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# JOURNAL OF Consumer & Commercial Law

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## ANNUAL SURVEY OF TEXAS INSURANCE LAW 2024

Court Permits Airline to Rely on Arbitration Clause Based on Equitable Estoppel

RECENT DEVELOPMENTS

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alderman@uh.edu

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# Annual Survey

# Insurance Law 2024

By Suzette E. Selden & Henry Moore*

## I. INTRODUCTION

The Texas Supreme Court recently answered the following certified question in the affirmative, "In an action under Chapter 542A of the Texas Prompt Payment of Claims Act, does an insurer's payment of the full appraisal award plus any possible statutory interest preclude recovery of attorney's fees?" The Court noted that the Texas Insurance Code prohibits an attorney's fees award when an insurer has fully discharged its obligations under the policy by paying the appraised amount plus any statutory interest.[1]

In a case where a school district sustained damage for two separate storms with multiple insurers, the Texas Supreme Court allowed an abatement, noting the pre-suit notice was inadequate because it failed to separately state the amount alleged to be owed by each insurer and for each claim arising from the two separate storms.[2]

The Fifth Circuit also addressed important *Stowers* issues in a bankruptcy case where the court allowed the bankruptcy trustee to claw back an earlier settlement that exhausted the policy limits,[3] and explored equitable issues when an excess carrier sued the primary carrier for failing to reasonably resolve the case.[4]

Texas courts are still hearing cases related to Covid, and continue to rule along with the nationwide cases that Covid caused loss to people, not property. Therefore, insurance coverage typically is not triggered.[5]

And the United State Supreme Court held that an insurer with financial responsibility for a bankruptcy claim is sufficiently concerned with the proceedings to be a "party of interest" that can raise objections to a reorganization plan.[6]

### A. Automobile

A police officer was hit while driving her patrol car. Her damages exceeded the policy limit of the driver who hit her. She sought to collect under her uninsured/underinsured motorist (UM/UIM) benefits. Her insurer denied coverage under the policy's regular use exclusion, and the officer filed suit. The regular use exclusion reads:

> Coverage under this Part III [regarding UM/UIM benefits] will not apply: 1. to bodily injury sustained by any person using or occupying: * * * d. a motor vehicle that is owned by or available for the regular use of you or a relative.

The trial court determined on summary judgment that the regular use exclusion violated public policy. The insurer appealed the decision. The appellate court reversed stating that the burden of proving public policy warrants non-enforcement of the contract provision falls on the insured because she is the signatory who opposes the contract. The court noted the insured failed to show both how much she received in worker's compensation benefits and that she suffered financial loss. Therefore, the court said it could not conclude the insured met her burden or suffered any financial loss, or that the insurer's policy violates the state's interest in protecting motorists from financial loss. *Progressive Cty. Mut. Ins. Co. v. Freeman*, 694 S.W.3d 924 (Tex. App.—Houston [14th Dist.] 2024, no pet. h.).

### B. Homeowners

An insureds' home was damaged by a tornado, and they notified their insurer. The insurer paid only a portion of the claim because the insurer maintained the tornado that struck the insured's home was subject to the "windstorm or hail deductible," which was $87,156. The insureds sued to recover the deductible arguing it should not have been withheld because the tornado that caused the damage was not a windstorm, therefore, the deductible should have been waived. The trial court granted the insurer's motion for summary judgment, and the insured's appealed. The insureds argued the term "windstorm" has more than one reasonable meaning, and, as a result, the windstorm and hail deductible is ambiguous. Media coverage referred to the event as a tornado, not a windstorm. Moreover, the dictionary definitions of windstorm and tornado are different. The appellate court held the term "windstorm" as used in the policy is reasonably susceptible to more than one meaning, and therefore is ambiguous. Therefore, the appellate court reversed the trial court's judgment and rendered judgment for the insureds of $87,156 in damages on their breach of contract claim. *Mankoff v. Privilege Underwriters Reciprocal Exch.*, No. 05-22-00963-CV, 2024 WL 322297 (Tex. App.—Dallas Jan. 29, 2024).

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[1] *Rodriguez v. Safeco Ins. Co. of Ind.*, 684 S.W.3d 789 (Tex. 2024).

[2] *In re The Lubbock Index. School Dist.*, 2024 WL 4575104 (Tex. 2024).

[3] *Law Office of Rogelio Solis P.L.L.C. v. Curtis*, 83 F.4th 409 (5th Cir. 2024), cert. denied, ___ S. Ct. ___, 2024 WL 4426605 (mem. op.).

[4] *Westport Ins. Co. v. Pa. Nat'l Mut. Cas. Co.*, 117 F. 4th 653 (5th Cir. 2024).

[5] *Cinemark Holdings, Inc. v. Factory Mut. Ins. Co.*, 2024 WL 3673544 (5th Cir. 2024); *Baylor College of Medicine v. XL Ins. Co. of Am., Inc.,* 2024 WL 438019 (Tex. App.—Houston [14th Dist.] 2024, no pet.).

[6] *Truck Ins. Exch. v. Kaiser Gypsum Co., Inc., et al.*, 602 U.S. 268 (2024).

**The Court noted that the Texas Insurance Code prohibits an attorney's fees award when an insurer has fully discharged its obligations under the policy by paying the appraised amount plus any statutory interest.**

The homeowners' sprinkler system froze, and then leaked into their basement. They made a claim under their homeowner's policy for the damage. The Fifth Circuit affirmed the district court's summary judgment in favor of the insurer based on a water damage exclusion in the policy. The policy excluded water originating below ground as well as "flood, surface water." The opinion goes into considerable detail on the origin of the water, its travels and how that interplays with the exclusionary language. *Laur v. Safeco Ins. Co. of Ind.,* No. 23-10315, 2024 WL 2991196 (5th Cir. June 14, 2024).

This is an appeal from a summary judgement in favor of an insurer. The Fifth Circuit reversed. The insured's metal roof was damaged in a hailstorm. The insurance policy had an exclusion for cosmetic damage to the roof. The insured's expert testified that the damage was functional, which is a covered loss. The trial court excluded much of the expert's testimony but not his opinion on the functional damage. Also, he was deposed after the exclusion ruling, and the insurer did not renew its objections. The Fifth Circuit held that there was sufficient evidence through this expert to create a fact issue. *Horton v. Allstate Vehicle & Prop. Ins. Co.*, No. 22-20533, 2023 WL 7549507 (5th Cir. Nov. 13, 2023).

### C. Commercial Property

A school district sent a pre-suit notice to multiple insurers for two separate storms. The demand did not distinguish between the insurers or the storms, but was just a single notice stating the amount to be owed was $20 million but that the damages ultimately sought at trial would be in excess of this amount as the investigation was not yet complete. After filing suit, the damages were listed between $100 million to $250 million. The insurers sought an abatement asserting the notice failed to comply with Texas Ins. Code section 542A. The trial court denied the abatement, but the court of appeals granted the abatement holding that the specific amount requirement of the statute was not met. The Texas Supreme Court noted the specific amount language only requires the notice assert a specific dollar amount, not that it must provide a fixed and final total sum that can never change. However, the Texas Supreme Court allowed the abatement for another issue — stating the notice was inadequate because it failed to separately state the amount alleged to be owed by each insurer and for each claim arising from the two separate storms. The Texas Supreme Court noted its decision should not be read as an approval of the court of appeals' construction of the statute's specific amount requirement. *In re The Lubbock Indep. School Dist.*, No. 23-0782, 2024 WL 4575104 (Tex. Oct. 25, 2024).

The Fifth Circuit affirms a summary judgment in favor of the insurer. This case follows a long line of Texas court decisions that deny coverage resulting from "physical loss" arising from Covid related claims. These policies cover business and related loss from physical damage. The courts (Texas and nationwide) have almost universally held that Covid caused loss to people, not to property, so this coverage is not triggered. *Cinemark Holdings, Inc. v. Factory Mut. Ins. Co.*, No. 23-40453, 2024 WL 3673544 (5th Cir. Aug. 6, 2024).

This case is one other in a long line of cases that claim loss due to Covid. As with most other decisions in these disputes, the court finds no coverage. In this case, the appellate court focuses on the pollution exclusion that excludes losses from contaminants including "bacteria, virus or hazardous substances…." In holding that the exclusion applies, the appellate court finds no ambiguity in the exclusion and affirms the trial court's summary judgment in favor of the insurer. *Baylor College of Med. v. XL Ins. Co. of Am., Inc.,* No. 14-22-00145-CV, 2024 WL 438019 (Tex. App.—Houston [14th Dist.] Feb. 6, 2024, no pet.).

In a hail damage case, the insured's three-year-old roof started leaking after a hailstorm that produced one and a half inch hail. The insurer denied the claim alleging that previous damage had contributed to the loss and that the insured failed to produce evidence that segregated the covered loss (recent hail damage) from the uncovered loss (previous wear and tear caused by an earlier hailstorm). The district court agreed that the insured failed to meet this burden. The Fifth Circuit affirmed while noting that there were unanswered questions on concurrent loss that had previously been certified to the Texas Supreme Court (*Frymire Home Servs., Inc. v. Ohio Sec. Ins. Co.*, 12 F.4th 467, 472 (5th Cir. 2021); *Overstreet v. Allstate Vehicle & Prop. Ins. Co.*, 34 F.4th 496, 499 (5th Cir. 2022)). The Fifth Circuit found none of these questions present in the instant case. *Shree Rama, L.L.C. v. Mt. Hawley Ins. Co.,* No. 23-40123, 2023 WL 8643630 (5th Cir. Dec. 14, 2023).

A roofing company was sued for faulty construction that produced leaks over a several year period. First Mercury covered the insured for the first two years of the damage, then Colony picked up the coverage for the next two years. The case settled with both carriers contributing to the settlement but with a reservation of their rights against each other. This case ensued. Colony maintained that First Mercury was responsible for all the loss, or at least more than it paid in settlement of the claim. It sought contribution and/or subrogation. The opinion goes into detail on Texas law addressing the time of loss, citing *Don's Building Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20 (Tex. 2008) and other Texas Supreme Court decisions that address the issue. The Fifth Circuit focused on an endorsement contained in the First Mercury policy that eliminated language extending coverage for continuing losses which begin in the policy period. Finally, the court noted that in the subrogation claim, Colony stood in the shoes of the insured and that Colony produced no evidence segregating the covered losses from the uncovered losses. The court affirmed summary judgment in favor of First Mercury thereby denying both the contribution and the subrogation claims. *Colony Ins. Co. v. First Mercury Ins. Co.,* 88 F.4th 1100 (5th Cir. 2023).

## II. AGENTS, AGENCY, AND VICARIOUS LIABILITY

### A. Individual liability of agents, adjusters, and others

This case starts with significant flood damage to a marina. Unfortunately, the insurance policies did not provide the blanket coverage the marina had requested and did not fully cover the loss.

**This case follows a long line of Texas court decisions that deny coverage resulting from "physical loss" arising from Covid related claims. These policies cover business and related loss from physical damage.**

The insured marina sued its insurance agent for failing to procure the requested coverage. Two parallel cases proceeded. The marina sued its insurance agent in state court and won a thirteen million dollar plus judgment. *Ins. Alliance v. Lake Texoma Highport Marina, L.L.C.,* 452 S.W.3d 57 (Tex. App.—Dallas 2014, pet. denied).

In the subsequent federal case, the insurance agent's primary and excess errors and omissions insurers sue each other as subrogees of the insurance agent. The insurance agent's primary carrier claimed that the excess carrier breached its contract to pay the excess amount of the judgment which the insured marina obtained against its insurance agent. The insurance agency's excess carrier sued the primary carrier claiming it breached its *Stowers* obligation in failing to settle within the primary policy limit. A jury found in favor of the excess insurer on the *Stowers* issue. The district court held that the *Stowers* breach was a defense to the breach of contract action against the excess insurer as a practical, if not legal, matter.

The Fifth Circuit disagreed with the district court on the *Stowers* defense but found the error harmless and affirmed the judgment. This case covers a multitude of issues related to the *Stowers* claim and the various offers made during the underlying litigation. In the dispute, there was also a collateral claim by the insurance agent against an insurance intermediary, and a counterclaim back against the insurance agent concerning contractual indemnity. The Fifth Circuit held that this dispute was unrelated to the *Stowers* claim and failing to address it did not preclude a valid *Stowers* demand. This case covers several other issues including equitable defenses asserted against the excess carrier, and the offset of the contract claim against the excess carrier's claim by the *Stowers* claim against the primary carrier. *Westport Ins. Corp. v. Pa. Nat'l Mut. Cas. Co.*, 117 F.4th 653 (5th Cir. 2024).

## III. THIRD PARTY INSURANCE POLICIES & PROVISIONS

### A. Automobile liability insurance

The Fifth Circuit affirms summary judgment in favor of the insurer on an auto policy property damage claim. The issue is sales tax. The policy damage coverage included "applicable sales tax." The insurer paid the fair market value on a total vehicle loss but declined to pay the sales tax. The court held that since no sales tax was due on the loss payment, there was no applicable sales tax. This case makes an *Erie* guess on this issue and has not yet been cited by any Texas state opinion. *Taylor v. Root Ins. Co.,* 109 F.4th 806 (5th Cir. 2024).

## IV. DUTIES OF LIABILITY INSURERS

### A. Duty to defend

South by Southwest (SXSW) was cancelled during Covid. Some ticket holders asked SXSW to refund their purchases. SXSW declined, citing a no-refund clause in the terms and conditions of its ticket agreement. Instead, SXSW offered ticket deferrals and half-priced tickets to future festivals. Some accepted this offer, but others refused and filed a class action lawsuit. That suit resulted in SXSW paying $1 million to settle the litigation. SXSW notified its insurer of the litigation as soon as it was filed. Its insurer said it would not defend nor indemnify SXSW in the lawsuit. SXSW sued its insurer alleging breach of contract, breach of implied duty of good faith and fair dealing, and violations of the Tex. Ins. Code. Its insurer won on summary judgment where the court held the policy exclusions excused the insurer from defending or covering the litigation. SXSW appealed, holding the contract exclusion did not apply because the claims for unjust enrichment and conversion did not arise from contracts. The Fifth Circuit agreed. Additionally, the professional services exclusion did not apply because the source of liability and motivation for the underlying litigation was SXSW's failure to refund 2020 festival tickets, which is not a professional service. Therefore, the district court's entry of summary judgment for the insurer was reversed. *SXSW, L.L.C. v. Fed. Ins. Co.*, 83 F.4th 405 (5th Cir. 2024).

A car flew off the raceway injuring spectators at a drag racing event. The injured parties sued the event sponsor who looked to its insurer for a legal defense. The district court found the policy to be ambiguous and declared a duty to defend was owed. The Fifth Circuit reversed and remanded with directions to grant summary judgment on the duty to defend to the insurer. The Fifth Circuit found that the lower court used a piecemeal approach to interpreting the policy, and that when you instead applied every part of the policy simultaneously — the CGL declaration, the CGL form, and the CGL endorsements, the policy was not ambiguous. *Kinsale Ins. Co. v. Flyin Diesel Performance Offroad*, 99F.4th 821 (5th Cir. 2024).

### B. Duty to indemnify

The insureds were sued for theft of Bitcoin. The insurer sued its insured for a declaratory judgment that it had no obligation to provide coverage under a homeowner policy or personal-umbrella policy. The district court granted summary judgment in favor of the insurer holding the insurer was not required to defend or indemnify the insureds in the underlying lawsuit. The policy required the insurer to defend and indemnify any claim against the insureds for damages based on an "occurrence" arising from negligent personal acts. The underlying lawsuit alleged only intentional acts. The court rejected the argument that a particular paragraph in the complaint should be interpreted as negligence citing to case law that there is a similar impossibility that a claim based on theft of property can be transformed into a negligence case. Therefore, the Fifth Circuit held the district court properly ruled there is no duty to indemnify. *Nationwide Mut. Ins. Co. v. Choi*, No. 23-20405, 2024 WL 2131515 (5th Cir. May 13, 2024).

With the underlying lawsuit still pending, two insurers, Farmers and Cincinnati, sought a declaration on their respective duties to indemnify the defendant in that lawsuit. The court analyzes Texas precedent, including *D.R. Horton-Tex., Ltd. v. Markel Int'l Ins. Co.*, 300 S.W.3d 740, 744 (Tex. 2009) and *Farmers Tex. Cty. Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 84 (Tex. 1997) then holds that until the underlying lawsuit (*DeRouen v. Hidden Lakes Development Partners, L.P.*, Cause No. 2019-26660, pending in the 164th District Court of Harris County, Texas) is resolved, the issue of indemnification is not ripe. Consequently, the trial court lacked subject matter jurisdiction so the summary judgment in favor of Cincinnati was reversed. *Farmers Ins. Exch. v. The Cincinnati Ins. Co.,* No. 01-23-00387-CV, 2024 WL 3973432 (Tex. App.—Houston [1st Dist.] Aug. 29, 2024).

### C. Settlements, assignments & covenants not to execute

An insured produced oil and gas off the African coast. Claims against the insured arose alleging misrepresentations of the oil content of two of its exploratory wells. Investors filed suit against the insured, who eventually filed for bankruptcy. The insured reached a settlement with the investors for $220 million, but agreed the investors would pursue the insured's rights under the insurers' policies. The insurer had refused to participate in the

litigation. The insurers argued that a covered loss had not occurred. The trial court agreed with the investors holding the insured's defense costs and settlement amounts constituted a "loss" under the policy. Liability insurance covers, "damage the insured does to others." The Texas Supreme Court concluded, "(1) the insureds suffered a loss under the policies, (2) the claimants can assert claims directly against the insurers, and (3) the settlement is not binding or admissible in the coverage litigation." Because the trial court abused its discretion by holding otherwise on the third issue, the Texas Supreme Court conditionally granted mandamus relief in part and ordered the trial court to vacate its order to the extent they rely on the holding that the settlement agreement is admissible and binding to establish coverage under the policies and the amount of any covered loss. *In re Ill. Nat'l Ins. Co.*, 685 S.W.3d 826 (Tex. 2024).

This case arose out of a car wreck in which multiple claimants received an apportioned, mediated settlement of a one-million-dollar commercial policy. GEICO settled its subrogation property damage claim with the same carrier for a leased car that was destroyed in the wreck. Two of the claimants sought to recover most of the proceeds of that settlement back from GEICO arguing that they were not made whole by the apportioned settlement for their injuries, arguing GEICO was not entitled to recover under equitable principles set forth in *Ortiz v. Great Southern Fire & Casualty Insurance Company*, 597 S.W.2d 242. In its grant of mandamus, the appellate court overturned the trial court's judgment and held that the contractual provisions of the policy controlled over equitable doctrines, and that GEICO was entitled to the reimbursement it received in the earlier settlement. There are numerous procedural twists and turns in the opinion involving notice and various motions unrelated to insurance law. *In Re Geico Indem. Ins. Co.,* No. 09-23-00403-CV, 2024 WL 2972775 (Tex. App.—Beaumont, Feb. 7, 2024).

## V. THIRD PARTY THEORIES OF LIABILITY

### A. Stowers duty & negligent failure to settle

This is an important case that adds a new wrinkle to the *Stowers* doctrine. Solis is an attorney who represented an injury claimant. The insured had a one-million-dollar policy which it tendered to Solis' client in response to a *Stowers* demand. A second claimant who was left out of the settlement forced the insured into involuntary bankruptcy. Curtis, the bankruptcy trustee sought to claw back the settlement into the bankruptcy estate. The bankruptcy court found in favor of the trustee, and the Fifth Circuit affirmed. In October, the U.S. Supreme Court denied certiorari. This opinion should be read in conjunction with *Texas Farmers Ins. Co. v. Soriano,* 881 S.W.2d 312 (Tex. 1994). The risk in this case did not fall on the insurance company but on the claimants and the insured. With multiple claimants and limited insurance, tread carefully. *Law Office of Rogelio Solis P.L.L.C. v. Curtis,* 83 F.4th 409 (5th Cir. 2024), cert. denied, ___ S.Ct. ___, 2024 WL 4426605 (mem. op.).

### B. Suits by third parties

#### 1. Suit as judgment creditor of insured

Martinez sued Nettleford who was insured. Nettleford made misrepresentations on his insurance application and refused to cooperate with the insurer. As a result the insurer refused to defend or indemnify Nettleford. Martinez made a *Stowers* demand on the insurer which it refused. Martinez took a default judgment against Nettleford and then a turnover of his action against Nettleford's insurer. The insurer sued Nettleford for declaratory judgment asserting that it owed nothing on the claim. Then the insurer took a default judgment against Nettleford which the appellate court held bound Martinez and defeated her action against the insurer. *Martinez v. SeaHarbor Ins. Agency L.LC.*, No. 05-23-00513-CV, 2024 WL 396630 (Tex. App.—Dallas Feb. 2, 2024).

## VI. SUITS BY INSURERS

### A. Rescission

An insured purchased a homeowner's policy for his home. During the policy period, a fire occurred at the home. After notifying the insurer of the loss, the insurer rescinded the policy stating that the insured had a prior conviction for insurance fraud that was not disclosed on his application for insurance. The insurer stated in a letter the misrepresentation rendered the policy void and that it would not have insured the home had the insured disclosed his prior insurance fraud conviction. The insured filed suit arguing there was no intentional or material misrepresentation. The trial court granted summary judgment for the insurer. On appeal the insured argued that whether a misrepresentation is material is a question of fact under the Tex. Ins. Code. The insurer argued there was ample evidence on the record, including the letter it sent the insured alleging the misrepresentation was material and its own statement that it "would have rejected this policy application but for the misrepresentation made in the policy." The appellate court held the insurer submitted its undisputed evidence establishing its affirmative defense, and the insured did not respond with evidence to dispute the facts as stated by the insurer. Therefore, summary judgment in favor of the insurer was proper. *Palma v. Allied Trust Ins. Co.*, No. 14-23-00063-CV, 2024 WL 3765821 (Tex. App.—Houston [14th Dist.] Aug. 13, 2024).

### B. Indemnity & contribution

This case involves insurance but only tangentially. The dispute arises out of indemnification language in an oil well Master Service/Sales Agreement (MSA). The MSA was between the oil well operator and a consultant. The agreement called for mutual indemnification with an insured amount of "at least 5 million dollars." Both parties were insured for more, the oil well operator for a lot more. The court held that the amount of insurance was irrelevant to the indemnification agreement and that the MSA set both the floor and the ceiling at five million dollars. The court also discusses the interplay with the facts of this case and the Texas Anti-Indemnity Act (Tex. Ins. Code. Chapter 151). *Century Sur. Co. v. Colgate Operating, L.L.C.,* 116 F.4th 345 (5th Cir. 2024).

### C. Subrogation

An explosion occurred at a plywood mill killing one employee and injuring three others. Workers' compensation benefits were provided to all claimants by the employer's insurance carrier. Third-party negligence claims were brought against several defendants who designed and manufactured the sander system that caused the explosion. At trial, the jury apportioned responsibility between the employer at 65% and the remainder between the third-parties. All the claimants except one stipulated that prior settlements exceeded the total damages awarded by the jury, and that a take-nothing judgment should be entered as to their claims. As to the remaining party, in the court's final judgment, that claimant received almost $650,000. The claimants asserted that the insurer's right to recovery was obviated by the "employer responsibility offset" contained in Texas Labor Code Section 417.001(b). The insurer argued this offset did not apply to the amounts received by the claimants and therefore, it was still entitled to reimbursement of benefits paid. Because the

offset exceeded the insurer's lien amount, the trial court ruled that the insurer's lien was wiped out and that the claimants would receive an additional offset for any future benefits paid.

On appeal, the insurer argued the reduction of its subrogation interest set out in Section 417.001(b) based on the jury's finding that the employer was 65% liable for the explosion did not apply to the funds received by the claimants as pretrial settlements. The appellate court noted that this issue appeared to be one of first impression for Texas courts. The appellate court examined both Section 417.001(b) of the Labor Code and Section 33.012(b) of the Texas Civil Practice and Remedies Code, giving effect to both, to determine the applicability and proper calculation method for the employer responsibility offset. The appellate court stated:

> Yoking the amount of the subrogation interest reduction to the dollar amount by which the trial court reduces the judgment award to claimant specifically "based on the percentage responsibility… attributable to the employer" give effect to that intent — the compensation insurer is barred from recouping that money that, absent the tortious conduct of its insured, the claimant would have received as damages in the trial court's judgment.

This interpretation resulted in reversing the trial court's judgment and holding that the employer responsibility offset did not apply to reduce the insurer's subrogation interest as to benefits paid to the settling claimants, and that those settling claimants were not entitled to any judgment offset against past or future benefits paid to them by the insurer. As to the remaining claimant, the trial court correctly determined that claimant was entitled to an offset against the insurer's subrogation lien but erred in determining the amount of that offset. *Old Republic Ins. Co. v. Morris, et al.*, No. 12-23-00292-CV, 2024 WL 4350334 (Tex. App.—Tyler Sept. 30, 2024).

## VII. DAMAGES & OTHER ELEMENTS OF RECOVERY

### A. Statutory additional damages

This case is an appeal from summary judgment in the insurer's favor. The issue is one of statutory construction, and is summarized in the court's opinion as follows:

> On appeal, Miracle Auto asks us to determine whether it must be licensed under chapter 2303 of the Texas Occupations Code as a vehicle storage facility to be entitled to compensation, under subsection 2303.156(b) of the Texas Occupations Code, for storing the insured's vehicle.

The court answers "yes" and affirms the trial court's judgment. The lack of a license was fatal to the insured's right to recover under the Code. *Miracle Auto., Inc. d/b/a Miracle Body & Paint v. Geico Cty. Mut. Ins. Co.,* 696 S.W.3d 713 (Tex. App.—San Antonio 2024, no pet.).

### B. Attorney's fees

After a tornado hit an insured's home, he notified his insurer. The insurer inspected the home and determined the damages. The insured notified the insurer he believed the damage amount was insufficient, and never heard from the insurer. The insured filed suit. More than a year after the insured filed suit, the insurer invoked the appraisal provision in the policy. The insurer then paid the amount determined by the appraiser. The insured argued he was still entitled to attorney's fees under the Texas Prompt Payment of Claims Act (TPPCA). The district court granted the insurer's motion for summary judgment, holding that under Tex. Ins. Code Section 542A.007(a) the insured was not entitled to attorney's fees. The insured appealed.

The Fifth Circuit certified the following question to the Texas Supreme Court: "In an action under Chapter 542A of the Texas Prompt Payment of Claims Act, does an insurer's payment of the full appraisal award plus any possible statutory interest preclude recovery of attorney's fees?" The Texas Supreme Court recently answered that question in the affirmative. It held that, "[S]ection 542A.007 of the Insurance Code prohibits an award of attorney's fees when an insurer has fully discharged its obligations under the policy by voluntarily paying the appraised amount, plus any statutory interest, in compliance with the policy's appraisal provisions." The Texas Supreme Court affirmed the district court's judgment. *Rodriguez v. Safeco Ins. Co. of Ind.*, 684 S.W.3d 789 (Tex. 2024).

An insured was involved in two car accidents. After recovering from injuries sustained in the first accident, the insured was hit again. The insured settled with the driver in the second accident, and then turned to her own insurer for reimbursement for additional damages beyond the driver's policy under her UM/UIM policy.Prior to her second accident, her medical records showed that her pain was much better after treatment for the first accident. The insured sued her insurer for the remaining damages. The jury awarded the insured her damages and attorneys' fees. The insurer appealed, and the appellate court held that the evi-

dence was factually sufficient to support the award of past medical expenses. Moreover, the court stated the trial court cannot reduce the lodestar calculation of attorney fees based on the existence of a contingency agreement. The appellate court affirmed the trial court's judgment holding the damages and attorneys' fees were appropriate. *Allstate Fire & Cas. Ins. Co. v. Yarum*, No. 05-22-01004-CV, 2024 WL 3963861 (Tex. App.—Dallas Aug. 28, 2024) (mem. op.).

The sole issue addressed in this opinion is the lack of a jury question regarding attorney's fees. The insured sued her insurer on a declaratory judgment action. The insurer made a jury demand, and the case was tried to a jury. No evidence on attorney's fees was presented and no question was submitted to the jury. Post verdict, the insured asked the court to award attorney's fees and presented evidence at the hearing on the amount which the court awarded. The insurer filed its objection stating that the issue was waived because it was not presented to the jury at trial. The appellate court agreed, holding the insured had waived the issue of attorney's fees by not requesting a jury finding citing Tex. R. Civ. Proc. 279. *Allstate v. Harper,* No. 03-23-00635-CV 2024 WL 4575701 (Tex. App.—Austin Oct. 25, 2024).

The insured sued his UM/UIM carrier after he was injured in a car accident, and had recovered partially from the driver who caused the accident. The jury awarded an amount to be paid under the underinsured motorist policy that was less than the UM/UIM insurer's pre-suit settlement offer. The trial court rendered judgment, awarding the insured an additional $823 under his UIM policy, and $20,000 in attorney's fees under the Uniform Declaratory Judgments Act. The insurer appealed arguing the attorney's fees incurred by the insured were not necessary. The Texas Supreme Court has made clear that an injured party must first obtain a judgment establishing the injuring party's liability and status as an underinsured motorist before the UM/UIM carrier is legally obligated to pay UIM benefits. Because it was necessary for the insured to seek a declaration establishing his entitlement to UIM benefits, the appellate court affirmed holding that the trial court did not abuse its discretion when it awarded the insured's attorney's fees. *State Farm Mut. Auto. Ins. Co. v. Valdez*, 690 S.W.3d 712 (Tex. App.—San Antonio 2024, pet. denied).

This case follows *State Farm v. Valdez* and affirms $50,000 in attorney's fees on a $75,000 judgment after insured turned down a $100,000 offer from the insurer. *Farmers Tex. Cty. Mut. Ins. Co. v. Barr,* No. 09-22-00321-CV, 2024 WL 2340792 (Tex. App.—Beaumont May 23, 2024).

## VIII. DEFENSES & COUNTERCLAIMS

### A. Breach of policy condition by insured

This case affirms a summary judgment in favor of the insurer on a freeze damage claim. The issue is an endorsement that requires the insured to "maintain protective devices… including a sprinkler system." The court treated this endorsement as a policy condition and placed the burden on the insured to produce evidence in response to a no evidence motion for summary judgment. The insurer argued that had the insured properly "maintained" the sprinkler system it would not have froze. Since the insured failed to address the no evidence issue, the court affirmed the trial court's judgment. A petition for review has been filed in the case. *Madhu Lodging Partners L.P. v. AmGuard Ins. Co.,* No. 02-23-00379-CV, 2024 WL 2760482 (Tex. App. - Fort Worth May 30, 2024, pet. filed).

### B. Limitations

After an insured's home was damaged in a hurricane, she filed a claim with her insurer. The insured invoked the appraisal process and also sued her insurer. An appraiser issued an award, which the insurer paid. The insured non-suited her claims without prejudice two days before trial and then filed another suit in district court. The trial court granted the insurer's motion for summary judgment and rendered judgment that the insured take nothing on her claims. The appellate court held the insured's claims, whether based on alleged policy breaches or statutory violations, accrued no later than February 19, 2019, when her counsel sent a letter that showed she was aware that the insurer's conclusion as to the amount of the loss was substantially different from her own. Whether under a two or four-year statute of limitations, this suit in July 2023 was untimely. Therefore, the appellate court sustained the trial court's judgment of summary judgment in favor of the insurer. *Galvan v. RVOS Farm Mut. Ins. Co.*, No. 13-23-00498-CV, 2024 WL 3963908 (Tex. App.—Corpus Christi Aug. 28, 2024).

### C. Other defenses

A roofing contractor that was not a licensed public adjuster was sued by a dissatisfied customer for violating Tex. Ins. Code section 4102. In turn, the roofing contractor sued the Texas Department of Insurance to invalidate Texas' licensing and dual-capacity regulations, alleging the statutes relating to public adjusters in the Texas Insurance Code sections 4101 and 4102 violated free speech and due process rights guaranteed by the First and Fourteenth Amendments of the United States Constitution. The roofing contractor was a professional contractor that provided roofing services to residential and commercial customers. The contractor was not licensed as a public adjuster but claimed to have extensive experience in facilitating settlement of insurance claims. Under the law, a person may not serve in a dual role - as both contractor and adjuster - in connection with property subject to an insurance claim or falsely advertise an ability to do so.

The Texas Department of Insurance prevailed at the trial court on a motion to dismiss, holding the First Amendment was inapplicable because the challenged laws regulated professional conduct, not speech, and the roofer failed to state a void for vagueness claim under the Fourteenth Amendment's Due Process Clause. The appellate court reversed and remanded. The Texas Supreme Court agreed with the trial court that the statute targets non-expressive commercial activities not speech and held, "any incidental impact on speech is not sufficient to bring the First Amendment into play." Additionally, the Texas Supreme Court

**The Texas Supreme Court agreed with the trial court that the statute targets non-expressive commercial activities not speech and held, "any incidental impact on speech is not sufficient to bring the First Amendment into play."**

stated the roofing contractor's form contract recited the definition of a public adjuster, even though the contractor is not a public adjuster. Therefore, the facial vagueness claim fails as a matter of law. The Texas Supreme Court reversed the court of appeals' judgment and rendered judgment dismissing the roofing contractor's case. *Tex. Dep't of Ins. v. Stonewater Roofing, Ltd. Co.*, 696 S.W.3d 646 (Tex. 2024).

## IX. PRACTICE & PROCEDURE

### A. Parties

An insurer was the primary insurer for companies that manufactured and sold products containing asbestos. Two of those companies filed bankruptcy after facing thousands of asbestos-related lawsuits. A reorganization plan was filed. The insurer was contractually obligated to defend each covered asbestos personal injury claim and to indemnify the debtors for up to $500,000 per claim. The insurer argued the plan exposed it to millions of dollars in fraudulent claims because the plan did not require the same disclosures for insured and uninsured claims. The district court confirmed the plan, and the Fourth Circuit affirmed. The Bankruptcy Code allows any "party in interest to raise and be heard on any issue" in Chapter 11 Bankruptcy. The appellate court concluded the insurer was not a "party in interest" because the reorganization plan was "insurance neutral," meaning the plan neither increased nor impaired the insurer's rights under the insurance contract. The United States Supreme Court held an insurer with financial responsibility for a bankruptcy claim is sufficiently concerned with the proceedings to be a "party in interest" that can raise objections to a reorganization plan. *Truck Ins. Exch. v. Kaiser Gypsum Co., Inc., et al.*, 602 U.S. 268 (2024).

### B. Jurisdiction

The trial court granted the insurer's motion to dismiss based on *forum non conveniens* which was in turn based on a forum-selection clause in the insurance policy. The insured appealed arguing that the forum-selection clause applied only to contract disputes and not to extra-contractual violations. The forum-selection clause designated the British Virgin Islands as the proper forum.
The appellate court affirmed the trial court's ruling. The appellate court reasoned that the tort claims were based on the contract which was subject to the forum-selection language so consequently fell under that provision. The opinion notes the distinction between forum-selection and choice of law provisions in the policy but implies that the ruling would be the same with regards to both. *Havercombre Ventures Ltd. v. Spheric Assurance Co. Ltd.*, No. 05-24-00220-CV, 2024 WL 4763277 (Tex. App.—Dallas Nov. 13, 2024).

### C. Pleadings

The issues in this case are more procedural than insurance related. The homeowners sued their insurer for a fire loss to their home. The property damage limit in the policy was enhanced by an endorsement that increased the loss limit by 25% to a total of $168,750. The insurer paid just over $163,500 for the loss. The homeowners asserted a loss exceeding the policy limit and sued. The trial court found the homeowner's response to the insurer's no evidence motion for summary judgment was conclusory and vague and granted the motion. The appellate court also found the same faults with the homeowner's appellate brief and affirmed the judgment. *Wills v. USAA Gen. Indem. Co.,* No. 01-22-00304-CV, 2023 WL 8459498 (Tex. App.—Houston [1st Dist.] Dec. 7, 2023, no pet.).

### D. Discovery

This case arises out of a water damage claim under a homeowner's policy. From the record, it appears the insurer made multiple payments on the claim. Still, the trial court's ruling on the insurer's motion for summary judgment was mainly supported by the insured's failure to respond to requests for admission. The insured complained of the court's reliance but never moved to withdraw her response. The appellate court held that the deemed admissions supported the ruling and affirmed the judgment. *Januzi v. Am. Modern Prop. & Cas. Ins.*, No. 12-24-00016-CV, 2024 WL 4002075 (Tex. App.—Tyler Aug. 29, 2024, no pet.).

### E. Experts

A lightning strike damaged the insured's property. The insurer made some preliminary payments on the claim, then refused further payment. The insured obtained a favorable jury verdict and the insurer appealed, arguing that expert testimony was required to prove the damage. The insured offered no expert testimony at trial. It was hotly disputed whether lightning had struck the house at all. The insurer's expert testified that there were no recorded lightning strikes within a half mile of the house. The insured offered lay testimony about scorch marks and appliances that quit working after the strikes. They also produced an extensive list of personal electronic items that were destroyed by the strike. The appellate court agreed that lay testimony was sufficient to show a power surge from a lightning strike was possible and that plugged-in appliances that worked before the strike and quit working right after the strike were likely damaged. The appellate court disagreed that lay testimony was sufficient to prove the complexity of damage the insured was claiming for many of the listed items. Because the evidence was sufficient for some, but not all, of the claimed items, the appellate court reversed and remanded, rather than reversing and rendering. *State Farm Lloyds v. Hilmi*, No. 02-23-00491-CV, 2024 WL 4377494 (Tex. App.—Fort Worth Oct. 3, 2024).

### F. Class Actions

A driver made a third-party claim against an insurer for damage sustained to her 1983 Mercedes-Benz after an accident involving the insurer's insured. The insurer determined the car was a total loss, and sent the driver checks for the pre-collision value along with lost vehicle use. The driver sent the checks back. Before the insurer was notified if the driver would accept its offer, the insurer told TXDOT that the driver's car was salvage. The driver had invested considerable time and resources into restoring her car and disagreed with the value the insurer determined. However, TXDOT sent her a letter notifying her the insurer had reported that it paid her claim and advised her the registration for the car was no longer valid. Nearly two years later the insurer represented to TXDOT that it had filed the report in error because the damage to the car was not sufficient to classify the car as a salvage motor vehicle. The driver sued and filed a motion for class certification. Following court order, the insurer reviewed more than 500 claims and determined no person during a five year period disputed whether their vehicle was a total loss or rejected the total loss payment made to them by the insurer. The trial court and appellate court approved the class, with the class definition as all claimants to whom the insurer sent a check to and within three days filed a report with TXDOT. The Texas Supreme Court granted a petition for review and held the predominance requirement could not be met as it is clear that substantial variation exists among the class regarding standing. Moreover, the class lacks typicality as the driver's set of facts are atypical because hers was a restored vintage car. The Texas Supreme Court reversed the appellate court's class certification order and remanded the case to the district court on

the driver's individual claim for damages. *USAA Cas. Ins. Co. v. Letot*, 690 S.W.3d 274 (Tex. 2024).

### G. Appraisal

The trial court denied the insurer's motion to compel appraisal on a storm damage claim holding that the insurer had waived appraisal. The appellate court disagreed and issued mandamus compelling appraisal. The court noted that the policy stated that any waiver of the policy terms must be in writing and that the insured could not show prejudice by the delay in requesting appraisal. *In re Surechoice Reciprocal Ins. Exch.,* NO. 01-24-00367-CV, 2024 WL 4776218 (Tex. App.—Houston [1st Dist.] November 14, 2024).

Homeowners passed away in their home, and there was delay in discovering them. Their relative handled managing the estate, and notifying the insurer of the claim. The relative contracted with the recommended provider to remediate the property, but disagreement arose regarding the damage amount. The relative invoked the mandatory appraisal clause, and both parties chose their own appraiser. The two appraisers agreed on the damage amount, which was less than what the insurer had already paid. The insurer filed for summary judgment on the ground that the appraisal award barred a claimed breach of contract, which the trial court granted. The relative appealed, resulting in a reversal of the decision based on mistake. The relative's appraiser's loss amount failed to calculate remediation efforts performed before his inspection. Construing the evidence in a light most favorable to the relative, the appellate court concluded that a factfinder could reasonably infer that the appraiser misinterpreted the scope of his task. Therefore, the appellate court reversed the trial court's ruling in favor of the insurer. *Dalton v. Republic Lloyds*, No. 07-22-00308-CV, 2023 WL 8270247 (Tex. App.—Amarillo Nov. 29, 2023, mem. op.).

This case involved a hail damage claim. In its initial evaluation, the insurer found the covered damage to the roof to be $8,800. It issued a check for that loss minus deductibles. It issued supplemental payments after that based on additional inspections and reports. The insured invoked the appraisal clause in the policy, and an appraisal award of around $96,000 resulted. The insurer refused to pay the award citing coverage issues. After suit was filed, the insurer paid the difference between the appraisal award and its previous payments as well as interest and attorney's fees. It then moved for summary judgment, which the trial court granted. The appellate court affirmed the judgment despite the insured's claim that the payment came too late to excuse the insurer from Tex. Ins. Code violations. Relying heavily on *Rodriguez v. Safeco Ins. Co. of Ind.*, 684 S.W.3d 789 (Tex. 2024), the appellate court found that the insurer was not obligated to pay the award "on demand." It also rejected insured's independent injury claim based on the increased cost of repair resulting from the delay. *Knopp v. State Farm Lloyds*, No. 05-22-00749-CV, 2024 WL 3579432 (Tex. App.—Dallas July 30, 2024).

### H. Motions for summary judgment

An insurer sought mandamus after its motion for summary judgment was denied in a water damage case. The appellate court denied mandamus without explanation. The appellate record shows only the petition for mandamus, no response to the petition and a denial of emergency relief. *In re Homeowners of Am. Ins. Co.,* No. 01-24-00697-CV, 2024 4292185 (Tex. App.—Houston [1st Dist.] Sept. 26, 2024).

## XI. OTHER ISSUES

### A. Sanctions

The trial court granted certain motion for sanctions filed by real party in interest and the plaintiff, and found the defendant had acted in bad faith and ordered him to pay plaintiff's counsel up to $88,240 within a short amount of time and before final judgment. Before the orders were signed, the defendant opposed requiring payment of sanctions before the final judgment on the grounds that doing so would prevent litigation from going forward. The trial court signed the orders requiring payment to plaintiff's counsel before final judgment. None of the orders explained why ordering defendant to pay the amounts ordered before final judgment did not preclude the insurer's access to the courts. Mandamus was granted, and the appellate court concluded the trial court abused its discretion by ordering the defendant to pay the plaintiff's attorney fees prior to final judgment without making express written findings concerning why the monetary sanctions did not have a preclusive effect on the insurer's access to the courts. *In re State Farm Mut. Auto. Ins. Co.*, No. 05-24-00229-CV, 2024 WL 3912369 (Tex. App.—Dallas Aug. 23, 2024).

### B. Receivership

This case involves the priority of a claim in a receivership plan under Tex. Ins. Code section 443.301. Mine Safety objected to the receiver's designating its claim as a "late filed non policy claim." This opinion goes into detail on the procedures surrounding the receivership and the processing of claims. In the end, the appellate court affirmed the trial court's findings and rulings. While the opinion has a narrow application, it is a must read for any practitioner with a similar claim. *Mine Safety Appliance Co., L.L.C. v. Prime Tempus, Inc.*, No. 03-23-00321-CV, 2024 WL 4750758 (Tex. App.—Austin Nov. 6, 2024).

** Suzette E. Selden is an attorney at Selden & Company PC in Austin focusing on insurance liti- gation. She was selected by Thomson Reuters for inclusion in 2012-2015, 2017-2020 Texas Rising Stars® publication. Suzette served as a committee member of the State Bar of Texas Women in the Profession Committee. She previously served as the President of the Capital Area Trial Lawyers Association. In 2002, Suzette graduated with highest honors from Brigham Young University with a B.A. in Communications, and with high honors from the University of Hous- ton Law Center in 2006.*

*Henry Moore is an attorney at Moore and Bomben, PLLC in Austin who practices civil litigation with a primary emphasis in personal injury and insurance disputes. He was selected by Thomson Reuters for inclusion in 2011-2021 Texas Super Lawyers® publication. Henry previously served as President of the Capital Area Trial Lawyers Association. He is a frequent speaker at continuing legal education seminars all over the state on insurance coverage issues. Henry was the recipient of the John Howie Award for mentorship from the Texas Trial Lawyers Association, and also the Scott Ozmun Trial Lawyer of the Year award from the Capital Area Trial Lawyers Association. He graduated with honors from the University of Texas with a B.A. in Psychology in 1974 and a J.D. from the University of Texas School of Law in 1976. He is board certified in personal injury trial law and insurance law.*

# NOTE

# DIVIDED COURT PERMITS AIRLINE TO RELY ON THIRD-PARTY VENDOR'S ARBITRATION CLAUSE BASED ON EQUITABLE ESTOPPEL

## *Herrera v. Cathay Pacific Airways Lt*

By Aleksandar Petrusevski*

**Introduction**

The Ninth Circuit's divided decision in *Herrera v. Cathay Pacific Airways* Lt[1] underscores a significant expansion of arbitration clauses' reach via the doctrine of equitable estoppel. This case highlights emerging tensions between arbitration enforcement and consumer protection, particularly in contracts involving intermediaries like travel agencies. By allowing a non-signatory airline to compel arbitration based on a third-party vendor's terms, the court's ruling raises critical questions about the obligations of non-signatories and the scope of equitable estoppel in consumer contracts. The court's divided ruling has far-reaching implications for consumer protection and contract enforcement, especially in the context of international air travel.

**Facts**

Winifredo and Macaria Herrera purchased international round-trip tickets on Cathay Pacific (Cathay) via the third-party booking platform ASAP Tickets, operated by International Travel Network, LLC (ITN). The Herreras agreed to ASAP's Terms and Conditions (T&C). ASAP's T&C stipulated that if an airline fare's rules allowed for refunds or exchanges, ASAP would charge a $250.00 fee per ticket to process any refunds or exchanges. The agreement also included a binding arbitration clause requiring any dispute or claim arising under ASAP's T&C be resolved through small claims court or arbitration. The tickets issued by Cathay incorporated Cathay's General Conditions of Carriage for Passengers and Baggage (GCC). Article 10.2 of Cathay's GCC provided that "except as otherwise provided by the Warsaw Convention or the Montreal Convention or applicable law," Cathay's GCC dictates how Cathay should issue a refund after Cathay cancels a flight. Under Article 11.1.1 of Cathay's GCC, Cathay is entitled to issue a refund to the person named on the ticket or whoever paid for the ticket after they provide satisfactory proof of payment.

Cathay canceled the Herreras' international return flight during their trip due to "operational reasons." At the airport, a Cathay agent assured the Herreras that they would receive a refund for the unused portion of their tickets and recommended the Herreras purchase a return flight through another airline. Following this advice, the Herreras purchased a return flight with another airline. Cathay later instructed the Herreras to contact ASAP for the refund. The Herreras made multiple requests to ASAP, resulting in only temporary travel vouchers that would expire within months of issuance. The Herreras rejected this offer due to ongoing COVID-19 travel restrictions. Cathay stated that the airline never received a refund request from the Herreras or ASAP on behalf of the Herreras.

The Herreras sued Cathay, alleging breach of contract under the GCC. Cathay moved to compel arbitration, invoking the arbitration clause in ASAP's T&C through equitable estoppel. The district court denied Cathay's motion to compel arbitration because the Herreras breach of contract case stemmed from Cathay's GCC, not ASAP's T&C. Cathay filed an interlocutory appeal seeking reversal of the district court's denial of its motion

to compel arbitration and either dismissal or a stay of the action pending arbitration of the Herreras' breach-of-contract claim.

**Holding**

The Ninth Circuit held that Cathay, though a non-signatory, could enforce ASAP's arbitration clause under the doctrine of equitable estoppel. The court reasoned that the Herreras' claims were "intimately founded in and intertwined with" ASAP's T&C, justifying arbitration. Judge Forrest dissented, arguing that the Herreras' breach-of-contract claim was independent of ASAP's T&C, making equitable estoppel inapplicable.

**Analysis**

Equitable estoppel allows a non-signatory to compel arbitration if the claims are intertwined with a contract containing an arbitration clause. Under the relevant caselaw, a non-signatory to a contract may enforce an arbitration provision under the doctrine of equitable estoppel when "the claims are 'intimately founded in and intertwined with' the underlying contract."[2] The court focused on whether Herreras' breach-of-contract claim was intimately founded and intertwined with ASAP's T&C, which included the arbitration clause. To determine whether equitable estoppel applies to the Herreras' claim, the court looked at the" relationship between the parties and their connection to the alleged violations."[3] Because the court concluded that the Herreras' allegations that Cathay breached the GCC were "intimately founded in and intertwined with" ASAP's alleged conduct under its T&C, Cathay was justified in seeking to enforce the arbitration clause contained in the T&C.

Judge J. Clifford Wallace, writing for the majority, emphasized that the Herreras' claims were intertwined with ASAP's T&C. The court found that resolving the breach-of-contract claim required analyzing ASAP's role in processing refunds and the arbitration clause within ASAP's agreement. The court drew parallels to *Franklin v. Cmty. Reg'l Med. Ctr.,* where claims against a non-signatory were linked to an employment contract.[4] In *Franklin*, a nurse entered into a travel-nurse-assignment contract with a staffing agency. This contract contained a provision that stipulated any claims or disputes under the contract would be handled with arbitration.[5] The staffing agency assigned the nurse to a hospital where she worked for several months.[6] The nurse sued the hospital to recover her unpaid wages.[7] Although her claims were directed at the hospital, a non-signatory to the nurse's contract with her staffing agency, the court compelled arbitration because her claims for unpaid wages were closely related to her contractual relationship with the staffing agency.[8] Because the staffing agency was responsible for reviewing the nurse's timekeeping records, approaching the hospital with any discrepancies, and paying her wages, the staffing agency and its contract with the nurse would be implicated in the nurse's suit against the hospital.[9] Since the nurse's claims against the hospital were dependent on the staffing agency's performance under its contract, the nurse's claims against the hospital were found to be "intimately founded in and intertwined with" her employment contract with the staffing agency and the nurse was found to be equitably estopped from avoiding arbitration of her claims against the hospital.[10]

Similarly, the court in *Herrera* found that the Herreras' claims against Cathay are connected to ASAP's T&C, which included an arbitration clause. Just as *Franklin* highlighted the "substance" of the claims rather than simply who was named in the contract, the court here observed that the Herreras' allegations depended on the obligations and processes set by ASAP's T&C.[11] Applying equitable estoppel to enforce the arbitration clause within ASAP's T&C was fair and appropriate, even though Cathay Pacific was not a direct signatory to the contract between the Herreras and ASAP. The doctrine of equitable estoppel allows a non-signatory to compel arbitration if the claims are intimately connected to the agreement containing the arbitration clause. The court found that the Herreras' breach-of-contract claims against Cathay were "intimately founded in and intertwined with" ASAP's performance under its T&C, particularly around the issues of requesting and processing refunds. The majority dismissed the Herreras' argument that federal regulations precluded arbitration, interpreting the regulations narrowly.

For these reasons, the court concluded that the district court erred in denying Cathay's motion to compel arbitration based on the doctrine of equitable estoppel. The district court's decision was reversed. The Ninth Circuit remanded the case back to the district court with instructions to either dismiss or stay the action pending arbitration of the Herreras' breach-of-contract claim, depending on whether all the suit's issues could be handled during the arbitration.

**Implications and Impact**

The decision in *Herrera v. Cathay Pacific Airways Ltd.* has significant implications for applying equitable estoppel in arbitration contexts, particularly when a non-signatory seeks to enforce an arbitration agreement embedded in a third-party contract. By upholding the arbitration clause, the court signaled that even if a party, like Cathay, isn't directly part of the original agreement, it can still compel arbitration if the claims are "intimately founded in and intertwined with" a contract that included an arbitration clause. This means that courts may now be more willing to enforce arbitration clauses when a case is indirectly related to a contract, even if the main contract dispute is with a different party. The court's reliance on cases like *Franklin v. Community Regional Medical Center* highlights the shift toward focusing on the core issues of the claims, rather than simply who signed the contract.

The decision also reinforces arbitration's reach over consumer claims, even when those claims are directed at a party that does not have a signed arbitration agreement with the consumer. This interpretation could undermine consumer protections by blurring the line on when arbitration applies, allowing companies to exploit indirect contractual ties to compel arbitration. As a result, consumers could find it harder to take their disputes to court if businesses increasingly use arbitration clauses in agreements with third-party intermediaries to avoid lawsuits. Due to ASAP's role as a middleman, the decision may impact how courts view the role of intermediaries in contractual disputes. The court's holding suggests that parties engaging with consumers through third-party platforms might be able to enforce arbitration even if they do not directly hold arbitration agreements with those consumers. Consumers and companies will need to be more cognizant of the provisions within the terms and conditions they consent to with intermediaries because it can expose the consumer or the company on a broader scale.

**The decision also reinforces arbitration's reach over consumer claims, even when those claims are directed at a party that does not have a signed arbitration agreement with the consumer.**

Judge Danielle J. Forrest began her dissent by immediately disagreeing with the outcome reached by the majority. She emphasized that the doctrine of equitable estoppel prevents parties from circumventing arbitration agreements by suing non-sig-

natories for issues "intimately founded in" or "intertwined with" an existing contract.[12] Judge Forrest argues that the Herreras case does not meet this threshold because their refund claim hinges solely on Cathay's obligations, not on ASAP's T&C. The dissent argued that Herreras' claim is narrowly focused on Cathay's failure to issue refunds per their own GCC. This is crucial because the claim does not involve interpreting and enforcing the agreement with ASAP but rather is concerned with a separate contractual obligation between Cathay and its passengers under its GCC.

Equitable estoppel does not apply where the plaintiff "would have a claim independent of the existence of the [contract containing the arbitration agreement]."[13] In *Kramer v. Toyota Motor Corp,* the court concluded that consumers' product-defect claims were not intertwined with their retail purchase agreements.[14] Even though the claims would not have arisen had the consumers not purchased the product, their claims did not rely on the actual terms of the purchase agreement.[15] In contrast, *Franklin* dealt with a nurse who brought claims for wages and overtime pay for unrecorded time against the hospital where she worked.[16] In that case, resolving the issue involved knowing whether the staffing agency paid her.[17] This is what made her claims "intertwined."

Judge Forrest focuses on the fact that the Herreras' claims rested on a simple theory: Cathay breached its ticket contract by not issuing them a refund following the cancellation of their flight. The claim is framed as an alleged breach by Cathay of its own obligations under the GCC. Thus, the underlying facts do not inherently implicate ASAP's T&C. For this reason, Judge Forrest concludes that the doctrine of equitable estoppel should not be applicable in this case.

The dissent also refuted the majority's view that ASAP's role as a middleman bound Cathay to the arbitration agreement in ASAP's Terms. If Cathay was required to issue any refund owed to ASAP instead of to the Herreras directly, then Cathay's obligation to ASAP would be independent of any downstream obligation that ASAP owed to the Herreras. Judge Forrest viewed these as two distinct obligations within two contracts involving separate parties. The majority also noted that the two obligations are intertwined because ASAP violated its own T&C by creating refund restrictions that formed a basis for the Herreras' claim. The dissent argued that when analyzing intertwined-with-contract claims, the question is not what the defendants assert but what plaintiffs plead in their complaint.[18] In this case, the Herreras specifically claimed that they were entitled to a refund from Cathay.

To conclude that ASAP violated its T&C by denying the Herreras a refund, one must first establish that Cathay was not obligated to provide the refund to the Herreras. In *Franklin*, the case could not be resolved without the nurse's information about her pay rate and terms of employment contained in the third-party contract.[19] The Herreras' claim that Cathay owed them a refund, however, could have been resolved without any information about their relationship with ASAP. Because Cathay has not shown any basis for which equitable estoppel should apply, Judge Forrest argues that the district court's denial of Cathay's motion to compel arbitration should be affirmed.

Judge Forrest's dissent argues that the claims against Cathay were independent of ASAP's T&C. She highlighted that the Herreras' refund entitlement stemmed from Cathay's GCC, not from ASAP's obligations, making equitable estoppel inappropriate. The dissent cautioned against broadening arbitration clauses to cover disputes unrelated to the contract's terms, emphasizing consumer protection concerns.

## Conclusion

The Ninth Circuit's decision in *Herrera v. Cathay Pacific Airways Ltd*. exemplifies the court's expansive interpretation of equitable estoppel in the context of arbitration agreements. By allowing Cathay Pacific, a non-signatory, to enforce an arbitration clause contained in ASAP's Terms and Conditions, the court has potentially set a precedent that could significantly impact consumer contract disputes. The ruling emphasizes the importance of the relationship between parties and the interconnectedness of claims, signaling a broader reach for arbitration contracts.

However, Judge Forrest's dissent highlights the potential dangers of this expansive interpretation. One such potential danger is that applications of equitable estoppel such as this could undermine consumer protections by compelling arbitration even when claims appear to be independent of the third-party agreements. Her concerns underscore the tension between facilitating arbitration and preserving access to judicial remedies for consumers.

For businesses, *Herrera* underscores the strategic advantage of leveraging intermediary agreements to extend arbitration clauses, which could serve as a shield against litigation. For consumers, it serves as a cautionary tale, emphasizing the importance of understanding the implications of agreeing to third-party terms. As arbitration clauses increasingly permeate consumer transactions, this decision may prompt further scrutiny from courts and policymakers seeking to balance efficiency with fairness in dispute resolution.

*Second Year JD Law Student, University of Houston Law Center, Graduation expected May 2026

1 104 F.4th 702 (9th Cir. 2024). https://law.justia.com/cases/federal/appellate-courts/ca9/21-16083/21-16083-2024-03-11.html
2 Kramer v. Toyota Motor Corp., 705 F.3d 1122, at 1128—29 (9th Cir. 2013), quoting Goldman v. KPMG, LLP, 173 Cal. App. 4th 209, at 221 (2009).
3 Franklin v. Cmty. Reg'l Med. Ctr., 998 F.3d 867, 875 (9th Cir. 2021).
4 *Id.* at 869.
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.* at 875—876.
9 *Id.*
10 *Id.* at 876.
11 *See id.* at 875.
12 *Kramer,* 705 F.3d at 1128—29.
13 *Id.* at 1131.
14 *Id.* at 1131—32.
15 *Id.*
16 *Franklin*, 998 F.3d at 875—76.
17 *Id.*
18 *Franklin,* 998 F.3d at 875.
19 *Id.*

## DECEPTIVE TRADE PRACTICES AND WARRANTY

### TO RECOVER ATTORNEY'S FEES, DEFENDANT HAS THE BURDEN TO SHOW THE CONSUMER'S CLAIMS WERE GROUNDLESS IN FACT OR LAW, BROUGHT IN BAD FAITH, OR BROUGHT FOR THE PURPOSE OF HARASSMENT

Gaudet v. Icon Custom Home Builder, LLC, ___ S.W.3d ___ (Tex. App. 2024).
https://www.casemine.com/judgement/us/66d29cd46baafd489a9d3afa

**FACTS:** Appellant/Cross-Appellee Gaudet wanted to purchase a house from Appellees/Cross-Appellants Icon Custom Home Builder, LLC and Juana Garcia (collectively, "ICON"). After negotiations and a $500 deposit, ICON sent Gaudet design plans and included price quotes higher than the initial verbal estimates. Gaudet alleged ICON of engaging in a bait-and-switch scheme and filed suit against them for breach of contract, common law fraud, statutory fraud and violations of the DTPA. ICON denied the claims and included a counterclaim for attorney's fees pursuant to §17.50(c) of the DTPA on the grounds that Gaudet's claims were groundless and brought in bad faith. The trial court found each of Gaudet's claims to be groundless but not brought in bad faith or for purposes of harassment.

Gaudet appealed, and ICON cross-appealed on the issue of bad faith.

**HOLDING:** Reversed in part, affirmed in part.

**REASONING:** ICON argued that Gaudet's claims were groundless because they were precluded by prior case law. To recover attorney's fees, the contesting party must show that the consumer's claims were groundless in fact or law, brought in bad faith, or brought for the purpose of harassment. Under DTPA § 17.50(c), the test for groundlessness relies on whether the totality of the evidence demonstrates an arguable basis in fact and law for the claim.

The court held that ICON failed to meet its burden. First, the cases were factually distinct from Gaudet's claim. Second, none of the cases address a claim for groundlessness because such claims were never asserted. The court reasoned that while Gaudet's claims failed on its merits due to insufficient evidence, this did not automatically render his claims groundless. The appellate court held that Gaudet provided enough evidence that demonstrated an arguable basis for fact and law. The trial court's holding was reversed and the award for attorney's fees was rescinded.

ICON also argued that Gaudet's claims were brought in bad faith. Gaudet testified that his motivations to bring the suit did not include a malicious or discriminatory purpose. Absent evidence from ICON showing otherwise, the court held that ICON failed to support its contention that Gaudet acted in bad faith. This issue was overruled. The court affirmed the judgment to the extent it ordered that Gaudet take nothing from ICON.

### BREACH OF THE WARRANTY OF MERCHANTABILITY MEANS THE GOODS SOLD ARE NOT FIT FOR THE ORDINARY PURPOSE FOR WHICH THE GOODS ARE USED

### THE ORDINARY PURPOSE OF AN AUTOMOBILE IS TO PROVIDE TRANSPORTATION

### VECHILE USED FOR APPROXIMATELY 229,000 IS MERCHANTABLE

Lessin v. Ford Motor Co., ___ F. Supp. 3d ___ (S.D. Cal. 2024).
https://docs.justia.com/cases/federal/district-courts/california/casdce/3:2019cv01082/632733/202

**FACTS:** Plaintiffs William Lessin, Carol Smalley, Caroline McGee, et. al., on behalf of themselves and others similarly situated (collectively, "Plaintiffs") sued Ford Motor Corporation ("Ford") for alleged defects in several generations of the Ford F-250 and F-350 trucks due to a "shimmy" in the vehicle due to the suspension system. Plaintiff Caroline McGee ("McGee") was from Texas and her claim was subject to Texas law governing the issue of merchantability. Ford filed a partial motion for summary judgement on Plaintiffs' claims for breach of implied warranty of merchantability, including McGee's.

**HOLDING:** Granted.

**REASONING:** In assessing McGee's claim against Ford, the court determined that Texas law is similar to those in other states for the issue of implied warranty of merchantability. To bring a claim in Texas for breach of implied warranty of merchantability, a plaintiff must establish that the goods are not fit for the ordinary purpose for which the goods are used. For vehicles, the ordinary purpose is providing transportation.

The court determined that McGee failed to raise an issue of material fact when it came to the trucks ability to function for its ordinary purpose. To reach this conclusion the court examined several factors: (1) if McGee's driving patterns and behaviors had changed due to the shimmy; (2) if McGee continued to use the vehicle and for how long; (3) whether McGee had alleged any facts to show that the shimmy had posed a significant safety hazard to render the vehicle unreasonably dangerous.

Based on the evidence provided to it, the court reasoned that McGee had continued to drive the vehicle for thousands of miles across Texas. McGee did not offer evidence to show that she had changed her driving habits or had treated the vehicle as unreasonably dangerous. In fact, the evidence showed that when McGee did encounter the shimmy, she had continued to drive the vehicle instead of stopping. Furthermore, McGee had continued to own the vehicle for the last five years and has put 299,000 miles on it, further showcasing the vehicles merchantability.

For all of these reasons, the court concluded that McGee had failed to raise an issue of material fact that would constitute denying Ford's motion for summary judgment on her claim for breach of implied warranty of merchantability.

**IMPLIED WARRANTY CLAIMS WERE TIME-BARRED**

**DTPA CLAIMS WERE TIME-BARRED**

Sparks v. Southwire Co., LLC, ___ S.W.3d ___(Tex. App.-Fort Worth 2024).
https://law.justia.com/cases/texas/second-court-of-appeals/2024/02-24-00120-cv.html

**FACTS**: Appellant Angie Sparks ("Sparks") purchased a travel trailer and surge protector from Appellee United Recreation and Mobile Home Center ("United") in 2015. In December 2016, a fire in the trailer caused by an electrical issue led to property damage and personal injuries when Sparks fell while trying to disconnect the trailer's electricity. Sparks filed suit in December 2020 against United and the surge protector's manufacturer, Appellee Southwire Company, LLC ("Southwire"), alleging breach of implied warranties and violations of the Texas Deceptive Trade Practices Act ("DTPA"). United and Southwire moved for summary judgment, arguing that the claims were barred by the applicable statutes of limitations. The trial court granted summary judgment, and Sparks appealed.
**HOLDING**: Affirmed.
**REASONING**: Sparks argued that the statute of limitations had not run by the time of filing because (1) she filed her implied warranty claims within the four-year limitations period, and (2) United and Southwire failed to identify the date on which Sparks discovered the fire's cause, which was the date her DTPA claims accrued.

The court explained, a claim generally accrues "when facts giving rise to the cause of action come into existence, even if those facts are not discovered or the resulting injuries do not occur until later." The discovery rule is an exception that defers a claim's accrual until the plaintiff discovers or reasonably should have discovered the wrongful act or injury. Implied warranties have a statute of limitations of either two or four years. Sparks' claims a statute of limitations of four years applies. However, because accrual began when United and Southwire delivered the faulty products in 2015, even if the statute of limitation was four years, filing in December 2020 was five years beyond the date of delivery and fell outside the statute of limitations.

A DTPA claim has a two-year statute of limitations from the "date on which the false, misleading, or deceptive act or practice occurred, or within two years after the consumer discovered…or should have discovered the occurrence…." Tex. Bus. & Com. Code Ann. §17.565. Sparks claimed her discovery was deferred until she learned the precise cause of the fire. However, Sparks observed wiring issues in the trailer within days of purchase and identified the cause of the fire as "electrical issues" and sought to solve the fire issue by running to the main breaker box, where she subsequently fell. Therefore, Sparks discovered the source of her wrongful injury on the date of the fire, December 2016. The statute of limitations expired in 2018, and the claim was filed in 2020.

The court concluded that both the implied warranty and DTPA claims were time-barred and affirmed the trial court's judgment.

**CONSUMER'S ALLEGATIONS, "READ IN A LIGHT MOST FAVORABLE TO HER," RAISE THE PLAUSIBLE INFERENCE THAT, IN RECEIVING A CREDIT LINE FROM CAPITAL ONE, SHE SOUGHT TO ACQUIRE GOOD[S] AND SERVICES**

In re Cap. One 360 Sav. Acct. Int. Rate Litig., ___ F. Supp. 4th ___ (E.D. Va. 2024).
https://casetext.com/case/in-re-capital-one-360-sav-account-interest-rate-litig-2

**FACTS:** Plaintiffs were citizens of eighteen different states and 360 Savings accountholders with Capital One between September 2019 and the filing of the Consolidated Amended Complaint. Defendants were Capital One, N.A. ("CONA") and Capital One Financial Corp. (collectively, "Defendants"). This consolidated multidistrict action arises out of Defendants' alleged violations of various state consumer protection and unfair trade practice statutes, as well as other causes of action. Plaintiffs alleged that Defendants furtively created the 360 Performance Savings account without raising the 360 Savings rate or informing customers of the change. As a result, Plaintiffs lost interest income proportionate to their account balances.

Plaintiffs filed suit, seeking to recover lost interest that Defendants' alleged conduct prevented them from earning on their "high interest" 360 accounts. Defendants filed the instant Motion to Dismiss the Consolidated Amended Complaint.
**HOLDING:** Granted in part; denied in part.
**REASONING:** Plaintiffs cited *In re Cap. One Consumer Data Sec. Breach Litig.*, to argue that they received goods or services to qualify as "consumers." In that case, the court rejected that Capital One customers are not "consumers" under the CLRA or the Texas DTPA. The plaintiffs plausibly alleged coverage under the CLRA because in receiving such a line of credit, they ostensibly received services to develop, secure, [and] maintain that credit line. As to the Texas DTPA, the court reasoned that the plaintiff's allegations, "read in a light most favorable to her," "raise[d] the plausible inference that, in receiving a credit line from Capital One, she sought to acquire good[s] and services."

**The plaintiffs plausibly alleged coverage under the CLRA because in receiving such a line of credit, they ostensibly received services to develop, secure, [and] maintain that credit line.**

The court additionally referred to the persuasive authority of *Oswego Laborers' Loc. 214 Pension Fund v. Marine*, to reason that the opening of Plaintiffs' 360 Savings accounts did qualify as a consumer transaction, because opening a savings account constituted a "purchase of goods or services."

Furthermore, the court noted that the 360 Disclosures referred to several of CONA's "services" to accountholders, including "Electronic Fund Transfer services," a Mobile Deposit "service" and Automatic Clearing house (ACH) External Transfer transactions. These Disclosures directly acknowledged additional consumer services, beyond simply storage of money. Unlike a

standard checking account that typically offers no special "convenience services," the 360 Savings account offered the "service" of earning "high interest" on deposited money that the Plaintiffs specifically sought out. Thus, the 360 Savings account did not stand as an average bank deposit account to park their money, but a "high interest" service account that Plaintiffs actively relied on the to earn additional income. The court granted in part and denied in part Defendants' Motion to Dismiss.

### AD NOT DECEPTIVE, REASONABLE CONSUMER WOULD KNOW TO READ THE LABEL TO CONFIRM THE INGREDIENTS

Bryan v. Del Monte Foods, Inc., ___ F.3d ___ (9th Cir. 2024).
https://cdn.ca9.uscourts.gov/datastore/memoranda/2024/11/22/23-3685.pdf

**FACTS:** Plaintiff Kerstine Bryan filed a putative class action lawsuit against Defendant Del Monte Foods, Inc. alleging violations of California and Oregon law due to the company's fruit cup labels. Plaintiff asserted that the fruit cups containing the phrase "fruit naturals" misled consumers into believing that all the ingredients in the fruit cups were natural.
The district court granted the Defendant's motion to dismiss. Plaintiff appealed.
**HOLDING:** Affirmed.
**REASONING:** Plaintiff argued that the word "natural" on the fruit cup labels was deceptive. The court noted that the labels on the front of the cups were ambiguous. A label is deemed ambiguous if a reasonable consumer would "necessarily require more information before they could reasonably conclude" whether a product displays a specific factual representation.

The court identified three reasons why Plaintiff failed to plausibly allege that the front label was unambiguously deceptive to the ordinary consumer.

**Examined holistically with the rest of the front label, the phrase "fruit naturals®" with the term "syrup" can indicate that while the fruit may be natural, the syrup may not be.**

First, the court discussed that using the phrase "fruit naturals," in itself, was not deceptive. The word "naturals" is used as a noun and not a descriptive adjective. Additionally, the inclusion of the registered trademark following the phrase also indicated that it was likely just part of the product's name. Examined holistically with the rest of the front label, the phrase "fruit naturals®" with the term "syrup" can indicate that while the fruit may be natural, the syrup may not be.

Second, Plaintiff relied on a survey that purportedly showed consumers found the label deceptive. The court disagreed with this conclusion, noting that the survey focused on what respondents believed the term "natural" should signify on a product label, rather than how they interpreted its use on Defendant's cups.

Lastly, the court held that a reasonable consumer would look at the back label to clarify any ambiguity from the front label. Citing *McGinty v. Proctor & Gamble Co.*, the court explained that for a label to create an expectation that a product is entirely natural, it must explicitly state so. Vague or general terms without clear qualifiers (e.g., "all-natural" or "100% natural") are insufficient to make that guarantee. The court reasoned the back label "accurately and clearly disclosed several synthetic ingredients" that the Plaintiff complained about and affirmed.

### DTPA AND INSURANCE CODE CLAIM BARRED BY LIMITATIONS

Galvan v. RVOS Farm Mut. Ins. Co., ___ S.W.3d ___(Tex. App.—Corpus Christi 2024, no pet. h.).
https://casetext.com/case/galvan-v-rvos-farm-mut-ins-co-2

**FACTS:** Appellee Jessica Galvan ("Galvan") held a homeowner's insurance policy with RVOS Farm Mutual Insurance Company ("RVOS"). Galvan's house was damaged by Hurricane Harvey on August 29, 2017, so she filed a claim with RVOS. Unsatisfied with RVOS's initial assessment, Galvan's counsel sent a demand letter on February 19, 2019, alleging that RVOS's adjuster had inadequately inspected her property, resulting in a significant discrepancy between RVOS's loss estimate and her expert's. This was claimed to violate both the Texas Insurance Code and the Deceptive Trade Practices Act (DTPA). Galvan sued RVOS on March 28, 2019, and filed an amended petition on May 8, 2019. Galvan filed a new suit in district court on July 6, 2023, alleging breach of contract and violations of the DTPA and Insurance Code. RVOS moved for summary judgement on the grounds that Galvan's suit was barred by a contractual limitations provision. On October 31, 2023, the trial court granted RVOS's summary judgement motion and Galvan appealed.
**HOLDING:** Affirmed.
**REASONING:** Galvan argued that her policy stated "no suit or action can be brought unless the policy provisions have been complied with. Action brought against us must be started within two years and one day after the cause of action accrues." The court rejected this argument, holding that Galvan's claims accrued no later than February 27, 2018, when RVOS notified her of the initial decision regarding the loss amount, and Galvan was aware that RVOS's conclusion was "substantially different" from her independent estimate. RVOS argued that Galvan's claims accrued when the letter was sent to her counsel because that letter notified her that some of her claim was denied, and that the payment was less than she sought. RVOS further argued that even if the contractual limitations provision does not apply, the DTPA and insurance code also contain two-year limitations provisions. As such, both her DTPA and Insurance Code claims were subject to a two-year limitations period

The court concluded that all of Galvan's claims derived from RVOS's initial decision regarding her amount of loss and since Galvan filed her district court suit more than two years later, her claims were barred by limitations. Galvan was advised of that decision on February 27, 2018, and Galvan was aware that RVOS's conclusion was substantially different from her own on February 19, 2019. Thus, no legal injury was suffered past February 19, 2019. The court concluded that RVOS established its entitlement to judgment as a matter of

law, and Galvan failed to raise a material fact issue regarding the limitations defense.

**ABSENT EVIDENCE OF A VALID INSURANCE CONTRACT, THE PLAINTIFFS' EXTRA-CONTRACTUAL DTPA CLAIMS ALSO FAIL AS A MATTER OF LAW**

Sliepcevic v. Am. Fam. Connect Prop. & Cas. Ins. Co., 2024 U.S. Dist. LEXIS 106268 (W.D. Tex. 2024).
https://law.justia.com/cases/federal/district-courts/texas/txwdce/5:2023cv00553/1217165/22/

**FACTS:** Mark and Linda Sliepcevic ("Plaintiffs") sued American Family Connect Property and Casualty Insurance Company, Inc. ("Defendant") for breach of contract and violations of the Texas Deceptive Trade Practices Act ("DTPA") after Defendant denied their home insurance claim.

In August 2022, Plaintiffs applied for a homeowner's insurance policy and agreed to pay the full premium. Defendant mailed a confirmation letter but could not process the payment because Plaintiffs' financial institution declined the charge. Defendant notified Plaintiffs on August 3, 2022, that the policy would expire on August 18, 2022, without payment. After the expiration date, Defendant sent letters confirming the policy's cancellation for non-payment.

On October 26, 2022, Plaintiffs' property sustained damage, which they reported to Defendant. On November 1, 2022, Defendant denied the claim, stating that the policy had been canceled prior to the date of loss. Plaintiffs sued, and Defendant moved for summary judgment, arguing Plaintiffs failed to provide evidence of a valid insurance contract.

**HOLDING:** Granted

**REASONING:** The court held that a valid contract is essential for a breach of contract claim under Texas law. The court found that Plaintiffs failed to fulfill the condition of payment, which is necessary to create an enforceable contract. Defendant provided evidence that it never received payment, and Plaintiffs presented no evidence to refute this.

For the DTPA claims, the court reasoned that extra-contractual claims like those under the DTPA cannot succeed without an underlying insurance contract. Because the court had already determined that the policy was not in effect at the time of the loss, Plaintiffs' DTPA claims failed as a matter of law. The court granted summary judgment in favor of the Defendant.

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

Calderon v. Sixt Rent a Car, LLC, ___ F.4th ___ (11th Cir. Aug. 15, 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."

While each plaintiff's experience obtaining their rental was different, they all reported some 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 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."**

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 since 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.

**ALLEGATIONS REGARDING EMPLOYEE'S MISREPRESENTATION ABOUT THE SOUP INGREDIENTS SATISFIED THE ELEMENTS OF A DTPA CLAIM FOR FALSE, MISLEADING, OR DECEPTIVE ACTS UNDER §17.46(B)(5)**

**EMPLOYEE'S ASSURANCE ABOUT THE SOUP BEING MEAT-FREE WAS SUFFICIENT TO STATE A CLAIM FOR BREACH OF EXPRESS WARRANTY UNDER THE UCC AND DTPA**

**IF CONSUMER CAN PROVE BREACH OF WARRANTY UNDER THE UCC, HE MAY RECOVER MENTAL ANGUISH DAMAGES ON HIS DTPA CLAIM WITHOUT PROVING INTENTIONAL CONDUCT**

Kumar v. Panera Bread Co., No. 4:21-CV-03779 (S.D. Tex.2024). https://law.justia.com/cases/federal/district-courts/texas/txsdce/4:2021cv03779/1851588/67/

**FACTS:** Plaintiff Selva Kumar ("Kumar") alleged that on January 23, 2021, Defendant Panera Bread Company's ("Panera") associate misrepresented - the broccoli cheddar soup by telling him that it did not contain chicken broth or meat and was made fresh daily. Kumar relied on this representation and purchased the soup. Kumar claimed that the statements of Panera's employees "falsely and fraudulently" misled him about the ingredients and freshness of its products and he suffered physical and emotional distress as a result. Kumar alleged violations under the Texas Deceptive Trade Practices Act (DTPA) breach of warranty under the DTPA and the Uniform Commercial Code (UCC). Panera filed a motion to dismiss.
**HOLDING:** Denied.
**REASONING:** A DTPA claim requires (1) the plaintiff to be a consumer; (2) the defendant to have engaged in false, misleading, or deceptive acts; and (3) these acts to have been a producing cause of the consumer's damages. Under the Tex. Bus. & Com. Code Ann. § 17.46(b)(5), the term "false, misleading, or deceptive acts or practices" includes representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have. Panera contended that Kumar's DTPA claim failed the second element. The court disagreed and reasoned that Kumar's claim–stating that Panera misrepresented the characteristics or ingredients of its products—was sufficient at the pleading stage to satisfy the second element of a DTPA claim.

Similarly, the court applied the same reasoning to Kumar's reliance on the assurance. Kumar alleged Panera's associate's assurance that the soup did not contain meat was specific enough to establish a warranty. Kumar undoubtedly relied on the associate's assurance that the soup was meat-free, but contrary to the warranty, the soup did contain meat. At the pleading stage, this was enough to state a claim for breach of warranty under the DTPA and the UCC.

The DTPA allows recovery of actual damages "without regard to whether the defendant's conduct was committed intentionally." Tex. Bus. & Com. Code Ann. §17.50(h). Since Kumar was granted the right to bring a cause of action for breach of warranty under the UCC, the court determined that Kumar could recover mental anguish damages on his DTPA claim regardless of whether Panera's conduct was intentional. The court denied Panera's motion to dismiss Kumar's DTPA claims.

**MERE NONDISCLOSURE OF MATERIAL INFORMATION DOES NOT ESTABLISH AN ACTIONABLE DTPA CLAIM**

**BROAD STATEMENTS COMPARING ONE'S GOOD WITH OTHERS OR LABELING SERVICE "GOOD" OR "SUPERB" WITHOUT MORE AMOUNTS TO MERE SALES TALK, OR PUFFERY, NOT A STATEMENT OF MATERIAL FACT**

**A DISCLAIMER OF THE IMPLIED WARRANTY OF MERCHANTABILITY MUST BE CONSPICUOUS, AND A DISCLAIMER OF THE IMPLIED WARRANTY OF MERCHANTABILITY MUST MENTION THE WORD "MERCHANTABILITY"**

**AN UNCONSCIONABLE ACT UNDER THE DTPA IS ONE THAT, TO A CONSUMER'S DETRIMENT, TAKES ADVANTAGE OF THE LACK OF KNOWLEDGE, ABILITY, EXPERIENCE, OR CAPACITY TO A GROSSLY UNFAIR DEGREE**

Pate v. Fun Town RV San Angelo, LP, No. 03-22-00059-CV, (Tex. App. 2024).
https://law.justia.com/cases/texas/third-court-of-appeals/2024/03-22-00059-cv.html

**FACTS:** Plaintiff-Appellant Pate ("Pate") purchased a recreational vehicle ("RV") from Defendant-Appellee Fun Town RV ("Fun Town"). Pate alleged the RV had numerous defects and that Fun Town failed to disclose prior repairs made to the trailer's flooring and the defects rendered the trailer worthless. Pate refused to take possession of the travel trailer despite it being repaired at no cost prior to the sale and subsequently demanded rescission of the sale and a full refund.

**Mere nondisclosures of information or minor repairs do not constitute a DTPA violation, and Pate provided no evidence of deception. Moreover, Fun Town's "as is" sale limited their responsibility for any pre-sale repairs or defects.**

Pate filed suit for failure to disclose, misrepresentation, unconscionable conduct, and breach of warranty under the Texas Deceptive Trade Practices Act (DTPA), asserting that Fun Town failed to disclose pre-sale repairs and sold them a defective travel trailer. The trial court granted summary judgment in favor of Fun Town, finding that Pate lacked sufficient evidence to substantiate their claims regarding Fun Town's alleged deceptive practices and breach of warranty. Pate appealed.

**HOLDING:** Affirmed.

**REASONING:** Pate argued that Fun Town's verbal assurances and sales materials had guaranteed the RV's quality and functionality, and that defects and undisclosed repairs rendered the trailer unfit for its ordinary purpose as a recreational vehicle, violating express and implied warranties under the DTPA and constituting an unconscionable act.

The court disagreed and held that Fun Town's statements about the RV were not actionable misrepresentations, but rather amounted to mere puffery (e.g., general claims about quality), which is not sufficient to establish an express warranty under the DTPA. Furthermore, a properly conspicuous disclaimer of the implied warranty of merchantability will be upheld under the DTPA, effectively limiting the seller's liability. Because Pate admitted that everything worked during the walk-through, accepted the trailer after inspection, and signed the purchase agreement that included a conspicuous disclaimer, Fun Town cannot be held liable for any implied warranty claims.

The court also noted that Fun Town's repairs were routine maintenance and did not require disclosure as a material defect. Mere nondisclosures of information or minor repairs do not constitute a DTPA violation, and Pate provided no evidence of deception. Moreover, Fun Town's "as is" sale limited their responsibility for any pre-sale repairs or defects.

Lastly, the court explained that Fun Town's actions were not unconscionable due to the nature of the purchase and Pate's history with recreational vehicles. An unconscionable act under the DTPA is one that grossly takes advantage of a consumer's lack of knowledge, ability, experience, or capacity to the consumer's detriment. In this case, Pate had prior experience owning recreational vehicles and had options to purchase a travel trailer from other dealerships. Consequently, no evidence of grossly unfair actions taken to Pate's detriment was ever established. The court upheld the trial court's finding and affirmed.

# RECENT DEVELOPMENTS

## DEBT COLLECTION

### A DEBT COLLECTOR DOES NOT VIOLATE THE FAIR DEBT COLLECTION PRACTICES ACT (FDCPA) BY FAILING TO HONOR A CONSUMER'S PREFERRED MEDIUM OF COMMUNICATION (E.G. EMAIL VS. MAIL) WHEN COMMUNICATING ABOUT A DEBT

### SECTION 1692c(a)(1) OF THE FDCPA PROHIBITS DEBT COLLECTORS FROM COMMUNICATING WITH COMSUMERS AT INCONVENIENT TIMES OR PLACES, BUT DOES NOT GOVERN THE MEDIUM OF COMMUNICATION

Harris v. Transworld Sys. Inc., ___ F. Supp. 3d ___ (N.D. Ga. 2024).
https://plus.lexis.com/api/permalink/13704834-35b6-4d71-a908-dbf45O3f6872b/?context=1530671

**FACTS:** On June 17, 2023, Resurgens Orthopaedic PC placed Tracy Harris's ("Plaintiff") unpaid account with Transworld Systems Inc. ("Defendant") for collection. The same day, Defendant sent Plaintiff an initial collection notice via email explaining Plaintiff's account had been placed with Defendant for collection and informing him of his rights to dispute and request verification of the debt. The following month, Defendant emailed Plaintiff three additional notices which each contained a link to opt out of receiving additional emails from Defendant. On August 7th, 2023, Defendant received a letter from Plaintiff via Certified Mail stating that Plaintiff is disputing the alleged debt owed and would like validation of the debt The letter also stated that the only convenient way to contact Plaintiff was via email. However, Plaintiff's letter failed to include the preferred email address, therefore, Defendant mailed a response to Plaintiff with the verification documents and information request. Plaintiff mailed another letter to Defendant on September 19th, which was identical to the August 7th letter except the Plaintiff now included his email address. Defendant did not respond to Plaintiff's September 19th letter.

**However, every court to consider this issue has held that a consumer's preferences for email concerns the medium rather than the time or place.**

Plaintiff filed a claim on November 15th stating that Defendant violated the FDCPA by communicating with him via mail rather than email as directed in August's dispute letter. Defendant moved for summary judgment. Plaintiff then filed a cross-motion for summary judgment.

**HOLDING:** Granted in part; denied in part.

**REASONING:** Defendant argues that as a debt collector, their actions do not violate §1692c(a)(1) of the FDCPA by mailing a consumer correspondence after the consumer requests contact by email only. Plaintiff argues that Defendant was obligated to adhere to the stated communication preferences and by failing to do so, Defendant violated the FDCPA's §1692c(a)(1).

The court noted that the FDCPA was enacted in to stop debt collectors from using abusive debt collection practices and promote consistent state action to protect consumers from such practices. For Plaintiff to succeed on a claim under the FDCPA, Plaintiff must establish that (1) he has been the object of collection activity arising from a consumer debt, (2) the defendant is a debt collector as defined by the FDCPA, and (3) the defendant has engaged in an act or omission prohibited by the FDCPA. Specifically, §1692c(a)(1) prohibits a debt collector from communicating with a consumer in any unusual time or place or a time or place known to be inconvenient to the consumer.

However, every court to consider this issue has held that a consumer's preferences for email concerns the medium rather than the time or place which falls outside the scope of §1692c(a)(1).

Because Plaintiff's argument concerns the medium of communication and not the time or place of attempted communication, the court granted Defendant's motion for summary judgment and denied Plaintiff's motion for summary judgment.

### MORTGAGE LOAN WAS NOT A CONSUMER DEBT UNDER THE FAIR DEBT COLLECTION PRACTICES ACT (FDCPA)

Lombard Flats LLC v. Fay Servicing LLC, ____ F. Supp. 3d ___ (N.D. Cal. 2024).
https://casetext.com/case/lombard-flats-llc-v-fay-servicing-llc-4

**FACTS:** Plaintiffs, Lombard Flats LLC ("Lombard") and Martin Eng ("Eng") sued Defendant Fay Servicing LLC ("Fay") concerning the mortgage loan on a property. In September 2019, Eng fell behind on loan payments and later filed for bankruptcy due to communication issues with Fay regarding loan modifications and several years of missed mortgage payments.

Lombard and Eng filed suit, alleging that Fay's attempt to collect on the defaulted loan violated the Fair Debt Collection Practices Act (FDCPA). This claim was based on the alleged misrepresentation that the loan was $3.2 million when the bankruptcy court reduced it to $3 million. The district court granted summary judgment to Fay, concluding that the loan is undisputedly not a consumer debt. Therefore, there was no valid claim under the FDCPA.

**HOLDING:** Affirmed.

**REASONING:** Lombard and Eng argued the FDCPA's definition of a "consumer debt." The FDCPA defines consumer debt as a debt obtained "primarily for personal, family, or household purposes." 15 U.S.C. §1692a(3). Courts typically consider the transaction holistically, focusing on the purpose for which the credit was extended. Nevertheless, the court utilized Eng's interrogatory responses and declarations to determine that there was no genuine dispute as to any material fact and that Fay was entitled to judgment as a matter of law.

First, Eng failed to provide evidence that depicted a genuine issue for trial regarding whether the loan was a consumer debt. Despite Eng's counsel stating that Eng lived at the Lombard property during the interrogatories, Eng had the burden of

proving his consumer debt claim, which he did not meet. The undisputed evidence from the bankruptcy proceedings depicted the Lombard Flats as rental units, and the mortgage loan was used to finance the flats as an investment property. Additionally, Lombard was a limited liability company, not an individual or family. Under the FDCPA, mortgage loans on commercial or rental properties were not considered consumer debts.

Secondly, the interrogatory responses failed to demonstrate unfair practices as a matter of law under the FDCPA. The court asked the plaintiffs to provide evidence supporting their claim that Fay inflated the debt amount and added extra interest charges. Eng responded, "I do not contend that," and requested modification to the existing mortgage loan. Despite this request, Lombard and Eng failed to meet their burden to submit evidence that Fay committed unfair practices as a matter of law under the FDCPA, nor did they provide evidence that showed a genuine issue for trial. As a result, the court affirmed the district court's decision and granted summary judgement to the remaining claims.

**PLAINTIFF FAILED TO STATE A CLAIM UNDER THE FDCPA AGAINST ARBORS BECAUSE HE DID NOT ALLEGE ARBORS WAS A DEBT COLLECTOR.**

**PLAINTIFF'S CLAIM AGAINST RENT RECOVERY IS TIME-BARRED.**

Clark v. City of Pasadena, 2024 U.S. Dist. LEXIS 176801 (S.D. Tex. 2024).
https://law.justia.com/cases/federal/district-courts/texas/txsdce/4:2023cv04050/1939539/58/

**FACTS:** Plaintiff Clark was a tenant at the Arbors apartment complex, where he lived until June 2021. Following the termination of his lease, Clark allegedly owed unpaid rent to Arbors, which he disputed. In September 2021, Rent Recovery, a third-party debt collection agency, sent Clark a collection letter seeking to recover the outstanding balance owed to Arbors. The letter threatened further collection actions if Clark failed to pay the debt.

In October 2021, Clark contacted Rent Recovery to dispute the debt and informed them that he did not owe any money due to disputes over the lease's terms. In response, Rent Recovery continued its collection efforts, leading Clark to believe that it was violating the FDCPA by engaging in harassing collection practices.

Clark filed suit on October 30, 2023, alleging that both Arbors and Rent Recovery violated the FDCPA. Arbors and Rent Recovery filed motions to dismiss, arguing that Clark's claims were insufficient and untimely.
**HOLDING:** Dismissed.
**REASONING:** Under the FDCPA, a "debt collector" is defined as any person or entity that regularly collects or attempts to collect debts owed or due to another. The Act excludes creditors collecting their own debts, like Arbors, unless their actions suggest that they are engaging in debt collection as if they were a third-party agency. In this case, the court found that Clark failed to allege sufficient facts to establish that Arbors was acting as a "debt collector" under the FDCPA because it was collecting its own debt, not a debt owed to another party. As a result, Arbors did not fall within the statutory definition of a debt collector, and Clark's claim was dismissed.

The court further held that Clark's claim against Rent Recovery was time-barred. The FDCPA imposes a one-year statute of limitations from the date the violation occurs. Rent Recovery sent the collection letter in September 2021, but Clark did not file his lawsuit until October 2023, well beyond the one-year limit. Therefore, Clark's claim against Rent Recovery was untimely and dismissed accordingly.

**CREDITOR'S LETTER WAS NOT AN ATTEMPT TO COLLECT A DEBT UNDER FDCPA BECAUSE IT DID NOT DEMAND PAYMENT, REFER TO THE AMOUNT OWED, OR DISCUSS REPERCUSSIONS FOR NON-PAYMENT.**

**COMMUNICATION WITH A DEBTOR VIA LETTER, AS OPPOSED TO EMAIL OR TEXT MESSAGE, IS NOT COMMUNICATING AT AN INCONVENIENT "TIME OR PLACE" UNDER FDCPA.**

**PROVIDING AN INFORMATIONAL LETTER IN RESPONSE TO A DISPUTE DOES NOT CONSTITUTE HARASSMENT, ABUSE OR UNFAIR OR UNCONSCIONABLE DEBT COLLECTION.**

Moss v. Midland Credit Mgmt., Inc., ___ F. Supp. 3d ___ (N.D. Ga. 2024).
https://plus.lexis.com/api/permalink/422f2ab9-b992-4aa4-9c06-2d53d8761fc8/?context=1530671

**FACTS:** Plaintiff Kimberly Moss ("Plaintiff") filed suit against Midland Credit management, Inc. ("Defendant") for allegedly violating the Fair Debt Collection Practices Act ("FDCPA"). Plaintiff wrote to Defendant previously in dispute of all debts Defendant was seeking to collect. Plaintiff stated that Defendant was to only communicate with her via text or email, not by U.S. mail and included certain times which would be most convenient for her to communicate. Defendant continued to communicate via letter which detailed how their records were accurate and invited Plaintiff to provide more information for Defendant to better understand Plaintiff's concerns. After the informational letter, Defendant proceeded to follow Plaintiff's preferred communication.

Plaintiff raised claims under the FDCPA for communicating with Plaintiff in an inconvenient place, engaging in harassing and deceptive behavior, and for unfair conduct. Defendant removed the case to the District Court and filed a motion to dismiss whereby Plaintiff responded with an Amended Complaint. Defendant then filed a Motion to Dismiss Plaintiff's Amended Complaint.
**HOLDING:** Recommended to be Granted.
**REASONING:** Plaintiff argued that Defendant violated the FDCPA by communicating at an inconvenient place, specifically by sending a letter to her home rather than her preferred method of communication. Plaintiff also argued that the letter was deceptive, claiming she had inquired about the debt and had requested documentation. Defendant contended that Plaintiff's complaint did not plausibly allege that the letter constituted debt collection activity or that Plaintiff was the target of such activity under the FDCPA. Defendant asserted that the letter was a mere informational response and did not meet the statute's criteria for

debt collection. Defendant further argued that "means of communication" was distinct from "place of communication" under the statute, and the FDCPA did not restrict the medium of communication.

The purpose of the FDCPA is to eliminate abusive debt collection practices. To state a claim under the FDCPA requires Plaintiff to show that (1) she has been the object of collection activity arising from consumer debt; (2) the defendant is a debt collector as defined by the statute; and (3) the defendant has engaged in an act or omission prohibited by the statute. For a debt collector to use false, deceptive, or misleading representation or means in connection with the collection of debt is evident if the statement would mislead the least sophisticated consumer to pay.

The court agreed, finding that the letter merely responded to Plaintiff's dispute without demanding payment, thus failing to constitute debt collection activity. Additionally, the court found that the medium of communication was not restricted by the FDCPA's scope. Since the single informational letter contained no threats, abusive language, or other conduct recognized as harassing, Plaintiff's claim of harassment and abuse failed. The court concluded that Plaintiff's complaint lacked allegations demonstrating misleading or manipulative intent in Defendant's letter. Consequently, the court recommended dismissing all claims and granting Defendant's motion to dismiss.

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

George v. Rushmore Serv. Ctr., LLC, ___ F.3d ___ (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.

**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:** Vacated 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 reasoned 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.

**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., 2024 U.S. Dist. LEXIS 136030 (D. Nev. 2024).
https://casetext.com/case/carrera-v-allied-collection-servs-4

**FACTS:** Plaintiff Margarita Carrera ("Carrera") filed suit against Allied Collection Services, Inc. ("Allied") under the Fair Debt Collection Practices Act ("FDCPA"). Carrera alleged that Allied obtained a default judgment against her for a debt she did not owe. She claimed she began banking with Chase in 2019, years after the alleged debt was incurred. In 2022, Allied renewed the judgment and placed a lien on Carrera's home, which prevented her from selling the property or securing a home equity loan. Carrera argued Allied's conduct violated §1692e of the FDCPA, which prohibits false, deceptive, or misleading representations in debt collection, by misrepresenting her ownership of a Chase Bank account in state court and failing 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.

**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:** Plaintiffs Iris Calogero and Margie Nell Randolph sued Shows, Cali & Walsh LLP ("Defendant") for violations of the Fair Debt Collection Practices Act ("FDCPA"). The claims arose from Defendant's efforts to collect alleged overpayments of grant funds the Plaintiffs received from the Louisiana Road Home program, which was established to distribute Community Development Block Grant funds to homeowners impacted by Hurricanes Katrina and Rita.

**Plaintiffs signed grant agreements acknowledging an obligation to report funds received from FEMA or private insurers and recognized the potential for legal action if they failed to comply.**

In 2007, Plaintiffs received homeowner compensation grants through the Road Home program, administered by the Louisiana Office of Community Development ("OCD"). Plaintiffs signed grant agreements acknowledging an obligation to report funds received from FEMA or private insurers and recognized the potential for legal action if they failed to comply.

Years later, the State hired Defendant to recover unreported funds that led to overpayments. In 2017 and 2018, Defendant sent Plaintiffs collection letters seeking repayment and warning that legal action could proceed if no resolution occurred within 90 days. Plaintiffs claimed these communications were intimidating, caused emotional distress, and improperly attempted to collect a time-barred debt. Plaintiffs filed suit under the FDCPA.

The lower court granted summary judgment for the Defendant. Plaintiffs appealed.

**HOLDING:** Reversed

**REASONING:** The Fifth Circuit held that a reasonable jury could find Defendant violated the FDCPA in multiple ways, one such way being by misrepresenting the judicial enforceability of time-barred debts. Although the court did not determine the applicable statute of limitations, it found the debt was untimely even under the most generous 10-year period. By threatening legal action without disclosing the debt's potential time-barred nature, the Defendant's letters could mislead or deceive a consumer regarding the enforceability of the debt. Therefore, the Fifth Circuit reversed the lower court's summary judgment ruling.

**FEDERAL TAXES ARE NOT CONSIDERED "DEBT" UNDER THE FAIR DEBT COLLECTION PRACTICES ACT (FDCPA)**

Wilson v. Cont'l Serv. Grp., LLC, ___ F. Supp. 3d ___(D. Colo. 2024).
https://www.casemine.com/judgement/us/673036f668a05673e580cc3d

FACTS: Continental Services Group, LLC ("Continental") sent a collection letter ("Letter") to Rashad Wilson ("Wilson") about an alleged federal tax debt Wilson originally owed to the Internal Revenue Service, under which Continental was a contractor authorized to collect outstanding tax debts. The Letter stated the amount owed included taxes, interest, and penalties, and interest and penalties would continue to accrue until the full amount of debt was paid. However, the Letter failed to inform Wilson that under the Federal Debt Collection Practices Act (FDCPA), he had a right to dispute the debt.

Wilson filed an Amended Complaint alleging that Continental violated the FDCPA by omitting information about his right to dispute the debt. In response, Continental filed a Motion to Dismiss.

REASONING: Rule 12(b)(6) states a complaint may be dismissed for "failure to state a claim upon which relief can be granted." The FDCPA applied to "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes." 15 U.S.C. § 1692a(5).

The court held in previous cases that federal tax debt did not qualify as a debt for the FDCPA. A person who has accumulated tax debt would not be described as a consumer and the payment of taxes would not be described as a transaction for personal, family, or household purposes. The term "transaction" implied a purchase or an exchange for some good or service to be used for personal, family, or household purposes, while taxes represented a unilateral financial obligation. For this reason, Wilson's debt was not covered by the FDCPA and, therefore, Continental was not required to inform Wilson of a right to dispute the debt in the Letter.

Because the Letter addressed a federal tax debt, it fell outside the scope of the FDCPA, and Continental was not required to include information about Wilson's right to dispute the debt. Therefore, Wilson's Amended Complaint did not establish a claim that could be remedied under the FDCPA, meeting the criteria for dismissal under Rule 12(b)(6).

The court dismissed Wilson's claim against Continental.

**O'DRISCOLL, AS THE PREVAILING PARTY AGAINST RPM, IS ENTITLED TO REASONABLE ATTORNEY'S FEES AND COSTS FROM RPM INCURRED DURING THE ENTIRETY OF THE ACTION UNDER THE FDCPA AND FCCPA**

**O'DRISCOLL IS NOT ENTITLED TO RECOVER ANY ATTORNEY'S FEES OR COSTS FROM ARBOR GROVE SINCE HE DID NOT PREVAIL AGAINST ARBOR GROVE**

**O'DRISCOLL REJECTED DEFENDANTS' OFFER OF JUDGMENT, AND THEREFORE, HE CANNOT RECOVER COSTS INCURRED AFTER THE OFFER BUT DEFENDANTS CAN RECOVER THEIR COSTS INCURRED AFTER THE OFFER**

O'Driscoll v. Arbor Grove Condo. Ass'n, Inc., ___ So. 2d ___ (M.D. Fla. 2024).
https://casetext.com/case/odriscoll-v-arbor-grove-condo-assn-2?

**FACTS:** Plaintiff William O'Driscoll ("O'Driscoll") owned a condominium within the community Defendant Arbor Grove Condominium Association, Inc. ("Arbor Grove"). Arbor Grove levied two fines against O'Driscoll, while Resource Property Management ("RPM") sent letters and filed suit against O'Driscoll for violating its governing documents. O'Driscoll in return filed a complaint alleging violations by both Arbor Grove and RPM (collectively "Defendants") of the Florida Consumer Collection Practices Act ("FCCPA"), as well as the FDCPA by improperly imposing fines related to his condominium fees.

RPM offered a settlement of $2,002 to resolve all claims, including attorney's fees and costs incurred up to the offer. RPM and Arbor Grove later claimed O'Driscoll rejected this offer, although O'Driscoll claimed to have accepted. The jury awarded O'Driscoll $2,000 in statutory damages against RPM, and $0 in statutory damages against Arbor Grove. O'Driscoll filed his Motion for Entitlement to Attorney's Fees and Costs. RPM and Arbor Grove responded and filed their Motion for Entitlement to Attorney's Fees and/or Costs.

**HOLDING:** O'Driscoll's motion granted against RPM and denied against Arbor Grove. Defendant's motion against O'Driscoll granted in part and denied in part.

**REASONING:** O'Driscoll contended that he was entitled to recover attorney's fees and costs from RPM as the prevailing party. The court accepted this argument, noting that RPM's stipulated liability under FDCPA and FCCPA justified a fee award. The court held that O'Driscoll, having succeeded against RPM, was entitled to attorney's costs.

**O'Driscoll contended that he was entitled to recover attorney's fees and costs from RPM as the prevailing party.**

As to O'Driscoll's claim for attorney's fees and costs against Arbor Grove as the prevailing party, the court rejected this argument. The court explained that O'Driscoll had not prevailed against Arbor Grove, emphasizing that although O'Driscoll obtained a judgment against Arbor Grove, only $0 in damages were awarded. Obtaining no damages renders O'Driscoll's action unsuccessful and O'Driscoll could not claim fees or costs from it.

Defendants argued that O'Driscoll's rejection of their Offer of Judgment barred him from recovering litigation costs incurred after the offer was rejected and entitled them to recover their own post-offer costs. The court agreed, holding that because O'Driscoll rejected the offer, he was prevented from claiming costs after that point, while RPM and Arbor Grove could recover their post-offer costs. The court relied on Fed. R. Civ. P. 68, permitting Defendants to recover costs when the final judgment is less favorable than the unaccepted offer served to the opposing party. The court ultimately held O'Driscoll's motion for attorney's fees and costs was granted in part and denied in part while Defendants' motion for fees and costs was also granted in part and denied in part.

# **RECENT** DEVELOPMENTS

## INSURANCE

### INSURER'S FULL PAYMENT OF AN APPRAISAL AWARD PLUS INTEREST PRECLUDES AN AWARD OF ATTORNEY'S FEES

Rodriguez v. Safeco Ins. Co. of Ind., 684 S.W.3d 789 (Tex. 2024).
https://casetext.com/case/rodriguez-v-safeco-ins-co-of-ind-2

**FACTS:** Homeowner Mario Rodriguez ("Rodriguez") filed suit against Safeco Insurance Company of Indiana ("Safeco") following a dispute over coverage for tornado damage to his property. Initially, Safeco issued a payment of $27,449.88, which Rodriguez accepted. However, Rodriguez's counsel later demanded an additional $29,500. After mediation failed, Safeco invoked the appraisal clause in its insurance policy. The appraisal panel determined the damage at $36,514.52, prompting Safeco to pay the balance of $32,447.73, plus an additional $9,458.40 in statutory interest, which Rodriguez accepted as full payment.

Rodriguez pursued claims under Chapter 542A of the Texas Insurance Code for attorney's fees. Safeco moved for summary judgment, asserting that full payment of the appraisal award and statutory interest extinguished its liability, including for attorney's fees. The district court granted Safeco's motion. Rodriguez appealed.

**HOLDING:** Affirmed.

**REASONING:** Rodriguez argued Safeco's payments did not preclude his recovery. The court disagreed. The court explained that the plain language of Texas Insurance Code § 542A.007 prohibits attorney's fees when no monetary judgment is awarded under the policy. Section 542A.007(a)(3) bases attorney's fees on a mathematical calculation involving the judgment amount. Since Safeco fully discharged its obligations by paying the appraisal award and statutory interest, no judgment could exist, resulting in a calculation of zero attorney's fees.

**Texas Insurance Code § 542A.007 prohibits attorney's fees when no monetary judgment is awarded under the policy.**

Additionally, § 542A.007(c) explicitly bars attorney's fees when the calculated amount is less than 0.2. This statutory framework, combined with prior case law such as *Ortiz v. State Farm Lloyds*, confirmed that payment of the appraisal award resolves liability under the insurance policy. The court emphasized its adherence to the statute's plain meaning and rejected speculative interpretations regarding legislative intent.

Ultimately, the court acknowledged concerns about potential insurer abuse but clarified that any remedy lies with the Legislature, not judicial reinterpretation. The court accordingly affirmed and held that Safeco's full payment precluded Rodriguez from recovering attorney's fees.

### UNDERWRITER DID NOT WAIVE ITS APPRAISAL RIGHT WHEN IT DENIED INSURED'S CLAIM BECAUSE THE POLICY UNEQUIVOCALLY STATED THAT WAIVER WAS REQUIRED TO BE IN WRITING

In re SureChoice Underwriters Reciprocal Exchange, ___ S.W.3d ___ (Tex. App. 2024).
https://casetext.com/case/in-re-surechoice-underwriters-reciprocal-exch-1

**FACTS:** Plaintiff Nicole Glasper ("Glasper") filed suit against Defendant SureChoice ("SureChoice") over its handling of her property damage insurance claim. Glasper held a policy with SureChoice that included an appraisal clause which stated that if both parties fail to agree on the amount of loss, either party may demand an appraisal of the loss. Both SureChoice's adjuster and Glasper's adjuster came to vastly different values for the repair costs of her property. Glasper then sent a demand letter for full payment of her adjuster's estimate. When SureChoice refused, Glasper filed suit.

In response, SureChoice sent a letter to Glasper invoking and demanding appraisal under the insurance policy. SureChoice additionally filed their answer and an Opposed Motion to Compel Appraisal and Abate, requesting the trial court compel appraisal and abate the lawsuit until after completion of the appraisal process. Glasper filed a response, arguing SureChoice waived their right to invoke an appraisal because they failed to do so within the 60-day statutory notice following her demand letter. The trial court denied SureChoice's Motion to Compel Appraisal and SureChoice filed a writ of mandamus.

**HOLDING:** Granted.

**REASONING:** The court held that SureChoice did not waive its right to invoke an appraisal because a waiver requires intent, either expressly or by intentional conduct that is inconsistent with claiming the right. For a waiver of the right to invoke an appraisal to occur the acts relied on must amount to a denial of liability, or a refusal to pay the loss. In this case, the insurance policy contained a provision that stated that any waiver or change to a provision of the policy must be made in writing by SureChoice to be valid.

Although Glasper argued that SureChoice's denial of her claim constituted a waiver of its appraisal rights, the court disagreed. The court explained that SureChoice acknowledged that the insurance policy covered part of the loss, but that it denied Glasper's claim because the amount fell below the policy's deductible. Therefore, SureChoice's denial was not based solely on a lack of liability or refusal to pay but was also partially because of causation.

Glasper further contended that SureChoice waived its right to an appraisal because the parties reached an impasse after SureChoice denied Glasper's demand letter. However, the court concluded that SureChoice's response to the letter did not create an impasse but instead invited Glasper to provide evidence to substantiate her damages. Because there was no evidence to show that SureChoice expressly waived their right to an appraisal, the court granted SureChoice's Motion to Compel Appraisal.

### DTPA AND INSURANCE CODE CLAIM BARRED BY LIMITATIONS

Galvan v. RVOS Farm Mut. Ins. Co., ___ S.W. 3d ___ (Tex. App.—Corpus Christi 2024, no pet. h.).
https://casetext.com/case/galvan-v-rvos-farm-mut-ins-co-2

**FACTS:** Appellee Jessica Galvan ("Galvan") held a homeowner's insurance policy with RVOS Farm Mutual Insurance Company ("RVOS"). Galvan's house was damaged by Hurricane Harvey on August 29, 2017, so she filed a claim with RVOS. Unsatisfied with RVOS's initial assessment, Galvan's counsel sent a demand letter on February 19, 2019, alleging that RVOS's adjuster had inadequately inspected her property, resulting in a significant discrepancy between RVOS's loss estimate and her expert's. This was claimed to violate both the Texas Insurance Code and the Deceptive Trade Practices Act (DTPA). Galvan sued RVOS on March 28, 2019, and filed an amended petition on May 8, 2019. Galvan filed a new suit in district court on July 6, 2023, alleging breach of contract and violations of the DTPA and Insurance Code. RVOS moved for summary judgement on the grounds that Galvan's suit was barred by a contractual limitations provision. On October 31, 2023, the trial court granted RVOS's summary judgement motion and Galvan appealed.
**HOLDING:** Affirmed.
**REASONING:** Galvan argued that her policy stated "no suit or action can be brought unless the policy provisions have been complied with." "Action brought against us must be started within two years and one day after the cause of action accrues." The court rejected this argument, holding that Galvan's claims accrued no later than February 27, 2018, when RVOS notified her of the initial decision regarding the loss amount, and Galvan was aware that RVOS's conclusion was "substantially different" from her independent estimate. RVOS argued that Galvan's claims accrued when the letter was sent to her counsel because that letter notified her that some of her claim was denied, and that the payment was less than she sought. RVOS further argued that even if the contractual limitations provision does not apply, the DTPA and insurance code also contain two-year limitations provisions. As such, both her DTPA and Insurance Code claims were subject to a two-year limitations period

**"Action brought against us must be started within two years and one day after the cause of action accrues."**

The court concluded that all of Galvan's claims derived from RVOS's initial decision regarding her amount of loss and since Galvan filed her district court suit more than two years later, her claims were barred by limitations. Galvan was advised of that decision on February 27, 2018, and Galvan was aware that RVOS's conclusion was substantially different from her own on February 19, 2019. Thus, no legal injury was suffered past February 19, 2019. The court concluded that RVOS established its entitlement to judgment as a matter of law, and Galvan failed to raise a material fact issue regarding the limitations defense.

### PLAINTIFF FAILED TO RAISE A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE ALLEGED DAMAGE OCCURRED DURING THE COVERAGE PERIOD OF THE INSURANCE POLICY

Espinoza v. State Farm Lloyds, ___ F. Supp. 3d ___ (W.D. Tex. 2024).
https://www.propertyinsurancecoveragelaw.com/wp-content/uploads/2024/09/Texas-Hail-Case-With-No-Damage-on-Date-of-Loss.pdf

**FACTS:** Plaintiff David Espinoza ("Espinoza") purchased a homeowner's insurance policy from Defendant State Farm Lloyd ("State Farm") for his home. Espinoza alleged that during the term of coverage his home sustained extensive damage from a hail and wind storm. Espinoza submitted an insurance claim to State Farm almost a year later, and State Farm sent a representative to inspect the home in connection to the claim. The State Farm inspector found that the storm damaged a single roof shingle but did not cause damage as submitted in the claim for the main dwelling roof and exterior gutters and downspouts.. The inspector estimated the roof shingle damage at $580.25 at replacement cost value, which fell below Espinoza's deductible of $3,650. Nearly two years later, Espinoza sent State Farm a claim letter which stated that the storm caused $51,400.76 in damage to Espinoza's home according to an inspector Espinoza hired. Two months later, Espinoza sent State Farm another letter alleging the storm resulted in $62,643.32 of damages to his home. State Farm refused to pay citing its own damages estimate based on its inspection.

Espinoza claimed breach of contract, non-compliance with the Texas Insurance Code breach of duty of good faith and fair dealing, and several violations of the Texas Deceptive Trade Practices Act. Espinoza requested actual damages for $62,642.32, as well as additional damages. State Farm moved for summary judgment on all of Plaintiff's claims.
**HOLDING:** Granted.
**REASONING:** Espinoza argued State Farm must pay for the storm damages and related fees to all of Espinoza's insurance claims as supported by their inspector. State Farm argued that Espinoza cannot prove that all of the damages in his claim as required by the concurrent cause doctrine. For an insurance company to be liable for breach of contract, the insured party must show that its claim falls within the insuring agreement policy. Texas courts recognize the concurrent cause doctrine which requires that "the insured is entitled to recover only that portion of the damage caused solely by the covered perils." If an insured party cannot provide evidence that a jury or court can use to allocate damages between those that resulted from covered perils and those that did not, the insured party's claim fails.

State Farm's inspector documented how the pre-existing damages pre-dated the insurance coverage period and Espinoza's inspection did not provide sufficient evidence to negate State Farm's claims. Because State Farm made its initial showing that there is no evidence to support Espinoza's breach of contract claim, Espinoza had to show competent summary judgment evidence of the existence of a genuine fact issue to overcome State Farm's motion. Espinoza did not amend his complaint when evidence proved the potential damaging storm occurred on a dif-

ferent day and therefore Espinoza did not present evidence to establish there were any traceable damages to the alleged date. Because Espinoza failed to identify evidence that a jury could use to segregate damages from the alleged date loss and pre-existing damages, the court granted summary judgment on all claims.

**PLAINTIFF SUED THE DEFENDANT INSURANCE COMPANY FOR BREACH OF CONTRACT AND EXTRA-CONTRACTUAL CLAIMS**

**DEFENDANT MOVED TO SEVER THE BREACH OF CONTRACT CLAIM FROM THE EXTRA-CONTRACTUAL CLAIMS**

**COURT DENIED SEVERANCE BECAUSE DEFENDANT FAILED TO SHOW HOW SEVERING THE FACTUALLY INTERTWINED CLAIMS WOULD PROMOTE CONVENIENCE OR JUDICIAL ECONOMY**

Musangu v. State Farm Mut. Auto. Ins. Co., ___ F. Supp. 3d ___ (N.D. Tex. 2024).
https://law.justia.com/cases/federal/district-courts/texas/txndce/3:2024cv01649/391601/17/

**FACTS:** Plaintiff Benaiah Musangu ("Musangu") was insured by Defendant State Farm Mutual Automobile Insurance Company ("State Farm") at the time of a wreck with an unidentified third-party. Police confirmed the third-party was responsible for the wreck and Musangu's resulting injuries however, the parties could not confirm if the third-party was insured. At the time of the wreck, Musangu had uninsured motorist benefits on his policy with State Farm.

Musangu filed suit against State Farm alleging breach of contract, violations of Texas Insurance Code ("TIC") §542.003 for failing to timely pay his claim, bad faith under TIC §541.060, and knowing violations of the Texas Deceptive Trade Practices Act ("DTPA"). State Farm moved to sever and abate the breach of contract claim from the extra-contractual claims.

**HOLDING:** Denied.

**REASONING:** State farm claimed severing and abating the breach of contract claim would promote convenience or judicial economy. The court disagreed. The court treated this motion to sever as one brought under the Federal Rules of Civil Procedure Rule 42(b), which allows a court to sever claims if convenience, prejudice, and expedition and economy favor it.

The court reasoned State Farm failed to show how severing the claims would promote convenience or judicial economy. The breach of contract and extra-contractual claims are factually intertwined, which weighed against severing the claims. The court considered a previous case where a severance and abatement were denied to a defendant-insurer because it would only serve judicial efficiency if the contractual claim were resolved against the plaintiff, effectively disposing of the other claims. In the current case, no judgment was entered against Musangu for his breach of contract claim. As a result, the court held that no convenience nor judicial economy interests would be served by granting State Farm's motion to sever and abate the contractual claims and the extra-contractual claims as they were factually intertwined. The court denied the defendant's unopposed motion to sever and abate the plaintiff's extra-contractual claims from the breach of contract claim.

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

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

Nelson v. Allstate Vehicle & Prop. Ins. Co., 2024 U.S. Dist. LEXIS 133579 (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.

**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.**

**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.

# **RECENT** DEVELOPMENTS

## CONSUMER CREDIT

### TO PLEAD A BREACH OF CONTRACT CLAIM UNDER CHAPTER 3 OF THE TEXAS BUSINESS AND COMMERCE CODE, PLAINTIFF MUST ALLEGE THAT THE CONTRACT INVOLVED A NEGOTIABLE INSTRUMENT

### PLAINTIFF FAILED TO PLAUSIBLY ALLEGE THAT HE HAD STANDING AS A "CONSUMER" UNDER THE DTPA, AS HE DID NOT SEEK OR ACQUIRE GOODS OR SERVICES BEYOND AN EXTENSION OF CREDIT AND INCIDENTAL SERVICES

Hunter v. Navy Fed. Credit Union, ___ F. Supp. 3d ___ No. 3:24-CV-0788-D (N.D. Tex. 2024).
https://law.justia.com/cases/federal/district-courts/texas/txndce/3:2024cv00788/388347/23/

**FACTS:** Plaintiff Henry Lee Hunter ("Hunter") sued Defendant Navy Federal Credit Union ("NFCU"), amongst other claims, for breach of contract under Chapter 3 of the Texas Business and Commerce Code and consumer fraud under the Deceptive Trade Practices-Consumer Protection Act (DTPA). Hunter alleged that his contracts with NFCU involved negotiable instruments under Texas Business and Commerce Code §3.104 and NFCU'S failure to honor the terms of these contracts constituted breach under §§3.301 and 3.302. Additionally, Hunter claimed that NFCU engaged in deceptive trade practices by failing to disclose material terms of the account agreements and misrepresenting the terms and conditions, thereby violating the DTPA. NFCU moved to dismiss under Fed. R. Civ. P. 12(b)(6).
**HOLDING:** Granted.
**REASONING:** NFCU argued that Hunter failed to plead factual allegations to reasonably infer that their contract qualified as negotiable instruments. The court agreed that Hunter failed to satisfy his burden of proof, because Hunter simply provided the court with conclusory statements. For a breach of contract claim under Chapter 3 to succeed, a plaintiff must satisfy the elements under Texas law and allege that the contract involved a negotiable instrument. The negotiability of an instrument is a question of law that requires facts to support such a fact-intensive inquiry. The court was unable to evaluate the contents of the exhibits to determine whether they satisfied Chapter 3's definition of negotiable instrument because Hunter neither attached to his first amended complaint the exhibits on which he relied, nor alleged facts about their contents.

> **There was nothing to support the claim that applying the proceeds from a collateral account to a secured credit account constituted a "financial service."**

NFCU argued that Hunter failed to plausibly plead a DTPA claim because he could not establish that he has consumer status. The court agreed, reasoning that Hunter's mere acquisition of a line of credit from NFCU, without more, did not suffice to confer consumer status under the DTPA. The elements of a DTPA claim are: (1) the plaintiff was a consumer; (2) the defendant either engaged in false, misleading or deceptive acts or engaged in an unconscionable action or course of action; and (3) the DTPA laundry-list violation or unconscionable action was a producing cause of the plaintiff's injury. The court relied on *Cobb v. Miller*, to determine that there was nothing to support the claim that applying the proceeds from a collateral account to a secured credit account constituted a "financial service." Moreover, the court cited *First State Bank v. Keilman* to substantiate that even if NFCU's applying the proceeds of the collateral account were considered a "financial service," it was incidental to NFCU's objective and, therefore, insufficient to confer consumer status under the DTPA. Because Hunter did not allege anything more than an extension of credit and incidental services, the court was unable to infer that Hunter had consumer status within the meaning of the DTPA. For these reasons, the court granted NFCU's motion to dismiss.

### INDIVIDUALIZED QUESTIONS PREDOMINATE, CLASS ACTION CERTIFICATION REVERSED

Ford v. TD Ameritrade Holding Corp., 115 F.4th 854 (8th Cir. 2024).
https://caselaw.findlaw.com/court/us-8th-circuit/116541966.html

**FACTS:** Plaintiff-Appellant Roderick Ford ("Ford"), a customer of Defendant-Appellant, TD Ameritrade, Inc. ("TD"), and lead plaintiff for a group of investors who traded securities through TD Ameritrade between 2011 and 2014, filed a securities fraud lawsuit against TD. Ford alleged that TD violated its "duty of best execution" by routing customer orders to trading venues that offered TD the highest payments, rather than those providing the best outcomes for customers. Ford claimed that this practice caused financial harm to customers and proposed using an algorithm capable of automatically determining economic loss for each affected individual.

Ford sought class certification for all TD Ameritrade clients who suffered economic loss due to this practice during the 2011-2014 period. Despite concerns about the need for individualized inquiries, the district court initially granted class certification. TD appealed.
**HOLDING:** Reversed.
**REASONING:** Ford argued that the proposed class of customers satisfied the class certification requirements under the Federal Rule of Civil Procedure 23(b)(3). The district court certified a class based on Rule 23(b)(3), which required that (1) questions of law or fact common to class members predominate over any questions affecting only individual members and that (2) a class action was superior to other available methods for fairly and efficiently adjudicating the controversy.

The court provided two reasons for reversing the district court's class certification. First, the court found that the proposed class did not meet the predominance requirement of Rule 23(b)(3), as determining economic loss for each member would require

individual inquiries, outweighing common issues. The court concluded that individual inquiries would have been required for each trade, as the economic loss could not be presumed and depended on specific circumstances. Despite Ford's algorithm, the court found that individual assessments remained necessary, particularly in instances of unusual market conditions or diverse investor strategies.

The court also determined that the proposed class constituted an impermissible "fail-safe class." The class was defined to include only customers who did not receive the best execution and were economically harmed by the practice. This created a "fail-safe" class, where class membership depended on the success of the plaintiffs' claims on the merits. Such a class was deemed impermissible because it allowed putative class members to avoid the consequences of an adverse judgment, resulting in manageability issues and undermining the fairness of the process. The court held that the proposed class does not satisfy the requirements of Rule 23 and reversed and remanded.

**THE TRUTH IN LENDING ACT'S RIGHT OF RESCISSION APPLIES ONLY TO CONSUMER CREDIT TRANSACTIONS INVOLVING A SECURITY INTEREST IN THE BORROWER'S PRINCIPAL DWELLING, NOT AUTO LOANS**

**PLAINTIFF FAILED TO STATE A CLAIM UNDER THE FAIR DEBT COLLECTION PRACTICES ACT OR FAIR CREDIT REPORTING ACT**

Brady v. Santander Consumer USA, ___ F. Supp. 3d ___ (E.D. Pa. 2024).
https://cases.justia.com/federal/district-courts/pennsylvania/paedce/2:2022cv05051/604126/19/0.pdf

**FACTS:** Plaintiff Charles Brady ("Plaintiff") purchased a used 2015 vehicle from Defendant, Platinum Motor Group ("Platinum") in March 2022. Plaintiff financed the purchase through Defendant Santander Consumer USA ("Santander"), pursuant to a Retail Installment Sale Contract Finance Charge ("Contract"). In August 2022, Plaintiff sent notices to Defendants attempting to rescind the Contract, citing financial hardship, and attached a Debt Validation Letter. Defendants continued to seek repayment on the loan.

Plaintiff filed suit against Defendants, asserting violations of (1) the Truth in Lending Act, 15 U.S.C. §1601, et seq. ("TILA"); (2) the Fair Debt Collection Practices Act, 15 U.S.C. §1681, et seq. ("FDCPA"); and (3) the Fair Credit Reporting Act, 15 U.S.C. §1692, et. seq. ("FCRA"). Defendants moved for summary judgment on all of Brady's claims.

**HOLDING:** Granted.

**REASONING:** Plaintiff asserted that Defendant Platinum violated his right of recission under 15 U.S.C. §1635 of TILA. Under 15 U.S.C. §1635 of TILA, an obligor has the right to rescind a transaction that is related to any consumer credit transaction in which a security interest is or will be retained or acquired in any property that was used as the principal dwelling of the obligor. The court explained that TILA's right of recission applies only to residential mortgages, not auto loans. The court rejected Plaintiff's argument and granted Platinum's motion for summary judgment on this issue because Plaintiff's purchase and financing of the vehicle had no connection to his principle dwelling, and thus, 15 U.S.C. §1635 of TILA was not applicable.

**A "debt collector" is not an employee of a creditor attempting to collect debts; rather, the goal of the FDCPA is to target "third party collection agents working for a debt owner."**

Plaintiff further asserted that Defendants violated the FDCPA. The court explained that to prevail on a claim under the FDCPA, the plaintiff must prove four elements: (1) the plaintiff is a consumer; (2) the defendant is a debt collector; (3) the defendant's challenged practice involves an attempt to collect a "debt" as defined by the Act; and (4) the defendant violated a provision of the FDCPA in attempting to collect the debt. The FDCPA defines "debt collectors" as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. §1692a(6). Additionally, a "debt collector" is not an employee of a creditor attempting to collect debts; rather, the goal of the FDCPA is to target "third party collection agents working for a debt owner." The court reasoned that Plaintiff failed to show that Defendants are debt collectors as defined by the FDCPA and held that Defendants are "creditors" under the Act because they were acting on behalf of their own company and were not using third party collectors.

Accordingly, the court concluded that Plaintiff failed to state a claim upon which relief could be granted under both TILA and the FDCPA. Defendants' motions for summary judgment were granted.

## ARBITRATION

### MOTION TO COMPEL ARBITRATION GRANTED

**UNDER TEXAS LAW, "[U]NLESS A PARTY CAN SHOW SHE WAS FRAUDULENTLY INDUCED TO SIGN A CONTRACT, SHE 'IS BOUND BY THE TERMS OF THE CONTRACT SHE SIGNED, REGARDLESS OF WHETHER SHE READ IT OR THOUGHT IT HAD DIFFERENT TERMS.'"**

Rummage v. Bluegreen Vacations Unlimited, Inc., ___ F. Supp. 3d ___ (E.D. Tex. 2024).
https://casetext.com/case/rummage-v-bluegreen-vacations-unlimited-inc-1

**FACTS:** Robin Rummage ("Plaintiff") was hired as a sales representative by Bluegreen Vacations Unlimited, Inc. ("Defendant") in September 2019, let go, then rehired in 2020. Plaintiff was terminated again sometime later, then filed suit against Defendant, bringing claims of discrimination and retaliation under Title VII. In response, Defendant filed a motion to compel arbitration, which alleged that Plaintiff voluntarily signed the Bluegreen Entities Arbitration Agreement ("Agreement") when she was hired. Defendants alleged that the Agreement was expressly labeled in the Plaintiff's Onboarding Packet and was always available to Plaintiff during her employment. In response, Plaintiff argued she did not enter into a valid arbitration agreement; or, in the alternative, that the court should find the Agreement unconscionable.
**HOLDING:** Granted.
**REASONING:** Plaintiff argued the Agreement was invalid because there was no "meeting of the minds" because she did not have a meaningful opportunity to read the Agreement, and the Agreement was not discussed or presented at the new hire orientation before she signed it. The court rejected this argument and found that "meeting of the minds" is based on the objective standard of what the parties said and did, and not on their subjective state of mind. The court explained in Texas employers may enforce an arbitration agreement if the employee received notice of the employer's arbitration policy and accepted it. Arbitration agreements are governed by state contract law principles. Courts perform a two-step test to determine whether arbitration must be compelled. First, the court determines whether (a) there is a valid agreement to arbitrate, and (b) whether the dispute in question falls within the scope of the arbitration agreement. Second, the court assesses whether any applicable federal statute, policy, or waiver renders the claims not arbitrable. The court held that failure to read the Agreement or believing it had different terms is not a basis to show that there was no "meeting of the minds" or fraud. Plaintiff was bound by the Agreement because of the objective fact that she signed it.

**The court rejected this argument and found that "meeting of the minds" is based on the objective standard of what the parties said and did, and not on their subjective state of mind.**

Plaintiff further argued the Agreement was unconscionable, alleging she was not adequately informed of its contents. The court dismissed this claim, explaining that failure to read a contract does not render it unconscionable.

The court ultimately found that Plaintiff's claims fell within the scope of the Agreement because the Agreement specifically identified claims of discrimination or harassment based on sex/gender. Additionally, Plaintiff did not raise any federal statute, policy, or waiver that would render the claims non-arbitrable. Accordingly, the court granted Defendant's motion to compel arbitration.

**ARBITRATION PROVISION IS NOT ENFORCEABLE BECAUSE 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. Aug. 8, 2024).
https://law.justia.com/cases/federal/district-courts/virginia/vaedce/1:2023cv00574/537336/23/

**FACTS:** Defendant Lowe's Home Centers is a national home improvement retailer. Plaintiff Eleanor Lovinfosse purchased a washing machine from Lowe's website. During checkout, the plaintiff clicked the "Place Order" button, which was accompanied by a statement that placing an order constituted agreement to Lowe's Terms and Privacy Statement. Both "Terms" and "Privacy Statement" were hyperlinked, and the Terms included an arbitration provision binding most future claims to arbitration. The Terms also stipulated that Lowe's retained the right to modify or terminate the Terms without notice.

Plaintiff filed suit against Lowe's, alleging deceptive "Online Choice Architecture" led her to purchase an unnecessary water hose labeled "Required for Use" with her washing machine. Lowe's moved to compel arbitration and dismiss the case, or alternatively, sought dismissal for failure to state a claim.
**HOLDING:** Motions denied.
**REASONING:** Defendant argued that since 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 countered 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 argument that she lacked sufficient notice of the arbitration agreement, holding that Lowe's website layout and language provided constructive notice of her assent. The court emphasized that an electronic "click" can signify acceptance of a contract if the layout gives reasonable notice of its terms. However, the court determined that Lowe's arbitration provision was unenforceable because Lowe's retained unfettered

discretion to modify or terminate the Terms without notice. The court held this rendered Lowe's promise to arbitrate illusory, as the defendant's ability to revoke the arbitration agreement at any time undermined its mutuality and enforceability.

**ARBITRATION AGREEMENT UNENFORCEBLE BECAUSE OF LINKING TO "BORDERLINE UNINTELLIGIBLE" ARBITRAL RULES**

Skot Heckman v. Live Nation Entertainment Inc., ___ F.3d ___ (9th Cir. 2024).
https://cdn.ca9.uscourts.gov/datastore/opinions/2024/10/28/23-55770.pdf

**FACTS:** Plaintiffs-Appellees ("Plaintiffs") bought entertainment tickets from Live Nation Entertainment and Ticketmaster LLC ("Defendants") through Ticketmaster's website. The website's online ticket purchase agreement included an agreement to comply with Ticketmaster's Terms of Use ("Terms), which provided that any claim arising out of a ticket, whether purchased in the present or prior, would be decided by an arbitrator employed by a newly created entity, New Era ADR Rules.
Plaintiffs brought a class action suit against Defendants, alleging anti-competitive practices in violation of the Sherman Act. The district court denied Defendants' motion to compel arbitration pursuant to the arbitration agreement, concluding that the agreement's delegation clause was unconscionable procedurally and substantively. Defendants appealed.
**HOLDING:** Affirmed.
**REASONING:** To render an agreement unenforceable, procedural and substantive unconscionability must be determined. In deciding procedural unconscionability under California law, the courts focused on factors of oppression and surprise in the agreement.

The court noted three reasons that rendered Ticketmaster's website Terms procedurally unconscionable. First, the power imbalance between Defendants and their consumers is oppressive because it gives Defendants "market dominance in the ticket service industries." Second, the court stated that Ticketmaster's website Terms and the way users were bound to them constituted elements of surprise. The Terms provided that users merely browsing their site agreed to the Terms and any of their changes. Changes were then applied prospectively and retroactively without prior notice. The court reasoned that this practice had consistently been held to be unenforceable. Lastly, the Terms on Ticketmaster's site is affirmatively misleading because they are inconsistent with New Era's Rules. The Terms read together with New Era's Rules were so "dense, convoluted and internally contradictory to be borderline unintelligible."

**The power imbalance between Defendants and their consumers is oppressive because it gives Defendants "market dominance in the ticket service industries."**

The court also held that four features of New Era's Rules features were substantively unconscionable. This included (1) the mass arbitration protocol, (2) the procedural limitations, (3) the limited right of appeal, and (4) the arbitrator selection provisions. These features violated basic principles of due process and insufficiently protected the interests of parties and nonparties. Because the delegation clause is unconscionable procedurally and substantively, the court held that the arbitration agreement is unenforceable.

## *Hope you have a very Happy New Year!*

And this issue of the *Journal* is a great way to begin 2025.

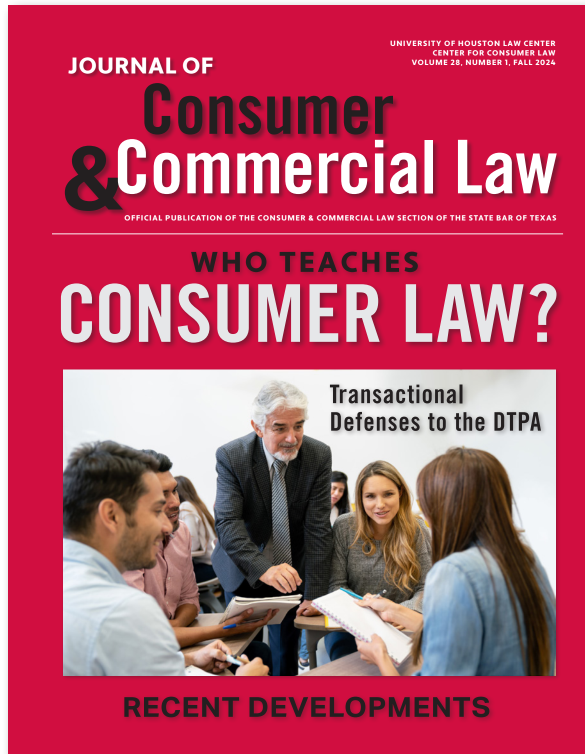
As usual for the first issue of the year, it contains the "*Insurance Law Update.*" Suzette E. Selden and Henry Moore do a great job discussing all the significant recent insurance law cases. Among the many decisions is a Texas Supreme Court opinion that answers the following certified question in the affirmative, "In an action under Chapter 542A of the Texas Prompt Payment of Claims Act, does an insurer's payment of the full appraisal award plus any possible statutory interest preclude recovery of attorney's fees?" The Court noted that the Texas Insurance Code prohibits an attorney's fees award when an insurer has fully discharged its obligations under the policy by paying the appraised amount plus any statutory interest.

Of course, it would not be the *Journal* if we didn't discuss more than 25 recent consumer law decisions, all of interest to consumer and commercial lawyers.

Finally, remember, the *Journal* is now available only in digital format. Members of the Consumer Law Section receive a link by email, and all issues of the *Journal* are available at http://www.jtexconsumerlaw.com/.

Wishing you a happy and healthy 2025.

**Richard M. Alderman**
**Editor-in-Chief**

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