

RECENT DEVELOPMENTS

MISCELLANEOUS

CHAPTER 33, WHICH ALLOWS A DEFENDANT TO DESIGNATE A PERSON AS A RESPONSIBLE THIRD PARTY, APPLIES TO TELEPHONE CONSUMER PROTECTION ACT CLAIMS AND STATE CLAIMS UNDER SECTION 305.053 OF THE TEXAS BUSINESS AND COMMERCE CODE

DEFENDANTS' MOTION TO DESIGNATE PLAINTIFF AS A RESPONSIBLE THIRD PARTY IS DENIED

Guadian v. Debtblue LLC, 2024 U.S. Dist. LEXIS 6399 (W.D. Tex. 2024)

<https://casetext.com/case/guadian-v-united-tax-def>

FACTS: The case involves a dispute between Debtblue LLC, Defendant, and Guadian, Plaintiff, over claims arising under the Telephone Consumer Protection Act (TCPA) and state claims under Section 305.053 of the Texas Business and Commerce Code.

Debtblue LLC sought to invoke Chapter 33 of the Texas Civil Practice and Remedies Code, which permits defendants to designate a person as a responsible third party in certain tort actions. Specifically, Debtblue LLC filed a motion to designate the plaintiff as a responsible third party. The court denied the defendant's motion and that denial forms the crux of the dispute in this case, with the court ruling against the defendant's attempt to invoke Chapter 33 in the context of TCPA claims and state claims under the Texas Business and Commerce Code.

HOLDING: Denied.

REASONING: In their argument, the defendants argued that Chapter 33 of the Texas Civil Practice and Remedies Code should apply to claims arising under the Telephone Consumer Protection Act (TCPA) and state claims pursuant to Section 305.053 of the Texas Business and Commerce Code. They asserted that allowing

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such designation would serve the interests of judicial economy and fairness by apportioning liability among all potentially responsible parties.

However, the court rejected this argument, emphasizing that the application of Chapter 33 to TCPA claims and state claims under Section 305.053 of the Texas Business and Commerce Code was not supported by the language or intent of the statute. The court highlighted the specific statutory framework governing TCPA claims and state claims under Section 305.053, which did not incorporate the provisions of Chapter 33.

Furthermore, the court considered the potential implications of allowing the defendant's motion to designate the plaintiff as a responsible third party. It noted the potential for confusion and procedural complexities that could arise from applying Chapter 33 to claims under distinct statutory schemes. Additionally, the court recognized the importance of maintaining

consistency and predictability in applying procedural rules, which would be undermined by expanding the scope of Chapter 33 to encompass TCPA claims and state claims under Section 305.053.

CLASS ACTION MEMBERS HAVE ARTICLE III STANDING

A REASONABLE CONSUMER COULD UNDERSTAND THE REPRESENTATIONS INDICATE THAT THE PRODUCT WILL HAVE A POSITIVE EFFECT ON DIABETES AND BLOOD SUGAR LEVELS

Horti v. Nestle Healthcare Nutrition, Inc., ___F.3d___ (9th Cir. 2023).

<https://law.justia.com/cases/federal/appellate-courts/ca9/22-16832/22-16832-2023-12-13.html>

FACTS: Plaintiffs purchased BOOST Glucose Control products from Defendant Nestle Healthcare Nutrition, Inc. ("Nestle"). The plaintiffs' purchases were motivated by the representations made in Nestle's labeling and marketing of the product. Aside from including "Glucose Control" in the product's name, Nestle's labels stated the product was "designed for people with diabetes" and claimed to "help manage blood sugar." The product was placed in stores and on websites among other legitimate diabetes treatments. Because of these representations, plaintiffs purchased BOOST Glucose Control despite its high price over comparable products.

Plaintiffs filed a putative class action against Nestle alleging Nestle violated state consumer protection laws by deceptively labeling and marketing BOOST Glucose Control products. The district court dismissed the plaintiffs' case. Plaintiffs appealed.

HOLDING: Reversed and remanded.

REASONING: The plaintiffs argued their complaint was dismissed in error. The plaintiffs claimed that by spending money they would not have spent absent Nestle's misrepresentations, they sufficiently pleaded an injury warranting Article III standing. The plaintiffs asserted Nestle's misrepresentations about BOOST Glucose Control products were likely to mislead a reasonable consumer. Nestle provided contrary interpretations of the product's labels.

The court accepted the plaintiffs' arguments and found the dismissal in error. For Article III standing, plaintiffs must show that (1) they suffered an actual concrete and particularized injury in fact, (2) that was likely caused by the defendant and (3) could be judicially redressed. At the pleading stage, the complaint must establish each element of Article III standing. The court noted that the plaintiffs' purchase of a more expensive product, which they otherwise would not have bought but-for Nestle's representations, established the first element of Article III. The product's price was a tangible economic injury that showed the plaintiffs suffered an actual injury in fact through financial losses that resulted.

The court reasoned that the plaintiffs' allegations that Nestle's representations were likely to mislead consumers met the second element of Article III. The plaintiffs' theory of product

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deception was evaluated under the reasonable consumer test, which required the plaintiffs to show that a significant portion of the public, acting reasonably in the circumstances, could be misled. The court noted the product's name, along with the claims on its labeling, were representations that could lead a reasonable consumer to expect the product to provide some positive benefit on diabetes and managing blood sugar. The court rejected Nestle's contrary interpretations of the product labels because the disagreement could not be appropriately resolved on a motion to dismiss. The court ultimately held that the plaintiffs had Article III standing because they purchased a product at a higher price because of Nestle's representations.

STATE LAW EXTRA-CONTRACTUAL CLAIMS BROUGHT IN CONJUNCTION WITH A FEDERAL NFIP BREACH OF CONTRACT CLAIM ARE PREEMPTED BY FEDERAL LAW

Langston v. Am. Nat'l Prop. & Cas. Co., 2023 U.S. Dist. LEXIS 210926 (S.D. Tex. 2023).

<https://casetext.com/case/langston-v-am-natl-prop-cas-co>

FACTS: Plaintiff Eric Langston's home was insured by Defendant ANPAC for federally funded flood insurance. The previous homeowner transferred a valid flood insurance policy to Langston, which was valid until June 12, 2021. To renew the policy, Langston had to make premium payments either by (1) the expiration date, (2) within 30 days of the expiration date, or (3) after the 30-day grace period but before 90 days after the policy expired. For the third option, there would be a 30-day waiting period beginning on the date that the premium payment was to be received.

The key factor to determine if an interaction with an insurer is “claims handling” is the status of the insured at the time of the interaction between the parties.

Langston received a Renewal Notice in April 2021, with a clear statement that the payment was due by June 12, 2021. Langston did not renew the policy and it expired. ANPAC mailed another notice to Langston stating that the policy expired. Eight months after the policy expiration date, Langston claimed that he did not receive renewal notices and requested reinstatement. ANPAC rejected the request. In response to the rejection, Langston filed a lawsuit for breach of contract, declaratory judgment, and violations of the Texas Deceptive Trade Practices Act (DTPA). ANPAC moved for summary judgment on each cause of action.

HOLDING: Granted.

REASONING: Langston argued that ANPAC represented to sell a product or service with the intent not to sell the product as advertised, which did not constitute “claims handling.” The court disagreed.

The Fifth Circuit has “unmistakably held that state law extra-contractual claims brought in conjunction with a federal NFIP breach of contract claim are preempted by federal law.” See *Grisom v. Liberty Mut. Fire Ins. Co.*, 678 F.3d 397, 401 (5th Cir. 2012). The key factor to determine if an interaction with an

insurer is “claims handling” is the status of the insured at the time of the interaction between the parties. Here, Langston received notices during a non-lapsed insurance policy. As such, the interactions between Langston and ANPAC, including renewals of insurance, are “claims handling” subject to preemption. Therefore, Langston's DTPA claim was preempted by federal law.

FCC HOLDS THAT THE TCPA'S PROHIBITION ONLY APPLIES TO ADVERTISEMENTS SENT TO PHYSICAL FAX MACHINES—NOT TO ADVERTISEMENTS THAT ARE SENT TO FAX NUMBERS RUN BY ONLINE FAX SERVICES.

FOURTH CIRCUIT AGREED THAT PLAINTIFF'S PROPOSED METHOD FOR IDENTIFYING WHICH FAX NUMBERS BELONGED TO STAND-ALONE FAX MACHINES WAS NOT SO FOOL-PROOF TO MEET ITS BURDEN AS TO ASCERTAINABILITY.

IT APPEARS DIFFICULT, IF NOT IMPOSSIBLE, FOR ANY TCPA CLASS ACTION BASED ON UNSOLICITED FAX ADVERTISEMENTS TO MEET THE FOURTH CIRCUIT'S STANDARD.

Career Counseling Inc. v. Amerifactors Fin. Grp., ___ F.3d ___ (4th Cir. 2024).

<https://www.ca4.uscourts.gov/opinions/221119.P.pdf>

FACTS: Plaintiff, Career Counseling, Inc., initiated a putative class action against defendant AmeriFactors Financial Group, LLC. Defendant faxed an unsolicited advertisement to Plaintiff and thousands of other recipients, contravening the Telephone Consumer Protection Act of 1991 (the “TCPA”), as amended by the Junk Fax Prevention Act of 2005. The plaintiff proposed class certification comprising of 59,000 individuals and entities who had received the same fax.

The district court's denial of the Plaintiff's request for class certification and the subsequent appeal by the Plaintiff raised key legal issues. The plaintiff challenged the district court's order and opinion denying their class certification. At the same time, Defendant, in a cross-appeal, contested the court's subsequent order and opinion, awarding summary judgment to Plaintiff on its TCPA claim.

HOLDING: Affirmed.

REASONING: Plaintiff argued that the district court committed legal error under the Hobbs Act deference to the FCC ruling that online fax services are not subject to the TCPA, and that the FCC ruling is no more than an interpretive rule which is not entitled to *Chevron* deference. The court disagreed.

The TCPA deems it unlawful to “send, to a telephone facsimile machine, an unsolicited advertisement.” 47 U.S.C. § 227(b)(1)(C). The court held the TCPA's prohibition applied only to advertisements sent to physical fax machines. The court agreed with the district court that the plain statutory language of the TCPA of an online fax service does not qualify as a “telephone facsimile machine.” The court also affirmed the district court's ruling, limiting the class's membership to stand-alone fax machine users, because not all 59,000 fax machines or services were subject to the TCPA—not all plaintiffs were ascertainable.

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Under the requirement of ascertainability, “a class cannot be certified unless a court can readily identify the class members about objective criteria.” The court explained that the Plaintiff’s factual premise that each of the nearly 59,000 fax recipients was using either a “stand-alone fax machine” or an “online fax service” was insufficient to make the individuals ascertainable. The court stated it would need to make an additional individualized inquiry of each fax recipient to determine if that recipient was a stand-

Fourth Circuit ultimately agreed that the court correctly ruled that the class was not ascertainable and that class certification was inappropriate.

alone fax machine user. While Career Counseling attempted to subpoena telephone carriers to determine fax machine usage, it did not establish whether recipients were using stand-alone fax machines or online fax services, as other factors could influence

fax reception. The court noted because the online recipients can block senders and delete incoming messages without printing them when the machine is an online fax machine, an online fax service is therefore not the same as the stand-alone fax service said to qualify under the TCPA as a “telephone facsimile machine.”

The court held that Plaintiff only demonstrated Rule 23(a) prerequisites of numerosity, commonality, typicality, and adequacy of representation — but had failed to satisfy Rule 23’s implicit requirement of ascertainability. Therefore, the court denied class certification. The Fourth Circuit ultimately agreed that the court correctly ruled that the class was not ascertainable and that class certification was inappropriate.

In conclusion, the Fourth Circuit held that Career Counseling’s proposed method for identifying stand-alone fax machines must be foolproof and meet the ascertainability requirement for class certification. The court affirmed the district court’s denial of Plaintiff’s class certification request.