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WHO TEACHES CONSUMER LAW?

RECENT DEVELOPMENTS

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Articles

Recent Developments

Who Teaches Consumer Law?

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ABSTRACT

This paper reports on a survey of 31 law professors teaching consumer protection law conducted in connection with the Center for Consumer Law & Economic Justice at the UC Berkeley School of Law and the Center for Consumer Law at the University of Houston Law Center's 2024 Teaching Consumer Law Conference. Questions posed in previous surveys at the Teaching Consumer Law Conference focused largely on what topics are covered in consumer law courses. The 2024 iteration of the survey instead explored responding professors' goals in consumer law courses and their experiences with and views on consumer law matters. Among the findings: nearly every respondent saw it as important that students hear arguments the professor disagreed with. While professors generally saw it as important that students learn the legal doctrines, professors as a group saw it as even more important that students learn problem-solving skills, how to work with statutes and regulations, and the policy justifications underlying the rules—suggesting that consumer law professors share the traditional view that a key purpose of law school is to teach students to think like lawyers. Two-thirds of the consumer law professors have represented a consumer in a dispute with a business, while nearly half have represented a business in a consumer matter. Not one professor—not even those who had represented businesses—thought the country had too much consumer regulation while 70% thought it had too little.

Introduction

In May 2024, I surveyed 29 consumer law professors attending the Center for Consumer Law & Economic Justice at the UC Berkeley School of Law and the Center for Consumer Law at the University of Houston Law Center's 2024 Teaching Consumer Law Conference.[1] Two other consumer law professors answered the survey questions after the conference, for a total of 31. Though this is not a large number of responses, it is probably a large share of the number of professors teaching consumer law.[2] The responses shed some light on what consumer law professors think is important when teaching consumer law, as well as some of their own experiences with and views of consumer law issues. Because nearly all the respondents chose to attend a conference on teaching consumer law, they may be more engaged with consumer law courses than some consumer law professors, but for that reason, they may be more inclined to care and think about the issues the survey asked about.

The survey included 22 questions, though not every respondent answered every question. All but one of the questions were multiple-choice; the last question invited respondents to say more about their responses to any of the preceding questions, an invitation only a few respondents accepted. The average time to complete the survey was about 25 minutes. While it is impossible to know how many respondents took breaks from answering the questions, the average response time suggests that respondents gave the questions considerable thought.

Teaching Preferences

As reflected in Figure Four, 13 respondents—or 42%—reported that it is very important that students learn the legal doctrine in their consumer law classes and another 15—or 48%—said it is somewhat important. Unsurprisingly, professors teaching doctrinal courses with an exam were likelier to say that it was very important that students learn the legal doctrine; 64% said it is very important while 36% said it is somewhat important. However, nearly half the professors who teach paper courses also said it is very important, while the others said it is somewhat important. Only one of the six clinical professors saw learning the doctrine as very important while four said it was somewhat important.

As a group, professors thought it was more important that students learn the policy justifications for the rules than the rules themselves. As shown in Figure Seven, 17 thought it was very important to learn the underlying policy justifications, as compared with the 13 who believe it very important that the students learn the rules. Another dozen thought it somewhat important that students learn the policy justifications. Perhaps this emphasis on policy justifications reflects the idea that rules may change, but the policies remain relevant. One professor mentioned that it was more important for the students to retain an understanding of the policies underlying, say, the Truth in Lending Act than TILA's technical rules themselves.

But there were matters that professors thought were more significant than either the legal doctrines or the underlying policies. Thus, on average, respondents thought it more important that students learn problem-solving skills than the legal doctrine in their consumer law classes. Specifically, 23 respondents—or 74%—thought it was very important that respondents learn problem-solving skills, with another half-dozen—or 19%—saying it is somewhat important.[3] The question did not define problem-solving skills, and it is possible, even likely, that those teaching exam courses, paper courses, and clinics all defined it differently. The disparity in views regarding the importance of problem-solving skills is largely attributable to the clinicians, all of whom thought learning problem-solving skills was very important, and to a lesser extent, to those who taught paper courses, of whom 78% called learning problem-solving skills very important. As to the professors teaching exam courses, nine thought problem-solving skills were very important compared to the eight who believed learning legal doctrine was very important.

Similarly, it was more important to professors that their students learn the skills needed to work with statutes and regulations than that students learn the doctrines those statutes and regulations established. Indeed, not one respondent rated that as unimportant, while only one called it neither important nor unimportant; in contrast, 23 saw it as very important, and seven saw it as somewhat important.[4] It may be that professors see the ability to work with statutes and regulations as more important than the legal doctrines because many students who take consumer law courses will not actually practice consumer law after graduating, though they are likely to work with statutes and regulations, a staple of many legal practices. In addition, most law schools give students considerable practice working with caselaw in their first year but less work with statutes and regulations. Consequently, upper-year classes, like consumer law, that are more based on statutory and regulatory law must teach students how to work with statutes and regulations or students will simply not learn those vital skills in law school.

As is true of many subjects, consumer law issues present sharp ideological divisions. Media reports complain that professors attempt to indoctrinate students with only one side of the argument.[5] To see whether this was true of consumer law professors, the survey asked professors how important it is to them that students hear arguments the professors themselves disagree with. As reported in Figure Eight, only one respondent did not see that as important. Indeed, 17 saw it as very important—again, more than those who saw learning legal doctrines as very important—while 13 saw it as somewhat important. Professors may feel hearing both sides is important because law schools teach students how to function in an adversarial system, and effective advocates must be able to anticipate their opponents' arguments. Personally, I don't want the first time my students hear the arguments I disagree with to be in court; I want my students to hear the arguments in class so that they can think about them even if I must make those arguments myself. Or it may be that the media reports exaggerate how often indoctrination occurs in classrooms. And, of course, the survey reports only how professors describe their views, as opposed to what they actually do in the classroom.

As a group, professors thought it was more important that students learn the policy justifications for the rules than the rules themselves.

The survey also asked consumer law faculty whether they would rather teach fewer topics in depth or more topics with less depth. Overall, 42% said they prefer to have their classes evenly divided between more topics and greater depth; 39% said they preferred fewer topics with greater depth; and 19% wanted more topics with less depth.[6] But the overall results mask the fact that professors teaching different kinds of courses had very different preferences. Thus, those teaching exam courses overwhelmingly preferred to have their classes evenly divided between more topics

and greater depth, while clinicians strongly preferred fewer topics with less depth. A third of the professors teaching paper courses preferred more topics, while 56% wanted fewer; only one wanted an even distribution.

In sum, it appears consumer law professors believe that it is more important that their classes teach students how to think like lawyers—how to solve problems and work with statutes and regulations—than that they learn consumer law. The variation in views on depth and breadth of coverage suggests that consumer law professors disagree about the importance of students mastering particular consumer law topics in depth. That is consistent with the finding of previous surveys that consumer law professors differ over what to cover[7]—which in turn suggests that consumer law lacks an agreed-upon core.

Attitudes Towards Consumer Law

The survey asked several questions about the respondents' attitudes toward consumer law. More than 70% of the respondents believe that the United States has not enough or has far too little consumer regulation while just over a quarter think it has the right amount.[8] Not one respondent found the amount of consumer regulation excessive. That view reflects the judgment of those with considerable consumer law expertise and should not be lightly dismissed. However, it may also reflect the paucity of conservative consumer law professors—at least conservative when it comes to consumer protection. Advocates of less regulation tend to be found more in the industry than in consumer law classes. Though I share the view that the country needs more, rather than less, consumer protection, I also believe it would be better if the contrary view were better represented in the legal academy. Even those calling for more regulation would benefit from greater ideological diversity if they had colleagues whose different perspectives might help them identify issues with their writings that others with similar ideological leanings might overlook.

Because disclosure is both a widely used consumer protection device,[9] and also frequently criticized,[10] the survey asked respondents about their view of disclosure. As reflected in Figure 14, no respondents said they thought disclosure is always or never effective. Half thought it was sometimes effective, 13% thought it was usually effective, and just over a third believed it to be rarely effective. ChiChi Wu, an attorney at the National Consumer Law Center, once opined that disclosure is a necessary but insufficient form of consumer protection. Many of the respondents might share that assessment.

The survey also asked why respondents saw disclosure as ineffective. As shown in Figure 15, 70% of the respondents thought that there are two explanations: consumers often do not read disclosures and frequently do not understand them when they do. One respondent believes that the problem lies solely in consumer incomprehension of disclosures while 17% suppose that consumers ignoring the disclosure is the only explanation. Ten percent concluded there was another explanation.

The last question about consumer law faculty attitudes towards consumer matters asked how the respondents believe businesses act when drafting terms that few consumers understand. The consumer law professors were unanimous—the only item on which they were unanimous—in predicting that the businesses would select a term that maximizes the benefit to the business.[11] This may reflect the (perhaps cynical) view that it is rational for an entity to maximize its own benefit if its counterparty is unable to tell which party would gain from writing the contract one way or the other. In the rare case when the consumer understands the term and complains, the business would still have the option of waiving the objectionable term. However, the respondents' unanimous view also suggests that when consumers cannot understand terms, the professors believe a market failure is more likely, so lawmakers should consider intervening in such cases.

Consumer Law Professors Have Represented Both Consumers and Businesses

The survey asked respondents if they had ever represented a consumer in consumer litigation. Two-thirds of them had.[12] The survey also asked whether the respondents had ever represented a business in litigation with a consumer or, in a separate question, whether they had ever drafted a consumer contract for a business. Nearly half—42%—had done one, the other, or both.[13] Recall that every respondent expressed the view that when it comes to terms consumers cannot understand, businesses will maximize their own benefits.[14] That unanimous total obviously included the half dozen respondents who had drafted consumer contracts for businesses.

Consumer Law Professors and Collection Issues

The survey asked respondents if they had had either a medical or non-medical debt go into collection. According to the responses, 42% had. Ten have had a non-medical debt in collection, nine have had a medical debt in collection, and six had both types of debt in collection.[15] If professors who are knowledgeable about consumer law have had such experiences, it becomes easier to understand how consumers with less sophistication about consumer law have had the same happen to them. To some extent, the question is also a proxy for asking if consumer law professors themselves have consumer law problems; obviously, the answers suggest many do.

Consumer Law Professors and Contract Clauses

The survey included three questions about contract clauses, of which two involved arbitration clauses. One such question inquired what respondents would do if they noticed a contract they were contemplating signing included an arbitration clause. More than three-quarters answered that they would agree to the contract even though they objected to arbitration clauses.[16] Only three, or 10%, stated that they do not object to arbitration clauses. Four, or 13% replied that they would search for another business that did not include arbitration clauses in their contracts.

The survey also asked what the respondents would do if the arbitration clause included a right to opt out within a specified period. Many arbitration clauses include such opt-out rights, presumably in an attempt to avoid unconscionability issues.[17] Some courts have, in fact, concluded that such opt-out rights prevent arbitration clauses from being held unconscionable.[18]

Half the respondents said that they would opt out.[19] However, it seems unlikely that many of the respondents would actually follow through with their plan because of the burden it entails. Not only must consumers draft a letter on their own, because firms do not provide forms for opting out, but they must also take the time to mail such a letter, as firms often refuse to accept them via email.

Though publicly available evidence about the number of opt-outs is sparse, it appears few consumers actually opt out of arbitration clauses. While it is possible that consumer law professors represent an exception, it seems unlikely. It is no secret that survey respondents often say they will do one thing when presented with an issue, but when actually presented with that issue, do something else.[20]

Thirty percent of the respondents said that while they object to arbitration clauses, they would not opt out because it is not worth it. That may be because, even if consumers opt out of arbitration clauses, they probably would not be able to satisfy the numerosity requirement to bring a class action because so few other consumers opt out.[21] Or it may be because they think a dispute with any given business is sufficiently unlikely as to make opting out a waste of time. Or both. Two respondents said they would not opt out because they do not find arbitration clauses objectionable; three said they would not opt out for a different reason, though they object to arbitration clauses.

According to the survey, consumer law professors believe it important that students hear both sides on consumer law issues, including arguments that the professor disagrees with.

The third question about contract clauses asked if respondents had "ever been on the verge of agreeing to a consumer contract but then read a contract term that you found objectionable, other than price, and so decided against agreeing to the consumer contract." Thirteen, or 43%, said that they had. Just over a third said that they had not because other companies would be likely to use the same term. Three said that they did not read contracts and so had not discovered such a term.[22] I confess to some surprise that so many had backed out of a transaction for such a reason. I wonder how typical the respondents are of both law professors and, more broadly, Americans in general.

Conclusion

A survey posed to 31 consumer law professors found that many had represented consumers and nearly half had represented businesses in consumer law matters. Despite this diversity of experience, the respondents were unanimous in concluding that the United States does not have too much consumer regulation. According to the survey, consumer law professors believe it important that students hear both sides on consumer law issues, including arguments that the professor disagrees with—which is inconsistent with media reports about professors indoctrinating students. Many professors thought it more important that students learn problem-solving skills, the skills needed to work with statutes and regulations, and the policies underlying rules than the rules themselves.

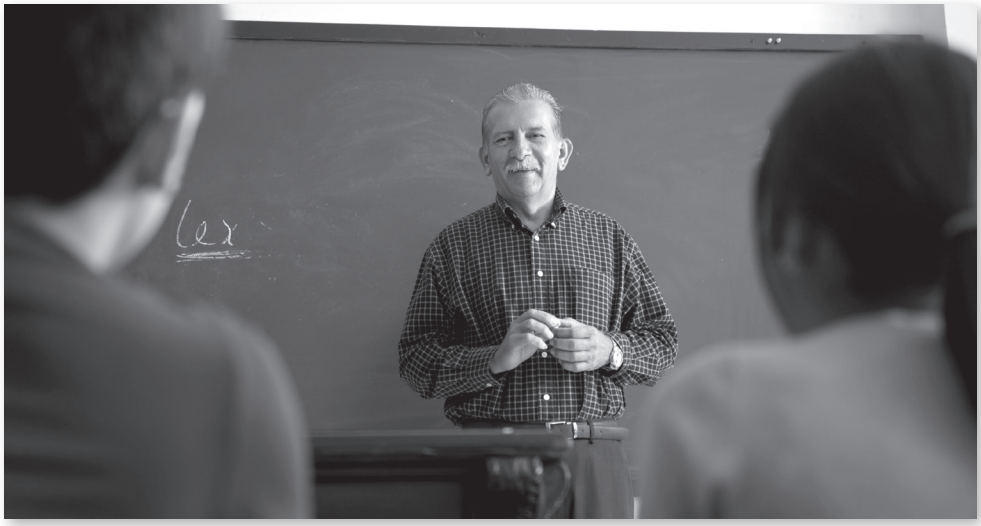
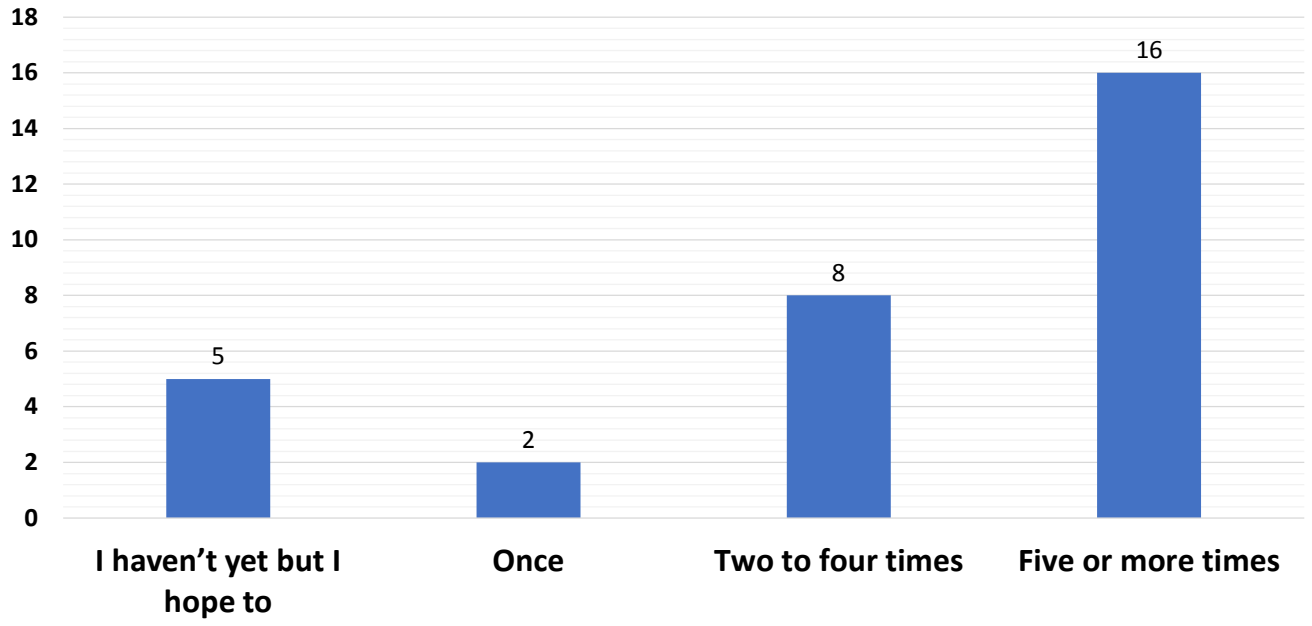


FIGURE 1



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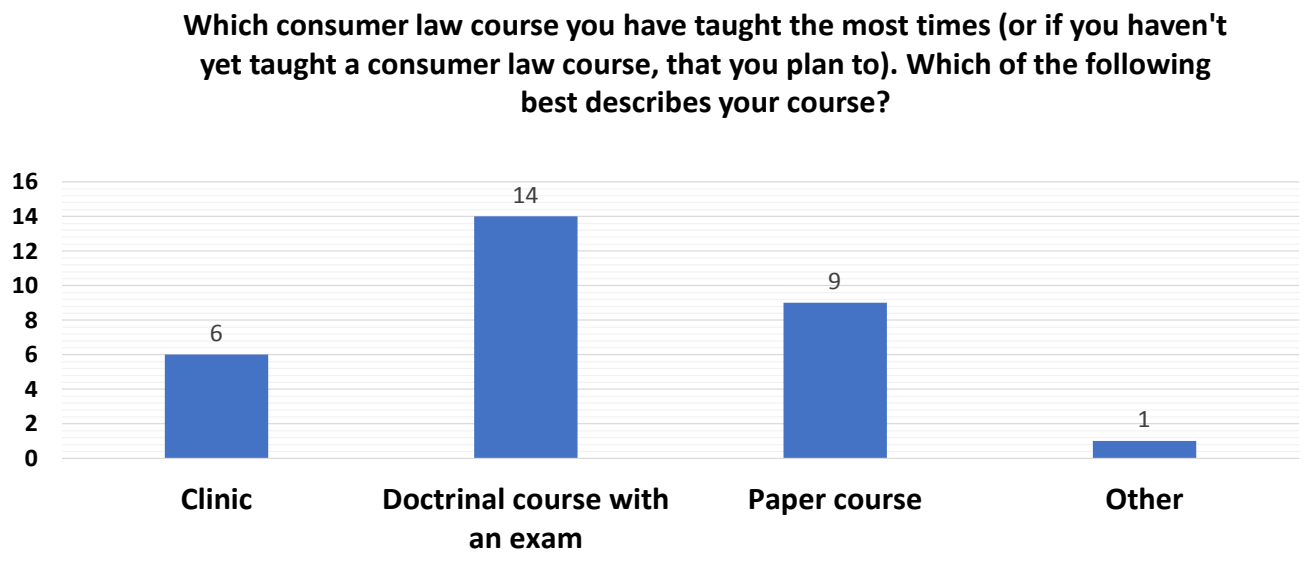

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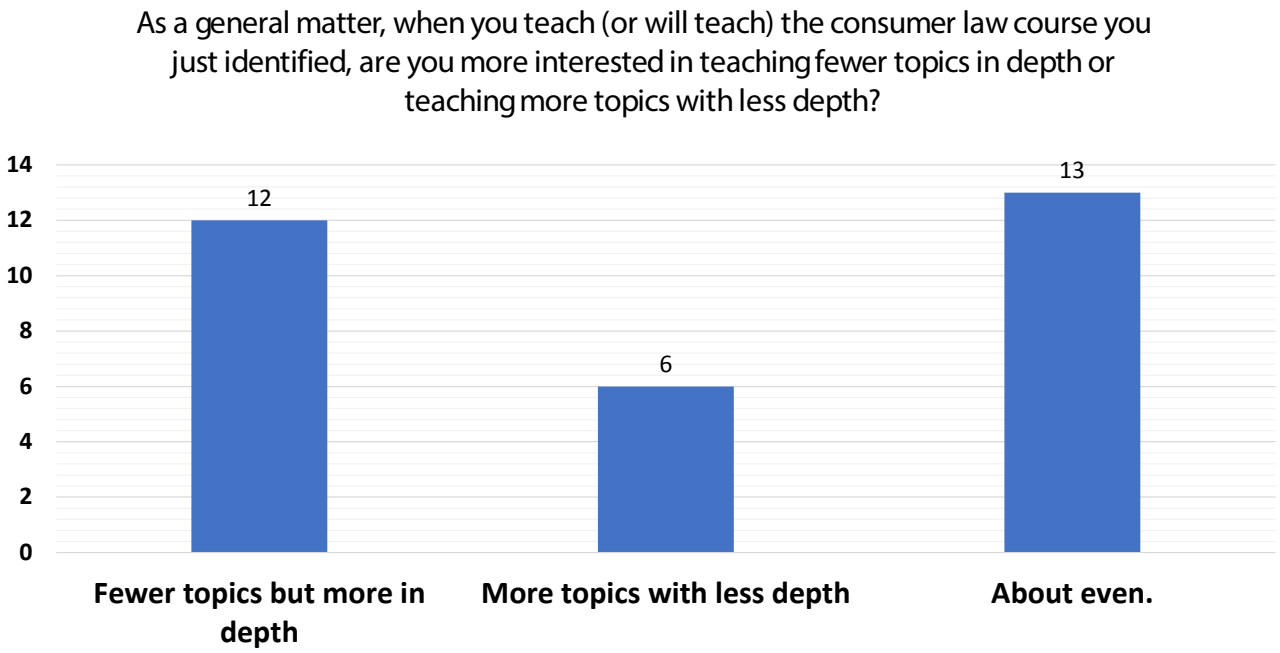

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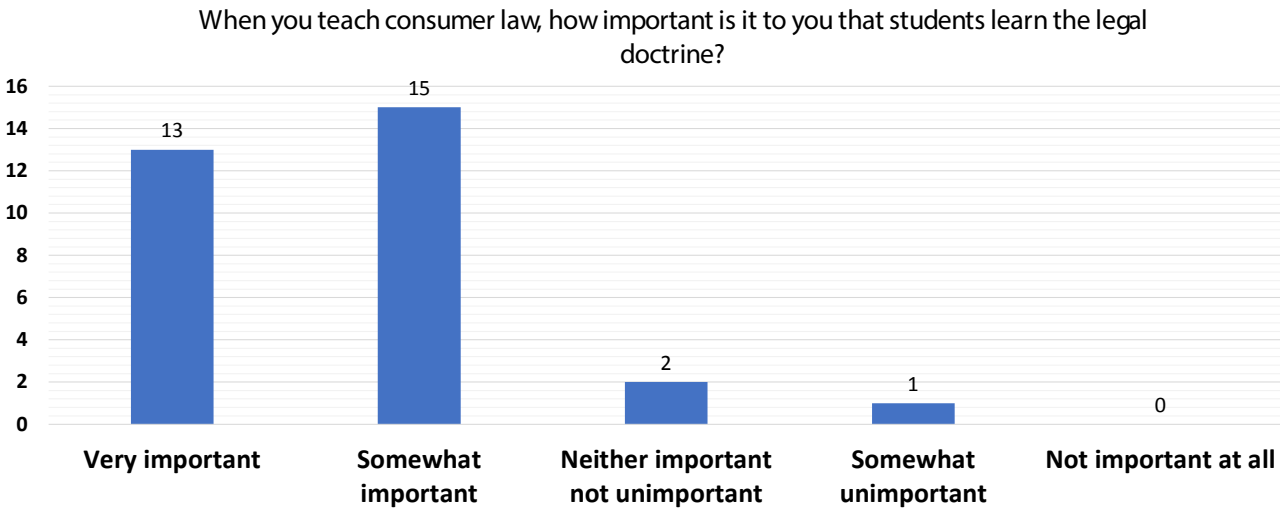

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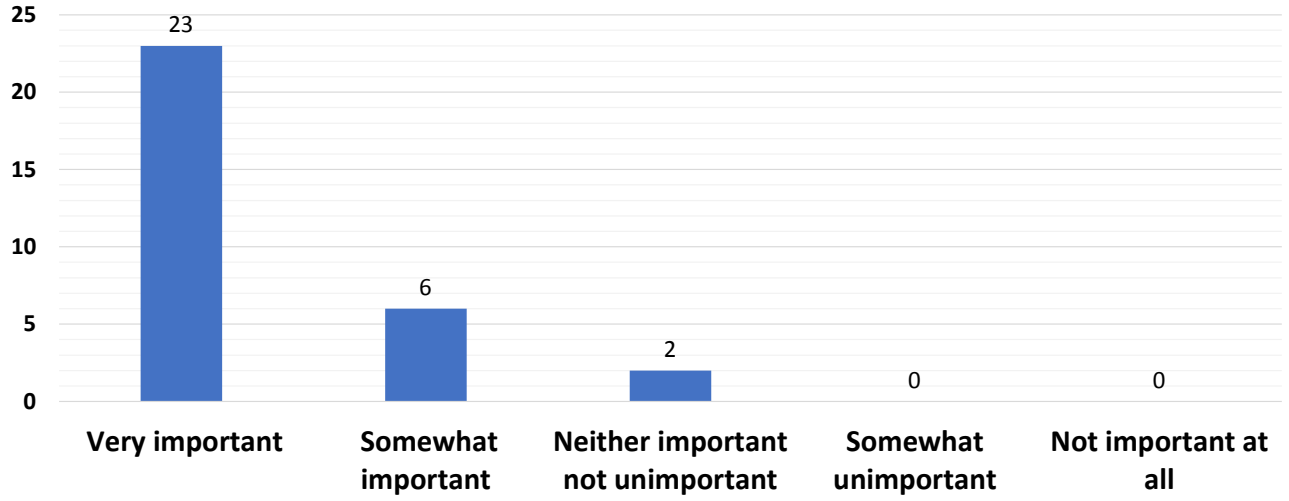

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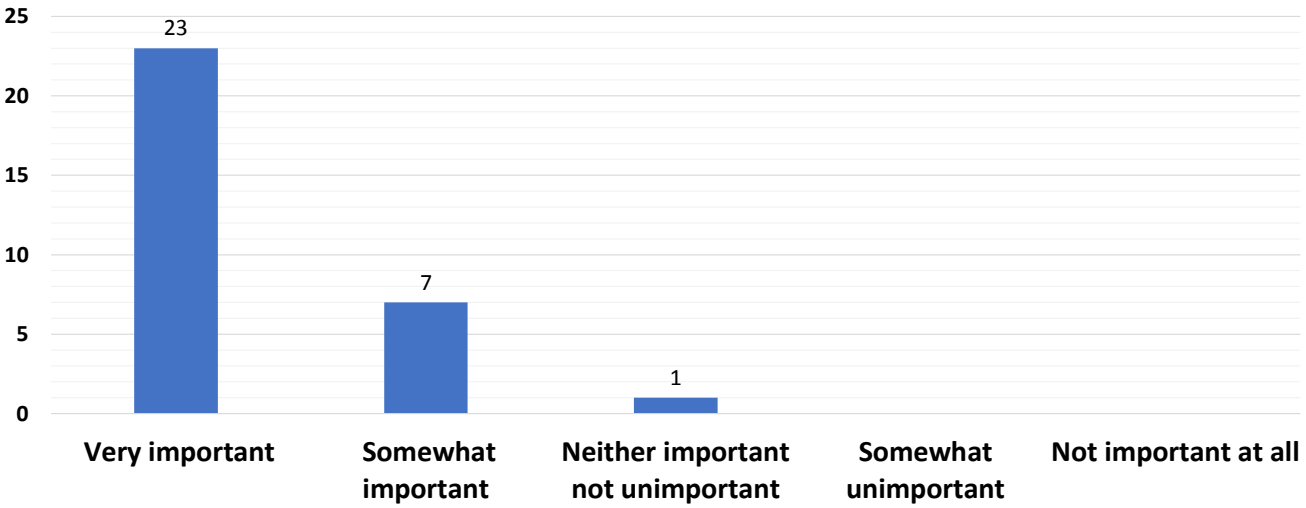

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FIGURE 7

When you teach consumer law, how important is it to you that students learn policy justifications for the rules?

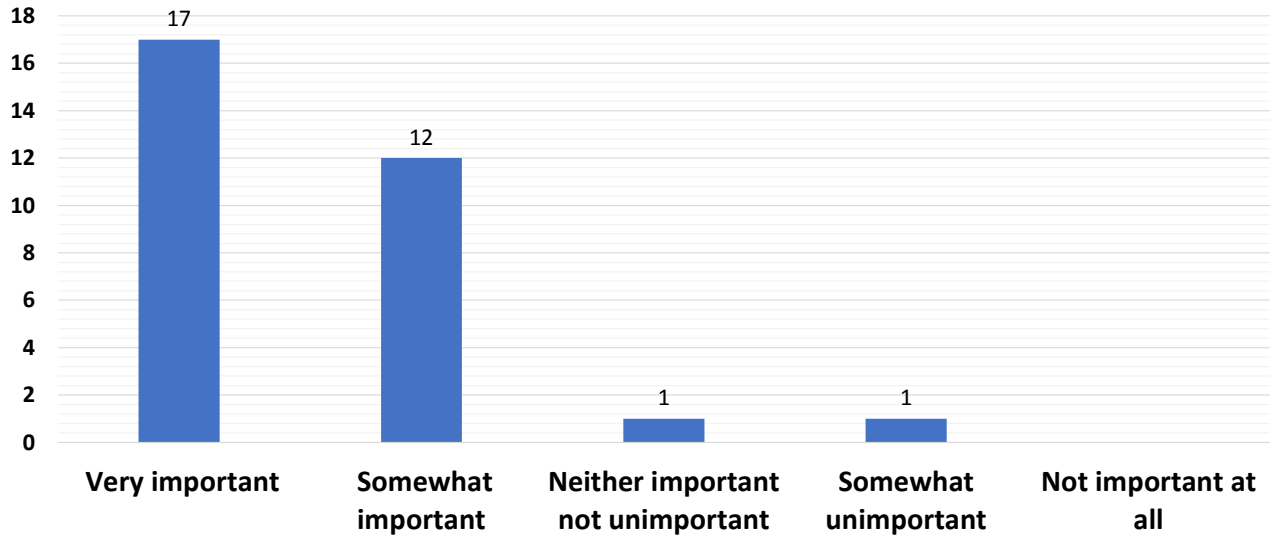
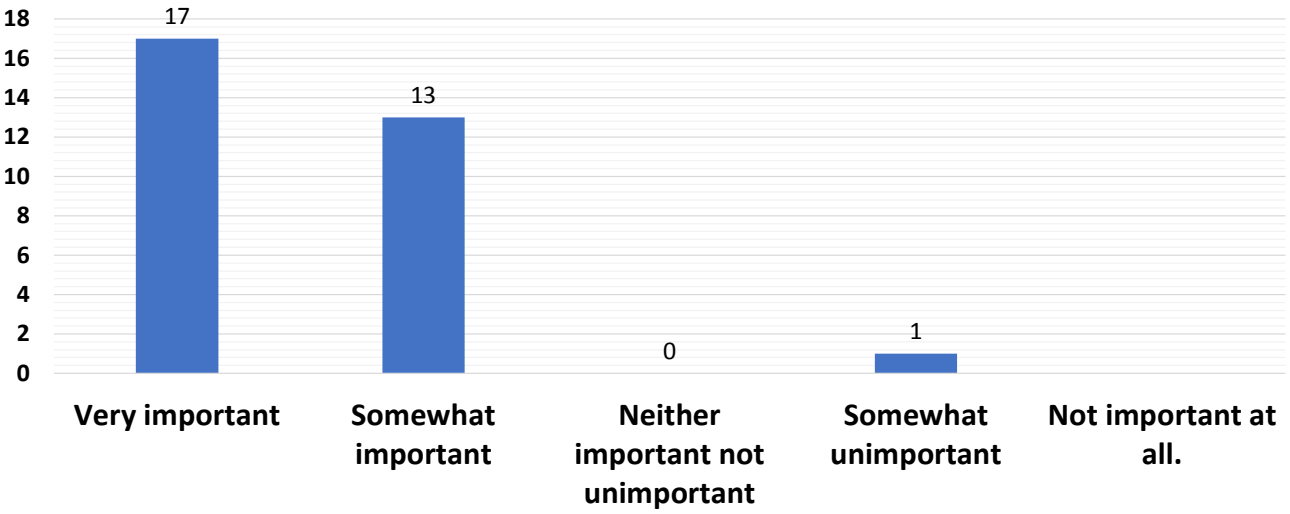


FIGURE 8

When you teach consumer law, how important is it to you that students hear arguments that you yourself disagree with (e.g., if you discuss the pros or cons of payday lending regulation, that students hear both about consumers getting caught in debt traps



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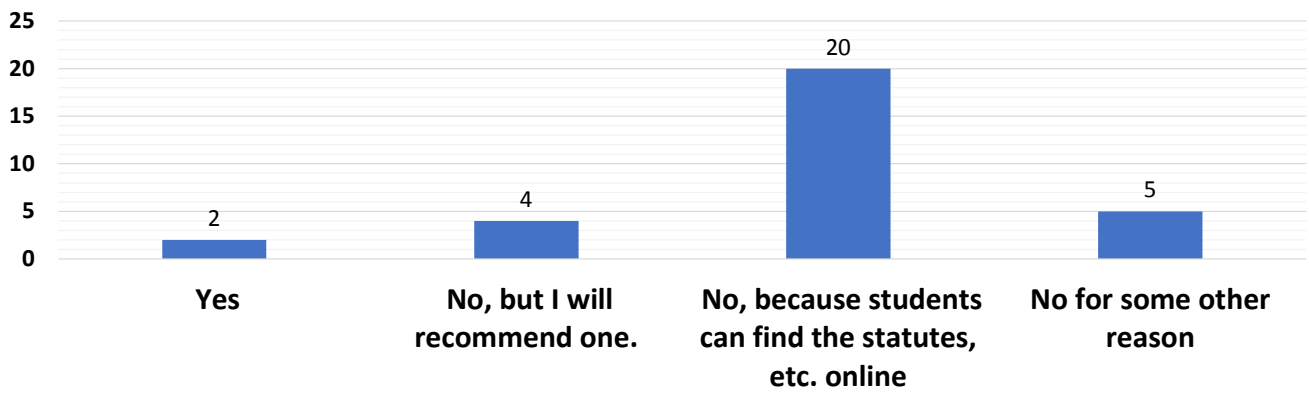

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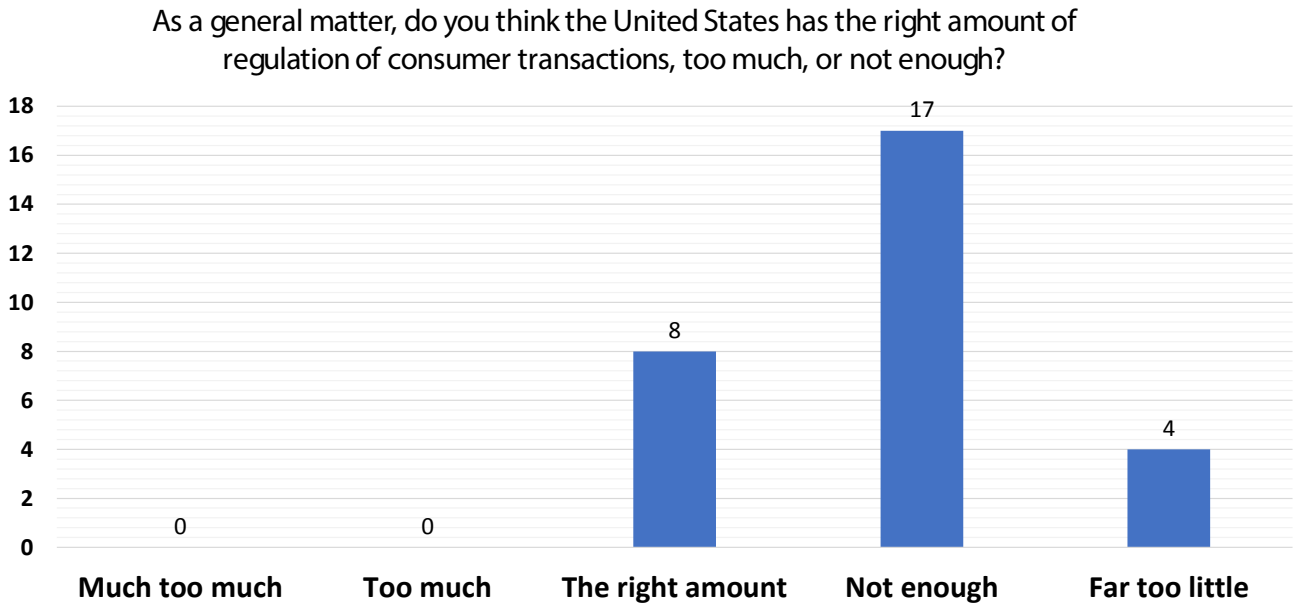

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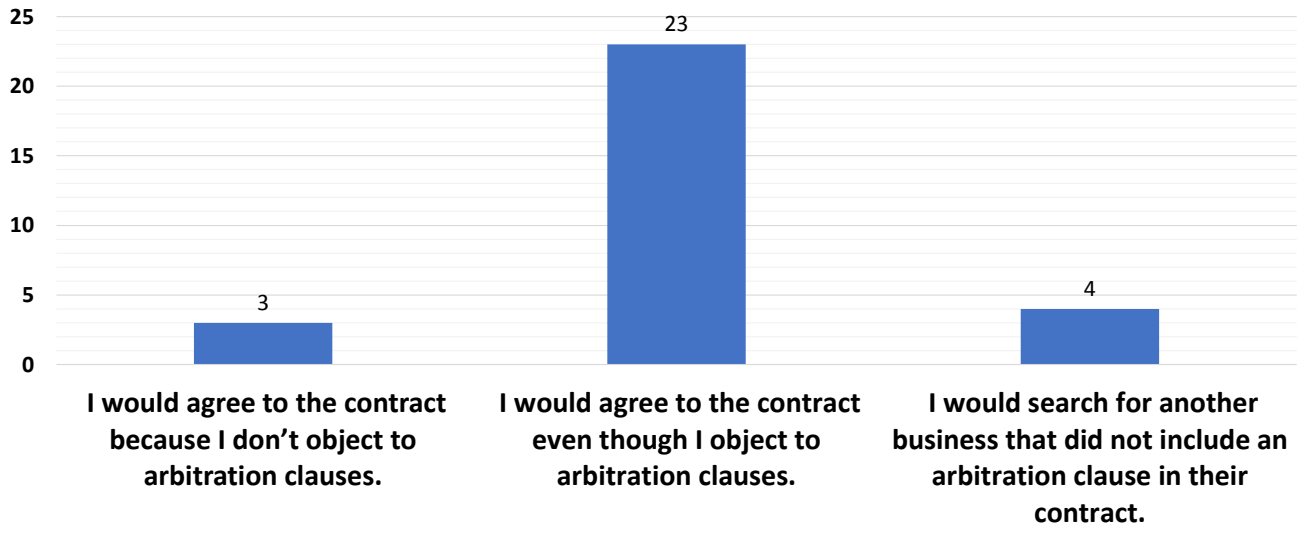

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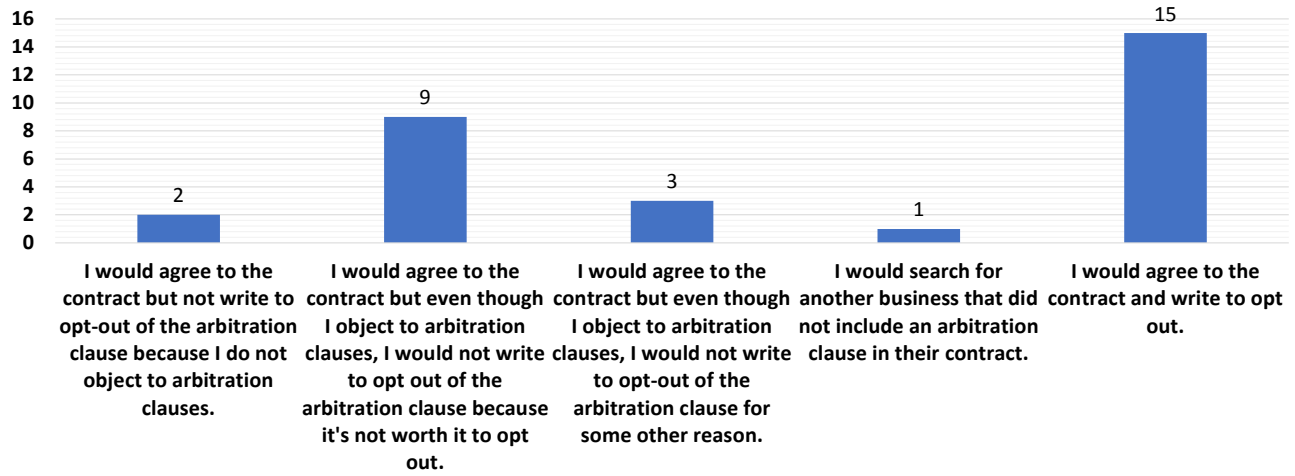

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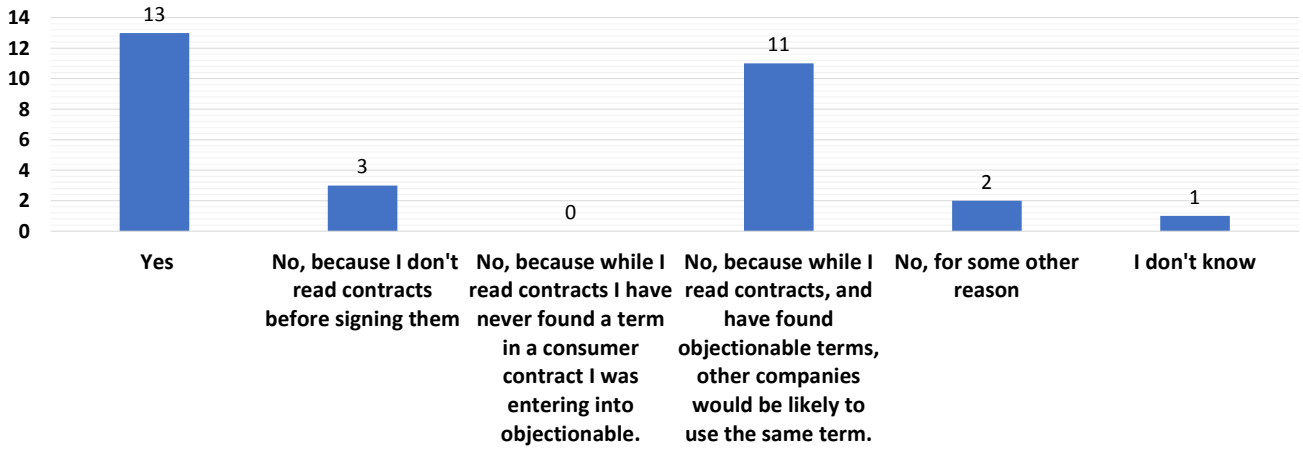

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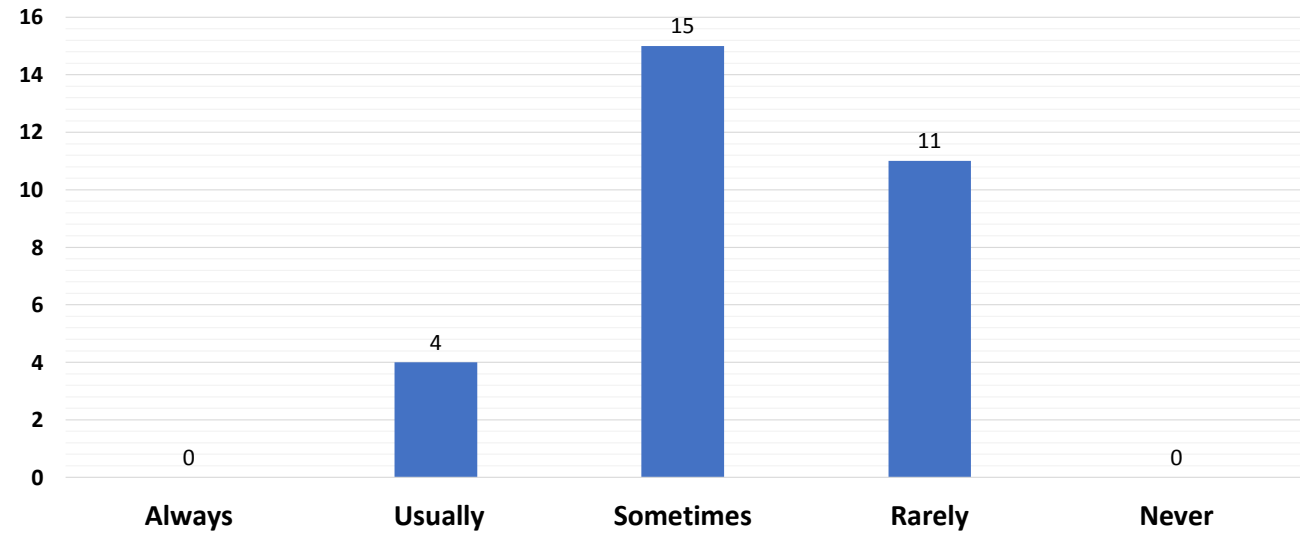


FIGURE 15

If you think disclosure is at least sometimes not an effective consumer protection device, why do you think it is not?

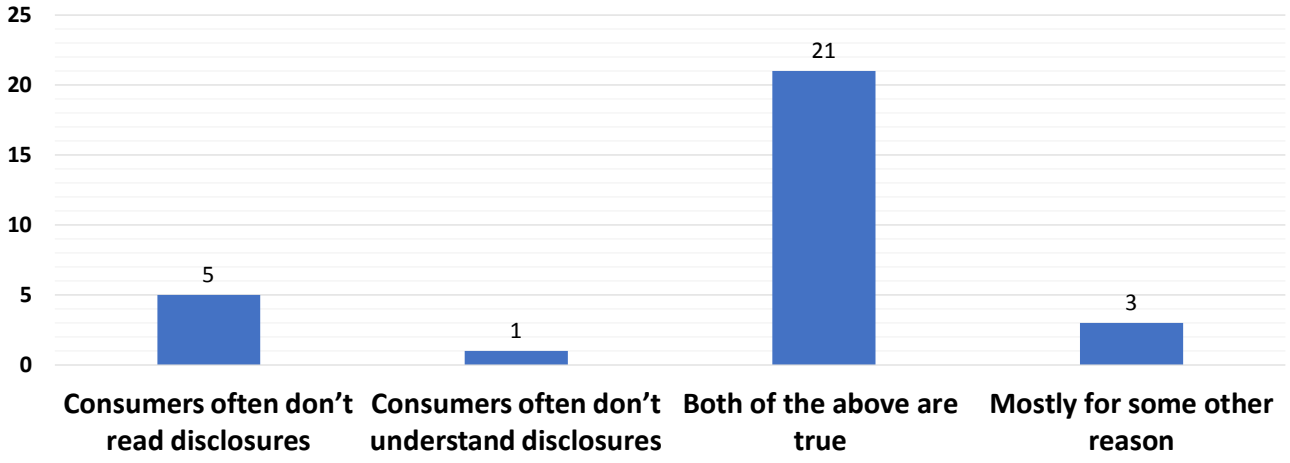
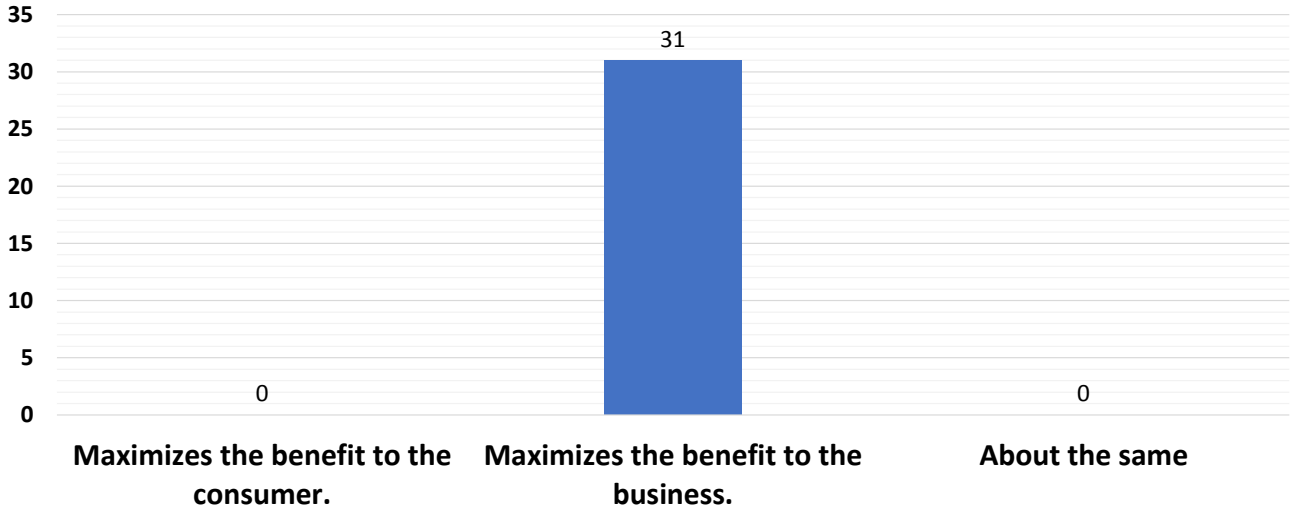


FIGURE 16

When it comes to terms that few consumers understand, would you guess businesses usually choose the contract term for their contract which:



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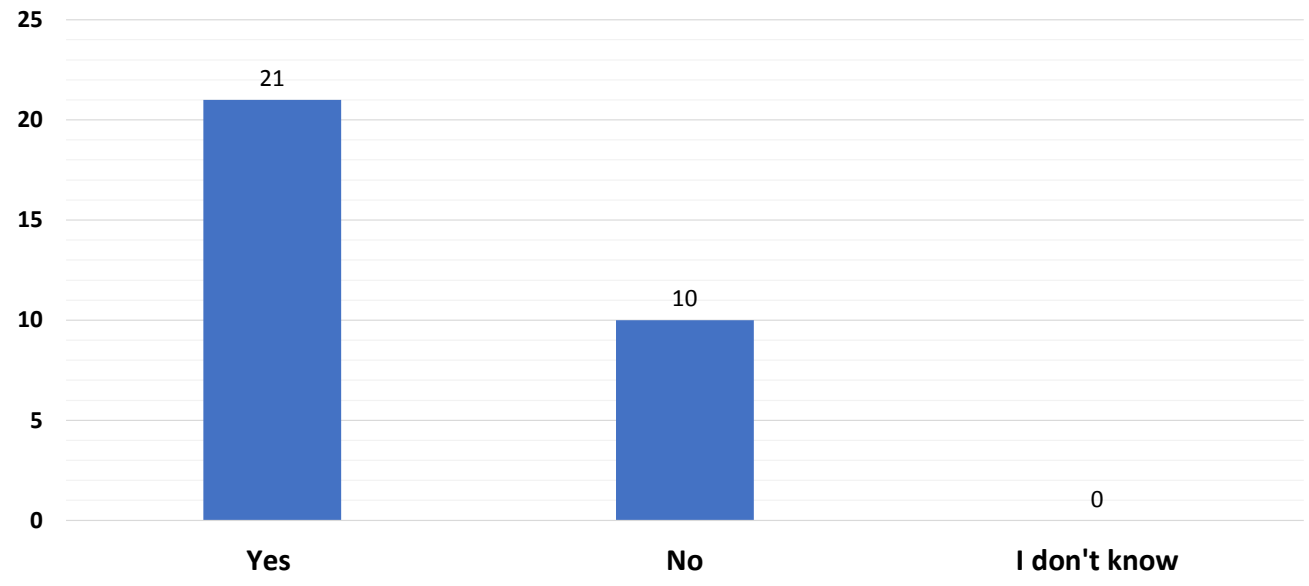

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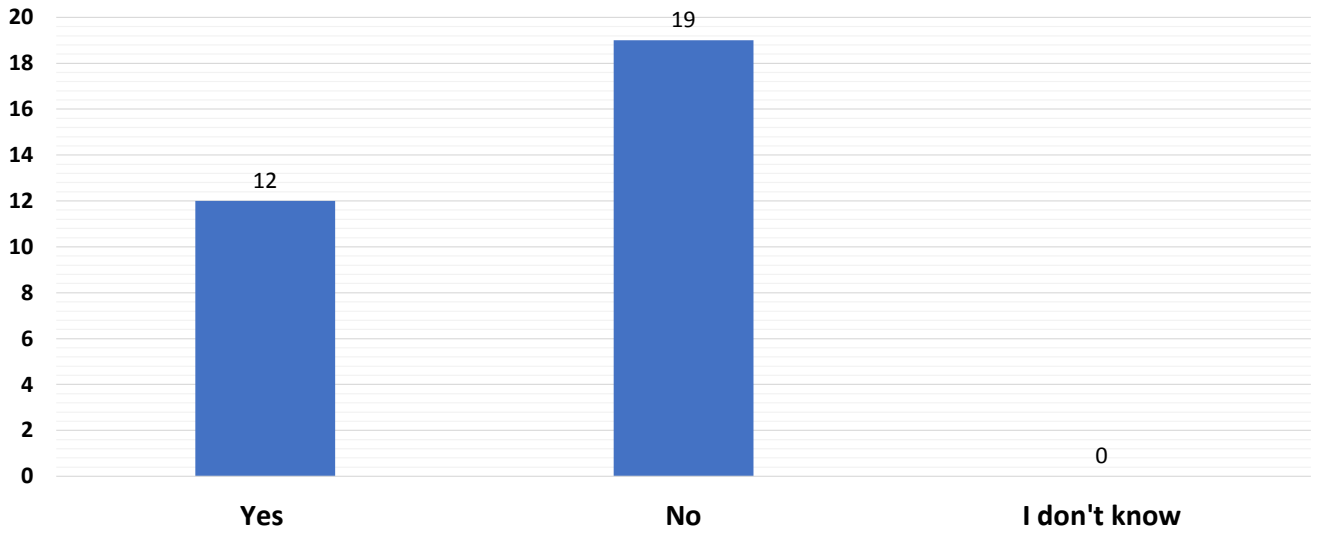

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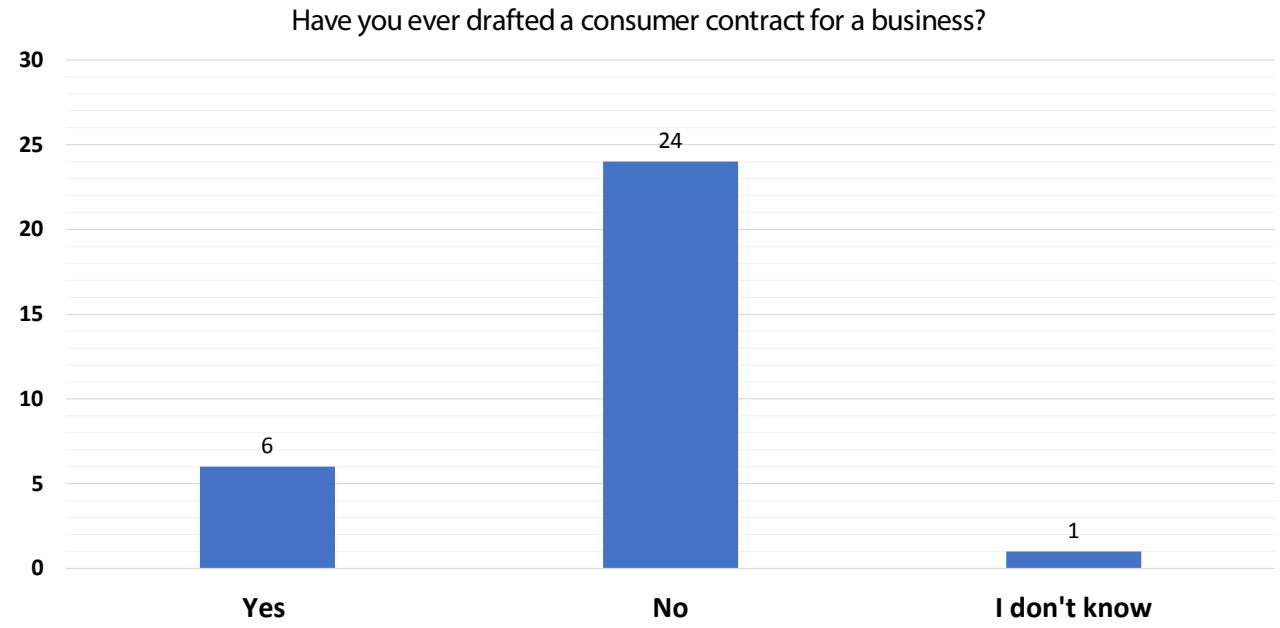

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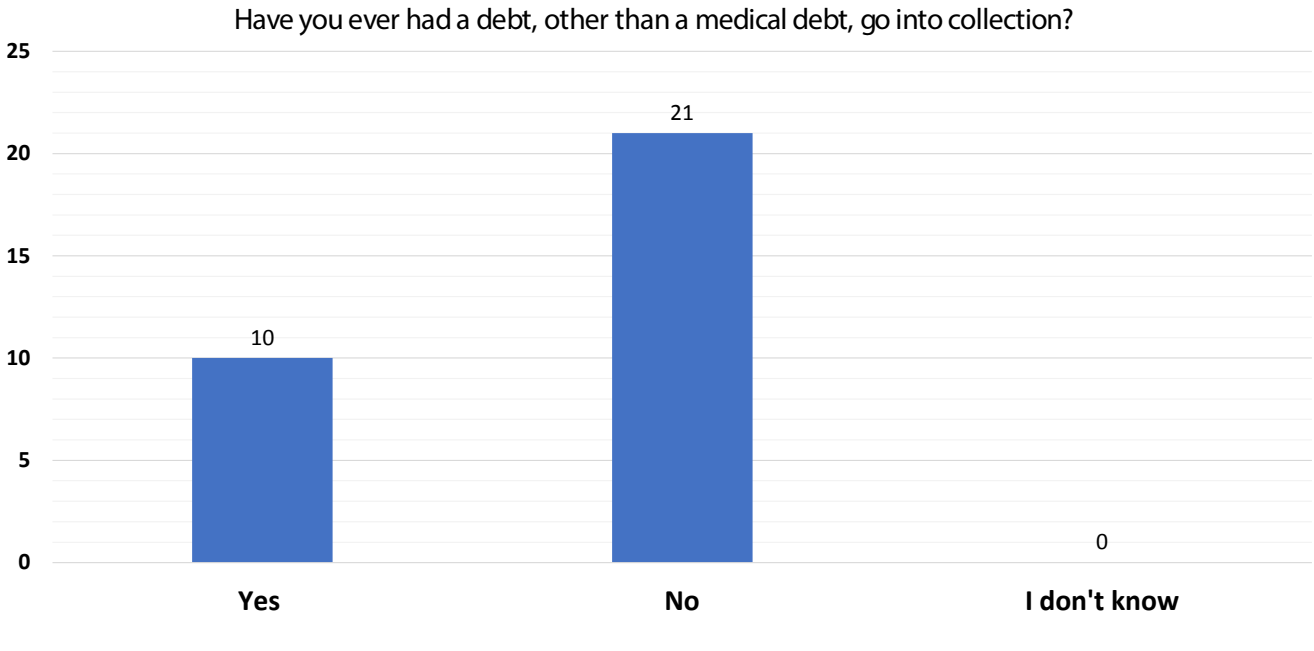

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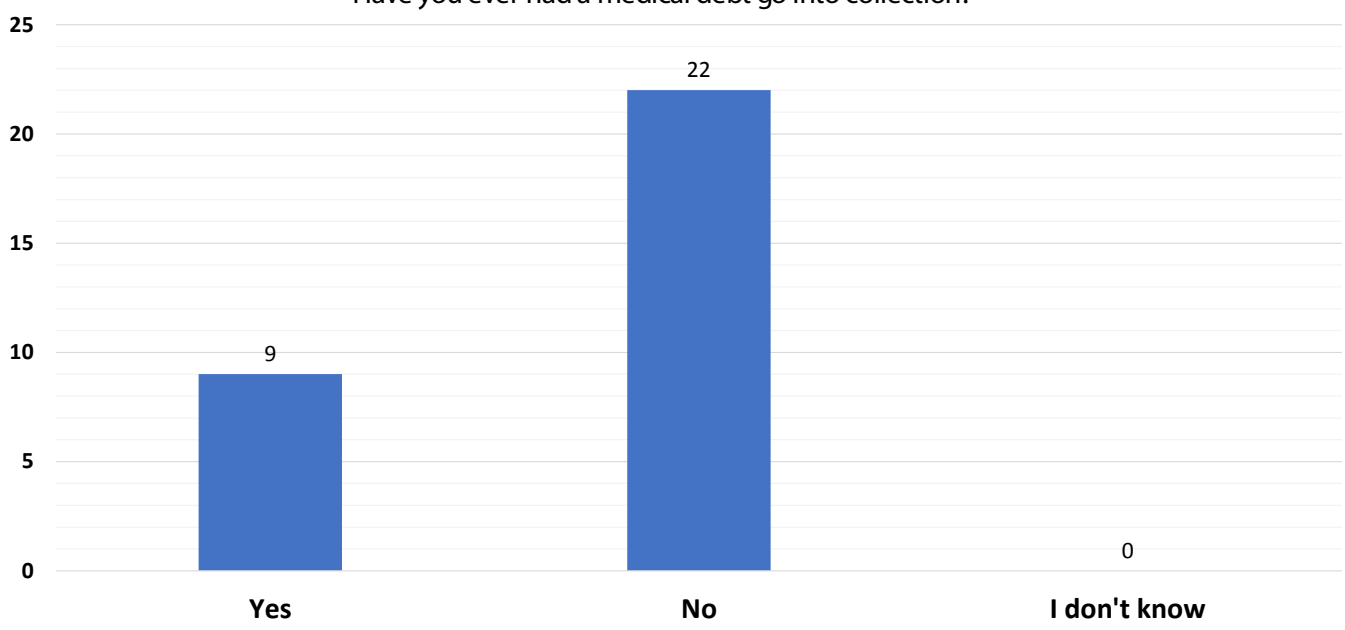

** Michael Millemann, Professor of Consumer Protection Law, University of Maryland Francis King Carey School of Law.* *The author thanks Richard Alderman and Dee Pridgen for helpful comments on the survey questions, the professors who answered the survey questions, Sophia E. Fodor for research assistance, and Anita Hopkins-Morris for technical assistance.*

1 For reports of surveys at previous Teaching Consumer Law Conferences, *see* Jeff Sovern, *The Content of Consumer Law Classes*, 12 J. Consumer & Commercial L. 48 (2008); Jeff Sovern, *The Content of Consumer Law Classes II*, 14 J. Consumer & Commercial L.16 (2010); Jeff Sovern, *The Content of Consumer Law Classes III*, 22 J. Consumer & Commercial L. 2 (2018) (hereinafter, Sovern, Content III).

2 A 2020-2022 survey found that 37% of the 199 law schools accredited by the American Bar Association did not offer a consumer law class and only about a quarter had a consumer law clinic. *See* Neil L. Sobol, *Consumer Law for Gen Z Law Students*, 66 Ariz. L. Rev. 93, 101 (2024). Some of those teaching such courses are adjunct professors who are probably less inclined to attend a conference on teaching consumer law.

3 See Figure Five.

4 See Figure Six.

5 *See, e.g*, John Ellis, *Higher Ed Has Become a Threat to America*, Wall. St. J. (Dec. 4, 2023) ("The radical left . . . most obviously through the one-party campuses [has] graduated an entire generation of young Americans indoctrinated with their ideas.").

6 See Figure Three.

7 *See* Sovern, Content III, *supra*, note 1, at 7.

8 See Figure Ten.

9 *See, e.g.,* the Truth in Lending Act, 15 U.S.C. § 1601 *et seq*.

10 *See, e.g,* Omri Ben-Shahar & Carl E. Schneider, More Than You Wanted to Know: The Failure of Mandated Disclosure (2016); Dee Pridgen, Jeff Sovern, & Christopher L. Peterson, Consumer Law Cases and Materials 277-285 (5th ed. 2020).

11 *See* Figure 16. An example, though not mentioned in the survey, might be the method for determining the amount of the credit card balance on which the finance charge is calculated. The Truth in Lending Act, as implemented by the Consumer Financial Protection Bureau, requires credit card issuers to disclose the balance computation method in credit card solicitations, see 12 C.F.R. § 1026.60(b)(6), though the likelihood is that few consumers understand it.

12 *See* Figure 17.

13 *See* Figures 18 & 19.

14 *See supra* note 11 and accompanying text.

15 *See* Figures 20 & 21.

16 *See* Figure 11

17 *See* Martha Perez-Pedemonti, Regaining the Right to Reject: Forced Arbitration Clauses in Credit Card Contracts, Public Citizen 6 (May 15, 2023) ("Approximately 76% of [the largest] credit card [issuers'] terms of service agreements containing forced arbitration clauses include opt-out provisions . . . ."), https://www.citizen.org/article/regaining-the-right-to-reject-forced-arbitration-clauses-in-credit-card-contracts/.

18 *See* Mohamed v. Uber Technologies, Inc., 848 F.3d 1201, 1211 (9th Cir. 2018); Suarez v. Uber Technologies, Inc., 2016 WL 2348706 *4 (U.S. Fed. Dist. Ct. M.D. Fl. 2016).

19 *See* Figure 12.

20 *See* Richard T. LaPiere, *Attitudes vs. Actions*, 13 Soc. Forces 230, 233-34 (1934) (finding that 91.6% of 128 surveyed auto camps, tourist camps, restaurants, and hotels said they would not accept people of Chinese ethnicity as customers, but only one of 251 hotels, auto camps, tourist camps, and restaurants (which included the surveyed facilities) actually refused to accommodate a Chinese guest who visited the establishment); see generally Howard Schuman, *Attitudes vs. Actions Versus Attitudes vs. Attitudes*, 36 Pub. Op. Q. 347, 349-50 (1972) (noting inconsistencies between survey responses and real-life behavior).

21 *See* Fed. R. Civ. P. 23 (class actions may be brought in federal court only if "the class is so numerous that joinder of all members is impracticable").

22 See Figure 13.

Transactional Defenses to the Deceptive Trade Practices Act

By Manuel H. Newburger *

I. INTRODUCTION

There are a limited number of defenses to suits under the DTPA aside from the classic: "I didn't do it." However, the Act does offer several defenses that, if considered at the transactional state—could save a defendant in subsequent litigation. This article will explore those defenses.

II. WAIVERS

As originally enacted the DTPA contained a complete prohibition on all waivers of its provisions. However, in 1995 the Act was amended to permit waivers under very limited circumstances. Section 17.42 states:

(a) Any waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void; provided, however, that a waiver is valid and enforceable if:
  (1) the waiver is in writing and is signed by the consumer;
  (2) the consumer is not in a significantly disparate bargaining position; and
  (3) the consumer is represented by legal counsel in seeking or acquiring the goods or services.

(b) A waiver under Subsection (a) is not effective if the consumer's legal counsel was directly or indirectly identified, suggested, or selected by a defendant or an agent of the defendant.

(c) A waiver under this section must be:
  (1) conspicuous and in bold-face type of at least 10 points in size;
  (2) identified by the heading "Waiver of Consumer Rights," or words of similar meaning; and
  (3) in substantially the following form:

"I waive my rights under the Deceptive Trade Practices-Consumer Protection Act, Section 17.41 et seq., Business & Commerce Code, a law that gives consumers special rights and protections. After consultation with an attorney of my own selection, I voluntarily consent to this waiver."

(d) The waiver required by Subsection I may be modified to waive only specified rights under this subchapter.

(e) The fact that a consumer has signed a waiver under this section is not a defense to an action brought by the attorney general under Section 17.47.

The conditions necessary to create an enforceable waiver mean that it will be a rare case in which a waiver exists. Of course, a "try and a miss" with a waiver will give rise to potential liability under Section 12 of the DTPA's laundry list of false, misleading, or deceptive acts and practices, which prohibits "representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law." Tex. Bus. & Com. Code § 17.46(b)(12).

A section 17.42 waiver is seldom practical as competent attorneys are generally hesitant to recommend DTPA waiver at the risk of a malpractice claim. The most likely application is in transactions in which a business consumer is represented by counsel who negotiates specific remedies (e.g., liquidated damages) to replace the DTPA remedies.

III. LARGE TRANSACTIONS

The DTPA potentially exempts two tiers of large transactions. Section 17.49(f) states:

(f) Nothing in the subchapter shall apply to a claim arising out of a written contract if:
  (1) the contract relates to a transaction, a project, or a set of transactions related to the same project involving total consideration by the consumer of more than $100,000;
  (2) in negotiating the contract the consumer is represented by legal counsel who is not directly or indirectly identified, suggested, or selected by the defendant or an agent of the defendant; and
  (3) the contract does not involve the consumer's residence.

Although this section bears some similarity to the waiver provision of section 17.42, it is markedly different, as no waiver is required. As noted above, few attorneys are likely to advise a consumer to waive the rights afforded by the DTPA. But this advice is irrelevant under Section 17.49(f). All that is required is that the transaction not involve the consumer's residence, that the transaction meet the $100,000 threshold, and that the consumer is represented by an attorney who was not identified, suggested, or selected by the seller or lessor. The author has seen this occur in non-residential real estate transactions such as the purchase of rental property.

In 1995 the Act was amended to permit waivers under very limited circumstances.

Any time a DTPA suit involves a non-homestead transaction of more than $100,000, the defense attorney should look into whether the consumer was represented by an attorney in negotiating the transaction. But, subsection(g) of section 17.49 provides:

(g) Nothing in this subchapter shall apply to a cause of action arising from a transaction, a project, or a set of transactions relating to the same project, involving total consideration by the consumer of more than $500,000, other than a cause of action involving a consumer's residence.

This exemption eliminates from the scope of the DTPA all transactions in excess of $500,000 that do not involve a consumer's residence. No waiver or attorney representation is required.

Professor Alderman has suggested that it might be possible to structure a project as a set of separate and distinct transactions or create separate legal entities, so that the $100,000 and $500,000 exemptions might be avoided. While the author recognizes the possibility of such an arrangement, a smart defendant is likely to argue that creative drafting cannot get around the "project, or a set of transactions relating to the same project" verbiage in Section 17.49.

More to the point, the person drafting for the seller of goods or services should be mindful of Professor Alderman's creative suggestion and ensure that the contract documents tie together what might arguably be separate transactions into a described project.

IV. PROFESSIONAL SERVICES

The DTPA also exempts certain claims based on professional services. Section 17.48 (c) and (d) provide:

(c) Nothing in this subchapter shall apply to a 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. This exemption does not apply to:
  (1) an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion;
  (2) a failure to disclose information in violation of Section 17.46(b)(24);
  (3) an unconscionable action or course of action that

cannot be characterized as advice, judgment, or opinion;
(4) breach of an express warranty that cannot be characterized as advice, judgment, or opinion; or
(5) a violation of Section 17.46(b)(26).

(d) Subsection (c) applies to a cause of action brought against the person who provided the professional service and a cause of action brought against any entity that could be found to be vicariously liable for the person's conduct.

Although case law demonstrates the fights that can be had over this part of the DTPA, these sections provide an opportunity to build the defense into a transaction. An attorney or accountant may wish to qualify a paid-for opinion with the statement that the opinion merely represents the professional advice, judgment, and opinions of the author. It might be preferable to build that limitation into a contract, having the client acknowledge that the author of the opinion is acting as a professional and that what will be provided is merely the author's professional advice, judgment, and opinion and not a warranty of outcome. While a consumer could certainly try to challenge the effectiveness of such a contract provision, including the provision might make the DTPA claim an uphill climb.

V. DISCLOSURE OF RELIANCE

The section of the DTPA that is arguably most relevant to this article has generated little case law over the history of the Act. Section § 17.506(a)–(c) of the DTPA state:

> (a) In an action brought under Section 17.50 of this subchapter, it is a defense to the award of any damages or attorneys' fees if the defendant proves that before consummation of the transaction he gave reasonable and timely written notice to the plaintiff of the defendant's reliance on:
> (1) written information relating to the particular goods or service in question obtained from official government records if the written information was false or inaccurate and the defendant did not know and could not reasonably have known of the falsity or inaccuracy of the information;
> (2) written information relating to the particular goods or service in question obtained from another source if the information was false or inaccurate and the defendant did not know and could not reasonably have known of the falsity or inaccuracy of the information; or
> (3) written information concerning a test required or prescribed by a government agency if the information from the test was false or inaccurate and the defendant did not know and could not reasonably have known of the falsity or inaccuracy of the information.
> (b) In asserting a defense under Subdivision (1), (2), or (3) of Subsection (a) of Section 17.506 above, the defendant shall prove the written information was a producing cause of the alleged damage. A finding of one producing cause does not bar recovery if other conduct of the defendant not the subject of a defensive finding under Subdivision (1), (2), or (3) of Subsection (a) of Section 17.506 above was a producing cause of damages of the plaintiff.
> (c) In a suit where a defense is asserted under Subdivision (2) of Subsection (a) of Section 17.506 above, suit may be asserted against the third party supplying the written information without regard to privity where the third party knew or should have reasonably foreseen that the information would be provided to a consumer; provided no double recovery may result.

Portions of the DTPA's laundry list that are most commonly used are strict liability sections that require neither knowledge nor intent. Consider, as examples, the following subsections of Section 17.46(b):

> (b) Except as provided in Subsection (d) of this section, the term "false, misleading, or deceptive acts or practices" includes, but is not limited to, the following acts:
> (1) passing off goods or services as those of another;
> (2) causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
> (3) causing confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another;
> (4) using deceptive representations or designations of geographic origin in connection with goods or services;
> (5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which the person does not;
> (6) representing that goods are original or new if they are deteriorated, reconditioned, reclaimed, used, or secondhand;
> (7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
> (8) disparaging the goods, services, or business of another by false or misleading representation of facts;
> (12) representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;
> (14) misrepresenting the authority of a salesman, representative or agent to negotiate the final terms of a consumer transaction;

These sections of the DTPA do not contain knowledge or intent requirements, and Section 17.50 of the Act imposes no greater burden to recover economic damages. *See* Tex. Bus. & Com. Code § 17.50(b). *See also, Pennington v. Singleton*, 606 S.W.2d 682 (Tex. 1980) (recognizing that a finding of knowledge or intent was not required to recover actual damages under the pre-1995 version of the DTPA).

Notwithstanding the correct statutory analysis of *Pennington*, Section 17.506 of the DTPA allows sellers and lessors of goods or services to avoid liability for unknown misrepresentations. If a seller or lessor makes the requisite disclosure of reliance, it has the opportunity to avoid liability for the accidental misrepresentation. The statute requires, however, that the disclosure of reliance be:

- written;
- before consummation of the transaction; and
- reasonable and timely.

An important consideration is what "timely" and "reasonable" mean. The canon against surplusage reflects "the idea that 'every word and every provision is to be given effect [and that n]one should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.'" *Nielsen v. Preap*, 586 U.S. 392 (2019) (alteration in original) (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts, 174 (2012)). The canon is not merely a creature of federal law.

Under the surplusage canon, "[i]f possible, every word

> and every provision is to be given effect (*verba cum effectu sunt accipienda*) . . . . None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 174 (2012); *cf. Columbia Med. Ctr. Of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008) ("The Court must not interpret the statute in a manner that renders any part of the statute meaningless or superfluous."); *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005) ("[C]ourts should examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless").

Paxton v. Comm'n for Law. Discipline, No. 05-23-00128-CV, 2024 Tex. App. LEXIS 2739, at *31ss–32 (Tex. App.—Dallas Apr. 18, 2024, pet .filed).

Reading "timely" to mean no more than 'before consummation" would appear to violate the surplusage canon. "Reasonable and timely" must mean more than merely before consummation. In *Featherston v. Weller*, No. 03-05-00770-CV, 2009 Tex. App. LEXIS 5110 (Tex. App.—Austin July 3, 2009, no pet.) the court found that a disclosure in an auction catalog was sufficient. Beyond that, the author has not found any cases that shine light on what is reasonable and timely. However, the author would suggest that "timely" should be presumed to mean at a time when the consumer could act without harm, and "reasonable" should be assumed to mean disclosed in a manner that is clear and conspicuous.

"Reasonable and timely" must mean more than merely before consummation.

VI. AS-IS SALES AND DISCLAIMERS OF RELIANCE

When goods are sold as-is, a disclaimer of reliance may be sufficient to break the chain of causation and may provide a defense to a claim for fraud. *Prudential Ins. Co. of Am. V. Jefferson Assocs.*, 896 S.W.2d 156, 162 (Tex. 1995).

There are limits of the extent to which *Prudential* can be applied.

> By our holding today we do not suggest that an "as is" agreement can have this determinative effect in every circumstance. A buyer is not bound by an agreement to purchase something "as is" that he is induced to make because of a fraudulent representation or concealment of information by the seller. *Weitzel v. Barnes*, 691 S.W.2d 598, 601 (Tex. 1985); *Dallas Farm Mach. Co. v. Reaves*, 158 Tex. 1, 307 S.W.2d 233, 240 (Tex. 1957); *see Cockburn v. Mercantile Petroleum, Inc.*, 296 S.W.2d 316, 326 (Tex. Civ. App.—Dallas 1956, writ ref'd n.r.e.). A seller cannot have it both ways: he cannot assure the buyer of the condition of a thing to obtain the buyer's agreement to purchase "as is", and then disavow the assurance which procured the "as is" agreement. Also, a buyer is not bound by an "as is" agreement if he is entitled to inspect the condition of what is being sold but is impaired by the seller's conduct. A seller cannot obstruct an inspection for defects in his property and still insist that the buyer take it "as is". In circumstances such as these an "as is" agreement does not bar recovery against the seller.

Prudential, 896 S.W.2d at 162.

Furthermore, in determining the effectiveness of an "as-is" provision a number of factors can negate the effectiveness of the buyer's disclaimer of reliance. These include:

- the nature of the transaction;
- the totality of the circumstances surrounding the agreement;
- whether the "as is" clause was an important part of the basis of the bargain and not an incidental or "boilerplate" provision; and
- whether the parties were of relatively equal bargaining position.

Id.

Prudential was decided before the 1995 amendments to the DTPA which added a reliance element to "laundry list" claims under Section 17.46(b). A disclaimer of reliance in an "as-is" transaction can also defeat a DTPA claim. *See*, *e.g.*, *Erwin v. Smiley*, 975 S.W.2d 335 (Tex. App.—Eastland 1998, pet. denied). Even so, a seller's failure to disclose "material facts which would not be discoverable by the buyer in the exercise of ordinary care and due diligence" can overcome a *Prudential* disclaimer. *Pairett v. Gutierrez*, 969 S.W.2d 512, 515 (Tex. App.—Austin 1998, pet. denied).

VI. CONCLUSION

The timely and appropriate use of transactional defenses can defeat a DTPA claim. While those who act in bad faith or who conceal material facts will likely fail in their attempts to use such defenses, the innocent sellers who run afoul of the DTPA's strict liability provisions may well escape liability by taking advantage of these defenses.

**Manny Newburger leads the Consumer Financial Services Law Practice Group at Barron & Newburger, P.C. He is a Fellow of the American College of Consumer Financial Services Lawyers, and for 24 years he taught consumer protection law at the University of Texas School of Law. Mr. Newburger is licensed to practice in Texas, Colorado, Massachusetts, and Wisconsin. He is also admitted to practice before the United States Supreme Court, the United States Courts of Appeals for the First through Eleventh and D.C. Circuits, and federal district courts in twenty-four districts.*

DECEPTIVE TRADE PRACTICES AND WARRANTY

WHERE THE UNDERLYING TRANSACTION IS A LOAN, CONSUMER STATUS IS NOT CONFERRED BECAUSE MONEY IS NEITHER A GOOD OR SERVICE.

North v. Capital One, N.A., __ F. Supp. 3d __ (S.D. Tex. 2024). https://www.casemine.com/judgement/us/663affea83075d3d98346000

FACTS: Plaintiff Julius Lamunn North ("North") filed suit against defendant Capital One. Capital One received a letter requiring the company to accept the tender of payment to settle the debt owed. However, the debts were never removed, nor documentation was provided which resulted in default. North alleged that Capital One provided unverified inquiries and debts onto North's credit report which damaged North's credit reputation and worthiness. North also alleged that Capital One had been and actively reported inaccurate credit score ratings causing North great financial strain.

North asserted claims for breach of contract, civil rights violations, and Deceptive Trade Practices Act (DTPA). Capital One removed the case to the state court and filed motions to dismiss the action under the Federal Rule of Civil Procedure 12(b)(6).

HOLDING: Motion to Dismiss Granted.

REASONING: Capital One argued North failed to state a claim or timely respond. Because of the district's local rules, North's failure to respond to Capital One's motion to dismiss was interpreted as an intention of posing no opposition to the motion by North. The court here considered the merits of the motion to dismiss despite North's lack of response since the motion to dismiss was a dispositive motion.

North's claim for violation of the DTPA failed because North did not allege that he was a consumer as required by the DTPA.

North's claim for violation of the DTPA failed because North did not allege that he was a consumer as required by the DTPA. By reviewing North's allegations, the court discovered that North is indebted to Capital One and therefore when there is an underlying transaction as a loan, consumer status is not granted because money is neither a good nor a service according to *Reule v. M&T Mortg.* However, there is an exception to the general rule when the objective of the transaction was for purchase or lease of a good or service notwithstanding that the plaintiff borrowed money for the completion of the transaction. In this case, it was unknown to the court as to why North was indebted to Capital One and therefore, the court was unable to apply the exception. Therefore, the court reasoned North failed to show he is a "consumer" and cannot state a claim under the DTPA.

The court further explained that the Fair Credit Reporting Act (FCRA) would have preempted any DTPA claim. The FCRA states that a furnisher is obligated to investigate and report its results to the credit reporting agency, as well as modify or delete false information. When a plaintiff asserts an FCRA claim against a furnisher, the plaintiff must show in the allegation that they disputed the accuracy or completeness of information with a consumer reporting agency, notified the furnisher of the dispute, and that the furnisher failed to investigate, correct any inaccuracies, or notify the agency of the results of the investigation.

Here, the court explained that North did not provide any evidence to show he disputed the accuracy of the information with a consumer reporting agency, which is essential to properly plead the FCRA claim. North also failed to allege any of the essential elements of an FCRA claim. Therefore, the court concluded that Capital One is entitled to summary judgment on the FCRA claim. The court recommended that Capital One's Motion to Dismiss be granted and the matter dismissed.

GENERALLY, A BUSINESS IS AN INTANGIBLE, UNLESS IT ENCOMPASSES GOODS OR SERVICES PURCHASED FOR USE IN THE FUNCTION OF THE BUSINESS

Chotani v. Mohammad Khan, ___ S.W.3rd ___ (Tex. App.-Tyler 2024).
https://law.justia.com/cases/texas/twelfth-court-of-appeals/2024/12-23-00217-cv.html

Facts: Plaintiffs-Appellees were Mohammad Khan ("Khan"), Rafaqat Ali ("Ali"), and Mehak Investments, LLC ("Mehak"). Defendants-Appellants were Azib Chotani ("Chotani"), and Azam Chaudhry ("Chaudhry"). Chotani acted as a broker between Ali and Chaudhry in negotiating an agreement regarding lease of a convenience store in Kilgore, Texas. On May 28, 2018, an agreement was signed in which Menghi, an entity owned by Chaudhry, agreed to sublease its operational lease for the store to Mehak, a company formed by Khan. As part of this transaction, Mehak also purchased the store's existing inventory. However, the Texas Alcoholic Beverage Commission ("TABC") denied the store an alcohol license. Subsequently, Chaudhry transferred ownership of Menghi to Khan. Later attempts by Khan and Ali to renew Menghi's fuel permits with the Texas Commission on Environmental Quality ("TCEQ") were denied due to a previous fine levied against Menghi.

Khan and Ali filed suit with multiple causes of action, including DTPA violations. The jury awarded Khan and Ali damages for the causes of actions and the DTPA claim. Chotani and Chaudhry filed a motion to disregard the jury answers and a judgment notwithstanding the verdict. The trial court denied their motions and rendered judgment in accordance with the Jury's verdict. Chotani and Chaudhry appealed.

Holding: Reversed.

Reasoning: Under the DTPA, to prevail on a claim, a plaintiff must establish that (1) they are a consumer; (2) the defendant engaged in a false, misleading, or deceptive act or practice; (3) the consumer relied on this act or practice; and (4) the act or practice was a producing cause of the consumer's actual damages. TEX. BUS. & COM. CODE ANN. § 17.50(a)(1) (West 2021). To

qualify as a consumer under the DTPA, the plaintiff must demonstrate that (1) they sought or acquired goods or services by purchase or lease, and (2) the goods or services purchased or leased form the basis of the complaint. The DTPA excludes transactions involving purely intangible rights, such as money or accounts receivable, unless these are associated with collateral services.

The court found that the transaction between Khan, Ali, and Chaudhry satisfied the first requirement of the DTPA definition of a consumer because it involved the acquisition of "goods and services." Khan and Ali did not merely acquire an intangible right to operate a store; they also leased the physical premises and purchased physical assets, including the store's inventory. However, the court determined that the transaction did not satisfy the second requirement. The crux of Khan and Ali's claim was based on the transfer of shares in Menghi to Khan, which is considered an intangible asset and not a good or service under the DTPA. Consequently, the court held that Khan and Ali did not qualify as consumers under the DTPA.

A CONSUMER IS NOT REQUIRED TO PROVE INTENT TO MAKE A MISREPRESENTATION TO RECOVER UNDER THE DTPA

MISREPRESENTATION THAT MAY NOT BE ACTIONABLE UNDER COMMON-LAW FRAUD MAY BE ACTIONABLE UNDER THE DTPA

Merrikh v. Costa, ___ S.W. 3d ___ (Tex. App.-Houston[14th Dist.] 2024).
https://law.justia.com/cases/texas/fourteenth-court-of-appeals/2024/14-22-00312-cv.html

FACTS: Appellees Joseph and Johna Costa (the "Costas") purchased a replacement engine for their Range Rover from Quality Auto Dismantle, LLC ("QAD"). Appellant Bijan Merrikh ("Merrikh"), a QAD employee, was the only individual who communicated with the Costas about the repairs. At the time, Merrikh was aware and failed to disclose to the Costas that QAD did not employ any mechanics, did not have the proper tools and training to conduct an engine replacement, and that he had never done that sort of work before. The Costas paid QAD for the replacement engine and the next several replacement engines installed by Merrikh. After the last replacement engine was installed, the vehicle overheated and was taken to another repair shop. The repair shop owner testified that several sensors were unplugged or bypassed so the "check engine" light would not notify the Costas of any issues.

Merrikh failed to disclose important information about his services that induced the Costas to enter into the transaction.

The Costas filed suit for failure to disclose under the DTPA and for common-law fraud by misrepresentation and non-disclosure. The trial court ruled in favor of the Costas on their DTPA claim, finding that Merrikh engaged in "false, misleading, or deceptive acts or practices." Merrikh appealed.

HOLDING: Affirmed.

REASONING: Merrikh argued that the DTPA claim failed because the Costas offered no evidence to support the elements of the claim. The court rejected Merrikh's argument and held that the Costas offered legally sufficient evidence that showed Merrikh failed to disclose important information about his services that induced the Costas to enter into the transaction. The court held that the Costas proved that they detrimentally relied on Merrikh's nondisclosure by their actions in using QAD for the repair and by testifying at trial that they would have used another repair shop had they known the nondisclosed information.

The court supported its holding by citing case law that held that consumers do not need to prove a defendant's intent to make a misrepresentation to recover under the DTPA. The court held that claims for failure to disclose under the DTPA differ from claims for common-law fraud in two ways. A common-law fraud claim requires that a plaintiff prove that the defendant intended to deceive the plaintiff and the plaintiff's justifiable reliance. In contrast, DTPA claims require a plaintiff to prove detrimental reliance and that the defendant committed at least one of the acts in the DTPA's "laundry list"—a defendant's intent for his non-disclosure is irrelevant. Accordingly, if the misrepresentation is not one that may not be actionable under the common-law fraud claims of misrepresentation or non-disclosure, it may still be actionable under the DTPA.

SHOTGUN PLEADINGS THAT FAIL TO MEET THE PLEADING REQUIREMENTS OF RULE 8(a)(2) AND 10(b) SHOULD BE DISMISSED.

DTPA AND EXPRESS AND IMPLIED WARRANTY CLAIMS DISMISSED.

Bauer v. AGCO Corp., ___ F. Supp. 3d ___ (W.D. Tex. 2024).
https://law.justia.com/cases/federal/district-courts/texas/txwdce/5:2023cv00993/1172752175/29/

FACTS: Brandon Bauer ("Plaintiff") purchased a tractor from AGCO Corporation ("Defendant") that he alleged was defective in terms of material and workmanship under the manufacturer's warranty. Plaintiff brought claims under the Texas Deceptive Trade Practices Act ("DTPA") and the Magnuson-Moss Warranty Act for breach of express and implied warranties. Plaintiff sought damages for the diminished value of the tractor, the cost of repairs, attorney's fees, costs, and additional statutory damages.

Defendant filed a Motion to Dismiss. Plaintiff responded to the motion, and Defendant subsequently replied.

HOLDING: Motion to Dismiss granted.

REASONING: Defendant argued that Plaintiff failed to plead sufficient facts to establish prima facie claims and characterized the complaint as a "shotgun pleading" that did not state a proper cause of action, violating the Federal Rules of Civil Procedure 8(a)(2) and 10(b). Defendant also asserted that the complaint failed to meet Rule 9(b)'s heightened pleading standard, which was necessary due to the expiration of the statute of limitations. Additionally, Defendant argued that the express and implied warranty claims under the DTPA and the Magnuson-Moss Warranty Act should be dismissed because the complaint failed to provide

adequate notice of the claims and the grounds upon which each claim rested.

The court found that the Plaintiff's complaint failed to separate different counts, did not clearly state the elements of each claim, and did not connect these elements to the facts alleged. The court cited precedent from the Eleventh and Fifth Circuits to support the dismissal of the "shotgun pleading," which fails to meet the pleading requirements under Rules 8(a)(2) and 10(b). Because the Plaintiff combined all claims into a single paragraph without listing the elements or tying them to the facts, the court determined that all claims, including those under the DTPA and the Magnuson-Moss Warranty Act, must be dismissed. The court further noted that Plaintiff did not specify the content of the express warranty in a manner that would allow the court to deem the claims plausibly pled. Consequently, the court concluded that Plaintiff had not met the burden to establish a plausible breach of express warranty, implied warranty, and DTPA claims.

RULE 91 MOTION PROPERLY GRANTED AS TO DTPA CLAIM WHEN PLAINTIFF FAILED TO ALLEGE FACTS SHOWING HE WAS CONSUMER AS TO GOODS OR SERVICES PROVIDED BY DEFENDANT.

Burns v. Emd Supply Inc., ___ S.W. 3d ___ (Tex. App.-Houston [1st Dist.] 2024).
https://casetext.com/case/burns-v-emd-supply-inc-1

FACTS: In his second lawsuit against EMD Supply Inc. and its CEO, James White ("Appellees"), Eric Burns ("Appellant") alleged breach of a verbal contract and deceptive trade practices. Appellant claimed that Appellees misled him into believing he had effectively executed a binding agreement. According to Appellant, Appellees had offered $30,000 in services and 15-20% royalties from the production and sale of his invention, with an agreement to produce "a fully functional prototype" of the invention. The alleged agreement was based on an oral contract and a letter of intent. Appellant argued that Appellees' deceptive trade practices induced him to comply with the oral agreement and fraudulently induced him to provide his intellectual property.

Appellees filed general denials and a Rule 91a motion to dismiss, arguing that the breach of contract claim lacked merit due to the absence of essential terms. They also moved to dismiss the Texas Deceptive Trade Practices-Consumer Act ("DTPA") claim, asserting that the Appellant failed to establish the necessary elements of a DTPA claim and did not provide the proper notice required under Section 17.505(a) of the Texas Business and Commerce Code. Appellant appealed the trial court's Rule 91a dismissal of his breach of contract and DTPA claims. The trial court held a hearing on the motion to dismiss and granted the Appellees' Rule 91a motion, though it did not specify the grounds for its ruling.

HOLDING: Affirmed.

REASONING: Appellant contended that the trial court erred by dismissing the DTPA claim, arguing that there was probable cause to believe Appellees had violated the DTPA and that the claim was not time-barred. Appellant also asserted fraud and conspiracy, arguing that there was a binding oral agreement obligating Appellees to produce the functional prototype before his patent expired. Appellees countered that the DTPA claim was time-barred and that Appellant failed to establish the elements required for a DTPA claim.

Under Texas Rule of Civil Procedure 91a, a claim has no basis if the plaintiff fails to plead a legally cognizable cause of action or if the facts alleged negate the plaintiff's entitlement to relief.

Under Texas Rule of Civil Procedure 91a, a claim has no basis if the plaintiff fails to plead a legally cognizable cause of action or if the facts alleged negate the plaintiff's entitlement to relief. To properly plead a DTPA claim, a plaintiff must first establish that they are a "consumer," which requires proving that they sought or acquired goods or services by purchase or lease, and that the goods or services form the basis of the complaint. Additionally, the plaintiff must show that the defendant engaged in false, misleading, or deceptive acts as specified in Section 17.46(b) of the Texas Business and Commerce Code, acted unconscionably, breached an express or implied warranty, or violated Chapter 541 of the Texas Insurance Code, and that the defendant's actions were a producing cause of the plaintiff's injury.

The court determined that Appellant's claim did not establish that he was a consumer under the DTPA because he did not demonstrate that he sought or acquired goods or services from Appellees by purchase or lease. Furthermore, Appellant failed to identify any specific provision of the DTPA that Appellees allegedly violated. As a result, the trial court properly dismissed the DTPA claim under Rule 91a. The court also noted that Appellant waived his DTPA claim on appeal by failing to provide any analysis to support his arguments. Therefore, the trial court did not abuse its discretion in dismissing the DTPA claim, and the judgment was affirmed.

SERVICING OF A LOAN OR A MODIFICATION CANNOT SUPPORT A DTPA CLAIM BECAUSE IT DOES NOT INVOLVE THE PURCHASE OR LEASE OF A GOOD OR SERVICE

Boelter v. US Bank Tr. N. A., ___ F. Supp. 3d ___ (W.D. Tex. 2024).
https://www.govinfo.gov/content/pkg/USCOURTS-txwd-1_22-cv-01214/pdf/USCOURTS-txwd-1_22-cv-01214-0.pdf

FACTS: Plaintiffs Corey and Jennifer Boelter took out a home mortgage loan with Wells Fargo Home Mortgage, Inc. in 2003. The Boelters executed a note and deed of trust secured against their home as part of the transaction. The deed of trust was eventually assigned to Defendant US Bank Trust N. A., as owner trustee of Defendant VRMTG Asset Trust ("Trustee"). The Trustee appointed Defendant Fay Servicing, LLC as its mortgage servicer. The Boelters have been in default on their home loan since 2018. The Trustee sent the Boelters a notice of default, an intent to accelerate, and a notice of acceleration as the Trustee prepared for and scheduled a nonjudicial foreclosure of the Boelters' home.

In response, the Boelters, proceeding pro se, sued the Trustee, Fay Servicing, and others in separate suits, alleging various violations of the DTPA. The defendants removed both actions to federal court, where they were consolidated. The defendants filed a joint motion for summary judgment on all the Boelters' claims. The Boelters did not file a response.

HOLDING: Recommended granting the summary judgment motion.

REASONING: Since the Boelters did not file a response to the summary judgment motion, the Court accepted the Defendants' undisputed facts and evidence.

The Court noted that to prove a DTPA claim, a plaintiff must demonstrate that they are a consumer who suffered damages due to the defendant(s) committing a false, misleading, or deceptive act. To qualify as a consumer, the plaintiff must establish (1) that they sought or acquired goods or services by purchase or lease and (2) that the purchased or leased goods or services form the basis of their complaint. For a borrower of money to qualify as a consumer, the plaintiff's complaint must concern seeking a loan to buy or lease goods or services. The court reasoned that when a mortgagor uses a loan to buy a home, the mortgagor's servicing of the loan does not involve the consumer buying or leasing a good or service. Since the Boelters' claim only related to the Defendant's loan servicing, the court held that these facts could not support a DTPA claim and that the Defendants were entitled to summary judgment.

For a borrower of money to qualify as a consumer, the plaintiff's complaint must concern seeking a loan to buy or lease goods or services.

DEBT COLLECTION

INDIANA COURT OF APPEALS HOLDS A DEBT BUYER WHO PURCHASED A PORTFOLIO OF DEFAULTED STUDENT LOANS AND PLACED AN ACCOUNT WITH A COLLECTION AGENCY QUALIFIES AS A "DEBT COLLECTOR" UNDER FAIR DEBT COLLECTION PRACTICES ACT

Rock Creek Capital LLC v. Tibbett, ___ N.E.2d ___ (Ind. Ct. App. 2024). https://www.consumerfinancialserviceslawmonitor.com/wp-content/uploads/sites/880/2024/05/Rock-Creek-Capital-v.-Tibbett_-_opinion.pdf

FACTS: On September 10, 2020, Rock Creek Capital LLC ("Rock Creek"), a company that purchases predominantly student loan debt as well as other types of debt, filed a complaint alleging Brianna Tibbett ("Tibbett") had enrolled as a student in a medical assistant education program with Ross Education, LLC, agreed to pay tuition, had an outstanding balance, and had breached her contractual obligations.

Tibbett later filed a motion for summary judgment alleging that she did not owe Rock Creek anything, Rock Creek lacked standing to collect any debt from her, and Rock Creek had no evidence that it owned any account or alleged debt. The motion was denied.

On April 20, 2021, Tibbett filed a Counterclaim and Class Action which asserted in part that Rock Creek committed unfair and deceptive acts which violated the Fair Debt Collection Practices Act ("FDCPA") because Rock Creek was not licensed to collect consumer debt in Indiana.

On June 9, 2021, Rock Creek filed an answer and affirmative defenses to Tibbett's counterclaim. Rock Creek denied "falsely representing that it had the legal right to collect the debt from Tibbett" and asserted that it possessed the legal right to do so.

On September 17, 2021, Rock Creek filed a motion for partial summary judgment asserting that it was "not a collection agency" as defined by the Indiana Code and did not need a license to collect on the underlying debt. Rock Creek requested partial summary judgment determining that an Indiana license to collect on the underlying debt was not required. The argument was that because they are collecting debt owed to their company on their own behalf they don't qualify as a collection agency because collection agencies collect debts owed to others. On March 31, 2022, Senior Judge Thacker entered an order granting the motion for partial summary judgment. Importantly, Senior Judge Thacker was sitting in for Judge Thompson when he granted the motion.

On June 7, 2022, Tibbett filed a Combined Memorandum in Response to Rock Creek's Motion for Summary Judgment and Supporting Tibbett's Cross-Motion for Summary Judgment which argued that Rock Creek was a debt collector as defined by 15 U.S.C. and was a supplier under the Indiana Deceptive Consumer Sales Act. She concluded that she was entitled to partial summary judgment because the FDCPA foundational requirements were met, and Rock Creek violated the FDCPA and the Indiana Deceptive Consumer Sales Act.

On August 4, 2022, Tibbett filed a Motion for Pending Matters to be Determined by Presiding Judge or Alternatively, for Designation of Judge. Tibbett asserted she had been prejudiced by inconsistent rulings and forfeiture of statutory right.

On January 10, 2023, Judge Thompson entered an order finding that Rock Creek was a debt collector and supplier and was subject to the FDCPA and the Indiana Deceptive Consumer Sales Act. The court granted Tibbett's motion for partial summary judgment and concluded that Rock Creek violated the FDCPA and the Indiana Deceptive Consumer Sales Act.

Rock Creek appealed the entry of partial summary judgment in favor of Tibbett.

HOLDING: Affirmed

REASONING: On appeal, Rock Creek argued that it was not a collection agency under the Indiana Collection Agency Act, asserting that the Act's definition of "collection agency" refers to entities collecting debts owed to another, not to themselves. Because Tibbett's debt was owed directly to Rock Creek and not "to another," Rock Creek maintained it was not a "collection agency" and therefore not required to obtain a license to collect its own debts. Rock Creek also argued it was not subject to the FDCPA because it did not meet the statutory definition of a debt collector.

The court analyzed the language of 15 U.S.C. § 1692a(6), which defines a "debt collector" as any person who uses any instrumentality of interstate commerce or the mails in any business with the principal purpose of collecting any debts.

In response, Tibbett argued that the Indiana collection agency statute provides two independent bases for determining if a person is a collection agency, including entities engaging in collecting claims owed or asserted to be owed to another. She also contended that Rock Creek was a debt collector under the FDCPA, emphasizing that the key question for FDCPA coverage of debt buyers is whether their principal purpose is debt collection.

The court analyzed the language of 15 U.S.C. § 1692a(6), which defines a "debt collector" as any person who uses any instrumentality of interstate commerce or the mails in any business with the principal purpose of collecting any debts or who regularly collects or attempts to collect debts owed or due to another. The court explained that this definition includes entities like Rock Creek that collect their own debts, particularly when their primary business is the purchase and collection of defaulted debt. The court noted that Welch, a manager at Rock Creek, testified under oath that purchasing defaulted debt was Rock Creek's primary business pursuit.

Therefore, the court held that Rock Creek was a "debt collector" under both the FDCPA and the Indiana Deceptive Consumer Sales Act. It concluded that the statutory definitions and Rock Creek's business practices met the criteria for a debt collector as defined by 15 U.S.C. § 1692a(6).

DEBT COLLECTOR SENT PLAINTIFFS COLLECTION LETTERS SEEKING TO RECOVER ALLEGED OVERPAYMENTS ON GRANTS

DEBT COLLECTOR'S LETTERS THREATENED LEGAL ACTION BUT DID NOT STATE THE DEBT MAY BE TIME-BARRED OR UNENFORCEABLE

Calogero v. Shows, Cali & Walsh, LLP, 2024 U.S. Dist. LEXIS 102444 (E.D. La. 2024).
https://caselaw.findlaw.com/court/us-5th-circuit/115937731.html

FACTS: This case arises from alleged violations of the Fair Debt Collection Practices Act ("FDCPA") stemming from Shows, Cali & Walsh LLP's ("Defendant") attempt to collect repayment of grant funds Iris Calogero and Margie Nell Randolph ("Plaintiffs") received from the Louisiana Road Home program following Hurricanes Katrina and Rita.

Following the devastation from these hurricanes, the State tasked the Louisiana Office of Community Development (the "OCD") and the Louisiana Recovery Authority with administering the Road Home program, which distributed Department of Housing and Urban Development's Community Block Grant's funds to Louisiana homeowners who sustained unreimbursed hurricane-related damage.

Plaintiffs contracted with the OCD for a homeowner's compensation grant in 2007 and received the money the same year. When they signed their grant agreements, Plaintiffs acknowledged their obligation to disclose any funds they received from FEMA or private insurers and that they could be sued for their failure to do so.

The State later hired Defendant to assist with efforts to recover the amount of unreported funds that resulted in grant overpayments. In 2017 and 2018, Defendant sent Plaintiffs collection letters seeking to recover overpaid grant funds. The letters also advised Plaintiffs that if no action was taken to resolve the matter within 90 days, Road Home may proceed with legal action against them.

Plaintiffs claimed that the Defendant's communications were intimidating and caused emotional distress. They subsequently entered into payment plans to repay the alleged overpayments. Plaintiffs then filed a lawsuit against the Defendant, alleging FDCPA violations, including the improper attempt to collect a time-barred debt.

In 2021, the parties filed cross-motions for summary judgment. The lower court granted summary judgment in favor of Defendant. Plaintiffs appealed.

HOLDING: Reversed and remanded

REASONING: The Fifth Circuit reversed the summary judgment ruling of the lower court and held that a reasonable jury could find that Defendant violated the FDCPA in multiple ways, one of which was by misrepresenting the judicial enforceability of the time-barred debts.

While the court did not definitively decide which statute-of-limitations period applied to Plaintiffs' time-barred debt allegation, the court held that the letters were untimely even under the most liberal 10-year window.

PLAINTIFF HAS STANDING BASED ON THE LIEN PLACED ON HER HOME AND DEFENDANT'S ALLEGED IMPROPER LAWSUIT.

DISPUTED ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT ON PLAINTIFF'S §1692E CLAIMS BASED ON DEFENDANT'S CONDUCT IN OBTAINING THE DEFAULT JUDGMENT.

PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON HER §1692E CLAIMS BASED ON DEFENDANT'S CONDUCT IN OBTAINING THE DEFAULT JUDGMENT.

Carrera v. Allied Collection Servs., Inc., ___ F. Supp. ___ (D. Nev. 2024).
https://casetext.com/case/carrera-v-allied-collection-servs-4

FACTS: Plaintiff Margarita Carrera ("Carrera") alleged that Allied Collection Services, Inc. ("Allied") obtained a default judgment against her based on a debt she did not owe. Carrera claimed she only began banking with Chase in 2019, well after the alleged debt was incurred. In 2022, Allied renewed the judgment and placed a lien on Carrera's home, preventing her from selling the property and obtaining a home equity loan. Carrera filed suit under the Fair Debt Collection Practices Act (FDCPA), asserting that Allied's conduct in obtaining and enforcing the judgment was improper and caused her tangible harm. She contended that Allied's actions violated §1692e of the FDCPA, which prohibits false, deceptive, or misleading representations in debt collection. Carrera also claimed that Allied misrepresented her ownership of a Chase Bank account in state court proceedings, leading to the default judgment against her, and that Allied failed to produce any agreement proving her liability for the debt.

HOLDING: Granted in part; denied in part.

REASONING: Carrera argued that the lien on her home and the alleged improper lawsuit by Allied constituted concrete injuries that conferred standing under Article III. The court accepted this argument, noting that the lien was a tangible harm that affected Carrera's property rights and financial opportunities. The court further reasoned that the alleged improper conduct by Allied in initiating the state court lawsuit bore a close relationship to the well-recognized tort of wrongful use of civil proceedings, thus establishing a concrete injury necessary for standing.

The court rejected Allied's motion for summary judgment on Carrera's §1692e claims, explaining that a genuine dispute of material fact existed regarding Carrera's ownership of the account. The court noted that Allied had not produced the underlying agreement proving Carrera's liability, and Carrera's sworn statements disavowing ownership created a triable issue. This unresolved factual dispute precluded summary judgment on the §1692e claims.

The court found that Carrera provided sufficient evidence to establish that Allied misrepresented her ownership of the

debt, specifically its failure to produce the agreement proving her liability. Allied's actions were deemed improper and constituted a violation of §1692e. Consequently, the court granted summary judgment in favor of Carrera on her §1692e claims.

DEBTOR FAILED TO SHOW AN INJURY IN FACT, LACKED ARTICLE III STANDING IN FDCPA SUIT

George v. Rushmore Serv. Ctr., LLC, ___ F. 4th ___(3d Cir. 2024).
https://caselaw.findlaw.com/court/us-3rd-circuit/116478089.html

FACTS: Appellant Alison George filed a lawsuit against Defendant Rushmore Service Center, LLC, i.e. Rushmore, alleging violations of the Fair Debt Collection Practices Act ("FDCPA") based on a collection letter she received in April 2018. The letter identified Premier Bankcard, LLC, the collection arm, as the "current/original creditor" for George's credit card debt. George claimed the naming of the collection arm on the letter was misleading because First Premier Bank, not Premier Bankcard, was the actual creditor.

The court noted that under Article III, a plaintiff must show a concrete injury to have standing.

George sought to represent a class of consumers who received similar letters as the deceptive letters would have left "the least sophisticated consumer" confused about whom the debt was owed and if it was legitimate. The District Court granted Rushmore's motion to stay proceedings and compel individual arbitration, who ruled in Rushmore's favor, and before the District Judge, who declined to vacate the arbitration award. George appealed.

HOLDING: Vacate and remanded.

REASONING: In asserting a FDCPA claim, the court agreed the complaint lacked specificity as it did not allege that George herself was confused or suffered any specific harm because of the letter. George called into question whether confusion alone is sufficient to allege a concrete injury in this context.

The court noted that under Article III, a plaintiff must show a concrete injury to have standing. In George's case, the amended complaint only suggested that the letter might confuse "the least sophisticated consumer," but did not claim that George herself was confused or suffered any adverse consequences. The court cited precedents, including TransUnion LLC v. Ramirez and Huber v. Simon's Agency, Inc., which emphasize the need for a concrete and particularized injury to establish standing. Because George did not allege such an injury, the court held that she lacked standing from the outset, rendering the District Court's orders void. The case was remanded with instructions to dismiss for lack of jurisdiction.

INSURANCE

INSURED MAY NOT PREVAIL ON CLAIMS UNDER §541 OF THE TEXAS INSURANCE CODE OR THE TEXAS DTPA IF THE COURT CONCLUDES THAT THE INSURED HAS NO CAUSE OF ACTION FOR BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING.

Thomison v. Meridian Sec. Ins. Co., ___ F. Supp. 3d ___ (W.D. Tex. 2024).
https://casetext.com/case/thomison-v-meridian-sec-ins-co

FACTS: Plaintiffs Don and Jessica Thomison ("Plaintiffs") filed suit against Defendant Meridian Security Insurance Company ("Defendant") following a dispute regarding their homeowners insurance policy. The policy covered specific damages such as hail but excluded damages that are cosmetic, mechanical, due to wear and tear, and latent defects. Plaintiffs reported a water leak in their kitchen, attempted to repair it, and submitted a claim for hail damage to recover interior repair costs caused by a hailstorm. Defendant received the claim and had the home inspected. After reviewing the inspection findings, Defendant sent Plaintiffs a letter detailing what it would cover.

Plaintiffs disagreed with the coverage determination and filed suit. They asserted claims for violation of the Texas Prompt Payment Act, breach of duty of good faith and fair dealing, and violation of the Texas Deceptive Trade Practices Act ("DTPA"). Defendant filed a motion for summary judgment on all claims.
HOLDING: Granted.
REASONING: Defendant argued that it is entitled to summary judgment on the bad faith cause of action because the evidence displays a bona fide dispute over coverage, which precludes a bad faith cause of action. Plaintiffs responded, stating that Defendant could not avoid liability for bad faith because it hired expert reports to support the insurance claim. The law requires Defendant to produce evidence that shows it had a reasonable basis for denying or delaying payments on the Plaintiffs' coverage claim and that there was a bona fide dispute as to coverage.

They asserted claims for violation of the Texas Prompt Payment Act, breach of duty of good faith and fair dealing, and violation of the Texas Deceptive Trade Practices Act ("DTPA").

The evidence produced by Defendant showed that Plaintiffs submitted their claim a year after the hailstorm in question, and the delayed submission created a reasonable need for an inspection to determine the cause and timing of the property damage. Therefore, because the court found that Defendant had a reasonable basis for the denial, it determined that the violation of §541 of the Texas Insurance Code and the DTPA claims were precluded. An insured cannot prevail on claims under §541 of the Texas Insurance Code or the DTPA if the court concludes there is no cause of action for breach of the duty of good faith and fair dealing, according to *Higginbotham*.

Because the court concluded as a matter of law that Defendant had a reasonable basis for the delay and denial of Plaintiffs' insurance claim, the cause of action for violation of §541 of the Texas Insurance Code and the claim for violation of the Texas DTPA are precluded.

IN THE ABSENCE OF SOME SPECIFIC MISREPRESENTATION BY THE INSURER OR AGENT ABOUT THE INSURANCE, A POLICYHOLDER'S MISTAKEN BELIEF ABOUT THE SCOPE OR AVAILABILITY OF COVERAGE IS GENERALLY NOT ACTIONABLE UNDER THE DTPA OR THE TEXAS INSURANCE CODE.

Harding v. State Farm Lloyds, ___ F. Supp. 3d ___ (S.D. Tex. 2024).
https://casetext.com/case/harding-v-state-farm-lloyds

FACTS: In 2021, Plaintiff Travis Harding ("Harding") filed a claim with insurer, Defendant State Farm Lloyds ("State Farm") after suffering serious water damage. State Farm performed an inspection of the home and Harding had a public adjustor assess the damage to the property to manage logistics connected to the insurance claim. In addition to the estimated damages costs, another request to State Farm of additional living expenses was added in connection to hotel costs when the home was uninhabitable and for undergoing repairs related to covered loss. Following this, State Farm made a second payment for any discrepancy in the estimates and paid Harding for additional mitigation costs. Harding then hired a mold and environmental assessment company which found the home to be uninhabitable.

Harding brought suit against State Farm alleging breach of contract and extracontractual claims. State Farm filed a Motion for Summary Judgment.
HOLDING: Motion for Summary Judgment Granted in Part and Denied in Part.
REASONGING: Harding argued a breach of contract occurred when Harding was not fully compensated under his insurance policy. In addition to the breach of contract, Harding alleged State Farm violated five provisions of the DTPA because State Farm represented to Harding that the Policy and State Farm's adjusting and investigative services had characteristics of benefits that they did not truly have. State Farm argued that the amounts of compensation were proper according to the insurance policy and provided for the reasoning with expert testimonies. Without specific misrepresentation by the insurer or agent about the insurance, a policyholder's mistaken belief about the scope or availability of coverage is not generally actionable under the DTPA or the Texas Insurance Code according *to Moore v. Whitney-Vaky Ins*. The court explained, because Harding failed to state any factual allegations in the pleading and in the brief, State Farm is entitled to summary judgment on the DTPA claims.

Harding further asserted claims under the Texas Prompt Payment of Claims Act (TPPCA) which granted additional damages where an insurer failed to meet certain deadlines in ac-

knowledging, investigating, deciding, or paying a claim. Harding asserted two theories under the TPPCA for when State Farm allegedly delayed investigating Harding's claim and when State Farm delayed in paying the claim.

The court held that State Farm commenced its investigation within the fifteen-day period required under the Texas Insurance Code §542.055. Because Harding failed to provide evidence that State Farm did not perform within the statute's timeframe and failed to provide any evidence of the delay in investigating the claim, State Farm is entitled to summary judgment on the delay-in-investigation theory. Under the delay-in-payment theory, the insurer is required to issue payment within sixty days of receiving all items, statements, and forms reasonably requested in compliance with the Texas Insurance Code §542.058(a). Here, there is a genuine dispute of fact about whether the payment was the full amount owed under the policy, and therefore, the court denied summary judgment under this theory.

Harding's claims of violations under the Texas Insurance Code §§541.060 and 541.061 were classified as non-meritorious by the court. Because Harding did not identify any specific material misrepresentations made by State Farm, the absence of such misrepresentations makes the claim not actionable under the DTPA and the Insurance Code. Therefore, State Farm is entitled to summary judgment on all of Harding's claims under Chapter 541 of the Texas Insurance Code. All claims, except for Harding's breach of contract claim for repair and water remediation costs and the TPPCA delayed payment claim, are dismissed.

INSURED'S STATEMENT THAT ALLSTATE DID NOT LIE NEGATES ESSENTIAL ELEMENTS OF THEIR COMMON LAW FRAUD CLAIMS AND CLAIMS UNDER CERTAIN SECTIONS OF THE TEXAS INSURANCE CODE AND DTPA.

STATEMENT DOES NOT NEGATE ESSENTIAL ELEMENTS OF THEIR BAD FAITH CLAIM UNDER TEXAS LAW.

Nelson v. Allstate Vehicle & Prop. Ins. Co., ___ F. Supp. 3d ___ (S.D. Tex. 2024).
https://law.justia.com/cases/federal/district-courts/texas/txsdce/4:2023cv01793/1917770/22/

FACTS: Abrian and Rose Nelson ("Plaintiffs") submitted a claim to Allstate Vehicle and Property Insurance Company ("Defendant") for roof damage caused by a 2022 hailstorm. Defendant denied the claim after conducting an inspection, which Plaintiffs alleged was inadequate and wrongful. Plaintiffs also claimed that Defendant, influenced by McKinsey & Company, designed its claims process to maximize profits at the expense of policyholders. Plaintiffs brought suit, asserting claims of common law fraud, fraud by nondisclosure, fraud in the sale of an insurance policy, and violations of the Texas Insurance Code and the Texas Deceptive Trade Practices Act ("DTPA"). Plaintiffs also asserted a bad faith claim under Texas law asserting that Defendant did not have a reasonable basis for denying their claim and that the denial was done in bad faith.
HOLDING: Granted in part; denied in part.
REASONING: The court held that Plaintiffs' deposition statements that Defendant did not "lie" to them were judicial admissions that negated the essential elements of their common law fraud claims and claims under certain sections of the Texas Insurance Code and DTPA. These claims required proof of a material misrepresentation, which was undermined by Plaintiffs' statements. As a result, the court granted summary judgment in favor of Defendant on these claims.

The court further held that Plaintiffs' deposition statements that Defendant did not "lie" to them did not negate the essential elements of their bad faith claim. Under Texas law, a bad faith claim does not require proof of misrepresentation. Instead, it focuses on whether the insurer had a reasonable basis for denying or delaying payment of a claim. The court found that the Plaintiffs' statements did not preclude their bad faith claim, allowing it to proceed.

INSURER BEARS THE BURDEN TO PROVE DAMAGE FELL WITHIN THE POLICY EXCLUSION

Abulehieh v. State Farm Lloyds, ___ F. Supp. 3d ___ (W.D. Tex. 2024).
https://casetext.com/case/abulehieh-v-state-farm-lloyds-1

FACTS: Defendant State Farm Lloyds ("State Farm") issued a policy insuring Plaintiff Abulehieh's dwelling. Abulehieh contacted State Farm to report a leak that had caused damage to his house. Later that day, a plumber identified the source of the leak as a broken toilet flange. After reviewing photos and supporting documentation, State Farm concluded that the damage was due to continuous and repeated seepage or leakage, which was not covered under the policy. Section I of the policy covers "accidental direct physical loss" to property but excludes coverage for damage caused by or resulting from continuous water or sewage leakage. State Farm supported its determination with additional images and the presence of mold, indicating a continuous leak rather than a sudden and accidental one. Abulehieh subsequently filed a lawsuit against State Farm for denying his insurance claim for damages.

Abulehieh alleged breach of contract, and State Farm moved for summary judgment on the claim.
HOLDING: Denied.
REASONING: Abulehieh argued that State Farm breached the policy by refusing to pay for covered damage. Under Texas law, once an insured proves that coverage exists, the insurer bears the burden of proving that an exclusion applies to the loss. Policy exclusions are strictly construed against the insurer.

In this case, State Farm failed to meet its burden of proving that the damage fell within the policy exclusion. The court found that State Farm did not present any evidence from an expert or witness with knowledge of plumbing leaks to support its position. Instead, State Farm relied solely on a declaration from a Claims Specialist, whose expertise in plumbing, engineering, or another relevant field was not established. The Claims Specialist's conclusions were based on claim records, plumbing photographs without sufficient explanation, and an affidavit, despite never having physically inspected the property. As a result, the court denied State Farm's motion for summary judgment on the breach of contract claim.

ARBITRATION

SUPREME COURT HOLDS FEDERAL ARBITRATION ACT MANDATES A STAY OF LITIGATION WHEN A COURT GRANTS A MOTION TO COMPEL ARBITRATION.

SECTION 3 OF THE FEDERAL ARBITRATION ACT MANDATES A STAY OF LITIGATION AND DOES NOT PERMIT COURTS TO DISMISS THE CASE INSTEAD.

Smith v. Spizzirri, ___U.S.__ (2024).
https://www.supremecourt.gov/opinions/23pdf/22-1218_5357.pdf

FACTS: Petitioners, current and former delivery drivers ("Petitioners") for an on-demand delivery service sued the delivery service ("Respondents") in Arizona state court for violations to federal and state employment laws after Respondents allegedly misclassified Petitioners as independent contractors and failed to pay the required minimum and overtime wages and failed to provide paid sick leave.

Respondents moved for removal to federal court and filed a motion to compel arbitration and to dismiss the suit. Petitioners agreed that their claims were arbitrable, however, Petitioners argued that the Federal Arbitration Act ("FAA") required the District Court to stay the action pending arbitration rather than dismissing the claim. The District Court ordered arbitration and dismissed the case without prejudice. The Ninth Circuit affirmed.
HOLDING: Reversed and remanded.
REASONING: Respondents contended that the term "stay" in §3 of the FAA only requires the court to halt parallel in-court litigation, allowing the district courts inherent authority to dismiss proceedings subject to arbitration.

The Court found that the statutory language of §3 of the FAA—"shall... stay"—clearly mandates a temporary suspension of proceedings.

The Supreme Court disagreed, interpreting "stay" according to its well-established legal definition, which means to temporarily suspend legal proceedings. The Court emphasized that the FAA's structure, which permits immediate interlocutory appeals after the denial of an arbitration request, supports this interpretation. The Court found that the statutory language of §3 of the FAA—"shall...stay"—clearly mandates a temporary suspension of proceedings rather than dismissal. The Court referenced the legal definition of "stay" as supported by Black's Law Dictionary and noted that under 28 U.S.C. §1292(b), an order compelling arbitration is not immediately appealable unless certified by the district court as a controlling question of law. Therefore, the Supreme Court concluded that §3 of the FAA requires a District Court to stay proceedings pending arbitration and does not grant the court discretion to dismiss the case. Consequently, the Court reversed the Ninth Circuit's decision and remanded the case.

PARTIES' ARBITRATION CLAUSE PROVIDED FOR ARBITRATION PURSUANT TO JAMS RULES

EXPRESS ADOPTION OF [THE JAMS RULES] PRESENTS CLEAR AND UNMISTAKABLE EVIDENCE THAT THE PARTIES AGREED TO ARBITRATE ARBITRABILITY INCLUDING WHETHER CLASS ARBITRATION WAS AVAILABLE

Work v. Intertek Res. Sols., Inc., ___ F. 3d ___ (5th Cir. 2024).
https://law.justia.com/cases/federal/appellate-courts/ca5/23-20120/23-20120-2024-05-28.html

FACTS: Plaintiff Joseph Work filed a putative collective action against Defendant Intertek Resource Solutions, Inc. for unpaid overtime, liquidated damages, attorneys' fees, and relief for the collective class. Both parties consented to arbitration but disagreed on whether class arbitration was appropriate. Work sought class arbitration while Intertek sought individual arbitration.

Intertek filed a Motion to Compel Individual Arbitration. Work argued that the inclusion of the JAMS Employment Arbitration Rules and Procedure, as well as the JAMS policy on Employment Arbitration Minimum Standards of Procedural Fairness ("JAMS Rule"), indicated a "clear and unmistakable" intent by both parties to delegate the question of class arbitrability to the arbitrator in accordance with JAMS Rules.

The district court agreed with Work, granting his Motion to Dismiss and denying Intertek's Motion to Compel Individual Arbitration. Intertek appealed.
HOLDING: Affirmed.
REASONING: On appeal, Intertek based their argument on *Lamps Plus, Inc. v. Varela* and asserted that (1) there was no consent to class arbitration, and it should not be delegated to the arbitrator, and (2) that the "pursuant to" language in the Arbitration Agreement is not clear enough to indicate an intent to incorporate by reference the JAMS Rules.

The court held Intertek was incorrect in both assertions. First, the court found that *Lamps Plus* did not apply because while that case held that an "ambiguous agreement" cannot provide a "contractual basis for compelling arbitration," here, the Arbitration Agreement was not ambiguous. Second, the court found that it has been determined that "courts should give contract terms their plain and ordinary meaning unless the instrument indicates the parties intended a different meaning." Both parties agreed to the clause as follows: "Any arbitration required hereunder *shall be* governed by the Federal Arbitration Act and *administered by JAMS* pursuant to its Employment Arbitration Rules & Procedures and *subject to JAMS* Policy on Employment Arbitration Minimum Standards of Procedural Fairness."

Therefore, the court held this was an unequivocal incorporation of JAMS Rules, finding that the express adoption of JAMS Rules in the arbitration agreement was "clear and unmistakable" evidence that the parties agreed to arbitrate arbitrability,

and the incorporation of the JAMS Rules establishes the arbitrator's authority to adjudicate questions of arbitrability.

ARBITRATION PROVISION IS NOT ENFORCEABLE BECAUSE OF THE UNFETTERED DISCRETION DEFENDANT RETAINED TO MODIFY OR REVOKE THE PROVISION WITHOUT NOTICE.

ARBITRATION PROVISION PROMISE TO ARBITRATE IS ILLUSORY.

Lovinfosse v. Lowe's Home Centers, LLP., ___ F. Supp. 3d ___ (E.D. Va. 2024).
https://law.justia.com/cases/federal/district-courts/virginia/vaedce/1:2023cv00574/537336/23/

FACTS: Defendant Lowe's Home Centers is a national retailer specializing in home improvement products. Plaintiff Eleanor Lovinfosse purchased a washing machine from Lowe's website. As part of the checkout process, the Plaintiff was required to click the "Place Order" button, which was accompanied by a statement indicating that by placing an order, the customer agreed to Lowe's Terms and Privacy Statement. Both "Terms" and "Privacy Statement" were hyperlinked on the website. If a customer clicked on the "Terms" hyperlink, it would lead to Lowe's Terms and Conditions of Use, which included an arbitration provision binding most future claims to arbitration. The Terms and Conditions also stipulated that Lowe's retained the right to modify or terminate the Terms without notice.

Plaintiff filed a lawsuit against Lowe's, alleging deceptive practices related to "Online Choice Architecture," which led her to purchase an unnecessary water hose labeled as "Required for Use" with her washing machine. In response, Lowe's filed a Motion to Compel Arbitration and Dismiss the Case, or alternatively, a Motion to Dismiss for Failure to State a Claim.
HOLDING: Motions denied.
REASONING: Defendant argues that because Plaintiff agreed to be bound by the Terms and Conditions, which included the arbitration provision, the parties formed a valid and enforceable arbitration agreement. The plaintiff counters that the arbitration agreement is unenforceable because (1) she was not given sufficient notice to assent to the term's arbitration provisions, and (2) the arbitration agreement cannot be enforced for being illusory.

The court rejected Plaintiff's contention that she had not been given enough notice to assent to the arbitration agreement. The court noted that courts have consistently held that an electronic "click" can signify acceptance of a contract as long as the website's layout and language give the user reasonable notice that the click will manifest agreement. In this instance, the court held that Lowe's website language and layout gave the plaintiff at least constructive knowledge of what she agreed to. However, the court held that enforcing the arbitration provision is not appropriate because Lowe's retained the right to modify or terminate the contract in any way without providing any notice, which made their entire promise to arbitrate illusory.

WHERE PARTIES HAVE AGREED TO TWO CONTRACTS—ONE SENDING ARBITRABILITY DISPUTES TO ARBITRATION, AND OTHER EITHER EXPLICITLY OR IMPLICITLY SENDING ARBITRABILITY DISPUTES TO THE COURTS—A COURT MUST DECIDE WHICH CONTRACT GOVERNS.

THE QUESTION IS WHETHER THE PARTIES AGREED TO SEND THE GIVEN DISPUTE TO ARBITRATION—AND, PER USUAL, THAT QUESTION MUST BE ANSWERED BY A COURT.

DISPUTES ARE SUBJECT TO ARBITRATION IF, AND ONLY IF, THE PARTIES ACTUALLY AGREED TO ARBITRATE THOSE DISPUTES.

Coinbase v. Suski, __U. S.__ (2024).
https://www.supremecourt.gov/opinions/23pdf/23-3_879d.pdf

FACTS: Two contracts were executed between Coinbase, Inc. ("Petitioner") and a class action was filed consisting of Coinbase users ("Respondents") regarding a sweepstakes promoting Dogecoin. The first contract was the Coinbase User Agreement, which included a mandatory arbitration clause and a delegation provision stating that arbitrability disputes would be decided by an arbitrator. The second contract was the Official Rules for the sweepstakes, which contained a forum selection clause stating that all disputes related to the promotion would be resolved exclusively in California courts.

Respondents filed a class action in California for violations of California laws by the actions of the sweepstakes. Petitioner moved to compel arbitration based on the User Agreement's delegation clause. The District Court denied the motion in support of the forum selection clause under the Official Rules. The Ninth Circuit affirmed.
HOLDING: affirmed.
REASONING: Petitioner argued that the Ninth Circuit should have applied the severability principle which makes an arbitration provision severable from the remainder of the contract. Petitioner also argued that the Ninth Circuit was erroneous in their holding that the Official Rules' forum selection clause superseded the User Agreement's delegation provision because of California state law. Petitioner argued that the User Agreement's delegation clause controls.

The Supreme Court evaluated four different layers of arbitration disputes with the case at hand that involved questioning what happens when parties enter multiple agreements that conflict on who decides arbitrability. Case law indicates that an arbitration clause with a delegation provision must be honored when there are no challenges to the provision. But, where there are two contracts with conflicting arbitration provisions, the court decides which contract governs. The Court held that because the parties agreed to two contracts that contradict one another over whether to go to court or to have disputes arbitrated, a court must decide which contract governs. And because it is considered a basic legal principle, arbitration must be consented to in contracts and, therefore, a dispute is subject to arbitration if the parties agree to arbitrate the disputes. Therefore, the Supreme Court held that a court, not an arbitrator, must decide which agreement controls and affirmed the Ninth Circuit's holding.

MISCELLANEOUS

SUPREME COURT UNANIMOUSLY HOLDS A TRANSPORTATION WORKER DOES NOT NEED TO WORK IN THE TRANSPORTATION INDUSTRY TO BE EXEMPT FROM COVERAGE UNDER SECTION 1 OF THE FAA.

Bissonnette v. LePage Bakeries Park St., LLC, 601 U.S.__ (2024). https://www.supremecourt.gov/opinions/23pdf/23-51_6647.pdf

FACTS: Petitioners Neal Bissonnette and Tyler Wojnarowski ("Petitioners") owned rights to distribute Respondent Flowers Foods, Inc.'s ("Respondent") products in certain parts of Connecticut. The relationship between the parties began with a contract allowing the purchase of the rights to distribute Respondent's products, which stated that any disputes would be arbitrated through the Federal Arbitration Act (FAA). Respondent baked goods, which were then sold and distributed by Petitioners. Petitioners later brought a putative class action against Respondent for underpaying them in violation of state and federal law.

Respondent moved to compel arbitration. Petitioners argued that they were exempt from arbitration under the FAA because they fell within an exemption in §1 of the Act, which applies to contracts of employment with seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. The District Court dismissed the case in favor of arbitration, concluding that Petitioners were not "transportation workers" as specified under §1. The Second Circuit affirmed, stating that Petitioners are in the bakery industry, not the transportation industry.

HOLDING: Vacated and remanded.

REASONING: Respondent argued that the §1 exemption would become too broad if the Court did not follow the Second Circuit's implied transportation-industry requirement. Respondent also contended that the Court's analysis in Saxon "suggests" that working in the transportation industry is necessary but not sufficient for §1 to apply. Arbitration agreements are considered valid, irrevocable, and enforceable under the FAA.

The Court has previously declined to adopt an industry-wide approach to §1. The Court held that a transportation worker does not need to work in the transportation industry to be exempted under §1 of the FAA. The Court disagreed with the Second Circuit's approach to determining whether an entity falls within the transportation industry, arguing that the Second Circuit's test would create unnecessary complications regarding the nature of a company's services. The Court emphasized that §1 is not infinitely broad but rather narrow, requiring a transportation worker to, at a minimum, play a direct and "necessary role in the free flow of goods" across borders.

Because the Second Circuit did not base its conclusions on this Court's precedents regarding the transportation-industry requirement, it did not apply the correct test, thus opening the door to "arcane riddles" when considering the nature of a company's services. Therefore, the Court determined that a transportation worker does not need to work for a company within the transportation industry to be exempt under §1 of the FAA.

TEXAS SUPREME COURT HOLDS PUBLIC ADJUSTER LICENSING LAWS REQUIRING A LICENSE AND PREVENTING CERTAIN CONDUCT DOES NOT VIOLATE THE ROOFER'S FREE SPEECH RIGHTS

Texas Dep't of Ins. v. Stonewater Roofing, Ltd. Co., 641 S.W.3d 794 (Tex. 2024).
https://law.justia.com/cases/texas/supreme-court/2024/22-0427-1.html

FACTS: Appellant Stonewater Roofing Ltd. (Stonewater), a roofing contractor that was not a licensed public insurance adjuster, sued to invalidate Texas's licensing and dual-capacity regulations, alleging that the laws violated the free speech and due process rights guaranteed by the First and Fourteenth Amendments. The laws required public adjusters to obtain a license and prohibited unlicensed individuals from performing certain activities related to insurance claims. The trial court ruled in favor of the state regulator, asserting that the First Amendment is inapplicable because the challenged laws regulate professional conduct, not speech. Stonewater appealed.

HOLDING: Affirmed.

REASONING: Stonewater argued that the state regulator law's requirements restricted its ability to communicate freely with insurers and clients, thereby infringing on its constitutional rights. The Texas Supreme Court rejected this argument, reasoning that the primary role of a public adjuster involves non-expressive commercial activities rather than pure speech.

Stonewater argued that the state regulator law's requirements restricted its ability to communicate freely with insurers and clients, thereby infringing on its constitutional rights.

The court distinguished between professional conduct and speech, concluding that the defined profession of public adjusting focuses on non-expressive commercial activities like evaluating insurance coverage, assessing property damage, and calculating repair costs. These activities are inherently non-expressive and thus not protected by the First Amendment in the same way as pure speech.

The court acknowledged that while some aspects of a public adjuster's work involve communication, these communications are incidental to the core professional activities. These tasks do not transform into protected speech merely because they involve some level of communication. Therefore, the licensing requirements and restrictions imposed by the statute do not unduly burden free speech rights.

The court also referenced the Eleventh Circuit's decision in *Del Castillo v. Secretary, Florida Department of Health*, which

upheld a similar licensing scheme for dieticians and nutritionists. The Eleventh Circuit held that advising and assisting individuals on appropriate nutrition intake was occupational conduct, not speech, and thus subject to professional regulation. The court found this reasoning persuasive and applicable to this case as the laws regulate professional conduct incidental to speech and thus only require First Amendment rational basis review. The court additionally noted that false commercial statements made while holding oneself out as an adjuster could be restricted, aligning with precedents that allow the regulation of false or misleading commercial speech.

In conclusion, the court affirmed the trial court's ruling and held that the public adjuster licensing laws are constitutional as they regulate non-expressive conduct and only incidentally burden speech, ensuring that professional standards are maintained without infringing on free speech rights.

CAR RENTAL "JACKETS" ARE PART OF CONTRACT WITH CAR RENTAL COMPANY.

Calderon v. Sixt Rent a Car, LLC, ___ F. 3d ___ (11th Cir 2024). https://law.justia.com/cases/federal/appellate-courts/ca11/20-10989/20-10989-2024-08-15.html

FACTS: Plaintiffs Phillippe Calderon of Florida, Ancizar Marin of Arizona, and Kelli Borel of Colorado rented a vehicle from Sixt. Usually, a customer renting from Sixt receives their rental agreement when picking up their rental car. The Sixt rental agreement came in two parts: the Face Card and the Terms and Conditions (the "T&C"). The Face Card would provide the terms specific to that customer's rental and include the customer's signature on the bottom, while the T&C contained the general terms applicable to Sixt rentals. Right above the signature line on the face card, the text states that by signing below, the signer also assents to the T&C in the rental jacket. The T&C established the customer was responsible for any damage during the rental period and appeared most often in a preprinted booklet called "Rental Jacket."

Sixt argued that because the plaintiffs signed the Face Card using an electronic signature pad, the T&C provisions related to damages and fees were not incorporated by reference.

While each plaintiff's experience obtaining their rental was different, they all reported some similar variation such as not being informed of the Rental Agreement or being unaware that they were signing it. After each plaintiff returned the vehicle at the end of their rental period, they all received invoices from Sixt seeking payment for damages the car sustained during their rental period.

The plaintiffs filed a putative class action against Sixt in a federal district court in Florida for violations of Florida's Deceptive and Unfair Trade Practice Act and common law breach of contract, alleging Sixt sent them these invoices violating Sixt's Terms and Conditions. The district court granted summary judgment for Sixt's breach of contract claim based on its finding that the T&C was not part of the Rental Agreement. Therefore, the court held there couldn't be a breach of contract. The plaintiffs appealed to the Fourth Circuit.

HOLDING: Reversed in part.

REASONING: Sixt argued that because the plaintiffs signed the Face Card using an electronic signature pad, the T&C provisions related to damages and fees were not incorporated by reference. Without these terms being incorporated, Sixt claimed they were not in breach and could not breach their rental agreement by breaching the T&C. Thus, Sixt requested the district court ruling be affirmed.

The circuit court held that the district court erred in its judgment because the T&Cs in the rental jacket were adequately incorporated by reference under Florida, Arizona, and Colorado state law. The court reasoned that the T&C on the rental jacket was incorporated by reference under Florida law because the Face Card (1) expressly provided that the Face Card was subject to the incorporated T&C and (2) sufficiently described the incorporated T&C so that the parties' intentions could be ascertained. Similarly, the court reasoned that the same T&C was incorporated by reference under Arizona law because the reference on the Face Card was clear and unequivocal, called to the customer's attention, assented to by the customer, and terms of the incorporated T&C were readily known and available to the customer. Finally, the circuit court similarly held that since the reference to the T&C on the rental jacket was expressly identified, the T&C of the rental jacket was also incorporated correctly in Colorado law.

THE LAST WORD

This is the first issue of Volume 28, and as usual it has something for everyone. First, Jeff Sovern's article, *Who Teaches Consumer Law*, provides an inside look at who our consumer law professors are, what their background is, and how they teach. I found it interesting that, "According to the survey, consumer law professors believe it is important that students hear both sides on consumer law issues, including arguments that the professor disagrees with." Some of the information in the article may surprise you.

And Manny Newburger's article, *Transactional Defenses to the Deceptive Trade Practices Act* discusses some little use defenses in the DTPA. As Manny notes, "innocent sellers who run afoul of the DTPA's strict liability provisions may well escape liability by taking advantage of these defenses."

And of course, there are over 20 cases digested in the Recent Decisions. As I said, something for everyone.

Richard M. Alderman
Editor-in-Chief