

RECENT DEVELOPMENTS

UNIFORM COMMERCIAL CODE

DUTY TO AVOID BREACH OF THE PEACE IS NON-DELEGABLE

REPOSSESSION DID NOT BREACH THE PEACE

Chapa v. Traciers & Assoc., Inc., 267 S.W.3d 386 (Tex. App. – Houston [14th Dist.] 2008).

FACTS: Ford Motor Credit Corp. (“FMCC”) hired Traciers & Associates, Inc. to repossess a white 2002 Ford Expedition owned by Marissa Chapa, who was in default on the promissory note. Traciers directed its field manager, Paul Chambers, to conduct the repossession and gave Chambers an address for Marissa. FMCC, Traciers, and Chambers were unaware the address actually belonged to Marissa’s brother, Carlos Chapa, who owned a similar white 2003 Ford Expedition. Carlos and his wife, Maria Chapa (“Chapa”), were not in default on their loan. Chambers investigated the address, observed Chapas’ white 2003 Ford Expedition, noted the license plate numbers did not match, but could not see the Expedition’s vehicle identification number. Maria Chapa loaded her children into the Expedition. Maria left the keys in the ignition with the engine running while she reentered the house. Chambers towed the vehicle onto an adjacent street before realizing the Expedition’s engine was running. Chambers stopped, noticed the children inside, and returned the Expedition. When Maria returned outside and discovered her children were missing, she called 911 and notified her husband.

Chapas filed suit against FMCC, Traciers, and Chambers for mental anguish, arising from an alleged breach of the peace caused by Chambers while attempting repossession. The trial court found the repossession did not breach the peace and granted summary judgment against the Chapas. Chapas appealed.

HOLDING: Affirmed.

REASONING: In order for Chapas to recover against FMCC and Traciers for mental anguish suffered, they had to establish a breach of the peace occurred. The court examined the breach of the peace elements, both from a criminal law standpoint, as well as from a U.C.C. standpoint. Under Texas criminal law, a breach of the peace includes all violations of the public peace or order. The court recognized this is a broad definition, and whether a specific act constitutes a breach of the peace depends on the surrounding facts and circumstances in the particular case. It was undisputed that Chambers did not behave violently or threaten physical injury to anyone. It was also undisputed Chambers did not know the children were in the vehicle when he towed it. Based on the facts of this case, the court found Chambers’ conduct did not breach the peace under criminal or common law.

Under Texas criminal law, a breach of the peace includes all violations of the public peace or order.

UCC specifically addresses breach of the peace concerning repossession of property, referring to conduct which leads or is likely to lead to an immediate loss of public order and tranquility. The court found no evidence Chambers met with any objections while attempting to repossess the vehicle. To the contrary, Chambers ceased repossession as soon as he learned of the presence of the children. The court found further evidence Chambers was attempting to avoid confrontation by removing a seemingly unoccupied vehicle from a public street when the driver was not present. For these reasons, the court held Chambers’ conduct did not breach the peace in violation of UCC and affirmed the summary judgment of the lower court.

MISCELLANEOUS

U.S. SUPREME COURT REJECTS FEDERAL PREEMPTION

Wyeth v. Levine, 129 S. Ct.1187 (2009).

FACTS: Levine developed gangrene and doctors amputated her arm, after the drug Phenergan was administered to her via the IV-push method. This method involves the drug being injected directly into the vein of the patient. Levine brought a state-law damages action against Wyeth, a manufacturer of Phenergan. Levine alleged Wyeth failed to provide an adequate warning regarding the risks of administering Phenergan by the IV-push method. A jury found for Levine and the Vermont Supreme Court later affirmed. Wyeth appealed to the U.S. Supreme Court.

HOLDING: Affirmed.

REASONING: Wyeth appealed arguing Levine’s failure-to-warn claims were pre-empted by federal law for two reasons: 1)

it was impossible for a manufacturer to comply with both state law duties and its federal labeling duties; and, 2) a manufacturer could not have modified a warning label placed on the drug once it was approved by the FDA, because that would interfere with the purposes and objectives of federal drug labeling regulation. The Court rejected Wyeth’s first argument, because although a manufacturer generally may not change a drug label after the FDA approves a supplemental application, the FDA’s “changes being effected” (“CBE”) regulation permits pre-approval labeling changes improving drug safety. Wyeth could have unilaterally added a stronger warning regarding IV-push administration of Phenergan, and there is no evidence the FDA would have rejected such a labeling change. The Court found it is the manufacturer, rather than the FDA, who bears primary responsibility for drug labeling at all times.

The Court also rejected Wyeth’s second argument as meritless, because the argument relied on an untenable interpretation of congressional intent and an overbroad view of

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an agency's power to pre-empt state law. The Court stated the history of the Food, Drug, and Cosmetic Act ("FDCA"), which governs drug labeling laws, shows Congress did not intend to pre-empt state-law regarding failure-to-warn actions. Congress did not authorize the FDA to pre-empt state law directly and the Court reasoned if Congress wanted state law to be pre-empted it would have written pre-emption into the FDCA. A finding of pre-emption would be at odds with congressional intent and the FDA's own longstanding position that state law is a complementary form of drug regulation. Consistent with the above analysis, the Court affirmed the lower court's decision.

COUNTER-DEFENDANT CANNOT REMOVE UNDER CLASS ACTION FAIRNESS ACT

Palisades Collections L.L.C. v. Shorts, 552 F.3d 327 (4th Cir. 2008).

FACTS: Palisades Collection, L.L.C. brought a state collection action against Charlene Shorts allegedly in connection with unpaid charges for cellular telephone service. Shorts counterclaimed against Palisades under a state consumer protection statute, joined AT&T Mobility, L.L.C. as an additional counter-defendant, and moved for class action certification. Before the state court could rule on Shorts's motion for class action certification, AT&T removed the action to federal court on the basis of diversity jurisdiction and pursuant to the Class Action Fairness Act ("CAFA"). The district court remanded the case back to state court, holding under the general removal statute, a counter-defendant does not have authority to remove a case to federal court. AT&T appealed.

HOLDING: Affirmed.

REASONING: The court found that the term defendant has a narrow meaning and only includes parties against whom the original plaintiff asserts claims. The court held that additional counter-defendants and third-party defendants are not defendants for CAFA purposes. The court addressed AT&T's argument that CAFA expanded the definition by adding a separate removal power. CAFA's language is not broad enough to include additional counter-defendants, simply because it states any defendant without limiting who may remove. The court found no language within the statute, nor any congressional intent indicating the term defendant encompassed additional counter-defendants. Strictly construing the plain language of the entire statute, the court found AT&T did not have the right to remove the case to federal court. Accordingly, the court affirmed the lower court's decision.

PUNITIVE DAMAGES AWARDED ON A 1-1 RATIO

Jurinko v. Med. Protective Co., 305 Fed. App'x. 13 (3d Cir. 2008).

FACTS: Dr. Marcincin and his colleagues misdiagnosed Stephen Jurinko's cancer. Jurinko subsequently filed a medical malpractice action against his doctors in state court. Dr. Marcincin's insurer, Medical Protective Company ("MPC") rejected Dr. Marcincin's request to settle the claim. The case proceeded to trial and the jury awarded Jurinko \$2.5 million in damages, \$1.3 million more than

Dr. Marcincin's coverage. In lieu of paying the excess verdict, Dr. Marcincin assigned his bad faith claim against MPC to Jurinko. Jurinko brought a diversity action in federal district court, alleging bad faith on the part of MPC. The federal jury returned a verdict in favor of Jurinko for \$1,658,345 in compensatory damages and \$6,250,000 in punitive damages. MPC filed a motion for judgment as a matter of law, or in the alternative, for a new trial, citing the amount of punitive damages awarded was excessive and a violation of the due process clause. The federal district court found the award was not unconstitutionally excessive. MPC appealed.

HOLDING: Affirmed as modified.

REASONING: The court reviewed the constitutionality of the punitive damage award. Specifically, the court examined the ratio between compensatory and punitive damages awarded.

The United States Supreme Court has held that when compensatory damages are substantial, a ratio of punitive damages equal to compensatory damages is likely the outermost limit of the due process guarantee.

The Court noted the precise award in any case must be based on the facts and circumstances of defendant's conduct as well as the harm to plaintiff. The award ratio in the present case was 3.13:1. A high ratio does not violate due process if a particularly egregious act resulted in only a small amount of economic damages. The compensatory damages in this case were substantial, and MPC's acts were egregious, but not particularly egregious. Thus, the court reduced the award to reflect a 1:1 ratio.

The court examined the ratio between compensatory and punitive damages awarded.

CREDIT REPAIR ATTORNEY SUSPENDED FOR SIX MONTHS

In re Disciplinary Action Against McCray, 755 N.W.2d 835 (N.D. 2008).

FACTS: Loren McCray was the sole employee of Bradley Ross Law, P.C., a credit repair services firm. Bradley Ross sponsored seminars about improving credit scores. Audience members were invited to sign up with Bradley Ross, with the promise that an attorney would write letters on their behalf to credit agencies. At one of these seminars, Dr. McKenzie signed a contract to enlist Bradley Ross's services. The contract stated she would be charged regardless of the amount of work performed on her file, and she waived her rights to receive copies of the letters sent to creditors on her behalf. McKenzie eventually became concerned about the letters Bradley Ross was sending to credit agencies on her behalf and requested copies. Each letter had McKenzie's name typewritten, but no written signature appeared and Bradley Ross was not identified in the letters. McKenzie thought she was paying for letters from attorneys to credit reporting agencies on Bradley Ross letterhead. The letters stated factual inaccuracies and grammatical errors.

McKenzie filed a complaint with the disciplinary board. The hearing panel found McCray knowingly authorized the use of form letters falsely purportedly written and mailed by the client,

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contained inaccurate client information, and claimed the client did not recognize the accounts on her credit report. The hearing panel found McCray violated numerous provisions of the rules of professional conduct. The panel recommended McCray be suspended from the practice of law for 120 days. Both McCray and the disciplinary board's counsel petitioned for review.

HOLDING: Suspension ordered.

REASONING: The court found the evidence supported all of the hearing panel's findings. In determining the appropriate

The court stated that generally, suspension is appropriate when a lawyer knowingly engages in conduct violating the duty owed to the profession and causes injury or potential injury to a client, the public, or the legal system.

sanction, the court considered the duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating and mitigating factors. The court stated that generally, suspension is appropriate when a lawyer knowingly engages in conduct violating the duty owed to the

profession and causes injury or potential injury to a client, the public, or the legal system.

McCray's intentional conduct adversely reflected on his fitness to practice law and caused injury or potential injury to McKenzie, the public, and the legal system. The hearing panel considered the pattern of misconduct, multiple offenses, refusal to acknowledge the wrongful nature of the conduct, and substantial experience in the practice of law as aggravating factors; the absence of a prior disciplinary record, and full and free disclosure as mitigating factors. Considering the multiple offenses and McCray's refusal to acknowledge the wrongful nature of his conduct, the court suspended McCray from the practice of law for six months and one day, and ordered him to pay the full costs and expenses of the disciplinary proceeding.

NYC'S CALORIE DISCLOSURE REGULATION ISN'T PREEMPTED

N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114 (2nd Cir. 2009).

FACTS: The New York State Restaurant Association ("NYSRA") challenged the constitutionality of the 2008 revised New York City Health Code regulation, requiring roughly 10% of restaurants in NYC to post calorie content information on their menus and menu boards. NYSRA contended the regulation was unconstitutional because it was preempted by federal law, the Nutrition Labeling and Education Act of 1990 ("NLEA"). The district court concluded the regulation was preempted. NYC's Board of Health repealed and modified the regulation, reasoning the regulation was not preempted by NLEA because it explicitly left to state and local governments the power to impose mandatory nutrition labeling by restaurants. The district court rejected NYSRA's preemption challenge, and granted NYC's motion for summary judgment. NYSRA appealed.

HOLDING: Affirmed.

REASONING: The court rejected NYSRA's challenge to the regulation because the court concluded that it was not preempted by NLEA. Under the Supremacy Clause of the U.S. Constitution, state laws that conflict with federal law are without effect and are preempted. Congress' purpose is the ultimate touchstone in every pre-emption case. In contending the district court erred, NYSRA argued that the regulations compelled the conclusion that while NYC was free to require restaurants to disclose nutrition information, it could do so only if its regulations were identical to federal regulation of such information. The court did not agree. It was the court's view that Congress intended to exempt restaurant food from the preemption sections necessary to allow food to be sold interstate. In requiring chain restaurants to post calorie information on their menus, NYC merely stepped into a sphere that Congress intentionally left open to state and local governments. The court affirmed the lower court's decision.