Wenxin Fan, *A Baccarat Binge Helped Launder the World's Biggest Cyberheist*, Bloomberg, Aug. 3, 2017, https://www.bloomberg.com/news/features/2017-08-03/a-baccarat-binge-helped-launder-the-world-s-biggest-cyberheist.

21 *See* Das & Spicer, *supra* note 15.

22 *See id*.

23 *See id*.

24 *See* Allison, *supra* note 11.

25 *See* Krishna N. Das & Jonathan Spicer, *How Millions from the Bangladesh Bank Heist Disappeared*, Reuters, July 21, 2016, https://www.reuters.com/article/us-cyber-heist-philippines/how-millions-from-the-bangladesh-bank-heist-disappeared-idUSKCN1011AT.

26 Karen Lema, *Bangladesh Bank Heist Was "State-Sponsored": U.S. Official*, Reuters, Mar. 29, 2017, https://www.reuters.com/article/cyber-heist-philippines/bangladesh-bank-heist-was-state-sponsored-u-s-official-idUSL2N1H61ZH.

27 U.C.C. § 4A-104(c) (Am. Law Inst. & Unif. Law Comm'n 2012) ("'Originator' means the sender of the first payment order in a funds transfer.").

28 *Id*. § 4A-103(a)(5) ("'Sender' means the person giving the instruction to the receiving bank.").

29 *Id*. § 4A-103(a)(4) ("'Receiving bank' means the bank to which the sender's instruction is addressed."). The Federal Reserve is also the "'[o]riginator's bank' mean[ing] . . . the receiving bank to which the payment order of the originator is issued [when] the originator is not a bank.").

30 *Id*. § 4A-103(a)(3) ("'Beneficiary's bank' means the bank identified in a payment order in which an account of the beneficiary is to be credited pursuant to the order or which otherwise is to make payment to the beneficiary if the order does not provide for payment to an account.").

31 *See generally* John S. Santa Lucia, Comment, *Exchange Losses from International Electronic Funds Transfers: Time to Unify the Law*, 8 Nw. J. Int'l L & Bus. 759 (1988) (noting that SWIFT transfers are not subject to any international law).

32 In response to a Freedom of Information Act request, the New York Fed released its "standard account agreement template for accounts maintained at the New York Fed for foreign central banks and monetary authorities." Statement, Fed. Res. Bank of New York, New York Fed Responds to Freedom of Information Request (Aug. 11, 2016), *available at* https://www.newyorkfed.org/newsevents/statements/2016/foia-cbias. The agreement states:

> Notwithstanding any other provision of this Agreement, the Reserve Bank is only liable for acting on an unauthorized funds transfer instruction if the Reserve Bank fails to comply with the agreed-upon security procedure used to authenticate such instruction or, when acting on such instruction, fails to act under principles of good faith as defined in Article 4A of the Uniform Commercial Code of the State of New York.

Account Agreement Between the Federal Reserve Bank of New York and [Name of Organization] (Aug. 11, 2016), *available at* https://www.newyorkfed.org/medialibrary/media/newsevents/statements/2016/foia-cbias.pdf [hereinafter Standard Foreign Central Bank Contract]. The agreement further provides that "the rights and obligations described herein or arising out of this Agreement will be governed by the Federal law of the United States of America and, in the absence of controlling Federal law, in accordance with the laws of the State of New York." *Id*.

33 Kathleen Patchel, et al., *The Uniform Commercial Code Survey: Introduction*, 54 Bus. Law. 1827, 1829 (1999).

34 Serajul Quadir, *Bangladesh Bank Weighs Lawsuit Against NY Fed Over Hack*, Reuters, Mar. 22, 2016, https://www.reuters.com/article/us-usa-fed-bangladesh/bangladesh-central-bank-weighs-lawsuit-against-ny-fed-over-cyber-heist-idUSKCN0WO2JQ.

35 U.C.C. § 4A-202(b).

36 The standard agreement states that the account holder agrees to use "the S.W.I.F.T. authentication protocols then in effect or, if applicable, the other authentication procedures specified in the Terms of Service as a security procedure for the authentication of payment or other instructions." Standard Foreign Central Bank Contract, *supra* note 32. There are no indications that Bangladesh Bank had agreed to other security procedures through a separate Terms of Service agreement.

37 U.C.C. § 4A-201 ("'Security procedure' means a procedure established by agreement of a customer and a receiving bank for

the purpose of . . . verifying that a payment order or communication amending or cancelling a payment order is that of the customer . . . .").
38 *Id*. § 4A-202(c).
39 *Id*.
40 Banco del Austro, S.A. v. Wells Fargo Bank, N.A., 215 F. Supp. 3d 302 (S.D.N.Y. 2016).
41 Clare Baldwin & Nathan Layne, *In Ecuador Cyber Heist, Thieves Moved $9 Million to 23 Hong Kong Firms*, Reuters, May 25, 2016, https://www.reuters.com/article/us-cyber-heist-hongkong-exclusive-idUSKCN0YG2W9; Tom Bergin & Nathan Layne, *Special Report: Cyber Thieves Exploit Banks' Faith in SWIFT Transfer Network*, Reuters, May 20, 2016, https://www.reuters.com/article/cyber-heist-swift/special-report-cyber-thieves-exploit-banks-faith-in-swift-transfer-network-idUSL2N18H04S.
42 *Banco del Austro, S.A.*, 215 F. Supp. 3d at 305-06.
43 *Id*. at 303.
44 *Id*. at 306.
45 Jonathan Spicer & Ruma Paul, *Bangladesh Eyes Settlement in U.S. Cyber Heist Suit Ahead of Its Own Case*, Reuters, Apr. 16, 2018, https://www.reuters.com/article/us-cyber-heist-bangladesh/bangladesh-eyes-settlement-in-u-s-cyber-heist-suit-ahead-of-its-own-case-idUSKBN1HN1MZ.
46 Baxter Letter, *supra* note 17.
47 Krishna N. Das & Serajul Quadir, *NY Fed, Bangladesh Central Bank to Resume Normal Money Transfers: Sources*, Reuters, Aug. 18, 2016, https://www.reuters.com/article/us-cyber-heist-bangladesh/ny-fed-bangladesh-central-bank-to-resume-normal-money-transfers-sources-idUSKCN10T0VS.
48 *Id*.
49 *Id*.
50 *Cf*. Serajul Quadir & Jonathan Spicer, *In a Shift, Bangladesh Bank Says No Plans to Sue Fed, SWIFT*, Reuters, Aug. 16, 2016, https://www.reuters.com/article/us-cyber-heist-bangladesh/in-a-shift-bangladesh-bank-says-no-plans-to-sue-fed-swift-idUSKCN10R0OG (reporting that Bangladesh Bank officials did not plan to sue the New York Fed).
51 U.C.C. § 4A-202(b) (Am. Law Inst. & Unif. Law Comm'n 2012).
52 U.C.C. § 1-201(b)(2) (Am. Law Inst. & Unif. Law Comm'n 2001).
53 Allision, *supra* note 11 (quoting the New York Fed as stating that "[t]he payment instructions in question were fully authenticated by the Swift messaging system in accordance with standard authentication protocols").
54 Banco del Austro, S.A. v. Wells Fargo Bank, N.A., 215 F. Supp. 3d 302, 305 (S.D.N.Y. 2016)("The court must assess whether the agreed-upon security procedure was commercially reasonable *and* whether the authorizing bank's use of that procedure to authenticate the transfers at issue comported with reasonable commercial standards of fair dealing.).
55 Choice Escrow & Land Title LLC v. Bancorp South Bank, 754 F.3d 611, 623 (8th Cir. 2014).
56 *Id*. The court explained:

> Where . . . a bank's security procedures do not depend on the judgment or discretion of its employees, the scope of the good-faith inquiry under Article 4A is correspondingly narrow. The automation of agreed-upon procedures generally ensures that those procedures will operate in a way that is consistent with the customer's expectations, as long as the procedures do not "unreasonably vary from general banking usage"—in other words, as long as they are commercially reasonable.

Id.
57 *Banco del Austro, S.A.*, 215 F. Supp. 3d at 305.
58 *Cf*. Quadir & Spicer, *supra* note 49 (reporting that Bangladesh Bank would not sue the New York Fed but not providing any reasons for that decision).
59 Ruma Paul, *Bangladesh to Sue Manila Bank Over $81 Million Heist*, Reuters, Feb. 7, 2018, https://www.reuters.com/article/us-cyber-heist-bangladesh/bangladesh-to-sue-manila-bank-over-81-million-heist-idUSKBN1FR1QV.
60 *Bangladesh Open to Out-of-Court Settlement Over $81 Million Cyber Heist*, Reuters, May 3, 2018, https://www.reuters.com/article/us-cyber-heist-bangladesh/bangladesh-open-to-out-of-court-settlement-over-81-million-cyber-heist-idUSKBN1I4218.
61 *See, e.g.*, Spicer & Paul, *supra* note 45 ("There is no act attributable to RCBC which caused the loss or the theft from Bangladesh Bank. . . . We reiterate that RCBC was merely a beneficiary bank, meaning, the payment instructions which are alleged to have been the result of hacking were not executed by it.").
62 *See Bangladesh Open to Out-of-Court Settlement Over $81 Million Cyber Heist, supra* note 60 (reporting that a senior official at Bangladesh Bank said "[t]here is an option before us to settle the issue out of court"); Spicer & Paul, *supra* note 45 (quoting an attorney who noted that given the uncertainty in the applicable law there are an "awful lot of reasons for people to settle").
63 Krishna N. Das et al., *Bangladesh Officials Visit Manila to Seek Recovery of Bank Heist Money*, Reuters, Aug. 1, 2016, https://www.reuters.com/article/us-cyber-heist-bangladesh-philippines-ex/exclusive-bangladesh-officials-visit-manila-to-seek-recovery-of-bank-heist-money-idUSKCN10D0B5 ("Bangladesh Bank is relying on internal RCBC documents to buttress its assertion that the Filipino bank's Jupiter Street branch in Manila . . . delayed acting on requests from RCBC's head office to freeze the funds on Feb. 9, said one of the sources in Dhaka.").
64 U.C.C. § 4A-211(b) (Am. Law Inst. & Unif. Law Comm'n 2012).
65 *Id*. § 4A-211(c). Cancellation of an accepted payment order is also allowed if "a funds-transfer system rule allows cancellation . . . without agreement of the bank." *Id*. There does not appear to be a funds-transfer system cancellation rule applicable to the Bangladesh Bank payment orders.
66 *Id*. §§ 4A-209(b)(1), 4A-205(a). Acceptance also occurs when the beneficiary bank receives payment for the order from the sender or on the funds transfer day following the payment date if the beneficiary bank has access to money from the sender to cover the payment order. *See id*. § 4A-209(2)-(3).
67 *Bangladesh Bank Fund Heist: Stop Payment Orders from Bangladesh Bank "Vague": RCBC*, The Daily Star (Dhaka, Bangladesh), Apr. 12, 2016, https://www.thedailystar.net/business/stop-payment-orders-bangladesh-vague-rcbc-1208086.
68 U.C.C. § 4A-211(c)(2).

Consumer News Alert Recent Decisions

Since 2006, the Center for Consumer Law has published the "Consumer News Alert." This short newsletter contains everything from consumer tips and scam alerts, to shopping hints and financial calculators. It also has a section just for attorneys highlighting recent decisions. The alert is delivered by email three times a week. Below is a listing of some of the cases discussed during the past few months. If a link does not work, it may be necessary to cut and paste it to your browser. To subscribe and begin receiving your free copy of the Consumer News Alert in your mailbox, visit www.peopleslawyer.net.

US SUPREME COURT

Supreme Court upholds American Express credit card rules. In a five to four ruling, the Supreme Court said Amex rules regarding its services for merchants do not violate federal antitrust law. The case centered on the fees credit card companies charge retailers for processing transactions. American Express has a policy of preventing retailers from offering customers incentives to pay with cheaper cards. Amex does not allow merchants to offer promotions or discounts on rival cards that charge them lower fees. The government argued that the practice sticks merchants with higher fees for Amex transactions, which are passed on to consumers whether or not an Amex card is used. The Court said government antitrust enforcers were unable to meet their burden of proving that the AmEx anti-steering rules harmed consumers. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).
https://www.supremecourt.gov/opinions/17pdf/16-1454_5h26.pdf

FEDERAL CIRCUIT COURTS

Hyperlink is too inconspicuous to compel arbitration. The First Circuit reversed an order compelling arbitration in a putative class action, finding that Uber could not enforce its terms of service against the plaintiffs because the hyperlinks to their agreements were inconspicuous.

The court noted that a contract-formation dispute might have been avoided altogether if Uber had used "a common method of conspicuously informing users of the existence and location of terms and conditions: requiring users to click a box stating that they agree to a set of terms, often provided by a hyperlink, before continuing to the next screen." *Cullilane v. Uber Techs., Inc.*, 893 F.3d 53 (1st Cir. 2018).
https://law.justia.com/cases/federal/appellate-courts/ca1/16-2023/16-2023-2018-06-25.html

Uber arbitration agreement not enforceable. A three-judge panel in the First Circuit Court of Appeals found that the arbitration clause in the Uber driver app was not enforceable. The court stated, "Because the Plaintiffs were not reasonably notified of the terms of the Agreement, they did not provide their unambiguous assent to those terms. We therefore find that Uber has failed to carry its burden on its motion to compel arbitration." *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53 (1st Cir. 2018).
http://media.ca1.uscourts.gov/pdf.opinions/16-2023P-01A.pdf

Debt collector engages in unfair or unconscionable litigation conduct in violation of FDCPA when it in bad faith unduly prolongs legal proceedings or requires a consumer to appear at an unnecessary hearing. The Second Circuit held the collector violated sections 1692e

and 1692f based on the false statements made in its affirmation, and its objection to plaintiff's exemption claim when it allegedly knew there was no legally sufficient basis to do so. *Arias v. Gutman, Mintz, Baker & Sonnenfeldt LLP*, 875 F.3d 128 (2d Cir. 2017).
https://law.justia.com/cases/federal/appellate-courts/ca2/16-2165/16-2165-2017-11-14.html

Gas company that gave discount on bank credit card cannot compel arbitration. The Third Circuit issued a split decision refusing to let Sunoco Inc. force arbitration in a credit card customer's proposed class action over an allegedly broken promise for rewards at gas stations, saying in the published ruling Sunoco was not even part of the card contract.

Sunoco contended, among other things, that because it was central in marketing the card with Citi, it should be allowed to compel arbitration under that contract. And White's decision to leave Citi out of the proposed class action over the rewards program was a strategic one to keep the case in court, the fuel company said. But the majority rejected those arguments, finding White's claims were about Sunoco's alleged broken promise for discounts, not about the credit card itself, according to Tuesday's decision. *Donald White v. Sunoco Inc.*, 870 F.3d 257 (3d Cir. 2017).
https://law.justia.com/cases/federal/appellate-courts/ca3/16-2808/16-2808-2017-09-05.html

Debt buyer is a debt collector under FDCPA. The Third Circuit reviewed the Supreme Court decision in *Henson v. Santander Consumer USA Inc.,* 137 S. Ct. 1718 (2017), and held that a debt buyer may be a debt collector under the FDCPA if it meets the "principal purpose" definition. *Tepper v. Amos Fin., LLC*, ___ F.3d ___ (3d Cir. 2018).
https://images.law.com/contrib/content/uploads/documents/402/24499/Tepper-v.-Amos-Financial.pdf

Unpaid tolls are not a debt under FDCPA. The Third Circuit ruled that a lower court was right to conclude that unpaid highway tolls are not a type of debt that can support a claim under the Fair Debt Collection Practices Act The court affirmed the dismissal of a lawsuit against an E-ZPass toll debt collector whose recovery letters allegedly violated a driver's privacy. *St. Pierre v. Retrieval-Masters Creditors Bureau Inc.*, ___ F.3d ___ (3d Cir. 2018).
https://law.justia.com/cases/federal/appellate-courts/ca3/17-1731/17-1731-2018-08-07.html

Fifth Circuit finds an attorney is a debt collector under FDCPA, and awards $101,000 in attorney's fees to consumer under FDCPA. Consumer sued attorney collecting a debt for a management company. The attorney argued that because he owned the management company, he was a creditor, not a debt collector. The court held that his "creditor-by-proxy argument lacks support in the law and defies logic." Under Texas law, the management company, and the law firm are distinct legal personalities. The court also affirmed the award of $1,000 in statutory damages and $101,000 in attorney's fees. *Shirley Infante v. Law Office of Joseph Onwuteaka, P.C.*, ___ F.3d ___ (5th Cir. 2018)
http://www.ca5.uscourts.gov/opinions/unpub/17/17-41071.0.pdf

Class action that basically awarded only fees to counsel is dismissed. A class action was filed against Subway, alleging its footlong sandwich is sometimes not 12" long. Subway argued its sandwiches were rarely les than 12" long, and agreed to implement measures to ensure, to the extent practicable, that all footlong sandwiches are at least 12 inches long. The parties agreed to cap class counsel's fees at $525,000. The district court preliminarily approved the settlement. The Seventh Circuit reversed. A class action that "seeks only worthless benefits for the class" and "yields [only] fees for class counsel" is "no better than a racket" and "should be dismissed out of hand." *In re Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, 869 F.3d 551 (7th Cir. 2018).
https://caselaw.findlaw.com/us-7th-circuit/1872079.html

Fees awarded to objector in a class action. The Seventh Circuit ordered a district court judge on to award fees to an objector in a class action against Southwest Airlines over canceled drink vouchers, saying the fees are warranted because the objector improved the class's recovery. "Objectors who add value to a class settlement may be compensated for their efforts," said Circuit Judge David Hamilton, writing for the unanimous panel. "Unless the parties expressly agree otherwise, settlement agreements should not be read to bar attorney fees for objectors who have added genuine value." *In re Southwest Airlines Voucher Litig.*, ___ F.3d ___ (7th Cir. 2018).
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2018/D08-02/C:17-3541:J:Hamilton:aut:T:fnOp:N:2196280:S:0

Ninth Circuit panel affirms the district court's order approving a cy pres only settlement. Under the terms of the settlement, Google is to pay a total of $8.5 million. Of that amount, $3.2 million will go to attorney fees, administration costs, and incentive payments to the named plaintiffs. The remaining $5.3 million will be split between six nonprofits that work on internet privacy issues: AARP, Inc., the Berkman Center for Internet and Society at Harvard University, Carnegie Mellon University, the Illinois Institute of Technology Chicago-Kent College of Law Center for Information, Society and Policy, the Stanford Center for Internet and Society, and the World Privacy Forum. *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737 (9th Cir. 2017).
https://caselaw.findlaw.com/us-9th-circuit/1871621.html

TCPA suit excluded under D&O policy. A split Ninth Circuit affirmed that the Los Angeles Lakers are not entitled to insurance coverage for class allegations that the team sent unwanted text messages to fans in violation of the Telephone Consumer Protection Act ("TCPA"). The court held that TCPA claims fall within the directors-and-officers policy's invasion-of-privacy exclusion. *L.A. Lakers, Inc. v. Fed. Ins. Co.*, 896 F.3d 795 (9th Cir. 2017).
http://caselaw.findlaw.com/us-9th-circuit/1871727.html

False statements in complaint may violate Fair Debt Collection Practices Act. Debt collector filed suit in state court to collect an unpaid credit card debt, but the complaint overstated both debtor's principal due and the applicable interest rate. Debtor then filed suit in federal court for violations of the Fair Debt Collection Practices Act. The district court granted summary judgment to collector. The Ninth Circuit held, however, that the false statements made by collector were material because they could have disadvantaged a hypothetical debtor in deciding how to respond to the complaint. *Afewerki v. Anaya Law Grp.*, 868 F.3d 771 (9th Cir. 2017).
https://law.justia.com/cases/federal/appellate-courts/ca9/15-56510/15-56510-2017-08-18.html

Attorney collecting HOA fees is a debt collector attempting to collect payment of a debt—irrespective of whether it also sought to perfect the HOA's security interest and preserve its right to record a lien in the future—it is subject to the full scope of the FDCPA. In a well

reasoned opinion, the Ninth Circuit discusses HOA fees and the FDCPA, finding the FDCPA applies and the notice sent to the consumer violated the act. *Mashiri v. Epstein Grinnell & Howell*, 845 F.3d 984 (9th Cir. 2017).
https://law.justia.com/cases/federal/appellate-courts/ca9/14-56927/14-56927-2017-01-13.html

Amazon's arbitration clause in its Conditions of Use is enforceable. The Ninth Circuit recently affirmed an order compelling individual arbitration of deceptive pricing claims in a putative class action against Amazon. Amazon moved to compel individual arbitration of the plaintiff's class claims based on the written arbitration agreement in its Conditions of Use. Its Motion to Compel explained that the plaintiff was presented with a notice of and link to the Conditions of Use on at least two notable occasions, the first being when he registered for an account and clicked on a "Create account" button. Below the "Create account" button and above the "Place your order" button were similar notices—both with hyperlinks in contrasting blue text—that told the plaintiff that clicking the buttons not only created an account and placed an order, but also acknowledged plaintiff's acceptance of the Conditions of Use. The Ninth Circuit enforced the arbitration provision in the Conditions of Use, recognizing that, under basic principles of contract law, online consumer contracts may be enforced so long as notice is conspicuous and acceptance is unambiguous. *Wiseley v. Amazon.com, Inc.*, 709 Fed. App'x 862 (9th Cir. 2017).
https://law.justia.com/cases/federal/appellate-courts/ca9/15-56799/15-56799-2017-09-19.html

Court dismisses credit report suit under "Spokeo." The Ninth Circuit agreed with a lower court that a job applicant who was denied employment cannot sue the insurer for violations of the Fair Credit Reporting Act, finding that he lacks standing under the high court's decision in *Spokeo Inc. v. Robins*, 136 S. Ct. 1540, because he cannot show he was concretely harmed by the alleged violations. *Dutta v. State Farm Mut. Auto. Ins. Co.*, 895 F.3d 1166 (9th Cir. 2018).
https://law.justia.com/cases/federal/appellate-courts/ca9/16-17216/16-17216-2018-07-13.html

Texas DTPA applies to Washington defendant in suit filed in Washington. The court discussed the Restatement (Second) of Conflict of Laws, finding that, "A mere counting of the Second Restatement factors thus favors choice of Texas law. But more importantly, "Texas is plainly where those 'contacts are most significant.' Thornell resides there, received the letters there, and suffered any damages there." *Thornell v. Seattle Serv. Bureau, Inc.*, ___ F.3d ___ (9th Cir. 2018).
https://law.justia.com/cases/federal/appellate-courts/ca9/16-35569/16-35569-2018-07-16.html

FDCPA does not apply to non-judicial foreclosure proceedings. The Tenth Circuit noted, "There is an obvious and critical difference between judicial and non-judicial foreclosures— '[a] non-judicial foreclosure differs from a judicial foreclosure in that the sale does not preserve to the trustee the right to collect any deficiency in the loan amount personally against the mortgagor.'" *Obduskey v. Wells Fargo*, 879 F.3d 1216 (10th Cir. 2018). (The Supreme Court has granted cert in this case, see the article at page 20.)
https://www.leagle.com/decision/infco20180119056

Court rules arbitrator decides class action issue. The Eleventh Circuit affirmed a district court ruling that an arbitrator, and not the court, must determine whether the agreement between the airline and members of its $9 Fare Club allows for a class arbitration. "The parties' agreement plainly chose AAA rules," the appeals court said. "Those rules include AAA's Supplementary Rules for Class Arbitrations, which, true to their name, supplement the other AAA rules. Supplementary Rule 3 provides that an arbitrator shall decide whether an arbitration clause permits class arbitration." *Spirit Airlines, Inc. v. Maizes*, ___ F.3d ___ (11th Cir. 2018).
https://law.justia.com/cases/federal/appellate-courts/ca11/17-14415/17-14415-2018-08-15.html

FEDERAL DISTRICT COURTS

Receiving an unwanted fax is enough to have standing under the U.S. Supreme Court's "Spokeo" ruling. A U.S. District Court judge held that health care marketing company must face a proposed Telephone Consumer Protection Act ("TCPA") class action over unwanted faxes. Defendants argued the proposed class lacked standing because the fax lacked an opt-out notice, which was a "bare procedural violation divorced from any concrete harm." The court disagreed. "[P]ost-Spokeo courts in this circuit have repeatedly held that mere receipt of a fax alleged to lack TCPA opt-out notices constitutes sufficient harm for purposes of Article III standing," the judge wrote, denying the bid to dismiss the TCPA claim. *America's Health & Resource Center Ltd. v. PromoLogics Inc.*, (N.D. Ill. Nov. 2, 2017).
https://law.justia.com/cases/federal/district-courts/illinois/ilndce/1:2016cv09281/331803/114/

Flu shot notice does not violate TCPA. A New Jersey federal judge nixed a putative class action against CVS Pharmacy Inc. for allegedly violating the Telephone Consumer Protection Act by notifying customers about the availability of flu shots via text messages. The court found that the messages fell under the so-called "health care exemption." *Bailey v. CVS Pharm., Inc.*, (D.N.J. Aug. 14, 2018).
https://www.leagle.com/decision/infdco20180821681

Consumer's failure to initiate the administrative proceedings as required by the Texas Lemon Law merely precludes plaintiffs from seeking certain administrative remedies, it does not preclude remedies under the DTPA. The court found that a consumer may either complain to the Board under the Lemon Law or sue under the Texas Deceptive Trade and Practices Act. *Stannard v. Nat'l Indoor RV Ctrs., LLC*, (E.D. Tex. July 27, 2018).
https://law.justia.com/cases/federal/district-courts/texas/txedce/4:2018cv00366/182478/11/

Lending company does not share tribal immunity. A Virginia federal judge refused to toss a proposed class action alleging that an online lending company sought to use its connection with a Michigan tribe to shield itself from accusations that it charged illegally high interest rates on loans. The court found the company had not shown it was entitled to share the tribe's sovereign immunity to suit. *Williams v. Big Picture Loans LLC*, (E.D. Va. 2018).
https://www.courtlistener.com/recap/gov.uscourts.vaed.367671/gov.uscourts.vaed.367671.146.0.pdf

Ohio federal judge rules law firm did not misled consumers by sending demand letters from its debt collections practice that used the firm's letterhead. The court noted that the attorneys were meaningfully involved in the debt collection process and that the Consumer Financial Protection Bureau had not shown the letters confused consumers. *Consumer Fin. Prot. Bureau v. Weltman Weinberg & Reis Co., L.P.A.*, (N.D. Ohio Apr. 9, 2018).

https://law.justia.com/cases/federal/district-courts/ohio/ohndce/1:2017cv00817/233240/61/

A fundraising company did not violate the Telephone Consumer Protection Act when calling a number on the National Do Not Call Registry to promote a breast cancer charity. The district court held there was no violation of the TCPA because the calls were made on a tax-exempt nonprofit organization's behalf, an Illinois federal court ruled Wednesday. The court found found that the TCPA's nonprofit exemption, which states that calls made by nonprofits cannot be considered solicitations, could be extended to Associated Community Services Inc. as it had contracted with the Breast Cancer Society to make calls on the charity's behalf and the charity possessed ultimate control over the nature of the calls and the money raised. *Spiegel v. Reynolds*, (N.D. Ill. Oct. 11, 2017).
https://www.gpo.gov/fdsys/pkg/USCOURTS-ilnd-1_15-cv-08504/pdf/USCOURTS-ilnd-1_15-cv-08504-1.pdf

Proposed class action dismissed under "Spokeo." Home Depot on Thursday eluded a proposed class action accusing the retailer of wrongfully obtaining job applicants' personal information through improper background checks, as a California federal judge found the applicants failed to demonstrate actual harm as required under the U.S. Supreme Court's *Spokeo* decision. *Saltzberg v. Home Depot USA Inc.*, (C.D. Cal. Oct. 18, 2017).
https://www.manatt.com/Manatt/media/Media/PDF/Newsletters/Employment/Saltzberg-v-Home-Depot-USA-Inc.pdf

Texas state court jury awards $42 million for faulty car repair work. A Dallas-area couple who said substandard auto repair work—allegedly done that way at the behest of insurer, State Farm—caused them to suffer severe injuries in a 2013 car accident. The Dallas County District Court jury handed up a 10-2 verdict against John Eagle Collision Center, a repair shop affiliated with Dallas car dealership group John Eagle Auto Group, finding its negligence led to severe injuries for plaintiffs. The plaintiffs alleged that during repair work to a 2010 Honda Fit, John Eagle glued the car roof instead of welding it to the safety cage as dictated by Honda's safety manuals and that the repairs were undisclosed when they bought the car in 2013. They alleged the substandard repair led the car safety cage to collapse in a 2013 car accident, causing them to suffer far greater injuries than if the roof had been welded. *Seebachan v. John Eagle Collision Center*, case number DC-15-09782, in the District Court of Dallas County, Texas; and *Seebachan v. State Farm Mutual Automobile Insurance Co.*, case number 4:17-cv-00694, (E.D. Tex.).

Collector's policies and training procedures sufficient to satisfy bona fide error defense. The Fair Debt Collection Practices Act provides that "[a] debt collector may not be held liable in any action brought under this title [, the FDCPA,] if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." The District Court for the District of Utah found that the collector's polices and training procedures were "specific and extensive" and met all the requirements of the bona fide error defense. *Berry v. Van Ru Credit*, (D. Utah Sept. 11, 2017).
https://ecf.utd.uscourts.gov/cgi-bin/show_public_doc?215cv0150-62

Postal service not immune from suit. An Illinois federal judge on Tuesday refused to dismiss the U.S. Postal Service from a suit claiming it declined to honor a payroll check, finding that even though the check cashing company's claim falls outside of the Federal Tort Claims Act's scope, the USPS is not immune to the suit. *Speedy Check Cashers, Inc. v. United States Postal Serv.*, 286 F. Supp. 3d 934 (N.D. Ill. 2017).
https://www.leagle.com/decision/infdco20171213a10

An Ohio federal judge nixed a putative class action accusing CVS Health Corp. of violating the Telephone Consumer Protection Act by placing prescription reminder calls to a reassigned cellphone number. The court ruled that the communications fell outside the statute's reach because they were made for the "health and safety of consumers." *Lindenbaum v. CVS Health Corp.*, (N.D. Ohio Nov. 20, 2017).
https://www.leagle.com/decision/infdco20171121849

CFBP reconsideration of payday lending rule not stayed. A Texas federal judge ruled that he will not stay the compliance date of the Consumer Financial Protection Bureau's ("CFPB") so-called payday lending rule, but will stay a lawsuit brought against the agency by two payday lender trade groups challenging the rule. By staying the suit but not the rule, Judge Yeakel leaves the trade groups in essentially the same position they would be in if they hadn't brought the suit at all—namely, waiting on the CFPB to move forward with its plans to reconsider the rule while still facing an August 2019 compliance date. *CFSA v. CFPB*, case number 1:18-cv-00295, in the U.S. District Court for the Western District of Texas (2018).

Attorney's fees awarded for motion to compel arbitration. The court noted that "As the Act [FAA] makes clear, arbitration is a creature of contract. Parties must agree to arbitrate in the first instance, and may contractually limit or alter the issues to be presented to the arbitrators. . .. The FAA requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms. In this case, the parties contractually agreed to the possibility of fee-shifting if, ten days after the defendant reminded the plaintiff of the arbitration agreement, the plaintiff continued litigation. This is precisely what happened: Aralar failed to abide by the arbitration agreement by not withdrawing his suit within ten days of notice, and Cowles correctly enforced the relevant contractual term." *Aralar v. Scott McRae Auto. Grp.*, (M.D. Fla. Apr. 17, 2018). https://us-arbitration.shearman.com/siteFiles/21965/2018.04.17%20Aralar%20v.%20Scott%20MCREA%20Automotive%20Group,%20LLLP,%203_16-cv-00146,%20....pdf

CFPB ruled unconstitutional. A New York federal judge has found the Consumer Financial Protection Bureau ("CFPB") to be unconstitutionally structured, saying in a ruling Thursday that she disagrees with the D.C. Circuit's holding to the contrary from earlier this year and is not bound by it. U.S. District Judge Loretta A. Preska reached her finding as part of her decision to axe the CFPB from a suit it brought jointly last year with New York's then-Attorney General Eric Schneiderman accusing RD Legal, a New Jersey-based settlement advance firm, of scamming 9/11 first responders and NFL retirees with high-cost loans.

Rejecting the D.C. Circuit majority's January conclusion in *PHH Corp. v. CFPB* that the agency's structure is constitutional, Judge Preska said she was siding with one of the circuit court judges who had dissented from that 6-3 ruling.

"Respectfully, the court disagrees with the holding of the en banc court and instead adopts Sections I-IV of Judge Brett Kavanaugh's dissent (joined in by Senior Circuit Judge A. Raymond Randolph), where, based on considerations of history,

liberty, and presidential authority, Judge Kavanaugh concluded that the CFPB 'is unconstitutionally structured because it is an independent agency that exercises substantial executive power and is headed by a single director,'" Judge Preska wrote. For more information, click here. *Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC*, (S.D.N.Y. June 21, 2018).
https://www.courtlistener.com/recap/gov.uscourts.nysd.468458/gov.uscourts.nysd.468458.80.0.pdf

Federal judge refuses to dismiss a proposed class action over claims that a debt collection agency sent debtors a letter that could mislead them about how to cancel automatic payments, but said the class will need to present evidence of deception to move forward. Williams v. NCB Mgmt. Servs., Inc., (N.D. Ill. Feb. 20, 2018).
https://docs.justia.com/cases/federal/district-courts/illinois/ilndce/1:2017cv06756/344241/38

STATE COURTS

When lawyers accomplish little, they deserve little in fees. A California judge said he would award plaintiffs' attorneys only about 6 percent of their requested fees for representing consumers in the settlement of a Fair and Accurate Credit Transaction Act class action against UCLA. As a result of the perceived puffed-up value of the award, the Judge calculated the attorneys' fees off of a $40,000 settlement value, awarding $13,333 instead of the $227,000 that was requested. The judge also cut the class representative's award from $5,000 to $500. *Fernandez v. Regents of the University of California*, case number BC656256, in the Superior Court for the State of California in and for the County of Los Angeles.

Suit for malicious prosecution in not subject to an arbitration clause. Customer signed Rental Purchase Agreement. Subsequently, merchant filed a theft of rental property complaint that resulted in the consumer's incarceration. Following his release, consumer filed this civil action claiming merchant filed a false report with the police that resulted in his incarceration—an act that he claims amounted to malicious prosecution. After a preliminary review of the matter, the circuit court found in favor of merchant, ruling that the parties entered a valid and enforceable arbitration agreement which covered consumer's claims. The Mississippi Supreme Court found, however, the ruling was made in error: though broad, the arbitration agreement did not contemplate the customer having to arbitrate his claim that merchant maliciously swore out a criminal affidavit, causing his wrongful incarceration. *Pedigo v. Robertson*, 237 So. 3d 1263 (Miss. 2017).
https://www.leagle.com/decision/inmsco20180215215

Court holds Magnuson Moss claims are subject to binding arbitration. Rejecting an FTC interpretation, a Michigan appellate court followed an early Michigan Supreme Court ruling and held that Congress has not amended the MMWA in any manner that would affect the decision that Magnuson Moss claims are subject to mandatory binding arbitration. *Galea v. FCA US LLC*, ___ N.W.2d ___ (Mich. Ct. App. 2018).
https://law.justia.com/cases/michigan/court-of-appeals-published/2018/334576.html

Statute of limitations for credit card debt begins with first uncured missed payment. Defendant argued that limitations did not begin until the creditor accelerates the debt. The Arizona Supreme Court noted, "To hold that a cause of action on the debt does not accrue until the creditor exercises his right to accelerate would vest the creditor with unilateral power to extend the statutory limitation period and permit interest to continue to accrue, long after it is clear that no further payments will be made, subject only to a standard of reasonableness and other equitable doctrines. This would functionally eliminate the protection provided to defendants by the statute of limitations."

The court concluded, stating, "we hold that when a credit-card contract contains an optional acceleration clause, a cause of action to collect the entire outstanding debt accrues upon default: that is, when the debtor first fails to make a full, agreed-to minimum monthly payment." *Mertola, LLC v. Santos*, ___ P.3d ___ (Ariz. 2018).
https://www.azcourts.gov/Portals/0/OpinionFiles/Supreme/2018/CV-17-0109-PR Opinion.pdf

Class definition not ascertainable. The Supreme Court of Arkansas reversed the order of the circuit court granting class certification for a group of Appellants' customers. The class definition included all who "owe or will incur debts" springing from business with Appellants. On appeal, Appellants argued that certification was improper because no class was "ascertainable." The supreme court agreed, holding that the class as defined was not ascertainable as a threshold matter, and, therefore, the circuit court abused its discretion by proceeding to a Rule 23 analysis and granting certification. The court remanded the case with instructions to decertify the class. *Arch St. Pawn Shop, LLC v. Gunn*, 531 S.W.3d 390 (Ark. 2017).
https://www.leagle.com/decision/inarco20171130018

"Loser pays" and similar cost-shifting clauses in consumer arbitration agreements violate Ohio public policy. Plaintiff challenged the enforceability of an arbitration agreement that included a "loser pays" clause. The "loser pays," or cost-shifting, clause required the loser to pay the costs and attorney fees of the substantially prevailing party. The court found the clause violated Ohio public policy and severed the "loser pays" provision. It otherwise enforced the agreement—i.e., the substantive underlying claims were subject to arbitration. *Gaither v. Wall & Associates, LLC*, 2017-Ohio-765 (2d Dist.).
https://law.justia.com/cases/ohio/second-district-court-of-appeals/2017/26959.html

California Supreme Court holds class-action objector may not appeal a class action settlement without first intervening. In *Devlin v. Scardelletti*, 536 U.S. 1 (2002), the U.S. Supreme Court held that a class-action objector may appeal a district court's approval of a class-action settlement under Federal Rule of Civil Procedure 23 without first intervening. The California Supreme Court rejected that approach in class actions in California state courts. The court's ruling was premised on statute and precedent:

> The Legislature has limited the right of unnamed class members to appeal by expressly requiring that class action objectors who wish to appeal be parties of record who have been aggrieved by the court's decision. [Code of Civil Procedure] (§ 902.) Had [objector] Muller properly intervened in the class action or filed a…motion to vacate the judgment, and been denied relief, she would have had a clear path to challenge the attorney fees award (or settlement or judgment) on appeal. Muller offers no persuasive reason why we should create an exception to our long-standing rule, or overrule or distinguish *Eggert* [a decision that the court said demanded the result today].

Hernandez v. Restoration Hardware, Inc., 409 P.3d 281 (Cal. 2018).
https://law.justia.com/cases/california/supreme-court/2018/s233983.html

MISCELLANEOUS

Student loan borrowers collectively owe more than $1.4 trillion in student loan debt. The CFPB has published a state-by-state snapshot of student loan debt that shows how this debt is spread across the country. It also breaks down the complaints handled by the CFPB from student loan borrowers in every state. The complaint data included reflects over 50,000 student loan complaints and over 10,000 debt collection complaints related to private or federal student loan debt, submitted through September 30, 2017. For a copy of the 54 page report, visit here, https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_student-loans_50-state-snapshot_complaints.pdf

Arizona passes new embryo law. Under a first-in-the-nation law that went into effect July 1, custody of disputed frozen embryos must be given to the party who intends to help them "develop to birth." This reverses the rulings of many courts to consider this question. These courts essentially held you cannot force a person to become a parent. The text of the bill may be found here, https://legiscan.com/AZ/text/SB1393/id/1702406

Governor Brown signs bill allowing California consumers to sue banks over bogus accounts. The bill protects the right of consumers to sue banks alleged to have created fraudulent accounts in their name. The legislation was prompted by the ongoing Wells Fargo & Co. scandal. It specifically prohibits banks from requiring disputes over fraudulent accounts to be sent to private binding arbitration, instead of being heard in a court.
http://www.latimes.com/business/la-fi-wells-fargo-arbitration-bill-20171004-story.html

California makes general contractor responsible for subcontractors' unpaid wages. California Governor Jerry Brown signed Assembly Bill 1701, which will make general contractors liable for their subcontractors' employees' unpaid wages if the subcontractor fails to pay wages due. The new law will go into effect on January 1, 2018. Specifically, section 218.7 has been added to the Labor Code. Subdivision (a)(1) provides the following: For contracts entered into on or after January 1, 2018, a direct contractor making or taking a contract in the state for the erection, construction, alteration, or repair of a building, structure, or other private work, shall assume, and is liable for, any debt owed to a wage claimant or third party on the wage claimant's behalf, incurred by a subcontractor at any tier acting under, by, or for the direct contractor for the wage claimant's performance of labor included in the subject of the contract between the direct contractor and the owner. The bill is available here, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB1701

White House says it will nominate Kraninger to head CFPB. President Donald Trump is likely to pick Kathy Kraninger, who works under Mick Mulvaney at the White House budget office, as the next director of the Consumer Financial Protection Bureau ("CFPB"), a person familiar with the decision said Friday. The selection of Kraninger, an associate director at the Office of Management and Budget, would be a surprise since she had not been widely discussed as a replacement for Mulvaney, the CFPB's controversial acting director who is also her boss as White House budget chief. Read more, here www.wsj.com/articles/kathy-kraninger-nominated-to-head-cfpb-1529183308

DECEPTIVE TRADE PRACTICES AND WARRANTY

DTPA STATUTE OF LIMITATIONS BEGINS TO RUN EVEN IF THE CLAIMANT DOES NOT YET KNOW THE SPECIFIC CAUSE OF THE INJURY; THE PARTY RESPONSIBLE FOR IT; THE FULL EXTENT OF IT; OR THE CHANCES OF AVOIDING IT

Wahrmund v. Buschman, ___ F. Supp. 3d ___, (E.D. Ark. 2018). https://www.leagle.com/decision/infdco20180313567

FACTS: Plaintiff/Counter-defendant John Wahrmund, doing business as Wahrmund Farms, ("Wahrmund") entered into contracts with Cattle Connections, LLC to provide care for the cattle of Defendant/Counter-claimants Terry Buschman and Ryan Buschman ("Buschmans"). The cattle had a higher than expected death rate while in Wahrmund's care. In February of 2015, Ryan Buschman traveled to Warhmund's property and discovered the cattle in poor health. The Buschmans later removed their cattle. Wahrmund presented a final invoice to the Buschmans when the last of the cattle was removed in January of 2016. Wahrmund alleged the final invoice was never paid. Warhmund sued Cattle Connections and the Buschmans, alleging breach of contract.

The Buschmans filed a counterclaim in April of 2017, alleging Wahrmund violated the DTPA by failing to disclose the quality of his services, falsely representing that he provided care for the cattle, and falsely representing the quality of his services. Wahrmund filed a motion to dismiss the Buschmans' counterclaim.

HOLDING: Dismissed based on limitations.

REASONING: The Buschmans argued that the statute of limitations under the DTPA should be calculated from January 2016, when they discovered the exact scope of their cattle loss.

The court rejected that argument by explaining that all actions under the DTPA must be commenced within two years after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice.

The Buschmans alleged they learned of the poor health of the cattle when Ryan Buschman visited Wahrmund's property. The court found the DTPA counterclaim accrued at this time because the Buschmans should have had enough information to discover the alleged falsity of Wahrmund's representations during the February 2015 visit. Alternatively, the Buschmans could have discovered Wahrmund's alleged wrongful acts or omissions during the visit through the exercise of reasonable diligence. Further, the Buschmans did not file their counterclaim by February 2017 and therefore their claim is time-barred.

CONSUMERS MUST PROVE THEY WERE ACTUALLY HARMED TO COLLECT THE MINIMUM MONETARY PAYOUT UNDER NEW JERSEY'S TRUTH IN CONSUMER CONTRACTS, WARRANTIES AND NOTICES ACT

Spade v. Select Comfort Corp., 232 N.J. 504 (N.J. 2018). https://caselaw.findlaw.com/nj-supreme-court/1893988.html

FACTS: Plaintiffs-Appellants ("the Spade and Wegner plaintiffs") purchased furniture from Defendant-Respondents, Select Comfort Corp., d/b/a Sleep Number, Leggett & Platt Inc. ("defendants"). The sales contract between the parties included language prohibited by the New Jersey Administrative Code ("NJAC") §13:45A-5.2(a) and NJAC §13:45A-5.3(a).

The Spade and Wegner plaintiffs filed class action suits against the defendants alleging that they were "aggrieved consumers" because the defendants' contract violated the Truth-in-Consumer Contract, Warranty and Notice Act ("TCCWNA"). The United States district court consolidated the suits and held that neither of the plaintiffs constituted an "aggrieved customer" for purposes of the TCCWNA. Both plaintiffs appealed. The Supreme Court of New Jersey addressed the certified questions of law posed by the Third Circuit.

The primary question for the court was: Is a consumer who receives a contract that does not comply with Furniture Delivery Regulation, but has not suffered any other adverse consequences from the non-compliance, an "aggrieved customer" under the TCCWNA?

HOLDING: The court answered the question in the negative.

REASONING: The Spade and Wegner plaintiffs argued that violation of the requirements of the NJAC makes one an aggrieved consumer under the TCCWNA, even if there is no actual harm suffered. Plaintiffs contended that the defendants violated statutory requirements by including prohibited language in the provisions of the consumer sales contract or agreements between the parties. Defendants maintained that a consumer may not be considered an "aggrieved consumer" without a demonstration of actual adverse consequences caused by the unlawful provisions.

The court reasoned that an "aggrieved consumer" is one who has suffered some form of actual harm as a result of the defendant's conduct and distinguished this from a consumer who is simply presented a contract. A consumer's suffering of adverse consequences, including monetary damages, evidence actual harm. In the absence of evidence that the consumer has suffered adverse consequences as a result of a violation of the TCCWNA, a consumer is not an "aggrieved consumer" to pursue remedial minimum monetary damages under the statute. Thus, because the Spade and Wagner plaintiffs could not show actual harm, they were not aggrieved consumers under the TCCWNA.

TEXAS DTPA APPLIES TO WASHINGTON DEFENDANT IN SUIT FILED IN WASHINGTON

Thornell v. Seattle Serv. Bureau, Inc., ___ F. App'x ___ (9th Cir. 2018).
https://www.casemine.com/judgement us/5b4f3d677ba35f5d 386e20c7

FACTS: Texas-residing Plaintiff, Sandra Thornell ("Thornell"), was the mother of a motorist involved in a collision. The motorist's insurer, State Farm Mutual Automobile Insurance Company ("State Farm"), paid for the repair of the motorist's vehicle. Later, at her home in Texas, Thornell received three letters from Defendant, Seattle Service Bureau, Inc. ("SSB"), a Washington corporation, following the referral of unliquidated subrogation claims to SSB by State Farm. According to Thornell, these letters deceptively suggested a listed sum to be a balance due on a debt, rather than a potential, unliquidated claim based on a subrogated interest. Concerned about potential impact to her credit rating, Thornell enrolled in a credit monitoring program and retained counsel.

Thornell filed suit against State Farm and SSB in Washington, alleging that the letters violated the Washington Consumer Protection Act ("CPA"). The district court held that under Washington's choice of law rules, Texas law was to be applied. Therefore, because Thornell had only submitted a claim under the CPA, her complaint was dismissed. Thornell appealed.

HOLDING: Affirmed.

REASONING: Thornell first argued that Washington law should be applied, because relief under the DTPA is only available to consumers, and Thornell was not a consumer with respect to State Farm and SSB. Secondly, Thornell argued that additional discovery was necessary before settling the choice of law issue.

For misrepresentation claims, the court acknowledged that Washington courts rely upon the significant relationship inquiry of §148 of the Restatement (Second) of Conflict of Laws.

The court rejected Thornell's first argument, holding that even if Thornell's assertion was true, such fact would be irrelevant to the choice of law analysis. For misrepresentation claims, the court acknowledged that Washington courts rely upon the significant relationship inquiry of §148 of the Restatement (Second) of Conflict of Laws. Under this inquiry, the relevant factors to be considered in deciding ruling law are: (a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations; (b) the place where the plaintiff received the representations; (c) the place where the defendant made the representations; (d) the domicile, residence, nationality, place of incorporation and place of business of the parties; (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time; and (f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.

As for Thornell's second argument, the court concluded that because Thornell was instructed to satisfy the claim in Washington, the court held that factor (f) favored application of Washington law. However, because factors (a)-(e) all clearly favored the application of Texas law, the court held that Texas law was properly applied.

DTPA JUDGMENT FOR $2,653.87 IN DAMAGES, $7,961.61 IN ADDITIONAL DAMAGES, AND $61,170.00 IN ATTORNEYS' FEES AFFIRMED

"AS IS" CLAUSE DID NOT CONCLUSIVELY NEGATE CAUSATION AS TO FAILURE TO DISCLOSE CLAIMS

Creditplex Auto Sales L.L.C. v. Bishop, ___ S.W. 3d ___ (Tex. App.—Dallas 2018).
https://law.justia.com/cases/texas/fifth-court-of-appeals/2018/05-17-00461-cv.html

FACTS: Appellee, Christin Bishop, purchased a used car from Appellant, Creditplex Auto Sales L.L.C. d/b/a Greenville Mitsubishi. Later that year, Bishop took the car to another dealership in order to purchase a larger vehicle. The dealership discovered frame damage and refused to accept the car. Bishop later sued Creditplex and Larry Jackson, general manager and part owner, for failure to disclose information under DTPA §17.46(b)(24) and unconscionable conduct under §17.50(a)(3). Bishop alleged Creditplex and Jackson failed to disclose that the car had previously been in a wreck. In a jury trial, the court granted Creditplex and Jackson a directed verdict based upon an "as is" clause in the sale contract. Bishop appealed and the appeals court reversed and remanded, concluding Bishop raised a genuine fact issue regarding fraudulent representation and that the "as is" clause did not conclusively negate causation as to Bishop's failure to disclose claims.

In trial, the jury found in favor of Bishop on both claims and awarded $2653.87 in damages. Further, the jury determined that Creditplex and Jackson knowingly and intentionally engaged in the deceptive conduct, and awarded Bishop an additional $7,961.61 in damages. Bishop moved for attorneys' fees in the amount of $86,250.00. After a hearing was held, the court awarded Bishop $61,170.00 in attorneys' fees. Creditplex and Jackson appealed.

HOLDING: Affirmed.

REASONING: The jury separately answered "yes" as to both Creditplex and Jackson on two questions: (1) whether Creditplex and Jackson individually or jointly engaged in any deceptive act that Bishop relied on, to her detriment, that was the producing cause of damages; and (2) whether Creditplex and Jackson engaged in unconscionable conduct that was the producing cause of damages.

Jackson argued that the court erred when it denied his motion for judgment notwithstanding the verdict. The court noted that the motion focused solely on the contention that the evidence was insufficient to support the elements of fraud by nondisclosure. The court found neither Jackson's motion, nor his brief on appeal, addressed the unconscionable conduct claim. Moreover, the court reasoned that even if it assumed that the trial court erred when it denied Jackson's motion on the basis of insufficient supporting evidence to support his failure to disclose claim, the error was harmless because Jackson failed to challenge on appeal the unconscionable conduct claim.

Creditplex and Jackson argued that the court erred in awarding attorneys' fees because they were grossly disproportionate to the damages, were not segregated nor authorized for the majority of the claims alleged, and were awarded for all trials including the one that Bishop lost. Further, they argued that the evidence was insufficient to establish that the fees were reasonable. Bishop argued that the appeal record was not complete because no reporter's record of the hearing was presented. Under DTPA §17.50(d) consumers are allowed to recover reasonable and necessary attorney fees. The court stated that without a record of the attorneys' fees hearing, it could not determine the basis for the court's award of fees. Therefore, the court concluded that the trial court did not abuse its discretion in awarding attorneys' fees.

CONSUMER'S FAILURE TO INITIATE THE ADMINISTRATIVE PROCEEDINGS AS REQUIRED BY THE TEXAS LEMON LAW MERELY PRECLUDES PLAINTIFFS FROM SEEKING CERTAIN ADMINISTRATIVE REMEDIES; IT DOES NOT PRECLUDE REMEDIES UNDER THE DTPA.

Stannard v. National Indoor RV Centers, LLC., ___ F. Supp. 3d___ (E.D. Tex. 2018).
https://cases.justia.com/federal/district-courts/texas/txedce/4:2018cv00366/182478/11/0.pdf?ts=1532785208

FACTS: Paul and Kimberly Stannard ("Plaintiffs") purchased a motorhome from Defendant National Indoor RV Centers, LLC. ("NIRVC"). Following the purchase of the motorhome, Plaintiffs discovered the undercarriage was filled with rust.

In May 2018 Plaintiffs filed claims against NIRVC alleging: (1) violations of the DTPA, (2) fraud and concealment, (3) misrepresentation, (4) breach of contract, (5) negligent repair, and (6) revocation of acceptance. NIRVC then filed a Motion to Dismiss or Abate based on Texas Occupations Code § 2301.607 ("Texas Lemon Law").

HOLDING: Dismissal granted in part, as to Texas Lemon Law claims, and abated in part, as to DTPA claims.

REASONING: NIRVC argued that Plaintiffs' failure to exhaust their administrative remedies under the Texas Lemon Law barred any claims for violation of the DTPA. The court rejected that argument by stating that although the Texas legislature was clear in its intention that the Texas Motor Vehicle Commission (the "Board") could exercise original jurisdiction over Texas Lemon Law claims; plaintiffs are given the option to complain to the Board, or sue in court in cases of separate DTPA claims. Because plaintiffs are given this option, Plaintiffs' failure to initiate administrative proceedings with the Board, in regard to the Texas Lemon Law, precluded them from seeking certain administrative remedies under the Texas Lemon Law. However, that failure does not affect Plaintiffs' ability to sue under the DTPA. For these reasons, the court dismissed all of the Texas Lemon Law claims, but abated the DTPA claims to allow Plaintiff to provide Defendant with proper pre-suit notice as required by the DTPA.

COURT FINDS CAR DEALER'S CONDUCT WAS UNCONSCIONABLE AND MORE THAN "MERE BREACH OF CONTRACT"

Yates Bros. Motor Co. v. Watson, 548 S.W. 3d 662 (Tex. App.—Texarkana 2018).
https://caselaw.findlaw.com/tx-court-of-appeals/1892847.html

FACTS: Plaintiff-Appellee Donna Watson entered into a Motor Vehicle Installment Sales contract with Defendant-Appellant Yates Brothers Motor Company, Inc. The contract stated that Watson was required to provide written proof of her insurance, make timely payments, and inform Yates in writing of a change in her address or where she would keep the vehicle. It is undisputed that Yates had the car insured at all times and was up to date on her payments. Yates provided testimony that proof of insurance had been mailed to Yates. Watson's vehicle was located through an illegally installed tracking device and repossessed solely for failure to provide written proof of insurance. Watson was required to pay a $500 repossession fee in order to retrieve her vehicle, regardless of whether or not the initial repossession was in error. At trial, Yates added additional reasons for the repossession of the vehicle.

Watson filed suit, alleging that Yates had acted unconsciously in the repossession of her vehicle and conduct thereafter. The trial court found for Watson, concluding that Watson had upheld the contract while Yates had in fact breached the contract and acted unconscionably under the DTPA. Yates appealed.

HOLDING: Affirmed.

REASONING: Yates argued that an alleged breach of contract, without more, does not constitute an unconscionable action under the DTPA. While the court agreed with this assertion, based on the fact that Watson maintained insurance and payment on the vehicle, it held that the acts that were considered unconscionable occurred outside of the contract.

The court found that Yates took advantage of Watson's lack of knowledge, ability, experience, or capacity to a grossly unfair degree by: (1) failing to inform Watson of an illegal GPS device installed in her car, (2) charging Watson a repossession fee that was not specified by a dollar amount in the contract, (3) continuing to demand payment of a repossession fee even after it had learned that notice of insurance had been mailed and (4) adding additional reasons for the repossession after the fact. The court found that these violations were outside of the contract were more than a mere breach of contract, and, therefore, were unconscionable.

CONSUMER CREDIT

SUPREME COURT UPHOLDS AMERICAN EXPRESS CREDIT CARD RULES

Ohio v. American Express Co., 138 S.Ct. 2274 (2018).
https://supreme.justia.com/cases/federal/us/585/16-1454/

FACTS: Plaintiff-Petitioners, the United States and several States (collectively, "Plaintiffs"), sued Defendant-Respondents, American Express Company and American Express Travel Related Services Company (collectively, "Amex") for violation of §1 of the Sherman Act due to the use of antisteering provisions in their merchant contracts. Amex's business model focused on attracting and maintaining the loyalty of its cardholders through a rewards program that encouraged higher spending. To fund the rewards program, Amex charged merchants higher fees per transaction than other credit card companies. Antisteering provisions intended to combat merchants from discouraging their customers from using Amex cards at the point of sale. Antisteering provisions served to prohibit merchants from implying a preference for non-Amex cards, dissuading the use of Amex credit cards, persuading customers to use other cards, or imposing special restrictions, conditions, disadvantages, or fees for the use of Amex cards.

Plaintiffs filed suit. The trial court held Amex's antisteering provisions to be anticompetitive because they resulted in higher merchant fees. The court of appeals reversed, and SCOTUS granted certiorari.

HOLDING: Affirmed.

REASONING: The Plaintiffs argued that Amex violated federal antitrust law because its antisteering provisions increased merchant fees, causing harm to consumers in the relevant market.

The Court rejected that argument by reasoning that Amex's vertical restraint had increased inter-brand competition, thereby increasing the quality and quantity of credit-card transactions. By analyzing the alleged violation under the rule of reason, the Court conducted a fact-specific assessment of "market power and market structure . . . to assess the [restraint]'s actual effect" on competition. The Court reasoned that credit-card networks are a two-sided market for credit card transactions and should be analyzed as a whole. Ultimately, the Plaintiffs failed to show that Amex's price of credit-card transactions was higher than the price one would reasonably expect to find in a competitive market. Proving that the merchant-fee increases were not entirely spent on the cardholder rewards program, was not persuasive evidence that the correlating antisteering provisions gave Amex the power to charge anticompetitive prices. Furthermore, there was no evidence that the antisteering provisions stifled or completely ended competition among credit-card companies concerning merchant fees. The Court explained that other credit card companies, such as Visa, MasterCard and Discover, are not prevented from competing against Amex by lowering their merchant fees or providing a broader merchant acceptance base for cardholders.

The Court reasoned that credit-card networks are a two-sided market for credit card transactions and should be analyzed as a whole.

TRUTH IN LENDING TIME LIMIT DOES NOT BEGIN UNTIL THE CREDITOR RE-BILLS CONSUMER

Krieger v. Bank of Am., 890 F.3d 429 (3d Cir. 2018).
http://www2.ca3.uscourts.gov/opinarch/171275p.pdf

FACTS: Plaintiff-Appellant William Krieger alleged that he fell victim to a credit card scam that resulted in an unauthorized charge by Western Union on his Bank of America ("BANA") credit card. Plaintiff informed BANA of the unauthorized use of his card and was told both that the charge would be removed and that, pending additional information, the matter would be considered resolved. However, Plaintiff was rebilled a month later after BANA determined that the charge was valid through their investigation. Plaintiff then submitted a written dispute request for the charge to be reexamined. BANA maintained that the charge was valid.

Plaintiff filed suit, alleging that BANA had failed to comply with TILA and the FCBA while handling the dispute. The district court granted a motion to dismiss for BANA, concluding that Plaintiff had failed to trigger BANA's obligation pursuant to 15 U.S.C.S. § 1666(a) of the FCBA, because Plaintiff's written notice was sent sixty-three days after the charge, missing the sixty-day deadline. Plaintiff appealed.

HOLDING: Reversed and Remanded.

REASONING: The Third Circuit found that when a creditor removes a disputed charge from a billing statement and then later reinstates the charge, the sixty-day period in which a consumer must file a written dispute begins when the consumer received the first statement reinstating the charge. The court reasoned that there is no longer an error to dispute when the charge is removed, and a consumer would have no need to file a notice unless the charge is reinstated. The charge is disputed, however, when it is rebilled, and should at that time commence the time limit to file a notice.

The court further reasoned that extending the time to file notice would not prejudice the consumer in any manner, as the result of the dispute would still end the same. Finally, the court held that TILA and FCBA were enacted to protect the ordinary consumer regarding credit information, and as such, a reasonable consumer would expect to file a written dispute only after there is a reinstated charge.

CUSTOMERS ALLEGING SELLER PRINTED TOO MUCH CUSTOMER CREDIT CARD INFORMATION ON RECEIPTS COULD NOT SHOW AN ACTUAL INJURY

Coleman v. Exxon Mobil Corp., ___ F. Supp. 3d. ___ (E.D. Mo. 2018).
https://www.leagle.com/decision/infdco20180416841

FACTS: Plaintiff, Michael Coleman, made several purchases from Defendant, Exxon Mobil Corp. Defendant provided a printed receipt that listed the first six and last four digits of Plaintiff's credit card in violation of the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"), which prohibits printing more than the last five digits of a credit card number on any receipt provided at the point of sale. Plaintiff filed suit, claiming Defendant's action caused him to suffer a heightened risk of identity theft and potentially exposed Plaintiff's private information to third parties who may have come into contact with the receipts.

Defendant moved to dismiss, claiming the plaintiff did not have standing to sue.

HOLDING: Dismissed.

REASONING: The plaintiff argued that disclosing the first six digits of his credit card would allow an identity thief to learn potentially valuable information that would otherwise be unavailable if the defendant had complied with FACTA.

The court rejected that argument by explaining that the first six digits printed on the plaintiff's receipts were a code identifying the plaintiff's bank, information which was already available online to the public. The court equated the printing of this code to printing the name of the bank in word form. Because the FACTA allowed the printing of the name of the bank in word form, the printing of the code on the plaintiff's receipt by the defendant provided no more personal information about the plaintiff's account than Congress permitted to be printed on receipts.

COURT DISMISSES CREDIT REPORT SUIT UNDER *SPOKEO*

Dutta v. State Farm Mut. Auto. Ins. Co., 895 F.3d 1166 (9th Cir. 2018).
https://cases.justia.com/federal/appellate-courts/ca9/16-17216/16-17216-2018-07-13.pdf?ts=1531501403

FACTS: Plaintiff-Appellant, Bobby Dutta, applied for employment with Defendant-Appellee, State Farm Mutual Automobile Insurance Company. Early in the application process, Dutta was required to sign an authorization to allow State Farm to obtain Dutta's consumer credit report. Dutta complied, and as a part of its typical application process, State Farm examined Dutta's credit history as an indicator of his practical ability to perform in the prospective position with State Farm. Dutta claims that, on March 11, 2014, State Farm called and informed Dutta that, due to his poor credit history, his application had been rejected. On March 14, Dutta received a pre-adverse action notice, dated March 11, which included a copy of his credit report. The cover letter instructed Dutta to contact State Farm within five days if the report contained any inaccurate or incomplete information. On March 17, Dutta contacted State Farm to dispute the credit report's accuracy. Despite Dutta's attempt to dispute the credit report, on March 18, Dutta received an email informing him that his application had been withdrawn.

Dutta filed suit, alleging that State Farm denied his application based on his credit report without having provided him sufficient notice under the FCRA. The district court granted summary judgment for State Farm, concluding that Dutta lacked standing to sue on the alleged FCRA violation, due to the absence of an injury in fact. Dutta appealed.

HOLDING: Affirmed.

REASONING: Dutta argued that State Farm violated §1681b(b)(3)(A) of the FCRA by providing pre-adverse action notice after having already taken adverse action against him. Additionally, Dutta argued that State Farm violated the same subsection by depriving him of the right to correct incorrect and misleading entries in his credit report.

Citing the United States Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), the court held that to satisfy the standing requirement of Article III of the Constitution, a plaintiff seeking damages for the violation of a statutory right must not only plausibly allege the violation, but also plausibly allege a concrete injury causally connected to the violation. The court noted that to be concrete, an injury must be neither abstract nor purely procedural. However, an intangible injury may be concrete if it is the object of a statutory claim closely related to a harm traditionally regarded as providing basis for a lawsuit.

The court also held that an injury in fact may be established by sufficient risk of real harm caused by the violation of a procedural right. To determine this, the court noted that two questions must be asked: (1) whether the statutory provision at issue was established to protect the plaintiff's concrete interests, and if so, (2) whether the specific procedural violation alleged caused either an actual harm or a material risk of harm to the plaintiff's concrete interests.

Although Dutta plausibly pled a violation of §1681b(b)(3)(A), he failed to demonstrate actual harm or material risk of harm resulting from the alleged violation. Accordingly, Dutta failed to establish a concrete injury to satisfy Article III's requirement of an injury in fact, and thus lacked standing.

NINTH CIRCUIT REJECTS ID THEFT CLASS ACTION FOR LACK OF *SPOKEO* STANDING

Daniel v. National Park Service, 891 F.3d 762 (9th Cir. 2018).
http://cdn.ca9.uscourts.gov/datastore/opinions/2018/05/30/16-35689.pdf

FACTS: Stephanie Daniel and other patrons brought a putative class action suit against the National Park Service alleging that the National Park Service violated §1681c(g) of the FCRA, by failing to redact the debit card expiration date from the patrons' purchase receipt for an entrance pass to the Yellowstone National Park.

The district court granted the Park Service's motion to dismiss for failure to state a claim. Daniel and the other patrons appealed.

HOLDING: Affirmed.

REASONING: Daniel argued that after the Yellowstone transaction, her debit card was used fraudulently and she suffered damages from her stolen identity. Daniel also claimed that the fraudulent use of her debit card was caused in part by the inclusion of her card's expiration date on her Yellowstone receipt.

The court rejected that argument, noting that Daniel lacked standing because her complaint made only conclusory allegations and generic statements that her stolen identity was traceable to the Park Service's alleged FCRA violations. The court reasoned that to meet the constitutional threshold of Article III standing, as evidenced in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), Daniel must allege that she: (1) suffered an injury in fact;(2) that is fairly traceable to the challenged conduct of the

Park Service; and (3) that it is likely to be redressed by a favorable judicial decision. Although Daniel alleged a sufficient injury of identity theft, she failed to allege that her injury was "fairly traceable" to the Park Service's issuance of the receipt. Without that link the court noted, Daniel's suit must be dismissed.

LENDING COMPANY DOES NOT SHARE TRIBAL IMMUNITY

Williams v. Big Picture Loans, 303 F. Supp. 3d 434 (E.D. Va. 2018).
https://cases.justia.com/federal/district-courts/virginia/vaedce/3:2017cv00461/367671/146/0.pdf?ts=1532785280

FACTS: Plaintiffs were members of a class action suit against two tribal entities, Big Pictures Loans, LLC and Ascension Technologies, Inc.. Lac Vieux Desert Band of Lake Superior Chippewa Indians ("the Tribe") entered the business of online lending and enacted an ordinance that stated that a tribally-owned LCC with the Tribe as its sole member would have tribal immunity.

The Tribe began making loans to consumers, including Plaintiffs, who were subject to APRs of over 600%. The Tribe, along with other lending entities, was sent cease-and-desist letters by the New York Department of Financial Services ("The Department") as a result of being in violation of their anti-usury statues. The Department also sent letters to third parties that credit and debit payday loan payments, which caused third parties to limit or end their relationships with the entities. After the Second Circuit denied a preliminary injunction to prevent New York from enforcing the anti-usury statutes against the lenders, the Tribe created two lenders, Big Pictures and Ascension in order to purchase a third-party, Bellicose Capital, LLC, to shield it from liability.

Plaintiffs filed suit against Big Picture and Ascension. The Defendants subsequently filed a motion to dismiss.

HOLDING: Motion Denied.

REASONING: Defendants Big Picture and Ascension argued that they were subject to tribal immunity as they were owned and operated as instrumentalities of the Tribe. In order to determine whether Big Picture and Ascension were entitled to tribal immunity, the court examined the entities under a six factor test that evaluated: (1) the entities' method of creation; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) whether the tribe intended for the entities to have tribal sovereign immunity; (5) the financial relationship between the tribe and the entities; and (6) whether the purposes of tribal sovereign immunity are served by granting immunity to the entities.

With regards to the first factor, the court found that while the entities were created under tribal law, the surrounding context of the sudden formation after the Tribe was denied an injunction weighed against finding immunity. When weighing the second factor, the court considered the stated purpose of the entities to further the economic development of the Tribe, but held that the underlying purpose was to shield Bellicose from liability and, therefore, weighed against immunity. With regards to the third factor, the court found that the non-involvement in day-to-day activities and the presence of a provision that prevented the Tribe from certain actions weighed against immunity. While the court agreed that the intention of the Tribe, the fourth factor, was undoubtedly to share immunity, it viewed the intention in the context of its desire to shield Bellicose from immunity and therefore weighed against that factor. The court found the fifth factor of the financial relationship between the Tribe and the entities to be lacking and that while there were policies that met the sixth factor, they failed to serve those purposes in practice.

Based on these reasons the court determined that neither entity qualified as an arm of the Tribe and therefore was not entitled to immunity from the class action suit.

THE FRCA PREEMPTS DTPA CLAIM

Jeffrey Seelbach v. Ditech Financial LLC., ____ F. Supp. 3d ____ (N.D. Tex. 2018).
https://cases.justia.com/federal/district-courts/texas/txndce/3:2017cv03386/296960/22/0.pdf?ts=1532081008

FACTS: Plaintiff, Jeffrey Seelbach, and Defendant Ditech Financial, LLC previously entered into a contract in which Seelbach failed to pay a promissory note. Following that failure to pay, Ditech brought a cause of action against Seelbach in order to obtain the unpaid debt. The case settled with the terms that Seelbach would pay a disclosed sum, and Ditech would agree to release Seelbach from his outstanding debt. Seelbach paid, and the court dismissed the case with prejudice.

Upon the conclusion of the previous lawsuit Ditech provided information to credit bureaus that stated Seelbach's debt remained unpaid and charged of as "bad debt." These reports damaged Seelbach's credit score, affecting his ability to secure employment and allegedly creating great emotional stress on Seelbach. Seelbach then filed this lawsuit alleging harassment, intentional infliction of emotional distress, breach of contract and violations of the TDCA and DTPA.

HOLDING: Dismissed.

REASONING: Ditech moved to dismiss under Fed. R. Civ. P. 12(b)(6), arguing that Seelbach's state DTPA and TDCA actions were preempted by the Fair Credit Reporting Act under the doctrine of federal preemption. The court agreed with Ditech's argument and pointed to multiple explicit preemption clauses in the FCRA. Specifically 15 U.S.C. § 1681t(b)(1)(F) which states, "no requirement or prohibition may be imposed under the law of any state—(1) with respect to any subject matter regulated under… (F) section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies."

Applying the text of this clause, the court held Seelbach's TDCA and DTPA claims were preempted. The court reasoned those claims would impose liability under Texas statutes relating to a case in which Ditech "furnished information to consumer reporting agencies." The court rejected Seelbach's counter argument that the claims should not be preempted because they were not specifically based on credit reporting; rather they were based on Ditech's breach of a contract. The court agreed that the major issue was the contract dispute, however, the TDCA and DTPA claims specifically related to Ditech's reporting of credit information to consumer reporting agencies. Because the state claims related to credit reporting responsibilities, they fell squarely under the preemption clause of the FCRA.

DEBT COLLECTION

A THIRD-PARTY COLLECTION AGENCY AND HOSPITAL DID NOT VIOLATE FDCPA BECAUSE THE AGENCY WAS NOT A "FLAT-RATER"

Echlin v. PeaceHealth, 887 F.3d 967 (9th Cir. 2018).
https://cases.justia.com/federal/appellate-courts/ca9/15-35324/15-35324-2018-04-17.pdf?ts=1523984497

FACTS: Plaintiff-Appellant, Michelle Echlin, was a patient at Defendant-Appellee, PeaceHealth, doing business as PeaceHealth Southwest Medical Center PeaceHealth ("Echlin"). Echlin incurred almost $1,000 in medical bills during two visits to PeaceHealth. After Echlin ignored multiple requests for payment, PeaceHealth referred Echlin's delinquent accounts to Defendant-Appellee, Computer Credit, Inc. ("CCI"), a collection agency with which PeaceHealth maintained a longterm subscriber agreement. Under this agreement, PeaceHealth would refer delinquent accounts to CCI to be pursued for a fixed fee. After receiving the account for Echlin's first visit, CCI sent two form letters to Echlin requesting payment be made to PeaceHealth. After a month without response from Echlin, CCI returned the account to PeaceHealth. CCI later sent another letter, this time requesting payment for Echlin's second visit, to PeaceHealth. Echlin responded with a letter to CCI disputing the debt. CCI marked the account as disputed, and returned it along with Echlin's letter to PeaceHealth.

Echlin filed suit alleging violation of 15 U.S.C. §1692(j) of the FDCPA, commonly known as "flat-rating", claiming that the letters she received from CCI created a false or misleading belief that CCI was meaningfully involved in the collection of Echlin's debt prior to the account being sent to CCI. The district court granted summary judgment for CCI and PeaceHealth, concluding that undisputed evidence showed that CCI's participation in the collection was in fact meaningful. Echlin appealed.

HOLDING: Affirmed.

REASONING: Echlin argued that CCI was required to do more than simply mail form letters to have meaningfully participated in debt-collection efforts. As stated §1692(j) prohibits creating the false impression that a collection agency besides the actual creditor is participating in collecting the debt. However, §1692(j) does not define what extent of participation is required for a collection agency's participation to be sufficiently meaningful.

The court rejected Echlin's argument, holding that CCI's participation was sufficient. The court held that meaningful participation may take a variety of forms. The key to determining meaningfulness is a holistic examination of whether the agency's participation in the collection process genuinely contributed to an effort to collect another's debt, or did the agency do little more than act as a mailing service for the creditor.

Despite the fact that CCI was not authorized to take many hallmark collection actions, such as to negotiate, process, or seek to compel repayment. Undisputed evidence showed that CCI did have sole authority over various other components of the collection efforts, independent of input from PeaceHealth. The court determined that this authority allowed CCI to participate in the collection of Echlin's debts.

DEBT COLLECTION LETTER THAT SHOWS A BALANCE WITHOUT DISCLOSING THAT THE BALANCE IS NOT ACCRUING INTEREST OR FEES IS NOT MISLEADING UNDER THE FAIR DEBT COLLECTION PRACTICES ACT

Taylor v. Financial Recovery Services, Inc., 886 F.3d 212 (2nd Cir. 2018).
https://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2016cv04685/459132/60/

FACTS: Plaintiffs-Appellants, Christine M. Taylor and Christina Klein, fell into credit card debt owed to Barclays Bank. After default, Barclays assigned the debts to Defendant-Appellee, Financial Recovery Services, Inc. ("FRS"), a collection agent. Barclays instructed FRS not to accrue interest or fees on the debt. FRS sent multiple collection notices to Taylor and Klein stating the unchanging balances due on the credit card debt. There was no indication on the collection notices of the accrual, or lack thereof, of interest or fees owed on the debt.

Taylor and Klein filed suit, alleging the collection notices sent by FRS were "false, deceptive, or misleading" under the FDCPA. The district court granted summary judgment in favor of FRS, concluding that FRS was in not in violation of the FDCPA. Taylor and Klein appealed.

HOLDING: Affirmed.

REASONING: Taylor and Klein argued that FRS's collection notices were misleading within the meaning of §1692(e) of the FDCPA because the failure to disclose whether interest and fees were accruing on the debt could lead a "least sophisticated consumer" to interpret the notices to mean that interest and fees were or were not accruing on the debts owed.

The FDCPA does not impose a duty on debt collectors to encourage debtors to delay repayment of debts.

The court was guided by two principles of statutory construction to determine whether the collection notice violated §1692(e). Under the first principle, which was the lack of standing regarding interest, the court reasoned that the FDCPA must be construed liberally to effectuate its stated purpose and the collection notices were to be looked at from the perspective of the "least sophisticated consumer." Using the second principle, statements regarding tax consequences, the court determined that a collection notice could be considered misleading if it is open to more than one reasonable interpretation and at least one of those interpretations is inaccurate.

These principles lead the court to conclude that the lack of disclosure was not misleading because the notice could have been read to mean that prompt payment of the stated balances would have satisfied the debts. In Taylor and Klein's case, prompt payments of the amount stated in the notices would have satisfied their debts. So the interpretation was not inaccurate and would not have caused harm. The only harm suffered by Taylor and

Klein was that they were unaware that delay of repayment would not increase their debt owed. The FDCPA does not impose a duty on debt collectors to encourage debtors to delay repayment of debts. If a collection notice correctly states a consumer's balance without mentioning interest or fees, and no such interest or fees are accruing, then the notice is not misleading and does not fail to state accurately the amount of debt.

ATTORNEY IS DEBT COLLECTOR UNDER FDCPA

CONSUMERS AWARDED $1,000 IN STATUTORY DAMAGES UNDER FDCPA.

Infante v. Law Offices of Joseph Onwuteaka, P.C., ___ F. App'x ___ (5th Cir. 2018).
http://www.ca5.uscourts.gov/opinions/unpub/17/17-41071.0.pdf

FACTS: Defendants-Appellants Law Offices of Joseph Onwuteaka, P.C. (the "law firm") and Joseph Onwuteaka, individually, regularly litigated the collection of debts referred to them by Onwuteaka's debt-buying company, Samara Portfolio Management, L.L.C.. Samara purchased the debt of Plaintiff-Appellee Shirley Infante, and referred her debt to Onwuteaka for collection. Infante counterclaimed, alleging violations of state and federal consumer protection laws, to which Onwuteaka nonsuited in reply. Infante in return then filed suit against Onwuteaka, the law firm, and Samara in federal court alleging violations of the FDCPA.

The district court ruled in favor of Infante and awarded her the statutory maximum of $1,000 in damages. Onwuteaka appealed.

HOLDING: Affirmed.

REASONING: Onwuteaka argued that both the grant of summary judgment and the award of fees were improper because neither he nor his firm was a "debt collector" under the FDCPA. Instead, Onwuteaka argued that he and the law firm should hold "creditor" status because Samara owned the debts, and Onwuteaka owned both Samara and the law firm. According to the FDCPA §1692(a)(4), (6), a "creditor" is "a person who offers or extends credit creating a debt or to whom a debt is owed; whereas a "debt collector" is one whose principal purpose or regular activity is to "collect or attempt to collect the debts owed, due, asserted to be owned, or due another."

The court rejected Onwuteaka's argument because he failed to establish how either he or his law firm can claim ownership of the debts that belong to Samara. Because Onwuteaka established his law firm as a professional corporation, and Samara as a limited liability company, all three are legally distinct entities. Therefore, neither Onwuteaka nor his law firm either owned, or extended the credit giving rise to the debts owned by Samara. Furthermore, the pre-suit demand letters that Onwuteaka sent to Infante both stated unambiguously: "This Is An Attempt to Collect A Debt By A Debt Collector." As a result, the court found that Onwuteaka and his law firm were both "debt collectors" under the FDCPA, justifying the district court's award of fees.

UNPAID TOLLS ARE NOT A DEBT UNDER FDCPA

St. Pierre v. Retrieval-Masters Creditors Bureau, Inc., 898 F.3d 351 (3d Cir. 2018).
https://law.justia.com/cases/federal/appellate-courts/ca3/17-1731/17-1731-2018-08-07.html

FACTS: Thomas St. Pierre opened an E-ZPass account, an electronic toll payment program that facilitates toll collection, in order to drive on the State's toll roads and bridges. Under the E-ZPass agreement, St. Pierre was required to reload his E-ZPass account balance if it fell below a threshold amount. Defendant, Retrieval-Masters Creditors Bureau, Inc. ("RMCB"), a private debt collection agency, mailed St. Pierre two collection letters stating the amount owed by St. Pierre. St. Pierre's name, address, a "quick response code," and his account number were visible through the glassine window of the collection envelope sent by RMCB.

St. Pierre filed a putative class action alleging that RMCB's disclosure of these pieces of information on the envelope violated the Fair Debt Collection Practices Act ("FDCPA"). The FDCPA prohibits the use of any "unfair or unconscionable means to collect or attempt to collect any debt, including any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mail." This prohibition only applies to a "debt."

RMCB moved to dismiss for failure to state a claim under Rule 12(b)(6). The district court granted RMCB's motion to dismiss, finding the FDCPA did not apply to RMCB's collection letters about St. Pierre's allegedly unpaid toll charges because tolls are not considered a consumer debt.

HOLDING: Affirmed.

REASONING: The district court dismissed St. Pierre's claim because it did not consider the allegedly unpaid E-ZPass charges that RMCB was trying to collect to be consumer debt covered by the act. The FDCPA defines a debt as an "obligation … of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes."

The Third Circuit discussed a three-part test to evaluate whether an obligation constitutes a "debt" under the FDCPA. First, did the obligation arise out of a transaction, a consensual exchange involving an affirmative request? Second, if the obligation did arise out of a transaction, what "money, property, insurance, or services" are the subject of this transaction? Third, was the "money, property, insurance, or services" primarily used for "personal, family, or household purposes?"

The court stated that St. Pierre would have had no obligation to pay highway tolls had he chosen to use alternate routes other than the tolls and, for this reason, his obligation did arise out of a "transaction" within the meaning of the FDCPA. The court noted that in exchange for the tolls all drivers benefit from "safer, faster, and more convenient travel in and through the State." Lastly, the court found that St. Pierre's benefit in exchange for payment of the tolls was not a private benefit, but a very public benefit of highway maintenance and repair.

St. Pierre's toll liability did not constitute an obligation for personal, family or household purposes and, therefore, did not qualify as a "debt" under the FDCPA.

RECENT DEVELOPMENTS

ARBITRATION

SUPREME COURT RULES COMPANIES CAN USE ARBITRATION CLAUSES IN EMPLOYMENT CONTRACTS TO PROHIBIT WORKERS FROM BANDING TOGETHER TO TAKE LEGAL ACTION OVER WORKPLACE ISSUES

Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).
https://www.supremecourt.gov/opinions/17pdf/16-285_q8l1.pdf

FACTS: Petitioners are employees from three consolidated suits. Respondents are their employers. The employers and employees entered into agreements providing for individual arbitration for any disputes that might arise between the parties. The employees later brought suits against the employers, seeking to litigate claims on behalf of a nationwide class under the FLSA's collective action provision. The employers filed motions to compel individual arbitration.

The trial courts in the Fifth and Ninth Circuits granted the employers' motions. The trial court in the Seventh Circuit denied the motion. The Seventh and Fifth Circuits affirmed. The Ninth Circuit reversed. The Supreme Court granted certiorari.

HOLDING: As to the Fifth Circuit, Affirmed. As to the Seventh and Ninth Circuits, Reversed and remanded.

REASONING: The employees asserted the Arbitration Act's saving clause allows courts to refuse to enforce arbitration agreements upon such grounds as exist at law or in equity for the revocation of any contract. They argued that the NLRA conflicted with and overrode the Arbitration Act's enforcement of arbitration agreements because it guaranteed class and collective action procedures. They also argued that the Court's dicta in *Eastex Inc. v. NLRB*, 437 U.S. 566 (1978), suggests that individualized dispute resolution procedures might be insufficient and collective procedures might be mandatory. Finally, they argued that the court should give *Chevron* deference to the NLRB's interpretation of the NRLA, suggesting it displaces the Arbitration Act, because the NLRB administers the NRLA.

The Court rejected these arguments by first explaining that the saving clause of the Arbitration Act only permits agreements to arbitrate to be invalidated by defenses that apply to any contract, such as fraud, duress, or unconscionability. The employees' defense targets arbitration and, thus, does not apply to any contract.

Second, the Court explained that the NLRA did not govern the adjudication of class or collective actions in court or arbitration because it neither expressed approval or disapproval of arbitration. Further, the NLRA did not mention class or collective action procedures, and it did not mention that it displaced the Arbitration Act.

Third, the Court noted that its dicta in *Eastex* did not purport to discuss what procedures an employee might be entitled to in litigation or arbitration.

Finally, the Court explained that it did not owe *Chevron* deference to the NLRB's interpretation of the NLRA because the NLRB interpreted it in a way that limited the Arbitration Act, which it did not administer.

HIDDEN ARBITRATION CLAUSE NOT ENFORCEABLE

Jones v. Samsung Elecs. Am., Inc., ___ F. Supp. 3d. ___ (W.D. Pa. 2018).
https://www.leagle.com/decision/infdco20180522b63

FACTS: Plaintiff Brittney Jones brought a class action on behalf of herself and others who purchased allegedly defective Samsung S3 cell phones ("S3") from Defendant Samsung Electronics America, Inc.. In 2013, Plaintiff purchased an S3. The box that the S3 was sold in had a sticker that listed in small font what the box contained. One of the items listed was, "Important Information Booklet." None of the headings in the table of contents or the index mentioned a mandatory arbitration agreement in the sixty-four-page booklet. Rather, the arbitration agreement was found under the section labeled, "Manufacturer's Warranty." In 2016, the Jones alleged that she left her S3 charging, at her mother's home, when the phone overheated and caught fire, causing over $10,000 worth of damages to the home.

Plaintiff filed suit to recover damages caused by the fire. Defendant filed a motion seeking to compel arbitration.

HOLDING: Motion Denied.

REASONING: Defendant argued that the arbitration agreement found within the "Important Information Booklet" was binding and, therefore, compelled arbitration. The court rejected this argument, agreeing with the Plaintiff that the agreement was set out in such an inconspicuous manner that Plaintiff could not have reasonably been deemed to be aware of it at the time of purchase.

Because a meeting of the minds is necessary to enforce a contract, the court found that Defendant could not enforce the arbitration agreement.

The court relied on a similar Third Circuit case, *Noble v. Samsung Elecs. Am., Inc*., 682 Fed. App'x 113, 115 (2017), wherein the court found that neither the table of contents nor the index afforded the consumer reasonable notice of the existence of any arbitration clause.

The court in the instant case found that the placement of an arbitration clause in the Manufacturer's Warranty section, a section that ordinarily speaks of the Defendant's obligations, provided insufficient notice to the Plaintiff. There could not have been a mutual manifestation of an intention to be bound, or a meeting of the minds. Because a meeting of the minds is necessary to enforce a contract, the court found that Defendant could not enforce the arbitration agreement.

WELLS FARGO DID NOT WAIVE ITS ARBITRATION RIGHTS AGAINST ABSENT CLASS MEMBERS

Martinez, et al. v. Wells Fargo Bank, NA, ___ F.3d ___ (11th Cir. 2018).
http://media.ca11.uscourts.gov/opinions/pub/files/201616820.pdf

FACTS: Plaintiffs-Appellees were a class of bank customers ("Plaintiffs") with checking accounts at Wells Fargo and Wachovia banks ("Wells Fargo"). These accounts were governed by agreements that allowed binding arbitration to be invoked at any reasonable time by either the bank or the customer. Plaintiffs filed class action lawsuits in 2008 and 2009 alleging Wells Fargo unlawfully committed certain acts relating to charges in overdraft fees. The cases were consolidated in late 2009 by the district court.

Upon consolidation, the district court ordered Wells Fargo to file a motion to compel arbitration by April 2010 if it intended to arbitrate the claims. Wells Fargo replied to the court that it would not seek to compel arbitration against named plaintiffs. However, it wished to reserve arbitration rights against any plaintiffs who might be joined later in the litigation process.

Wells Fargo later attempted to compel arbitration against the named plaintiffs. The district court denied the motion and the Eleventh Circuit affirmed. Wells Fargo then attempted to compel arbitration against the unnamed class members. Again, the district court denied the motion, holding that Wells Fargo waived its right to arbitrate because it "acted inconsistently with its arbitration rights." The district court further stated that if arbitration were allowed, "significant prejudice would result." Wells Fargo appealed.

HOLDING: Vacated and remanded.

REASONING: Wells Fargo argued that although it may have waived its arbitration rights as to the named parties, it had not waived rights against unnamed parties. The court accepted this argument by explaining the two prongs that must be met to determine whether a party has waived its arbitration rights. First, the court must determine whether the party has acted inconsistently with the arbitration right. The court noted this inconsistency may be found when the party has substantially invoked the litigation process before compelling arbitration. If the compelling party has done so, the second question was whether the compelled party had been prejudiced.

The court noted that when analyzing a waiver, the key is whether both the court and the opposing party are given fair notice of the compelling party's intent to exercise arbitration rights. This notice must be given at an early state of the litigation process.

The court concluded that Wells Fargo had not acted inconsistently with its arbitration rights. Wells Fargo previously stated it would not compel against named plaintiffs; however, it specifically reserved its right to arbitrate against any party that might later be joined. The court determined this reservation "had the effect of putting both the court and Plaintiffs on notice" of Wells Fargo's intent to arbitrate against unnamed parties.

Further the court stated that there was no requirement for a party to file any type of conditional arbitration motion against all possible and future adversaries, such as unnamed plaintiffs, in order to avoid waiving its rights. The court held that Wells Fargo did not act inconsistently with its arbitration rights, and, therefore, did not waive them as to the unnamed parties.

CUSTOMER OF DEFUNCT CRYPTOCURRENCY EXCHANGE DOES NOT HAVE TO ARBITRATE PROPOSED CLASS ACTION ALLEGING DEFENDANT HELPED LAUNDER $8 MILLION IN STOLEN CUSTOMER FUNDS

Leidel v. Coinbase, Inc., F. App'x ___ (11th Cir. 2018).

https://cases.justia.com/federal/appellate-courts/ca11/17-12728/17-12728-2018-04-23.pdf?ts=1524493837

FACTS: Plaintiff, Brandon Leidel, was a customer of Cryptsy, a cryptocurrency exchange service owned by Paul Vernon. Cryptsy operated by using the financial services website of Coinbase, Inc. ("Defendant"), to convert customers' cryptocurrency to cash. As a part of using Defendant's website, Cryptsy accepted the terms of Defendant's User Agreement. The User Agreement included an arbitration clause and a choice-of-law provision that stated that California law would govern the User Agreement. For about three years, Vernon converted more than $8,000,000 of Cryptsy customers' cryptocurrency to cash, and deposited the cash to his personal bank account.

Leidel, representing a class of all affected Cryptsy customers, along with a receiver of Cryptsy, filed suit against Defendant in Florida, alleging that Defendant failed to: (1) adequately monitor or investigate Cryptsy's and Vernon's use of the Defendant website; (2) detect Vernon's theft of Cryptsy's customers' cryptocurrency; and (3) report suspicious activity by Vernon or Cryptsy to the appropriate authorities. Defendant moved to compel arbitration under the User Agreement. The district court dismissed Cryptsy's claim, pending arbitration, but denied the motion to compel arbitration of Leidel's claim. Defendant appealed.

The User Agreement included an arbitration clause and a choice-of-law provision that stated that California law would govern the User Agreement.

HOLDING: Affirmed.

REASONING: Defendant argued that the arbitration clause along with the choice-of-law provision within the User Agreement bound Leidel under the doctrine of equitable estoppel. The court rejected this argument, holding that Leidel is not bound by the arbitration clause, regardless of whether Florida or California law controls.

First using Florida law, the court held that to compel arbitration under a theory of equitable estoppel, the party seeking to compel must show that the plaintiff is relying on a contract to assert its claims, and that the dispute is within the scope of the arbitration clause. Leidel's claim was not based on the User Agreement, but on duties allegedly imposed by law. Additionally, Leidel's claim was brought on behalf of a larger class also not party to the User Agreement. Accordingly, the court held that Leidel's claim neither relied on nor bore a significant relationship to the User Agreement. Thus, the court held that Leidel was not bound by the arbitration clause under equitable estoppel.

Next, using California law, the court noted that a nonsignatory plaintiff may be estopped from refusing to arbitrate when he or she asserts claims that are dependent upon, or inextricably intertwined with the underlying contractual obligations of the agreement containing the arbitration clause. Using this rationale, the court determined that Leidel's claim did not rely on the User Agreement to establish his cause of action, nor did Leidel seek enforcement of terms of the User Agreement. Therefore, the court held that Leidel's claim was neither dependent upon nor inextricably intertwined with the User Agreement, and Leidel could not be estopped from refusing to arbitrate.

UBER ARBITRATION AGREEMENT NOT ENFORCEABLE

Cullinane v. Uber Techs., Inc., 893 F.3d 53 (1st Cir. 2018).
https://law.justia.com/cases/federal/appellate-courts/ca1/16-2023/16-2023-2018-06-25.html

FACTS: Rachel Cullinane and three other plaintiffs ("the Plaintiffs") argued that Uber violated a Massachusetts consumer-protection statute by knowingly imposing certain fictitious or inflated fees.

Uber's Terms and Conditions consisted of an approximately ten-page document that was available to Uber app users during the registration process via hyperlink. If the user "clicked" on the "Terms of Service & Privacy Policy" the user would be taken to another screen that contained two additional clickable buttons entitled "Terms & Conditions" and "Privacy Policy". The agreement contained a "Dispute Resolution" section that provided that the user and Uber agree that any dispute, claim, or controversy arising out of or relating to the agreement would be settled by binding arbitration. The Uber app did not require prospective users to "click" any of these buttons or access the agreement before they could complete the registration process.

The District Court granted Uber's motion to compel arbitration. Plaintiffs appealed.
HOLDING: Reversed and remanded.
REASONING: Uber argued to compel arbitration claiming that its online presentation of the "Terms of Service & Privacy Policy" was sufficiently conspicuous to bind the plaintiffs whether or not they chose to click through the relevant terms. The court rejected that argument, noting that the plaintiffs were not reasonably notified of the terms of the arbitration agreement because Uber did not use a common method of conspicuously informing users of the existence and location of terms and conditions, such as requiring users to click a box stating that they agreed to a set of terms before continuing onto the next screen. Instead, Uber displayed a notice of deemed acquiescence and a link to the terms and conditions at registration. The court reasoned that the reading and conspicuousness of the "Terms of Service & Privacy Policy" hyperlink was diminished by other similarly displayed terms that were presented simultaneously to the user during registration.

Due to this, the court determined that the terms of the agreement were not reasonably communicated to the plaintiffs, and, therefore, Uber's motion to compel arbitration could not stand.

An agreement that is silent concerning arbitration between a signatory and non-signatory cannot speak to the arbitrability of disputes between such parties.

NON-SIGNATORY CANNOT ENFORCE ARBITRATION CLAUSE IN DTPA CASE

Jody James Farms, JV v. Altman Group, Inc., 547 S.W. 3d 624 (Tex. 2018).
https://caselaw.findlaw.com/tx-supreme-court/1895748.html

FACTS: Plaintiff-Petitioner, Jody James Farms, JV, purchased a crop insurance policy from Rain & Hail, LLC, through the independent insurance agency of Defendant-Respondents, The Altman Group, Inc., and their agent Laurie Diaz (collectively, "the Agency"). Upon loss of their grain sorghum crop, Jody James contacted the Agency, through Laurie Diaz, to report the suffered loss. Rain & Hail denied coverage under the claim for failure to present timely notice of claim and inability to make loss determinations due to the comingling of performing and non-performing crops. Jody James and Rain & Hail arbitrated the loss coverage determination pursuant to the arbitration clause in the insurance policy. The arbitrator ruled in favor of Rain & Hail. The Agency was not a signatory to the insurance policy containing the arbitration clause at issue.

Jody James filed suit against the Agency, alleging it engaged in deceptive-trade practices by failing to timely submit the crop-loss claim to Rain & Hail. The trial court ordered Jody James and the Agency to arbitration under the Federal Arbitration Act and confirmed the result of arbitration in favor of the Agency. The court of appeals affirmed. Jody James petitioned for review.
HOLDING: Reversed and remanded.
REASONING: Jody James argued that an arbitration agreement does not exist between it and the Agency based on the insurance policy contract.

The court accepted that argument by recognizing that a contract that is silent on a matter cannot speak unmistakably to that matter. Therefore, an agreement that is silent concerning arbitration between a signatory and non-signatory cannot speak to the arbitrability of disputes between such parties. An arbitration agreement may bind parties to the extent that such intent is expressed within the agreement's terms. The insurance policy agreement between Jody James and Rain & Hail expressed intent to arbitrate only with respect to one another and does not expressly extend to unspecified third parties or non-signatories.

The court reasoned that a contract could compel enforcement of an arbitration clause by a third party if there is a related valid and enforceable agreement. Because the arbitration agreement only applied to disputes between Rain & Hail and Jody James, the insurance policy could not be reasonably read to encompass disputes between Jody James and non-signatories, rendering the arbitration clause unenforceable by the Agency.

ARBITRATION CONFIDENTIALITY AGREEMENT NOT ENFORCEABLE AGAINST STATE ENFORCING UNFAIR PRACTICE ACT CLAIMS

STATE IS NOT BOUND BY ARBITRATION AGREEMENT IN CONSUMERS' CONTRACTS.

State ex rel. Balderas v. ITT Educ. Servs., Inc., 421 P.3d 849 (N.M. Ct. App. 2018).
https://law.justia.com/cases/new-mexico/court-of-appeals/2018/a-1-ca-35204.html

FACTS: The State of New Mexico, filed suit against ITT Educational Services, Inc., claiming violations of the New Mexico Unfair Practices Act ("UPA"). ITT filed a motion to compel arbitration. The district court denied ITT's motion and ITT appealed. During discovery, the State served subpoenas on two attorneys, who had represented ITT students in prior arbitration proceedings against ITT, requesting certain documents relating to the prior arbitration. ITT objected to the subpoenas and asserted that the disclosure of the requested documents would violate the confidentiality clauses of the enrollment agreements.

The district court granted the State's motion to compel the production of the documents. ITT then moved for an interlocutory appeal, which was granted. The interlocutory appeal required the appellate court to consider the enforceability of the arbitration provision and the confidentiality clause.

HOLDING: Affirmed.

REASONING: ITT's main contention was that the Federal Arbitration Act ("FAA"), and policy favoring arbitration, mandated that the terms of the arbitration provision, including the confidentiality clause, prohibited the release of the information sought by the State. The court rejected this argument by explaining that it would be contrary to public policy to allow ITT to use the confidentiality clause to shield itself from the State's investigation and litigation authorized under the UPA. Thus ITT's motion to compel arbitration failed for the same reason.

The court reasoned that the FAA does not preempt state law governing contract formation and enforcement. In enacting the UPA, the Legislature authorized the State to demand the production of documents on any person who might be in possession of documents relevant to the subject matter of a violation of the UPA. While an investigative demand cannot be made for privileged matters, or matters which would not be required to be produced by a subpoena for the production of evidence, the State had broad authority to investigate violations of the UPA. Further, the State's authority to enforce the UPA included the statutory right to bring suit in its name alleging violations of the UPA; and to compel the State to arbitrate would be against the specific powers granted by the Legislature to the State under the UPA.

AGREEMENT AUTHORIZED ATTORNEY'S FEES FOR MOTION TO COMPEL ARBITRATION

Aralar v. Scott McRae Auto. Grp., LLLP, ___ F. Supp. 3d ___ (M.D. Fla. 2018)
https://www.leagle.com/decision/infdco20180417e99

FACTS: Plaintiff Joseph Aralar sued his employer, defendant Scott McRae Automotive Group, under the FLSA for alleged unpaid overtime and back wages. As a condition of employment, however, Aralar signed an arbitration agreement. It provided that if a plaintiff does not move to dismiss or stay the action with notice of the arbitration agreement within ten days of service by the defendant, then a defendant who succeeds in making those motions may request fees and costs. After Aralar filed suit, McRae provided notice of the agreement and filed the necessary motions. After receiving notice from McRae, Aralar did not move to dismiss or stay proceedings within ten days. The court granted McRae's motion to compel arbitration and stayed the case until arbitration was finalized.

The arbitrator granted McRae's motion for judgment on the pleadings, finding that Aralar's particular job was not covered by the FLSA. The arbitrator also awarded fees and costs to McRae, who filed a motion to confirm the award. Aralar filed an opposing motion to vacate.

HOLDING: Award confirmed.

REASONING: Aralar presented two reasons why the court should vacate the award of attorney's fees. In the first, he argued that the arbitrator exceeded the Eleventh Circuit's limits on fee shifting after arbitration. In the second, Aralar claimed that his original FLSA claim was meritorious, precluding an award of attorney's fees.

The court rejected Aralar's first argument by demonstrating that the case he used for support dealt with mandatory fee shifting, which implicated Title VII rather than the FLSA, and was later vacated. In fact, the Eleventh Circuit's position on post-arbitration attorney's fees was that federal courts should defer to the arbitrator's decision when possible. The court likewise rejected the public policy prong of his argument, and noted that public policy is no longer a recognized cause for vacating an arbitration award.

The court also rejected Aralar's second argument, in which he presented two Supreme Court cases employing a per se rule against granting attorney's fees in non-frivolous cases. The court rejected this argument because both cases fell into the privileged category of civil rights cases. This sort of imperative against attorney's fees does not exist under the FAA; which instead requires courts to enforce privately negotiated arbitration agreements just as other contracts.

In the instant case, the agreement allowed for attorney's fees to be awarded to a defendant who succeeded in moving to compel arbitration. The court outlined the four circumstances in which a court can vacate the results of arbitration: (1) if the award was procured by corruption, fraud, or undue means; (2) if there was evident partiality or corruption in the arbitrators; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, or in refusing to hear evidence pertinent and material to the controversy—or of any other misbehavior by which the rights of any party have been prejudiced; or (4) if the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

None of those conditions were present in this case. Instead, the court confirmed that it must uphold the terms of the agreement between the parties and confirmed the award of attorney's fees.

INSURANCE

FAILURE TO STATE A BREACH OF CONTRACT CLAIM AND THUS A RIGHT TO RECEIVE POLICY BENEFITS PRECLUDES EXTRA-CONTRACTUAL CLAIMS AS WELL

Moore v. Allstate Tex. Lloyd's, ___ F. App'x. ___ (5th Cir. 2018). https://law.justia.com/cases/federal/appellate-courts/ca5/17-10904/17-10904-2018-07-19.html

FACTS: Moore purchased an insurance policy from Allstate to cover his property. Moore filed a claim with Allstate related to damage on his property due to storm-related events. After inspecting the property three times, Allstate wrote to Moore stating that Allstate would not cover the alleged damages to Moore's property

Moore sued Allstate in state court asserting breach of contract and extra-contractual claims. The district court granted Allstate's motion to dismiss because Moore failed to plead facts sufficient to state a viable breach of contract claim. Moore appealed.

HOLDING: Affirmed.

REASONING: The Fifth Circuit agreed with the district court and found that Moore's general assertions of Allstate's breach of contract were devoid of factual content. Regarding the extra-contractual claim, Moore's main contention was that the fourth rule from *USAA Tex. Lloyds Co, v. Menchaca*, 545 S.W.3d 479 (Tex. 2018)., which states that "if an insurer's statutory violation causes an injury independent of the loss of policy benefits, the insured may recover damages for that injury even if the policy does not grant the insured a right to benefits", afforded him relief.

Moore could not recover for Allstate's alleged extra-contractual violations because Moore failed to state a breach of contract claim, and thus, a right to receive policy benefits.

The court dismissed Moore's argument regarding the extra-contractual claims by stating that the fourth rule from *Menchaca* includes an explanation that this independent-injury rule applies "only if the damages are truly independent of the insured's right to receive benefits." The independent-injury rule "does not apply if the insured's…extra-contractual claims 'are predicated on [the loss] being covered under the insurance policy" . . ., or if the damages 'flow' or 'stem' from the denial of the claim for policy benefits." Therefore, Moore could not recover for Allstate's alleged extra-contractual violations because Moore failed to state a breach of contract claim, and thus, a right to receive policy benefits.

CAUSES OF ACTION FOR BREACH OF FIRST-PARTY INSURANCE CONTRACTS AND VIOLATIONS OF THE DTPA AND THE TEXAS INSURANCE CODE ACCRUE ON THE DATE THE INSURER DENIES THE INSURED'S CLAIM

Smith v. Travelers Cas. Ins. Co. of Am., ___ F. Supp. 3d. ___ (S.D. Tex. 2018).
https://cases.justia.com/federal/district-courts/texas/txsdce/4:2016cv01527/1363016/54/0.pdf?ts=1531388559

FACTS: Lillian Smith, was insured by Travelers Casualty Insurance Company of America. Smith alleged that a lightning strike caused damage to the foundation and the air conditioning unit of her commercial property. She reported an insurance claim to Travelers in September of 2013, which was acknowledged two days later. After inspection by an engineer, Travelers issued a letter denying first-party property coverage in November of 2013. In December of 2014, Smith retained a second engineer to inspect the property, who determined that the damage was caused by the lightning strike. In April of 2015, after Smith's request for further reinvestigation of the claim, Traveler's sent the report from a third engineer's inspection, which did not alter its original denial of coverage.

Smith filed suit in January of 2016, asserting claims for breach of contract and violations of the DTPA and the Texas Insurance Code. Travelers filed a Motion for Summary Judgment, arguing that the statute of limitations barred each of Smith's claims.

HOLDING: Motion granted.

REASONING: Travelers argued that the statute of limitations began to accrue in November of 2013, on the date that the original denial of coverage was issued. Plaintiff argued that the statute of limitations was tolled, due to the reinvestigations that occurred after November of 2013.

Citing the Fifth Circuit Court of Appeals in *Citigroup Inc. v. Federal Insurance Co.*, 649 F.3d 367 (5th Cir. 2011)., the district court rejected Smith's argument, holding that the causes of action for breach of first-party insurance contracts, violations of the DTPA, and the Texas Insurance Code started to accrue on the date the insurer denies the insured's claim.

The court acknowledged that when there is no outright denial of an insurance claim, the exact date of accrual of a cause of action may be determined on a case-by-case basis. However, reopening a claim upon the insured's request does not change the accrual date for the purposes of limitations.

Accordingly, Plaintiff's requests for Travelers to reinvestigate her claim and any subsequent review have no effect on the statute of limitations, as Defendant did not alter its original decision to deny coverage. Thus, because Smith filed suit after the statute of limitations had elapsed on each of her causes of action, Travelers was entitled to summary judgment.

APPELLATE COURT GRANTS PLEA OF ABATEMENT UNDER CHAPTER 542A OF THE INSURANCE CODE

In Re Allstate Indem. Co., ___ S.W. 3d ___ (Tex. App.–Houston [14th Dist.] 2018).
https://law.justia.com/cases/texas/fourteenth-court-of-appeals/2018/14-18-00362-cv.html

FACTS: Plaintiffs, Holly Holt and David Cabrera, sued Defendant, Allstate Indemnity Company, for violations of Chapter 541 of the Texas Insurance Code. Allstate was the insurer of a condominium owned by Holt and Cabrera. Upon damage to the condominium, resulting from Hurricane Harvey, Holt and Cabrera filed an insurance claim. The amount paid for damages under the insurance claim was disputed. Holt and Cabrera filed suit and alleged that, prior to filing suit, they had sent Allstate a letter and two emails, as evidence of adequate notice. In response, Allstate filed an answer and a plea in abatement.

The court determined that because the notice was insufficient, the trial court abused its discretion by denying a plea in abatement.

The trial court denied Allstate's plea in abatement. Allstate filed a petition for writ of mandamus. The court of appeals granted review.

HOLDING: Petition conditionally granted.

REASONING: Allstate asserted that the trial court abused its discretion by denying the plea in abatement based on the finding that there was adequate notice in compliance under Chapter 542(A) of the Texas Insurance Code.

The court accepted that argument by reasoning that Holt and Cabrera did not provide sufficient pre-suit notice prior to filing their claims under the Texas Insurance Code. Further, the court noted that a trial court may abuse its discretion if it reaches an arbitrary or unreasonable decision amounting to a clear and prejudicial error of law or if it fails to correctly apply the law to the facts. Section 542.003(a)–(c) set forth the necessary requirements for pre-suit written notice by the insurance claimant. After review, the court found that the letter and emails sent by Holt and Cabrera to Allstate did not comply with the requirements of Section 542.003(a)–(c). The court determined that because the notice was insufficient, the trial court abused its discretion by denying a plea in abatement.

MISCELLANEOUS

DRUG COMPANY DID NOT "SEND" UNSOLICITED FAX

Health One Med. Center, Eastpointe P.L.L.C. v. Mohawk, Inc., Bristol-Meyers Squibb Co., and Pfizer Inc., 889 F.3d 800 (6th Cir. 2018).
http://www.opn.ca6.uscourts.gov/opinions.pdf/18a0089p-06.pdf

FACTS: Plaintiff-Appellant was a medical center ("Health One") who was sent unsolicited faxes by a third party ("Mohawk"). The faxes listed Mohawk's contact information and offered discount pricing on drugs; two of those drugs were manufactured by Defendants-Appellees ("Bristol" and "Pfizer"). Bristol and Pfizer had no actual awareness the unsolicited faxes were sent.

Health One originally brought a putative class-action lawsuit against Mohawk only, alleging the faxes violated the Telephone Consumer Protection Act by unlawfully sending an unsolicited advertisement. Mohawk never answered the complaint. After the district court entered a default judgment against Mohawk, Health One amended its complaint to add Bristol and Pfizer. The amended complaint asserted Bristol and Pfizer "sent" unsolicited faxes because the faxes sent by Mohawk mentioned their drugs. The district court granted Bristol and Pfizer's motion to dismiss, concluding the manufacturers had not "sent" the faxes. Health One appealed.

HOLDING: Affirmed.

REASONING: Health One argued that Bristol and Pfizer were each a "sender" of the faxes based on the meaning given in 47 C.F.R. §64.1200(f)(10) of the TCPA, which defines "sender" as anyone "on whose behalf" a fax is sent or anytime an entity's "goods or services are advertised or promoted" in an unsolicited advertisement. Mohawk argued that because Bristol and Pfizer's drug prices were "advertised or promoted" in the fax, each fit the definition of "sender."

The court rejected that argument for two reasons. First, it held that to be liable under the Telephone Consumer Protection Act the defendant is required to have "used" a fax machine to "send" and unsolicited advertisement. The court stated that when a term is not defined in the statute, that term should be given its ordinary meaning as opposed to the meaning used in a different statute. Using the American Heritage Dictionary, the court determined that "send" could have two relevant meanings here. "Send" could either mean to cause information to be conveyed, or to dispatch a communication. The court stated that only Mohawk caused or dispatched the message, not Bristol and Pfizer.

"Send" could either mean to cause information to be conveyed, or to dispatch a communication.

Second, the court stated that even if the FCC regulation's definition of "sender" was used, Bristol and Pfizer would still not fit the definition. Further, the TCPA allocates liability in cases where one party "physically sends (i.e. dispatches)" the fax and a different party "causes" the fax to be sent. This situation occurs when a company hires a fax broadcaster. Bristol and Pfizer did not dispatch the faxes, Mohawk did. Nor did Bristol and Pfizer cause the unsolicited faxes to be sent by hiring Mohawk. In fact, Bristol and Pfizer did not know about the faxes. Based on this, the court concluded that Bristol and Pfizer are not liable for the unsolicited faxes sent by Mohawk.

This issue of the *Journal* is one of the most diverse and comprehensive we have published. It contains articles on teaching consumer law, notorious "*notarios*," whether non-judicial foreclosures are subject to the Fair Debt Collection Practices Act, and liability for SWIFT bank heists. And, of course, there are the usual sections on Recent Developments and the Consumer Alert.

I have often said that no matter what area of consumer or commercial law you deal with, or what side of the docket you represent, the *Journal* has something of interest. It has never been truer than with this issue.

Finally, I want to thank Corbett Enright, the student Editor-in-Chief, and the entire editorial board of Volume 21 of the *Journal* for their outstanding work and dedication to the *Journal*. The new student Editor-in-Chief, Austin Campbell, and the board of Volume 22 are off to a great start with this issue.

Richard M. Alderman
Editor-in-Chief