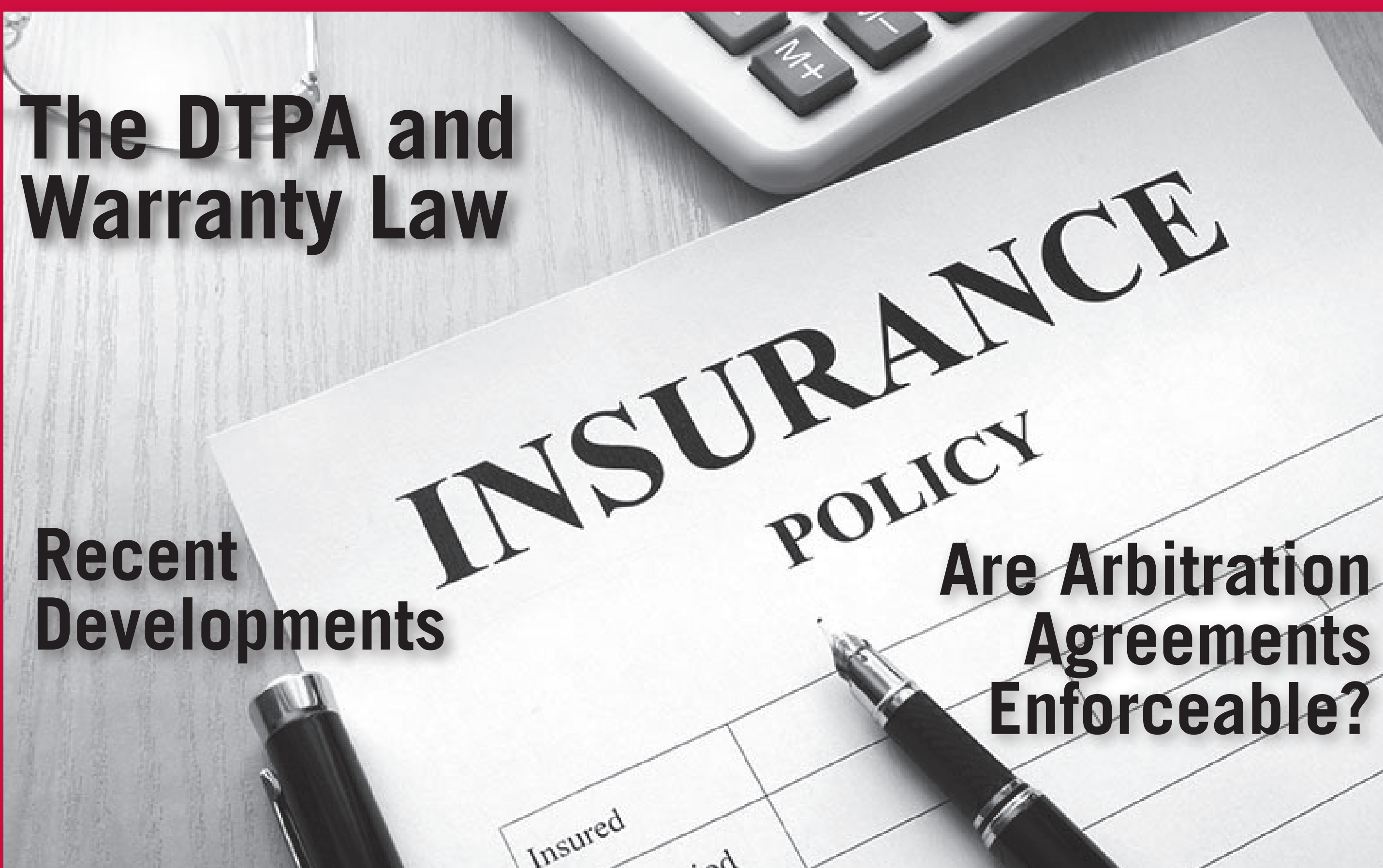
UNIVERSITY OF HOUSTON LAW CENTER
CENTER FOR CONSUMER LAW
VOLUME 23, NUMBER 2, WINTER 2019

Journal of Consumer & Commercial Law

OFFICIAL PUBLICATION OF THE CONSUMER & COMMERCIAL LAW SECTION OF THE STATE BAR OF TEXAS

ANNUAL SURVEY OF Texas Insurance Law 2019



The DTPA and Warranty Law

Recent Developments

Are Arbitration Agreements Enforceable?

Journal of Consumer & Commerical Law

Volume 23, Number 2

Winter 2019

State Bar of Texas
Consumer & Commercial Law Section

Journal of Consumer & Commercial Law

VOLUME 23, NUMBER 2, WINTER 2019

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

Manuscripts should be forwarded to:

Richard M. Alderman
University of Houston Law Center
Krost Hall #210
4604 Calhoun Rd.
Houston, TX 77204-6060
alderman@uh.edu

Articles

Recent Developments

The Texas Supreme Court, in two cases issued the same day, addressed the issue of allowing violations under the Texas Prompt Payment of Claims Act (TPPCA) to proceed after an insurer pays an appraisal award.

ANNUAL SURVEY OF TEXAS INSURANCE LAW

By Suzette E. Selden,* Jonathan D. Selden,** & Dennis L. Grebe***

I. INTRODUCTION

The Texas Supreme Court, in two cases issued the same day, addressed the issue of allowing violations under the Texas Prompt Payment of Claims Act (TPPCA) to proceed after an insurer pays an appraisal award. The court held that an insurer's timely payment of an appraisal award does not as a matter of law bar an insured's claim under the TPPCA, and the court outlined rules for determining when prompt payment violations can proceed against an insurer who paid an appraisal award.[1]

One recent appellate court decision held that *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809 (Tex. 2006) did not prevent a declaratory judgment action for UIM/UM proceeds and an attorneys' fees recovery.[2]

As the business of selling life insurance policies to third parties in life settlement transactions increases, courts are deciphering how to properly implement the law when multiple parties are involved in the payment of premiums and insurance proceeds.[3]

An appellate court held a workers' compensation carrier has a duty to continue to pay death benefits until the beneficiaries actually recover money from a third party, and the carrier cannot stop payments merely because a settlement agreement is reached.[4]

Texas Insurance Code section 542A.006(a) allows an insurer to accept civil liability an agent might have to a claimant for the agent's conduct related to the claim by providing written notice to the claimant. If the insurer elects this, a court must dismiss all claims against the agent with prejudice, which in many cases takes away diversity jurisdiction, resulting in removal to federal court. Courts have been split on the issue of when 542A election actually defeats diversity jurisdiction resulting in remand. However, in a pair of cases recently decided, a San Antonio judge in the Western District of Texas attempted to answer questions about how to properly apply the relatively new provisions of Texas Insurance Code chapter 542A. The court essentially held the distinction boiled down to the timing of the insurer's 542A election, but it noted that other courts have held differently.[5]

II. FIRST PARTY INSURANCE POLICIES & PROVISIONS

A. Automobile

Insured was involved in an auto accident and received policy limits from the third party. He then initiated a UIM claim against Allstate seeking a declaration that he was entitled to recover his remaining damages under his UIM policy. He also sought attorney's fees under the Uniform Declaratory Judgment Act (UDJA).

Relying on *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809 (Tex. 2006), Allstate argued the insured must file suit and establish the amount he is legally entitled to recover from the other motorist to trigger an insurer's contractual duty to pay UIM benefits. Allstate argued that only after the contractual duty to pay is established may an insured pursue a breach of contract claim against the insurer to recover UIM benefits. According to Allstate, an insured cannot file a claim for declaratory relief to obtain the judgment required by *Brainard*. Further, Allstate argued attorney's fees were not recoverable.

The court disagreed, explaining *Brainard* merely addressed breach of contract and did not prevent recovery of attorney's fees in claims brought under the UDJA. The court highlighted the UDJA is available to individuals "'whose rights, status, or other legal relations are affected by a…contract' to have 'determined any question of…validity' arising under the contract and to 'obtain a declaration of rights.'" Therefore, a declaratory judgment is appropriate in UIM/UM claims, and the insured may recover attorney's fees in these claims. *Allstate Ins. Co. v. Irwin*, No. 04-18-00293-CV, 2019 Tex. App. LEXIS 7368 (Tex. App.—San Antonio Aug. 21, 2019, pet. filed).

Insured's husband was killed taking pictures on the side of the road after insurer instructed her to "go ahead and take pictures" of a collision scene. Evidence showed the insurer had a procedure and practice of asking insureds to take pictures of collision scenes. Insured sued insurer alleging numerous negligence-based causes of action, including negligence undertaking and gross negligence, and Insurance Code and DTPA actions for the insurer's alleged misrepresentation that photos were required to provide coverage. The insured also maintained additional causes of action for the insurer's alleged failure to properly settle and pay her underinsured motorist (UIM) claims. The trial court dismissed her negligence, Insurance Code, and DTPA actions (save for the UIM claims) with summary judgment.

Insured sought and received permission to pursue interlocutory appeal on the negligence issues and also appealed the DTPA and Insurance Code issues. The court of appeals affirmed the trial court's negligence findings, agreeing no duty existed for the insurer to protect the physical safety of its insured. It dismissed the DTPA and Insurance Code issues for lack of jurisdiction because the trial court did not authorize interlocutory appeal on those issues.

The court noted there was no prior Texas precedent regarding its no-negligence findings for this particular scenario and went on to examine three "*Phillips* factors" on whether to create a new duty of care for insurers—the foreseeability of risk, knowledge of risk, and the burden of guarding against risk. *See Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523 (Tex. 1990). It found there was no evidence the insurer "was aware of any prior, similar incidents in which an insured was injured (much less struck by another vehicle) while photographing an accident scene." It also ruled the insured had "superior knowledge of the risk" because she was "in a better position" to evaluate it than the insurance call-center employee on the other end of the phone in another state. Finally, the court ruled it would be too burdensome to expect insurers to "assess whether an insured is safe and secure enough to report a claim or take photographs." The court likewise upheld the dismissal of the negligent undertaking claim because, in somewhat circular fashion, the insurer did not "undertake any action for [the insured's] protection." It affirmed the dismissal of the gross negligence claims because it did not find any negligent conduct to begin with. *Kenyon v. Elephant Ins. Co., LLC*, 2019 Tex. App. LEXIS 3310 (Tex. App.—San Antonio April 24, 2019, pet. filed).

B. Homeowners

Insured's home was damaged in a storm. Insured sued the insurer after an agreement on the property damage could not be reached. At trial, the jury answered "No" to the jury question, "Did State Farm fail to comply with the Policy?" However, the jury answered "Yes" to the question "Did State Farm engage in any unfair or deceptive act or practice that caused damages to [insured]?" Based on *Menchaca*, the jury's answer to the breach-of-contract liability question did not, by itself, defeat the insured's insurance-code violations claim. *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018). However, the court noted that to recover policy benefits from an insurance-code violation, the fact finder, "must find that the violation caused the insured to lose benefits she was otherwise entitled to receive under the policy." The court held the damages the jury awarded under the insurance code violations claim were damages that were not available under the policy, e.g., damages to the fence and garage, and therefore, not recoverable. The court affirmed judgment in favor of the insurer. *Wall v. State Farm Lloyds*, 573 S.W.3d 281 (Tex. App.—Houston [1st Dist.] 2018, no pet.).

Homeowner's insurer appealed verdict finding it failed to comply with its homeowners' policy after a hail storm damaged its insured's home, outbuildings, and personal property. The insurer tendered payment for the personal property losses years after the initial claim and included 18% penalty interest under Chapter 542 of the Texas Insurance Code. It did not dispute its failure to timely pay those damages. It did dispute and put on evidence regarding its adjustment of the dwelling and extension losses. The trial court, however, issued an "instructed verdict" in the form of a blanket jury instruction that the insurer "failed to comply" with the policy. The court of appeals found that charge was an unacceptable comment on the weight of the evidence because it concerned both the personal property coverage (for which there was no disputed evidence) and dwelling coverage (for which there was conflicting evidence). "The trial court did not find as a matter of law [insurer] breached [coverage] with respect to damage to the dwelling and extensions, nor could it make such a finding on the conflicting evidence presented." The appellate court reversed and remanded the case for a new trial. *State Farm Lloyds v. MacKeen*, 2019 Tex. App. LEXIS 4047 (Tex. App.—Amarillo May 17, 2019, no pet.).

C. Disability Insurance

Insured was a president of Intracare and sought long term disability benefits following a heart attack and bypass surgery. Insured relied on findings from his cardiologist who indicated the insured had lifting, standing, and driving restrictions. The insurer retained a vocational expert who determined the insured was capable of performing his job duties. As such, the insurer denied benefits on the grounds the insured was not disabled. The insured appealed this decision and insurer retained a medical expert who determined the insured was capable of working full time at a medium activity level. Therefore, insurer upheld its denial. The insured sued in state court seeking a declaratory judgment, which was subsequently removed to federal court. The federal court granted insurer's summary judgment and determined the insured could "clearly return to work at his previous occupation." The court of appeals agreed. The court explained that even if it accepted insured's expert opinions at face value, he would still be able to perform his "Regular Occupation" as president. This term was not contradictory or ambiguous. As such, the insured was not entitled to long term disability benefits. *Shanker v. United of Omaha Life Ins. Co.*, 768 F. App'x 295 (5th Cir. 2019).

III. FIRST PARTY THEORIES OF LIABILITY

A. Breach of Contract

Insurer issued a life insurance policy for a Michigan resident in October 2007. Three years later, James Settlement Services International (JSS) bought the policy in a life settlement transaction. JSS buys life insurance policies and sells fractions of the death benefits to investors. The policy was sold by JSS to Conestoga, who contracted with Provident to manage its policies.

In 2014, Provident erroneously stopped paying premiums on the policy and stopped calling the insurer to ascertain the minimum payment due. Therefore, the policy entered into a grace period. According to the policy, the insurer would mail a grace notice indicating the premium required to keep the policy in force. The policy would terminate within sixty-one days from the date the insurer mailed the grace notice unless payment was received.

The grace notice was dated November 17, 2014. Neither Provident nor Conestoga paid the overdue premium within sixty-one days. Rather, Conestoga wired the funds upon receipt of the Notice of Loss of Coverage.

At trial, the judge determined Conestoga had the burden of proof as to whether the insurer failed to mail notice of the grace period and termination of coverage as required by the policy. The jury determined Conestoga failed to meet its burden of proof.

On appeal, Conestoga argued the insurer failed to strictly comply with the termination provisions of the policy. Conestoga urged the court to interpret the policy as requiring the insurer to create a postmark for mailing of the grace notice. The court highlighted that Texas law requires strict compliance with an insurance policy's termination provision. However, the plain language of the grace period provision did not require the insurer to create or retain a postmark when mailing the notice. The court of appeals highlighted the insurer had the burden of proof to establish it sent a grace notice that is required prior to termination of the policy. As the district court erred in placing the burden of proof on Conestoga, the court analyzed whether this amounted to harmless error.

The court determined the misallocation of the burden of proof did not produce an irrational verdict as the evidence was largely in favor of the insurer. However, it was not so one-sided that Conestoga failed to present a genuine issue of material fact. Therefore, the matter was reversed and remanded for a new trial. *Conestoga Trust v. Columbus Life Ins. Co.*, 759 F. App'x 227, 229 (5th Cir. 2019).

B. Prompt Payment of Claims

A wind and hail storm damaged an insured company's property. The insured filed a claim with its insurer who inspected the property, but found the damage was less than the five-thousand-dollar deductible. The insured filed suit alleging violations of the Texas Prompt Payment of Claims Act (TPPCA), and the insurer invoked the appraisal provision in the policy. Seven months after invoking the appraisal process, the appraisers agreed on a damage amount of $195,345.63. The insurer paid the award six days after it was issued, which the insured accepted, and amended its petition to only include the prompt payment violations for failing to comply with statutory deadlines for acknowledging receipt of the claim, commencing an investigation of the claim, notifying the insured of its rejection of the claim, and paying the claim. Both parties filed motions for summary judgment. The trial court denied the insured's summary judgment motion and granted summary judgment in favor of the insurer holding that an insured could not sustain a claim under the TPPCA when the insurer paid the appraisal award. The appellate court affirmed the trial court's holding.

If an insurer later accepts a claim after initially rejecting it, or if an insurer is adjudicated liable for a claim it rejected, TPPCA deadlines and prompt pay requirements will apply.

Upon review, the Texas Supreme Court looked to the intent of the Legislature when it enacted the TPPCA. The court noted the TPPCA does not mention appraisals or how invocation of an appraisal process affects the TPPCA's deadlines and requirements and interpreted the absence of any such language in Chapter 542 to mean "that the Legislature intends neither to impose specific deadlines for the contractual appraisal process within the TPPCA scheme nor to exempt the contractual appraisal process from the deadlines provided by the TPPCA." The investigation of the claim in this case began when the insurer rejected the claim, stating it was less than the deductible. The court said the later invocation of the appraisal process does not somehow start the investigation period anew. The Texas Supreme Court said it disapproved of the opinions cited by the appellate court, "to the extent these opinions could be read to excuse an insurer liable under the policy from having to pay TPPCA damages merely because it tendered payment based on an appraisal award, or to foreclose any further proceedings to determine the insurer's liability under the policy."

The Texas Supreme Court noted that under the TPPCA, until an insurer is determined to owe the insured benefits and is liable under the policy, either by accepting the claim and notifying the insured it will pay, or through an adjudication of liability, the insurer is required to pay nothing, is not subject to a payment deadline, and is not subject to TPPCA damages for delayed payment. However, "if an insurer later accepts a claim after initially rejecting it, or if an insurer is adjudicated liable for a claim it rejected, TPPCA deadlines and prompt pay requirements will apply." The Court held, "invocation of the contractual appraisal provision to resolve a dispute as to a claim rejected in accordance with the TPPCA's procedural requirements neither subjects an insurer to TPPCA damages nor insulates the insurer from TPPCA damages. An insurer will become liable for TPPCA damages under section 542.060 only if it: (1) accepts liability or is adjudicated liable under the policy; and (2) violated a TPPCA deadline or requirement."

In this case, neither the insurer's invocation of the appraisal process nor its payment based on the appraisal amount exempted the insurer from TPPCA damages as a matter of law. However, without the insurer having accepted liability under the policy or having been adjudicated liable, the insured is not entitled to TPPCA damages as a matter of law. Therefore, the Texas Supreme Court found that neither party met its burden of establishing it was entitled to judgment as a matter of law, reversed the appellate court's decision, and remanded the case to the trial court for further proceedings. *Barbara Techs. Corp v. State Farm Lloyds*, No. 17-0640, 2019 Tex. LEXIS 687 (Tex. June 28, 2019).

After an insured's home suffered hail damage, he reported the loss to his insurer. The insurer sent him a small check for the damage. The insured disagreed with the damage amount and sued the insurer. The appraisal clause was invoked, and the insurer paid the appraisal award. However, the check was sent to the wrong address and included a bank incorrectly, so the insurer reissued the check a month later. The insured argued genuine issues of material fact existed with respect to the timely payment of the appraisal award and his acceptance of the award. The court held that because the insured did not raise the issue of timeliness of payment with the trial court as a reason to avoid summary judgment on the breach of contract claim, he could not raise the issue on appeal. Citing *USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018), the appellate court stated, "[w]hen an insurer has fully paid an appraisal award, no additional benefits are being wrongfully withheld under the policy, and in that situation, the only way an insured can recover any damages beyond policy benefits is where a statutory violation or act of bad faith caused an injury independent of the loss of benefits." Because the insured received benefits he was entitled to under the policy from the appraisal award and has not alleged any act so extreme as to cause independent injury, he failed to raise an issue of material fact on his statutory and bad faith claims. Moreover, because the insurer made a reasonable payment on the claim within the sixty-day statutory limit, the subsequent payment resulting from the appraisal process did not mean the insured violated the prompt payment deadlines of the Texas Insurance Code. *Hinojos v. State Farm Lloyds*, 569 S.W.3d 304 (Tex. App.—El Paso 2019, no pet.).

C. ERISA

An insured who had bariatric surgery was the beneficiary of an ERISA-covered health plan. Complications arose after the surgery requiring follow-up surgery and intensive care. The insurer denied preauthorization for both the bariatric surgery and follow-up surgery. The plan did not cover bariatric surgery or complications related to it. However, the plan did cover conditions including nausea and excessive vomiting. The insured filed an appeal which was denied. Prior to the surgery, the insured's medical records did not reflect treatment for nausea and vomiting. References to nausea and vomiting only appeared after the coverage dispute began. A second appeal was also denied, after which the insured brought suit. The district court held the insurer did abuse its discretion in the second appeal and should have given more weight to the evidence linking gastroesophageal reflux disease and esophagitis to nausea and vomiting. However, the Fifth Circuit reversed stating that where a district court substitutes its own judgment for the plan administrator, the court must reverse. The Fifth Circuit explained that the insurer did not have to credit the insured's post-surgery letters over her pre-authorization documentation and the insurer's consulting doctor's opinion. *Rittinger v. Healthy Alliance Life Ins. Co.*, 914 F.3d 952 (5th Cir. 2019) (It is worth noting that the Texas Insurance Code section 1701.062 bans insurers' use of delegation clauses. However, this plan is a Missouri plan that delegated the fiduciary duty to the insurer, so review by the court of the appeals is not *de novo*, but abuse of discretion standard.).

IV. THIRD PARTY INSURANCE POLICIES & PROVISIONS

A. Comprehensive General Liability Insurance

The employee of a general contractor had his leg amputated after a construction crane accident. A jury found the accident was 90% caused by a subcontractor and 10% caused by the crane company that leased the crane to the subcontractor. The verdict was more than $35 million (magnanimously overturned by the Texas Supreme Court which found the injured general contractor employee was actually the sub-contractor's "statutory employee" and only entitled to workers compensation benefits). Both the subcontractor and crane company had commercial general liability policies issued by the same insurer, but the crane company required the subcontractor to add it as an additional insured on its policy as well.

The Fifth Circuit held that there was a genuine issue of material fact that existed regarding whether the pastor's actions were directly related to the operations of the church.

After the accident, the crane company asked the insurer to cover it as an additional insured under the subcontractor's policy. The insurer denied and covered it under the crane company's own policy, which had a substantial deductible and required the crane company to pay all its defense costs. The crane company settled with the injured worker for almost $3.5 million, and the insurer paid. The crane company then reimbursed the insurer its $3 million deductible and defense costs of over $800,000. The crane company then sued its insurer seeking reimbursement of its expenditures under the subcontractor's CGL policy. Both filed motions for summary judgment.

The insurer claimed the crane company lacked standing because its deductible endorsement assigned it the exclusive rights to pursue the same claims the crane company was seeking to recover. The court rejected this argument because there was a distinction in the policy between "reimbursed" and "reimbursable" costs. "Under the most logical reading of the Policy," the court held, "[Insurer] may recover 'reimbursable' amounts, but it is not assigned the right to also seek recovery from other sources of amounts that the insured has already reimbursed."

Next, the insurer sought to avoid coverage under the subcontractor's additional-insured policy by relying on the Texas Anti-Indemnity Statute, TEX. INS. CODE, sections 151.001-151.151. That law forbids indemnification for an indemnitee's own negligence in construction contracts (like a contractor requiring a subcontractor to indemnify it for its own negligence). "Unless an exception applies," the court reasoned, "the Statute voids the additional-insured coverage because that coverage requires the [subcontractor] Policy to cover [the crane company]." The court examined the statute's "Employee Exception" (which allows indemnification for the bodily injury or death of an employee of the indemnitor) and its "Workers' Compensation Exception" (which exempts agreements affecting the "benefits and protections" of Texas workers' compensation laws), Sec. 151.105(5), and found none to apply. Thus, the court concluded, the Anti-Indemnity Act voided the crane company's additional-insured coverage under the subcontractor's policy. *Maxim Crane Works, L.P. v. Zurich Am. Ins. Co.*, 392 F. Supp. 3d 731 (S.D. Tex. 2019).

V. DUTIES OF LIABILITY INSURERS

A. Duty to Defend

A store clerk sued her employer after being sexually molested by a co-worker. The employer requested a defense from its insurer, who sought a summary judgment that it did not have a duty to defend. The district court granted the summary judgment in favor of the insurer holding that the exclusion in the policy for bodily injury suffered during employment applied. On appeal, the insured argued that the employee was not working at the time of the assault. The appellate court held that clerk alleged in the petition she was working at the time of the assault so the exclusion applied, and the lower court's decision was affirmed. *United Fire & Cas. Co. v. Kent Distribs.*, 759 F. App'x 326 (5th Cir. 2019).

B. Duty to Indemnify

A pastor at a church chaired a committee that supported an effort to pass an ordinance called the "Traditional Family Values Ordinance," which was approved. The ordinance provided that the city of El Paso endorsed traditional family values by making health benefits available only to city employees and their legal spouse and dependent children. However, the El Paso City Council later amended the ordinance to restore benefits to individuals who would have lost their benefits. The mayor cast the tie-breaking vote in favor of amending the ordinance. The pastor began circulating recall petitions to remove the mayor from office, and used the church's website to recruit volunteers to circulate the recall petition. The website stated at the bottom that it was owned by the pastor and not the church.

The mayor sued the church in state court for violating the election code. The trial court entered an order granting the mayor's motion for partial summary judgment and finding the pastor and church liable to the mayor for violations of the election code. Before the case proceeded to trial, the church and pastor entered into an agreed judgment with the mayor stating they were liable to him for $475,000. The church sent its first claim to its insurer before the appellate court entered its decision. After the court of appeals entered its decision, the church and pastor told the insurer that because the court had awarded no fees, they were not making a claim. A year later, they submitted their second claim to their insurer who informed them it did not have a duty to defend or indemnify them based on the claims in the petition. The church then demanded the insurer pay $475,000 plus interest based on the agreed judgment in the mayor's lawsuit, along with an additional $450,000 plus interest for attorney's fees. The pastor and church sued the insurer for breach of contract, unjust enrichment, and bad faith insurance dealings. The insurer removed the case to federal court. The district court granted the insurer's summary judgment motion, concluding that the insurer had no duty to defend or indemnify the pastor because his actions were not directly related to the operations of the church. The pastor and church appealed.

The D&O provision covers "those sums that the insured becomes legally obligated to pay as damages because of 'wrongful acts'" the insured commits. The mayor alleged the pastor was liable for violating the election code provisions that govern corporations, not individuals, based on his status as pastor of the church. The mayor thus alleged that the pastor's activities were directly related to the church's operations. Therefore, the Fifth Circuit concluded that the mayor's allegations triggered State Farm's duty to defend. Moreover, the criminal acts exclusion did not bar the insurer's duty to defend. The violation of the election code that the mayor said was violated is not a criminal offense. The district court found there was no duty to indemnify the pastor. However, the Fifth Circuit held that there was a genuine issue of material fact that existed regarding whether the pastor's actions were directly related to the operations of the church and thus subject to indemnification by the insurer. Therefore, the Fifth Circuit reversed the district court's grant of summary judgment in favor of the insurer on the duty to defend and indemnify, and remanded the case for further proceedings. *Word of Life Church v. State Farm Lloyds*, 766 F. App'x 49 (5th Cir. 2019).

VI. SUITS BY INSURERS

A. Declaratory Relief

A fuel tank system was installed by an insured contractor at a truck stop, and fuel began to leak from the system. The owner of the truck stop sued the insured contractor for the leak. The insured brought a third-party claim against the manufacturer of the faulty flex connector that the insured believed caused the leak. The flex connector manufacturer brought counterclaims against the insured, and then offered to drop the claims if the insured would also dismiss its claims with prejudice. The insurance company urged the insured to accept the settlement offer, but the insured refused. At trial, the jury returned a verdict in favor of the truck stop owner and the manufacturer.

The insurer then filed a declaratory judgment seeking a determination of the parties' rights under the policy. The district court held that the professional liability endorsement (PLE) in the policy did not provide coverage for the manufacturer judgment, and the remainder of the policy provided coverage for only part of the manufacturer judgment. The case proceeded to trial on whether the insured complied with the cooperation clause. The jury found in favor of the insured, but the district court entered judgment partially in favor of the insured pursuant to its conclusion that only some of the manufacturer's judgment was covered. The jury found that the insured did not breach the cooperation clause in the insurance policy by failing to settle with the manufacturer, and the Fifth Circuit agreed. The Fifth Circuit also concluded that the PLE extended coverage when the insured rendered professional services that resulted in money damages, i.e. a monetary judgment, award, or settlement. Therefore, the PLE provided coverage for the entire manufacturer judgment and the district court erred in its summary judgment holding that it did not. The Fifth Circuit reversed the district court's holding that the PLE did not cover the entire manufacturer's judgment. *Mid-Continent Cas. Co. v. Petroleum Solutions, Inc.*, 917 F.3d 352 (5th Cir. 2019).

B. Indemnity & Contribution

The Deepwater Horizon blowout killed 11 men and spilled more oil than any other accident in U.S. history. It's owners—a joint venture between British Petroleum, MOEX Offshore (a distant subsidiary of Tokyo-based Mitsui & Co. Ltd.), and Houston-based Anadarko Petroleum—paid billions in losses as part of multi-district litigation in Louisiana. BP and Anadarko eventually settled with each other, with Anadarko returning its 25% stake in the project to BP along with a $4 billion payment. BP then agreed to release Anadarko and indemnify it for all other claims arising out of the incident. Importantly for this case, the indemnification agreement did not include Anadarko's defense costs of "well over $100 million."

At the time of the blowout, Anadarko had a $150 million excess-liability policy issued by a Lloyds of London syndicate. It contained a "Joint Venture Provision" limiting coverage to the amount of Anadarko's 25% ownership interest in the project. After the incident, the Lloyds underwriters paid Anadarko $37.5 million (25% of $150 million) and walked away. But Anadarko called foul, claiming the underwriters owed it as much as $112.5 million more to pay for "defense expenses" which it said were not limited by the joint-venture reduction (the insurance policy at issue did not require the Lloyds underwriters to defend Anadarko, only reimburse it). Anadarko filed suit and the trial court denied the underwriters motion for summary judgment and granted Anadarko's in part.

Both parties appealed and the 9th District Court of Appeals reversed the trial court and found entirely for the underwriters. The Texas Supreme Court reversed the court of appeals, rendered partial judgment for Anadarko, and remanded to the trial court for further proceedings. Its entire decision rested tenuously on the insurance policy's failure to define the word "liability." The court looked at ordinary definitions of the word, which it found meant "debt, obligation, or responsibility" and the context in which it was used. It said the policy "consistently distinguishes between Anadarko's 'liabilities' and 'expenses'" and ruled "'liability' refers in this policy to an obligation imposed on Anadarko by law to pay for damages sustained by a third party" and does not include defense expenses. "By consistently referring separately to liabilities and expenses," the court ruled, "the policy indicates that although it covers both, they are not the same." Thus, the joint venture limitation provision "applies only to liabilities, not to defense expenses." The court gave several examples illustrating drastically reduced liability payouts compared to giant defense expense reimbursements (such as "$37.5 million for liabilities and $100 million for defense expenses"). It acknowledged the underwriters' contention that this kind of reasoning would render its policy provision "absurd," but concluded, "[t]he absurdity safety valve is reserved for truly exceptional cases, and mere oddity does not equal absurdity." (citing and quoting *Combs v. Health Care Servs. Corp.*, 401 S.W.3d 623, 630 (Tex. 2013)). *Anadarko Petroleum Corp. v. Houston Cas. Co.*, 573 S.W.3d 187 (Tex. 2019).

C. Subrogation

In an administrative appeal, the workers' compensation carrier challenged a trial court determination that the carrier improperly suspended payment of death income benefits before a purported settlement agreement between the decedent's beneficiaries and the third party could be fully funded. While the litigation was ongoing and settlement papers were drawn up, the parties proceeded to an administrative proceeding at the Division of Workers' Compensation. The Administrative Law Judge sided with the carrier, holding it properly suspended death benefits on the date the plaintiffs signed the interim agreement with the defendants. On judicial review, the district court determined the carrier could not suspend payment until the litigation settlement was actually paid. In a lengthy analysis as to when the recovery occurred, the court of appeals upheld the district court's ruling. The court reiterated the plaintiffs did not have an enforceable decree vesting them with a right of recovery against defendants. Absent such a decree, the court determined the statue requires actual disbursement of third-party funds before a carrier is entitled to suspend payments. Ultimately, a workers' compensation carrier has a duty to continue to pay death benefits unless and until the plaintiffs recovered money in the underlying third-party suit. *Tex. Mut. Ins. Co. v. Garcia*, No. 08-15-00075-CV, 2019 Tex. App. LEXIS 2653 (Tex. App.—El Paso Apr. 3, 2019, pet. filed).

An oil rig blew up in Ohio. Its operator's insurer attempted to subrogate against a third-party fracking outfit. The contract between the Texas-based operator and fracker included a broad arbitration agreement governed by Texas law. It also required the operator to force its insurer to waive subrogation rights against the fracker for liabilities the operator assumed. After the insurer's demand, the fracking company preemptively filed suit in the Southern District of Texas, seeking a declaration that it did not owe anything. The insurer argued the case should be pulled into arbitration and, regardless, the court lacked personal jurisdiction. The district court ruled the insurer waived subrogation rights and could not arbitrate. It also found it did not have personal jurisdiction over the insurer and dismissed the case. The Fifth Circuit overruled the arbitration issue, finding the insurer could invoke arbitration as a subrogee because it "waived some subrogation rights, but not all." It cited two Texas Supreme Court rulings distinguishing between "waived and unwaived subrogation rights." *See Ken Petroleum Corp. v. Questor Drilling Corp.*, 24 S.W.3d 344 (Tex. 2000) and *Exxon Mobil Corp. v. Ins. Co. of the State of Pa.*, 568 S.W.3d 650 (Tex. 2019). But, because the district court did not decide what property was damaged or what the insurer's payment covered, it could not decide what subrogation claims had been "waived and unwaived." The court did however agree with the district court that it did not have personal jurisdiction over the insurer because it did not have "minimum contacts" with Texas. *Halliburton Energy Servs. Inc. v. Ironshore Specialty Ins. Co.*, 921 F. 3d 522 (5th Cir. 2019).

[B]ecause [the insured's] action did not arrive in federal court within one-year of his claim's denial, it is time-barred.

VII. DEFENSES & COUNTERCLAIMS

A. Limitations

Insured sued a private "Write-Your-Own" (WYO) insurance carrier in Texas state court for breach of a flood insurance policy issued as part of the National Flood Insurance Program under 42 U.S.C. §§ 4071-72. That program allows private insurers to issue and administer policies written and underwritten by the Federal Emergency Management Agency (FEMA). It carries a strict, one-year statute of limitations and requires suits against the FEMA administrator be brought in federal court because ultimately, "payments are drawn from the federal treasury" (quoting *Shuford v. Fidelity Nat'l Prop. & Cas. Ins. Co.*, 508 F.3d 1337, 1343 (11th Cir. 2007)). The insured in this case missed the deadline and filed in state court. At issue was whether the statute's strict provisions applied to a lawsuit against a private WYO carrier as opposed to the FEMA administrator. The United States District Court for the Southern District of Texas ruled the action was time-barred because the insured filed the state court suit more than a year and three months after receiving an initial denial letter from the insurer. The Fifth Circuit took it a step further and ruled the action was barred because it was not removed to federal court until even later. "[B]ecause [the insured's] action did not arrive in federal court within one-year of his claim's denial, it is time-barred." Regarding the question of whether a private insurer stood in the shoes of the FEMA administrator, the court cited several sister courts, including the Second, Third, and Sixth Circuits, to agree that "a lawsuit against a WYO company is, in reality, a suit against FEMA." (quoting *Van Holt v. Liberty Mut. Fire Ins. Co.*, 163 F. 3d 161, 166-67 (3d Cir. 1998)). *Ekhlassi v. Nat'l Lloyds Ins. Co.*, 926 F.3d 130 (5th Cir. 2019).

B. Other Defenses

The insureds sued the insurer for damage to their home caused by a hailstorm. The insurer offered $25,000, but the insureds did not respond. At trial, the amount of judgment in the insureds' favor was $15,354.45, which was an amount significantly less than eighty percent of the insurer's offer of settlement. The insurer filed a motion to modify judgment arguing that Rule 167 required a take-nothing judgment. Rule 167 says when the amount of the judgment is significantly less favorable to the offeree than the rejected offer, the trial court must award litigation costs to the offeror. It defines "significantly less favorable" if it would be less than eighty percent of the offer. Tex. R. Civ. P. 167. The court held an ex parte hearing without the insureds' counsel, who told the court he was testifying in federal court that day, and ruled in favor of the insurer on a take-nothing judgment. The insureds appealed. The appellate court held that it was an improper ex parte hearing that constituted error. However, the court held the error was not harmful because the one-satisfaction rule applied. Therefore, the amount awarded to the insureds was significantly less favorable than the insurer's offer of settlement, so the appellate court affirmed the take-nothing judgment of the trial court. *Salinas v. State Farm Lloyds*, No. 13-18-00129-CV, 2019 Tex. App. LEXIS 2893 (Tex. App.—Corpus Christi April 11, 2019, pet. filed).

VIII. PRACTICE & PROCEDURE

A. Jurisdiction

This case puts to test the change to the Texas Insurance Code put into place in September 2017. The Texas Insurance Code allows an insurer to accept whatever civil liability an agent might have to a claimant for the agent's conduct related to the claim by providing written notice to the claimant. Tex. Ins. Code § 542A.006(a). If the insurer elects to accept responsibility for the agent, a court must dismiss all claims against the agent with prejudice. *Id.* § 542A.006(c).

In this case, the insured church whose building was damaged during a windstorm sued its insurer and the adjuster. The insured's allegations against the adjuster alleged that the adjuster purposefully ignored covered damages and then hired an engineer he knew would conduct an estimate favorable to the insurer. The insurer elected responsibility for the adjuster, but not until two months after the adjuster was joined. The insurer's election of responsibility did not render the adjuster's joinder improper, because it did not preclude recovery against the adjuster until months after his joinder. The court noted that the insurer's argument that the adjuster was improperly joined based solely on its section 542A.006 election misunderstands the doctrine of improper joinder, which is primarily about joinder.

The insurer argued that the voluntary-involuntary rule applies here, which states that "a case non-removable on the initial pleadings could become removable only pursuant to a voluntary act of the plaintiff." The court found that the adjuster was properly joined in this case, stating due to the allegations against the adjuster, "There was, therefore, at least a reasonable basis to predict that River of Life might recover against Harris [the adjuster] at the time of his joinder. This means that Harris was properly joined even though Church Mutual [the insurer] has now elected responsibility for him." Therefore, the insurer's election of responsibility after suit was filed could not render this case removable because it was not a voluntary act by the insured. Since the parties lack complete diversity, the United States District Court for the Western District of Texas lacked subject matter jurisdiction over the case and remanded it to state court. *River of Life Assembly of God v. Church Mut. Ins. Co.,* No. 1:19-CV-49-RP, 2019 U.S. Dist. LEXIS 67977 (W.D. Tex. April 22, 2019).

In another case involving Texas Insurance Code section 542A.006, an insured's property was damaged by hail and wind. The insured sued the insurer for breach of contract and breach of the duty of good faith and fair dealing, and the adjuster for violations of Texas Insurance Code sections 541 and 542 and of the Texas Deceptive Trade Practices Act. The insurer elected to accept liability for the adjuster and then removed the case to federal court arguing that the adjuster's Texas citizenship should not be considered because it is an improperly joined party. The court stated that since section 542A.006 came into effect there has been much litigation over the effect of an insurer's election on diversity and removal jurisdiction and noted that it previously held, "that when an insurer makes its election before an insured files suit, no cause of action exists against the agent, and if the insured later names the agent as a non-diverse defendant the court may disregard the agent's citizenship for purposes of diversity jurisdiction." The court then said there has been disagreement when an insurer elects to accept liability at any time after the insured files suit. Some courts have previously found a non-diverse defendant to be improperly joined following an insurer's post-suit election. *Flores v. Allstate Vehicle & Prop. Ins. Co.,* No. SA-18-CV-742-XR, 2018 U.S. Dist. LEXIS 186829 (W.D. Tex. Oct. 31, 2018) (denying remand); *Yan Qing Jiang v. Travelers Home & Marine Ins. Co.*, No. 1:18-CV-758-RP, 2018 U.S. Dist. LEXIS 200860 (W.D. Tex. Nov. 28, 2018) (finding improper joinder but remanding because amount-in-controversy requirement was not met). However, other courts have held that an insurer's post-suit election does not render a non-diverse defendant improperly joined. *See, e.g., River of Life Assembly of God*, 2019 U.S. Dist. LEXIS 67977 (granting motion to remand); *Williams v. Allstate Vehicle & Prop. Ins. Co.*, No. 3:19-CV-0320-N, 2019 U.S. Dist. LEXIS 122295 (N.D. Tex. July 23, 2019) (same); *Yarco Trading Co. v. United Fire & Cas. Co.*, 397 F. Supp. 3d 939 (S.D. Tex. 2019) (same). The court in this case disagreed with the latter line of reasoning. Instead the court held, "Where a diverse insurer elects to accept liability for a non-diverse defendant under Section 542A.006 and that election establishes the impossibility of recovery against the non-diverse defendant in state court at the time of removal, the non-diverse defendant is improperly joined and its citizenship may be disregarded for diversity jurisdiction purposes." Therefore, because in this case the insurer made the election to accept liability for the adjuster after being sued but before removal, the court denied the insured's motion to remand and dismissed all claims against the adjuster. *Bexar Diversified MF-1, LLC v. Gen. Star Indem. Co.*, No. SA-19-CV-00773-XR, 2019 U.S. Dist. LEXIS 200150 (W.D. Nov. 18, 2019).

In a case heard by the same judge in *Bexar Diversified MF-1, LLC* and also addressing the application of Texas Insurance Code section 542A.006, insureds sued their insurer and its adjusters after their property was damaged in a hailstorm. After suit was filed, the insurer removed the case to federal court asserting diversity jurisdiction. Only after the insureds filed a motion to remand did the insurer for the first-time elect to accept liability for its adjusters under Texas Insurance Code section 542A.006. The court held that the insureds pled facts that provided the court with a reasonable basis to conclude the insureds may have a valid claim against the adjusters. Moreover, the court held that because the insurer did not file its 542A.006 election until more than a month after its initial notice of removal, the election could not confer diversity jurisdiction. Therefore, the adjusters were not improperly joined parties and their Texas citizenship must be considered when determining diversity jurisdiction. Because the adjusters are not diverse from the insureds, complete diversity did not exist and the court did not have subject matter jurisdiction over the case. Therefore, the case was remanded to state court. *Kotzur v. Metro. Lloyds Ins. Co.*, No. SA-19-CV-01165-XR, 2019 U.S. Dist. LEXIS 201152 (W.D. Tex. Nov. 19, 2019).

A worker's wife sought workers' compensation benefits from Spartan Equipment, her husband's employer, after he suffered fatal injuries while doing yard work at the home of the majority owner of Spartan. The Administrative Law Judge determined the worker was an independent contractor; therefore, his injury was not compensable. On January 5, 2015, the Division notified the injured worker that after review by the panel, the order was final. The notice also stated, consistent with Texas Labor Code section 410.252(a), that "[i]f you are not satisfied with this decision and desire to have the dispute resolved in court, then you must file a lawsuit in the appropriate district court not later than the 45th day after the date on which the Division of Workers' Compensation mailed the parties the decision."

During the administrative process, the worker's beneficiaries also sought a wrongful death claim against Spartan Equipment and third parties. Rather than file a separate lawsuit, the decedent's wife amended her complaint, well within the forty-five-day deadline, to include she was seeking judicial review of the administrative decision and order. Six months later, the trial court granted a plea to the jurisdiction as the judicial review had no relation to the underlying wrongful death claim.

Following the dismissal, the decedent's wife filed suit against the workers' compensation carrier, who highlighted the forty-five-day window had elapsed. Therefore, the trial court did not have jurisdiction. In a lengthy statutory construction analysis, the court determined that while the legislature did set out a 45-day deadline to seek judicial review, nothing in the Act indicates an intent for that deadline to be jurisdictional. The court reasoned that since the legislature is bound to know the consequences of making a requirement jurisdictional, one must ask, in trying to determine legislative intent, whether the legislature intended those consequences. Ultimately, the Texas Supreme Court found no intent to make the forty-five-day deadline jurisdictional, overruling several lower courts who have ruled to the contrary. Therefore, the Texas Supreme Court affirmed the judgment of the court of appeals, remanding the case to the trial court for further proceedings. *Tex. Mut. Ins. Co. v. Chicas*, No. 17-0501, 2019 Tex. LEXIS 353 (Tex. Apr. 5, 2019).

A group of injured workers sued the Texas Department of Insurance-Division of Workers' Compensation, its commissioner, the state of Texas, and their employer due to backdated dates of maximum medical improvement (MMI), which caused the injured employees to lose entitlement to temporary income benefits. The trial court granted a plea to the jurisdiction which the court of appeals affirmed for numerous reasons. First, the court discussed sovereign immunity and waiver with respect to the dismissal of several defendants. Next, the court highlighted the injured workers failed to challenge TDI rules under the Administrative Procedures Act (APA). The court indicated that the APA was the proper avenue and denied the injured workers' request to be permitted to replead their complaints. Next, several of the injured workers failed to exhaust their administrative remedies which preclude a district court's jurisdiction. The court further highlighted the suspension of temporary income benefits was not a vested right; therefore, the injured workers' takings argument challenging rule provisions that allow for the backdating of MMI dates was without merit. *Holt v. Tex. Dep't of Ins.-Div. of Workers' Comp.*, No. 03-17-00758-CV, 2018 Tex. App. LEXIS 10555 (Tex. App.—Austin Dec. 20, 2018, pet. filed).

In *In re Old Republic Risk Mgmt.*, several employees were injured and one was killed in an explosion. The injured workers and their beneficiaries received workers' compensation benefits from the employer's workers' compensation policy and filed suit against several third parties. They also filed suit against the workers' compensation carrier for fraudulent lien, violations of the insurance code, fraud, independent fraudulent acts by lawyer/law firm, and conspiracy to assert fraudulent lien. The workers' compensation carrier filed a plea to the jurisdiction and motion to dismiss the lawsuit against them for lack of subject matter jurisdiction. The carrier asserted the plaintiffs had not exhausted their administrative remedies and the Division of Workers' Compensation maintained exclusive jurisdiction to hear claims alleged in plaintiffs' lawsuit.

Expert disclosure rules do not trump "[a] lawyer's candid advice and counseling," even when a client is testifying as an expert.

Following the district court's denial, mandamus was granted. The appellate court explained that plaintiffs' allegations, if true, demonstrate a failure to comply with the workers' compensation act with respect to the carrier's attempt to recover monies and/or inflated medical benefits. Such noncompliance would constitute administrative violations, and it is the Division of Workers' Compensation duty to ensure that the Act is executed. The court highlighted the Division is tasked with regulating and administering the business of workers' compensation and monitoring system participants. As such, it should be the decision maker with regard to whether benefits have been inflated and administrative costs have been wrongfully included in the subrogation claim. For this reason, the court held the Division has exclusive jurisdiction of plaintiffs' claims and plaintiffs had not exhausted their administrative remedies. Therefore, the trial court abused its discretion by denying the carriers' plea to the jurisdiction. No. 12-19-00144-CV, 2019 Tex. App. LEXIS 4895 (Tex. App.—Tyler June 12, 2019, no pet. h.).

B. Discovery

The Texas Supreme Court reversed an appellate court decision upholding sanctions against defendant who denied requests for admissions, but later admitted liability on the first day of trial. While speeding out of a high school parking lot, a driver hit a woman. The injured woman sued the insured alleging negligence and gross negligence. Evidence showed the driver was speeding at more than twice the implied limit with "the accelerator almost to the floor" before driving over a sidewalk and hitting the woman. While the driver's conduct was "certainly risky," the court held it did not pose an "extreme risk" to satisfy the objective gross negligence standard. Furthermore, the driver's opening statement confession—after denying multiple requests to admit liability earlier—was not sanctionable under Rule 215.4(b) because the driver had a due process right to deny liability and force the injured party to prove her claims. Requests for admissions were "never intended to be used as a demand upon a plaintiff or defendant to admit that he had no cause of action or ground of defense," the court held, quoting *Sanders v. Harder*, 227 S.W.2d 206, 208 (Tex. 1950). "Requests for admissions are no method for trying the merits." *Medina v. Zuniga*, No. 17-0498, 2019 Tex. LEXIS 387 (Tex. April 26, 2019).

C. Experts

The Texas Supreme Court upheld a decision by the court of appeals vacating a trial court's order to produce emails between an attorney and a client's corporate representative when the representative was also acting as a testifying expert. This case involved an insurance dispute concerning property damage caused by a hurricane. The client, the Texas Windstorm Insurance Association (TWIA), asserted attorney-client privilege, claiming the emails were exempt from disclosure under Texas Rules of Civil Procedure 192.3(e)(6) and 194.2(f)(4)(A). The insured city seeking the emails disagreed, arguing TWIA's designation of its own corporate representative as a testifying expert waived the privilege. The Texas Supreme Court preserved the privilege, holding that expert disclosure rules do not trump "[a] lawyer's candid advice and counseling," even when a client is testifying as an expert. "While Texas' expert disclosure rules are broad, they remain subject to the attorney-client privilege, which is not waived merely by a client's decision to offer expert testimony." *In re City of Dickinson*, 568 S.W.3d 642 (Tex. 2019).

D. Arbitration

Insurer attempted to subrogate against an "other assured" subcontractor despite clear policy language waiving subrogation rights against other assureds. It also tried to enforce an arbitration provision between the contractor and subcontractor. The United States District Court for the Southern District of Texas dismissed the insurer's claims on both points, and the insurer appealed to the Fifth Circuit. The Fifth Circuit affirmed the district court's decisions, finding the arbitration provision did not apply to the insurer because it was not party to the contract with the subcontractor, and the subcontractor qualified as an "other assured" under the clear language of the contractor's policy with the insurer. "[A]ttacks on an arbitration agreement's existence," the court held, are "matters for courts, not arbitrators." Applying Louisiana law to interpret the insurance contract, the court held the "plain language" of the contract's "other assured" definition clearly and broadly included the subcontractor. "The issue turned," the court said, "on the specific policy definition in play." If the parties intended to restrict coverage or allow subrogation against other assureds, they could have inserted a provision doing so, the court ruled. "They did not, and we cannot do it for them." *Lloyd's Syndicate 457 v. FloaTEC, LLC*, 921 F.3d 508 (5th Cir. 2019).

E. Appraisal

An insured submitted a wind and hail damage claim to his insurer. The insurer adjusted the claim but said it was less than the deductible. The insured sued, and the insurer requested an appraisal. The appraisal award was more than the deductible, and the insurer promptly paid the award. The trial court granted the insurer's motion for summary judgment on all claims. The appellate court held that the payment of the award barred the insured's breach of contract claim and the common law and statutory bad faith claims to the extent the only actual damages sought were lost policy benefits. However, the court held the insured could proceed on his prompt payment claims, following the holding issued the same day in *Barbara Techs. Corp. v. State Farm Lloyds*, No. 17-0640, 2019 Tex. LEXIS 687 (Tex. June 28, 2019) (holding an insurer's payment of an appraisal award does not as a matter of law bar an insured's claims under the Prompt Payment Act). *Ortiz v. State Farm Lloyds*, No. 17-1048, 2019 Tex. LEXIS 678 (Tex. June 28, 2019).

Insured's home was severely damaged by a hurricane, and he filed a claim with the Texas Windstorm Insurance Association (TWIA). Insured alleged the initial adjuster determined his home was a total loss of $330,000. However, TWIA retained a second adjuster who determined the property was repairable for approximately $175,000. TWIA asserted it accepted coverage on the insured's claim "in full" and paid approximately $175,000. Insured filed suit and alleged TWIA violated the insurance code by mishandling his claim and failing to comply with statutory deadlines regarding his claim. TWIA highlighted the insured did not seek appraisal prior to filing suit; therefore, TWIA filed a plea to the jurisdiction and motion for summary judgment. The trial court denied both motions, and the matter proceeded to an interlocutory appeal.

The appellate court determined the trial court had jurisdiction over the insured's claims. However, the appellate court determined the trial court erred in denying TWIA's motion for summary judgment. TWIA sent a notice of claim acceptance which was clear and unambiguous to the insured. Further, TWIA advised him of his appraisal rights and provided an appraisal request form. The insured argued TWIA failed to pay the entire claim; therefore, TWIA did not accept the claim in full. The court noted the insured was conflating the term "coverage" and "claim." TWIA provided ways to contest the amount of the claim. For example, the appraisal process or documentation of additional repairs could have been submitted. The appellate court held the insured's failure to invoke the appraisal process barred his present claim, as the insurance code allows for a claimant to challenge an appraisal decision but does not contain a similar provision for challenging TWIA's initial determination of the amount of loss. *Tex. Windstorm Ins. Ass'n v. Park*, No. 13-18-00634-CV, 2019 Tex. App. LEXIS 3303 (Tex. App.—Corpus Christi Apr. 25, 2019, pet. filed).

F. Severance & Separate Trials

Insured injured in car accident sued his own insurer after settling with the other driver's insurance company. The insurer asked the court to sever the insured's contractual claim from his extra-contractual claim and abate the extra-contractual claim until the contract claim was resolved. The insured argued that under *USAA Tex. Lloyds Co. v. Menchaca*, No. 14-0721, 2017 Tex. LEXIS 361 (Tex. April 7, 2017) abating the extra-contractual claims could prevent meaningful discovery in the underlying breach of contract case. The court disagreed quoting to the *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809 (Tex. 2006), decision, holding that the insurer "is under no contractual duty to pay benefits until [plaintiff] obtains a judgment establishing the liability and underinsured status of the other motorist." The court noted the insured did not state what evidence relevant to his contractual claim was also relevant to his extra-contractual claims. The court severed and abated the extra-contractual claims. *In re Allstate Fire & Cas. Ins. Co.*, No. 04-18-00676-CV, 2018 Tex. App. LEXIS 10499 (Tex. App.—San Antonio Dec. 19, 2018, pet. filed).

In *American National County Mutual Insurance Company v. Holland*, an insured injured in a car accident sued her insurer for failing to pay under-insured motorist (UIM) benefits after she settled for policy limits with the at-fault driver. She also sued her insurer for violations of the Texas Insurance Code. At trial, the insurer filed a motion to sever and abate the extra-contractual claims, but the trial court denied the motion. The jury found in favor of the insured, awarding policy limits. The insurer appealed. The appellate court held the extra-contractual claims were used to prejudice the jury against the insurer, and severed the extra-contractual claims and remanded the contractual claims. The appellate court reversed the trial court's judgment and rendered a take nothing judgment in favor of the insurer because it found that the insurer telling insured she only could settle if she did not make a PIP or UIM claim did not breach its duty of good faith because it was not required to pay until liability and damage were determined in court. No. 12-18-00141-CV, 2019 Tex. App. LEXIS 2171 (Tex. App.—Tyler March 20, 2019, no pet.).

IX. OTHER ISSUES

A. Multiple Insurers

Valero Refining Texas (VRT) contracted with Qualspec to perform work at a refinery in Corpus Christi, Texas. The contractual relationship was governed by a multi-site work agreement. The contract indicated that unless Qualspec was enrolled in Valero's Rolling Owner Controlled Insurance Program (ROCIP), Qualspec shall maintain workers' compensation insurance.

A Qualspec employee was injured at the refinery and received workers' compensation benefits from VRT. The worker sued VRT and Valero Energy Corporation (VEC), who in turn filed summary judgments. VRT argued that the Texas Workers' Compensation Act recognizes that a general contractor may be a deemed employer for a subcontractor's employees if there is a written agreement effectuating this relationship.

The parties' arguments focused on what it meant to "provide" workers' compensation insurance under the Labor Code. It was undisputed that VRT secured coverage for Qualspec pursuant to its ROCIP program. The court explained the common meaning of "provide" is "to supply or make available." The court noted VRT took affirmative steps to provide coverage for its subcontractors via the written agreement and ROCIP. Therefore, VRT conclusively established it provided workers' compensation insurance, so the exclusive remedy provision applied. Summary judgment with respect to VEC was also proper as it was strictly a holding company and did not have a right to control the refinery. Therefore, VEC did not breach any duty to the injured worker. *Powell v. Valero Energy Corp.*, No. 13-18-00209-CV, 2019 Tex. App. LEXIS 1490 (Tex. App.—Corpus Christi Feb. 28, 2019, pet. filed).

B. Excess & Primary Coverage

An excess insurer filed suit for negligent misrepresentation against a law firm for alleged misstatements or omissions in representing an insured. Although the firm did not represent the excess insurer, the firm provided the excess insurer with information about the litigation, including developments in the litigation and the firm's opinions of the settlement value and potential judgment value of the case. The matter went to trial and the plaintiff was awarded approximately 24 million dollars in compensatory damages and an additional ten million in exemplary damages. Following the judgment, the excess insurer retained its own counsel, for the first time, and filed suit against the law firm.

The Fifth Circuit found no direct Texas case on point, but made an *Erie* guess that the Supreme Court of Texas would apply the attorney immunity doctrine to shield attorneys for such negligent misrepresentation claims. *See Erie R.R. v. Tompkins,* 304 U.S. 64 (1938). This doctrine is intended to ensure loyal, faithful, and aggressive representation by attorneys employed as advocates by avoiding the inevitable conflict that would arise if the firm was forced to constantly balance their own potential exposure against their client's best interests. The court reiterated that attorneys are generally "immune from civil liability to non-clients 'for actions taken in connection with representing a client in litigation.'" Rather, an attorney may be liable to non-clients only for conduct outside the scope of his representation of his client or for conduct foreign to the duties of a lawyer.

Essentially, the courts are instructed to look at the general kind of conduct at issue and determine whether the attorney was discharging the duties to a client when performing said conduct. The excess carrier was complaining of the following wrongful conduct:

(1) reporting on the status of litigation and settlement discussions;
(2) providing opinions as to the strength and valuation of plaintiffs' claims;
(3) providing opinions on litigation strategies employed by opposing counsel and the prejudice of pre-trial developments;
(4) providing estimates of potential liability;
(5) reporting on the progress of a jury trial; and
(6) reporting on pre-trial ruling and pre-trial settlement offers.

The Fifth Circuit held this conduct clearly falls within the routine conduct attorneys engage in when handling this type of litigation. Therefore, the court held the requirements for attorney immunity were met, and the excess carrier's compliant should be dismissed. *Ironshore Europe DAC v. Hardin*, 912 F.3d 759 (5th Cir. 2019).

** Suzette E. Selden is an attorney at Selden & Co. in Austin, Texas, focusing on insurance litigation. She was selected by Thomson Reuters for inclusion in 2012-2015, 2017-2019 Texas Rising Stars® publication. Suzette currently is a committee member of the Texas State Bar Women in the Profession Committee. She previously served as the President of the Capital Area Trial Lawyers Association. In 2002, Suzette graduated with highest honors from Brigham Young University with a B.A. in Communications, and with high honors from the University of Houston Law Center in 2006.*

*** Jonathan D. Selden is an attorney at Selden & Co. in Austin, Texas, focusing on consumer and personal injury litigation. He currently serves as a committee member of the State Bar of Texas Jury Service Committee. He received a JD degree from Gonzaga University School of Law in 2003 and a BA from Brigham Young University in 2001.*

**** Dennis Grebe is an attorney at Burns Anderson Jury & Brenner, L.L.P. in Austin, Texas, focusing on workers' compensation defense. In 2010, Dennis graduated from Trinity University with a B.A. in Economics and then received his law degree from the University of Texas School of Law in 2014.*

---

1 *Barbara Techs. Corp. v. State Farm Lloyds*, No. 17-0640, 2019 Tex. LEXIS 687 (Tex. June 28, 2019); *Ortiz v. State Farm Lloyds*, No. 17-1048, 2019 Tex. LEXIS 678 (Tex. June 28, 2019).
2 *Allstate Ins. Co. v. Irwin*, No. 04-18-00293-CV, 2019 Tex. App. LEXIS 7368 (Tex. App.—San Antonio Aug. 21, 2019, pet. h. filed).
3 *Conestoga Trust v. Columbus Life Ins. Co.*, 759 F. App'x 227, 229 (5th Cir. 2019).
4 *Tex. Mut. Ins. Co. v. Garcia*, No. 08-15-00075-CV, 2019 Tex. App. LEXIS 2653 (Tex. App.—El Paso Apr. 3, 2019, pet. filed).
5 *Bexar Diversified MF-1, LLC v. Gen. Star Indem. Co.*, No. SA-19-CV-00773-XR, 2019 U.S. Dist. LEXIS 200150 (W.D. Nov. 18, 2019); *Kotzur v. Metro. Lloyds Ins. Co.*, No. SA-19-CV-01165-XR, 2019 U.S. Dist. LEXIS 201152 (W.D. Tex. Nov. 19, 2019); *see also River of Life Assembly of God v. Church Mut. Ins. Co.,* No. 1:19-CV-49-RP, 2019 U.S. Dist. LEXIS 67977 (W.D. Tex. April 22, 2019).

The DTPA and Warranty Law: An Overview

By Mark E. Steiner*

I. Introduction

This article presents an overview of warranty law and the Texas Deceptive Trade Practices Act (DTPA). The DTPA provides a cause of action for "breach of express and implied warranty."[1] What constitutes a breach of warranty must be established independently of the DTPA as "there are no true DTPA warranties."[2] The relationship between the DTPA and warranty law is complicated. Some claims are best presented as warranty claims under the UCC or common law; other claims are best presented as warranty claims based upon the UCC or common law but pled under the DTPA; still others are best presented by skipping warranty law altogether and instead asserting a DTPA laundry-list violation.

This article necessarily just scratches the surface. The best place to further explore this topic is found in Richard M. Alderman, *The Lawyer's Guide to the Texas Deceptive Trade Practices Act* ch. 5 (2d ed. 2018).

II. The DTPA and Warranty Law

In 1984, the Texas Supreme Court decided *La Sara Grain v. First Nat'l Bank of Mercedes,* the most important case on warranty claims and the DTPA.[3] There, an employee of a business was able to embezzle funds because the bank honored company checks despite not having the required two signatures. The business sued the bank, claiming the bank breached an implied warranty that it would follow its customer's instructions to require two signatures. In oft-quoted language, the court stated, "The DTPA does not define the term 'warranty.' Furthermore, the act does not create any warranties; therefore any warranty must be established independently of the act."[4] As Richard Alderman has noted, this statement "should be clear and straightforward" but some courts appear to be confused about the relationship between the DTPA and warranty law.[5]

In 2019, the Texas Supreme Court re-affirmed *La Sara*'s approach to the DTPA and warranty law.[6] Despite *La Sara*'s very plain statement that the DTPA does not create any warranties and "any warranty must be established independently of the act,"[7] several courts of appeals somehow managed to hold that the *Melody Home* warranty only existed within the DTPA.[8] Only the Tyler Court of Appeals and the Fifth Circuit held that the *Melody Home* warranty also could be brought under the common law.[9] This battle over whether the *Melody Home* warranty was DTPA-only mattered because if a consumer could sue only under the DTPA, then the consumer was under the DTPA's two-year limitations period. Thus, the plaintiff could not seek refuge under a longer limitations period.[10]

The implied warranty of workmanlike repairs is a creature of the common law. A breach of the warranty can be asserted in an action for violations of the DTPA, but it also can be asserted in a common-law action.

In *Melody Home,* the Texas Supreme Court held that "an implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner is available to consumers suing *under the DTPA*."[11] The courts that subsequently held the *Melody Home* warranty was only found in the DTPA were fixated on the "under the DTPA" part of that sentence, concluding it meant "*only* under the DTPA." This was a surprising interpretation of *Melody Home* because the Texas Supreme Court had already decided that the DTPA did not create any warranties in *La Sara* three years before *Melody Home*. Chief Justice Hecht in *Nghiem* pointed out that the court in *Melody Home* had relied upon *La Sara* and that the court's holding "cannot reasonably be read to directly contradict authority on which we expressly relied."[12] He concluded: "The implied warranty of workmanlike repairs is a creature of the common law. A breach of the warranty can be asserted in an action for violations of the DTPA, but it also can be asserted in a common-law action."[13]

The Texas Supreme Court thus decided that the DTPA's limitations did not apply to the *Melody Home* warranty brought under the common law. Unfortunately, the court ended the opinion with an inconclusive discussion about whether the two-year limitations or the four-year residual limitations period from the Civil Practice and Remedies Code would apply.[14] The issue of the limitations period for the *Melody Home* warranty will have a second round of litigation because the first round only settled that the DTPA's two-year limitations period did not apply.

In order to recover for a breach of warranty under the DTPA, the plaintiff must prove he or she is a consumer, that a warranty was made, the warranty was breached, and that, as a result of the breach, an injury resulted.[15]

III. UCC Warranties and the DTPA

If goods are involved, then Chapter 2 of the Texas Business and Commerce Code will apply whether the warranty claim is brought under Chapter 2 or the DTPA.

A. UCC Warranties

Chapter 2 establishes three warranties: express warranty, implied warranty of merchantability, and the implied warranty of fitness for a particular purpose.

1. Express Warranty

To recover for the breach of an express warranty, a plaintiff must prove: (1) an express affirmation of fact or promise by the seller relating to the goods; (2) that such affirmation of fact or promise became a part of the basis of the bargain; (3) that the plaintiff relied upon the affirmation of fact or promise; (4) that the goods failed to comply with the affirmation of fact or promise; (5) that the plaintiff was injured by such failure of the product to comply with the express warranty; and (6) that such failure was the cause of plaintiff's injury.[16]

Chapter 2 establishes express warranties in section 2.313. Three situations will create an express warranty: (1) any affirmation of fact or promise made by the seller to the buyer that relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise; (2) any description of the goods that is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description, and (3) any sample or model that is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.[17] Section 2.313 notes that "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."[18] This is known as the "puffing" defense.

A statement that constitutes puffing or "sales talk" won't be considered an express warranty. Puffery is "an expression of opinion by a seller not made as a representation of fact."[19] What is puffing and what is an affirmation of fact or promise obviously will depend on what is said. For example, a homebuilder's statements that the buyers would be getting a "kick butt house" and "would be pleased as punch" were "slang terms constituting an opinion and are not fact assertions."[20] Similarly, the homebuilder's statements that the house would be a "magnificent home with a quality level rarely seen in Tarrant County" and that it would be "one of the finest homes in the City" were just expressions of opinion.[21] But that same homebuilder's statements that a leak was "fixed" and "will not pose a future problem" were actionable.[22]

The "fact that the statement is a warranty does not preclude it from being actionable" as a DTPA laundry-list misrepresentation.[23] That is important to remember if the warranty claim would be subject to defenses under warranty law that would not apply to a DTPA misrepresentation claim. But a statement that is considered puffing under warranty law is going nowhere as a DTPA misrepresentation.[24] The Texas Supreme Court has stated that misrepresentations are actionable under the DTPA "so long as they are of a material fact and not merely 'puffing' or opinion."[25]

2. Implied Warranty of Merchantability

Chapter 2 of the Uniform Commercial Code establishes an implied warranty of merchantability for goods "if the seller is a merchant with respect to goods of that kind."[26] Section 2.314 gives six examples of the standard that a merchantable good must

meet.[27] Most cases discuss whether the goods were fit for their ordinary purpose.[28]

To recover on a claim for breach of implied warranty of merchantability, the plaintiff must prove: (1) the defendant sold or leased a product to the plaintiff, (2) the product was not merchantable, (3) the plaintiff notified the defendant of the breach, and (4) the plaintiff suffered injury.[29] To prove that the good was not merchantable, a plaintiff must show there was some defect in the product, that there was a condition of the goods that rendered them unfit for the ordinary purpose for which they are used because of a lack of something necessary for adequacy.[30]

While most courts recognized that the implied warranty of merchantability applies to used goods, the Texas courts of appeals were outliers on this issue.[31] This forty-year reign of error by these courts ended when the Texas Supreme Court finally addressed whether the implied warranty of merchantability applies to used goods.[32] The supreme court held that a downstream buyer could sue the manufacturer for breach of the implied warranty of merchantability.[33] The court did not address whether that buyer would have an implied-warranty claim against the immediate seller.[34]

The courts of appeals had long held otherwise, which put Texas with a very small number of states on this issue.[35] The case that led the march down the wrong path was *Chaq Oil Co. v. Gardner Machinery Corp.,* a case decided by the Fourteenth Court of Appeals in 1973.[36] In a powerful display of judicial inertia, every other court of appeals that subsequently addressed this issue also held that the implied warranty of merchantability did not apply to used goods.[37] The rule became known as the "*Chaq Oil* rule." In 2012, the Fourteenth Court of Appeals—where the rule was born—tried to limit the effect of its *Chaq Oil* rule by narrowing the holding. The court was well aware of the mess it made, noting that "Texas is one of the few states to follow the *Chaq Oil* Rule; most state courts that have addressed this issue have concluded that a warranty of merchantability is implied in a contract for the sale of goods, even if the buyer purchases the goods knowing that they are used."[38] The court held that *Chaq Oil* only applied when the subsequent buyer was suing the subsequent seller; *Chaq Oil* did not apply when the subsequent buyer was suing the manufacturer.[39]

The Texas Supreme Court affirmed the court of appeals in an opinion that is often read as a reminder to manufacturers that the implied warranty of merchantability could be disclaimed. Justice Willett, writing for the court, held that the resale of a used good does not "automatically terminate any remaining implied-warranty obligation" for the manufacturer.[40] Justice Willett seemed wistful about the procedural posture of the case, lamenting that "we take cases as they come, and given how this cases was tried, we agree with the court of appeals that the downstream buyer was entitled to rely on the implied warranty of merchantability."[41] The defendant made a pleading error. Because an express disclaimer is an affirmative defense, it had to be pled. While there may have been an as-is clause, the defendant "failed to raise it as an affirmative defense in its pleadings" and the issue was not tried by consent.[42] The court of appeals held that the manufacturer failed to plead the affirmative defense in the trial court, and the manufacturer did not challenge that holding at the supreme court. Justice Willett sadly had to conclude, "We therefore must affirm the court of appeals on this issue."[43]

The Texas Supreme Court next belatedly joined the overwhelming majority of courts on the issue of used goods and merchantability, finding "no reason why the merchant's legally imposed duty to issue merchantable goods should automatically end when a good passes to subsequent buyers."[44] The court disapproved of the *Chaq Oil* rule "insofar as the holding extends to an implied-warranty claim by a second-hand buyer against the original manufacturer."[45]

The court also declared that "inspection does play a role" in determining whether the second-hand purchaser obtains an implied warranty of merchantability.[46] The court seemingly suggested that without "a reasonable and prudent examination under the circumstances" the implied warranty of merchantability for used goods is waived.[47]

But inspection probably will not be an issue in the future since Justice Willett spent the rest of the opinion hyping as-is clauses. He helpfully informed manufacturers that the court's holding on implied warranties and used goods only applies when manufacturers do not "exclude or modify implied warranties, which Texas law undeniably permits."[48] The court concluded:

> If the manufacturer validly disclaims implied warranties at the first sale, as is commonly done, that disclaimer carries with the good, just as the warranty otherwise would. Absent such disclaimer language, manufacturers do not escape liability merely because a good has transferred owners, and the purchaser of a used good can rely upon an implied warranty created at the time of first sale. The law imposes an obligation that merchants sell merchantable goods, and when they fall short of this standard, a second-hand buyer who suffers an economic loss from a defect has the right of recovery through an implied-warranty action.[49]

3. Implied Warranty of Fitness for Particular Purpose

Section 2.315 states the requirements for the warranty of fitness for particular purpose:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.[50]

For this implied warranty to operate, the seller must know, or have reason to know, two things: first, the particular purposes for which the goods are required, and, second, that the buyer is relying on the seller to select appropriate goods to accomplish that purpose. If the buyer simply relies on the description of the goods provided on the container, this warranty does not apply. If such goods do not perform as expected, the warranty of merchantability may be breached, but this warranty requires specific knowledge on the part of the seller. This warranty, like the implied warranty of merchantability, may be modified or excluded.[51]

The Official Comments to section 2.315 help explain the scope of this warranty:

> 1. Whether or not this warranty arises in any individual case is basically a question of fact to be determined by the circumstances of the contracting. Under this section the buyer need not bring home to the seller actual knowledge of the particular purpose for which the goods are intended or of his reliance on the seller's skill and judgment, if the circumstances are such that the seller has reason to realize the purpose intended or that the reliance exists. The buyer, of course, must actually be relying on the seller.
>
> 2. A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question. For example, shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains.[52]

The particular purpose must be a particular non-ordinary purpose.[53] There are not a lot of fitness for particular purposes cases and even fewer cases with any kind of extended discussion of this type of warranty.[54]

B. Defenses to UCC Warranties

A corollary to *La Sara*'s pronouncement that warranty claims must be established independently of the DTPA is that defenses to these warranties also will be brought into the DTPA.[55] Generally, the provisions of the DTPA cannot be waived or disclaimed; however, DTPA claims based upon breach of express or implied warranty are exceptions to this rule.[56] Warranty law provides for such defenses as disclaimers and limitations of remedies.

The particular purpose must be a particular non-ordinary purpose.

1. Notice

Both the DTPA and Chapter 2 require notice to the defendant. The failure to give timely notice has very different consequences under these statutes. The DTPA requires a 60-day presuit notice and the failure to give notice can only result in abatement.[57] But section 2.607(c)(1) provides: "Where tender has been accepted, the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy."[58] That means failure to give timely notice for a breach of warranty claim is fatal.[59] This notice requirement also applies to Chapter 2 breach-of-warranty claims brought under the DTPA.[60]

Because notice is in the nature of a condition precedent rather than an affirmative defense, the burden of alleging and proving proper notice is on the buyer.[61] Typically, notice is a question of fact to be decided by the trier of fact; it is a question of law only if there is no room for ordinary minds to differ.[62] Obviously, sellers should be able to succeed on dispositive motions when no notice was given. It is much more difficult to show that actual notice was unreasonable as a matter of law.[63]

Notice to a remote manufacture probably is required. It is difficult for a plaintiff to argue that the manufacturer is a "seller" for the purpose of his or her warranty claim but is not a "seller" for the purposes of notice.[64] This issue of whether notice is required to the remote manufacturer was reserved by the Texas Supreme Court in 1986 and has not yet been addressed by the court.[65] Five Texas courts of appeals have addressed this issue, with four holding that notice must be given to the remote manufacturer.[66] The Fifth Circuit has followed the view of the majority of Texas courts of appeals.[67]

2. Disclaimers

The UCC sets the following requirements for the exclusion or modification of express and implied warranties in section 2.316. Texas's version reads in full as follows:

> a. Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this chapter on parol or extrinsic evidence (Section 2.202) negation or limitation is inoperative to the extent that such construction is unreasonable.
>
> b. Subject to Subsection (c), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."
>
> c. Notwithstanding Subsection (b)
>
> 1. unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
>
> 2. when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and
>
> 3. an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.[68]

I have not been able to find a Texas case that has enforced a disclaimer of express warranty under section 2.316.[69] Cases that have upheld a disclaimer of express warranties have relied upon the court-made rule from *Prudential* that sidesteps the more narrow strictures of section 2.316 or DTPA waiver.[70]

One commentator has explained the difficulty involved in interpreting a express-warranty disclaimer:

> The section calls for courts to construe "words

> or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty…as consistent" if reasonable, but a seller's attempt to exclude or modify a warranty fails "to the extent that such construction is unreasonable." As with section 2-313, this section creates confusion. Language creating warranties and disclaiming them can hardly be "consistent." Courts understandably throw up their hands in despair when applying this section too and often decide solely by weighing the specificity and conspicuousness of the disclaimer. Some courts even suggest that an inconsistent disclaimer can trump an express warranty. Most decisions nonetheless seem to favor the express warranty over any disclaimer.[71]

In other jurisdictions, disclaimers of express warranties have been enforced where the express warranty does not appear in the written agreement and that agreement either specifically or generally disclaims all oral express warranties.[72]

There are many more cases on disclaimers of implied warranties than disclaimers of express warranties. The issue in these cases typically is whether the disclaimer was conspicuous.[73] Section § 1.201(10) says "conspicuous" means "so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it." Whether a term is "conspicuous" is a matter of law.[74] Section § 1.201(10) gives these examples of "conspicuous terms":

> (A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and
>
> (B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.[75]

3. Limitation of Liability

Chapter 2 allows parties to limit liability and remedies. Section 2.719 provides:

> a. Subject to the provisions of Subsections (b) and (c) of this section and of the preceding section on liquidation and limitation of damages,
>
> (1) the agreement may provide for remedies in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and
>
> (2) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.
>
> b. Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this title.
>
> c. Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.[76]

In *Southwestern Bell Tel. Co. v. FDP Corp*., the supreme court made a distinction between a non-warranty DTPA claim and a warranty-based DTPA claim: the warranty claim could be limited by a limitation-of-liability clause while the non-warranty DTPA claim could only be affected by the DTPA's waiver provision, not by a limitation-of-liability clause. The court explained:

> We agree that a liability limitation would be invalid under §17.42 insofar as it purported to waive liability for an act defined as deceptive under §17.46(b). Unlike a "laundry list" claim, however, an action for breach of warranty is not a creation of the Act. Because claims for breach of warranty derive from common-law principles of other statutory provisions, we must consult these sources in determining the nature and extent of warranties. For example, the UCC creates an implied warranty of merchantability, and it also allows sellers to disclaim the warranty if certain specific prerequisites are met. Such a disclaimer does not offend the "no waiver" provision in a suit for breach of warranty under the DTPA.[77]

While *Prudential Ins. of Am. v. Jefferson Assocs.* complicates this distinction when as-is clauses are involved, this dichotomy of warranty versus non-warranty claims and the efficacy of limitation-of-liability clauses within the DTPA still stands.[78]

Limitation-of-liability clauses are routinely enforced in Texas courts on claims based upon breach of warranty or contract.[79] Some courts have noted, "So long as the agreement does not violate public policy, it will be enforceable; it will not violate public policy if there is no disparity in bargaining power between the parties."[80] The language about disparity of bargaining power might afford some room for a plaintiff to argue that the clause is not enforceable.

The Texas Supreme Court recently addressed whether limitation-of-liability clauses in the parties' agreements barred a punitive damages award.[81] The purchase agreement for an aircraft stated: "Flexjet will not be liable to either customer for any indirect, special, consequential damages as punitive damages."[82] The seller failed to disclose problems with aircrafts two engines; the engines had problems; a lawsuit ensued.[83] Plaintiffs sued for both breach of contract and fraud. The jury awarded $2,694,160 in actual damages for fraud and $5,388,320 in exemplary damages.[84] The plaintiffs chose to recover under fraud.

The supreme court upheld the legal sufficiency of the evidence to support the award of actual damages for fraud, but reversed the punitive damages award.

The supreme court upheld the legal sufficiency of the evidence to support the award of actual damages for fraud, but reversed the punitive damages award.[85] The court asserted that "a damages-limitation clause is a limited warranty that is the basis of the bargain and will limit recovery to the limited damages."[86] In other words, the defendant was giving the plaintiffs a better price because it no longer had to worry about its exposure to punitive damages. The court also pointed out such clauses are "generally valid and enforceable."[87] Critical to the court's pro-fraud jurisprudence is its reliance on the "strongly embedded public policy favoring freedom of contract."[88]

The plaintiffs' argument basically was that fraud changes everything, pointing to supreme court precedent that had held "fraud vitiates whatever it touches."[89] The court of appeals concluded that "a buyer cannot be bound by an agreement waiving exemplary damages if the seller commits fraud by nondisclosure."[90] Enforcement of the limitation-of-damages clause would allow sellers to "deliberately fail to disclose material facts to entice a buyer to enter a contract and then shield himself from a damage to which the buyer is entitled."[91]

The supreme court rejected plaintiff's fraud-is-bad arguments and reversed this portion of the trial court's judgment. The court concluded instead that fraud is not so bad that it would render the limitation-of-damages clause ineffective. The court pointed out:

> We have never held, however, that fraud vitiates a limitation-of-liability clause. We must respect and enforce terms of a contract that parties have freely and voluntarily entered.... We note that the purchasing parties did not waive a claim for fraud; they only waived the ability to recover punitive damages for any fraud.[92]

The court was being a little disingenuous when it said it had never held that that fraud vitiates a limitation-of-liability clause. Since this was a case of first impression, the court also had never held that fraud does vitiate a limitation-of-liability clause. If fraud vitiates everything it touches, it seems like it would have vitiated this clause. In any event, the court found that the defendant's fraud did not touch this clause.

Such limitation-of-liability clauses now will be enforced against contract of warranty claims or warranty claims brought under DTPA. These clauses still should not be enforced against DTPA laundry-list or unconscionability claims.[93]

Both DTPA waivers and Chapter 2 disclaimers of implied warranties must be conspicuous. But a limitation-of-liability clause probably does not have to be conspicuous because it would not be considered to have shifted risk in such an extraordinary way that it exculpated a party from the consequences of its own future negligence.[94]

4. Statute of Limitations

Chapter 2 provides for a four-year limitations period. It states, in pertinent part, that:

> a. An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
>
> b. A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.[95]

A warranty claim brought through the DTPA would be subject to the DTPA's two-year limitation period.[96] Chapter 2 seemingly provides a longer limitations period than that of the DTPA but it that may not be true in all circumstances. Section 2.725 does not include the discovery rule but the DTPA does. Limitations for breach of warranty begin when the breach occurs "regardless of the aggrieved party's lack of knowledge of the breach" and the breach occurs upon delivery. But the DTPA's limitations period begins "after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice."[97] This means it is possible that the DTPA might afford more time to sue.

5. Mere Breach of Contract

While a breach of warranty is actionable under the DTPA, a breach of contract, without more, is not.[98] The Texas Supreme Court noted that "it has long been the rule in Texas that mere nonfeasance under a contract creates liability only for breach of contract" while conceding that courts and commentators have struggled to clarify the boundary between contract claims and other causes of action.[99] An allegation of a mere breach of contract, without more, also does not constitute a "false, misleading or deceptive act" in violation of the DTPA.[100] Since breach of contract is not actionable under the DTPA, defendants reflexively argue that the plaintiffs' alleged warranty claims are contract claims.[101]

A court's determination of whether a claim is for warranty or contract invariably begins with *FDP Corp*. Courts of appeals characterize claims as breach of contract when the seller fails to make any delivery and as warranty when the seller delivers defective goods.[102]

IV. Common-Law Warranties for Services and the DTPA

A. Common-Law Warranties for Services

Warranties for services are common-law creations. In Texas, express warranties for services borrow from Chapter 2. Texas courts have been very reluctant to establish common-law implied warranties.[103] The Texas Supreme Court has been willing to establish a common-law implied warranty only when there is a gap to be filled in existing law.[104]

1. Express Warranties for Services

Although the warranty provisions of Chapter 2 explicitly do not apply to services, the Texas Supreme Court has held that Chapter 2 is "instructive" for express warranties for services.[105] The elements of a claim for breach of an express warranty for services are: "(1) the defendant sold services to the plaintiff; (2) the defendant made a representation to the plaintiff about the characteristics of the services by affirmation of fact, by promise, or by description; (3) the representation became part of the basis of the bargain; (4) the defendant breached the warranty; (5) the plaintiff notified the defendant of the breach; and (6) the plaintiff suffered injury."[106]

2. Implied Warranties for Services

At the absolute height of the remedial revolution in American courts, the Texas Supreme Court recognized the implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner.[107] But even the relatively liberal *Melody Home* court assured doctors and lawyers that the issue of "whether an implied warranty applies to services in which the essence of the transaction is the exercise of professional judgement by the service provider" was not before the court.[108] Seventeen years before *Melody Home*, the Texas Supreme Court held that a home builder impliedly warranted that a house was constructed in a good workmanlike manner and was suitable for human habitation.[109]

The *Melody Home* and *Humber* warranties remain the most significant common-law warranties in Texas. Texas courts have taken a very conservative approach to implied service warranties for the last thirty years. In *Parkway Co. v. Woodruff,* the supreme court cautioned that "an implied warranty will not be judicially imposed unless there is a demonstrated need for it."[110] Since *Melody Home* was decided in 1987, no Texas court has recognized any new implied warranties. In *Murphy v. Campbell,* the supreme court held there was no cause of action for breach of an implied warranty of accounting services.[111] That would have been a significant change of Texas warranty law and the supreme court was no longer interested in such dramatic changes.

Plaintiffs also have tried arguing for small, incremental changes in service warranty law. These attempts to create new, relatively minor, implied warranties have all failed. Courts have rebuffed attempts to establish an implied warranty for services incidental to helicopter maintenance,[112] or an implied warranty of the security of property left in a health club locker,[113] or an implied warranty to provide reasonably proficient and safe and sound banking services.[114] Plaintiffs have succeeded only when arguing their case fits squarely within the parameters of already established implied warranties. For example, in *Archibald v. Act III Arabians*, the plaintiff won in the Texas Supreme Court by showing in a horse-training case that the horse was the tangible good and the horse training was the repair or modification of an existing good.[115] The Austin Court of Appeals refused to extend the *Melody Home* good and workmanlike performance to a subcontractor.[116] Any petition that now asks a court to recognize a new implied service warranty would now be subject to the new Rule 91a motion to dismiss.[117]

If a rogue court were to create an implied warranty for professional services, the DTPA contains a firewall that would prevent any such warranty from becoming a DTPA claim. In 1995, the legislature added the professional services exemption, which initially provides that the DTPA does not apply to any claim for damages "based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill."[118] But this exemption does not apply to any "express misrepresentation or a material fact that cannot be characterized as advice, judgment, or opinion."[119] At first glance, it appears to mean that professional services are exempt from most DTPA claims unless the consumer can prove a DTPA violation, which does not seem to accomplish much. But one claim is not listed in these exceptions—implied warranties. At the very least, a dispositive motion based upon the professional services exemption would eliminate any implied warranties. The professional services exemption thus immunizes professionals from any DTPA claim based upon an implied warranty. In 2011, the Texas legislature gave realtors an even better deal. An exemption was added for realtors that blocks any DTPA claim based upon either express or implied warranties.[120]

B. Defenses to Common-Law Warranties

1. Defenses to Express Service Warranties

The defense of puffing would be available to any service express warranty claims.[121] In *Humble National Bank*, the court of appeals held that the bank's slogan "A Tradition of Excellence" was so vague and general that it is impossible to know what is expressly warranted.[122] Similarly, the bank's purported policy of "knowing its customers" was not sufficiently specific regarding the services to be performed.[123]

2. Superseding Implied Service Warranties

Implied service warranties are considered "gap-fillers" by the Texas Supreme Court. When there is no gap, there is no implied warranty. This approach was adopted in *Centex Homes*, where the court addressed whether a homebuilder may disclaim the implied warranties of habitability and good and workmanlike construction that accompany a new home sale. The court held the implied warranty of habitability cannot be waived except under limited circumstances where somebody buys a "problem house with express and full knowledge of the defects that affect its habitability."[124] But when the parties' agreement sufficiently describes the manner, performance or quality of construction, the express agreement may supersede the implied warranty of good workmanship because the implied warranty is no longer needed to protect the buyer.[125]

When the Texas Supreme Court in *Melody Home* decided to recognize the implied warranty, it also foresaw that service providers would attempt to disclaim the warranty. Instead of waiting for that issue to reach the court, the court preemptively held that "the implied warranty that repair or modification services of existing tangible goods or property will be performed in a good and workmanlike manner may not be waived or disclaimed."[126] In 2013, the court revisited whether the *Melody Home* warranty could be disclaimed or superseded in *Gonzales v. Southwest Olshan Foundation Repair Co*.[127] The court was guided by its reasoning in *Centex*, explaining:

> The *Melody Home* warranty is a "gap-filler" warranty similar to the one we addressed in *Centex Homes v. Buecher* for good and workmanlike construction of a new home. As in *Buecher*, we hold that parties cannot disclaim but can supersede the implied warranty for good and workmanlike repair of tangible goods or property if the parties' agreement specifically describes the manner, performance, or quality of the services. Because the parties' agreement here specifies that the service provider would perform foundation repair in a good and workmanlike manner and adjust the foundation for the life of the home due to settling, the express warranty sufficiently describes the manner, performance, or quality of the services so as to supersede the *Melody*

Home implied warranty.[128]

The court belatedly found that the *Melody Home* implied warranty of good and workmanlike repair of tangible goods or property was a "gap-filler" warranty. It found this gap-filler warranty may not be disclaimed but may be superseded if "the parties' agreement sufficiently describes the manner, performance or quality" of the services."[129] Based upon the facts in the case, the court set a low bar on whether the *Melody Home* warranty has been superseded by the agreement. After *Gonzales*, the implied warranty of good and workmanlike repair of tangible goods or property only attaches to a contract if the parties' agreement does not provide for the quality of the services to be rendered or how such services are to be performed.

V. Attorneys Fees and Warranty Claims

It is long-settled law in Texas that a party who prevails in a lawsuit is entitled to recover attorneys fees only if permitted by statute or by contract.[130] If a consumer prevails on any warranty claim brought through the DTPA, then she is entitled to attorneys fees.[131]

A plaintiff also can recover attorneys fees for a breach of an express warranty under Chapter 38.[132] The supreme court held in 2008 that Texas Civil Practice and Remedies Code section 38.001(8), which allows attorneys fees for claims based on oral or written contracts, applied to breach of express warranty claims.[133] The court reasoned that an express warranty claim is based upon contract because it is "part of the basis of a bargain and is contractual in nature."[134]

Two courts of appeals have held that Chapter 38 also applies to implied warranties provided the plaintiff is claiming damages from economic loss only.[135] The First Court of Appeals was fairly persuasive in the *Howard Industries* case that a breach of implied warranty of merchantability was based upon contract because "an implied warranty becomes part of the terms of a contract."[136] The court of appeals noted that the Texas Supreme Court instructed that "[i]mplied warranties are created by operation of law and are grounded more in tort than in contract."[137] But the court of appeals also noted that the supreme court had explained in *JCW Electronics* that, "[c]onceptually, the breach of an implied warranty can either be in contract or in tort depending on the circumstances," noting that "Dean Prosser observed long ago, this area of the law is complicated 'by the peculiar and uncertain nature and character of warranty, a freak hybrid born of the illicit intercourse of tort and contract.'"[138] Two other courts of appeals have held that recovery of attorneys fees for a common-law breach of implied warranty claim is not authorized by statute.[139]

The Texas Supreme Court probably would follow the reasoning from *Howard Industries* and allow attorneys fees when the claim is about economic loss only. If it does not though, then the implied warranty claims could be brought through the DTPA, where attorneys fees would be mandated if the plaintiff prevails.

VI. Conclusion

Since changes to the DTPA in 1995, plaintiffs lawyers have increasingly ignored its provisions. Those lawyers should not overlook the possibility of bringing claims for breach of express or implied warranty under the DTPA. Pleading a warranty claim under the DTPA should ensure the award of attorneys' fees for successful plaintiffs and possibly allow for the award of additional damages if predicate findings are met. Whether to plead a warranty claim under the DTPA deserves careful review. And the old adage "don't put all your eggs in one basket" has particular relevance to plaintiffs' pleadings.

** Mark E. Steiner teaches consumer law at South Texas College of Law Houston and is a member of the Council of the Consumer and Commercial Law Section of the State Bar of Texas. Dr. Steiner received a B.A. from The University of Texas, a J.D. from the University of Houston Law Center, and a Ph.D. in History from the University of Houston, all in the last century.*

---

1 Tex. Bus. & Com. Code § 17.50(a)(2).
2 *Enterprise-Laredo Assocs. v. Hacha's, Inc.,* 839 S.W.2d 822, 830 (Tex. App.—San Antonio 1992, writ denied).
3 673 S.W.2d 558 (Tex. 1984).
4 *Id*. at 565.
5 Richard Alderman, The Lawyer's Guide to the Texas Deceptive Trade Practices Act § 5.02 (2d ed. 2018).
6 *Nghiem v. Sajib*, 567 S.W.3d 718 (Tex. 2019).
7 *La Sara Grain Co.,* 673 S.W.2d at 565.
8 *Southwest Olshan Found. Repair Co. v. Gonzales*, 345 S.W.3d 431, 437 (Tex. App.—San Antonio 2011), *aff'd on other grounds*, 400 S.W.3d 52 (Tex. 2013); *Foreman v. Pettit Unlimited, Inc*., 886 S.W.2d 409, 412 (Tex. App.—Houston [1st Dist.] 1994, no writ); *Darr Equip. Co. v. Allen*, 824 S.W.2d 710, 712 (Tex. App.—Amarillo 1992, writ denied).
9 *Basic Energy Serv., Inc. v. D-S-B Props., Inc*., 367 S.W.3d 254, 268-269 (Tex. App.—Tyler 2011, no pet.); *Walker v. Sears, Roebuck & Co*., 853 F.2d 355, 362-363 (5th Cir. 1988).
10 *See Walker*, 853 F.2d at 363.
11 *Melody Home Mfg Co. v. Barnes*, 741 S.W.2d 349, 354 (Tex. 1987) (emphasis added).
12 *Nghiem,* 567 S.W.3d at 723.
13 *Id.*
14 *See* Tex. Civ. Prac. & Rem. Code §§ 16.003, 16.051.
15 *McDade v. Texas Commerce Bank Nat'l Ass'n,* 822 S.W.2d 713, 718 (Tex. App.—Houston [1st Dist.] 1991, writ denied).
16 *Great Am. Prods. v. Permabond Int'l,* 94 S.W.3d 675, 681 (Tex. App.—Austin 2002, no pet.).
17 Tex. Bus. & Com. Code § 2.313.
18 *Id.*
19 *Dowling v. NADW Mktg., Inc.*, 631 S.W.2d 726, 729 (Tex. 1982).
20 *Kramer v. Hollman,* No. 02-11-00136-CV (Tex. App.—Fort Worth Nov. 21, 2012, pet. denied) (mem. op.).
21 *Id.* at *3.
22 *Id.* at *5.
23 Alderman, *supra* note 5, § 5.02.
24 *Humble Nat'l Bank v. DCV, Inc.,* 933 S.W.2d 224, 229-230 (Tex. App.—Houston [14th Dist.] 1996, writ denied).
25 *Pennington v. Singleton*, 606 S.W.2d 682, 687 (Tex. 1980); *see also Kessler v. Fanning*, 953 S.W.2d 515, 519 (Tex. App.—Fort Worth 1997, no pet.).
26 Tex. Bus. & Com. Code § 2.314.
27 *Id.*
28 *See, e.g., MAN Engines & Components, Inc. v. Shows,* 434 S.W.3d 132 (Tex. 2014); *Garrick v. Autoliv ASP, Inc.,* No. 14-17-00818-CV (Tex. App.—Houston [14th Dist.] July 12, 2018, no pet.) (mem. op.); *Tatsch v. Chrysler Group, LLC,* No. 04-13-00757-CV (Tex. App.—San Antonio Dec. 3, 2014, no pet.) (mem. op.).
29 *Equistar Chems., L.P. v. Dresser-Rand Co.,* 240 S.W.3d 864, 867 (Tex. 2007) (quoting *Polaris Indus. v. McDonald*, 119 S.W.3d 331, 336 (Tex. App.—Tyler 2003, no pet.)).
30 *See Plas-Tex, Inc. v. United States Steel Corp.,* 772 S.W.2d 442, 444 (Tex.1989).

31 *See, e.g., Beck Enters., Inc. v. Hester,* 512 S.W.2d 672, 675-76 (Miss. 1987).
32 *MAN Engines & Components, Inc.,* 434 S.W.3d at 132.
33 *Id.* at 142.
34 *Id.* at 138.
35 *See Shows v. MAN Engines & Components, Inc.,* 364 S.W.3d 348, 352 (Tex. App.—Houston [14th Dist.] 2012), aff'd, 434 S.W.3d 132 (Tex. 2014); *see also* Diane Schmauder, *Annotation, Liability on Implied Warranties in Sale of Used Motor Vehicle,* 47 A.L.R. 5th 677 § 3 (1997).
36 500 S.W.2d 877 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ).
37 *See, e.g., Southerland v. Northeast Datsun, Inc.,* 659 S.W.2d 889, 891 (Tex. App.—El Paso 1983, no writ).
38 *Shows,* 364 S.W.3d at 352.
39 *Id.* at 352-53.
40 *MAN Engines & Components, Inc. v. Shows,* 434 S.W.3d 132, 134 (Tex. 2014).
41 *Id.*
42 *Id.* at 135.
43 *Id.* at 137.
44 *Id.* at 138.
45 *Id.*
46 *Id.*
47 *Id.*
48 *Id.* at 140.
49 *Id.* at 141-42.
50 Tex. Bus. & Com. Code § 2.315.
51 *Id.*
52 Tex. Bus. & Com. Code § 2.315 Official Comments cmts. 1-2 (2019).
53 *Chandler v. Gene Messer Ford, Inc.,* 81 S.W.3d 493, 503 (Tex. App.—Eastland 2002, no pet.).
54 *See, e.g., Strauss v. Ford Motor Co.,* 439 F. Supp. 2d 680, 686 (N.D. Tex. 2006) (using a car for transportation is not a particular purpose).
55 *See Materials Mktg. Corp. v. Spencer,* 40 S.W.3d 172, 175 (Tex. App.—Texarkana 2001, no pet.).
56 *Southwestern Bell Tel. Co. v. FDP Corp.,* 811 S.W.2d 572, 576 (Tex. 1991).
57 Tex. Bus. & Com. Code § 17.505(a), (c).
58 Tex. Bus. & Com. Code § 2.607(c)(1).
59 *Hull v. South Coast Catamarans, L.P.,* 365 S.W.3d 35, 43-44 (Tex. App.—Houston [1st Dist.] 2011, pet. denied); *U.S. Tire-Tech, Inc. v. Boeran, B.V.,* 110 S.W.3d 194, 198-202 (Tex. App.—Houston [1st Dist.] 2003, pet. denied); *Lochinvar Corp. v. Meyers,* 930 S.W.2d 182, 189-90 (Tex. App.—Dallas 1995, no writ.).
60 *See Southwest Lincoln-Mercury, Inc. v. Ross,* 580 S.W.2d 2, 4 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).
61 *Hull,* 365 S.W.3d at 43-44; *U.S. Tire-Tech, Inc.,* 110 S.W.3d at 199-200.
62 *Hull,* 365 S.W.3d at 43-44.
63 *Compare Ketter v. ESC Med. Sys., Inc.,* 169 S.W.3d 791 (Tex. App.—Dallas 2005, no pet.) (notice received two years and seven months after sale was not unreasonable as a matter of law when the date of discovery of breach not shown) *with Southerland v. Northeast Datsun, Inc.,* 659 S.W.2d 889, 892-93 (Tex. App.—El Paso 2005, no writ) (notice given three years, eleven months after discovery of breach is unreasonable as a matter of law).
64 *Compare* Tex. Bus. & Com. Code § 2.313-2.315 *with* Tex. Bus. & Com. Code § 2.607 (c) (1); *see also McKay v. Novartis Pharm. Corp.,* 751 F.3d 694, 706-07 (5th Cir. 2014).
65 *Wilcox v. Hillcrest Mem'l Park,* 701 S.W.2d 842 (Tex. 1986) (per curiam); *Compaq Computer Corp. v. Lapray,* 135 S.W.3d 657, 674 (Tex. 2004).
66 *Barocio v. General Electric Co.,* No. 07-12-00311-CV (Tex. App.—Amarillo Jan. 3, 2014, no pet.) (mem. op.) (notice required); *Bailey v. Smith,* No. 13-05-085-CV (Tex. App.—Corpus Christi May 18, 2006, no pet.) (mem. op.) (notice required); *U.S. Tire-Tech, Inc. v. Boeran, B.V.,* 110 S.W.3d 194, 199 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (notice required); *Wilcox v. Hillcrest Mem'l Park of Dallas,* 696 S.W.2d 423, 424-25 (Tex. App.—Dallas 1995), writ ref'd per curiam, 701 S.W.2d 842 (Tex. 1986) (notice required); *Vintage Homes, Inc. v. Coldiron,* 585 S.W.2d 886, 888 (Tex. App.—El Paso 1979, no writ) (only notice to immediate seller required).
67 *McKay,* 751 F.3d at 706-07.
68 Tex. Bus. & Com. Code § 2.316. The helpful Official Comments to this section provide as follows:

> 1. This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude "all warranties, express or implied." It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise. . . .
>
> 3. Disclaimer of the implied warranty of merchantability is permitted under subsection (2), but with the safeguard that such disclaimers must mention merchantability and in case of a writing must be conspicuous.
>
> 4. Unlike the implied warranty of merchantability, implied warranties of fitness for a particular purpose may be excluded by general language, but only if it is in writing and conspicuous.
>
> 5. Subsection (2) presupposes that the implied warranty in question exists unless excluded or modified. Whether or not language of disclaimer satisfies the requirements of this section, such language may be relevant under other sections to the question whether the warranty was ever in fact created. Thus, unless the provisions of this Article on parol and extrinsic evidence prevent, oral language of disclaimer may raise issues of fact as to whether reliance by the buyer occurred and whether the seller had "reason to know" under the section on implied warranty of fitness for a particular purpose.
>
> 6. The exceptions to the general rule set forth in paragraphs (a), (b) and (c) of subsection (3) are common factual situations in which the circumstances surrounding the transaction are in themselves sufficient to call the buyer's attention to the fact that no implied warranties are made or that a certain implied warranty is being excluded.
>
> 7. Paragraph (a) of subsection (3) deals with general terms such as "as is," "as they stand," "with all faults," and the like. Such terms in ordinary commercial usage are understood to mean that the buyer takes the entire risk as to the quality of the goods involved. The terms covered by paragraph (a) are in fact merely a particularization of paragraph (c) which provides for exclusion or modification of implied warranties by usage of trade.
>
> 8. Under paragraph (b) of subsection (3) warranties may be excluded or modified by the circumstances where the buyer examines the goods or a sample or model of them before entering into the contract. "Examination" as used in this paragraph is not synony-

mous with inspection before acceptance or at any other time after the contract has been made. It goes rather to the nature of the responsibility assumed by the seller at the time of the making of the contract. Of course if the buyer discovers the defect and uses the goods anyway, or if he unreasonably fails to examine the goods before he uses them, resulting injuries may be found to result from his own action rather than proximately from a breach of warranty.

In order to bring the transaction within the scope of "refused to examine" in paragraph (b), it is not sufficient that the goods are available for inspection. There must in addition be a demand by the seller that the buyer examine the goods fully. The seller by the demand puts the buyer on notice that he is assuming the risk of defects which the examination ought to reveal. The language "refused to examine" in this paragraph is intended to make clear the necessity for such demand.

Application of the doctrine of "caveat emptor" in all cases where the buyer examines the goods regardless of statements made by the seller is, however, rejected by this Article. Thus, if the offer of examination is accompanied by words as to their merchantability or specific attributes and the buyer indicates clearly that he is relying on those words rather than on his examination, they give rise to an "express" warranty. In such cases the question is one of fact as to whether a warranty of merchantability has been expressly incorporated in the agreement. Disclaimer of such an express warranty is governed by subsection (1) of the present section.

The particular buyer's skill and the normal method of examining goods in the circumstances determine what defects are excluded by the examination. A failure to notice defects which are obvious cannot excuse the buyer. However, an examination under circumstances which do not permit chemical or other testing of the goods would not exclude defects which could be ascertained only by such testing. Nor can latent defects be excluded by a simple examination. A professional buyer examining a product in his field will be held to have assumed the risk as to all defects which a professional in the field ought to observe, while a nonprofessional buyer will be held to have assumed the risk only for such defects as a layman might be expected to observe. Tex. Bus. & Com. Code § 2.316 Official Comments.cmts. 1, 3-8 (2019)

69 *See, e.g., Luig v. North Bay Enterprises, Inc., 55 F. Supp. 3d 942 (N.D. Tex. 2014); Materials Mktg. Corp. v. Spencer,* 40 S.W.3d 172, 175 (Tex. App.—Texarkana 2001, no pet.); *Mobile Housing, Inc. v. Stone,* 490 S.W.2d 611, 615 (Tex. Civ. App.—Dallas 1973, no writ).

70 *See, e.g., Hou-Tex, Inc. v. Landmark Graphics,* 26 S.W.3d 103, 110-11 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

71 Robert A. Hillman, *U.C.C. Article 2 Express Warranties and Disclaimers in the Twenty-First Century,* 11 Duq. Bus. L.J. 167, 170-71 (2009).

72 Kurt M. Saunders, *Can You Ever Disclaim an Express Warranty?, 9* J. Bus. Entrepreneurship & L. 59, 64-65 (2016).

73 *See, e.g., Fieldtech Avionics & Instruments, Inc. v. Component Control.Com, Inc.,* 262 S.W.3d 813 (Tex. App.—Fort Worth 2008, no pet.); *Cronus Offshore, Inc. v. Kerr McGee Oil & Gas Corp.,* 369 F. Supp. 2d 848 (E.D. Tex. 2004), *aff'd,* 133 F. App'x 944 (5th Cir. 2005).

74 *Fieldtech Avionics & Instruments, Inc.,* 262 S.W.3d at 829.

75 *Id.*; *see also Cate v. Dover Corp.*, 790 S.W.2d 559, 560-61 (Tex. 1990).

76 Tex. Bus. & Com. Code § 2.719.

77 *Southwestern Bell Tel. Co. v. FDP Corp.,* 811 S.W.2d 572, 576-77 (Tex. 1991).

78 896 S.W.2d 156 (Tex. 1995). On limitation-of-liability clauses and DTPA non-warranty claims, *see Helena Chem. Co. v. Wilkins,* 47 S.W.3d 486, 505 (Tex. 2001) (limitation-of-liability clauses cannot preclude plaintiff's lost-profit recovery for DTPA misrepresentations or unconscionability); *see also Arthur's Garage, Inc. v. Racal-Chubb Sec. Sys.,* 997 S.W.2d 803, 811 (Tex. App.—Dallas 1999, no pet.).

79 *Head v. U.S. Inspect DFW, Inc.,* 159 S.W.3d 731 (Tex. App.—Fort Worth 2005, no pet.).

80 *Fox Elec. Co. v. Tone Guard Sec.,* 861 S.W.2d 79, 82-83 (Tex. App.—Fort Worth 1993, no writ.); *see also Allright, Inc. v. Elledge,* 515 S.W.2d 266, 267 (Tex. 1974).

81 *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings,* 572 S.W.3d 213 (Tex. 2019).

82 *Id.* at 217.

83 *Id.* at 218-19.

84 *Id.* at 219.

85 *Id.* at 233-34.

86 *Id.* at 230.

87 *Id.* at 231.

88 *Id.* at 230.

89 *Id.* at 232 (citing Hooks v. Samson Lone Star, Ltd. P'ship, 457 S.W.3d 52 (Tex. 2015)). *Fraus omnia corrumpit* (fraud vitiates everything it touches) is a long-recognized rule in Texas. *See, e.g., Italian Cowboy Partners, Ltd. v. Prudential Ins. Co.,* 341 S.W.3d 323, 336 (Tex. 2011); *Computer Assocs. Int'l v. Altai,* 918 S.W.2d 453, 455 (Tex. 1994); *Borderlon v. Peck,* 661 S.W.2d 907, 908-09 (Tex. 1983); *Morris v. House,* 32 Tex. 492, 495 (1870).

90 *Bombarier Aerospace Corp. v. SPEP Aircraft Holdings, LLC,* 565 S.W.3d 280, 305 (Tex. App.—Dallas 2017), *rev'd in part,* 572 S.W.3d 213 (Tex. 2019).

91 *Id.*

92 *Bombardier Aerospace Corp.,* 572 S.W.3d at 232.

93 *Southwestern Bell Tel. Co. v. FDP Corp.,* 811 S.W.2d 572, 576 (Tex. 1991).

94 *Bergholtz v. Southwestern Bell Yellow Pages, Inc.,* 324 S.W.3d 195, 199 (Tex. App.—El Paso 2010, no pet.).

95 Tex. Bus & Com. Code § 2.725.

96 *Lochinvar Corp. v. Meyers,* 930 S.W.2d 182, 188 (Tex. App.—Dallas 1996, no writ).

97 Tex. Bus. & Com. Code § 17.565.

98 *See Crawford v. Ace Sign, Inc.,* 917 S.W.2d 12 (Tex. 1996) (per curiam).

99 *Id.* at 13.

100 *Ashford Development, Inc. v. USLife Real Estate Servs.,* 661 S.W.2d 933, 935 (Tex.1983).

101 *See Southwestern Bell Tel. Co. v. FDP Corp.,* 811 S.W.2d 572, 574 (Tex. 1991) ("Our first inquiry is whether FDP's allegations state a claim for breach of warranty, which is actionable under the DTPA, or merely a claim for breach of contract."); *see generally* Alderman, The Lawyer's Guide to the Texas Deceptive Trade Practices Act §8.023.

102 *See, e.g., Ellis v. Precision Engine Rebuilders, Inc.*, 68 S.W.3d 894 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

103 *See, e.g., Dennis v. Allison,* 698 S.W.2d 94 (Tex. 1985) (no need to impose an implied warranty theory as a matter of public policy because the patient of a psychiatrist has adequate remedies to redress wrongs committed during treatment).

104 *Centex Homes v. Buecher,* 95 S.W.3d 266, 273 (Tex. 2002).

105 *Southwestern Bell Tel. Co.*, 811 S.W.2d at 575.

106 *Paragon Gen. Contractors, Inc. v. Larco Constr., Inc.,* 227 S.W.3d 876, 886 (Tex. App.—Dallas 2007, no pet.).
107 *Melody Home Mfg. Co. v. Barnes,* 741 S.W.2d 349 (Tex. 1987).
108 *Id.* at 354.
109 *Humber v. Morton,* 426 S.W.2d 554 (Tex. 1968).
110 901 S.W.2d 434, 439 (Tex. 1995).
111 964 S.W.2d 265 (Tex. 1997).
112 *Rocky Mountain Helicopter, Inc. v. Lubbock County Hosp. Dist.,* 987 S.W.2d 50 (Tex. 1999).
113 *Sisters of Charity of the Incarnate Word, Houston, Texas v. Meaux,* 122 S.W.3d 428 (Tex. App.—Beaumont 2003, pet. denied).
114 *Humble Nat'l Bank v. DCV, Inc.,* 933 S.W.2d 224 (Tex. App.—Houston [14th Dist.] 1996, writ denied.).
115 755 S.W.2d 84 (Tex. 1988).
116 *Codner v. Arellano*, 40 S.W.3d 666 (Tex. App.—Austin 2001, no pet.).
117 Tex. R. Civ. P. 91a.
118 Tex. Bus. & Com. Code § 17.49(c).
119 *Id.*
120 *See id.* § 17.49 (i).
121 *Humble Nat'l Bank v. DCV, Inc.,* 933 S.W.2d 224 (Tex. App.—Houston [14th Dist.] 1996, writ denied).
122 *Id.* at 231.
123 *Id.*
124 *Centex Homes v. Buecher,* 95 S.W.3d 266, 274 (Tex. 2002).
125 *Id.* at 275.
126 *Melody Home Mfg. Co. v. Barnes,* 741 S.W.2d 349, 355 (Tex. 1987).
127 400 S.W.3d 52 (Tex. 2013).
128 *Id.* at 53.
129 *Id.* at 56 (quoting *Centex Homes,* 95 S.W.3d at 268).
130 *Medical City Dallas, Ltd. v. Carlisle Corp.,* 251 S.W.3d 55, 58 (Tex. 2008).
131 *Elliott v. Kraft Foods N. Am., Inc.,* 118 S.W.3d 50, 58-59 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (holding the trial court's failure to award attorneys' fees was reversible error when consumer established a claim for breach of implied warranty of merchantability).
132 *Medical City Dallas, Ltd.,* 251 S.W.3d at 63.
133 *Id.*
134 *Id.* at 60.
135 *Howard Indus. v. Crown Cork & Seal Co., LLC,* 403 S.W.3d 347, 351-52 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (breach of implied warranty of merchantability); *City Direct Motor Cars, Inc. v. Expo Motorcars, L.L.C.,* No. 14-13-00122-CV (Tex. App.—Houston [14th Dist.] June 5, 2014, no pet.) (mem. op.) (breach of implied warranty of title).
136 403 S.W.3d at 352.
137 *Id.* (citing *JCW Elecs., Inc. v. Garza*, 257 S.W.3d 701, 704 (Tex. 2008)).
138 *Id.*
139 *Basic Energy Serv., Inc. v. D-S-B Props., Inc.*, 367 S.W.3d 254, 268-69 (Tex. App.—Tyler 2011, no pet.); *7979 Airport Garage L.L.C. v. Dollar Rent A Car Sys.*, 245 S.W.3d 488, 507-09 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

Wage Claims After *OTO v. Kho*:

ARE ARBITRATION AGREEMENTS ENFORCEABLE

By Paul Cane,* George Abele & Deepika Daggubati*****

The California Supreme Court recently addressed—again—the enforceability of an arbitration agreement of an employee who sought to recover allegedly unpaid wages through California's administrative process.[1] The court concluded, over a vigorous dissent, that under the facts of the case before it, the arbitration agreement was not enforceable. In doing so, the court may have set the stage for yet another intervention by the United States Supreme Court.

Case Summary

Factual Background

Ken Kho worked as a service technician at an automobile dealership known as OTO. Three years into Kho's employment, a low-level HR employee approached Kho at his workstation and presented him with several documents to sign immediately. Kho had no opportunity to read the documents, and the HR employee did not explain their contents or provide copies for Kho to retain. Instead, Kho was required to sign on the spot.

Kho had signed a two-page arbitration agreement containing an acknowledgment of at-will employment. The arbitration promise appeared in a dense, single-spaced, page-long paragraph printed in an extremely small font. It provided that, subject to limited exceptions, almost all employment-related claims by either party must be submitted to binding arbitration before a retired judge. The arbitration allowed full discovery, pleadings, rules of evidence, and motion practice in accordance with California's rules of civil litigation. The clause did not address allocation of arbitration costs explicitly but stated that statutory code and case law would control.

After Kho was discharged, Kho filed a complaint for unpaid wages with the Labor Commissioner. Upon Kho's request, the Labor Commissioner set a date to conduct a "*Berman* hearing," an administrative procedure to recover unpaid wages.[2] One business day before the hearing, OTO petitioned to compel arbitration and stay the proceedings. OTO did not appear at the hearing and instead requested via facsimile that the hearing be taken off calendar. The hearing officer declined and proceeded to award Kho $102,912 in unpaid wages and $55,634 in liquidated damages, interest, and penalties.

OTO appealed, seeking *de novo* review in the California Superior Court. The Labor Commissioner represented Kho on appeal. The trial court vacated the Labor Commissioner's award because it was improperly held in OTO's absence. However, the trial court also held that the arbitration agreement at issue was both procedurally and substantively unconscionable. The court of appeal reversed, holding that while the agreement contained an "'extraordinarily high' degree of procedural unconscionability," the agreement was not substantively unconscionable. Therefore, OTO could enforce the arbitration agreement and bypass the *Berman* hearing process.
The California Supreme Court granted review.[3]

General Unconscionability Principles

California unconscionability law is well developed. An arbitration agreement is unenforceable only where both substantive and procedural unconscionability exist; it is not enough that one may exist without the other.[4] In analyzing unconscionability, California courts employ a "sliding scale" test. Where there is minimal procedural unconscionability, the party opposing arbitration must show a high level of substantive unconscionability (or *vice versa*).[5]

Whether an agreement is procedurally unconscionable depends on whether there is "'oppression' arising from an inequality of bargaining power," or "'surprise' arising from buried terms in a complex printed form."

Whether an agreement is procedurally unconscionable depends on whether there is "'oppression' arising from an inequality of bargaining power," or "'surprise' arising from buried terms in a complex printed form."[6] Time-of-hire agreements or post-hire agreements imposed as a condition of employment or continued employment, respectively, often are nonnegotiable ("adhesive," in legal parlance), but are frequently enforced, absent other factors.[7]

Substantive unconscionability concerns "the fairness of an agreement's actual terms and . . . assessments of whether they are overly harsh" or "so one-sided as to shock the conscience."[8] For an employment arbitration agreement to be enforceable, it must meet certain minimum requirements to ensure that substantive rights afforded by statute are not waived. Specifically, an arbitration agreement is enforceable if it provides for: (i) a neutral arbitrator; (ii) a written decision subject to limited judicial review; (iii) payment by the employer of all costs unique to arbitration; (iv) adequate discovery; and (v) recovery of all statutory remedies.[9] Where an employee waives the right to a *Berman* process, "'[a]n agreement's failure to provide an employee with an accessible and affordable arbitral forum for resolving wage disputes may support a finding of unconscionability.'"[10]

The OTO *Court Held the Agreement Was Unconscionable*

The California Supreme Court found OTO's arbitration agreement to be both procedurally and substantively unconscionable and therefore unenforceable.

Procedural Unconscionability

With respect to procedural unconscionability, the court found that the agreement created oppression and surprise. The court viewed the agreement as procedurally unconscionable in part because Kho was forced to sign it to retain a job he had held for three years. Moreover, the agreement was "presented to Kho in his workspace," with "[n]either its contents nor its significance . . . explained," by a "low-level employee" which "creat[ed] the impression that no request for an explanation was expected and any such request would be unavailing."[11] Further, because Kho earned piece-rate compensation, any time he spent reviewing the agreement would have been unpaid. The court concluded that, by having the HR employee wait for Kho to sign the documents, OTO "conveyed an expectation that Kho sign them immediately, without examination or consultation with counsel" and "that negotiation efforts would be futile."[12] OTO did not provide Kho a copy of the agreement for his records. These facts, the court found, supported a clear finding of oppression.

The court also found the element of surprise in how the arbitration provisions were conveyed. The text was "visually impenetrable" as a page-long paragraph in small font with complex sentences "filled with statutory references and legal jargon."[13] The provision for allocation of costs merely referred Kho to legal authorities that a layperson would be unable to decipher.

Thus, the court found that the "document itself and the manner of its presentation did not promote voluntary or informed agreement to its terms" and, therefore, it was "virtually impossible" to conclude that Kho voluntarily waived his *Berman* rights and agreed to arbitration.[14]

Given the "exceptionally strong" degree of procedural unconscionability present, the court noted that "even a relatively low degree of substantive unconscionability may suffice to render the agreement unenforceable."[15]

Substantive Unconscionability

While acknowledging that, in general, the waiver of *Berman* process is not per se unconscionable, the court held that, here, OTO's agreement was substantively unconscionable, given the "unusually coercive setting in which this bargain was entered" and considering the "terms of what Kho gave up and what he received in return."[16]

Several factors led the court to find substantive unconscionability. First, the agreement provided no explanation of how Kho would initiate arbitration or locate an arbitrator, or even that commercial providers of arbitration services existed. Second, the arbitration agreement required proceedings to follow a civil litigation framework, including formal pleadings, discovery demands, dispositive motions, and technical rules of evidence, which *Berman* hearings do not follow. Navigating such complexity could deter claimants from bringing wage claims at all. Third, the complexity of the litigation-like arbitral process contemplated by the agreement effectively would require the average claimant to hire counsel. The court concluded that OTO's arbitral framework, considered in the context of the identified procedural shortcomings, was not sufficiently accessible or affordable for wage claimants. Kho "surrendered the full panoply of *Berman* procedures and assistance" of the Labor Commissioner, and "[w] hat he got in return was access to a formal and highly structured arbitration process that closely resembled civil litigation if he could figure out how to avail himself of its benefits and avoid its pitfalls."[17] Thus, the arbitral framework lacked both the "speedy, informal, and affordable" benefits of the *Berman* process, and the usual "efficiencies and cost savings often associated with arbitration."[18]

The court declared that its analysis was consistent with federal law, because it said that its holding "rests on generally applicable unconscionability principles."[19]

The Dissent

In a lengthy dissenting opinion, Justice Ming Chin rejected the unconscionability analysis and conclusions of the six-justice majority, citing both state-law principles and Federal Arbitration Act preemption.[20] He found the majority's conclusion "that an arbitration agreement is substantively unconscionable—and therefore unenforceable—precisely because it prescribes procedures . . . carefully crafted to ensure fairness to both sides" is "hard to grasp and counterintuitive."[21] The FAA "precludes the majority from invalidating this arbitration agreement based on its subjective view that, for the purpose of 'vindicati[ng]' employees' 'statutory rights,' the prescribed arbitration procedure is not as effective as the statutory *Berman* procedure."[22] FAA preemption and the savings clause require that the "unconscionability standard be . . . the same for arbitration and nonarbitration agreements" and be applied "evenhandedly" without "disfavor[ing] arbitration" or "rely[ing] on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable."[23] "By refusing to enforce the arbitration agreement based on its view that the arbitration procedure is less advantageous for Kho and other employees than the *Berman* procedure, the majority runs afoul of these governing principles. . . . By insisting that the arbitration agreement have more features comparable to those of the *Berman* procedure, the majority is 'frustrat[ing]' the FAA's 'purpose to ensure that private arbitration agreements are enforced according to their terms.'"[24]

What's Next?

The majority opinion may not be the last word. Justice Chin's dissenting opinion demonstrated that the FAA preempts state-law anti-arbitration rules, and the U.S. Supreme Court may again have to intervene to remind the California courts of the FAA's primacy. The U.S. Supreme Court in *Buckeye Check Cashing, Inc. v. Cardegna*[25] reaffirmed that an arbitration agreement's enforceability may not "turn[] on" a state's "judgment concerning the forum for [a] state-law cause of action."

In fact, Justice Ginsburg's opinion for the Court in *Preston v. Ferrer*[26]—an 8-1 decision that the OTO majority opinion did not cite, let alone deal with—should have been controlling. A fee dispute arose between television personality Alex Ferrer (better known as "Judge Alex") and his attorney, one Preston. California's Talent Agencies Act specifies that the Labor Commissioner is to adjudicate in the first instance disputes between agents and the talent they represent. The losing side then can request a trial de novo in the Superior Court. The process is similar to the *Berman* hearing process at issue in OTO.

Ferrer and Preston had an arbitration agreement. Ferrer contended that the dispute could not be arbitrated at all because of the Talent Agencies Act, or in the alternative that any arbitration had to await the Labor Commissioner's exercise of its primary jurisdiction. The Supreme Court rejected Ferrer's claim, citing the FAA's provision that arbitration contracts are valid, irrevocable, and enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract."[27] The Court held that the FAA preempted the Labor Commissioner's exercise of primary jurisdiction. "A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results,'" the Court noted.[28] The Act reflects Congress' "intent 'to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.'"[29]

Ferrer's position—which insisted on the exhaustion of the Talent Agencies Act's administrative remedy—could not be squared with congressional policy, the Court declared. "Requiring initial reference of the parties' dispute to the Labor Commissioner would, at the least, hinder speedy resolution of the controversy."[30] As a result, Preston was free to—and was required to—present his claim against Ferrer to an arbitrator at the earliest possible time.[31] The Court summarized its holding: "When parties agree to arbitrate . . ., *the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative*."[32]

Why should a Labor Commissioner *Berman* hearing differ, for FAA preemption purposes, from a Labor Commissioner Talent Agencies Act fees hearing? The *OTO* majority offered no answer, and the U.S. Supreme Court may well have to supply it.

Practical Take-Aways in the Interim

While the California Court's FAA reasoning is dubious, U.S. Supreme Court intervention cannot be counted upon. Fortunately, nothing in *OTO* should trouble careful California employers. Most wage claims are relatively small (Kho's was an aberration), and the cost-free *Berman* hearing to adjudicate them may not be materially inferior to—and indeed for many employers may be preferable to—an arbitration that the employer must pay for.

Employers, however, will want to review their arbitration agreements to ensure that *OTO* cannot be cited as a ground to invalidate an arbitration agreement entirely, for other kinds of claims. There is no single prescribed drafting solution to cater to *OTO*, but employers might consider provisions like these for their arbitration agreements:

- "Nothing in this Agreement prevents Employee from filing or recovering pursuant to a complaint, charge, or other communication with any federal, state or local governmental or law enforcement agency."
- "Nothing in this Agreement requires arbitration of claims that as a matter of law (after application of FAA preemption principles) cannot be made subject to a pre-dispute arbitration agreement."

For cases arising under arbitration agreements without language of this kind, employers should consider:

- Waiving arbitrability for wage claims subject to *Berman* hearings.
- Insisting that courts sever any supposedly offending provision(s) of the arbitration agreement, so as not to (as one case put it) "throw the [arbitration] baby out with the bath water."

Employers also will want to review the procedural steps used to present and obtain arbitration agreements. The *OTO* majority clearly was bothered by what it called the "oppressive circumstances present here."[33] Indeed, the court noted that "the same contract terms might pass muster under less coercive circumstances …. Had [OTO] set out the terms of its agreement in a legible format and fairly understandable language, or had it given Kho a reasonable opportunity to seek clarification or advice, this would be a different case."[34] While no one aspect likely will be determinative, employers may want to consider details such as:

- The appearance of the agreement (*e.g.*, font size).
- The understandability of the arbitration language.
- The length of time employees have to review the agreement.
- The employee's opportunity to ask questions.
- The employee's opportunity to consult counsel.
- The availability to the employee of a copy of the executed agreement.

OTO may well be another in a line of California cases that the U.S. Supreme Court ultimately resolves. But in the meantime, *OTO* provides employers with a reminder to assess the status of their arbitration agreements, and the procedures used to obtain them.

** Paul Cane is a partner in the Employment Law practice of Paul Hastings and is based in the firm's San Francisco office. Mr. Cane represents management in employment matters. His principal focus is major motions and appeals. Mr. Cane has briefed and argued numerous cases in the state and federal courts of appeals, including the California Supreme Court and U.S. Supreme Court. He has a special expertise in appeals involving pre-dispute arbitration agreements. Mr. Cane is a graduate of Dartmouth College and the law school at the University of California at Berkeley, where he was Editor-in-Chief of the California Law Review. Before joining Paul Hastings in 1981, he served as law clerk to United States Supreme Court Justice Lewis F. Powell, Jr.*

*** George Abele is a partner in the Employment Law practice of Paul Hastings and is based in the firm's Los Angeles office. He divides his practice among his employment advice/litigation and appellate practices. Mr. Abele's employment advice and litigation practice includes the representation of private and public employers in all aspects of employment law, including wage and hour class actions, wrongful discharge, discrimination, sexual harassment litigation, traditional labor arbitrations, and private arbitrations. He has particular experience in wage and hour class actions and PAGA representative actions. Mr. Abele graduated with Distinction from the University of Virginia and received his law degree from the UCLA School of Law.*

**** Deepika Daggubati is an associate in the Employment Law practice of Paul Hastings and is based in the firm's Los Angeles office. She represents employers in all aspects of labor and employment law, including harassment, discrimination, retaliation, wrongful termination, and wage and hour issues. Ms. Daggubati received her law degree from the University of Southern California, with honors, in 2017, where she participated in the Hale Moot Court Honors Program and the USC Mediation Clinic. Ms. Daggubati earned her Bachelor of Arts degree in English and Psychology, cum laude, from Georgetown University. She also received a Master of Fine Arts degree from the California Institute of the Arts.*

---

1 *OTO, LLC v. Kho*, 2019 Cal. LEXIS 6241 (2019).

2 A *Berman* hearing is an administrative hearing conducted by a deputy labor commissioner to resolve unpaid wage disputes. In a *Berman* hearing, pleadings are limited to a complaint and answer, no discovery is available, and all relevant evidence is admitted. The hearing officer may cross-examine parties and explain issues to them as needed. A party may appeal the Labor Commissioner's decision to the Superior Court for *de novo* review. The Labor Commissioner may elect to represent financially disadvantaged claimants in appeals and in enforcement of judgments.

3 The court originally granted review to decide whether a litigation-like arbitral scheme can constitute a sufficiently accessible and affordable process for parties. However, the court did not provide a definitive conclusion on this issue because it found that, under the facts of the case, OTO's arbitration agreement was unconscionable and therefore unenforceable—thus rendering moot any analysis of the sufficiency of the arbitration procedure outlined in the agreement.

4 *E.g., Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114 (2000) (both forms of unconscionability must be present to defeat contract formation).

5 *Id*. at 114 ("[T]he more substantively oppressive the contract term[s], the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.").

6 *McManus v. CIBC World Mkts. Corp.*, 109 Cal. App. 4th 76, 87 (2003) (citation omitted).

7 *See OTO*, 2019 Cal. LEXIS 6421, at *17-19. For example, the California Supreme Court previously had enforced an arbitration agreement where the employee was told at the time of hire, "'[S]ign it or no job.'" *Baltazar v. Forever 21, Inc*., 62 Cal. 4th 1237, 1241 (2016).

8 *OTO*, 2019 Cal. LEXIS 6421, at *16, *24 (internal citations and quotation marks omitted).

9 *Armendariz*, 24 Cal. 4th at 90-91, 103-13.

10 *OTO*, 2019 Cal. LEXIS 6241, at *13 (quoting *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1146 (2013) ("*Sonic II*")).

11 *Id.* at *19-20 (internal quotation marks omitted).

12 *Id.* at *20.

13 *Id.* at *21.

14 *Id.* at *23.

15 *Id.* at *25, *34.

16 *Id.* at *35.

17 *Id.* at *35.

18 *Id.* at *28-29.

19 *Id.* at *35.

20 9 U.S.C. § 1, *et seq*.

21 *OTO*, 2019 Cal. LEXIS 6241, at *45.

22 *Id.* at *45-46.

23 *Id.* at *106-07 (internal quotation marks omitted).

24 *Id.* at *108 (internal citations omitted).

25 546 U.S. 440, 446 (2006).

26 552 U.S. 346 (2008).

27 9 U.S.C. § 2.

28 552 U.S. at 357 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985)).

29 *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983)).

30 *Id.* at 358.
31 *Id.*
32 *Id.* at 359 (emphasis added).
33 *OTO*, 2019 Cal. LEXIS 6241, at *2-3.
34 *Id*. at *34-35.aul Hastings LLP

FTC v. Credit Bureau Ctr., LLC

THE DETRIMENT OF CHANGING THREE DECADES OF PRECEDENT

By Morgan A. Thomas*

Introduction

Defendant-Appellant Michael Brown, owner of Credit Bureau Center, LLC, challenged the long-standing precedent upheld by the Seventh Circuit in *FTC v. Amy Travel Service Inc.*,[1] holding that section 13(b) of the Federal Trade Commission Act ("FTCA") implicitly authorized restitution. Brown contended that the injunctive relief authorized did not implicitly authorize restitution, and the court agreed. The court's decision significantly undermines the decades-old understanding of the Federal Trade Commission's broad power under section 13(b) of the FTCA, overturning *Amy Travel*—a case that set a standard for the Seventh Circuit's sister courts—and reaching a conclusion that will likely not be met with enthusiasm from the other courts of appeals.

Facts

In January 2014, Michael Brown, owner of Credit Bureau Center, LLC, contracted with Danny Pierce to direct customers to his credit-monitoring service through a Craigslist advertisement in which Pierce had listed for fake rental properties.[2] Pierce directed applicants to Brown's website to get a "free" credit score.[3] However, in order to attract customers, Brown used a "negative option feature,"[4] a provision under which the customer's silence or failure to affirmatively reject goods or services or to cancel the agreement is interpreted by the seller as an acceptance of the offer.[5] After customers applied for the free credit report they were automatically enrolled in Brown's credit-monitoring service, which charged a subscription fee of $29.94 each month. Customers were only made aware of this enrollment when Brown sent them a letter after the completion of enrollment.

Consumers complained to the Federal Trade Commission. After an investigation was opened, the FTC sued Brown under section 13(b) of the FTCA.[6] The Commission sought an injunction and restitution, alleging that the Craigslist advertisements violated the FTCA's prohibition on "unfair and deceptive acts or practices."[7] The Commission also alleged that the website violated the same provision of the FTCA, as well as the Restore Online Shoppers' Confidence Act ("ROSCA"),[8] the Fair Credit Reporting Act ("FCRA"),[9] and the Free Credit Reports Rule.[10] The district court found that Brown violated the FTCA as a principal for the Craigslist advertisements and website in violation of the FTCA, ROSCA, FCRA and Free Credit Report Rule.[11] The court also issued a permanent injunction on Brown's continued involvement in the credit-monitoring industry and ordered Brown to pay over $5 million in restitution.[12]

Holding

A. Liability

Brown contested his liability, the permanent injunction and the restitution award. While Brown conceded liability for the Craigslist scheme, he challenged his liability for the website violations, asserting that the website did not contain misrepresentations in violation of the FTCA and satisfied ROSCA's disclosure requirements.[13] However, the court found that instead of considering every theory of liability, section 13(b) allows them to "start and end with ROSCA, which restricts the use of a 'negative option feature' to sell goods or services on the Internet."[14] Because there was no dispute about whether Brown used a negative option feature, the only question was whether he complied with ROSCA's disclosure requirements. The court held that he was personally liable because he did not disclose all material terms of the transaction before obtaining the consumer's billing information.[15]

B. Permanent Injunction

Brown attacked the permanent injunction as unconstitutionally harsh and disproportionate, relying on the Excessive Fines Clause.[16] However, the court held that the permanent injunction could not implicate the Excessive Fines Clause because an injunction is not a fine.[17]

C. Restitution Award

Brown contended that restitution was not proper in this case because section 13(b) does not authorize an award of restitution.[18] The court agreed, overturning *Amy Travel*, and holding that section 13(b) of the FTCA does not authorize awards of restitution by allowing injunctions and restraining orders.[19]

Discussion of Prior Law

This case effectively overturned thirty years of precedent during which the Seventh Circuit and its sister courts of appeals have agreed upon the statutory interpretation used in *Amy Travel*. Before *Amy Travel,* both *Porter v. Warner Holding Co.*[20] and *Mitchell v. Robert DeMario Jewelry, Inc.*[21] held that restitution was proper under the respective acts being challenged in both cases.[22] Although neither the Emergency Price Control Act of 1942 nor the Fair Labor Standards Act explicitly list restitution as a valid remedy under the statutes, the Court found that restitution could be read into or implied from statutes so long as the statute does not explicitly prohibit it, reasoning that restitution furthered the purpose of the statutes.[23] The implied remedies jurisprudence was carried into the Seventh Circuit's decisions in *FTC v. World Travelers Vacation Brokers, Inc.*[24] and *FTC v. Elders Grain, Inc.*[25] In *Amy Travel*, the Seventh Circuit pointed out that although those decisions helped guide its reasoning, the court never addressed how restitution was necessary to exercise the power to issue an injunction.[26] Rather, it merely noted that restitution was a proper form of ancillary relief.[27]

This case effectively overturned thirty years of precedent during which the Seventh Circuit and its sister courts of appeals have agreed upon the statutory interpretation used in *Amy Travel*.

In *Amy Travel*, three individuals were the owners and directors of corporations that marketed discount vacations known as "vacation passports" through telemarketing.[28] The price of the voucher varied between $289 and $329, but the price of the airfare that the prospective traveler also needed to purchase was never disclosed.[29] The scripts the salespersons would use when speaking to customers failed to make clear that the customer, by giving the salesperson a credit card number, would be charged for the voucher.[30] The FTC filed a complaint under section 13(b) of the FTCA, seeking injunctive relief, an asset freeze, restitution, and other forms of relief.[31] The court held that despite the defendants' assertion that the statutory language indicated restitution was improper under section 13(b), precedent pointed to the opposite conclusion.[32]

Since *Amy Travel*, implied remedies continue to be accepted.[33] However, courts gradually began to emphasize the importance of furthering a statute's purpose. In 1996, the U.S. Supreme Court decided *Meghrig v. KFC Western, Inc.*,[34] which clarified when an implied remedy does not further a statute's purpose. Although *Meghrig* did not turn on an interpretation of section 13(b), it interpreted a similar statute, turning on the issue of whether section 6972(a) of the Resource Conservation and Recovery Act of 1976 ("RCRA") permits compensation for past clean-up efforts.[35] The court held the RCRA does not permit compensation because it calls for the prohibition of a party from further violating the statute rather than contemplating the award of any past costs or damages.[36] The court compared the RCRA to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA").[37] Both acts addressed similar toxic-waste issues. However, CERCLA explicitly authorizes monetary relief.[38] The Court concluded that Congress demonstrated in CERCLA that it "knew how to provide for recovery of cleanup costs, and that the language used to define the remedies under the RCRA does not provide that remedy."[39] Since *Meghrig* was decided, the Supreme Court has adhered to a more limited understanding of implied remedies read into statutes by the courts and has instead recognized the importance of the statutory interpretation canon *expressio unius*: the express provision of one method of enforcing a substantive rule suggests that Congress intended to exclude others.[40]

Reasoning

Under the newly attenuated understanding of how broadly a court may interpret a statute, the Seventh Circuit disagreed with the Commission's contention, endorsed by the court in *Amy Travel*, that section 13(b) implicitly authorizes restitution. In overturning *Amy Travel*, the court began by comparing the purpose of injunctions with that of awarding restitution.[41] The court found that an implied restitution remedy is not proper under section 13(b) because injunctive relief requires (1) a defendant to be "'violating' or 'about to violate' the law,"[42] and (2) a reasonable belief that enjoining an ongoing or imminent violation would be in the best interest of the public.[43] The court concluded that reading restitution into the statute in light of these two requirements is illogical and unfounded.[44]

The court also examined sections 45(l) and 57b(b) of the FTCA, both of which empower courts to grant equitable relief as the district court deems necessary.[45] Because section 13(b) does not include the same language as those statutes, the court turned to *expressio unius* and concluded that Congress acted intentionally when they left the equitable relief language out of 13(b).[46] The court then turned to legislative history pointing to Congress's approval of restitution as a remedy under section 57b(b) just two years after enacting section 13(b).[47] If section 13(b) authorized a restitution award, Congress would have had no reason to enact section 57.[48] Both 45(l) and 57b(b) also require detailed procedures of fair notice and statutes of limitations, none of which are offered by section 13(b).[49] The court concluded that section 13(b), read plainly and considering the need to harmonize one provision of a statute with other provisions of a statute, is meant to simply enjoin ongoing and imminent future violation.[50]

The Seventh Circuit noted that it still presumes that courts will retain the traditional equitable authority that has been established for decades, but they must concede to Congress, as Congress is the entity that controls the scope of remedial relief when a statute provides a cause of action.[51] The Seventh Circuit applied the Supreme Court's reasoning in *Meghrig* in its entirety to section 13(b). Like the RCRA, contemplated in *Meghrig*, section 13(b), read plainly, does not contemplate restitution; it simply permits injunctions and temporary restraining orders.[52] The court also analogized the relationship between the RCRA and CERCLA to the relationship between sections 13(b), 45(l) and 57b(b) to conclude that Congress has considered where equitable relief is proper.[53] When addressing why *Amy Travel* would no longer be the standard, the court noted that the analysis in *Amy Travel* was limited and required the court to ignore the plain text of section 13(b) and disregard other thought-out provisions in the FTCA.[54] While acknowledging the importance of *stare decisis*, the court concluded that it is equally important for courts to respect statutes that Congress has passed and correct any misinterpretations of statutes.[55] Thus, the court overturned *Amy Travel* and vacated the restitution award.[56]

Conclusion

Credit Bureau Center will likely reach the Supreme Court as the circuit split now draws into question the prioritization of conflicting statutory canons of interpretation. This has a direct impact on the vital issue of how courts, and different sitting judges, prioritize statutes to resolve statutory vagueness. It also entails the important issue of how and when to recognize conflicts between long standing *stare decisis* and statutory canons and how they may be reconciled.

The dissent in *Credit Bureau Center* found that the holding was inappropriate, both because it overturned thirty years of precedent and because eight other courts of appeals agreed with *Amy Travel.*[57] The decision is significant to say the least. Chief Justice Diane Wood, who wrote for the dissent, noted that "no court has ever tied the hands of a government agency in the way that the majority has done here, and the majority cites none."[58] Indeed, there is no Supreme Court case that has held a federal agency is required to avoid one type of authority authorizing a remedy and instead use another.

The majority focused much of its analysis on the newly emphasized importance of furthering a statute's purpose, but ironically missed the equally important idea of furthering an agency's purpose. This is especially troubling in light of the fact that the Federal Trade Commission was established to enforce the FTCA, which prohibits unfair or deceptive acts or practices in commerce.[59] When an agency is in place to protect consumers from fraudulent practices, prohibiting monetary relief for those wronged limits, rather than furthers, the agency's purpose. This holding is also troubling because Congress did nothing after *Amy Travel.* It is presumed that if Congress wants to clarify the meaning of a statute in light of a court's apparent misinterpretation, then Congress will do so. When Congress does nothing to change a longstanding, controlling standard, it is disturbing when a court presumes that Congress intended all along that the statute mean the opposite.

Restitution acts as a deterrent. Without it, entities like Credit Bureau Center will have little incentive to avoid participating in similar fraudulent schemes, which will have a detrimental effect on the public that rely on the FTC and its resources to resolve these sorts of issues. Keeping public interest in mind—something that the majority addresses several times throughout its opinion—society gains greater benefits by allowing equitable relief under section 13(b). Allowing restitution is an important part of the Commission's duty to protect consumers. Simply ordering an entity to cease all deceptive and fraudulent activities might be a protection for the public against future harm, but it simultaneously and adversely deprives the public of a remedy for past injury. Simply put, equitable remedies are important and necessary. The hope is that either Congress will speak to this issue, and clarify its support for *Amy Travel,* or the Supreme Court will resolve the case in a manner favorable to the FTC.

** Morgan A. Thomas is a 2021 Juris Doctorate candidate at the University of Houston Law Center, concentrating in commercial litigation. In 2017, Morgan graduated with highest honors from Texas State University with a B.S. in Public Relations.*

---

1 937 F.3d 764 (7th Cir. 2019).
2 *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764, 767 (7th Cir. 2019).
3 *Id*. at 768.
4 *Id*. at 766.
5 16 C.F.R. § 310.2(w).
6 *Credit Bureau Center, LLC*, 937 F.3d at 768.
7 *Id.* (citing 15 U.S.C. § 45(a)).
8 *Id.* (citing 15 U.S.C. § 8403).
9 *Id.* (citing 15 U.S.C. § 1681j(g)).
10 *Id.* (citing 12 C.F.R. §§ 1022.130-.138)
11 *Id.*
12 *Id.*
13 *Id*. at 769.
14 *Id.*
15 *Id*. at 770.
16 *Id.*
17 *Id*.
18 *Id.* at 771.
19 *Id.* at 785.
20 328 U.S. 395 (1946).
21 361 U.S. 288, (1960).
22 *Credit Bureau Center, LLC*, 937 F.3d at 776.
23 *Id.* at 776-77.
24 861 F.2d 1020 (7th Cir. 1988).
25 868 F.2d 901 (7th Cir. 1989).
26 *Credit Bureau Center, LLC*, 937 F.3d at 779.
27 *Id*. (citing *FTC v. Amy Travel Services, Inc.,* 875 F.2d 564, 571 (7th Cir. 1989)).
28 *Amy Travel Services, Inc.*, 875 F.2d at 566.
29 *Id*.
30 *FTC v. Amy Travel Services, Inc.*, 875 F.2d at 569.
31 *Id*. at 570.
32 *Id*. at 572.
33 *See United States v. Tankersley*, 96 F. App'x 419, 422 (7th Cir. 2004); *FTC v. Think Achievement Corp.*, 312 F.3d 259, 262 (7th Cir. 2002); *FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997).
34 516 U.S. 479 (1996).
35 *Id.* at 484.
36 *Id.*
37 *Id.* at 485.
38 *Id.*
39 *Id.*
40 *Credit Bureau Center, LLC*, 937 F.3d at 782 (*citing to Armstrong v. Exceptional Child Ctr., Inc.*, 135 S.Ct. 1385 (2015).
41 *Id.* at 783.
42 *Id.* at 772.
43 *Id.* at 773.

44 *Id.* at 772-73.
45 *Id.* at 773-75.
46 *Id*. at 773-74.
47 *Id*. at 774.
48 *Id.*
49 *Id*.
50 *Id.*
51 *Id.* at 782 (citing to *Armstrong*, 135 S.Ct. at 1385).
52 *Id.* at 783.
53 *Id.*
54 *Id.* at 785.
55 *Id.* (citing to *Ahng v. Allsteel*, 96 F.3d 1033, 1037 (7th Cir. 1996).
56 *Id*. at 786.
57 *Id.* 786 (Wood, J., dissenting).
58 *Id.*
59 15 U.S.C. § 45.

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 sends TCPA dispute back to Sixth Circuit. The U.S. Supreme Court ordered the Sixth Circuit to revisit its split decision that faxes seeking contact information verification qualify as advertisements under junk fax rules, in light of an earlier high court ruling on the validity of federal agencies' interpretation of federal law. The high court vacated a panel decision from November that revived a putative TCPA class action against health care information technology provider Enclarity Inc. and its parent company. The Supreme Court then remanded the dispute to the appellate court for further consideration in light of its June decision in *PDR Network v. Carlton & Harris Chiropractic*. The Supreme Court offered no further explanation of its decision.

In the *PDR Network* case, the Supreme Court sidestepped the question of whether district courts are required under the Hobbs Act to defer to agency orders such as the Federal Communications Commission's numerous interpretations of the TCPA. Instead, the justices sent the dispute back to the Fourth Circuit to consider a pair of key questions that had not been properly addressed: whether the challenged FCC order was a legislative or interpretive rule, and whether PDR Network had been afforded an adequate opportunity to challenge the order. Enclarity Inc. v. Fulton, 140 S. Ct. 104 (2019).
https://www.leagle.com/decision/insco20191009l29

Supreme Court sends TCPA dispute back to Sixth Circuit.

Justices will not clarify what constitutes "interest." The U.S. Supreme Court refused to review a split First Circuit decision affirming the dismissal of a proposed class action alleging Citizens Bank, N.A.'s flat overdraft fees violate usury laws, declining a request to clarify what constitutes "interest" under the National Bank Act. Fawcett v. Citizens Bank, N.A., 140 S. Ct. 224 (2019).

FEDERAL CIRCUIT COURTS OF APPEALS

Practice of jailing indigent debtors for non-payment of court debts violates Fourteenth Amendment. The Fifth Circuit recently affirmed a grant of summary judgment to a class of plaintiffs alleging that Louisiana's Judicial Expense Fund, which essentially allows judges to jail indigent debtors for the non-payment of court debts, violates the Fourteenth Amendment. The district court granted summary judgment, certified a class, and issued a declaratory judgment. A panel of the Fifth Circuit affirmed. The District Court summarized the Plaintiff's claim as follows:

> Defendants' policy of jailing indigent debtors for nonpayment of court debts without any inquiry into their ability to pay is unconstitutional under the Due Process clause and the Equal Protection Clause of the Fourteenth Amendment, and the Judge's authority over both fines and fees revenue and ability-to-pay determinations violates the Due Process Clause.

Cain v. White, 937 F.3d 446 (5th Cir. 2019).
http://www.ca5.uscourts.gov/opinions/pub/18/18-30955-CV0.pdf

Bankruptcy discharge violation not subject to arbitration. The Fifth Circuit affirmed a bankruptcy court order denying a bank's motion to compel arbitration. The court held that when a debtor seeks to enforce a discharge injunction, a bankruptcy court may decline to compel arbitration because it implicates a bankruptcy court's ability to enforce its own orders. Henry v. Educ. Fin. Serv., 941 F.3d 147 (5th Cir. 2019).
http://www.ca5.uscourts.gov/opinions/pub/18/18-20809-CV0.pdf

Financing statement may refer to another document to describe collateral. The Seventh Circuit held that a financing statement describing the collateral as "[a]ll Collateral described in First Amended and Restated Security Agreement dated March 9, 2015 between Debtor and Secured Party" was sufficient to perfect even though the security agreement was not also filed because the collateral was "objectively determinable" under § 9-108(b)(6). In re I80 Equipment, LLC, 938 F.3d 866 (7th Cir. 2019).
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2019/D09-11/C%3A18-3291%3AJ%3ABrennan%3Aaut%3AT%3AfnOp%3AN%3A2397737%3AS%3A0

Phrase "current balance" is not misleading under FDCPA. The Seventh Circuit upheld a dismissal of a consumer's claim that the phrase "current balance" in a collection letter obscured the static nature of her debt. Plaintiff alleged that the collection letter from defendant Delta Outsource Group, Inc. falsely implied that Koehn's static debt was subject to interest and fees in violation of the Fair Debt Collection Practices Act. The sole basis for her claim was the phrase "current balance" which, according to Koehn, would "mislead debtors to give such static debts greater priority than they otherwise would." The district court dismissed the case, finding that no significant portion of the population would be misled by the "current balance" language in the letter. The Seventh Circuit affirmed. Koehn v. Delta Outsource Grp., Inc., 939 F.3d 863 (7th Cir. 2019).
https://consumerfinancialserviceslawmonitor.lexblogplatform.com/wp-content/uploads/sites/501/2019/10/Koehn-v.-Delta-Seventh-Circuit-Opinion.pdf

Robocall ban violates First Amendment. The Ninth Circuit found that a Montana law banning automated political campaign calls is unconstitutional, "strikes at the heart of the First Amendment" and disproportionately disadvantages candidates with fewer resources.

In 2018, a Montana federal judge denied political consulting firm Victory Processing LLC's constitutional challenge to the law, finding that it serves a compelling governmental interest and is sufficiently narrowly tailored to survive strict scrutiny applied to content-based legislation.

The Ninth Circuit found that a Montana law banning automated political campaign calls is unconstitutional.

The Ninth Circuit disagreed, holding that the 1991 legislation does not further the state's interest in protecting privacy. The Montana State Legislature had said the privacy threat posed by the automated calls relates to the fact that they tie up phone lines and fill answering machines not the content of the calls. Therefore, regulating what is in the calls does not "address Montana's expressed concerns," the panel said. "Regulating robocalls based on the content of their messaging presents a more severe threat to First Amendment freedoms than regulating their time, place, and manner." Victory Processing LLC v. Fox, 937 F.3d 1218 (9th Cir. 2019).
https://law.justia.com/cases/federal/appellate-courts/ca9/18-35163/18-35163-2019-09-10.html

Arbitrator must disclose conflicts of interest. The Ninth Circuit ruled that arbitrators have an obligation to disclose their financial interests in the cases before them. In a 2-1 decision, the court vacated a $3 million JAMS arbitration award, holding the award cannot stand because a purportedly neutral JAMS arbitrator failed to disclose that he has an equity stake in the arbitration service, which, in turn, benefits from repeat business from Monster.

The court explained that "clear disclosures by arbitrators aid parties in making informed decisions." In this case, the court concluded, "given the Arbitrator's failure to disclose his ownership interest in JAMS, coupled with the fact that JAMS has administered 97 arbitrations for Monster over the past five years, that vacatur of the Award is necessary on the ground of evident partiality." Monster Energy Co. v. City Beverages, LLC, 940 F.3d 1130 (9th Cir. 2019).
http://cdn.ca9.uscourts.gov/datastore/opinions/2019/10/22/17-55813.pdf

Inaptly titled arbitration notice unenforceable. The Ninth Circuit has affirmed a pair of rulings that denied Samsung's bid to arbitrate two lawsuits involving its Galaxy S7 smartphones, concluding that an "inaptly titled" booklet that comes with the phones and "vague" references to terms on the packaging do not adequately inform consumers they are agreeing to arbitration.

In a pair of three-page opinions, a three-judge panel on Tuesday rejected Samsung Electronics America Inc.'s arguments that the phone's packaging and a booklet—titled either "Product Safety and Warranty Information" or "Health and Safety and Warranty Guide"—in its Galaxy S7 boxes sufficiently notified consumers they were agreeing to arbitration by using the phones.

"We conclude that the inaptly titled booklet containing the terms and conditions and the smartphone packaging's vague reference to terms and conditions are insufficient to put a reasonable consumer (or a reasonably prudent smartphone user) on notice of the arbitration provision that Samsung seeks to enforce," the panel wrote in both opinions. Velasquez-Reyes v. Samsung Elecs. Am. Inc., 777 F. App'x 241 (9th Cir. 2019) (mem. op.); Samsung Elecs. Am. Inc. v. Ramirez, 777 F. App'x 243 (9th Cir. 2019) (mem. op.).
https://law.justia.com/cases/federal/appellate-courts/ca9/17-56556/17-56556-2019-09-17.html
https://law.justia.com/cases/federal/appellate-courts/ca9/18-16094/18-16094-2019-09-17.html

Split Ninth Circuit says bank must face FDCPA class action. A split Ninth Circuit panel revived a putative class action claiming that Capital One checked credit histories without a valid reason under the Fair Credit Reporting Act. One judge dissented, saying the lead plaintiff had not laid out a sufficiently plausible case.

Capital One argued that Nayab did not suffer any injury from the financial giant's allegedly unauthorized inquiries about her credit. But the panel said the allegation of unauthorized access alone gives Nayab standing to bring the case, "regardless whether the credit report is published or otherwise used by that third-party." Nayab v. Capital One Bank (USA), N.A., 942 F.3d 480 (9th Cir. 2019).
https://law.justia.com/cases/federal/appellate-courts/ca9/17-55944/17-55944-2019-10-31.html

A single unsolicited text message does not generate the harm necessary to sustain Telephone Consumer Protection Act claims. The Eleventh Circuit ruled that receiving a single unsolicited text message does not generate the harm under *Spokeo* necessary to sustain Telephone Consumer Protection Act claims, complicating plaintiffs' path to asserting such allegations across large classes.

The opinion, which reversed a decision to allow plaintiff John Salcedo to proceed with claims over an unsolicited text he received from his former lawyer Alex A. Hanna, also creates a circuit split on Article III standing that may push the U.S. Supreme Court to revisit the concreteness requirement the high court established in its *Spokeo* decision.

In its 22-page decision, the Eleventh Circuit found that its own precedent, the legislative history of the TCPA and the Supreme Court's decision in *Spokeo* provided little support for treating Salcedo's allegations as the type of intangible harm that could confer standing.

The court distinguished Salcedo's allegations "of a brief, inconsequential annoyance" from receiving one text message from the "real but intangible harms" that Congress intended for the TCPA to remedy, which include having family dinners interrupted by a ringing telephone and having cellphone lines tied up for long periods of time. Salcedo v. Hanna, 936 F.3d 1162 (11th Cir. 2019).
https://law.justia.com/cases/federal/appellate-courts/ca11/17-14077/17-14077-2019-08-28.html

Contractual forum-selection and class-action-waiver clauses struck down as contrary to public policy. A class of borrowers sued lenders, claiming that their loan agreements violated Georgia usury laws. The lenders sought to defend the case on the basis of contractual forum-selection and class-action-waiver clauses. The court of appeals began its opinion this way:

> American courts have long refused to enforce contractual provisions that contravene public policy. *See, e.g., Marshall v. Baltimore and Ohio R.R.*, 57 U.S. 314, 334 (1853) ("It is an undoubted principle of the common law that it will not lend its aid to enforce a contract to do an act that is illegal, or which is inconsistent with sound morals or public policy. . . ."). In Georgia, "[n]o principle of jurisprudence is better settled than this." *Glass v. Childs*, 71 S.E. 920, 921 (Ga. Ct. App. 1911).

The court then went on to hold that the forum-selection clause and class-action waiver violated public policy, specifically "Georgia's Payday Lending Act and Industrial Loan Act, [which] articulate a clear public policy against enforcing forum selection clauses in payday loan agreements and in favor of preserving class actions as a remedy for those aggrieved by predatory lenders."

Note that there was not an arbitration clause that would have been protected by the FAA. Davis v. Oasis Legal Fin. Operating Co., LLC, 936 F.3d 1174 (11th Cir. 2019)
https://law.justia.com/cases/federal/appellate-courts/ca11/18-10526/18-10526-2019-08-28.html

Forum selection and class action waiver unenforceable under Georgia law. The Eleventh Circuit has affirmed that Georgia's Payday Lending Act (PLA) and the Georgia Industrial Loan Act (GILA) supersede contrary provisions in loan agreements. The PLA prohibits lenders from using out-of-state forum selection clauses, and both the PLA and GILA expressly permit class actions. Notwithstanding contract provisions waiving these rights agreed to by both parties to the contract, the court held that Georgia law "articulate[s] a clear public policy against enforcing forum selection clauses . . . and in favor of preserving class actions." Furthermore, the court rejected arguments that the PLA does not apply to out-of-state lenders, finding that such a holding would "undermine the entire purpose of the PLA."

Thus, forum selection clauses and class action waiver provisions in loan agreements governed by the PLA and GILA were held to be unenforceable—and a class action alleging substantive violations of the Georgia lending laws has been allowed to proceed. Davis v. Oasis Legal Fin. Operating Co., LLC, 936 F.3d 1174 (11th Cir. 2019).
https://law.justia.com/cases/federal/appellate-courts/ca11/18-10526/18-10526-2019-08-28.html

FEDERAL DISTRICT COURTS

Failure to pay arbitration fees constitutes waiver of arbitration. A New Jersey federal judge rejected a Nissan car dealership's bid to arbitrate a proposed class action alleging it violated consumer protection statutes by selling vehicles with mandatory fees to inflate the sales prices. The court concluded that the dealer waived arbitration by failing to pay arbitration fees. U.S. District Judge Anne E. Thompson said she was unswayed by North Plainfield Nissan's arguments that it never received notices that plaintiff Rachel A. Page had initiated arbitration proceedings because of a "clerical error" or a wrong mailing address. The judge noted in her ruling that Page sent the dealership at least two letters and the American Arbitration Association sent at least three letters to its business address. There was also a notice of receipt attached to at least one letter, the opinion says.

The court concluded that the dealer waived arbitration by failing to pay arbitration fees.

The complaint asserts violations of the Truth in Lending Act, the Consumer Fraud Act, the Truth-in-Consumer Contract, Warranty and Notice Act, the Consumer Service Contract Act and motor vehicle advertising regulations. Page v. GPB Cars 12, LLC, 2019 WL 5258164 (D.N.J. 2019).
https://www.leagle.com/decision/infdco20191017e58

Class decertified under Spokeo. A California federal judge has decertified a class of roughly 6.5 million Walmart job applicants challenging the retail giant's background check procedures and remanded the dispute to state court. The judge found that the named plaintiffs had failed to allege an injury sufficient to meet the *Spokeo* standing bar.

In January the judge certified a class of millions of Walmart job applicants accusing the company of violating the Fair Credit Reporting Act and California's Investigative Consumer Reporting Agency Act by providing them with deficient background check disclosure forms between June 2012 and March

2019. The judge subsequently reversed his decision.

The judge ruled that while the plaintiffs earlier in the litigation had put forth allegations sufficient to meet the Article III standing bar established in *Spokeo v. Robbins*—requiring plaintiffs to assert a concrete injury and not merely rely on statutory violations to be able to sue in federal court—the burden rested with the plaintiffs to maintain this posture as the case progressed. The judge found that as the dispute had proceeded to the summary judgment phase, the plaintiffs needed to advance more "specific facts" to demonstrate standing rather than rest on the "mere allegations" that had sustained them to date. Plaintiffs failed to accomplish this, according to Judge Carter. "Even assuming, arguendo, that defendant's written disclosures were inadequate under the FCRA, named plaintiffs have failed to identify an injury stemming from this statutory violation that can suffice to support Article III standing," the judge wrote in his 16-page order. Pitre v. Wal-Mart Stores, Inc., 2019 WL 5294397 (C.D. Cal. 2019).
https://law.justia.com/cases/federal/district-courts/california/cacdce/8:2017cv01281/684657/104/

Plaintiff in TCPA case must allege lack of consent. Many courts have come to the determination that a plaintiff's prima facie claim under the TCPA concerns alleging only that the plaintiff's cellular telephone was called using an ATDS. In their reasoning, those courts typically find that the lack of "prior express consent" is a defendant's affirmative defense, and therefore a plaintiff's claim is not defective for failing to allege any lack of consent or revocation of consent.

Other courts, however, continue to find that allegations regarding the lack or revocation of consent is a necessary element of the plaintiff's claim—which, if not alleged, requires dismissal of the complaint. The Eastern District of North Carolina has adopted this latter view of what must be alleged under the TCPA. Vitale v. Nationstar Mortg. LLC, 2019 WL 4267867 (E.D.N.C. 2019).
https://www.leagle.com/decision/infdco20190912584

Debt collector hit with $267M in damages. A California federal judge has entered a $267 million judgment against a debt collection agency that a jury found liable for blasting consumers with more than 534,000 unsolicited robocalls.

The final judgment came after a May jury trial that concluded with a verdict in favor of plaintiff Ignacio Perez and a class of consumers. The suit accused debt collector Rash Curtis & Associates of violating the Telephone Consumer Protection Act by calling their phones using various automated dialers and without their prior express consent.

The jury found that Rash Curtis had made more than 501,000 calls to class members with its Global Connect dialer, nearly 2,600 calls using a VIC dialer and more than 31,000 calls using a TCN dialer. The company also made 14 unwanted calls to Perez using the Global Connect dialer and an artificial or prerecorded voice, the jury concluded.

The judge ruled that, consistent with the jury's verdict, each member of the class should recover $500 per call from Rash Curtis, for an aggregate award in favor of the class of $267 million. The judge separately awarded Perez $7,000 for the calls the jury found he received in violation of the TCPA. Perez v. Rash Curtis & Associates, Case No. 16-cv-03396 (N.D. Cal. 2019).

STATE COURTS

Texas Supreme Court holds class arbitrability is a "gateway issue" to be decided by court, not arbitrator, absent "clear and unmistakable" contrary agreement. In its decision, the court noted this was a reversal of its 2004 decision in *In re Wood*. The court stated:

> Though *Wood* squarely decided the "who decides" issue, this is one of those rare circumstances requiring us to reconsider our prior decision. Given the persuasive authority casting doubt on *Wood*'s core holding, the court of appeals anticipated as much. But even though we reach the same conclusion about *Wood*'s continued vitality for essentially the same reasons articulated in the court of appeals' thoughtful and well-written opinion, only this Court can abrogate established precedent. The court of appeals understandably viewed Wood as an anachronism but was obliged to follow it as precedent until we overruled that decision. We do so today.

Robinson v. Home Owners Mgmt. Enters., Inc., ___ S.W.3d ___ (Tex. 2019).
https://www.txcourts.gov/media/1445180/180504.pdf

Texas Veterinary Licensing Act bars DTPA claim. A Texas appellate court has held that a veterinarian's misrepresentation is barred by section 801.507 of the Veterinary Licensing Act. Then court stated that, "There is no dispute that Dr. Holcomb is a licensed veterinarian," as if that answers all questions. In fact, the Act exempts veterinarians only for claims alleged to have resulted from veterinary malpractice or negligence. The court seems to ignore the consumer's allegation that her claim arises from Hill Country's misrepresentations that the drugs it dispensed would cure the infection. Connor v. Hill Country Animal Hosp., 2019 WL 5251142 (Tex. App.—Austin 2019, no pet. h.).
https://casetext.com/case/connor-v-hill-country-animal-hosp

California Supreme Court invalidates an employment arbitration agreement. At issue was an agreement to arbitrate employment claims, including wage claims. Under the agreement, Kho had to arbitrate wage claims instead of having them decided in court or in an administrative "Berman hearing" conducted by the California Labor Commissioner. An appellate court upheld the agreement, even though the court was "disturbed" by how it was drafted and presented. But the California Supreme Court struck down the agreement, insisting that an agreement waiving a Berman hearing must be particularly fair, given the "full panoply" of benefits employees would enjoy in a Berman hearing. Look for the Supreme Court to get involved in this case. OTO, LLC v. Kho, 447 P.3d 680 (Cal. 2019).
https://law.justia.com/cases/california/supreme-court/2019/s244630.html

STATE NEWS

California limits interest rates on payday loans. California Governor Gavin Newsom signed into law AB 539, a bill to stop outrageous interest rates that payday lenders in California are charging on their larger, long-term payday loans, but warned that the payday lenders are already plotting to evade the new law.

California's new law targets payday lenders that are charging 135-200% and higher on long-term payday loans that put people into an even deeper and longer debt trap than short-term payday loans. Payday lenders were exploiting the prior law that applied to only loans of $2,500 or less by making loans of $2,501 and above. Clear, loophole-free interest rate caps are the simplest and most effective protection against predatory lending. Under the new law, which will go into effect January 1, 2020, interest rate limits will apply to all loans of up to $10,000.
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB539

DECEPTIVE TRADE PRACTICES AND WARRANTY

COURT DISCUSSES "AS IS" CLAUSE AND FRAUDULENT INDUCEMENT

Ivy v. Garcia, ____ S.W.3d ____ (Tex. App. 2019).
https://law.justia.com/cases/texas/third-court-of-appeals/2019/03-18-00545-cv.html

FACTS: Plaintiff-Appellant Marlonia Ivy's contract to purchase Defendants-Appellees Victor and Wanda Garcia's home included an "as is" clause. During the ten-day option period granted by the contract, Ivy hired an inspector who inspected the home and listed numerous problems with it in the inspection report. Instead of terminating the contract, Ivy and the Garcias negotiated a new pricing and completed the sale of the house. Ivy later filed suit related to the condition of the house, claiming: common law fraud, violations of the DTPA, breach of fiduciary duty, negligent misrepresentation, conspiracy, and intentional infliction of emotional distress.

The trial court granted the Garcias' motion for summary judgment, dismissing all of Ivy's claims. Ivy appealed.
HOLDING: Affirmed in part, reversed and remanded in part.
REASONING: The Garcias argued that Ivy was bound by the "as is" clause included within the contract to purchase, waiving Ivy's right to bring claims related to the condition of the home.

The court rejected this argument, holding that buyers are not bound by an "as is" clause if (1) the seller intended to induce the buyer into the contract by making a fraudulent misrepresentation or by concealing information, and (2) the buyer relied on the misrepresentation in entering into the "as is" contract.

To the extent of the defects revealed by the inspection report, the court held that Ivy's claims were defeated as a matter of law. However, the court also held that Ivy presented legally sufficient evidence of other defects that were not included in the inspection report, thus supporting her DTPA, fraud, and misrepresentation claims. Because the court found that a genuine issue of material fact existed about whether the Garcias intended to conceal the defects not revealed in the inspection report, the summary judgment was reversed as to those defects and remanded for trial.

DTPA DOES NOT APPLY TO TRANSACTION OVER $500,000

AES Valves, LLC v. Kobi Int'l Inc., ____ S.W.3d ____ (Tex. App. 2019).
https://law.justia.com/cases/texas/first-court-of-appeals/2019/01-18-00081-cv.html

FACTS: Plaintiff Kobi International Inc. and Defendant AES Valves, LLC, entered into a purchase order for custom plug valves. After AES delivered the plug valves Kobi alleged that they were defective and inoperable for the project for which they were intended. Kobi filed suit, alleging violation of the DTPA, among other causes of action.

Kobi sought economic damages of $8,347,015.78, plus treble damages of $16,694,031.56 and attorney's fees. The trial court awarded Kobi a lump sum of $25,041,047.34 in damages, plus attorney's fees and prejudgment interest. AES appealed.
HOLDING: Affirmed in part, reversed in part.
REASONING: AES argued that the trial court erred in allowing Kobi to prevail on its DTPA claim, because DTPA does not allow cause of action for a suit involving more than $500,000.00.

The court accepted AES's argument, holding that the DTPA contains an exemption for causes of action arising from a transaction or set of transactions relating to the same project when the total consideration by the consumer amounts to more than $500,000.00. The court stated that this exemption's purpose is to maintain the DTPA as a viable source of relief for consumers in small transactions and to limit litigation between businesses over large transactions from the scope of the DTPA. The court stated that, by its own pleading, Kobi was statutorily precluded from seeking DTPA damages because Kobi's transaction with AES exceeded the $500,000.00 limit imposed by the DTPA. Therefore, Kobi did not assert a valid DTPA cause of action.

Kobi was statutorily precluded from seeking DTPA damages because Kobi's transaction with AES exceeded the $500,000.00 limit imposed by the DTPA.

DTPA NOTICE MAY SATISFY UCC NOTICE REQUIREMENT

IMPLIED WARRANTY FOR PERSONAL INJURY DOES NOT REQUIRE PRIVITY

Ardoin v. Stryker Corp., ____ F. Supp. 3d ____ (S.D. Tex. 2019).
https://casetext.com/case/ardoin-v-stryker-corp

FACTS: Plaintiff Florence Ardoin underwent a right total hip arthroplasty. The surgeon implanted an artificial hip system called the Stryker Secur-Fit Max System ("System"), which was manufactured, marketed, and sold by Defendant Howmedica Osteonics Corporation. After Plaintiff started experiencing pain in her lower back and right hip, she underwent a revision surgery. After the surgery, the surgeon reported that a piece of the System had loosened, and two bone screws were broken. Plaintiff filed suit alleging various causes of action, including breach of implied warranty of merchantability.

Defendant filed a motion to dismiss.
HOLDING: Denied.
REASONING: Defendant first argued that Plaintiff failed to provide proper notice of the breach of implied warranty.

The court explained that, under Texas law a party asserting breach of warranty must, within a reasonable time after she discovers or should have discovered any breach, notify the seller of breach or be barred from any remedy. The court further explained that a general expression of dissatisfaction may be enough to fulfill the notice requirement.

Here, the court found that Plaintiff sent Defendant a notice letter pursuant to the notice requirements of the DTPA, briefly describing the issues that Plaintiff had with the System, with attached operative reports from both the original surgery and the revision surgery. The letter also listed three provisions of the DTPA under which Plaintiff intended to file claims. Although the letter did not mention any claims of breach of implied warranty, the court held that it did contain enough information about Plaintiff's dissatisfaction with Defendant's product to provide Defendant with notice of a problem with a particular product purchased by a particular buyer.

The Texas Supreme Court held in Garcia v. Tex. Instruments, Inc. that privity of contract is not required for an implied warranty action for personal injuries.

Defendant next argued that, because the hip replacement in question was made up of component parts, privity was required for Plaintiff to assert a claim of breach of implied warranty. Defendant relied on the Fifth Circuit's decision in *Hininger v. Case Corporation*, a case involving an implied warranty claim for economic loss against a component manufacturer.

The court rejected this argument, holding that *Hininger* was not applicable to this case because it did not address actions for personal injuries, but was repeatedly emphasized by the Fifth Circuit to regard a claim for economic loss. The court further stated that the Texas Supreme Court held in *Garcia v. Tex. Instruments, Inc*. that privity of contract is not required for an implied warranty action for personal injuries. Thus, Plaintiff did not need to plead privity. Because Plaintiff sufficiently pleaded the four elements of her claim in the noticed letter, the court denied Defendant's motion.

DTPA AND WARRANTY CLAIMS AGAINST PREVAGEN SURVIVE MOTION TO DISMISS

Engerat v. Quincy Bioscience, LLC, ____ F. Supp. 3d ____ (W.D. Tex. 2019).
https://casetext.com/case/engerat-v-quincy-bioscience-llc

FACTS: Plaintiffs Max Engerat, Jack Purchase, and Ronald Atkinson were Texas residents who acquired and consumed the dietary supplement Prevagen. Defendant Quincy Bioscience, LLC, manufactured, marketed, sold, and distributed Prevagen. Defendant's advertising and labeling stated that Prevagen would "improve memory within 90 days" and support a "sharper mind," "clearer thinking," and "healthy brain function." Plaintiffs alleged that Defendant's advertisements were false, misleading, and designed to trick consumers into purchasing an ineffective supplement.

Plaintiffs filed suit, alleging claims under the DTPA and breach of express and implied warranties. Defendant filed a motion to dismiss.

HOLDING: Motion denied.

REASONING: Defendant argued that all of Plaintiffs' claims fail because Defendant's clinical drug trial ("the Study") conclusively demonstrated that the marketing statements about Prevagen were both truthful and fully substantiated. that Plaintiffs' DTPA claim did not satisfy the DTPA requirement that the defendant engaged in false, misleading, or deceptive acts because the Study demonstrated Defendant's claims to be true, and that Plaintiffs did not meet the pleading standard for either breach of express warranty or breach of implied warranty because the Study precluded Plaintiffs' claims.

The court rejected all of these arguments, explaining that the Study was extrinsic evidence because it was neither referenced in the complaint nor central to Plaintiff's claims. Therefore, the Study could not be considered in Defendant's 12(b)(6) motion.

Defendant also argued that Plaintiffs failed to plead their DTPA claims with sufficient particularity, as required by Federal Rule of Civil Procedure 9(b).

The court explained that, at minimum, a plaintiff must set forth the "who, what, when, where, and how" of the alleged fraud. Here, the court held that Plaintiffs' complaint alleged that Defendant made false and misleading statements regarding Prevagen in television commercials, on Prevagen's packaging, and on Prevagen's bottle label; had sufficiently detailed the alleged false and misleading statements made by Defendant; stated when and where Plaintiffs were exposed to the alleged false and misleading statement; and how the statements were false. Because Plaintiffs had, in essence, sufficiently alleged that Prevagen cannot do what Defendant claimed it could do, the court held the Plaintiffs had sufficiently pled their DTPA claim

CONSUMER CREDIT

FEDRAL TRADE COMMSSION MAY NOT SEEK RESTITUTION UNDER FTC ACT SECTION 13(b)

Fed. Trade Comm'n 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

FACTS: Michael Brown and his company Credit Bureau Center, LLC, a credit-monitoring service ("Brown"), offered a free credit report and score but failed to mention that consumers would be enrolled in a $29.94 monthly membership subscription.

The FTC sued Brown for advertising "free" credit reports without adequately disclosing that consumers would be enrolled in an expensive credit monitoring service on an ongoing basis. The FTC brought its lawsuit under §13(b) of the FTC Act, which authorizes the FTC to bring suit to enjoin an unlawful act or practice. The FTC sought a permanent injunction, as well as an award of restitution from Brown. Construing Section 13(b) to permit both, the trial court issued the permanent injunction and ordered Brown to pay more than $5 million in restitution. Brown appealed.

The FTC sought a permanent injunction, as well as an award of restitution from Brown.

HOLDING: Vacated.

REASONING: Brown challenged the restitution award arguing that, by its terms, Section 13(b) authorizes the FTC to seek only restraining orders and injunctions and that it is without authority to obtain restitution under the provision. The FTC responded by arguing that its authority was implied in the statute and pointed to decades of case law permitting the agency to recover restitution.

The court rejected the FTC's argument, noting that the Supreme Court had evolved its understanding of implied remedies in recent decisions, most notably *Meghrig v. KFC Western*. In *Meghrig*, the Supreme Court ruled that where Congress has provided elaborate enforcement provisions for remedying the violation of a federal statute, it cannot be assumed that Congress intended to implicitly authorize additional judicial remedies. Accordingly, the court held that the FTC Act does not provide implied or equitable restitution because its plain language is limited to injunctive relief.

FINANCING STATEMENT MAY REFER TO ANOTHER DOCUMENT TO DESCRIBE COLLATERAL

In re 180 Equip., LLC, 983 F.3d 866 (7th Cir. 2019).
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2019/D09-11/C%3A18-3291%3AJ%3ABrennan%3Aaut%3AT%3AfnOp%3AN%3A2397737%3AS%3A0

FACTS: Defendant-Appellee, Jeana K. Reinbold ("Trustee") was appointed as the trustee of the Estate of 180 Equipment, LLC, a business that obtained a commercial loan from PlaintiffAppellant, First Midwest Bank. To ensure repayment of the loan, 180 Equipment and First Midwest executed a security agreement that granted First Midwest a security interest in substantially all of 180 Equipment's assets. These were described as twenty-six listed categories of collateral, such as accounts, cash, equipment, instruments, goods, inventory, and all proceeds of any assets. To perfect its interest in 180 Equipment's assets, First Midwest timely filed a financing statement with the Illinois Secretary of State. The financing statement purported to cover "all Collateral described in First Amended and Restated Security Agreement dated on March 9, 2015 between Debtor and Secured Party." When 180 Equipment defaulted on the loan and filed a voluntary bankruptcy petition, the court appointed Trustee to manage the bankruptcy. First Midwest filed suit against Trustee to recover the loan and filed a declaration that its security interest in 180 Equipment assets was properly perfected.

The bankruptcy court found that the lien was avoidable because "a financing statement that fails to contain any description of collateral fails to give the particularized kind of notice" required by Article 9 of the UCC. First Midwest appealed.

HOLDING: Reversed and remanded.

REASONING: Trustee argued that the financing statement was insufficient for enforcement because it failed to independently describe the underlying collateral and only incorporated the list of assets by referencing the parties' security agreement, thus failing to properly indicate the secured collateral.

The court rejected Trustee's argument, identifying two reasons why the financing statement was sufficient. First, the court cited the revised Article 9 of the UCC's plain and ordinary meaning, which allows a party to indicate collateral in any method if the collateral is objectively determinable. The court held that, because Article 9's plain meaning does not require a specific description of the secured collateral, Midwest was allowed to indicate collateral in the financing statement by referencing a description of that collateral in the parties' security agreement. Second, the court held that the approach of past courts regarding financing statements supported the permissibility of incorporation by reference in Illinois, so long as the identity of the collateral is objectively determinable.

Accordingly, the court held that First Midwest met this requirement with the security agreement's detailed list of collateral and the financing statement referencing all collateral as described in the underlying security agreement between the parties.

DEBT COLLECTION

FDCPA DOES NOT APPLY UNLESS DEBT IS A CONSUMER DEBT

Burton v. Kohn Law Firm, S.C., 934 F.3d 572 (7th Cir. 2019). https://scholar.google.com/scholar_case?case=601733704072297992&q=Burton+v.+Kohn+Law+Firm,+S.C&hl=en&as_sdt=400006&as_ylo=2019&as_vis=1

FACTS: Kohn Law Firm, S.C. ("Kohn"), acting on behalf of Unifund CCR, LLC ("Unifund"), a debt collection agency, filed suit against John Burton to collect credit card debt allegedly incurred by Burton at Citibank, N.A. Burton denied he had incurred the debt, and Kohn and Unifund's suit was dismissed.

Burton subsequently filed suit against Kohn and Unifund, alleging violations of the FDCPA. Kohn and Unifund moved for summary judgment, arguing that Burton had failed to present sufficient evidence that the debt incurred at Citibank was a consumer debt. The trial court granted summary judgment to Kohn and Unifund. Burton appealed.

HOLDING: Affirmed.

REASONING: Burton argued that the debt in question was a consumer debt. As proof, he presented (1) his own statement that the debt was consumer debt; (2) evidence of Kohn and Unifund's inclusion of FDCPA disclaimers on debt collection letters, their state action against Burton in his personal capacity, their sending of communications to Burton's personal residence, and their advertising of consumer debt collection on their websites; and (3) billing statements on the Citibank account.

A plaintiff must establish that the debt in question is a consumer debt by showing it arises from a transaction incurred for personal, family, or household purposes.

The court rejected Burton's argument, holding that Burton failed to present sufficient evidence the debt was consumer debt because none of his admitted evidence identified the type of debt. The court stated that, in order to state a claim under the FDCPA, a plaintiff must establish that the debt in question is a consumer debt by showing it arises from a transaction incurred for personal, family, or household purposes.

The court held that Burton's statement was insufficient because it was unsupported by an affidavit or sworn testimony and it contradicted statements Burton made in federal court. The court next held that none of Kohn and Unifund's actions were sufficient to establish the type of debt they were attempting to collect in this case. Finally, the court held the billing statements on the Citibank account were insufficient because they did not identify why charges were incurred and Burton could not explain whether the transactions were for a consumer purpose. Because Burton failed to present sufficient evidence that the debt was consumer debt, the FDCPA did not apply.

PHRASE "CURRENT BALANCE" IS NOT MISLEADING UNDER FDCPA

Koehn v. Delta Outsource Grp., Inc., 939 F.3d 863 (7th Cir. 2019).
https://consumerfinancialserviceslawmonitor.lexblogplatform.com/wp-content/uploads/sites/501/2019/10/Koehn-v.-Delta-Seventh-Circuit-Opinion.pdf

FACTS: Plaintiff-Appellant, Patricia Ann Koehn, received a letter from Defendant-Appellant, Delta Outsource Group, Inc. ("Delta"), a collection agency. The letter stated that the "current balance" of Koehn's debt was $2,034.03.

Koehn filed suit, claiming the letter was misleading and violated the FDCPA. Specifically, Koehn argued that the phrase "current balance" violated 15 U.S.C. §1692g(a)(1), which requires a debt collector to state "the amount of debt," and 1692(e), prohibiting "any false, deceptive, or misleading representation or means in connection with the collection of any debt." Delta filed a motion to dismiss for failure to state a claim, arguing that no significant fraction of the population would be misled by the letter. The trial court granted Delta's motion to dismiss. Koehn appealed.

HOLDING: Affirmed.

REASONING: Koehn argued that the letter from Delta was misleading because the phrase "current balance" implied that her balance could grow, even though her account was static. Koehn claimed that, by falsely implying the "current balance" might increase, the wording would mislead debtors to give such static debts greater priority than they would otherwise.

The court rejected Koehn's argument, holding that nothing in the phrase "current balance" was inherently misleading. The court looked to their previous holding in *Chuway v. National Action Financial Services, Inc.* to note what qualified as a misleading letter under FDCPA. In *Chuway*, a letter stated a debtor's balance as a specified amount but also added a directive to call a toll-free number to obtain the most current balance information. The *Chuway* court held that letter to be misleading because it implied that the only way to obtain the current balance was to call the debt collector.

The court also looked to their holding in *Barnes v. Advanced Call Center Technologies, LLC*, where the court affirmed summary judgement for debt collector who used the phrase "Current Amount Due." The *Barnes* court stated that, absent some particularly ambiguous language in the rest of the letter, it could not be seen how the phrase could indicate anything other than the "Current Amount Due" was "the amount of the debt."

Because the letter sent to Koehn did not contain any directives to call for a "current balance" or any other particularly ambiguous language that implied that "current balance" meant anything other than the balance owed, the court held the letter from Delta complied with the FDCPA.

HOMEOWNER LACKED STANDING UNDER FDCPA BECAUSE HE WAS NOT "PERSONALLY OBLIGATED OR ALLEGEDLY OBLIGATED TO PAY ANY DEBT"

Kraft v. Phelan Hallinan Diamond & Jones, P.C., ____ F. Supp. 3d ____ (D.N.J. 2019).
https://law.justia.com/cases/federal/district-courts/new-jersey/njdce/3:2017cv13765/363583/40/

FACTS: Plaintiff Warren Kraft acquired ownership of a property (the "Premises") by inheritance when his father passed away. The mortgagor assigned the Premises' mortgage to the Federal National Mortgage Associations ("FNMA"). Washington Mutual N.A., a predecessor in interest to Wells Fargo regarding the mortgage, initiated a property foreclosure action against Kraft due to nonpayment. Washington Mutual and Wells Fargo retained Phelan Hallinan Diamond & Jones, P.C. ("Phelan Hallinan") as counsel to litigate the foreclosure action. A final judgment of foreclosure was eventually entered against Kraft.

Kraft alleged Wells Fargo never reviewed the original note because it was lost by the FNMA. Kraft also contended Phelan Hallinan could not confirm the accuracy of the mortgage assignments to Washington Mutual and Wells Fargo because the FNMA never transferred the original note. Therefore, Kraft claimed Phelan Hallinan chose to proceed with false certifications and false representations of the legal status of the debt.

Kraft filed suit, asserting FDCPA violations by Phelan Hallinan, Phelan Hallinan and Schmieg, L.L.C., Rosemarie Diamond, Francis S. Hallinan, and Lawrence T. Phelan (collectively, "Defendants"). Defendants filed a motion to dismiss on several grounds, including failure to state a claim.
HOLDING: Granted with prejudice.
REASONING: Defendants argued Kraft could not bring a claim under the FDCPA because he did not qualify as a consumer under the statute. In order to qualify as a consumer and have standing under the FDCPA, a plaintiff must allege that they actually owe debt. Defendants asserted Kraft was not a consumer because he did not sign the original promissory note and did not actually owe any debt.

Kraft argued that he did qualify as a consumer because he was obliged to pay the debt incident to the mortgage because of a covenant that ran with the property.

The court rejected Kraft's argument, holding that, even if some covenant did exist in the mortgage, it would still be insufficient to establish Kraft as a consumer owing a debt for the purposes of the FDCPA. The court stated that actions premised on a mortgagor's promissory note are *in personam*. Thus, in the event of a default, the mortgagee may foreclose on the property to satisfy the debt and, should there be a deficiency, may recover personally *only* against a signatory to the promissory note.

Because Kraft did not allege that he signed the promissory note, he therefore did not allege any debt was owed by him. Accordingly, the court found Kraft's contention that he was a consumer because he was obligated to pay this debt was merely a conclusory statement which the court could not consider in ruling on the Defendants' motion to dismiss.

USE OF MULTIPLE CREDITOR NAMES MAY VIOLATE FDCPA

Smith v. Univ. Cmty. Hosp., Inc., ____ F. Supp. 3d ____ (M.D. Fla. 2019).
https://ecf.flmd.uscourts.gov/cgi-bin/show_public_doc?2018-00270-42-8-cv

FACTS: Plaintiff Ben Smith received medical treatment at Defendant University Community Hospital, d/b/a Florida Hospital Carrollwood ("Community Hospital"). Community Hospital filed and posted a lien of Smith's outstanding medical bill in the county's public records and sent a notification letter and copy of the hospital lien to Smith. The lien paperwork indicated that it was sent by "Patient Financial Services." Smith filed suit against Community Hospital, alleging its actions violated various sections of the FDCPA, and asserting that Community Hospital was subject to the FDCPA under the false name exception of U.S.C. §1692a(6).

The triggering of the FDCPA does not depend on whether a third-party is in fact involved in the collection.

Community Hospital moved for summary judgement, denying that it was subject to the FDCPA under the false name exception. Smith filed a cross-motion for summary judgement on all of his claims.
DISPOSITION: All motions for summary judgement denied.
REASONING: The court explained that under the false name exception a creditor becomes subject to the FDCPA if the creditor, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. Thus, the court held that the triggering of the FDCPA does not depend on whether a third-party is in fact involved in the collection, but whether the least sophisticated consumer would have the false impression that a third-party was collecting the debt.

The court held that summary judgement was precluded for either party because the parties disagreed in regard to how the least sophisticated consumer would determine who sent the lien to Smith. Because the court found that a reasonable jury could have found either that Patient Financial Services presented itself in the lien paperwork as part of Community Hospital and not a third-party debt collector, or alternatively found that Patient Services presented itself as a third-party debt collector rather than an entity within Community Hospital, both parties' motions for summary judgment were denied.

DEBT COLLECTOR MAY INCLUDE COLLECTION COSTS IN A DUNNING LETTER WHEN THE UNDERLYING CONTRACTUAL RELATIONSHIP BETWEEN THE DEBTOR AND CREDITOR PROVIDES FOR THE RECOVERY OF SUCH COST

Sparks v. EquityExperts.org, LLC, 936 F.3d 348 (6th Cir. 2019).
https://www.courtlistener.com/opinion/4656295/melvin-sparks-v-equityexpertsorg-llc/

FACTS: Plaintiffs Melvin and Angela Sparks were subject to paying assessments made by the Homeowners' Association ("Association"). As a part of the Sparks' agreement with the Association, the Sparks would be liable for costs associated with the collection of unpaid assessments. When the Sparks fell behind on their homeowners' association assessments, the Association engaged Defendant EquityExperts.org, LLC ("Equity Experts"), a debt-collection company, to collect from the Sparks. Equity Experts also sought to collect the Association's collection service fees from the Sparks. The Sparks filed suit, arguing that Equity Experts' attempted collection violated the FDCPA's prohibition against debt collectors from attempting to collect debts not expressly authorized by the agreement creating the debt or permitted by law.

The court granted summary judgment in favor of Equity Experts. The Sparks appealed.

HOLDING: Affirmed.

REASONING: The Sparks argued that Equity Experts could not collect the fees associated with the collection service, because they had not personally incurred those fees.

The court rejected the Sparks' argument, holding that the fees were collectable. The court stated that the fees charged were a part of the Association's actual costs of collection, as the Association was contractually obligated to cover the costs of collection once Equity Experts performed the service for which it was charging.

The court further held that Equity Experts could not be expected to collect the collection fees for free. The court reiterated their previous holding in *Singer v. Pierce & Assocs., P.C.*, that "a debt collector may include collection costs in the dunning letter when the underlying contractual relationship . . . provided for the recovery of such . . . costs." The court then interpreted "costs" according to its ordinary meaning, which includes "costs of collection."

Because the Sparks' agreement with the Association expressly authorized the collection of the Association's costs, and because the Association hired Equity Experts to serve as its collection agent, Equity Experts was a part of the Association's costs of collection and entitled to collect its fees directly from the Sparks.

FIFTH CIRCUIT HOLDS THAT PRIVATE STUDENT LOANS MAY BE DISCHARGEABLE IN BANKRUPTCY

Crocker v. Navient Solutions, LLC, ____ F.3d ____ (5th Cir. 2019).
http://www.ca5.uscourts.gov/opinions/pub/18/18-20254-CV0.pdf

FACTS: Plaintiff Evan Crocker obtained a private student loan that was later serviced by Defendant Navient Solutions, LLC. Subsequently, Crocker filed for Chapter 7 bankruptcy and was granted a discharge. However, Navient continued to demand repayment after the discharge. Crocker filed an adversary proceeding against Navient in the Bankruptcy Court for the Southern District of Texas, seeking to discharge his private student loan, issue an injunction, and hold Navient in contempt.

Navient moved for summary judgement, arguing that Crocker's education loans were nondischargeable. The Bankruptcy Court denied Navient's motion. Navient appealed.

HOLDING: Reversed and remanded.

REASONING: Navient argued that Crocker's education loans were nondischargeable in bankruptcy under 11 U.S.C. §523(a)(8)(A)(ii) because the language of the statute plainly included private student loans.

Crocker's private loan did not qualify as an obligation to repay funds received as an educational benefit, scholarship, or stipend.

The court rejected Navient's argument, holding that the 11 U.S.C. §523(a)(8)(A)(ii) exception to discharge applies to educational benefits with conditional repayment, similar to scholarships or stipends. The court held that Crocker's private loan did not qualify as an obligation to repay funds received as an educational benefit, scholarship, or stipend, because the unconditional repayment nature of Crocker's loan made it distinct from those listed under the statute. Accordingly, Crocker's loan may be dischargeable.

DUNNING LETTER'S USE OF THE WORD "MAY" COULD BE MISLEADING

Heredia v. Capital Mgmt. Serv. L.P., ____ F.3d ____ (7th Cir. 2019).
https://law.justia.com/cases/federal/appellate-courts/ca7/19-1296/19-1296-2019-11-08.html

FACTS: Defendant-Appellee Capital Management Services, L.P. ("CMS") sent out four collection letters to its debtor, Plaintiff-Appellant Mabel Heredia, hoping to collect past-due debts. The letters from CMS, which proposed a payment plan, stated that "Discover may file a 1099-C form," and that "[s]ettling a debt for less than the balance owed may have tax consequences." Heredia filed suit, claiming that the 1099-C clause in the collection letters violated the FDCPA.

CMS filed a motion to dismiss. The trial court granted CMS's motion. Heredia appealed.

HOLDING: Reversed and remanded.

REASONING: Heredia argued that the phrase "Discover may file a 1099-C form" violated section 1692e of the FDCPA because CMS used "misleading" representations in connection with the collection of debt.

The court agreed with Heredia, holding there to be material differences between the statements "may file a 1099-C form" and "may have tax consequences." The tax consequences warning was literally true and not misleading, because settlement may or may not have tax consequences depending on the financial situation of the debtor.

However, the court held that while it was not technically illegal or impossible for Discover to file a 1099-C form with the IRS for an amount under $600.00, Discover would never realistically file a 1099-C form if not required by the IRS to do so. This is because under no circumstances would Discover be forgiving at least $600.00 in principal in this case. The court held this information was within the knowledge of the creditor. Accordingly, the court held that the dunning letter's use of the word "may" could be both literally true and still misleading.

MORTGAGE ASSIGNEES AND LOAN SERVICING COMPANIES ARE NOT DEBT COLLECTORS UNDER THE FDCPA IF THE DEBT WAS NOT IN DEFAULT AT THE TIME IT WAS ASSIGNED

DEFENDANTS DID NOT ENGAGE IN CONDUCT THAT IS WRONGFUL UNDER THE TDCA

PLAINTIFF IS NOT A CONSUMER BASED ON A DTPA CLAIM ARISING OUT OF A LOAN MODIFICATION

Thompson v. Fay Servicing, LLC, ____ F. Supp. 3d ____ (N.D. Tex. 2019).
https://scholar.google.com/scholar_case?case=9546088977373651590&q=thompson+v.+fay+servicing,+llc,&hl=en&as_sdt=6,44&as_vis=1

FACTS: Plaintiffs Lyndon and Paula Thompson refinanced their home loan with Defendant Fay Servicing, LLC ("Fay"), and executed an adjustable rate note ("Note") secured by a deed of trust ("DOT") with World Savings Bank, FSB. The DOT's terms required Plaintiffs to pay the Note's principal and interest, as well as any fees and charges when due. The Note provided that the lender may sell the Plaintiffs' property to enforce the DOT if Plaintiffs failed to make payments as they become due or fail to comply with any condition of the DOT.

Plaintiffs later filed for Chapter 13 bankruptcy and the successor of World Savings, Wells Fargo Bank, offered Plaintiffs a temporary Home Affordable Modification Trial Period Plan ("Trial HAMP"), under which Plaintiffs would make monthly payments while a permanent modified monthly payment ("Permanent HAMP") was calculated. After a bankruptcy court approved Plaintiffs' request to incur additional debt to modify their mortgage loan, Fay notified Plaintiffs that they were approved for a Permanent HAMP with different terms from the Trial HAMP. Plaintiffs refused the Permanent HAMP and expressed their desire to remain on the Trial HAMP. Plaintiffs later became delinquent in their responsibilities on the Note. Fay notified Plaintiffs of their delinquency and demanded payment in order to cure the default. Plaintiffs failed to respond and Defendants sent Plaintiffs an acceleration of the Note, which informed Plaintiffs of a trustee sale of their property to Defendant U.S. Bank.

Plaintiffs filed suit alleging multiple causes of action, including violations of the FDCPA, TDCA, and DTPA. Defendants moved for summary judgment on all claims.

HOLDING: Motion granted.

REASONING: Plaintiffs argued that Defendants violated multiple provisions of the FDCPA. The court rejected Plaintiff's arguments without reaching the merits of Plaintiff's FDCPA claim because, as the court held, Defendants were not debt collectors within the meaning of the FDCPA. Defendants, as a mortgage assignee and a loan servicer, were each involved with the loan before its official default. Therefore, they were not debt collectors.

Defendants, as a mortgage assignee and a loan servicer, were each involved with the loan before its official default.

Next, Plaintiffs argued that Defendants violated the TDCA by collecting or attempting to collect unauthorized interest or incidental fees, and by misrepresenting the character, extent, or amount of a consumer debt. The court also rejected this argument, stating that Plaintiffs appeared to have misunderstood the legal effect of the Trial HAMP. The court held that the Trial HAMP was provided as a trial period that required Plaintiffs to continue payments. The Trial HAMP clarified that "a new principal balance" would be calculated at the end of the trial period and would collect any past-due payments to the mortgage loan balance. The court reasoned that when Defendants presented Plaintiffs with the proposed Permanent HAMP, Plaintiffs did not have the luxury of choosing between the Permanent HAMP and the Trial HAMP because, by the terms of the Trial HAMP itself, the Trial HAMP was temporary and a new principal balance that included certain fees and interest was forthcoming. Furthermore, Plaintiffs presented no evidence indicating the Trial HAMP was not temporary, that Defendants represented the Trial HAMP would continue after the Permanent HAMP was calculated, or that Defendants represented that the Trial HAMP would be the same as the Permanent HAMP.

Finally, Plaintiffs argued that they qualified as consumers under the DTPA because their claim arose from a loan modification. The court rejected this argument, holding that Plaintiffs (1) were not consumers within the meaning of the DTPA and (2) presented no evidence that indicated the refinancing and subsequent loan modification negotiations were anything but pure loan transactions. Additionally, the court held that whether Plaintiffs were consumers under the TDCA was irrelevant, as their TDCA claim had already failed on its merits, and thus could not be used to establish consumer status for a DTPA claim.

ARBITRATION

INAPTLY TITLED ARBITRATION NOTICE UNENFORCEABLE

Velasquez-Reyes v. Samsung Elecs. Am., Inc., 777 F.App'x. 241 (9th Cir. 2019).
https://law.justia.com/cases/federal/appellate-courts/ca9/17-56556/17-56556-2019-09-17.html

Samsung Elecs. Am., Inc. v. Ramirez, 777 F.3d 243 (9th Cir. 2019).
https://law.justia.com/cases/federal/appellate-courts/ca9/18-16094/18-16094-2019-09-17.html

FACTS: Plaintiff Dulce Velasquez-Reyes purchased a Samsung Galaxy S7 ("S7") from her cellular service provider, citing advertisements promising the phone would be waterproof. Upon purchase, Velasquez-Reyes failed to see the notice printed on the back of the S7 box and the packaging sleeve. Page 19 of the included warranty guide provided an arbitration notice. Velasquez-Reyes did not opt out of the arbitration agreement. After the purchase, Velasquez-Reyes inadvertently dropped the S7 in water, causing it to malfunction. Samsung refused to repair the S7.

Plaintiff Daniel Ramirez purchased a Samsung Galaxy S7, which came with a warranty guide similar to that in the case of Velasquez-Reyes. The S7 later exploded and burnt Ramirez.

Velasquez-Reyes and Ramirez separately filed suit. In each case, the trial court denied Samsung's motion to compel arbitration. Samsung appealed both cases.

HOLDING: Affirmed.

REASONING: Samsung argued that California courts have adopted the "in-the-box" theory of assent, and that it applied to these cases.

The court rejected Samsung's argument, citing *Norcia v. Samsung Telecomms. Am., LLC*, which held that inaction or silence does not constitute acceptance of a contract under California law. The court noted that an offeree may show acceptance of a contract through conduct, unless the contractual provisions are deemed "inconspicuous" and "contained in a document whose contractual nature is not obvious."

Because the booklet containing the terms and conditions was inaptly titled and the smartphone's packaging contained only vague reference to the terms and conditions, the court concluded that Samsung did not sufficiently put the reasonable consumer on notice of the arbitration provision.

BANKRUPTCY DISCHARGE VIOLATION NOT SUBJECT TO ARBITRATION

Henry v. Educ. Fin. Serv., ____ F.3d ____ (5th Cir. 2019).
http://www.ca5.uscourts.gov/opinions/pub/18/18-20809-CV0.pdf

FACTS: Appellee Stephanie Henry borrowed money from the predecessor of Appellant Educational Financial Service, a division of Wells Fargo. Henry later filed for Bankruptcy under Chapter 13 of the Bankruptcy Code. The bankruptcy court confirmed Henry's Chapter 13 plan and entered a discharge order. However, Wells Fargo continued to correspond with Henry's attorney.

Wells Fargo's correspondence prompted Henry to initiate an adversary proceeding in bankruptcy court, claiming that Wells Fargo violated the bankruptcy court's discharge order by attempting to collect discharged debt. Wells Fargo moved the bankruptcy court to compel arbitration under the FAA. The bankruptcy court denied Wells Fargo's motion.

HOLDING: Affirmed.

REASONING: Wells Fargo argued that the bankruptcy discharge violation was subject to arbitration under the FAA because the Supreme Court's holding in *Epic Systems Corp. v. Lewis* casted doubts on precedents set in *In re National Gypsum Company* and *Shearson/American Express, Inc. v. Mahon*, which held bankruptcy courts have discretion to refuse to compel arbitration in an action to enforce a discharge order. Specifically, Wells Fargo pointed to the Court's statement in *Epic Systems,* that legislative history holds no weight, and argued that it cast doubt on the continued validity of the *Mahon* court's holding that Congressional intent to limit or prohibit waiver of a judicial forum for a particular claim is "deducible from [the statute's] text or legislative history."

The court rejected Wells Fargo's argument that legislative history holds no weight, explaining that the statement in *Epic Systems* that "legislative history is not the law" did not mean that legislative history can never be relevant when interpreting a statute, but merely clarified that the legislative history upon which the dissent relied did not trump the "[l]inguistic and statutory context" identified by the majority.

The court further explained that even if Epic Systems had partially overruled *Mahon*, it would not matter because the court in *National Gypsum* did not rely on legislative history for its holding, but instead looked to the purposes of the Bankruptcy Code. Therefore, *National Gypsum*'s application of *Mahon* remains good law following *Epic Systems*, affording bankruptcy courts the discretion to decline to enforce arbitration clauses.

ARBITRATOR MUST DISCLOSE CONFLICTS OF INTEREST

Monster Energy Co. v. City Beverages, LLC, 940 F.3d 1130 (2019).
http://cdn.ca9.uscourts.gov/datastore/opinions/2019/10/22/17-55813.pdf

FACTS: Respondent-Appellant, City Beverages, LLC, operating as Olympic Eagle Distributing ("Olympic Eagle"), signed a distribution agreement with Monster Energy Company ("Monster"). After Monster terminated the agreement, the parties proceeded to arbitration to determine whether Monster had improperly terminated the agreement. The agreement listed JAMS, an arbitration organization, to decide on a neutral arbitrator. The selected arbitrator disclosed an economic interest in the financial success of JAMS but did not disclose his ownership interest in JAMS nor JAMS's substantial business relationship with Monster. After arbitration ended in Monster's favor, Olympic Eagle discovered the arbitrator's ownership interest in JAMS and JAMS's substantial business relationship with Monster. Monster moved to confirm the arbitration award

Olympic Eagle cross-petitioned to vacate the award. The trial court granted Monster's petition to confirm the award. Olympic Eagle appealed.

HOLDING: Reversed and vacated.

REASONING: Olympic Eagle argued that the weight of arbitrator's undisclosed was sufficient to require vacatur of the award.

The court agreed with Olympic Eagle's argument. The court stated that to support vacatur of an arbitration award, the arbitrator's undisclosed interest in an entity must be substantial, and that entity's business dealings with a party to the arbitration must be nontrivial. The court found that JAMS's relationship to the arbitrator required disclosure, and that vacatur was therefore warranted for two reasons.

First, the relationship required disclosure because the arbitrator's ownership interest was sufficiently substantial. The court reasoned that the ownership interest was substantial because the arbitrator had a right to a portion of profits from all arbitrations, not just the ones that he personally conducted.

Second, the relationship required disclosure because JAMS and Monster were engaged in nontrivial business dealings. The court looked to the rate of business dealings between JAMS and Monster to determine whether or not it was trivial. At a rate of more than one arbitration per month, the court found that the rate of business dealing was not trivial.

The court noted that the ruling does not require automatic disqualification or recusal, only disclosure prior to arbitration concerning the arbitrator's ownership interest and whether the entity conducting the arbitration is engaged in nontrivial business dealings with one or more of the involved parties.

TEXAS SUPREME COURT HOLDS CLASS ARBITRABILITY IS A "GATEWAY ISSUE" TO BE DECIDED BY COURT, NOT ARBITRATOR, ABSENT "CLEAR AND UNMISTAKABLE" CONTRARY AGREEMENT

Robinson v. Home Owners Mgmt. Enters., Inc., ____ S.W.3d ____ (Tex. 2019).
https://www.txcourts.gov/media/1445180/180504.pdf

FACTS: Plaintiffs Nathan and Misti Robinson purchased a house and enrolled in a limited warranty program operated by Defendant Home Owners Management Enterprises ("Home"). After Home failed to resolve construction-related defects in the Robinson's new house, the Robinsons filed suit. The trial court compelled arbitration to resolve the matter, in accordance with the terms of the warranty. Before arbitration, the Robinsons sought to add class action claims against Home to the arbitration proceeding. Home moved to strike the class claims from the arbitration proceeding. The trial court denied Home's motion, but bifurcated the class claims from the original construction defect claims. Ultimately, the arbitrator found for the Robinsons.

The Robinsons then returned to the trial court and filed a putative class action lawsuit against Home. Additionally, the Robinsons demanded that the class claims be arbitrated, relying on the broad nature of the warranty's arbitration provision. Home filed a motion to dismiss, arguing that only a court could make the determination as to whether the arbitration agreement authorized class arbitration. The trial court granted Home's motion. The Robinsons appealed. The intermediate appellate court affirmed the trial court's decision. The Robinsons again appealed.

HOLDING: Affirmed.

REASONING: The Robinsons argued that the court did not need to rule on the issue of whether the availability of class arbitration is a question of arbitrability for the court or the arbitrator because of the breadth of the arbitration clause. Relying on the Texas Supreme Court's holdings in *In re Wood* and *Green Tree Fin. Co. v. Bazzle*, the Robinsons argued that their broadly worded arbitration clauses clearly and unmistakably commit all disputes about class arbitrability to the arbitrator.

Neither the limited warranty nor the addendum contained language clearly and unmistakably delegating arbitrability determinations to the arbitrator.

The court rejected the Robinsons' argument, expressly overruling its decision in *Wood*, stating that the court must first determine whether the arbitrability of class claims is a gateway or subsidiary question. Because class arbitration alters the dispute-resolution bargain, enhancing complexity and multiplicity of claims, the court concluded that it would be improper to assume that parties would want these kinds of claims to be arbitrated. The distinctions between bilateral and class arbitration trigger the principal characteristic of gateway issues. Therefore, the court held that the decision for class arbitration is a question for a court.

The court concluded that neither the limited warranty nor the addendum contained language clearly and unmistakably delegating arbitrability determinations to the arbitrator. Unlike the presumption in *Wood* and *Bazzle*, the court concluded that the presumption in this case favored judicial determination, so contractual silence about who decides arbitrability does not delegate gateway questions to the arbitrator with unmistakable clarity. Accordingly, the court held that the question of arbitrability was to be determined by a court.

MISCELLANEOUS

A SINGLE UNSOLICITED TEXT MESSAGE DOES NOT GENERATE THE HARM NECESSARY TO SUSTAIN TELEPHONE CONSUMER PROTECTION ACT CLAIMS

Saledo v. Hanna, 936 F.3d 1162 (11th Cir. 2019).
https://law.justia.com/cases/federal/appellate-courts/ca11/17-14077/17-14077-2019-08-28.html

FACTS: Plaintiff John Salcedo was a former legal client of Defendant Alex Hanna. Salcedo received a single unsolicited text message from Hanna's law firm. Salcedo filed suit as the representative of a putative class of former clients of Hanna who received other unsolicited text messages from Hanna over the past four years.

Salcedo alleged violations of the Telephone Consumer Protection Act ("TCPA"). Hanna moved to dismiss the complaint for lack of standing. The trial court denied the motion, holding that Salcedo had standing, but allowed Hanna to pursue an interlocutory appeal. The trial court stayed its proceedings pending appeal.

HOLDING: Reversed and remanded.

REASONING: Hanna argued that Salcedo's receipt of a single unsolicited text message was insufficient to establish standing.

The court accepted Hanna's argument, holding that, based on the legislative history of the TCPA, Salcedo failed to allege a concrete injury that established the injury in fact requirement of Article III standing.

The court held that, although the TCPA created a private right of action, that private right of action alone did not create standing.

The court held that, although the TCPA created a private right of action, that private right of action alone did not create standing. In addition to failing to show that the unsolicited text message had cost Salcedo anything monetarily, Salcedo neither alleged any specific time in which he was unable to use his cell phone because of the text message, nor any specific loss of opportunity due to the text message.

While the court acknowledged that the TCPA is silent on the subject of unsolicited text messages, it held that Congress's legislative history and findings suggested that a single text message is qualitatively different than the types of unsolicited communications about which Congress was concerned when enacting the TCPA.

Happy New Year!

To celebrate the new year, I can't think of anything better than a new issue of the *Journal*. And this issue has something for everyone.

The articles this time deal with a variety of legal issues from the relationship between warranty and the DTPA and the enforceability of arbitration clauses on suits for wage claims, to a recent Seventh Circuit decision challenging 30 years of precedent dealing with the FTC's authority to seek restitution. There also is our most popular article of the year, the "Annual Survey of Texas Insurance Law," discussing all the decisions of the past year. All of this, in addition to the usual Alert Updates, and the Recent Decisions sections.

And with a new year comes my usual reminder 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 matter. While this issue has numerous articles on a variety of subjects, that is not always the case. We rely primarily on you—our readers—to submit things you have written that you feel would be of interest to our readers, and lately submissions have been running slow. 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.

I look forward to reading your submissions, and hope you enjoy reading this issue.

Richard M. Alderman
Editor-in-Chief