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SERVICE CONTRACTS AND THE MAGNUSON-MOSS WARRANTY ACT

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Articles

Recent Developments

SERVICE CONTRACTS AND THE MAGNUSON-MOSS WARRANTY ACT:

NAVIGATING THE BOUNDARIES OF FEDERAL AND STATE REGULATION OF EXTENDED WARRANTIES

Brian T. Casey* and Jon L. Gillum**

Service contracts—or extended warranties as they are often known in business parlance—are unique types of risk transfer contracts both in terms of the way they function and the ways they are regulated. Although service contracts mirror many of the features of traditional insurance products, most states expressly exclude them from the statutory definition of insurance, and the majority of states go one step further by establishing formal licensing and financial security requirements that govern the sale of service contracts to consumers by service contract provider or obligors. While these state-based laws and rules are the primary source of regulation for service contracts, such contracts are also potentially subject to the federal Magnuson-Moss Warranty Act (the "MMWA").[1] Yet, the MMWA also governs "regular" or "included" warranties that cover products sold to consumers and are included without payment of additional consideration, and the lion's share of the MMWA's requirements do not expressly apply to service contracts but rather only to consumer product "written warranties." Furthermore, the provisions of the MMWA that do extend to service contract raise questions as to the existence of the MMWA's preemption of state law and possible reverse-preemption of the MMWA under the McCarran-Ferguson Act (which preserves state authority to regulate the business of insurance). Given this regulatory complexity, the application of the MMWA to service contracts can be both nuanced and confusing. This article is intended to help navigate the subtle boundaries between the MMWA and state service contract laws and understand the difference between service contracts and insurance products.

I. Overview of the MMWA

The MMWA requires "suppliers," which include manufacturers and sellers of consumer products, to provide consumers with detailed information about warranty coverage of a consumer product, and regulates the rights of consumers and the obligations of warrantors under written warranties. While the MMWA does not require a manufacturer or seller to provide a written warranty to consumers, once a manufacturer or seller opts to offer a written warranty on a consumer product, the written product warranty must comply with the MMWA and the applicable regulations of the Federal Trade Commission (the "FTC"), which enforces the MMWA.[2]

The MMWA requires "suppliers," which include manufacturers and sellers of consumer products, to provide consumers with detailed information about warranty coverage of a consumer product.

In passing the MMWA, Congress intended to (1) ensure consumers have access to complete terms and conditions of a warranty; (2) provide consumers with information about warranty coverage of a consumer product before its purchase to enable the consumer to make an informed purchase decision; (3) promote competition in the sale of products based on warranty coverages; (4) strengthen incentives for warrantors to perform their warranty obligations in a timely and thorough manner and to resolve any warranty disputes with minimum delay and expense to consumers; and (5) establish remedies consumers can pursue for a breach of warranty.[3] Congress also directed the FTC to adopt rules and regulations applicable to warrantors and warranties of consumer products, and the FTC has responded with a number of rules interpreting the MMWA on such issues as prohibited tying practices,[4] definitions under the MMWA, and pre-sale availability of written warranty terms.[5]

In addition to fines and penalties which the FTC can assess against a warrantor for violation of the Act, a consumer can bring a private right of action against a warrantor for its violation of the Act, which allows for recovery of court costs and reasonable attorneys' fees by the consumer from the warrantor.[6] Although most consumer litigation for violations of the Act is brought in state court due to challenges inherent to the existence of federal jurisdiction, class action litigation under the Act may be brought in federal court.[7]

II. Overview of State Service Contract Laws

Many, but not all, states have codified some form of service contract law. Among those states that have enacted service contract legislation, a handful of states simply define a service contract and provide that they are not regulated as insurance.[8] However, the majority of states that have enacted service contract laws establish licensing/registration and financial security requirements for service contract obligors and specify certain required contract terms and business practices.[9] To accomplish this, some states have adopted the Service Contracts Model Act promulgated almost 20 years ago by the National Association of Insurance Commissioners, or some variation thereof.[10] This model act applies broadly to any type of tangible[11] personal property purchased by a consumer and defines a service contract as a:

> contract or agreement for a separately stated consideration or for a specific duration to perform the repair, replacement or maintenance of property or indemnification for repair, replacement or maintenance, for the operational or structural failure due to a defect in materials, workmanship or normal wear and tear, with or without additional provision for incidental payment of indemnity under limited circumstances, including, but not limited to, towing, rental and emergency road service, but does not include mechanical breakdown insurance or maintenance agreements. [12]

However, other states have approached service contract regulation based on the specific type of underlying product involved, primarily built around three categories of consumer products. As a result, some state service contract laws apply only to (i) motor vehicles, (ii) consumer electronics, or (iii) residential home appliances, HVAC systems, and structural components.[13] At its core, a service contract's coverage is for inherent defects arising from the original manufacturing of the underlying product.[14]

Most state service contract acts exclude from their scope (a) warranties, (b) maintenance agreements and (c) commercial product service contracts.[15] In some states, warranties, maintenance agreements and service contracts offered by regulated public utilities covering their transmission devices are also excluded. For this purpose,

- "Warranty" typically means a warranty made solely by a manufacturer, importer or seller of property or services without separate charge and that is incidental to the sale of a product covering defective parts, mechanical or electrical breakdown, labor or other remedial measures, such as repair or replacement of the property or repetition of services.

- "Maintenance agreement" typically means a contract of limited duration that provides for only scheduled maintenance of a product.

Regardless of the approach, most state service contract laws typically provide exceptions for warranties included in the original price of the product as well as service contracts offered by manufacturers or others in the supply chain (either as an exemption from licensing/registration altogether or an exemption from financial security requirements imposed on an obligor).[16]

In addition, most state service contracts allow a service contract obligor to pay "incidental indemnity" in some circumstances and cover damage for "accidental handling" in addition to promising to repair or replace a defective underlying product.[17] Finally, in recent years, many states have added certain specialized types of ancillary risk transfer products to their definitions of service contracts, especially for motor vehicles, such as key fob replacement, road hazard services, and paintless dent repair.[18] For example, Texas not only includes the aforementioned types of ancillary products within its definition of a non-residential "service contract," but it also includes certain types of identity theft-recovery services and a new depreciation benefit for motor vehicles.[19]

Indeed, the growing number of these types of ancillary products—many of which do far more than simply repair or replace an underlying defective product—highlights one of the defining features of a regulated service contract: state lawmakers have chosen to treat such contracts as non-insurance products. After all, state service contract laws are primarily designed to regulate "third party" risk-transfer contracts, meaning service contracts that are not issued by a business that is the manufacturer or distributor (supply chain) of the subject, underlying product. Without the exception that service contract laws provide to a state's insurance laws, third-party obligor service contracts would in most cases be considered insurance. This is because such contracts typically satisfy all the elements of the common definition of insurance: (1) risk transfer from the covered product purchaser to the contract issuer, (2) payment of separate consideration by the contract purchaser to the contract issuer where there is risk distribution among purchasers of the issuer's contracts, charging a price for each contract in an amount that assumes actuarial distribution of expected future claims to be made under all the issued contracts, (3) indemnity promise by the contract issuer to the contract purchaser, and (4) loss triggered by the occurrence of an adverse fortuitous event beyond the substantial control of the contract issuer.[20] This last item is the critical one that facially makes a third party obligor service contract presumptively an insurance contract—in the absence of a service contract statutory exception—because the third party issuer is not a member of the covered product's supply chain or distribution channel and has no control, or relationship whatsoever, to the quality of the covered product's manufacture and performance.

Therefore, in essence, what state service contract laws do is substantially deregulate a risk-transfer contract that would otherwise be an insurance contract and expressly deem a service contract not to be insurance.[21] As discussed in Part III below, this regulatory approach creates more confusion regarding which federal laws apply to service contracts in light of the McCarran-Ferguson Act, which is the foundation of America's state-based system of insurance regulation and can result in reverse-preemption of federal law for insurance products.[22]

III. The Difference Between Service Contracts Under the MMWA and State Law

Understanding the way the MMWA approaches extended warranties in contrast to state service contract laws first requires examination of two of the MMWA's key defined terms: "written warranty" and "service contract." Under the MMWA, a "written warranty" means:

> (A) any written affirmation of fact or promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or (B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product if such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer.[23]

In other words, a MMWA "written warranty" generally replicates what is often referred to in business parlance as a "limited" or included warranty. In contrast, the MMWA defines a "service contract" quite succinctly as: "a contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance or repair (or both) of a consumer product."[24]

At first glance the differences between a "written warranty" and a "service contract" under the MMWA are not instantly apparent, especially because the broad definition of a written warranty arguably subsumes the same types of promises covered by a service contract and both prongs of the definition of a "written warranty" are joined by an "or." To add to the confusion, both definitions expressly refer to promises to "repair." However, the FTC's regulations aid in understanding the distinction between these two terms by honing in on the key distinguishing phrase—the "basis of the bargain"—which is contained in the definition of "written warranty" but missing from the definition of a "service contract":

> A service contract under the Act must meet the definitions [sic] of section 101(8) [definition of a service contract], 15 U.S.C. 2301(8). An agreement which would meet the definition of written warranty in sec-

> tion 101(6)(A) or (B), 15 U.S.C. 2301(6)(A) or (B), but for its failure to satisfy the basis of the bargain test is a service contract. For example, an agreement which calls for some consideration in addition to the purchase price of the consumer product, or which is entered into at some date after the purchase of the consumer product to which it applies, is a service contract. [emphasis added] [25]

In short, a "written warranty" under the MMWA must be included as part of the initial consumer product purchase transaction and its cost embedded within the single purchase price paid by the consumer—the original "basis of the bargain." However, a "service contract" under the MMWA in contrast requires some type of additional consideration or transaction that is separate and apart from the basis of the initial bargain with the consumer. And, in that sense, the definition of a MMWA "service contract" begins to look very similar to the definition of "service contract" under most state service contract laws which, as noted above, typically requires a promise to repair or replace a product in exchange for separately stated consideration.

It is at that point, however, that the similarities between the MMWA's definition of "service contract" and the state service contract law's definition of a "service contract" end and the differences begin. For example, the FTC's MMWA regulations go on to note the following:

> An agreement which relates only to the performance of maintenance and/or inspection services and which is not an undertaking, promise, or affirmation with respect to a specified level of performance, or that the product is free of defects in materials or workmanship, is a service contract. An agreement to perform periodic cleaning and inspection of a product over a specified period of time, even when offered at the time of sale and without charge to the consumer, is an example of such a service contract.[26]

In other words, the FTC sweeps maintenance agreements into the MMWA's definition of a "service contract," even though most state service contract laws typically do not apply to mere maintenance agreements.

Similarly, the definition of a "service contract" under the MMWA does not include any exceptions for extended warranties offered by manufacturers—products that are often excepted from licensing and/or financial security requirements under state service contract law. [27] Moreover, the MMWA does not expressly cover such services as key fob replacement, road hazard protection, incidental indemnity, or identity theft—products that arguably do more than repair defects in or maintain a consumer product and which many states have chosen expressly to include in their statutory definitions of a "service contract." [28]

In summary, while there is some overlap between the definitions of a service contract under the MMWA and state service contract laws, certain types of products may not fall within both definitions. Instead, some extended warranties (i) may be a "service contract" under both state service contract laws and the MMWA, (ii) may be a "service contract" under the MMWA but not under state service contract laws, or (iii) may be a "service contract" under state service contract laws but not under the MMWA.

IV. Preemption Considerations Under the MMWA

Parsing legal definitions is only half of the battle in determining the boundaries between service contracts under the MMWA and state service contract laws. Once a determination is made about the applicability of these definitions, the next step is to consider whether preemption principles come into play. And, unfortunately both traditional federal preemption (due to the fact the MMWA is a federal law that potentially conflicts with underlying state service contract laws) and less common reverse-preemption (due to the fact that the McCarran-Ferguson Act makes state insurance laws the supreme law of the land in certain situations) are potentially relevant.[29] Indeed, the FTC's rules state the following:

Parsing legal definitions is only half of the battle in determining the boundaries between service contracts under the MMWA and state service contract laws.

> The Act recognizes two types of agreements which may provide similar coverage of consumer products, the written warranty, and the service contract. In addition, other agreements may meet the statutory definitions of either "written warranty" or "service contract," but are sold and regulated under state law as contracts of insurance. One example is the automobile breakdown insurance policies sold in many jurisdictions and regulated by the state as a form of casualty insurance. The McCarran-Ferguson Act, 15 U.S.C. 1011 et seq., provides that most federal laws (including the Magnuson-Moss Warranty Act) shall not be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance. While three specific laws are subject to a separate proviso, the Magnuson-Moss Warranty Act is not one of them. Thus, to the extent the Magnuson-Moss Warranty Act's service contract provisions apply to the business of insurance, they are effective so long as they do not invalidate, impair, or supersede a State law enacted for the purpose of regulating the business of insurance.[30]

Moreover, there are two major considerations that make any preemption analysis—whether traditional or reverse—very nuanced and fact-specific in this area.

First, even though the MMWA applies to service con-

Although it is tempting to focus only on state laws when evaluating how a service contract is regulated, the MMWA provides an important reminder that federal law may be equally as significant.

tracts (as defined by the MMWA), the MMWA contains only a few provisions that are expressly applicable to service contracts (as opposed to MMWA written warranties). For example, the FTC has taken the position that the MMWA requires a service contract's terms and conditions to be "fully, clearly, and conspicuously disclosed."[31] And, the MMWA states that the terms and conditions of a service contract must be in "simple and readily understood language" in the event that a supplier enters into a service contract in addition to or in lieu of a written warranty.[32] The MMWA also restricts a supplier's ability to disclaim an implied warranty covering the underlying product if the supplier enters into a service contract with the consumer within 90 days of the date of the sale of the underlying product.[33] However, the vast majority of the provisions of the MMWA apply only to written warranties but not to service contracts. Although the MMWA grants the FTC the authority to promulgate rules to prescribe "the manner and form" for disclosing a service contract's terms and conditions, the FTC has chosen not to promulgate any such rules to date.[34] Thus, there are only limited situations where a provision of the MMWA could potentially conflict with a state service contract law for purposes of any preemption analysis.

Second, even where a conflict exists between the MMWA and a state's service contract law, it is necessary to determine if the underlying state law is regulating the business of insurance, and thereby invoking the application of the McCarran-Ferguson Act. However, as noted above, that analysis may depend on exactly how the state in question has chosen to regulate service contracts.[35] For example, states that have chosen to regulate service contracts outside of their insurance codes through state governmental agencies other than their departments of insurance and that expressly state that service contracts are not insurance would be unlikely candidates for reverse preemption under the McCarran-Ferguson Act. However, states that regulate service contracts in their insurance codes, through their insurance departments, and merely state that service contracts are exempt from certain, but not all, portions of the state's insurance code could make a stronger case for reverse preemption.[36]

V. Conclusion

Although it is tempting to focus only on state laws when evaluating how a service contract is regulated, the MMWA provides an important reminder that federal law may be equally as significant. Service contract obligors, administrators, and contractual liability insurance policy insurers of any type of extended warranty will want to consult with insurance regulatory counsel to ensure that they have correctly determine how their product is categorized under both the MMWA and state service contract laws, as well as potentially state insurance laws and the McCarran-Ferguson Act. [37]

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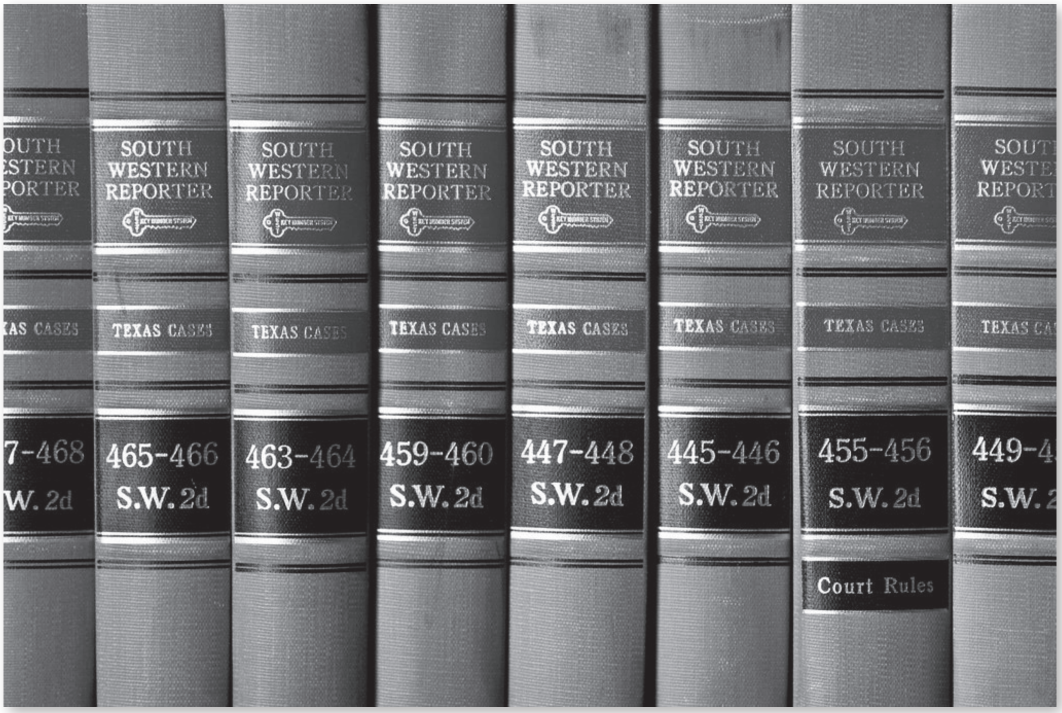
1 15 U.S.C. §§ 2301-2312.
2 *See Id.*
3 *See*, e.g., 15 U.S.C. §§ 2301-2312; 16 CFR § 700.1-1-703.8. The FTC has also issued rules to address the amendments to the MMWA resulting from the E-Warranty Act. *See* https://www.ftc.gov/news-events/press-releases/2016/09/ftc-issues-final-rule-amendments-related-e-warranty-act.
4 *See*, e.g., Lauren Fincher & Jon L. Gillum *Use It or Lose It?: FTC Warns Companies Against Conditioning Warranty Coverage on Use of Specified Parts or Services*, InsureReinsure (Apr. 19, 2018).
5 *See* 16 CFR §§ 700.1-703.8.
6 15 U.S.C. §§ 2310(d).
7 *See Id.*
8 *See, e.g.*, Idaho Code § 41-114A(2).
9 *See, e.g.*, Tex. Occ. Code chs. 1303 & 1304. Financial security requirements typically require an obligor to either post a bond, hold a reserve, demonstrate a level of net assets, or purchase a contractual liability insurance policy known in business parlance as a "CLIP." *See*, e.g., Tex. Occ. Code § 1303.151-54.
10 See NAIC Service Contracts Model Act (available at https://www.naic.org/store/free/MDL-685.pdf).
11 State-regulated service contracts laws typically do not expressly permit coverage for the rendering of only services and, in some cases, for intangible products like computer software. However, as noted below many states have added ancillary products to their definitions of "service contract"—a trend that has extended the boundaries of the types of permissible products covered by service contracts and excluded from regulation as insurance.
12 *See* NAIC Service Contracts Model Act (available at https://www.naic.org/store/free/MDL-685.pdf).
13 For an in-depth discussion of the way that Texas separates the licensing and regulation of home warranties (overseen by the Texas Real Estate Commission) and other types of extended warranties (overseen by the Texas Department of Licensing and Regulation) from the regulation of insurance by the Texas Department of Insurance, *see* Jon L. Gillum & Lauren M. Fincher, *"Cross-Agency Regulation of Service Contracts in Texas,"* 19 Tex. Tech. Admin. Law J., 107-150 (Fall 2017).
14 For example, most state service contract laws permit coverage for risks due to inherent defects, defective workmanship, and operational failure. *See, e.g.*, Tex. Occ. Code § 1304.003. In contrast, state service contract laws do not typically permit coverage for adverse fortuitous events created caused by a third-party such as theft.
15 Exclusion from regulation as a service contract, however, also means that such products do not benefit from the express exception to regulation as insurance found in most state service contract laws. As a result, such products—particularly commercial service contracts—could be subject to regulation by state departments of insurance depending on whether the particular features of the products meet the definition of insurance in each state. *See generally* Gillum & Fincher, *supra* note 13, at 148.
16 *See, e.g.*, Tex. Occ. Code §§ 1303.004 & 1304.004.
17 *See, e.g.*, Tex. Occ. Code § 1304.003
18 *See, e.g.*, *Id.*
19 *See Id.*
20 *See, e.g.*, Guaranteed Warranty Corp., Inc. v. Humphrey, 533 P.2d 87, 90 (Ariz. Ct. App. 1975); Fla. Stat. § 624.02; N.Y.

Ins. Law § 1101(a)(1); 1 Couch on Ins. § 1:6 (2016).
21 *See* Brian T. Casey & on L. Gillum, *Extending the Murky Divide Between Warranty and Insurance,* Law360 (Aug. 21, 2017). Another example of this type of deregulation can be found within state insurance codes that typically create "specialty" insurance licenses for the sale of certain categories of consumer insurance that would otherwise require the seller to hold a full-fledged insurance agency license. For example, insurance covering personal/portable electronic device insurance ("PEDI"), travel, rental cars, and credit can often be sold by holders of a specialty license. *See, e.g.*, Texas Ins. Code ch. 4005. In the case of products like mobile devices, such PEDI licenses help fill the coverage gaps inherent in service contracts noted above. For example, while a service contract can cover inherent defects in a smartphone, a PEDI policy is typically needed to cover theft or accidental damage. *See id.*
22 *See* 15 U.S.C. §§ 1011-1015.
23 15 U.S.C. § 2301(6).
24 15 U.S.C. § 2301(8).
25 16 C.F.R. § 700.11.
26 *Id.*
27 *See* 15 U.S.C. § 2301(8); 16 C.F.R. § 700.11.
28 *See, e.g.*, Tex. Occ. Code § 1304.003; Jon L. Gillum & Brian T. Casey, *Key-Fob Amendment to Texas Service Contract Law Considered by Legislature*, InsureReinsure (Mar. 29, 2017).
29 *See generally*, Kennedy v. Butler Financial Solutions, LLC, 2009 WL 290471 (N.D. Ill. 2009) (memorandum opinion).
30 16 C.F.R. § 700.11.
31 *See* 15 U.S.C. § 2306(a-b); 80 Fed. Reg. 4270 (Jan 27, 2015).
32 *See* 15 U.S.C. § 2306(b).
33 *See* 15 U.S.C. § 2308(a).
34 *See* FTC, "Final Action Concerning Review of Interpretations of Magnuson-Moss Warranty Act," 80 Fed. Reg. 42710 (July 20, 2015).
35 *See Kennedy,* 2009 WL 290471, at *4-5.
36 This same type of nuanced preemption analysis that hinges upon the state law characterization of service contracts is also relevant to the jurisdictional reach of the Bureau of Consumer Financial Protection. *See* Brian T. Casey, *Does the CFP Have Jurisdiction Over Service Contracts*, Law360 (Jul. 19, 2013).
37 The authors would also like to thank Zach Lerner for his editorial assistance with this article.



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 http://www.peopleslawyer.net/

U.S. SUPREME COURT

Supreme Court allows consumers to sue Apple for antitrust violations. The Supreme Court has allowed a major antitrust case to proceed against Apple for alleged monopolization of the iPhone app market. The Court split 5-4 over whether such claims were barred by the direct-purchaser rule established by the Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Justice Brett M. Kavanaugh, joined by the Court's four more liberal justices, wrote for the majority, while Justice Neil M. Gorsuch, joined by the Court's other conservative justices, dissented.

The majority concluded that they were direct purchasers who could sue, stating: "It is undisputed that the iPhone owners bought the apps directly from Apple. Therefore, under *Illinois Brick*, the iPhone owners were direct purchasers who may sue Apple for alleged monopolization." The majority deemed it dispositive that iPhone owners pay any overcharge on apps to Apple directly, with no intermediary. The Court dismissed Apple's theory that *Illinois Brick* allows consumers to sue only the party that sets the retail price—in this case, the app developers—regardless of which party sells the product. *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019).
https://www.supremecourt.gov/opinions/18pdf/17-204_bq7d.pdf

FEDERAL CIRCUIT COURTS OF APPEALS

"Assignee" does not identify creditor as required by FDCPA. The Third Circuit held that a collection letter from the firm failed to spell out the identity of the creditor. The consumer received a letter from Lyons Doughty & Veldhuis, which said the firm represented Capital One Bank (USA), N.A., and identified that company as the "assignee" of three other entities. The court found the term "assignee" is a "legal term that would not necessarily help the least sophisticated consumer understand the relationships be-

tween the parties listed." The court noted that while the letter identifies Capital One Bank as Lyons Doughty & Veldhuis's client and conveys that the firm has been retained to collect a debt, "the least sophisticated debtor could still think that any one or more of the listed entities was owed the debt." "Thus, the letter's reference to three other entities, as well as its 'assignee' language, 'overshadowed' the creditor's identity." Gross v. Lyons Doughty & Veldhuis PC, ___ F. App'x ___ (3d Cir. 2019).
https://law.justia.com/cases/federal/appellate-courts/ca3/19-1031/19-1031-2019-07-10.html

Prohibited information on envelope is injury for purposes of FDCPA. The Third Circuit confronted a FDCPA issue posed by a debt collector's conduct. The debt collector sent the debtor a letter with a "QR" code on the outside of the envelope that, if scanned, revealed the debtor's account number with the collection agency. She brought suit, alleging violation of an FDCPA provision that prohibits debt collectors from placing language or symbols other than their own return addresses on envelopes containing communications with debtors. The purpose of the provision is to avoid infringing the debtor's privacy by revealing information that could be used to determine that she is the subject of debt-collection efforts.

The court held that the debtor had standing to sue because the disclosure of confidential information (in the form of a code revealing her account number) inflicted a harm that Congress had determined was an injury. The court reasoned that, through the QR code, "protected information has been made accessible to the public," and this disclosure "is itself the harm" Congress intended to protect against. Thus, the debtor suffered an injury through the public display of private information regardless of whether anyone actually scanned the barcode and read the account number. DiNaples v. MRS BPO, LLC, ___ F.3d ___ (3d Cir. 2019).
https://law.justia.com/cases/federal/appellate-courts/ca3/18-2972/18-2972-2019-08-12.html

Debt collector cannot enforce original creditors arbitration agreement. A consumer executed a credit card agreement with a creditor containing an arbitration clause. After the consumer fell behind on her payments, her account was referred to the debt collector for collection. The consumer filed suit against the debt collector, alleging that one of the collection letters violated the FDCPA by "failing to inform her whether interest would continue to accrue on her account." The debt collector moved to compel arbitration based on the provision in the consumer's credit card agreement with the original creditor, under a third-party beneficiary, agency, or equitable-estoppel theory. The district court rejected each theory and denied the motion, concluding that (i) the agreement did not "evince an intent to benefit" the debt collector; (ii) the FDCPA claim "did not bear a sufficient nexus to the credit-card agreement"; and (iii) the debt collector could not equitably estop the consumer from resisting arbitration under the Third Circuit's previous interpretation of South Dakota law.

On appeal, the Third Circuit agreed with the district court. Orn v. Alltran Fin., L.P., ___ F. App'x ___ (3d Cir. 2019).
https://buckleyfirm.com/sites/default/files/Buckley%20InfoBytes-%20Orn%20v.%20Alltran%20Financial%2C%20L.P.-%203rd%20Circuit%20opinion%20-%202019.07.12.pdf

Procedural unconscionability determination was for judge not arbitrator, notwithstanding a delegation clause. The district court compelled arbitration finding that there was a meeting of the minds and that the "procedural unconscionability objection went to the enforceability of the Arbitration Agreement and not its formation," and must "be decided by the arbitrator under the Arbitration Agreement's delegation clause."

On appeal, the Fifth Circuit held that there was a "meeting of the minds" based upon the employee's electronic acknowledgment of the Arbitration Agreement and its terms. However, the Fifth Circuit reversed the district court's referral of the procedural unconscionability challenge to arbitration. Under Mississippi law, the court found it was clear that "[p]rocedural unconscionability goes to the formation of the contract." Although recognizing that unconscionability allegations relating to the contract as a whole are from the arbitrator, the court held that the employee's "procedural unconscionability objection challenges the formation of the Arbitration Agreement itself" and "the district court had the duty to resolve this challenge" notwithstanding the delegation clause. Bowles v. OneMain Fin. Grp., LLC, 927 F.3d 878 (5th Cir. 2019).
https://law.justia.com/cases/federal/appellate-courts/ca5/18-60749/18-60749-2019-06-19.html

Congress, not the courts, is responsible for changing the rules for discharging student loan debt in bankruptcy. Borrower, who became unable to make payments on her student loans and other debts, initiated an adversarial action against the Department of Education in bankruptcy court after receiving a general discharge of her debts, in an attempt to have two student loans discharged as well. While Borrower was able to prove that her monthly expenses exceed her income, the bankruptcy and district courts found that she failed the three-prong test for evaluating claims of "undue hardship." Borrower failed to (i) show that she was "completely incapable of employment now or in the future"; or (ii) prove that her present state of affairs was likely to persist through the bulk of the loan repayment period. Borrower appealed, arguing that the three-prong test "is inconsistent with the plain meaning of the term 'undue hardship'" and urged the appellate court to adopt instead "a 'totality of the circumstances' test."

On appeal, the Fifth Circuit agreed with the lower courts, stating that when Congress amended the bankruptcy law regarding the discharge of federal student loans, the intent was to limit it to cases of "undue hardship" in order to prevent the use of bankruptcy except in the most compelling circumstances. According to the appellate court, until an en banc panel or the Supreme Court reviews the standard, the panel finds no error in the lower courts' decision.
Thomas v. Dep't of Educ., 931 F.3d 449 (5th Cir. 2019).
https://buckleyfirm.com/sites/default/files/Buckley%20InfoBytes%20-%20Thomas%20v.%20Department%20of%20Education%20-%205th%20Circuit%20Opinion%202019.07.30.pdf

FTC's restitution award cannot stand. The Seventh Circuit reversed a $5.2 million restitution award won by the Federal Trade Commission in a case against an allegedly deceptive credit monitoring service, overturning precedent to find that the statute the agency sued under does not authorize such an award.

The restitution award came as part of a summary judgment order that a lower court entered in the FTC's case against Credit Bureau Center LLC and company owner Michael Brown, brought under Section 13(b) of the Federal Trade Commission Act. But the court found that the "forward-facing" statute authorizes only injunctive relief for ongoing or prospective harm, and restitution remedies past conduct, so the commission cannot pursue both forms of relief under the same statute. "Beyond the conceptual tension, this requirement raises an illogical implication: It would condition the Commission's ability to secure restitution for past conduct on the existence of ongoing or imminent unlawful conduct," the court said.

Section 13(b) also requires the FTC to weigh equities and consider its likelihood of success when seeking relief under the statute. That is "procedurally incompatible" with a bid for restitution, "which has its own preconditions" and is authorized under separate FTCA provisions, the panel said. FTC v. Credit Bureau Ctr., ___ F.3d ___ (7th Cir. 2019).
https://law.justia.com/cases/federal/appellate-courts/ca7/18-2847/18-2847-2019-08-21.html

Bona fide error defense applies to collection of time-barred debt. The Seventh Circuit affirmed a summary judgment for a debt collector, concluding the collector's FDCPA violations were unintentional and the debt collector was entitled to the bona fide error defense.

The consumer made his last credit card payment in August 2010, but attempted to make an additional payment in June 2011, which never cleared. In December 2015, the debt collector sent a collection letter to the consumer and subsequently filed a collection action in state court, both assuming a last payment date of June 2011, the date of the payment that did not clear. The state court dismissed the suit because the last payment that actually cleared was outside of the state's five-year statute of limitations, meaning the debt was time-barred. The consumer filed suit against the debt collector for violating the FDCPA's prohibition on collecting time-barred debt.

The appellate court determined that the FDCPA violations were unintentional, as the debt collector was unaware that the June 2011 payment had failed. Additionally, the appellate court held that the debt collector was not required under the FDCPA to independently verify the validity of the debt to satisfy the requirements of the bona fide error defense. Abdollahzadeh v. Mandarich Law Grp., LLP, 922 F.3d 810 (7th Cir. 2019).
https://law.justia.com/cases/federal/appellate-courts/ca7/18-1904/18-1904-2019-04-29.html

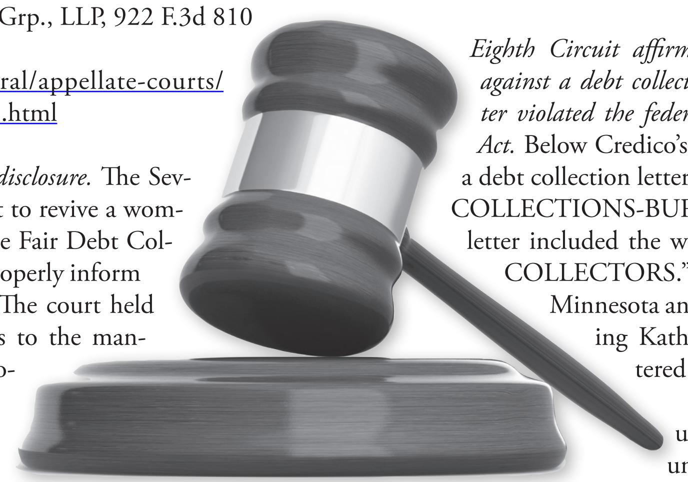
Hyperlinks are not enough for debt disclosure. The Seventh Circuit found that an attempt to revive a woman's lawsuit, claiming it violated the Fair Debt Collection Practices Act by failing to properly inform her about debt obligations failed. The court held that making her follow hyperlinks to the mandated disclosures was not lawful notification.

The appellate panel backed a lower court's decision to grant summary judgment to Beth Lavallee, concluding that Med-1 failed to properly inform her about debt disclosures by sending an email with links to a vendor's website containing the documents and disclosures. By only conveying the company's name, email address and a link to the vendor, Med-1 failed to meet the bar for what qualifies as "communication" under the FDCPA. Lavallee v. Med-1 Solutions, LLC, ___ F.3d ___ (7th Cir. 2019).
https://law.justia.com/cases/federal/appellate-courts/ca7/17-3244/17-3244-2019-08-08.html

Student loan borrowers can sue servicers under state consumer protection laws. A unanimous panel of the U.S. Court of Appeals for the Seventh Circuit concluded that the federal Higher Education Act (HEA) does not preempt state law claims against student loan servicers. The case involves a student loan borrower who brought a putative class action against the loan servicer alleging violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, and constructive fraud and negligent misrepresentation under Illinois common law. The district court granted the defendant's motion to dismiss concluding that these state law claims were expressly preempted by the HEA. On appeal, the Seventh Circuit reversed. Nelson v. Great Lakes Educ. Loan Servs., 928 F.3d 639 (7th Cir. 2019).
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2019/D06-27/C:18-1531:J:Hamilton:aut:T:fnOp:N:2362027:S:0

Debt collector's fee counts as an authorized cost under debtor's contract. The Seventh Circuit considered whether a contract provision saying the signor would "be billed for any amounts that are due and owing plus any costs (including reasonable attorney's fees) incurred by [Six Flags] in attempting to collect amounts due," included collection costs. The parties agree that NRA is allowed to collect this fee if it was "expressly authorized by the agreement creating the debt." The contract explicitly allows for "*any* costs." "As the Supreme Court recently reiterated, the word 'any' signifies breadth." *See Smith v. Berryhill,* 139 S. Ct. 1765 (2019). "Dictionary definitions confirm that the phrase 'any costs' is broad enough to include this fee."

"We therefore conclude that a percentage-based collection fee is a 'cost' within the meaning of this language." Bernal v. NRA Grp., LLC, 930 F.3d 891 (7th Cir. 2019).
https://law.justia.com/cases/federal/appellate-courts/ca7/17-3629/17-3629-2019-07-19.html



Eighth Circuit affirms dismissal of a consumer's suit against a debt collector, alleging that its collection letter violated the federal Fair Debt Collection Practices Act. Below Credico's name in the top right corner of a debt collection letter, appeared the words "CREDIT-COLLECTIONS-BUREAU." Several lines below the letter included the words "PROFESSIONAL DEBT COLLECTORS." The letter was sent to Klein in Minnesota and signed by three people, including Kathy Mitchell, who was not registered to collect debts in Minnesota.

The court found that an unsophisticated consumer would understand that "PROFESSION-

AL DEBT COLLECTORS" and "CCB" respectively describe and reference Credico. The court also found it was not an FDCPA violation for the letter to be signed by an unregistered individual. The court stated:

> The relevant signature was one of three signatures on the letter, and the other two signatories were both registered to collect debts in Minnesota. Further, Credico, doing business as Credit Collections Bureau, is licensed to collect debts in Minnesota, so it could legally collect the debt, and Mitchell's signature was not an unfair or unconscionable means to attempt to collect a debt.

Klein v. Credico Inc., 922 F.3d 393 (8th Cir. 2019).
https://scholar.google.com/scholar_case?case=2665718523940609426&q=Klein+v.+Credico+Inc&hl=en&as_sdt=40003

$1.8 billion in robocall damages reduced to $32 million. The Eighth Circuit refused to put marketing company ccAdvertising on the hook for more than $1.6 billion in statutory damages for making millions of illegal robocalls in violation of the Telephone Consumer Protection Act. The court found that the lower court was right to reduce the "shockingly large" sum to $32.4 million.

The TCPA provides for uncapped statutory damages of $500 per violation, an amount that can only be reduced if the award is deemed unconstitutional. The lower court did just that, finding that the $1.6 billion in statutory damages required by the TCPA was "obviously unreasonable and wholly disproportionate to the offense" and that a penalty of $10 per call was more appropriate.

A three-judge Eighth Circuit panel on Tuesday agreed with the district court's assessment that a $1.6 billion award would violate the Constitution's due process clause, finding that ccAdvertising's conduct did not warrant the "shockingly large" penalty. Golan v. FreeEats.com, Inc., 930 F.3d 950 (8th Cir. 2019).
https://law.justia.com/cases/federal/appellate-courts/ca8/17-3156/17-3156-2019-07-16.html

Arbitration clause was acknowledged, not accepted. The Eighth Circuit agreed with the district court that the applicable arbitration and delegation provisions contained in the employee handbook were not enforceable contracts under Missouri state law.

The court noted that agreements to arbitrate are a matter of contract law. While it was undisputed that these arbitration provisions were contained in the electronically-accessible employee handbook, the court found that no contract had been formed under Missouri contract law. On two separate occasions, the plaintiff had been electronically presented with the employee handbook containing these provisions. And on each occasion, the plaintiff clicked on an acknowledgement of review. However, she did not recall actually reviewing the employee handbook, and there was no evidence that she ever reviewed its text. Shockley v. PrimeLending, 929 F.3d 1012 (8th Cir. 2019).
https://law.justia.com/cases/federal/appellate-courts/ca8/18-1235/18-1235-2019-07-15.html

Constitutionality of CFPB upheld. In a unanimous opinion the Ninth Circuit decided a challenge to the CFPB's structure. The CFPB is headed by a single Director who exercises substantial executive power but can be removed by the President only for cause. Relying on the Supreme Court's separation-of-powers decisions in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and *Morrison v. Olson*, 487 U.S. 654 (1988), the court held that the CFPB's structure is constitutionally permissible. Consumer Financial Protection Bureau v. Seila Law LLC, 923 F.3d 680 (9th Cir. 2019).
http://cdn.ca9.uscourts.gov/datastore/opinions/2019/05/06/17-56324.pdf

FCRA time period begins to run from date of entry. The Ninth Circuit held the seven-year period for reporting adverse items under § 1681c(a)(5) of the Fair Credit Reporting Act (FCRA) runs from the "date of entry" of an item and not the "date of disposition." The decision offers a detailed analysis of how to report *non-conviction* criminal charges, specifically when the seven-year reporting window begins to run and whether a dismissal of an earlier charge constitutes an independent, reportable adverse item. Moran v. The Screening Pros, LLC, 923 F.3d 1208 (9th Cir. 2019)
https://law.justia.com/cases/federal/appellate-courts/ca9/12-57246/12-57246-2019-05-14.html

Ninth Circuit clarifies standard for multi-state class action settlements. The decision provides an easier standard for certifying *settlements* with variations in state law and allows class actions, even nationwide classes, to be settled on a less stringent standard than litigated classes. The decision does not change the requirement for heightened standards and a rigorous analysis for class certification. In re Hyundai and Kia Fuel Economy Litigation, 926 F.3d 539 (9th Cir. 2019).
http://cdn.ca9.uscourts.gov/datastore/opinions/2019/06/06/15-56014.pdf

Misleading offer to "resolve" a time-barred debt when there is no accompanying disclosure that the debt is time-barred, may violate FDCPA. The Eleventh Circuit first noted that, with regard to a collection letter seeking payment on a time-barred debt, an express threat of litigation is not required to state a claim for relief under § 1692e so long as one can reasonably infer an implicit threat. The court then noted that the question in the instant case is whether it is *plausible* that a reasonable jury could find that this representation to "resolve" the matter would so mislead an unsophisticated consumer. It concluded that "it is at least plausible that the collection letter Defendants sent to Plaintiff would have been 'false, deceptive, or misleading' to the 'least sophisticated' recipient of the letter, in violation of § 1692e of the FDCPA. The court reversed the district court's dismissal of the consumer's claim. Holzman v. Malcolm S. Gerald & Assocs., Inc., 920 F.3d 1264 (11th Cir. 2019).
https://law.justia.com/cases/federal/appellate-courts/ca11/16-16511/16-16511-2019-04-05.html

Circuit split on FACTA standing. The Eleventh Circuit affirmed a $6.3 million settlement between Godiva Chocolatier, Inc. and a class of plaintiffs who alleged that Godiva violated the Fair and Accurate Credit Transactions Act (FACTA) by printing too many digits of the plaintiffs' credit cards on their receipts. In holding that the class representative, Dr. David Muransky, had standing to bring a FACTA claim, the Eleventh Circuit split with other circuits, teeing the issue up for the Supreme Court.

In *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), the

Supreme Court held that "Article III standing requires a concrete injury even in the context of a statutory violation." The Supreme Court explained that a "risk of real harm" might satisfy the requirement, but that not all statutory violations "cause harm or present any material risk of harm." Since *Spokeo*, the Second, Third, Seventh, and Ninth circuits—as well as several district courts—have dismissed FACTA claims for a lack of standing.

The Eleventh Circuit now stands alone in holding that a plaintiff has standing to bring a FACTA claim by simply alleging a procedural violation and a "heightened risk of identity theft." Relying on pre-*Spokeo* precedent, the court held that the "risk [of harm] need be no more than an 'identifiable trifle' to be concrete" within the meaning of *Spokeo*. Muransky v. Godiva Chocolatier, Inc., 922 F.3d 1175 (11th Cir. 2019).
https://www.consumerfinancialserviceslawmonitor.com/wp-content/uploads/sites/501/2019/05/Muransky-v.-Godiva-FACTA-Standing.pdf

Fee shifting attorney's fees award not increased by "risk." The Eleventh Circuit held that when a defendant agrees to pay class-action fees in a class-action settlement, in an amount to be determined by the district judge, separate from the fund set up by the settlement to compensate class members, the attorney's fee may *not* include a fee multiplier. Based on the holding of a Supreme Court case dealing with statute fee-shifting, the court stated:

> For this reason, not adjusting fees for risk is consistent with fee-shifting statutes. These statutes limit fees to prevailing parties, and adjusting fees for risk effectively subsidizes the attorney's losing cases—a result at odds with the prevailing party requirement. Plus, enhancing for risk "would make the setting of fees more complex and arbitrary, hence more unpredictable, and hence more litigable." For all of these reasons, the Supreme Court decreed that courts could not use a multiplier in statutory fee-shifting cases to account for risk.
>
> ****
>
> But this is a contractual fee-shifting case, not a common-fund case. As such, it is more closely related to the Supreme Court precedent governing fee-shifting statutes. And just because precedent is not technically binding does not mean we should blithely disregard it. To promote consistency in the law, we should adhere to precedent where its reasoning applies.

In re The Home Depot Inc., Customer Data Security Breach Litig., 931 F.3d 1065 (11th Cir. 2019).
http://media.ca11.uscourts.gov/opinions/pub/files/201714741.pdf

Split over FACTA continues. The D.C. Circuit has found that a printed receipt containing all 16 digits of a customer's credit card number is an "egregious" enough violation of the Fair and Accurate Credit Transactions Act to confer standing, further deepening a circuit split over the Supreme Court's *Spokeo* standard.

A three-judge panel reversed a lower court's ruling last year that found consumer Doris Jeffries did not have Article III standing to sue under FACTA because she noticed right away that her receipt had too much financial information printed on it and held onto it rather than throwing it away. The lower court said even though Centerplate had technically violated FACTA, which prohibits vendors from printing more than the last five digits of a credit card number on their customers' receipts, Jeffries had not suffered any harm because she pocketed the receipt and thus kept it from potential fraudsters prying eyes.

In its ruling, however, the panel said a "FACTA violation as egregious as the one committed by Centerplate" confers standing simply because the receipt in question drastically increased Jeffries' risk of falling victim to identity theft. Jeffries v. Volume Servs. Am., Inc., 928 F.3d 1059, (D.C. Cir. 2019).
https://www.cadc.uscourts.gov/internet/opinions.nsf/F33AD708B0A13B7C8525842B00503A3F/$file/18-7139-1795389.pdf

FEDERAL DISTRICT COURTS

Class attorneys receive $1M fee in TCPA class action settlement. An Illinois federal judge gave the final signoff to a $3.3 million settlement, including $1 million in attorneys' fees, to end a class action accusing Mesa Laboratories Inc. of sending thousands of unsolicited faxes for spore-testing services without the legally required opt-out information. The judge noted that while the fee amount is "quite significant in terms of absolute dollar amount," class counsel's one-third share of the money is consistent with settlements that are reached within the Seventh Circuit.

Under the settlement, more than 3,000 settling class members who received a spore-testing advertisement will receive checks ranging from $550-$650 that will become void 90 days after their issue date. Class members who cash their checks will then receive a check containing their pro rata share of any amount leftover from uncashed checks, and any money left from the second distribution will be donated to a *cy pres* recipient. James L. Orrington, II, DDS, P.C. v. Mesa Laboratories Inc., No. 1:18-CV-00841(N.D. Ill. filed Feb. 1, 2018).
https://www.courtlistener.com/recap/gov.uscourts.ilnd.348882/gov.uscourts.ilnd.348882.42.0.pdf

Payday lender cannot force arbitration. A San Diego federal judge ruled that a national payday lender cannot compel arbitration of a proposed class action accusing it of gouging California borrowers with high-cost loans. The court found that a 2017 ruling by the state's highest court sinks the arbitration provision that the lender sought to enforce.

U.S. District Judge Gonzalo P. Curiel said the arbitration provision cited by the Kansas-based Speedy Cash included language prohibiting the California borrowers behind the lawsuit from pursuing claims for public injunctive relief in any setting. This type of waiver was deemed unenforceable by the California Supreme Court in 2017. The judge also found that this public injunctive relief language was not only itself invalid but also fatal to the rest of the arbitration provision, thanks to a "poison pill" clause linked to the language's continued survival.
Delisle v. Speedy Cash, 2019 WL 2423090 (S.D. Cal. 2019).
https://law.justia.com/cases/federal/district-courts/california/casdce/3:2018cv02042/590568/23/

$80 million Roundup verdict reduced to $25 million. A California federal judge reduced an $80 million verdict against Monsanto to $25 million, calling the company's failure to warn about the dangers of its Roundup weedkiller "reprehensible," but finding

the punitive damages awarded to a man who claims Roundup caused his cancer unreasonably high. "The jury's punitive damages award [$75 million] was approximately 15 times the size of the compensatory damages award," the judge said. "Monsanto's conduct, while reprehensible, does not warrant a ratio of that magnitude, particularly in the absence of evidence showing intentional concealment of a known or obvious safety risk." Hardeman v. Monsanto Co., 385 F. Supp. 3d 1042 (N.D. Cal. 2019).
https://www.cand.uscourts.gov/filelibrary/3734/PTO160.pdf

Damages for mental anguish are recoverable under the Texas Debt Collection Act. A Texas Bankruptcy Court held that to show entitlement to mental anguish damages under the TDCA, "plaintiff must put on evidence showing the nature, duration, and severity of their mental anguish, thus establishing a substantial disruption in the plaintiffs' daily routine, or show a high degree of mental pain and distress that is more than mere worry, anxiety, vexation, embarrassment, or anger. A plaintiff is not required to show that their mental anguish resulted in physical symptoms. Damages for mental anguish may be proven by the claimant's own testimony." Garza v. CMM Enters., LLC (In re Garza), 2019 WL 3365899 (Bankr. S.D. Tex. 2019).
https://casetext.com/case/garza-v-cmm-enters-llc-in-re-garza

Debt collector did not violate Fair Debt Collection Practices Act or Texas Debt Collection law. A Texas federal district court found that a collector's service of a default judgment to a prior address did not violate state or federal law. Alvarado v. Eltman Law, P.C., 2019 WL 2249715 (N.D. Tex. 2019). https://scholar.google.com/scholar_case?case=16008446528421921165&hl=en&as_sdt=6&as_vis=1&oi=scholarr

New York's prohibition of arbitration agreements in sexual harassment claims is pre-empted by Federal Arbitration Act. Latif v. Morgan Stanley & Co. LLC, 2019 WL 2610985 (S.D.N.Y. 2019).
https://www.seyfarth.com/dir_docs/publications/LatifvMorgan_Stanley.pdf

Court rules that the New York statute prohibiting agreements to arbitrate sexual harassment claims is inconsistent with and violated the FAA. In 2018, New York passed a statute meant to address claims of sexual harassment in the workplace. N.Y. C.P.L.R. § 7515. Specifically, the statute prohibited contracts that required parties to submit to mandatory arbitration to resolve allegations or claims of unlawful sexual harassment.

As the first New York court to address the obvious conflict between federal and state law, the court in *Latif* ruled that the New York statute prohibiting agreements to arbitrate sexual harassment claims was inconsistent with and violated the FAA. The court found that the employee's sexual harassment claims were subject to mandatory arbitration and granted the employers' motion to compel arbitration. Latif v. Morgan Stanley & Co. LLC, 2019 WL 2610985 (S.D.N.Y. 2019). https://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2018cv11528/506253/52/

Replacing defective part with same part is not a breach of warranty. A Michigan federal judge dismissed half the claims in a proposed class action accusing Ford Motor Co. of selling trucks with defective brakes, finding that replacing a defective part with the same part is not a breach of the company's warranty. The judge stated: "Nothing in this warranty should be construed as requiring defective parts to be replaced with parts of a different type or design than the original part, so long as the vehicle functions properly with the replacement part."
Weidman v. Ford Motor Co., 2019 WL 3003693 (E.D. Mich. 2019).
https://casetext.com/case/weidman-v-ford-motor-co

STATE COURTS

California Supreme Court rejects strict class-certification "ascertainability" requirement. The California Supreme Court issued a unanimous decision rejecting a strict class-certification "ascertainability" requirement sometimes associated with decisions of the U.S. Court of Appeals for the Third Circuit. This paragraph sums up the issue and the court's conclusion:

> This case is a putative class action brought on behalf of retail purchasers of an inflatable outdoor pool sold in packaging that allegedly misled buyers about the pool's size. We must decide whether the trial court abused its discretion when it denied the representative plaintiff's motion for class certification on the basis that he had not supplied evidence showing how class members might be individually identified when the time came to do so. The Court of Appeal upheld this ruling. It reasoned that this evidence was necessary to ensure that proper notice would be given to the class, and that without it, the trial court could appropriately conclude that plaintiff had not satisfied the ascertainability requirement for class certification. We conclude that the trial court erred in demanding that plaintiff offer such evidence to satisfy the ascertainability requirement.

It is important to note that this decision interprets California's class action rule, not Federal Rule 23. Noel v. Thrifty Payless, Inc., 445 P.3d 626 (Cal. 2019).
https://www.courts.ca.gov/opinions/documents/S246490.PDF

Continuing to work constitutes consent to arbitration clause. The California Court of Appeals, ruled that an employee impliedly consents to an arbitration agreement by simply continuing to work, despite never signing the arbitration agreement and even outright rejecting it. The Court held that "California law in this area is settled: When an employee continues his or her employment after notification that an agreement to arbitration is a condition of continued employment, that employee has impliedly consented to the arbitration agreement." *Diaz v. Sohnen Enters.*, 2019 WL 1552361 (Cal. App. 2019).
https://law.justia.com/cases/california/court-of-appeal/2019/b283077.html

FEDERAL AGENCIES

CFPB proposed FDCPA rules. The Consumer Financial Protection Bureau has proposed a new rule that applies to the Fair Debt

Collection Practices Act. The rule limits phone calls to seven a week, although consumer groups wanted them limited to three, and provides the debt collector may not call again for at least one week after reaching the consumer. It also clarifies consumer protection requirements for certain consumer debt collection disclosures. On the other hand, the rule would allow debt collectors to send consumers an unlimited number of texts and emails.

The proposed rule also prohibits suits and threats of suit on time-barred debts and requires communication to the consumer before credit reporting. In a win for the industry, however, the rule offers a number of safe harbors to protect debt collectors from being sued.

Pursuant to the provisions of the FDCPA, the 538-page proposal applies only to collection agencies, debt buyers, collection law firms and loan services covered by the FDCPA. Banks and other first-party creditors are exempt from the debt collection law. Companies have will have 90 days to comment on the CFPB's notice.

The proposed rule is available at, https://files.consumerfinance.gov/f/documents/cfpb_debt-collection-NPRM.pdf

A Washingon Post article is available here, https://www.washingtonpost.com/business/2019/05/07/trump-administration-wants-allow-debt-collectors-call-times-week-text-email-much-they-want/?noredirect=on

NLRB decides first mandatory arbitration case since Epic Systems. In *Epic Systems v. Lewis*, the Supreme Court held that class- and collective-action waivers in mandatory arbitration agreements do not violate the NLRA. The National Labor Relations Board has now addressed several important questions involving mandatory arbitration agreements following the Supreme Court's *Epic Systems* decision. The Board held:

- Employers are not prohibited under the National Labor Relations Act (NLRA) from informing employees that failing or refusing to sign a mandatory arbitration agreement will result in their discharge.
- Employers are not prohibited under the NLRA from promulgating or changing mandatory arbitration agreements in response to employees opting in to a collective action under the Fair Labor Standards Act or state wage-and-hour laws.

The decision, *Cordúa Restaurants, Inc.*, 368 NLRB No. 43 (2019) may be downloaded here, https://www.nlrb.gov/news-outreach/news-story/nlrb-decides-first-mandatory-arbitration-case-following-supreme-court%E2%80%99s

STATE LEGISLATION

The Texas Legislature has passed House Bill 996, which limits when a debt buyer can initiate legal action or arbitration to collect consumer debt and requires specific notices with respect to out-of-statute debt. Upon approval by Texas Gov. Greg Abbott, the new provisions will become effective Sept. 1, 2019. H.B. 996.
https://capitol.texas.gov/tlodocs/86R/billtext/pdf/HB00996F.pdf#navpanes=0

North Dakota enacts automatic renewal law to protect consumers. The law defines an "automatic renewal" as "a paid subscription or purchasing agreement [that] is automatically renewed for a period of more than one month at the end of a definite period for a subsequent period." When presenting automatic renewal agreements to consumers, the law mandates that merchandise companies: 1) present the terms in a clear and conspicuous manner; 2) provide acknowledgement of the automatic renewal offer; and 3) inform consumers on how to cancel the automatic renewal subscription or agreement through a cost-effective, timely, and simple procedure. If the automatic renewal period binds the consumer for more than six months, towards the end of the initial term sellers are required to provide the consumer with a clear and conspicuous written notice that she/he can cancel the contract and avoid triggering the automatic renewal. Additionally, automatic renewal periods may not exceed twelve months. A copy of the law is available at https://www.legis.nd.gov/assembly/66-2019/documents/19-0455-04000.pdf

DECEPTIVE TRADE PRACTICES AND WARRANTY

INSURED, EXERCISING REASONABLE DILIGENCE, SHOULD HAVE DISCOVERED THE MISREPRESENTATIONS AND THE INADEQUATE COVERAGE PROVIDED BY POLICY

Adaptive Modifications, LLC v. Atl. Cas. Ins. Co., ___F. Supp. 3d___ (E.D. Tex. 2019).
https://casetext.com/case/adaptive-modifications-llc-v-atl-cas-ins-co

FACTS: Plaintiff Adaptive Motors, LLC, owned by James Boren, was a business that converted living spaces into accessible homes for the disabled and elderly. Boren asked Defendant Dan Mitchell, an insurance agent for Defendant Trimark Insurance Group ("Trimark"), to procure a commercial general liability policy for Boren's business that covered various handyman work, including installing faucets. Mitchell applied to Defendant Delta General Agency Corporation, North Texas Branch ("Delta"), to underwrite the policy, which was then issued to Boren with Defendant Atlantic Casualty Insurance Company ("Atlantic") acting as the managing general agent. Mitchell told Boren that the policy would cover the requested work. However, the policy allegedly only covered carpentry work. After becoming insured, Boren was contracted to install a faucet in a customer's home, which later leaked. The customers filed the underlying suit in this case against Boren for property damage. Boren contacted Atlantic to defend and indemnify Boren in the suit, pursuant to the insurance policy. Atlantic denied Boren's claim.

Boren should have learned of Mitchell's alleged misrepresentations and the lack of coverage provided by the policy upon Boren's initial review of the policy through the exercise of reasonable diligence.

Boren filed suit against Defendants, alleging violations of Chapter 541 of the Texas Insurance Code, §17.46(b) of the DTPA, breach of contract, and negligence by failing to procure the appropriate insurance coverage. Defendants removed the case to federal court. Boren filed a motion to remand.

HOLDING: Motion dismissed.

REASONING: Atlantic argued that the case should not be remanded because Boren improperly joined the Texas Defendants to defeat diversity jurisdiction. To establish improper joinder, the removing party has the burden to demonstrate either: (1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court. Defendants argued that Boren could not establish a cause of action because his suit was barred by the Texas's two-year statutes of limitations.

Boren argued that he could establish a cause of action because, under the discovery rule, Boren's claims accrued when Atlantic denied coverage to Boren.

The court rejected Boren's argument, holding that the discovery rule did not apply. The court noted that under Texas law, an insurance agent has no duty to explain policy terms and the insured is bound by its terms. The court found that Boren should have learned of Mitchell's alleged misrepresentations and the lack of coverage provided by the policy upon Boren's initial review of the policy through the exercise of reasonable diligence. Because Boren failed to exercise reasonable diligence, the discovery rule was inapplicable to this case.

CONSUMER'S ALLEGATIONS ARE MORE THAN BREACH OF CONTRACT

Hart v. Tufenkian Artisan Carpets, ___F. Supp. 3d___ (N.D. Tex. 2019).
https://law.justia.com/cases/federal/district-courts/texas/txndce/3:2018cv02178/306189/20/

FACTS: Plaintiffs Milledge and Linda Hart contracted with Defendant Tufenkian for the purchase of seven rugs. The Harts relied on several guarantees, including the date of delivery, the quality of the rugs, and the ability to sample the rugs through strike offs. After the Harts ordered the rugs, the Harts placed purchase orders for other items for their home remodel, based around the appearance of the ordered rugs. The Harts rejected two sets of strike offs, and refused to take further delivery, alleging that Tufenkian had breached their contract and failed to live up to its promises. The Harts filed suit asserting claims of breach of contract and promissory estoppel.

The Harts amended their petition to include breach of the DTPA. Tufenkian moved to dismiss the Harts' DTPA claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

HOLDING: Denied.

REASONING: Tufenkian argued that the Harts' DTPA claim should be dismissed because the claim was only a restatement of the Harts' breach of contract claim.

The court rejected the arguments, holding that the Harts had successfully alleged more than breach of contract. First, the court noted the Harts alleged that Tufenkian represented that it would provide the Harts with rugs similar in quality, pattern, color, and texture to the rugs viewed by the Harts in Tufenkian's Dallas showroom, but that Tufenkian failed to provide the aforementioned rugs. Because the Harts alleged that Tufenkian represented that it would provide a certain good or service and then failed to provide that good or service, they successfully pled a DTPA claim.

Second, the court noted that the Harts alleged Tufenkian had repeatedly failed to provide rugs that matched the samples provided, despite Tufenkian's representing that it would do so. Because the Harts alleged that Tufenkian "never intended to fulfill the contract in the first place," the court found the Harts had stated a plausible claim for fraudulent inducement under the DTPA.

Finally, the court noted that, unlike the Hart's breach of contract claim, in which the Harts sought contractual economic damages for the rugs they purchased that were not delivered, the

Harts' DTPA claim also sought damages for items related to the Harts' remodeling plan that the Harts purchased in reliance on the defendant's misrepresentations concerning the quality of the rugs, and the Harts' ability to approve the strike offs before Tufenkian began full production. Because the Harts alleged that Tufenkian "caused confusion and misunderstanding about the approval of the strike offs prior to full production of the rugs," they had stated a plausible DTPA claim.

DTPA CLAIM MAY OVERLAP OTHER CLAIMS INCLUDING BREACH OF CONTRACT

DTPA UNCONSCIONABILITY CLAIM DOES NOT REQUIRE PROOF OF RELIANCE

Marek v. Lehrer, ___S.W.3d___ (Tex. App. 2018).
https://www.courtlistener.com/opinion/4568733/tom-marek-v-r-l-lehrer/

FACTS: Plaintiff-Appellee R. L. Lehrer was a rancher who entered into a contract to sell a ranch property ("Property") to Defendant-Appellant Tom Marek. A provision of the contract provided Lehrer the ability to lease the Property for five years. Marek did not sign the originally drafted lease, but instead presented Lehrer a subsequent draft that contained shorter lease durations and a termination clause. Lehrer filed suit against Marek alleging breach of the cattle grazing lease and violation of the DTPA.

The trial court found for Lehrer in both regards, with the jury finding that Marek knowingly engaged in an unconscionable action that was the producing cause of Lehrer's damages. Lehrer elected to recover under the DTPA, which provided additional compensatory damages. Marek appealed.
HOLDING: Affirmed.
REASONING: Marek argued that the case concerned mere breach of contract, not a DTPA violation, and that additional damages under the DTPA are improper.

The court rejected Marek's argument, holding that a DTPA claim may overlap with other causes of action, including breach of contract. The court noted that a primary purpose of the DTPA is 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. The court further explained that the DTPA provides consumers with a cause of action for either a false, misleading, or deceptive act or practice relied upon by the consumer and specifically enumerated in the "laundry list" included in section 17.46; or an unconscionable act. Although breach of contract alone is insufficient to demonstrate that a party did not intend to perform, a breach of contract combined with "slight circumstantial evidence" of fraudulent intent is "some evidence of fraudulent intent, enough to support a verdict." Because the court concluded that there existed at a minimum "slight circumstantial evidence" for the jury to infer that Marek did not intend to perform the agreement, the evidence was legally sufficient to support a DTPA verdict.

Marek further argued against the finding of an unconscionable act, asserting that Lehrer had failed to connect how Lehrer "relied to his detriment" on language allegedly added to a receipt he claims he never saw. The court rejected this argument, holding that, unlike the "deceptive" prong of the DTPA, the statute does not require reliance to support a finding of unconscionability nor did the jury charge include a reliance element. Because the court found the evidence was legally sufficient to support the jury's finding that Marek committed an unconscionable action, the trial court did not err in awarding additional damages under the DTPA.

DTPA APPLIES TO IMPLIED MISREPRESENTATIONS CONSUMER MAY RECOVER DIMINISHED VALUE

EMPLOYER IS NOT LIABLE FOR TREBLE DAMAGES WHEN EMPLOYEE ACTS BEYOND THE SCOPE OF HIS EMPLOYMENT

Parking Co. of Am. Valet, Inc. v. Fellman, ___S.W.3d___ (Tex. App. 2019).
https://www.courtlistener.com/opinion/4644717/parking-company-of-america-valet-inc-and-parking-company-of-america-love/

FACTS: Plaintiff-Appellee Bradley Fellman left his vehicle with Defendant-Appellants, Parking Company of America Valet, Inc., and Parking Company of America Love Field, Inc. (collectively, "PCA"), to be valet parked. The vehicle was undamaged when Fellman left his vehicle with PCA. The PCA's parking attendant took Fellman's vehicle for a joyride, ultimately crashing and damaging the vehicle. The parking attendant then modified the customer portion of Fellman's ticket to say that the vehicle had been damaged before being dropped off. Fellman filed suit alleging breach of the bailment contract and violation of the DTPA.

The court stated that, because part of diminishment in value comes from the stigma buyers attach to vehicles that have been in accidents, it was proper for Fellman to recover relative to the full diminishment.

The trial court entered findings that the appellants had breached the implied representations that PCA would park Fellman's car in the valet parking lot without taking it for unauthorized joyrides, PCA would take reasonable care of the car, and PCA would not modify Fellman's ticket stub as a deceptive ploy to accuse Fellman of making a fraudulent claim. Accordingly, the court granted summary judgement in Fellman's favor. PCA appealed.
HOLDING: Affirmed in part. Reversed and remanded in part. Reversed and vacated in part.
REASONING: PCA first argued that there were no representations made that could have been actionable under the DTPA, and that their nonverbal conduct could not constitute an implied representation actionable under the DTPA.

The court rejected this argument, as it had previously held that implied representations were actionable under the DTPA. The court noted that testimony provided at the trial supported the trial court's findings that appellants impliedly represented that they would park Fellman's car in the valet parking lot without taking it for joyrides and that they would take reasonable care of the car. Accordingly, the court held that this implied representation was actionable under the DTPA.

Next, PCA argued that because Fellman sold the damaged car to a buyer after the accident, the value of the sale should constitute the post-accident market value for determining diminished value. PCA further contended that the value of a vehicle can only go down, so the post-accident value should be higher than what the vehicle was sold for a year after the accident.

The court rejected this argument, instead citing an expert witness who testified at trial that diminished value is the loss in value of an automobile after a collision and repair of the damage. The court stated that, because part of diminishment in value comes from the stigma buyers attach to vehicles that have been in accidents, it was proper for Fellman to recover relative to the full diminishment.

Finally, PCA argued that the trial court erred in granting treble damages to Fellman, as PCA's employee was acting beyond the scope of his employment. The court accepted this argument, holding that PCA had only authorized the attendant to drive the car from the place where Fellman left to the parking place. No evidence in the record suggested that the attendant's use of the car was anything but a joyride. The court reasoned that a joyride is not of the same general nature as the conduct authorized by PCA, nor was it incidental to authorized conduct. Accordingly, the court held that the trial court erred in granting treble damages, as PCA was not responsible for what occurred when the attendant deviated from his assigned responsibilities.

CONSUMER CREDIT

CONSTITUTIONALITY OF CFPB UPHELD

Consumer Fin. Prot. Bureau v. Seila Law, LLC, 923 F.3d 680 (9th Cir. 2019).
https://www.leagle.com/decision/infco20190506075

FACTS: Plaintiff-Appellee Consumer Financial Protection Bureau ("CFPB") was investigating whether Defendant-Appellee Seila Law, LLC, violated the Telemarketing Sales Rule. The CFPB issued a civil investigative demand ("CID") to Seila Law, requiring the firm respond to interrogatories and requests for documents. Seila Law refused to comply. The CFPB filed suit, seeking enforcement of the CID.

The district court granted the petition and ordered Seila Law to comply with the CID. Seila Law appealed.
HOLDING: Affirmed.
REASONING: Seila Law argued that the CFPB's structure violates the Constitution's separation of powers because the agency is headed by a single director who exercises substantial executive power but can only be removed by the President for cause.

The court rejected Seila Law's argument, first holding that the CFPB exercised quasilegislative and quasi-judicial powers, not purely executive powers. The CFPB's for-cause removal restriction was a permissible means of insulating the CFPB from Presidential control. The court further held that, because of the CFPB's quasi-legislative and quasi-judicial roles, Congress could use the for-cause restriction to ensure that the CFPB acted independently of the President's will.

Second, the court held that the substantial executive power wielded by the director was not dispositive. The court relied on the Supreme Court opinion in *Free Enterprise Fund v. Public Company Accounting Oversight Board* 561 U.S. 477 (2010), analogizing the for-cause restriction for the Director of the CFPB to the for-cause restriction for the Commissioners of the SEC who wielded substantial executive power. Accordingly, it was not unconstitutional to require for-cause removal of an agency head who wielded substantial power.

Lastly, the court made no distinction between multi-member and single-individual leadership structures. Thus, it was not an issue that the CFPB was headed by a single individual.

FACTA STANDING UNDER *SPOKEO* SATISFIED BY EGREGIOUS VIOLATION

Jeffries v. Volume Servs. Am., Inc., ___F.3d___ (D.C. Cir. 2019).
https://www.anylaw.com/case/doris-jeffries-v-volume-services-america-inc/d-c-circuit/07-02-2019/PI1GtWsBGQqH1ylcIeS-

FACTS: Plaintiff Doris Jeffries made a credit card purchase from Defendant Volume Services America, LLC, doing business as Centerplate. Centerplate provided Jeffries a receipt containing all sixteen digits of her credit card number, as well as the card's expiration date. Jeffries filed suit, alleging Centerplate violated the Fair and Accurate Credit Transactions Act (FACTA), which prohibits printing more than the last five digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction.

Centerplate filed a motion to dismiss. The district court granted Centerplate's motion, concluding that Jeffries lacked standing.
HOLDING: Reversed and remanded.
REASONING: Jeffries argued that the violation of her statutory right under FACTA constitutes an injury in fact, without any additional showing of harm.

The court accepted Jeffries's argument, reasoning that, under *Spokeo v. Robins*, the violation of a procedural right granted by statute can itself manifest concrete injury. The court acknowledged that the statute must protect a concrete right, and interpreted FACTA as protecting the interest of avoiding an increased risk of identity theft. The court explained that protecting this risk is closely analogous to common law tort breach of confidence, both of which protect against unauthorized disclosure of information to a third party. Additionally, Congress determined that printing too much credit card information on a receipt creates a real harm.

The violation of a procedural right granted by statute can itself manifest concrete injury.

The court qualified its holding, stating that although not every violation of FACTA creates a concrete injury in fact, failure to truncate the sixteen-digit card number does because it provides too much credit card information on a receipt.

STUDENT LOAN BORROWERS CAN SUE SERVICERS UNDER STATE CONSUMER PROTECTION LAWS

Nelson v. Great Lakes Educ. Loan Servs., Inc., ___F.3d___ (7th Cir. 2019).
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2019/D06-27/C:18-1531:J:Hamilton:aut:T:fnOp:N:2362027:S:0

FACTS: Plaintiff-Appellant Nicole Nelson borrowed federal student loans to help pay for her education. Defendant-Appellees, Great Lakes Education Loan Services, Inc. ("Great Lakes"), was a loan servicer that provided guidance to borrowers on the repayment of their loans. Nelson used Great Lakes' services to pay back her loans. Great Lakes was required under the Higher Education Act, 20 U.S.C. §1098g ("HEA"), to make certain disclosures about repayment options to borrowers. Under the HEA, Great Lakes was exempt from disclosure requirements imposed by state laws, which barred potential claims against Great Lakes for failing to disclose information to borrowers. The required disclosures included descriptions of forbearance and deferment to financially struggling borrowers.

When Nelson suffered a drop in her income and needed help on payments, she sought advice from Great Lakes. Great Lakes instructed Nelson that forbearance and deferment were her best options, and Nelson relied on this information. Nelson filed suit, alleging that Great Lakes steered borrowers away from income-driven repayment plans that are less lucrative to lenders and toward more burdensome options in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act.

Great Lakes moved to dismiss. The district court granted Great Lakes' motion, holding each of Nelson's claims alleged only that Great Lakes failed to disclose information which is expressly preempted by the HEA. Nelson appealed.

HOLDING: Vacated and remanded.

REASONING: Nelson argued that the HEA's preemption of state-law disclosure requirements does not entirely bar her use of state consumer protection laws because she relied, to her detriment, on Great Lakes' voluntary affirmative misrepresentations made to her in the counseling of the repayment of her loans.

The court accepted this argument, examining the different types of preemption that could potentially bar claims against the statute: express, conflict, and field. First, the court used statutory interpretation to hold that the HEA did not expressly preempt voluntary affirmative misrepresentations claims. The court noted that if a claim stated a loan servicer made misrepresentations in disclosures that they were not required to make in the first place, the claim would not necessarily imply a preempted disclosure requirement by the statute. Thus, it would be possible for student loan borrowers to apply state consumer protection laws to sue loan servicers.

It would be possible for student loan borrowers to apply state consumer protection laws to sue loan servicers.

Second, neither conflict preemption nor field preemption barred Nelson's claims. Conflict preemption did not apply because it was not impossible for loan servicers to comply with both federal law and state law requirements. Field preemption did not apply because federal law did not so comprehensively occupy student loan regulation as to not leave room for state legislation to apply.

INSURANCE

INSURED, EXERCISING REASONABLE DILIGENCE SHOULD HAVE DISCOVERED THE MISREPRESENTATIONS AND THE INADEQUATE COVERAGE PROVIDED BY POLICY

Adaptive Modifications, LLC v. Atl. Cas. Ins. Co., ___F. Supp. 3d___ (E.D. Tex. 2019).
https://casetext.com/case/adaptive-modifications-llc-v-atl-cas-ins-co

FACTS: Plaintiff Adaptive Motors, LLC, owned by James Boren, was a business that converted living spaces into accessible homes for the disabled and elderly. Boren asked Defendant Dan Mitchell, an insurance agent for Defendant Trimark Insurance Group ("Trimark"), to procure a commercial general liability policy for Boren's business that covered various handyman work, including installing faucets. Mitchell applied to Defendant Delta General Agency Corporation, North Texas Branch ("Delta"), to underwrite the policy, which was then issued to Boren with Defendant Atlantic Casualty Insurance Company ("Atlantic") acting as the managing general agent. Mitchell told Boren that the policy would cover the requested work. However, the policy allegedly only covered carpentry work. After becoming insured, Boren was contracted to install a faucet in a customer's home, which later leaked. The customers filed the underlying suit in this case against Boren for property damage. Boren contacted Atlantic to defend and indemnify Boren in the suit, pursuant to the insurance policy. Atlantic denied Boren's claim.

Boren filed suit against Defendants, alleging violations of Chapter 541 of the Texas Insurance Code, §17.46(b) of the DTPA, breach of contract, and negligence by failing to procure the appropriate insurance coverage. Defendants removed the case to federal court. Boren filed a motion to remand.

HOLDING: Motion dismissed.

REASONING: Atlantic argued that the case should not be remanded because Boren improperly joined the Texas Defendants to defeat diversity jurisdiction. To establish improper joinder, the removing party has the burden to demonstrate either: (1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court. Defendants argued that Boren could not establish a cause of action because his suit was barred by the Texas's two-year statutes of limitations.

Under Texas law, an insurance agent has no duty to explain policy terms and the insured is bound by its terms.

Boren argued that he could establish a cause of action because, under the discovery rule, Boren's claims accrued when Atlantic denied coverage to Boren. The court rejected Boren's argument, holding that the discovery rule did not apply. The court noted that under Texas law, an insurance agent has no duty to explain policy terms and the insured is bound by its terms. The court found that Boren should have learned of Mitchell's alleged misrepresentations and the lack of coverage provided by the policy upon Boren's initial review of the policy through the exercise of reasonable diligence. Because Boren failed to exercise reasonable diligence, the discovery rule was inapplicable to this case.

DEBT COLLECTION

TEXAS DEBT COLLECTION ACT CLAIM BARRED BY STATUTE OF FRAUDS

Ebrahimi v. Caliber Home Loans, Inc., ___S.W.3d___ (Tex. App. 2019).
https://law.justia.com/cases/texas/fifth-court-of-appeals/2019/05-18-00456-cv.html

FACTS: Plaintiff-Appellant Farrokh Ebrahimi executed a $268,000 note payable to America's Wholesale Lender and a deed of trust ("the loan") that was ultimately assigned to DefendantAppellee U.S. Bank, N.A, which granted a security interest in Ebrahimi's Texas property. Ebrahimi defaulted on the loan by failing to make installment payments and her property was referred to foreclosure. A notice of acceleration was sent to Ebrahimi by the loan servicer, Defendant-Appellee Caliber Home Loans, Inc. ("Caliber"), along with an accompanying notice of substitute trustee sale.

Ebrahimi filed an initial lawsuit against Caliber in order to stop the foreclosure sale, but Ebrahimi and Caliber subsequently filed an agreed stipulation of dismissal. After Ebrahimi again failed to make installment payments towards the loan, Defendant-Appellee U.S. Bank attempted to proceed with another foreclosure sale. Ebrahimi alleged that Defendants made an oral promise to delay foreclosure until a proper accounting of what she owed was provided to her.

Ebrahimi subsequently brought the underlying suit against Caliber and U.S. Bank to stop the foreclosure sale under the Texas Debt Collection Act (TDCA) and the DTPA. Defendants filed for summary judgement, which the trial court granted on all grounds.

HOLDING: Affirmed.

REASONING: Ebrahimi argued that she was entitled to relief under §392.304(a)(8) of the TDCA because she provided testimony that she would not have dismissed her first lawsuit but for Defendants' alleged representations that they would: (1) send an accurate accounting and a payoff amount to Ebrahimi, and (2) not proceed with any foreclosure actions until Ebrahimi had an opportunity to pay whatever amount was actually owed.

The Texas statute of frauds bars the enforcement of loan agreements that exceed $50,000 in value unless the agreement is in writing and signed by the party to be bound.

The court rejected this argument, holding that these oral promises were governed by the statue of frauds, Texas Business and Commerce Code §26.02(b), and were thus barred. The court noted that the Texas statute of frauds bars the enforcement of loan agreements that exceed $50,000 in value unless the agreement is in writing and signed by the party to be bound. Further, the definition of "loan agreement" includes an agreement to delay repayment of money or to otherwise extend credit or make a financial accommodation. Oral modifications of a written contract are also subject to the statute of frauds if they materially alter the obligations imposed by the original contract. Therefore, agreements to modify an existing loan agreement, including to forgo or delay foreclosure, are subject to the statute of frauds.

Because the original note was for an amount greater than $50,000, it was subject to the statute of frauds. Thus, any oral agreement to delay foreclosure would fall under §26.02(b) and be included under the definition of "loan agreement" in §26.02(a)(2). Accordingly, the court held that any claim under the TDCA based on Defendants' alleged oral promise that they would delay foreclosure in order to give Ebrahimi an opportunity to cure default was barred by the statute of frauds.

THIRD-PARTY COUNTERCLAIM DEFENDANTS CANNOT REMOVE CLASSACTION COUNTERCLAIMS TO FEDERAL COURT

Home Depot U.S.A., Inc. v. Jackson, ___U.S.___ (2019).
https://www.supremecourt.gov/opinions/18pdf/17-1471_e2p3.pdf

FACTS: Citibank, N.A., filed a debt-collection action against George Jackson in North Carolina state court, alleging that Jackson was liable for charges incurred on a Home Depot credit card. Jackson answered and filed an individual counterclaim against Citibank and third-party class-action claims against Home Depot U.S.A., Inc, and Carolina Water Systems, Inc. Jackson alleged that Home Depot and Carolina Water Systems engaged in unlawful referral sales and deceptive and unfair trade practices, in violation of North Carolina law. Home Depot filed a notice of removal and Jackson subsequently filed a motion to remand.

The district court granted Jackson's motion and the Fourth Circuit affirmed. Home Depot appealed.

HOLDING: Affirmed.

REASONING: Home Depot argued that removal to federal court was proper, as they qualified as "defendants" to a "claim" under 28 U.S.C. §1441.

The Court rejected this argument, holding that §1441 refers to "civil actions," not "claims." The Court explained that the action as defined by Jackson's complaint was the "civil action . . . of which the district court" must have "original jurisdiction." The "defendant" to that action is the defendant to the complaint, not a party named in a counterclaim. The Court further noted that: (1) the Federal Rules of Civil Procedure differentiate between third-party defendants, counterclaim defendants, and defendants; (2) Congress has clearly extended removal authority to parties other than the original defendant in §§1462(a) and (b), but has not done so in §1441; and (3) the Court has previously held in *Shamrock Oil & Gas Co. v. Sheets* that a counterclaim defendant who was the original plaintiff was not one of the "defendants." Therefore, there was no textual reason to reach a different conclusion for a counterclaim defendant who was not part of the initial lawsuit in the instant case.

Alternatively, Home Depot argued that even if §1441(a) did not allow removal, 28 U.S.C. §1453(b) did, as it permitted removal by "any defendant" to a "class action." The Court disagreed, holding that the two clauses in §1453(b) that employ the term "any defendant" clarify that certain limitations on removal that might otherwise apply do not limit removal under that provision. Neither clause alters §1441(a)'s limitation on who can remove, suggesting that Congress intended to maintain the limitation. In addition, §§1453(b) and 1441(a) both rely on the procedures for removal in §1446, which also employs the term "defendant." Interpreting that term to have different meanings in different sections would render the removal provisions incoherent.

FDCPA ATTORNEY'S FEES AWARD SLASHED

Paz v. Portfolio Recovery Associates, LLC., ___F.3d___ (7th Cir. 2019).
https://law.justia.com/cases/federal/appellate-courts/ca7/17-3259/17-3259-2019-05-15.html

FACTS: Plaintiff Isaac Paz defaulted on a credit card debt, which was purchased by Defendant Portfolio Recovery Associates ("PRA"). In PRA's attempt to collect the debt, PRA violated the FDCPA by failing to report to credit reporting agencies that Paz disputed the debt. Paz filed suit against PRA, but ultimately accepted a settlement offer from PRA to eliminate the debt and pay Paz reasonable attorney's fees, per Federal Rule of Civil Procedure 68. The settlement offer provided that the "offer of judgment is made solely for the purposes specified in Rule 68 and is not to be construed as an admission that Defendant is liable in this action, that Plaintiff has suffered any damage, or for any other reason." Despite the settlement, PRA continued to violate the FDCPA in the same manner. Paz filed a second suit alleging violation of the FDCPA.

PRA again provided a series of settlement offers to resolve all claims and cover Paz's attorney's fees. Paz did not respond and proceeded to trial. The district court found for Paz, but limited Paz's attorney's fees award to those incurred before PRA's final Rule 68 offer. Paz appealed.
HOLDING: Affirmed.
REASONING: Paz argued that he was entitled to all attorney's fees incurred, including those incurred after the final settlement offer because he did not understand PRA's settlement offers, due to ambiguity and unfair terms, thus rendering the offers worthless. Therefore, PRA's offers to settle were not substantial and should have been disregarded by the district court in determining the fee award.

The court rejected Paz's arguments, stating that a settlement offer made pursuant to Rule 68 limits a plaintiff's ability to recover costs and attorney's fees incurred after the date of the offer. Paz's decision to proceed to trial, despite PRA's settlement offers, was a consideration that warranted a substantial reduction in Paz's attorneys' fees. Additionally, the court cited Paz's previous experience accepting offers with identical terms.

Paz also argued that the district court abused its discretion in finding that Paz achieved only limited success on the merits of his claims. Paz asserted that agreeing to PRA's settlement offer, which expressly disclaimed PRA's liability, would have prevented Paz from claiming prevailing party status and receiving attorney's fees. The court also rejected this argument, holding that, by operation of Rule 68, Paz's acceptance of the offer would have resulted in a judgment being entered against PRA, and attorney's fees would not be precluded.

COURT DENIES DEFAULT JUDGMENT BASED ON WRONGFUL DEBT COLLECTION

Alvarado v. Eltman Law, P.C., ___Fed. Appx.___ (N.D. Tex. 2019).
https://www.courtlistener.com/recap/gov.uscourts.txnd.307353/gov.uscourts.txnd.307353.13.0_1.pdf

FACTS: Defendant Eltman Law, P.C., was representing Conn's Electronics ("Conn's") in Conn's lawsuit against Plaintiff Alex Alvarado. Eltman Law obtained a default judgment in state court after representing to the court that Alvarado was properly served in the lawsuit, which concerned debt owed to Conn's. Alvarado claimed that service had been improper, as he had been served notice to his prior address and not at the address he resided at the time of service. Alvarado filed suit against Eltman Law alleging violation of the FDCPA.

Alvarado did not seek to reverse or modify the state court judgment. Rather, Alvarado attempted to separately recover for the injury of Eltman Law failing to serve him at his proper address. Alvarado moved for default judgement on his claim of improper service.
HOLDING: Denied.
REASONING: Alvarado argued that service was improper because the service was attempted at his old address and he was never served.

The court rejected Alvarado's argument, holding that Alvarado had only pled a legal conclusion of improper service, alleged insufficient detail, and had provided no evidence in support of his claim of improper service. The court explained that Alvarado had not successfully prosecuted his case because he cited no case law to support his legal conclusion of improper service, nor did he provide sufficient notice as to how the alleged improper service would fall as a violation within the statutes. Because Alvarado failed to show any actionable violation under any statute, the court concluded that default judgment for damages and attorney's fees was inappropriate.

"ASSIGNEE" DOES NOT IDENTIFY CREDITOR AS REQUIRED BY FDCPA

Gross v. Lyons Doughty & Veldhuis, P.C., ___F.3d___ (3rd Cir. 2019).
https://www.leagle.com/decision/infco20190710072

FACTS: Defendant-Appellee, Lyons Doughty & Veldhuis, P.C. ("LDV"), was a debt collector that sent a letter to Plaintiff-Appellant Glenn Gross, attempting to collect on a debt. The letter stated that LDV represented Capital One Bank, an assignee of three other parties, but did not explicitly identify the creditor to whom Gross's debt was owed. The letter added that Gross's account was in default and that Gross could contact LDV to pay the outstanding balance. Gross filed suit against LDV for failing to identify the name of the creditor to whom the debt was owed.

The trial court dismissed Gross's complaint, holding that LDV's letter sufficiently identified Capital One Bank as the creditor by its reference to Capital One Bank as an assignee. Gross appealed.

HOLDING: Reversed and remanded.
REASONING: Gross argued that LDV's letter violated the FDCPA's requirement that debt collectors identify the name of the creditor to whom the debt is owed. Gross pointed out that, although at least four entities were connected to the debt, the letter did not explicitly identify the creditor to whom the debt was owed.

The court accepted this argument, holding that, under the least-sophisticated-debtor standard, LDV's letter did not effectively disclose the creditor's identity. The court explained that the word "assignee" is a legal term that the least sophisticated consumer might not understand. The court reasoned that, although the letter stated that LDV was a debt collector and listed the parties that it represented, the least sophisticated debtor could think that any one of the listed entities was owed the debt. Because even a sophisticated consumer could interpret LDV's letter in different ways, the letter's use of "assignee" language together with list of entities muddled the creditor's identity and failed to disclose Capital One Bank as the creditor to whom the debt was owed, as required by the FDCPA.

SEVENTH CIRCUIT HOLDS DEBT COLLECTOR'S FEE COUNTS AS AN AUTHORIZED COST UNDER DEBTOR'S CONTRACT

Bernal v. NRA Grp., LLC, ___F.3d___ (7th Cir 2019).
https://www.courtlistener.com/opinion/4641362/joseph-bernal-v-nra-group-llc/

FACTS: Plaintiff Joseph Bernal bought a monthly pass to Six Flags amusement parks. The contract between Bernal and Six Flags stated that if Bernal fell behind on his payments, he would "be billed for any amounts that are due and owing plus any costs (including reasonable attorney's fees) incurred by [Six Flags] in attempting to collect amounts due." After Bernal missed several monthly payments, Six Flags hired AR Assist, a debt collector, to recover the balance from Bernal. AR Assist was permitted to charge Six Flags a five percent management fee, plus an additional amount based on the number of days the debt was delinquent. AR Assist hired NRA Group, LLC, as a sub-contractor. NRA sent Bernal a collection letter for the amount owed, plus the percentage-based costs. Bernal filed a class-action lawsuit under the FDCPA, alleging that the percentage-based collection fee was not expressly authorized by the contract.

The court then noted that Black's Law Dictionary specifically stated that costs of collection were "[e]xpenses incurred in receiving payment of a note; esp., attorney's fees incurred in the effort to collect a note."

The district court held that the percentage-based collection fee was expressly authorized in the language of the contract between Plaintiff and Six Flags which stated that "[Y]ou will be billed for any amounts due and owing plus any costs . . . incurred by us in attempting to collect amounts due . . ." Bernal appealed.
HOLDING: Affirmed.
REASONING: Bernal first argued that the contract authorized only "actual costs," which he said included things like letterhead and postage but not collection fees. Alternatively, Bernal argued that the collection fee was not authorized because it had not yet been "incurred."

The court rejected both arguments. First, the court noted that the contract explicitly allowed for "any costs." The court then noted that Black's Law Dictionary specifically stated that costs of collection were "[e]xpenses incurred in receiving payment of a note; esp., attorney's fees incurred in the effort to collect a note." Because the court found that the fee would unquestionably be a "cost" within the meaning of the contract had Six Flags paid its attorneys the exact same amount to send the exact same collection letter, the court held the fee was also a "cost" within the meaning of the contract when it paid AR Assist to send the collection letter.

Next, the court explained that Six Flags had incurred a liability contingent on both if Plaintiff paid and when Plaintiff paid. Although the contract's language used the past tense form of the word "incur," the court found that the past participle is flexible and can relate to future events. Therefore, the standard collection fee fell within the contract's language and was not violative of the FDCPA.

ARBITRATION

AN AMBIGUOUS AGREEMENT CANNOT PROVIDE THE NECESSARY CONTRACTUAL BASIS FOR COMPELLING CLASS ARBITRATION

Lamps Plus, Inc., v. Varela ___U.S.___ (2019).
https://www.supremecourt.gov/opinions/18pdf/17-988_n6io.pdf

FACTS: Plaintiff-Appellee Frank Varela was an employee of Defendant-Appellant Lamps Plus, Inc. Lamps Plus mistakenly disclosed tax information on Varela and other employees to a hacker. A fraudulent tax income tax return was later filed in Varela's name.

Varela filed a putative class action against Lamps Plus. Lamps Plus sought to compel individual arbitration based on the arbitration agreement in Varela's employment contract. The trial court rejected the individual arbitration request, but authorized class arbitration and dismissed Varela's claims. Lamps Plus appealed, arguing the trial court erred by compelling class arbitration. The Ninth Circuit affirmed. Lamps Plus appealed and the Supreme Court granted certiorari.

HOLDING: Reversed and remanded.

REASONING: Lamps Plus argued that the trial court erred by compelling class arbitration because a court cannot force a party to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.

Courts cannot infer consent to participate in class arbitration absent an affirmative contractual basis for concluding that there was an express agreement to do so.

The Court agreed with Lamps Plus's argument, holding that class arbitration was improper when the employment contract at issue did not expressly contract for class arbitration.

The Court explained that shifting from individual to class arbitration was a fundamental change. The Court noted that class arbitration is not only markedly different from the "traditional individualized arbitration," it also undermines the most important benefits of that familiar form of arbitration. Specifically, class arbitration sacrifices arbitration's principal advantage of informality and makes the process slower, costlier, and "more likely to generate procedural morass than final judgment." Because of the crucial differences, the Court stated that courts cannot infer consent to participate in class arbitration absent an affirmative contractual basis for concluding that there was an express agreement to do so.

CONTINUING TO WORK CONSTITUTES CONSENT TO ARBITRATION CLAUSE

Diaz v. Sohnen Enters., 34 Cal.App.5th 126 (Cal. Ct. App. 2019).
https://www.leagle.com/decision/incaco20190410037

FACTS: Plaintiff-Appellee Erika Diaz ("Diaz") was employed by Defendant-Appellant Sohnen Enterprises ("Sohnen") when she received notice that Sohnen was adopting a policy requiring arbitration of all claims. Sohnen stated that continued employment by employees who refused to sign the agreement would constitute implied acceptance of the agreement. Diaz expressed her intent not to sign the agreement, to which Sohnen reiterated that continuing to work constituted acceptance of the agreement. After once again informing Sohnen that she rejected the arbitration agreement but intended to continue her employment, Diaz filed suit.

Sohnen moved to compel arbitration. The trial court denied Sohnen's motion, holding that the arbitration agreement was a contract of adhesion. Sohnen appealed.

HOLDING: Reversed and remanded.

REASONING: Sohnen argued that Diaz's continued work with Sohnen constituted consent to the arbitration agreement.

The court agreed, holding that Diaz implied consent to the arbitration agreement by continuing her employment after receiving notification that agreement to arbitration was a condition of continued employment.

The court gave three reasons for the holding. First, Diaz received an express explanation that continued employment was itself manifestation of agreement to the arbitration policy. Second, Diaz continued her employment after receiving the express explanation that doing so was sufficient to accept the arbitration agreement. Because Diaz continued her employment, she was bound by the arbitration agreement even before she notified Sohnen of her rejection of the agreement and her intent to continue employment. Third, the employment agreement was at will, allowing Sohnen to unilaterally change the terms of Diaz's employment as long as Sohnen provided notice.

IF PARTIES STIPULATE ARBITRATION AWARD IS TO BE "REASONED," AN ARBITRATOR WHO FAILS TO SATISFY THAT REQUIREMENT MAY BE EXCEEDING HIS/HER POWERS BY RENDERING AN AWARD IN A NON-COMPLIANT FORM.

Smarter Tools, Inc. v. Chongqing SENCI Imp. & Exp. Trade Co., Ltd., ___ F. Supp. 3d ___ (S.D.N.Y. 2019).
https://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2018cv02714/490905/37/

FACTS: Plaintiff Smarter Tools, Inc. ("STI") and Defendant Chongqing SENCI Import & Export Trade Company, Ltd. ("SENCI") entered into arbitration proceedings regarding a purchase order agreement into which STI and SENCI had previous entered. The final award stated that (1) STI must pay SENCI the balance owed to SENCI; (2) STI's claims against SENCI were denied; (3) each side was to bear its own costs; and (4) the costs of arbitration were borne as incurred.

STI filed suit to vacate the arbitral award. SENCI cross-moved to vacate STI's petition and confirm the arbitral award.

HOLDING: Denied and remanded.

REASONING: STI argued that the award must be vacated because the arbitrator exceeded its authority in failing to issue a reasoned award.

The court accepted this argument, holding that although an arbitrator's rationale for an award need not be explained, parties are free to contract around the default rule to require more detailed awards, such as here, where it was undisputed that the parties had requested a "reasoned award."

The court referred to the Second Circuit's holding in *Leeward Const. Co., Ltd. v. Am. Univ. of Antigua-College of Med.,* explaining that a reasoned award requires "something more than a line or two of unexplained conclusions, but something less than full findings of fact and conclusions of law on each issue raised before the panel." The court found that because the arbiter gave no rationale for rejecting STI's claims, but only provided a conclusory statement, the award at issue did not meet the standard for a reasoned award. Because the parties agreed to a reasoned award, the arbitrator exceeded his authority by issuing an award that did not meet the standard of a reasoned opinion.

The court nonetheless declined to vacate the award, strictly limiting the remedy of vacatur in order to facilitate the purpose underlying arbitration.

SUBSEQUENT BUYER OF HOME WHO DID NOT SIGN AGREEMENT SUBJECT TO ARBITRATION AGREEMENT UNDER DIRECT-BENEFITS ESTOPPEL

Toll Dallas TX, LLC v. Dusing, Not Reported in S.W. Rptr. (Tex. App. 2019) LEXIS 3947, WL 2127885
https://law.justia.com/cases/texas/third-court-of-appeals/2019/03-18-00099-cv.html

FACTS: Toll Dallas TX, LLC ("Toll") was a homebuilder who constructed and sold a home to third-party Brodney Pool. Pool entered into a Purchase and Sale Agreement ("Agreement") with Toll that contained an arbitration provision requiring all matters administered under the DTPA to be arbitrated. Brent and Edith Dusing later purchased the home from Pool.

A year later the Dusings filed suit against Toll, alleging DTPA violations. Toll moved for arbitration. The trial court denied the motion, stating the Dusings were not party to the arbitration provision contained in the Agreement.

HOLDING: Reversed and remanded.

REASONING: The Dusings argued that they were not subject to the arbitration provision contained in the Agreement because they were not signatories.

The court agreed that only parties to an arbitration agreement may be compelled to arbitrate claims falling within its scope but noted that the doctrine of direct-benefit estoppel was an exception that may bind nonparties when the rules of law or equity would bind them otherwise.

The court stated that the doctrine of direct-benefits estoppel holds that a party cannot avoid arbitration when that party seeks and obtains direct benefits from a contract by means other than a lawsuit. The court held that the Dusings were subject to the doctrine because the Dusings made claims under a warranty provided in the Agreement and negotiated a lower purchase price with Pool due to the needed repairs called for by the warranty.

Finally, the court referred to evidence that Pool and the Dusings agreed to pursue a warranty claim against Toll and split the proceeds. This suggested that the Dusings both sought and obtained substantial and direct benefits under the warranty sufficient to trigger the estoppel doctrine and bind them to the Agreement and the arbitration provision contained therein.

PROCEDURAL UNCONSCIONABILITY DETERMINATION WAS FOR JUDGE NOT ARBITRATOR, NOTWITHSTANDING A DELEGATION CLAUSE

Bowles v. OneMain Fin. Grp., L.L.C., 927 F.3d 878 (5th Cir. 2019).
https://www.courtlistener.com/opinion/4631352/cathy-bowles-v-onemain-financial-group-llc/

FACTS: Plaintiff-Appellant Cathy J. Bowles was a former employee of Defendant-Appellee OneMain Financial Group ("OneMain"). On multiple occasions during Bowles's employment with OneMain, Bowles was required to review and acknowledge an employee dispute resolution agreement ("Agreement"). Bowles had worked for OneMain for nearly twenty years when she was terminated for interacting inappropriately with employees under her supervision. Bowles filed suit against OneMain, alleging age discrimination.

OneMain moved to compel arbitration, per the Agreement. The trial court granted OneMain's motion. Bowles appealed.

HOLDING: Reversed, vacated, and remanded.

REASONING: Bowles argued that the district court incorrectly upheld the validity of the Agreement by erroneously referring her procedural unconscionability claim to the arbitrator. Bowles argued that, under Mississippi law, such objections were for the trial court to decide.

The court accepted Bowles's argument, holding that procedural unconscionability was a claim on the formation of the contract. Accordingly, the trial court had a duty to resolve the challenge. The court acknowledged that general allegations of unconscionability going to the formation of the entire contract were an issue for an arbitrator. However, when a party challenges the specific decision to agree to arbitrate as unconscionable, the trial court must decide.

DEBT COLLECTOR CANNOT ENFORCE ORIGINAL CREDITOR'S ARBITRATION AGREEMENT

Orn v. Alltran Fin., L.P., ___ F.3d ___ (3rd Cir. 2019).
https://www.leagle.com/decision/infco20190712126

FACTS: Plaintiff-Appellee Diane Orn opened a credit card account with Citibank, N.A. The account was governed by a contract that included a mandatory arbitration provision ("Agreement"). In identifying who could force arbitration, the Agreement spoke of "us" or "you," which it defined as Citibank and the cardmember who opened the account, respectively. The agreement did not expressly allow any third party to compel arbitration. However, it did state that all claims were subject to arbitration, including "[c]laims made by or against . . . us or you . . . or by someone making a claim through us or you, such as a[n] . . . agent . . . or an affiliated/parent/subsidiary company." When Orn fell behind on her credit card payments, Citibank referred her account to Defendant-Appellant Alltran for collection. Alltran sent Orn letters seeking to collect on her account, one of which Orn alleged was violative of the FDCPA. Orn filed suit with a complaint that neither relied on the terms of the Agreement with Citibank nor asserted that Citibank committed any wrongdoing, but instead named Alltran as the sole defendant.

Alltran moved to compel the arbitration provision contained in the Agreement. The trial court denied Alltran's motion. Alltran appealed.

HOLDING: Affirmed.

REASONING: Alltran argued it could invoke the Agreement as a third-party beneficiary or as Citibank's agent.

The court rejected both theories. First, the court explained that, under South Dakota law, a non-signatory may enforce an agreement as a thirdparty beneficiary if the contract was entered into by the parties directly and primarily for the third-party's benefit. The court stated that this condition created a "but-for" test that required a non-signatory to show that the parties would not have executed the agreement unless they intended to benefit the third party. The court stated that Alltran failed to meet this condition because there was no evidence that Citibank and its cardholders would not have entered the Agreement but for the intent to benefit debt collectors like Alltran.

The court stated that the first condition was not met because Alltran did not attempt to argue that the allegations against it amounted to allegations of "substantially interdependent and concerted misconduct."

Second, the court rejected Alltran's agency theory because South Dakota treats the ability of agents to compel arbitration as a type of equitable estoppel. Under the applicable test for equitable estoppel, Alltran could have enforced the Agreement based on its role as Citibank's agent if either (1) "all the claims against the nonsignatory defendants are based on alleged substantially interdependent and concerted misconduct by both the nonsignatories and one or more of the signatories to the contract," or (2) Orn asserted "claims arising out of agreements against nonsignatories to those agreements without allowing those defendants also to invoke the arbitration clause contained in the agreements." The court stated that the first condition was not met because Alltran did not attempt to argue that the allegations against it amounted to allegations of "substantially interdependent and concerted misconduct." The court reasoned that the second condition was not met because Alltran could not show that Orn's claims arose out of the Citibank agreement because the claim that Orn asserts against Alltran did not rely on any terms in the Card Agreement."

FIFTH CIRCUIT HOLDS CLASS ARBITRATION IS A GATEWAY ISSUE TO BE DECIDED BY THE COURTS—NOT ARBITRATORS—ABSENT "CLEAR AND UNMISTAKABLE" LANGUAGE IN THE ARBITRATION AGREEMENT TO THE CONTRARY

20/20 Commc'ns, Inc. v. Crawford, 930 F.3d 715 (5th Cir. 2019). https://law.justia.com/cases/federal/appellate-courts/ca5/18-10260/18-10260-2019-07-22.html

FACTS: Defendant-Appellant 20/20 Communications, Inc. ("20/20"), was a marketing company that employed the class of plaintiffs, including Plaintiff-Appellee Lennox Crawford. 20/20 required employees to sign an arbitration agreement (the "Agreement") under which they agreed to bring only individual actions, and not class or collection actions, to arbitration. Despite this, numerous field sales managers of 20/20 filed class arbitration claims alleging identical complaints. 20/20 sought a declaration in federal court that the issue of class arbitrability was a gateway issue for a court rather than the arbitrator to decide, and that the class arbitration bar did indeed foreclose class arbitration.

Meanwhile, some employees asked their individual arbitrators to issue clause construction awards holding that the class arbitration bar is prohibited by the NLRA. Of six arbitrators who issued clause construction awards, one arbitrator concluded that the class arbitration bar is indeed unenforceable under the NLRA.

In response, 20/20 filed a new suit, seeking to vacate the one arbitrator's clause constriction award invalidating the class arbitration bar and reasserting class arbitrability to be a gateway issue. The trial court dismissed 20/20's complaint, confirming the clause constriction award and holding that the arbitration agreement authorized the arbitrator, rather than a court, to determine class arbitrability. 20/20 appealed.

HOLDING: Vacated and remanded.

REASONING: 20/20 argued that the issue of class arbitrability was a gateway issue for a court to decide.

The court accepted 20/20's argument, explaining that class arbitrability was a gateway issue for a court to decide, unless clear and unmistakable language within an agreement states otherwise. The court held that the Agreement purported to permit only individual arbitrations and prohibited class arbitrations "to the maximum extent permitted by law." The court held that this class arbitration bar foreclosed any suggestion that the parties meant to disrupt the presumption that questions of class arbitration are decided by courts rather than arbitrators.

MISCELLANEOUS

CONSTITUTIONALITY OF CFPB UPHELD

Consumer Fin. Prot. Bureau v. Seila Law, LLC, 923 F.3d 680 (9th Cir. 2019).
https://www.leagle.com/decision/infco20190506075

FACTS: Plaintiff-Appellee Consumer Financial Protection Bureau ("CFPB") was investigating into whether Defendant-Appellee Seila Law, LLC, violated the Telemarketing Sales Rule. The CFPB issued a civil investigative demand ("CID") to Seila Law, requiring the firm respond to interrogatories and requests for documents. Seila Law refused to comply. The CFPB filed suit, seeking enforcement of the CID.

The district court granted the petition and ordered Seila Law to comply with the CID. Seila Law appealed.
HOLDING: Affirmed.
REASONING: Seila Law argued that the CFPB's structure violates the Constitution's separation of powers because the agency is headed by a single director who exercises substantial executive power but can only be removed by the President for cause.

Seila Law argued that the CFPB's structure violates the Constitution's separation of powers because the agency is headed by a single director who exercises substantial executive power but can only be removed by the President for cause.

The court rejected Seila Law's argument, first holding that the CFPB exercised quasilegislative and quasi-judicial powers, not purely executive powers. The CFPB's for-cause removal restriction was a permissible means of insulating the CFPB from Presidential control. The court further held that, because of the CFPB's quasi-legislative and quasi-judicial roles, Congress could use the for-cause restriction to ensure that the CFPB acted independently of the President's will.

Second, the court held that the substantial executive power wielded by the director was not dispositive. The court relied on the Supreme Court opinion in Free Enterprise Fund v. Public Company Accounting Oversight Board, analogizing the for-cause restriction for the Director of the CFPB to the for-cause restriction for the Commissioners of the SEC who wielded substantial executive power. Accordingly, it was not unconstitutional to require for-cause removal of an agency head who wielded substantial power.

Lastly, the court made no distinction between multimember and single-individual leadership structures. Thus, it was not an issue that the CFPB was headed by a single individual.

CALIFORNIA SUPREME COURT REJECTS CLASS-CERTIFICATION "ASCERTAINABILITY" REQUIREMENT

Noel v. Thrifty Payless, Inc., ___P.3d___ (Cal. 2019).
https://www.courts.ca.gov/opinions/documents/S246490.PDF

FACTS: Plaintiff-Appellant, James Noel purchased an inflatable pool from a Rite Aid drugstore chain location ("Rite Aid"). A picture that appeared on the packaging of the pool suggested that it was larger than reality. Noel alleged that his purchase of the pool was influenced by this picture. Noel brought a putative class action against Defendant-Appellee Thrifty Payless, Inc., the operator of Rite Aid, for violating the Consumers Legal Remedies Act, the Unfair Competition Law, and the False Advertising Law. The trial court denied class certification, finding that Noel had provided no evidence on how the class could be ascertained, as required by California's class action rule. The California Court of Appeal affirmed the trial court's decision. Noel appealed.
HOLDING: Reversed and remanded.
REASONING: Noel argued that he had no obligation under California's class action rule to offer evidence that there were means of identifying the individual members of the class he proposed.

The court accepted Noel's argument for two reasons. First, the court reasoned that a class is ascertainable when it is defined in a way that is sufficient to allow a member of the proposed class to identify himself or herself as having a right to recover. Because Noel's proposed class definition created no ambiguity as to who was included within it and who would be bound by its outcome, the court found that the class was ascertainable.

Second, the court reasoned that the trial and appellate courts' concerns with providing evidence reflecting how the members of the class could be individually identified and contacted were irrelevant to the issue of ascertainability. Because providing a means of identifying and contacting members of a class is a distinct issue from whether a class might exist, the court found that the trial court abused its discretion when it found that no ascertainable class existed.

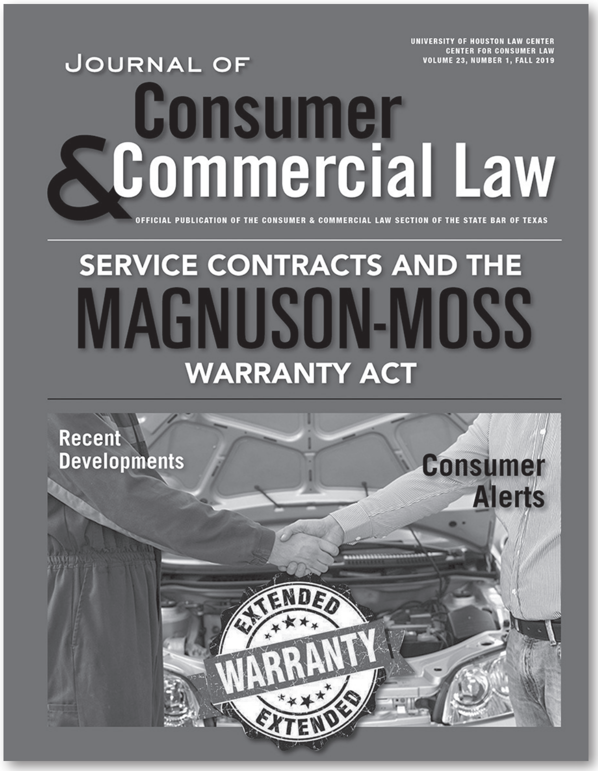
FEE-SHIFTING ATTORNEY'S FEES AWARD NOT INCREASED BY "RISK"

In Re The Home Depot Inc., Customer Data Sec. Breach Litig., ___F.3d___ (11th Cir. 2019).
https://www.leagle.com/decision/infco20190725065

FACTS: Following a data breach at The Home Depot Inc., the information for tens of millions of credit cards was stolen, and a class of banks who issued the cards ("Banks") sued Home Depot to recover their resulting losses. Home Depot settled with the class and agreed to pay the reasonable attorney's fees of Class Counsel. The agreement specified that the attorney's fees would be paid separate from and in addition to the class fund, but the parties left the amount of those fees undetermined. The trial court awarded attorney's fees to Class Counsel using the lodestar method, finding Class Counsel's hours to be reasonable and applying a multiplier of 1.3 to account for the risk the case presented Both

sides appealed. Home Depot appealed.
HOLDING: Vacated and remanded.
REASONING: Home Depot argued that the trial court abused its discretion by applying a multiplier. Home Depot based its argument on Supreme Court precedent outlining the use of multipliers in statutory fee-shifting cases.

The court accepted Home Depot's argument, holding that the trial court abused its discretion in applying the multiplier to the lodestar amount. The court based its reasoning on *Perdue v. Kenny A. ex rel. Winn*, in which the Supreme Court held that risk was not an appropriate basis for enhancing an attorney's fee in statutory fee-shifting cases because most of the factors used to justify an enhancement were already subsumed in the lodestar, resulting in a windfall if they were to count them again with a multiplier. The court reasoned it to be just as unreasonable to double-count these factors in a contractual fee-shifting case as it was in a statutory fee-shifting case.



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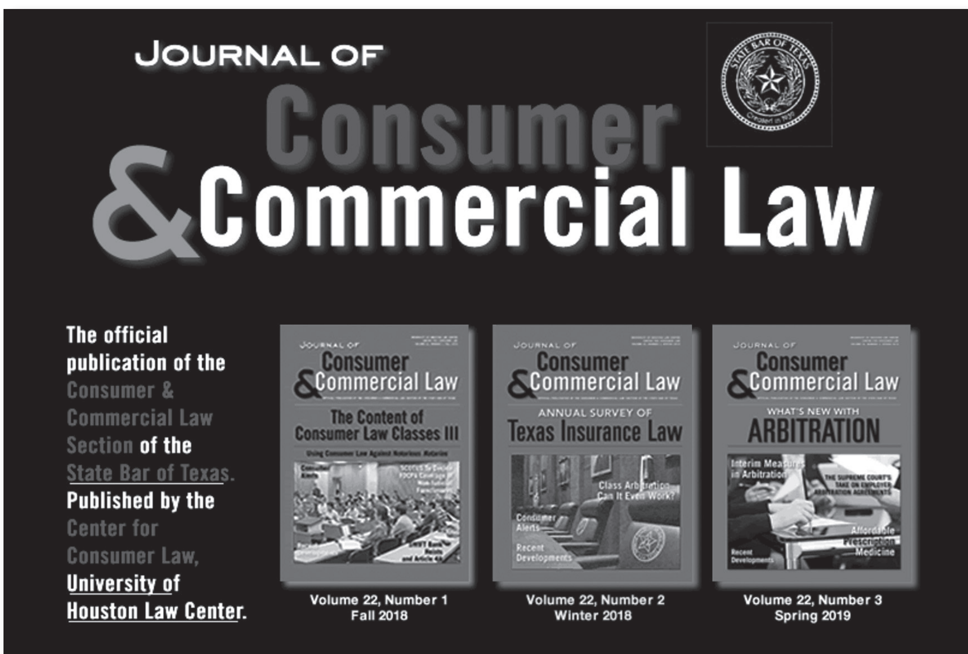

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THE LAST WORD

As usual, this issue of the *Journal* contains a little something for anyone interested in Consumer or Commercial law. In additional to an article on "extended warranties," formally called "service contracts," the *Alert* and *Recent Developments* sections discus more than 35 decisions, all of interest to consumer and commercial lawyers.

And I need to remind you that the *Journal* is only as good as the quality and quantity of the material we receive for publication. Fortunately, quality has not been a problem. Our authors have supplied us with excellent papers. Quantity, however, is another issue. We rely primarily on you—our readers—to submit things you have written that you feel would be of interest to our readers. We accept all forms of articles, whether they are formal "law review" style, less formal with citations in the body of the paper, and even "editorial" style or "opinion" pieces on current issues of interest to consumer or commercial attorneys. I can't guarantee everything submitted will be published, but based on past experience the probability is very high.

Finally, this is the first issue of Volume 23, and I hope you join me in thanking Editor-in-Chief Austin Campbell and the entire staff of Volume 22 for doing a truly outstanding job. I am sure the new law student staff, led by student-Editor-in-Chief Michael Goldsmith, will continue to maintain the same standard of excellence.

Richard M. Alderman
Editor-in-Chief