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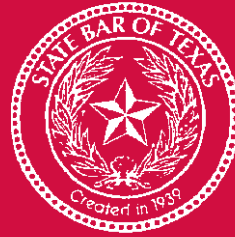
The Myth of Conditional Financing After *McCarthy II*



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Sales Contracts

Defendants' Claims
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The Myth of Conditional

Financing After *McCarthy II*

**Texas Court Reinforces Consumer
Rights in Retail Installment
Sales Contracts**

The decision has significant implications for both plaintiffs and defendants in motor vehicle litigation.

By R. Douglas Scott *

I. INTRODUCTION

Retail installment sales contracts are among the most commonly used consumer-finance instruments in Texas, yet disputes involving “spot delivery” or “conditional financing” practices have occupied an uncertain space between dealership practices and statutory consumer protections. The Fourteenth Court of Appeals’ recent decision in *McCarthy v. Wisch Auto Group, Inc. d/b/a Bayway Chevrolet* calls many of those assumptions into question.¹ In *McCarthy II*, the court addressed whether a dealership may rescind a completed retail installment transaction after the failure to assign the contract to a third-party lender. In doing so, the court closely examined the interaction between the retail installment sales contract (“RISC”), the conditional delivery agreement (“CDA”), and multiple provisions of Chapter 348 of the Texas Finance Code governing motor vehicle installment sales. The court ultimately concluded that the RISC became binding upon execution, that Bayway Chevrolet (“Bayway”) was identified as the originating creditor under the transaction documents, and that the Bayway could not rely on the subsequent failure of assignment financing to invalidate the completed sale.

The decision has significant implications for both plaintiffs and defendants in motor vehicle litigation. It limits a dealer’s ability to rely on the failure of third-party financing to justify post-sale rescission and reinforces the statutory protections governing these transactions under the Texas Finance Code, the Deceptive Trade Practices Act (“DTPA”), and the Texas Debt Collection Act (“TDCA”). It also highlights the potential liability that may arise when a dealer represents that a sale is complete, only to later attempt to reverse course.

This article examines the *McCarthy II* decision and its practical impact. It focuses on how the court’s reasoning reframes “conditional financing,” clarifies the role of the dealer as creditor, and provides a framework for evaluating claims arising from failed spot-delivery transactions.

1 This article refers to the Fourteenth Court of Appeals’ 2021 arbitration decision involving the same parties as “McCarthy I” and its 2026 merits opinion as “McCarthy II.” See *Wisch Auto Group, Inc. v. McCarthy*, No. 14-19-00483-CV, 2021 WL 2154075 (Tex. App.—Houston [14th Dist.] May 27, 2021, no pet.) (“McCarthy I”); *McCarthy v. Wisch Auto Group, Inc.*, __ S.W.3d __, No. 14-24-00040-CV, 2026 WL 771396 (Tex. App.—Houston [14th Dist.] Mar. 19, 2026, no pet. h.) (“McCarthy II”).

II. THE TRANSACTION AND THE DISPUTE

The dispute in *McCarthy II* arises from a transaction that is common in the motor vehicle industry but frequently misunderstood in litigation. Jeffrey and Melissa McCarthy (the “McCarthys”) went to Bayway to purchase a vehicle and ultimately agreed to buy a Chevrolet Silverado (the “Silverado”). As part of the transaction, they traded in their existing vehicle (the “Nissan”) and entered into a retail installment sales contract (“RISC”) identifying the dealership as the seller and creditor. The parties simultaneously executed both the RISC and a separate conditional delivery agreement. The McCarthys left the dealership with the Silverado, and Bayway took possession of the Nissan with the obligation to satisfy the outstanding loan balance. From the consumers’ perspective, the transaction was complete: they had signed the contract, surrendered their prior vehicle, and taken delivery of the new one.

What the McCarthys were not told was that the dealership had only obtained a conditional approval from a third-party lender. That approval required additional verification of income and other conditions before funding would occur. When those conditions were not satisfied to the lender’s approval, the lender declined to fund the transaction several weeks later.

At that point, Bayway attempted to reverse course. It informed the McCarthys that the sale was not final and demanded the return of the Silverado. At the same time, Bayway failed to pay off the loan on the Nissan, which was ultimately repossessed and sold, leaving the McCarthys with a deficiency balance.

The situation escalated quickly. Bayway engaged in repeated collection efforts, including threats of criminal consequences, involvement of law enforcement, and attempts to recover the vehicle through repossession agents. Despite these efforts, the McCarthys maintained possession of the Silverado and pursued legal claims based on the Bayway’s conduct.

The case proceeded to trial, where the jury found in favor of Bayway, rejecting the McCarthys’ statutory claims and finding that they had failed to comply with the contract. The trial court entered a take-nothing judgment. On appeal, however, the Fourteenth Court of Appeals reached a different conclusion on several key issues, setting the stage for a broader examination of whether this type of transaction can ever be treated as “conditional” under Texas law.

Before the appeal addressed in *McCarthy II*, the parties had already appeared before the Fourteenth Court of Appeals in an earlier interlocutory appeal involving Bayway’s attempt to compel arbitration under the RISC. In that appeal, now referred to herein as *McCarthy I*, the court affirmed the trial court’s denial of arbitration. Although *McCarthy I* primarily addressed contract formation and arbitration principles, the opinion foreshadowed many of the concerns that later became central to *McCarthy II*, particularly the tension between Bayway’s reliance on the RISC for arbitration purposes while simultaneously treating the underlying transaction as non-final once financing failed.

III. THE COURT’S HOLDING: A RISC IS NOT A CONDITIONAL AGREEMENT

The central issue on appeal was whether the transaction could be treated as contingent on the Bayway’s ability to assign the retail installment sales contract (“RISC”) to a third-party lender. Bayway’s position reflected a common industry assumption: that a vehicle sale completed through “spot delivery” remains subject to financing approval and may be unwound if that approval does not materialize.

That assumption did not arise in a vacuum. For decades, dealerships have operated under a business model in which they act as intermediaries, originating retail installment contracts with the expectation that those contracts will be promptly assigned to third-party lenders. When a lender declines to purchase the contract, the dealer is left holding the paper. From a practical standpoint, this creates pressure to reverse the transaction rather than retain the credit risk. As a result, some dealers have treated delivery of the vehicle as effectively “conditional,” even where the governing contract does not reflect that understanding.

Historically, disputes arising from these transactions have not always produced clear appellate guidance. Many cases turn on fact-specific issues involving disclosures, contract language, or conditional-delivery agreements. Others resolve before appellate review, leaving the underlying legal theory largely untested. This lack of clarity has allowed the concept of “conditional financing” to persist as a practical assumption, even where its legal foundation is uncertain. The Fourteenth Court of Appeals rejected that premise.

A. The RISC Is Binding at Execution

The court began with the language of the contract itself. The RISC identified Bayway as the seller and creditor and set forth the essential terms of the transaction, including the amount financed, payment schedule, and obligations of the parties. Nothing in the agreement made the transaction contingent on third-party financing.

Under settled contract principles, the agreement became binding when it was executed. The court emphasized that a RISC is not a preliminary agreement or placeholder. It is the operative credit contract governing the transaction. Once signed, it establishes enforceable rights and obligations



In practical terms, this means that a dealer cannot accomplish indirectly, through practice or characterization, what the statute forbids directly.

between the dealer and the consumer. Bayway's expectation that it would later assign the contract to a lender did not alter that analysis. Assignment is a separate transaction. It may affect whose expectation that it would later assign the contract to a lender did not alter that analysis. Assignment is a separate transaction. It may affect who ultimately receives payments, but it does not determine whether a contract exists in the first place.

B. Texas Law Prohibits Conditional Assignment

The court's analysis did not stop at the contract. It also relied on the Texas Finance Code, which directly addresses this issue. Section 348.1015 prohibits a retail installment contract from being conditioned on its assignment to a third party. Any provision attempting to impose such a condition is void.

This statutory prohibition is significant. It reflects a legislative decision to treat RISCs as complete and binding agreements at the time of execution, not as contingent arrangements dependent on outside approval. The court's opinion reinforces that principle by refusing to recognize a condition that the statute itself invalidates.

In practical terms, this means that a dealer cannot accomplish indirectly, through practice or characterization, what the statute forbids directly. Even if a dealer subjectively views the transaction as contingent on financing, that understanding has no legal effect if it is not reflected in an enforceable and lawful contract provision.

C. The Dealer Remains the Creditor

A related issue addressed by the court was the identity of the creditor. Bayway argued, in substance, that it merely facilitated financing and that GM Financial would have become the ultimate creditor had the assignment been completed. The court rejected that position.

The RISC expressly identified Bayway Chevrolet as the "Seller/Creditor." The agreement obligated the consumers to make payments under the contract and gave the dealership the right to enforce the debt, repossess the vehicle upon default, and recover a deficiency balance. The dealership also retained the right to assign the contract to another entity. Those provisions are consistent with the dealership originating the credit transaction itself.

The distinction matters because many post-sale disputes arise from a dealer's attempt to characterize itself as merely a conduit between the consumer and a lender. *McCarthy II* makes clear that this characterization is inconsistent with the structure of the transaction reflected in the RISC. The dealer is the originating creditor at the moment the contract is signed, even if it later intends to transfer the paper to a third-party finance company.

This conclusion is consistent with the broader statutory framework governing retail installment transactions. The dealer originates the extension of credit, negotiates the terms of the transaction, executes the RISC, and possesses all rights associated with the debt unless and until those rights are assigned. The dealer's expectation that it will later sell or assign the contract does not alter the legal reality that the dealer is the creditor when the transaction is consummated.

The distinction is particularly important in spot-delivery litigation because dealerships frequently argue that they merely arrange financing and therefore should not bear responsibility when financing later fails. *McCarthy II* undermines that position. The court repeatedly emphasized that Bayway, not GM Financial, was the creditor identified in the RISC and the entity that initially extended credit to the consumers. The possibility of a future assignment did not change the nature of the original transaction.

The court's analysis therefore carries implications beyond Chapter 348 of the Texas Finance Code. Creditor status carries with it not only contractual rights but also statutory obligations under a variety of federal and state consumer-protection laws. One of the most significant examples arises under the Equal Credit Opportunity Act.

D. Creditor Status Carries Potential ECOA Consequences

One of the most significant aspects of *McCarthy II* may ultimately be found not in its interpretation of the Texas Finance Code, but in its treatment of the Equal Credit Opportunity Act ("ECOA"). While most attention has focused on the court's rejection of "conditional financing," the opinion may have equally important implications for federal consumer-credit litigation.

The trial court granted summary judgment against the McCarthys on their ECOA claim, concluding that Bayway was not a creditor subject to the statute. The Fourteenth Court of Appeals reversed in part, holding that the summary-judgment evidence created at least a fact issue regarding whether Bayway qualified as a creditor. In doing so, the court relied on many of the same facts that ultimately drove its analysis throughout the remainder of the opinion: Bayway accepted the credit application, extended credit through the RISC, and expressly identified itself in the transaction documents as the "Seller/Creditor."

Bayway argued that GM Financial made the credit decision and that any obligations arising under the ECOA belonged solely to GM Financial. According to Bayway, it merely facilitated the transaction and expected to assign the contract once financing was finalized. The court rejected that argument, concluding that the evidence would permit a factfinder to determine that Bayway itself qualified as a creditor under the statute.

That holding is significant because creditor status under the ECOA carries substantive obligations. Among other things, creditors generally must provide notice when adverse action is taken concerning a consumer's application for credit. The purpose of the notice requirement is to ensure transparency in the credit process and to provide consumers with sufficient information to understand, investigate, and challenge the basis for the denial or termination of credit. The notice requirement serves a particularly important function in spot-delivery transactions because consumers who have already surrendered a trade-in vehicle and taken possession of a replacement vehicle may have effectively been removed from the credit marketplace before learning that financing has failed.

In the context of spot-delivery transactions, the issue becomes particularly important when financing later collapses after the consumer has already signed the RISC, surrendered a trade-in vehicle, obtained insurance, and taken possession of the replacement vehicle. Dealerships frequently take the position that any adverse-action obligations belong exclusively to the third-

This portion of the opinion is particularly important because dealerships frequently rely on conditional delivery forms to argue that no completed sale occurred.

party lender because the lender ultimately declined to purchase the contract. *McCarthy II* suggests that the analysis may not be so simple. If the dealership originated the credit transaction and qualifies as a creditor under the statute, the dealership may itself bear responsibility for complying with the ECOA's notice requirements.

The consequences of failing to provide a required adverse-action notice can be substantial. The ECOA creates an independent federal cause of action and authorizes recovery of actual damages, punitive damages in appropriate cases, attorney's fees, and costs. As a result, a creditor's failure to comply with the statute may create liability separate and apart from any claim arising under the Texas Finance Code, the Deceptive Trade Practices Act, the Texas Debt Collection Act, or the underlying retail installment contract itself.

For consumer practitioners, this portion of the opinion may prove to be one of *McCarthy II*'s most important long-term contributions. Attorneys evaluating failed-financing or spot-delivery disputes should not limit their analysis to state-law claims. Counsel should also determine who originated the credit transaction, who qualified as the creditor under the transaction documents, whether an adverse action occurred, and whether the consumer received the notices required by federal law.

Ultimately, the ECOA discussion reinforces the broader theme running throughout *McCarthy II*. A dealership cannot simultaneously claim the benefits of creditor status while disclaiming the obligations that accompany it. If the dealership is the creditor when the transaction is consummated, it may also be the creditor for purposes of federal consumer-protection statutes when the transaction later unravels.

E. The Conditional Delivery Agreement Did Not Save the Transaction

Bayway also relied heavily on a separate Conditional Delivery Agreement ("CDA"), arguing that the vehicle delivery remained temporary until financing was finalized. The court was unpersuaded.

The CDA expressly stated that it became void upon execution of the RISC. Texas Finance Code section 348.013 likewise provides that a conditional delivery agreement is void once the parties execute a retail installment contract for the vehicle. Because the parties executed the RISC at the same time as the CDA, the statutory framework itself rendered the CDA ineffective once the RISC became operative.

This portion of the opinion is particularly important because dealerships frequently rely on conditional delivery forms to argue that no completed sale occurred. *McCarthy II* demonstrates that these agreements cannot override the governing statutory structure where the parties have already entered into a binding retail installment contract.

The opinion therefore reinforces a hierarchy that is often blurred in litigation. The RISC governs the financing transaction. Once executed, the parties' rights and obligations arise from that agreement and from the Texas Finance Code. Ancillary delivery documents cannot be used to negate the statutory protections attached to the RISC itself.

F. Arbitration Enforcement and the Inconsistency of Conditional Financing

The tension underlying Bayway's litigation position became apparent years before the Fourteenth Court of Appeals issued its merits opinion in *McCarthy II*. In an earlier interlocutory appeal, now referred to as *McCarthy I*, Bayway sought to compel arbitration pursuant to the arbitration provision contained in the retail installment sales contract ("RISC"). Although *McCarthy I* formally concerned arbitration, the dispute foreshadowed the central issue later resolved in *McCarthy II*.

Bayway's arbitration argument necessarily relied upon the enforceability of the RISC. The arbitration provision appeared in the RISC itself, not in the Conditional Delivery Agreement ("CDA"). To compel arbitration, Bayway was therefore required to rely upon the validity and enforceability of the very agreement it later characterized as non-final once financing failed.

That position exposed a fundamental inconsistency common in spot-delivery litigation. Dealerships frequently seek to enforce provisions of the RISC that benefit the dealership, including arbitration clauses, repossession rights, default provisions, and attorney-fee provisions, while simultaneously arguing that the transaction remained conditional and subject to rescission because a third-party lender declined to purchase the contract. In effect, the dealership seeks to treat the RISC as binding when advantageous and non-binding when burdensome.

McCarthy II substantially undermines that approach. The court held that the RISC became binding upon execution, that Bayway was the originating creditor under the transaction, and that Texas Finance Code section 348.1015 prohibited conditioning the contract upon subsequent assignment to a lender. The court further held that the CDA became void upon execution of the RISC under section 348.013.

Viewed together, *McCarthy I* and *McCarthy II* create a coherent framework for future litigation. A dealership that seeks to enforce rights arising from a RISC may face substantial difficulty simultaneously arguing that the transaction never became final because financing later failed. While the two opinions address different legal issues, both reflect judicial skepticism toward attempts to selectively enforce portions of a retail installment transaction while disavowing the transaction's overall finality.

In that respect, *McCarthy I* was more than an arbitration dispute. It was an early indication of the broader doctrinal conflict ultimately resolved in *McCarthy II*: whether a dealership may simultaneously rely upon the RISC when it provides contractual advantages and disregard the same agreement when lender assignment efforts prove unsuccessful.

G. The Practical Realities Underlying the Dealership Position

Although the Fourteenth Court of Appeals ultimately rejected Bayway Chevrolet's position, the dealership's arguments did not arise in isolation or from mere opportunism. The modern retail automobile industry operates within a financing structure that creates substantial practical pressure in favor of conditional-delivery practices, particularly in transactions involving subprime or near-subprime borrowers.

In most modern vehicle transactions, dealerships do not intend to retain retail installment contracts for the life of the loan. Instead, dealers typically originate RISCs with the expectation

that the contracts will be rapidly assigned to institutional lenders or finance companies. The dealership receives payment from the assignee shortly after execution of the transaction, allowing the dealer to recover the vehicle's purchase price, free internal credit lines, and continue high-volume sales operations without functioning as a long-term lender.

This system depends heavily on speed. Consumers often expect same-day delivery, and dealerships compete aggressively by advertising immediate approval and rapid vehicle turnover. The practice also serves another important business purpose: removing the consumer from the credit marketplace. Once a consumer signs the RISC, surrenders a trade-in vehicle, obtains insurance, and drives away in the replacement vehicle, the consumer is far less likely to continue shopping for alternative financing or competing vehicles. The dealership, however, retains the opportunity to locate an assignee for the contract. From the dealership's perspective, immediate delivery helps secure the transaction while financing approval remains incomplete. Financing decisions are therefore frequently made before lenders complete final underwriting review. In many transactions, the lender initially provides only conditional approval subject to later verification of income, employment, insurance coverage, residency, or other underwriting requirements.

That structure creates obvious commercial risk for dealerships. If the lender later declines to purchase the contract, the dealer may be forced to retain a high-risk loan it never intended to service. For dealerships operating on thin margins or high inventory turnover, retaining large volumes of unassigned paper may create significant liquidity concerns. The risk becomes even more pronounced in transactions involving buyers with impaired credit, fluctuating income, recent medical leave, or other underwriting irregularities.

Dealerships also emphasize that they do not view themselves as traditional lenders in the ordinary sense. Unlike banks or finance companies, dealerships are principally engaged in the sale of vehicles, not the long-term servicing of consumer debt. From the dealer's perspective, the extension of credit reflected in the RISC is often viewed as temporary or intermediary in nature, existing only until assignment to the ultimate financing source.

The Bayway litigation illustrates many of these concerns. The record reflected that GM Financial initially issued only a conditional approval and later declined funding after concerns arose regarding verification of Jeffrey McCarthy's income while he was on medical leave. The dealership argued that the consumers' alleged misrepresentations in the credit application process

materially contributed to the collapse of the financing transaction. From the dealership's standpoint, it was being forced to retain a transaction that it believed never satisfied the lender's underwriting requirements.

These concerns are not trivial. Fraudulent or inaccurate credit applications can materially distort underwriting decisions and expose dealerships and lenders alike to significant financial losses. Likewise, the modern assignment and securitization structure underlying vehicle finance transactions depends on rapid transferability of retail paper. Dealers therefore argue that the practical realities of the industry necessarily require some mechanism for unwinding transactions when financing fails shortly after delivery.

The difficulty for dealerships, however, is that these commercial realities do not alter the governing statutory framework. Chapter 348 of the Texas Finance Code reflects a legislative decision to prioritize certainty and consumer protection once a RISC is executed and the vehicle delivered. The *McCarthy II* court did not reject the dealership's concerns as irrational; rather, it concluded that the existing statutory scheme allocates the risk of failed assignment to the dealer rather than the consumer.

In that respect, *McCarthy II* may be understood less as a rejection of the practical realities of dealership financing and more as a reaffirmation that industry custom cannot override statutory consumer protections. Regardless of how dealerships operationally structure modern financing transactions, the enforceability of the RISC ultimately remains governed by Texas law rather than by informal assumptions regarding future assignment. Those competing policy concerns ultimately framed the court's analysis of the governing statutory framework.

IV. THE STATUTORY FRAMEWORK UNDER THE TEXAS FINANCE CODE

The *McCarthy II* decision is significant not merely because of its factual outcome, but because of the statutory framework underlying the court's reasoning. The opinion reflects a careful application of Chapter 348 of the Texas Finance Code, which governs motor vehicle installment sales. The relevant statutes demonstrate that Texas law treats a retail installment transaction as complete upon execution of the RISC and delivery of the vehicle. The statutory scheme leaves little room for the concept of "conditional financing" as it is commonly asserted in practice.

A. Section 348.1015 and the Prohibition Against Conditional Assignment

The most important provision discussed by the court was Texas Finance Code section 348.1015, which provides:

"A retail installment contract may not be conditioned on the subsequent assignment of the contract to a holder."

Section 348.1015(b) further provides that any provision violating the statute "is void."

This language is direct and unambiguous. A dealer cannot condition the enforceability of a RISC on whether a third-party lender ultimately agrees to purchase the contract. The Legislature could have allowed such a structure. It did not.

The policy reasons underlying the statute are apparent. Consumers entering into vehicle transactions are rarely in equal bargaining positions with dealerships. The consumer typically signs lengthy preprinted agreements prepared entirely by the dealer or its finance sources. The consumer trades in an existing vehicle, pays a



down payment, obtains insurance, and takes delivery of the replacement vehicle with the understanding that a completed transaction has occurred.

Permitting the dealer to later declare the transaction void based on financing problems would create substantial instability and invite abuse. The consumer may already have surrendered title to the trade-in vehicle, incurred insurance costs, or altered employment and transportation arrangements in reliance on the transaction. The Legislature's prohibition against conditional assignment protects against precisely this type of uncertainty. *McCarthy II* reinforces that the statute means what it says.

B. Section 348.013 and the Limited Role of Conditional Delivery Agreements

The court also relied on Texas Finance Code section 348.013 governing conditional delivery agreements. That section allows temporary delivery arrangements under limited circumstances but expressly states that the CDA becomes void upon execution of a retail installment contract for the vehicle.

This statutory structure is important because many dealerships attempt to use conditional delivery agreements as a mechanism to preserve a unilateral right to rescind. *McCarthy II* confirms that such agreements cannot survive the execution of the RISC itself.

The statutory framework therefore distinguishes between temporary possession of a vehicle before a completed financing agreement exists and a completed retail installment transaction memorialized in a signed RISC. Once the latter occurs, the statutory protections governing retail installment sales attach.

C. Section 348.408 and the Dealer's Obligations Regarding Trade-In Vehicles

The court also addressed Texas Finance Code section 348.408, which requires a retail seller to pay off the outstanding balance on a traded-in vehicle within a specified time after execution of the RISC and delivery of the new vehicle. This provision became central in *McCarthy II* because Bayway failed to timely satisfy the lien on the McCarthys' trade-in vehicle after taking possession of it. The resulting repossession and deficiency balance became part of the damages alleged by the McCarthys.

Bayway attempted to justify its conduct by arguing that the transaction was never final because financing failed. The court rejected that reasoning because the statute imposes obligations triggered by execution of the RISC and delivery of the vehicle, not by successful assignment to a lender.

This aspect of the opinion may have particularly broad consequences in future litigation. In many spot-delivery disputes, dealerships attempt to reverse the transaction while still retaining the trade-in vehicle or delaying payoff of the prior loan. *McCarthy II* clarifies that the statutory duties governing the trade-in arise once the RISC is executed.

V. PRACTICAL IMPLICATIONS FOR DEALERSHIPS

The *McCarthy II* opinion creates substantial practical con-

sequences for Texas dealerships engaged in spot-delivery transactions. For years, many dealerships have operated under the assumption that they may unwind transactions if third-party financing cannot ultimately be secured. *McCarthy II* calls that assumption into serious doubt.

A. Increased Exposure Under Consumer Protection Statutes

One immediate implication is increased exposure under consumer-protection statutes. The court revived several claims under the DTPA, TDCA, Finance Code, and ECOA based largely on the Bayway's post-sale conduct. The opinion suggests that a dealer may face liability when it represents that a completed sale is not final despite the execution of a binding RISC, threatens criminal prosecution in connection with what is fundamentally a civil contractual dispute, undertakes aggressive repossession activity inconsistent with the governing agreement, fails to timely satisfy statutory obligations regarding trade-in vehicles, or otherwise treats consumers as lacking enforceable contractual rights after execution of the RISC.

The opinion is especially notable for its treatment of the Bayway's collection activity. Bayway allegedly contacted law enforcement, sought criminal charges, hired repossession agents, and repeatedly attempted to pressure the consumers into surrendering the vehicle. The court's reasoning strongly suggests that these actions cannot be justified merely because third-party financing failed.

B. Dealers May Be Forced to Retain Unassigned Contracts

The practical reality underlying many spot-delivery disputes is simple: dealerships often do not want to hold contracts that lenders decline to purchase. *McCarthy II* does not eliminate that business concern. Instead, it reallocates the risk. Under the court's reasoning, the dealership bears the risk that a lender may later refuse assignment of the contract.

That risk cannot simply be shifted back onto the consumer after execution of the RISC. Possible operational responses include delaying vehicle delivery until financing receives final approval, implementing more rigorous pre-delivery underwriting procedures, requiring verified funding before execution of the RISC, or restructuring dealership financing operations to better manage the risks associated with retaining unassigned contracts.



The *McCarthy II* decision significantly changes the litigation landscape for both sides of these disputes.

Whether these operational changes occur remains to be seen, but *McCarthy II* substantially increases the legal risk associated with informal spot-delivery practices.

C. Potential Increase in Litigation

The opinion is also likely to increase litigation involving post-sale unwinding attempts. Plaintiffs' attorneys will likely rely heavily on *McCarthy II* in cases involving rescinded spot deliveries, repossession threats following failed financing, failures to satisfy trade-in obligations, adverse credit reporting, deceptive financing representations, and disputes concerning creditor status under federal consumer-protection statutes.

The decision may also affect settlement leverage. Dealers defending these cases can no longer confidently assume that the phrase "conditional financing" will resolve the dispute as a matter of law.

VI. PRACTICAL IMPLICATIONS FOR PLAINTIFFS' AND DEFENSE COUNSEL

The *McCarthy II* decision significantly changes the litigation landscape for both sides of these disputes.

A. Implications for Plaintiffs' Counsel

For plaintiffs' counsel, *McCarthy II* provides a roadmap for reframing spot-delivery disputes away from vague equitable arguments and toward statutory enforcement.

The opinion demonstrates the importance of obtaining and closely analyzing the RISC itself, identifying whether the dealer is designated as the "Seller/Creditor," evaluating compliance with section 348.408 regarding trade-in obligations, determining whether the dealership attempted to impose conditions prohibited by section 348.1015, analyzing collection activity under the TDCA, and evaluating whether proper ECOA notices were provided.

The opinion also highlights the importance of focusing on the dealership's conduct after financing problems arise. In *McCarthy II*, the post-sale conduct—including threats of criminal prosecution and repossession efforts—became central to the statutory claims.

B. Implications for Defense Counsel

For defense counsel, *McCarthy II* presents a more difficult challenge. Traditional defenses based on "conditional financing" may no longer carry the same persuasive force, particularly where the RISC itself lacks an enforceable financing contingency. Defense counsel will likely need to focus more heavily on alleged misrepresentations during the credit application process, fraud-based defenses, causation disputes, mitigation issues, contractual default provisions, and limitations on recoverable damages.

The opinion also demonstrates the importance of precise transactional drafting. If dealerships intend to preserve certain rights in the event financing fails, those rights must be structured in a manner consistent with Chapter 348. *McCarthy II* suggests that informal assumptions and contradictory delivery documents will not suffice.

Defense counsel must also carefully evaluate collection and repossession activity once financing complications arise. Actions that may previously have been viewed as aggressive but per-

missible collection efforts may now create substantial statutory exposure.

VII. CONCLUSION

The Fourteenth Court of Appeals' decision in *McCarthy II* represents one of the most significant Texas appellate opinions addressing spot-delivery practices and retail installment financing in recent years.

The court's reasoning fundamentally undermines the assumption that a dealership may freely unwind a completed vehicle sale merely because a third-party lender declines to purchase the contract. Under *McCarthy II*, the RISC is a binding agreement upon execution, the dealership remains the originating creditor, and the Texas Finance Code prohibits conditioning the enforceability of the contract on a subsequent assignment.

The opinion also reinforces the broader principle that statutory consumer protections cannot be avoided through informal business practices, industry custom, or contradictory delivery documents. Once the RISC is executed and the vehicle delivered, the parties' rights and obligations are governed by the contract and by Chapter 348 of the Texas Finance Code.

Equally important, the opinion demonstrates that creditor status carries both rights and responsibilities. By recognizing that a dealership may qualify as a creditor under the Equal Credit Opportunity Act, *McCarthy II* highlights a potentially significant source of federal liability in failed-financing transactions and reminds practitioners that creditor status may trigger obligations extending beyond the Texas Finance Code.

For practitioners, the lesson is clear: the phrase "conditional financing" cannot substitute for the actual language of the contract or the requirements of Texas law.

McCarthy II is therefore significant not because it creates new law, but because it rigorously applies existing law. That distinction matters. The opinion does not invent a new consumer right. Instead, it enforces protections that already existed within the Texas Finance Code but were often overlooked or minimized in practice. In Texas, the risk that a lender may later decline to purchase a retail installment contract belongs to the dealership, not the consumer.

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DEFENDANTS' CLAIMS FOR ATTORNEY'S FEES AND COSTS UNDER THE TEXAS INSURANCE CODE AND DTPA

In Texas, a breach of contract claim is rarely filed as the only cause of action against insurers.



Introduction

In Texas, a breach of contract claim is rarely filed as the only cause of action against insurers. Usually, these claims are accompanied with allegations of violations of the Texas Insurance Code or DTPA violations. These extra-contractual claims are brought so frequently that courts have started questioning their credibility. DTPA claims are also frequently added to non-insurance breach of contract lawsuits, even though a mere breach of contract is not a violation of the DTPA as a matter of law.¹

Recovery under the Texas Insurance Code and DTPA includes treble damages and attorney's fees. Thus, the Texas Insurance Code and DTPA can be powerful vehicles for recovery and are used as leverage against defendants. However, defendants can bring counterclaims under the Texas Insurance Code and DTPA. As discussed below, defendants need not merely "play defense" when claims under the Texas Insurance Code and DTPA are improper.

In America, parties generally bear their own attorney's fees unless a statute or other authority provides for them.² Both the Texas Insurance Code and DTPA include statutes that allow defendants to recover attorney's fees and costs. Texas Insurance Code §541.153 and Texas Business & Commerce Code §17.50(c) (the "Statutes") authorize defendants to recover attorney's fees and costs when plaintiffs assert claims that are groundless, brought in bad faith, or brought for the purpose of harassment. Subsequent case law shows that courts have declined to create a bright-line rule as to what conduct will trigger the right to relief under the Statutes. Instead, recovery under the Statutes is informed by precedent but is very fact specific.

To be clear, claims asserted under the Statutes are not "reverse bad faith." No such tort is recognized in Texas.³

The Statutes

The public policy behind the Statutes is discouraging frivolous lawsuits.⁴ The Statutes provide:

Sec. 541.153. FRIVOLOUS ACTION. A court shall award to the defendant court costs and reasonable and necessary attorney's fees if the court finds that an action under this subchapter is groundless and brought in bad faith or brought for the purpose of harassment.⁵

Sec. 17.50. RELIEF FOR CONSUMERS. (c) On a finding by the court that an action under this section was groundless in fact or law or brought in bad faith, or brought for the purpose of harassment, the court shall award to the defendant reasonable and necessary attorneys' fees and court costs.⁶

The court in *Arizpe v. Principal Life Insurance Company* provides a helpful analysis to compare the Statutes:

Notably, while both statutes feature the same three elements, their requirements differ. While under Texas Insurance Code § 541.153 a defendant, to be entitled to Attorney's fees and court costs, must establish that the Plaintiff's claims were (1) groundless and brought in bad faith, or (2) groundless and brought for the purpose of harassment, under DTPA § 17.50(c) a defendant need only show that the plaintiff's DTPA claims were either groundless, or brought in bad faith, or brought for the purpose of harassment. Despite the slight difference

between DTPA § 17.50(c) and Texas Insurance Code § 541.153, Texas courts and federal courts interpreting these two statutory provisions have determined that "whether an action is groundless, brought in bad faith, or brought for the purpose of harassment is a question to be determined by the trial court."⁷

Therefore, the standard for recovery is easier for the defendant to meet under the DTPA. A defendant need not show that the action was groundless *and* brought in bad faith; one will suffice.⁸ Under both Statutes, it is up to the courts to decide whether there was a violation.⁹ Once the court has decided the Statutes were violated, an award of attorney's fees to the defendant is mandatory.¹⁰

Because the Statutes are so similar, claims simultaneously brought under them are often analyzed together by the reviewing court. Appellate courts will review the trial court's determinations of groundlessness, bad faith, and harassment as questions of law under an abuse of discretion standard.¹¹

What is a Groundless Claim?

"An action is 'groundless' if it 'has no basis in law or fact, and is not warranted by any good faith argument for extension, modification, or reversal of existing law.'"¹² "Groundless" under the DTPA and Texas Insurance Code has the same meaning as "groundless" under Texas Rule of Civil Procedure 13.¹³ Determining whether an action is groundless requires the court to consider whether the "totality of the tendered evidence demonstrates an arguable basis in fact or law for the [plaintiff's] claim."¹⁴ A claim that lacks supporting evidence is not automatically a groundless claim.¹⁵

What is a Claim Brought in Bad Faith?

"A suit is brought in bad faith if it is motivated by a malicious or discriminatory purpose."¹⁶ Stated another way, "bad faith is simply not bad judgment or negligence, but means the conscious doing of wrong for dishonest, discriminatory, or malicious purposes."¹⁷ Further, "malice [for the purposes of the Statutes] may be inferred from the proof that the claimant did not have a good faith belief that there was a basis for the claim."¹⁸

What is a Claim Brought for the Purpose of Harassment?

Courts have not clearly defined what constitutes actionable harassment, often blending analysis of harassment with analysis of groundlessness and bad faith.¹⁹ The dictionary definition of "harassment" is "an act or instance of harassing; torment, vexation, or intimidation."²⁰ A claim brought for the purpose of harassment must solely be brought for the purpose of harassment.²¹ A court is unlikely to find harassment if the plaintiff's claims are not found to be groundless and brought in bad faith.²² Any purpose of recovering money damages, however small, as a motivating factor will defeat a finding of harassment.²³ The case law indicates a defendant seeking to prove harassment must prove non-monetary motive.

Successful Counterclaims under the Statutes

The following are examples of successful counterclaims under the Statutes:

- The plaintiff was in possession of facts that, for a long time, precluded any further claim payments.²⁴
- The plaintiff was in possession of facts before the

lawsuit was filed demonstrating that the claimed damages were pre-existing or caused by forces other than those claimed in the lawsuit.²⁵

- The plaintiff's complaint used misleading screenshots that omitted important information.²⁶

- The plaintiff was not a DTPA consumer.²⁷

- The plaintiff's claim was excluded by the DTPA's "large transactions" exception.²⁸

- The plaintiff sued on a released claim.²⁹

- The plaintiff's claim was groundless because even a qualified inspector would not have seen the alleged termite infestation.³⁰

- The plaintiff left her claims pending for eight months after she learned facts demonstrating that the defendant had no liability.³¹



Sometimes, defendants combine claims under the Statutes with requests for sanctions under Texas Rule of Civil Procedure 13 and Texas Civil Practice & Remedies Code §10.001.³² This can be an effective tactic, if justified by both law and facts. Defendants may also bring claims under the Statutes alongside a motion to dismiss or motion for summary judgment.

Unsuccessful Counterclaims under the Statutes

The following are examples of unsuccessful counterclaims under the Statutes:

- The request for attorney's fees and costs was not supported by sufficient pleading or argument.³³

- The plaintiff had a mistaken belief about scope of available coverage.³⁴

- The plaintiff had a lapse of judgment in asserting the claim.³⁵

- The plaintiff's claims were time-barred under the applicable statute of limitations, but the court found that the claimant made multiple good faith arguments for the extension of law.³⁶

- The plaintiff's alleged losses and damages lacked any expert support but were supported by at least some employee testimony.³⁷

- Penalties under the DTPA were imposed without the claimant having a meaningful opportunity to be heard.³⁸

- The plaintiff failed to convince the jury.³⁹

- The court granted summary judgment against plaintiff.⁴⁰

Courts generally do not look to prior case law when deciding on claims brought under the Statutes. Rather, courts consider the plain language of the Statutes and how other courts have defined groundlessness, bad faith, and harassment. Thus, the facts of each case remain important.

Claims Must Be Pled and Supported by Adequate Explanations

Most Texas courts have held that claims under Texas Insurance Code §541.153 and Texas Business & Commerce Code §17.50(c) constitute counterclaims, not sanctions.⁴¹ Courts will look for at least some degree of detail addressing the definitions of groundlessness, bad faith, and harassment.⁴²

Claims Must be Supported by Adequate Evidence

The defendant has the burden of proof under the Statutes. To meet this burden, the defendant must provide adequate evidence that the complained-of acts are actionable under the Statutes and entitle the defendant to relief.⁴³ The burden of proof is not met by showing the plaintiff is not entitled to relief under the Texas Insurance Code or DTPA.⁴⁴ The burden is also not met by merely questioning the motives of the plaintiff.⁴⁵

No Expert Testimony is Necessary to Make the Claims

Courts that have granted relief under the Statutes did so on the basis of their own examination of the facts. These courts did not expressly rely on expert testimony or hold that such testimony is necessary to support a defendant's recovery under the Statutes.⁴⁶ Additionally, courts that have denied relief under the Statutes have not done so because of absence of expert testimony.⁴⁷

In this way, the defendant's burden of proof is much easier than the plaintiff's burden on a bad faith claim, since the plaintiff's claims must be supported by expert testimony to establish concepts like the standard of care and claim handling procedures.⁴⁸

The Usual Rules Regarding Reasonable and Necessary Attorney's Fees Apply

The defendant must support its claim for reasonable and necessary attorney's fees with evidence, including segregating fees for prosecuting counterclaims under the Statutes from other fees.⁴⁹ Further, the defendant must request the submission of a jury issue regarding the award of reasonable and necessary

The defendant must support its claim for reasonable and necessary attorney's fees with evidence, including segregating fees for prosecuting counterclaims under the Statutes from other fees.

attorney's fees, unless the disputed claims and amount of fees are resolved otherwise by motion practice.⁵⁰

Commentary

Several critics of claims brought under the Statutes ask, "Have you ever seen anyone win one of these things before?" The answer is "Yes" as shown above. Beyond "good" defense facts supporting recovery under the Statutes, successful counterclaimants can bolster their chances of success by using the following tools:

1. **Targeted admissions.** Serve requests for admissions early. Force the plaintiff to admit he or she lacks factual support for a specific statutory provision (e.g., admitting he or she never spoke to the adjuster accused of making misrepresentations). The Texas Insurance Code and DTPA contain many fine points that are often alleged but rarely, if ever, occur in real life. Targeted admissions will expose the lack of factual support for such claims and create a basis for counterclaims.
2. **The "Put Up or Shut Up" Letter.** Send a safe-harbor or conditional demand letter to opposing counsel that details the exact lack of legal or factual basis for a claim, explicitly referencing the Statutes, and giving a specific deadline to dismiss such claim voluntarily. If the plaintiff's counsel refuses, this letter serves as primary evidence of bad faith and ongoing harassment at the subsequent fee hearing.
3. **Anchor with Procedural Overlays.** Bundle counterclaims under the Statutes with requests for sanctions under Texas Rule of Civil Procedure 13 and Texas Civil Practice & Remedies Code §10.001, when justified by the facts and law. Rule 13 and Chapter 10 allow the court to hold plaintiffs and their counsel jointly and severally liable for fees.⁵¹
4. **Prepare to Distinguish the "Bona Fide Coverage Dispute" Defense to Counter-Claims.** This will involve developing evidence of plaintiff's non-financial motive and frivolous factual and legal positions. A hostile or evasive plaintiff in deposition can turn a weak claim into a frivolous claim.⁵² Plaintiffs asserting a *bona fide* coverage dispute in response to a counterclaim may be putting themselves in the ironic position of undercutting their own bad faith claims.⁵³
5. **Do Not Treat Counterclaims under the Statutes as an Afterthought.** Everyone is busy and defending against the plaintiff's affirmative claims takes priority, but often counter claims under the Statutes seem to be left as afterthoughts. The case law shows that defendants are rewarded by giving serious effort to the counterclaims in oral and written discovery and their success may be enhanced by employing the techniques discussed above.

Turning to Texas' insurance regulatory scheme, Texas Insurance Code Chapter 542 does not include an analog of the Statutes, although claims of late payments are also routinely added to pleadings under the Statutes. The Texas Legislature may wish to update the insurance regulatory scheme with some recourse for a defendant if the plaintiff's claim under Chapter 542 is frivolous.

Conclusion

The Statutes have more utility than the popular misconception. While the Statutes have not discouraged frivolous lawsuits, prosecution of claims under the Statutes means that defendants can do more than "play defense," especially when claims under the Statutes are combined with requests for sanctions and dispositive motions.

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1. *Rocky Mtn. Helicopters, Inc., v. Lubbock County Hosp. Dist.*, 987 S.W.2d 50, 53 (Tex. 1998).
2. *See, e.g., Bierscheid v. JPMorgan Chase Bank*, 606 S.W.3d 493, 545 (Tex. App.—Houston [1st Dist.] 2020, pet. denied).
3. State supreme courts in other jurisdictions have expressly declined to recognize such a tort. *See, e.g., Johnson v. Farm Bureau Mut. Ins. Co.*, 533 N.W.3d 203, 208 (Iowa 1995).
4. *Knoderer v. State Farm Lloyds*, 515 S.W.3d 21, 47 (Tex. App.—Texarkana 2017, pet. denied).
5. Tex. Ins. Code §541.153.
6. Tex. Bus. & Comm. Code §17.50(c).
7. *Arizpe v. Principal Life Ins. Co.*, 2019 U.S. Dist. LEXIS 151971, *4 (N.D. Tex. 2019).
8. *Owen v. Jim Allee Imports, Inc.*, 380 S.W.3d 276, 290 (Tex. App.—Dallas 2012, no pet.).
9. *Id.; Donwerth v. Preston II Chrysler-Dodge, Inc.*, 775 S.W.2d 634, 637 (Tex. 1989); *Knoderer*, 515 S.W.3d at 47; *Giacomo v. Smith*, 2006 Tex. App. LEXIS 10016, *9 (Tex. App.—Beaumont 2006, no pet.).
10. Tex. Ins. Code §541.153; Tex. Bus. & Comm. Code §17.50(c).
11. *Donwerth*, 775 S.W.2d at 637; *Rutherford v. Riata Cadillac Co.*, 809 S.W.2d 535, 539 (Tex. App.—San Antonio 1991, writ denied).
12. *Donwerth*, 775 S.W.2d at 637 (Tex. 1989); *Banion v. Geo-Vera Spec. Ins. Co.*, 2016 U.S. Dist. LEXIS 173378, *8 (S.D. Tex. 2016).
13. *Donwerth*, 775 S.W.2d at 637; *Vela v. Catlin Spec. Ins. Co.*, 2015 Tex. App. LEXIS 3743, *45 (Tex. App.—Corpus Christi 2015, pet. denied).
14. *Banion*, 2016 U.S. Dist. LEXIS at *9.
15. *Donwerth*, 775 S.W.2d 634 at 637.
16. *Banion*, 2016 U.S. Dist. LEXIS at *9.
17. *Vela*, 2015 Tex. App. LEXIS at *45.
18. *Arizpe*, 2019 U.S. Dist. LEXIS at *7.
19. *See, e.g., Med. Specialist Group, P.A. v. Radiology Assocs., L.L.P.*, 171 S.W.3d 727, 733 (Tex. App.—Corpus Christi 2005, pet. denied).
20. <https://www.dictionary.com/browse/harassment> (last accessed July 5, 2026).
21. *Arizpe*, 2019 U.S. Dist. LEXIS at *7.
22. *Id.; Rutherford*, 809 S.W.2d 535 at 539.
23. *See Donwerth*, 775 S.W.2d at 638.
24. *Mosser v. Aetna Life Ins. Co.*, 2018 U.S. Dist. LEXIS 228293, *33 (E.D. Tex. 2018); *Howard v. State Farm Lloyds*, 2005 U.S. Dist. LEXIS 48236, *20 (S.D. Tex. 2005).
25. *Giacomo*, 2006 Tex. App. LEXIS at *9.
26. *Mosser*, 2018 U.S. Dist. LEXIS at *34.
27. *McDuffie v. Blassingame*, 883 S.W.2d 329, 336 (Tex. App.—Amarillo 1994, writ denied) (when accompanied by other bad faith facts); *Alcan Aluminum Corp. v. BASF Corp.*, 133 F. Supp.2d 482 (N.D. Tex. 2001).

28. *Haynesville Shale Rentals, LLC v. Total Equip. & Serv.*, 2014 U.S. Dist. LEXIS 48478, *15 (S.D. Tex. 2014).

29. *Cypress Engine Accessories, LLC v. HDMS Ltd. Co.*, 283 F. Supp. 3d 580, 592 (S.D. Tex. 2017).

30. *Kelly v. Benedict*, 2009 Tex. App. LEXIS 3865, *11 (Tex. App.—Austin 2009, no pet.). This is a potentially important opinion for its implications on bad faith claims predicated upon allegedly unreasonable inspections.

31. *Baird v. Villegas*, 2004 Tex. App. LEXIS 2421, *16 (Tex. App.—Austin 2004, no pet.).

32. See, e.g., *Burns v. Std. Cas. Co.*, 2026 Tex. App. LEXIS 1814, *28 (Tex. App.—Houston [14th Dist.] 2026, no pet.).

33. *Barkhausen v. Craycom, Inc.*, 178 S.W.3d 413, 423 (Tex. App.—Houston [1st Dist.] 2005, pe. denied).

34. *Vela*, 2015 Tex. App. LEXIS at *42.

35. *Id.*

36. *Arizpe*, 2019 U.S. Dist. LEXIS at *4 (N.D. Tex. 2019). But cf. *Marquis v. Sadeghian*, 2024 U.S. Dist. LEXIS 56319, *4 (E.D. Tex. 2024) (time-barred claim not supported by valid arguments, therefore, defendant could recover its attorney's fees).

37. *Metro Hospitality Partners, Ltd. v. Lexington Ins. Co.*, 84 F. Supp.3d 553, 575 (S.D. Tex. 2015).

38. *Davila v. World Car Five Star*, 75 S.W.3d 537, 544 (Tex. App.—San Antonio 2002, no pet.).

39. *Rutherford*, 809 S.W.2d at 537.

40. See *Gonzales v. Am. Title Co.*, 104 S.W.3d 588, 599 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

41. *Knoderer*, 515 S.W.3d at 47; *Mosser*, 2018 U.S. Dist. LEXIS at, *32; *Great Am. Ins. Co. v. AFS/IBEX Fin. Servs.*, 2011 U.S. Dist. LEXIS 81961, *30 (N.D. Tex. 2011).

42. *Banion*, 2016 U.S. Dist. LEXIS at *10; *Barkhausen*, 178 S.W.3d at 423.

43. *Id.*

44. *Great Am.*, 2011 U.S. Dist. LEXIS at *30.

45. *Id.*

46. See, e.g., *Mosser*, 2018 U.S. Dist. LEXIS at *32.

47. See, e.g., *Great Am.*, 2011 U.S. Dist. LEXIS at *30.

48. *Humphries v. State Farm Lloyds*, 2022 U.S. Dist. LEXIS 41466, *7 (N.D. Tex. 2022); *Nino v. State Farm Lloyds*, 2014 U.S. Dist. LEXIS 163993, *15 (S.D. Tex. 2014).

49. *Schlager v. Clements*, 939 S.W.2d 183, 191-192 (Tex. App.—Houston [14th Dist.] 1996, writ denied); *Knoderer*, 515 S.W.3d at 47; *Marquis v. Sadeghian*, 2024 U.S. Dist. LEXIS 56319, *4 (E.D. Tex. 2024).

50. *Knoderer*, 515 S.W.3d at 47; *McClung v. Wal-Mart*, 866 F. Supp. 306, 311 (N.D. Tex. 1994).

51. Tex. R. Civ. P. 13; Tex. Civ. Prac. & Rem. Code §10.004.

52. See *Namdarkhan v. Glast, Phillips & Murray, P.C.*, 2020 Tex. App. LEXIS 3499, *39 (Tex. App.—Dallas 2020, pet. denied). Relatedly, at least one court held plaintiff's counsel, rather than plaintiff himself, liable for fees under the DTPA. See *McClung*, 866 F. Supp. at 311.

53. See *State Farm Fire & Cas. Co. v. Simmons*, 963 S.W.2d 42, 44 (Tex. 1998) ([A]n insurer breaches its duty of good faith and fair dealing by denying a claim when the insurer's liability has become reasonably clear. Evidence establishing only a *bona fide* coverage dispute does not demonstrate bad faith.”).

RECENT DEVELOPMENTS

DECEPTIVE TRADE PRACTICES AND WARRANTY

STATUTE OF LIMITATIONS FOR A DTPA CLAIM IS TWO YEARS

CAUSES OF ACTION ACCRUE AND STATUTES OF LIMITATIONS BEGIN TO RUN WHEN FACTS COME INTO EXISTENCE THAT AUTHORIZE A CLAIMANT TO SEEK A JUDICIAL REMEDY

REPAIRS PERFORMED BY A DEFENDANT DO NOT TOLL THE DISCOVERY RULE FOR PLAINTIFFS, WITHOUT MORE

JS Custom Homes LLC v. Doigg, 2026 Tex. App. LEXIS 6444 (Tex. App.—Dallas 2026).

<https://law.justia.com/cases/texas/fifth-court-of-appeals/2026/05-25-00253-cv.html>

FACTS: Appellant Jerret Smith (“Smith”), a homebuilder and founder of JS Custom Homes LLC (“JS”), contracted with Appellees, Jonathan and Carisa Doigg, (the “Doiggs”) for the construction of a new home. The Doiggs moved into the home in April 2013 and soon began noticing cracks in the laundry room tile and slab foundation. Smith paid for an engineer selected by the

To obtain the benefit of tolling based on fraudulent representations, the Doiggs had to establish that their reliance on Smith’s statements that the foundation was normal and reasonable.

Doiggs to inspect the home. In September 2014, the engineer reported the foundation design was flawed, was not constructed to meet site conditions, and would continue to move even

after the recommended repairs. Smith subsequently made the repairs and allegedly reported the foundation was normal after the repairs were completed. In June 2021, the Doiggs noticed the doors inside the home would not close and observed additional cracking and damage. The Doiggs filed suit against JS and Smith in March 2023, alleging violations of the Deceptive Trade Practices Act (“DTPA”). After a jury trial, the trial court entered judgment in favor of the Doiggs and awarded damages in accordance with the jury’s verdict. JS and Smith appealed.

HOLDING: Reversed.

REASONING: JS and Smith argued that the statute of limitations barred the Doiggs’ DTPA claim because the Doiggs were on notice of the foundation defect in September 2014 but did not file suit until March 2023. The court agreed, reasoning the statute of limitations for a DTPA claim was two years. The court explained the causes of action accrued over time and statutes of limitations began to run when facts came into existence that authorize a claimant to seek a judicial remedy. After receiving the engineer’s report, the Doiggs were on notice that the foundation

was flawed and would continue to move even after the recommended repairs.

The court further held that repairs performed by a defendant do not toll the discovery rule for plaintiffs, without more. To obtain the benefit of tolling based on fraudulent representations, the Doiggs had to establish that their reliance on Smith’s statements that the foundation was normal and reasonable. The court reasoned that the Doiggs’ reliance was not reasonable because the 2014 engineer’s report had already informed them of extensive foundation defects and stated that the foundation would continue to move even after repairs. Therefore, the Doiggs’ DTPA claim was barred by the statute of limitations.

BECAUSE DTPA CLAIMS REQUIRE ALLEGATIONS OF ACTIONS THAT ARE “FALSE, MISLEADING, OR DECEPTIVE,” ALL DTPA CLAIMS AVER FRAUD THEREFORE, THE PLEADING REQUIREMENTS OF RULE 9(B) WILL BE APPLIED

AS PLAINTIFF’S DTPA CLAIMS FAIL TO MEET THE PLEADING REQUIREMENTS OF RULE 9(B), ITS DTPA CLAIMS ARE DISMISSED

Native Waterscapes, LLC v. Starstone Specialty Ins. Co., 2026 U.S. Dist. LEXIS 109217 (W.D. Tex. 2026).

FACTS: Plaintiff Native Waterscapes, LLC (“Waterscapes”) was insured by Defendant Starstone Specialty Insurance Company (“Starstone”). Waterscapes was sued by two of its customers for property damage and construction defects. Waterscapes requested a defense from Starstone in both suits, but Starstone denied coverage for one claim and continued to investigate the other.

Waterscapes subsequently sued Starstone, asserting Texas Deceptive Trade Practices Act (“DTPA”) violations, among other claims. Starstone moved to dismiss Waterscapes’ First Amended Complaint under Rule 12(b)(6), arguing, in part, that the DTPA claims failed to satisfy Rule 9(b).

HOLDING: Granted in part and denied in part.

REASONING: Starstone argued Waterscapes’ DTPA claims were subject to Rule 9(b)’s heightened pleading requirements because the claims alleged false, misleading, or deceptive conduct. The court agreed and held that the Waterscapes’ DTPA claims averred fraud.

The court further explained that Waterscapes was required to plead with particularity the circumstances constituting fraud, including the alleged fraudulent statements, the speaker, when and where the statements were made, and why the statements were fraudulent. Because Waterscapes failed to provide those allegations, the court concluded the DTPA claims did not satisfy Rule 9(b) and dismissed the claims without prejudice.

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A TRANSACTION, A PROJECT, OR A SET OF TRANSACTIONS RELATING TO THE SAME PROJECT INVOLVING TOTAL CONSIDERATION BY THE CONSUMER OF MORE THAN \$500,000 IS EXEMPTED FROM THE DTPA

BECAUSE THE TOTAL CONSIDERATION FOR THE PLANNED UNDERTAKING INCLUDING SEVERAL CONTRACTORS EXCEEDED \$500,000, PLAINTIFF WAS NOT ENTITLED TO RELIEF UNDER ITS DTPA CLAIM AS A MATTER OF LAW

Mueller Supply Co. v. Arrow Self Storage, LLC, 2026 Tex. App. LEXIS 4772 (Tex. App.—Corpus Christi 2026).
<https://law.justia.com/cases/texas/thirteenth-court-of-appeals/2026/13-24-00380-cv.html>

FACTS: Appellee Arrow Self Storage, LLC (“Arrow”) hired Appellant Mueller Supply Company, Inc. d/b/a Mueller, Inc. (“Mueller”) to fabricate steel components for a self-storage facility. Arrow obtained a construction loan of just under \$1.3 million for the project but paid Mueller \$294,039 under the parties’ purchase agreement. After problems arose with the fabricated components, Arrow sued Mueller for, among other claims, violations of the Texas Deceptive Trade Practices Act (“DTPA”).

The jury found for Arrow on its DTPA claim, and the trial court entered judgment on the verdict. Mueller moved for judgment notwithstanding the verdict and for a new trial, arguing Arrow’s DTPA claim was barred because the total project value exceeded \$500,000. The trial

The court treated Arrow’s construction of the self-storage facility as the relevant planned undertaking, rather than limiting the analysis to Arrow’s \$294,039 payment to Mueller.

court denied Mueller’s motion. Mueller appealed.

HOLDING: Reversed and rendered.

REASONING: Mueller argued the jury’s DTPA award was barred by Tex. Bus. & Com. Code §17.49(g) because the transaction was part of a project involving total consumer consideration of more than \$500,000. The court agreed, explaining that the exemption applied to a transaction, project, or set of transactions relating to the same project when the consumer’s total consideration exceeded \$500,000.

The court treated Arrow’s construction of the self-storage facility as the relevant planned undertaking, rather than limiting the analysis to Arrow’s \$294,039 payment to Mueller. Arrow hired several subcontractors, coordinated their work, and used construction loan proceeds of just under \$1.3 million to complete the facility. Because the total consideration for the planned undertaking exceeded \$500,000, Arrow was not entitled to DTPA relief as a matter of law.

DISPOSITIVE ISSUE IN DETERMINING WHETHER CLIENT HAD STANDING TO SUE ATTORNEY UNDER DTPA “IS WHETHER [CLIENT] WAS A BENEFICIARY OF THE LEGAL SERVICES PROVIDED”

SECTION 17.49(C) SPECIFICALLY EXEMPTS FROM ITS PROTECTIONS AN EXPRESS MISREPRESENTATION OF MATERIAL FACT THAT CANNOT BE CHARACTERIZED AS ADVICE, JUDGMENT, OR OPINION, AS WELL AS “A FAILURE TO DISCLOSE INFORMATION”

GENERALLY, A PARTY MAY RECOVER UNDER QUANTUM MERUIT ONLY WHEN THERE IS NO EXPRESS CONTRACT

Cooper v. Schulman, 2026 Tex. App. LEXIS 5451 (Tex. App.—Austin, 2025).

<https://law.justia.com/cases/texas/third-court-of-appeals/2026/03-23-00778-cv.html>

FACTS: Plaintiff-Appellant Johnathan Cooper sought legal representation from Defendant-Appellee David Schulman after Cooper was convicted of several crimes. Cooper’s brother, Wesley, signed a legal-services agreement and paid Schulman a \$10,000 fee on Cooper’s behalf. After Schulman’s business partner fell ill, Schulman refunded \$7,500 to Wesley but retained \$2,500 as a fee for the personal interview conducted with Cooper. Cooper and Wesley alleged they understood the \$10,000 was solely for representation beyond the personal interview and would not have agreed to the payment if they had known the \$2,500 would not be refunded.

Cooper filed suit, asserting, among other claims, fraudulent inducement and violations of the Texas Deceptive Trade Practices Act (“DTPA”). Schulman counterclaimed for quantum meruit and moved for summary judgment on both his counterclaim and Cooper’s DTPA claim. The trial court granted Schulman’s motion for summary judgment. Cooper appealed.

HOLDING: Reversed and remanded.

REASONING: Schulman argued that Cooper lacked standing to assert a DTPA claim because Wesley paid the \$2,500 fee. The court disagreed, holding that the dispositive issue was not who paid the money but whether Cooper was a beneficiary of the legal services provided.

Schulman also argued that Tex. Bus. & Com. Code §17.49(c) barred Cooper’s DTPA claim because it arose from the rendition of professional services. The court disagreed, explaining that §17.49(c) specifically exempts from its protection an express misrepresentation of material fact that cannot be characterized as advice, judgment, or opinion, as well as a failure to disclose information intended to induce a consumer into a transaction the consumer otherwise would not have entered. Cooper presented evidence creating a fact issue that Schulman failed to disclose his intent to retain the \$2,500 fee, precluding summary judgment.

Finally, the court concluded that summary judgment on Schulman’s quantum meruit claim was improper because the summary judgment evidence raised a fact issue regarding the existence of an

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express contract, and quantum meruit generally is unavailable where an express contract governs the parties' dispute.

AN AWARD OF TREBLE DAMAGES UNDER THE DTPA IS CONSIDERED PART OF THE AMOUNT IN CONTROVERSY

PLAINTIFF HAS PROVIDED PROPER PRE-SUIT NOTICE AS REQUIRED UNDER §17.505(A)

Profit & Holding, LLC v. Lozano Liquidation Enter., LLC, 2025 U.S. Dist. LEXIS 86880 (S.D. Tex. 2025).
<https://trellis.law/doc/district/35611060/>

FACTS: Plaintiff Profit & Holding, LLC ("Plaintiff") entered into an agreement with Defendants Lozano Liquidation Enterprise, LLC and Joel Lozano ("Defendants") to purchase 10,800 units of Dymatize Super Mass Gainer Protein Powder for \$45,950. Defendants allegedly failed to deliver the product. Plaintiff sued in federal court for breach of contract, fraud, and violations of the Texas Deceptive Trade Practices Act ("DTPA"). Defendants moved to dismiss, arguing: (1) lack of subject matter jurisdiction because the amount in controversy was less than \$75,000; (2) failure to provide pre-suit notice under DTPA § 17.505(a); and (3) inadequate pleadings. Plaintiff attached two demand letters to its First Amended Complaint.

HOLDING: Denied.

REASONING: Defendants argued that the court lacked subject matter jurisdiction because the amount in controversy stated in the First Amended Complaint did not exceed \$75,000. The court rejected this argument, citing the Texas DTPA that allows a pre-

vailing plaintiff to obtain treble damages if the defendant's actions are found to be "knowing or intentional." This elevated the Plaintiff's claim to \$137,850, not including attorney's fees. Therefore, the court held that the \$75,000 jurisdictional requirement was satisfied

The court found that the two demand letters contained Plaintiff's complaint, damages, and attorney's fees, which fulfilled the statutory notice requirement's purpose of encouraging settlement.

because treble damages and attorney's fees under the DTPA are included in the amount in controversy.

Defendants also sought abatement, alleging Plaintiff failed to provide pre-suit notice under § 17.505(a) of the DTPA. The court found that the two demand letters contained Plaintiff's complaint, damages, and attorney's fees, which fulfilled the statutory notice requirement's purpose of encouraging settlement. The court denied Defendants' request for abatement, holding that Plaintiff provided proper pre-suit notice as required under § 17.505(a).

COURT DENIES DEFENDANT'S MOTION TO COMPEL ARBITRATION IN A CLASS ACTION BROUGHT UNDER THE TELEPHONE CONSUMER PROTECTION ACT ("TCPA")

COURT HELD THAT A DEFENDANT'S CONDUCT, EVEN PRIOR TO CLASS CERTIFICATION, MAY SUPPORT AN INFERENCE THAT IT WAIVED ITS RIGHT TO COMPEL ARBITRATION OF PUTATIVE CLASS MEMBER'S CLAIMS

Moore, et al. v. Club Exploria, LLC, (7th Cir. 2026).
<https://law.justia.com/cases/federal/appellate-courts/ca7/25-2721/25-2721-2026-08-18.html>

FACTS: Club Exploria, LLC ("Exploria"), a vacation property company, contracted with third-party vendors to run a telemarketing campaign. The vendors purchased leads generated through opt-in websites and used scripted, prerecorded calls to contact potential customers. George Moore ("Moore") received two of these calls and sued Exploria, alleging he and other class members received calls without their consent in violation of the Telephone Consumer Protection Act ("TCPA").

Over the next several years, Exploria actively defended the case in court. Exploria filed pleadings with affirmative defenses, engaged in class-related discovery, filed motions on the merits, and opposed class certification. After the class was certified, Exploria sought to raise arbitration as a defense to unnamed class members' claims. The district court denied Exploria's motion to compel arbitration, holding that Exploria's conduct before and after class certification was inconsistent with an intent to arbitrate and therefore constituted waiver. Exploria appealed.

HOLDING: Affirmed.

REASONING: Exploria argued that it did not waive its arbitration rights because it moved to compel arbitration after the class was finalized. The court rejected this argument, holding that a defendant's conduct before class certification may be relevant to whether it waived the right to compel arbitration of putative class members' claims. Arbitration agreements with putative class members may also be relevant to class certification, especially where the agreements contain class-action or joinder limitations. By failing to raise arbitration during class-related discovery or in opposition to class certification, a defendant may imply that it intends to litigate the class claims in court. Thus, a defendant's pre-certification conduct may support an inference of waiver. Exploria's conduct at each stage of litigation was inconsistent with an intent to arbitrate. Therefore, the district court did not err in denying Exploria's motion to compel arbitration.

PUFFERY IS AN EXPRESSION OF OPINION BY A SELLER NOT MADE AS A REPRESENTATION OF FACT. ASSERTIONS THAT A PROPERTY IS SUPERB, SUPER FINE, AND ONE OF THE FINEST LITTLE PROPERTIES CONSTITUTE PUFFERY

THE TEXAS UNIFORM COMMERCIAL CODE ALLOWS SELLERS TO DISCLAIM BOTH THE IMPLIED WARRANTY OF MERCHANTABILITY AND THE IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE

RECENT DEVELOPMENTS

Foster v. Corteva Agriscience LLC, 2026 U.S. Dist. LEXIS 193338 (N.D. Tex. 2026).
<https://law.justia.com/cases/federal/district-courts/texas/txndce/5:2025cv00183/408595/30/>

FACTS: Plaintiffs (the “Fosters”) had been in the cotton business in West Texas for generations and had purchased cotton seeds from Defendant Corteva Agriscience LLC (“Corteva”). In 2024, the Fosters planted Phytogen cotton seeds purchased from Corteva. The seeds failed to emerge, resulting in multiple replants and an estimated loss of over \$1.5 million. Corteva had advertised that its Phytogen cotton seeds were “Improving West Texas Cotton Yields” and were “keeping cotton king in West Texas with ‘game-changing’ high yields.” The Fosters sued Corteva under the Texas Deceptive Trade Practices Act (“DTPA”), alleging these statements were false or misleading. The Fosters also alleged Corteva breached the implied warranties of merchantability and fitness for a particular purpose.

The Fosters had entered into a Technology Use Agreement (“TUA”) with Corteva that expressly disclaimed the implied warranties of merchantability and fitness for a particular purpose. Corteva moved to dismiss all four claims under Rule 12(b)(6).

HOLDING: Motion to dismiss granted. Counts Two, Three, and Four dismissed with prejudice; Count One dismissed without prejudice.

REASONING: The court explained that a DTPA misrepresentation must concern a material fact and cannot be mere puffery or opinion. Puffery is an expression of opinion by a seller that is not made as a representation of fact. Whether a statement is one of fact or opinion depends on the circumstances, including the specificity of the statement. The court noted that Texas courts have found statements describing property as “superb,” “super fine,” and “one of the finest little properties” to be puffery.

The court concluded that Corteva’s statements that its Phytogen seeds were “improving West Texas cotton yields” and producing “game-changing high yields” were similarly broad and did not make specific factual representations or comparisons. The statements were therefore puffery and were not actionable under the DTPA.

The court also held that the TUA validly disclaimed the implied warranties of merchantability and fitness for a particular purpose. The Texas Uniform Commercial Code allows sellers to disclaim both implied warranties if the disclaimer satisfies certain requirements. To disclaim the implied warranty of merchantability, a written disclaimer must mention “merchantability” and be conspicuous. To disclaim the implied warranty of fitness for a particular purpose, the disclaimer must be in writing and must be conspicuous. Here, the TUA’s disclaimer appeared in a stand-alone section titled “Disclaimer of Warranty” and was written in bold capital letters. The disclaimer expressly mentioned “merchantability” and “fitness for a particular purpose.” Because the disclaimer contained the required language and was conspicuous enough for a reasonable person to notice it, the court held that the disclaimer was enforceable.

BECAUSE BUYER AGREED TO ACCEPT THE PROPERTY “AS IS” AND “WITHOUT WARRANTY EXCEPT FOR THE WARRANTIES OF TITLE AND THE WARRANTIES IN THIS CONTRACT,” THE TRIAL COURT DID NOT ERR IN GRANTING DIRECTED VERDICT IN FAVOR SELLER ON DTPA EXPRESS WARRANTY CLAIM

Bassett v. Byrn, 2025 Tex. App. LEXIS 9056 (Tex. App.—Austin 2025).

<https://law.justia.com/cases/texas/third-court-of-appeals/2025/03-23-00867-cv.html>

FACTS: Defendant Justin Byrn listed a property (the “Property”) for sale. Plaintiffs Darin and Kimberly Bassett (the “Bassetts”) entered into a contract with Byrn to purchase the Property. The contract included a provision stating that the Bassetts accepted the Property “as is,” meaning in its present condition with any and all defects and without warranty except for warranties of title and warranties contained in the contract. The Bassetts retained a third party to inspect the Property, and the inspection revealed several defects. The Bassetts requested Byrn to reduce the purchase price based on those defects, and Byrn complied. The contract was then executed and the sale closed in the same month.

The Bassetts sued Byrn, alleging he made misrepresentations about the condition of the Property. The Bassetts asserted claims for fraud in a real estate transaction, fraud by nondisclosure, fraud in the inducement, breach of contract, and violations of the Texas Deceptive Trade Practices Act (“DTPA”). The trial court granted a directed verdict on the Bassetts’ breach-of-contract and warranty claims and rendered a take-nothing judgment on the remaining claims. The Bassetts appealed.

HOLDING: Affirmed.

REASONING: The Bassetts argued Byrn misrepresented the condition of the Property. The Bassetts claimed they relied on an express warranty made in Byrn’s advertisement stating the Property had been “completely remodeled from the piers up” when further inspection showed the Property did not meet that standard. Byrn denied that the advertisement created an express warranty and argued that, even if it did, the contract’s “as is” provision disclaimed warranties except for warranties of title and warranties contained in the contract.

The court agreed with Byrn. The “as is” provision stated the buyer accepted the Property “with any and all defects without warranty except for the warranties of title and the warranties in this contract.” The court reasoned that, by agreeing to this provision, the buyer agreed to make their own independent assessment of the bargain and accept the risks that they may be wrong. The provision did not prevent the buyer from conducting an inspection of the property or negotiating repairs or treatments before closing.

The Bassetts agreed to the “as is” provision, conducted their own inspection, and discovered the defects during the inspection. Nonetheless, the Bassetts executed the purchase agreement and closed on the Property. As such, the court found that the trial court had not erred in granting Byrn’s motion for directed verdict on the Bassett’s DTPA express warranty claim against him.

RECENT DEVELOPMENTS

DEBT COLLECTION

TO PREVAIL UNDER THE FDCPA AND THE TDCA, THE DEBT AT ISSUE MUST BE A CONSUMER DEBT DEFENDANT PRODUCED A COPY OF THE LOAN PAPERWORK INDICATING THAT THIS WAS A COMMERCIAL DEBT

Johnson v. Bankers Healthcare Grp., LLC, 2026 U.S. Dist. LEXIS 194849 (W.D. Tex. 2026).

FACTS: Plaintiff Bryant Lanear Johnson entered into a loan agreement with Defendant Bankers Healthcare Group, LLC. Defendant maintained that the loan was commercial and Plaintiff represented the funds would be used for business purposes. Plaintiff, however, claimed the loan was for personal use. Plaintiff sued Defendant under the Fair Debt Collection Practices Act (“FDCPA”) and Texas Debt Collection Act (“TDCA”).

The parties filed cross-motions for summary judgment. Defendant argued that Plaintiff’s FDCPA and TDCA claims failed because the underlying obligation was a commercial debt rather than a consumer debt.

HOLDING: Recommended Defendant’s motion for summary judgment be granted.

REASONING: Defendant argued Plaintiff could not prevail under the FDCPA or TDCA because both statutes applied only to consumer debts. The court agreed, explaining the FDCPA defined “debt” as an obligation arising from a transaction primarily for personal, family, or household purposes. The court further explained the TDCA similarly required an obligation primarily for personal, family, or household purposes.

Plaintiff asserted he sought the loan for personal use. Defendant, however, produced signed loan paperwork expressly identifying the loan as commercial. The paperwork also indicated the loan was for business development. Plaintiff did not identify any record evidence creating a material dispute regarding the nature of the loan. Because the record showed a commercial debt rather than a consumer debt, Plaintiff could not maintain his FDCPA or TDCA claims.

COURT REASONED ALLEGED HARMS EXCEEDED MERE CONFUSION, INCLUDING CONCRETE FINANCIAL AND EMOTIONAL CONSEQUENCES FROM DEFENDANTS’ ACTIONS, SUFFICIENT TO ESTABLISH STANDING

Sheinkopf v. Faloni L. Grp., LLC, 2026 U.S. Dist. LEXIS 152729 (2026).

<https://law.justia.com/cases/federal/district-courts/new-jersey/njdce/3:2025cv14092/580761/24/>

FACTS: Plaintiff Gittie Sheinkopf (“Sheinkopf”) incurred a debt from Synchrony Bank. After Sheinkopf defaulted, Defendant LVNV Funding, LLC (“LVNV”) acquired the Synchrony Bank debt and hired Defendant Faloni Law Group (“Faloni”) to collect it. Faloni filed a state court collection action against Sheinkopf on LVNV, alleging Sheinkopf was indebted to the Synchrony Bank.

However, the bill of sale attached to the collection action did not mention Synchrony Bank in the debt’s chain of title. Instead, the chain listed entities Sheinkopf did not recognize. Sheinkopf allegedly attempted to obtain clarification from Defendants, but Defendants did not resolve the issue, and the collection action was later dismissed without prejudice.

Sheinkopf sued Defendants under the Fair Debt Collection Practices Act (“FDCPA”), alleging Defendants’ conduct caused her financial and emotional harm, including a reduced credit score, interference with her work and family responsibilities, delayed financial commitments, and anxiety. Defendants moved to dismiss the claim for lack of Article III standing and failure to state a claim.

HOLDING: Denied.

REASONING: The court held that Sheinkopf had standing because she alleged concrete harm from the Defendants’ actions. The court explained that, to establish Article II standing for her FDCPA claims, Sheinkopf had to allege physical, monetary, or cognizable intangible harm that flowed from her reliance on the Defendants’ misrepresentations.

Sheinkopf alleged more than mere confusion. She argued the collection action negatively affected her credit score, the time she spent reviewing Defendants’ filings and her own records interfered with her work schedule and ability to care for her family, she delayed making financial commitments, and she suffered significant anxiety affecting her sleep, focus and everyday family life. Accordingly, the court held that these allegations were sufficient to establish a concrete injury and denied the Defendants’ motion to dismiss.

DEFENDANT QUALIFIED AS A DEBT COLLECTOR. ITS PRINCIPAL BUSINESS WAS VEHICLE REPOSSESSION, AND IT USED MAIL AND EMAIL

DEFENDANT “BREACHED THE PEACE” AS A MATTER OF LAW WHEN IT CONTINUED REPOSSESSING THE VEHICLE OVER HUSBAND’S ORAL PROTEST

Hart v. Hill & Assocs. of Ga., Inc., 2026 U.S. Dist. LEXIS 154232 (N.D. Ga. 2026).

FACTS: Plaintiff Kimberly Hart purchased a vehicle subject to a lien held by DK Auto, LLC (“DK Auto”). After Plaintiff defaulted, DK Auto submitted an order to Defendant Hill & Associates of Georgia, Inc. to repossess the vehicle. Defendant’s principal business purpose was enforcing security interests through automobile repossessions. Defendant received customer payments by mail and repossession assignments through its company email. During the repossession of Plaintiff’s vehicle, Plaintiff’s husband, Jerome Hart (“Mr. Hart”), orally protested the taking. Bystanders called the police, and the confrontation escalated to threats against the tow truck drivers. Mr. Hart was arrested and later pled guilty to threatening the tow truck drivers. Defendant continued the repossession and towed the vehicle.

Plaintiff brought claims under the Fair Debt Collection

RECENT DEVELOPMENTS

Practices Act (“FDCPA”) and for wrongful repossession. Plaintiff moved for partial summary judgment on both claims.

HOLDING: Recommended Plaintiff’s motion for partial summary judgment be granted.

REASONING: Defendant argued it did not qualify as a debt collector under the FDCPA. The court rejected this argument, reasoning that a repossession company qualified as a debt collector when its principal business purpose was enforcing security interests and it used the mails or an instrumentality of interstate commerce. Defendant’s principal business purpose was automobile repossession, it received customer payments by mail, and it received repossession assignments through its company email. Therefore, the court held that Defendant qualified as a debt collector under the FDCPA.

Defendant also argued that any oral protest occurred after the vehicle had been immobilized and whether it breached the

A breach of the peace occurred when a repossession continued despite the unequivocal oral protest of the debtor or a qualifying third party such as the debtor’s spouse.

peace was a question for the jury. The court rejected these arguments, reasoning that a nonjudicial repossession was wrongful when it breached the peace. A breach of the peace occurred when a repossession continued despite the unequivocal

oral protest of the debtor or a qualifying third party such as the debtor’s spouse. Once such a protest occurred, self-help repossession was no longer a lawful alternative.

Although breach of the peace is generally a question for the jury, the court noted it was undisputed that bystanders and Plaintiff called the police. Mr. Hart was arrested and pleaded guilty to threatening the tow truck drivers in connection with the repossession. Because these undisputed facts showed Defendant’s continued repossession over Mr. Hart’s oral protest had escalated to violence, the court held that Defendant breached the peace as a matter of law and therefore the repossession was wrongful.

THE FAIR DEBT COLLECTION PRACTICES ACT’S PLAIN LANGUAGE REQUIRES THE TRANSACTION BE PRIMARILY FOR PERSONAL, FAMILY, OR HOUSEHOLD PURPOSES

THE UNDISPUTED EVIDENCE SHOWED KELLY INTENDED TO AND ACTUALLY USED LOAN PROCEEDS FOR BUSINESS PURPOSES

TYPE OF COLLATERAL SECURING A LOAN DOES NOT CONTROL FDCPA APPLICABILITY WHEN TRANSACTION PURPOSE IS BUSINESS

FACTS: Republic Bank & Trust Co. (“Republic”) issued a \$32,000 home equity line of credit to Plaintiff James Kearney’s son, Kelly Kearney (“Kelly”). Kelly secured the loan with a mortgage intended to cover his residence. Because of an error by Republic’s vendor, however, the mortgage contained the property description for Plaintiff’s home rather than Kelly’s. After Kelly defaulted, Republic hired Defendant Morgan & Pottinger, P.S.C. to pursue collection and foreclosure, resulting in foreclosure proceedings against Plaintiff’s property. Although the loan application described the proceeds as being for home improvement, Kelly testified that he told Republic’s loan officer that he intended to use the loan proceeds to invest in his family’s business. Kelly deposited \$30,000 of the proceeds into a checking account and transferred \$25,000 to one of his brother’s businesses.

Plaintiff sued Defendant under the Fair Debt Collection Practices Act (“FDCPA”) based on Defendant’s mistaken foreclosure efforts involving Plaintiff’s property. Defendant moved for summary judgment, arguing that Kelly’s loan did not constitute a “debt” under the FDCPA because it was not incurred “primarily for personal, family, or household purposes.”

HOLDING: Granted.

REASONING: Defendant argued that Kelly’s loan did not qualify as a “debt” under the FDCPA because the loan was incurred for business purposes. The court agreed, explaining that the FDCPA’s plain language defines “debt” as an obligation arising from a transaction primarily for personal, family, or household purposes. The court found it undisputed that Kelly intended to use the loan proceeds primarily for business purposes. Kelly testified that he told Republic’s loan officer he intended to use the proceeds to invest in his family’s business. The court also found it undisputed the loan proceeds were primarily used for business purposes. Based on Kelly’s intended and actual use of the proceeds, the court held the loan was primarily for business purposes and therefore did not qualify as a “debt” under the FDCPA.

Plaintiff argued the loan nevertheless fell within the FDCPA because Kelly’s primary residence secured it. The court rejected this argument, explaining that the type of collateral securing a loan did not determine whether the FDCPA applied. Instead, the court focused on the purpose for which the loan was incurred. Because Kelly incurred the loan for business purposes, the fact that his residence secured it did not bring the loan within the FDCPA.

Kearney v. Morgan & Pottinger, P.S.C., 2026 U.S. Dist. LEXIS 180185 (W.D. Ky. 2026).

<https://law.justia.com/cases/federal/district-courts/kentucky/kywdce/3:2024cv00299/134905/29/>

RECENT DEVELOPMENTS

CONSUMER CREDIT

UNDER THE FAIR CREDIT REPORTING ACT, CONSUMER MUST MAKE A PRIMA FACIE SHOWING THAT THE DISPUTED INFORMATION WAS IN FACT INACCURATE OR INCOMPLETE TO PREVAIL ON AN UNREASONABLE INVESTIGATION CLAIM

Ward v. Nat'l Credit Sys., No. 25-1078, 2026 U.S. App. LEXIS 21295 (10th Cir. 2026).
<https://law.justia.com/cases/federal/appellate-courts/ca10/25-1078/25-1078-2026-07-20.html>

FACTS: Plaintiff Robbin Ward's daughter used his personal information to apply and secure a residential lease Ward's name without his knowledge or permission. Ward's daughter lived at the property, failed to timely pay rent, and was eventually evicted. The landlord then transferred collection of the outstanding debt to National Credit Systems, Inc. ("NCS"). NCS reported the delinquent debt under Ward's name to various credit reporting agencies ("CRAs"), which documented the debt on Ward's credit report.

After discovering the debt, Ward disputed its validity and claimed that he was a victim of identity theft. NCS investigated Ward's dispute but concluded that the debt information was accurate and declined to correct its reporting. Ward sued NCS under the Fair Credit Reporting Act ("FCRA"), alleging that NCS failed to conduct a reasonable investigation of his dispute. At trial, the jury found NCS liable and awarded Ward damages for emotional distress. NCS appealed the district court's denial of its post-trial motion challenging the judgment.

HOLDING: Reversed and Remanded.

REASONING: NCS argued that Ward failed to make a prima facie case showing that NCS furnished inaccurate or incomplete information. The court agreed, holding that inaccuracy or incompleteness is a threshold element of an unreasonable investigation claim under the FCRA. To prevail on such a claim, a consumer must first establish that the disputed information was, in fact, inaccurate or incomplete. The reasonableness of the furnisher's investigation is not examined unless the consumer first satisfies that threshold requirement.

The court further reasoned that the disputed information must be objectively and readily verifiable as containing a mistake or error. Ward's claim did not meet that standard because the alleged inaccuracy depended on the truth of Ward's assertion that he was not a victim of identity theft. The court concluded that this assertion was not objectively verifiable by NCS, while the objective evidence available to NCS suggested that Ward was connected to the debt. Because Ward failed to establish that NCS furnished inaccurate or incomplete information, his unreasonable investigation claimed under the FCRA.

N.J. SUPREME COURT HOLDS NO PRIVATE RIGHT OF ACTION TO VOID LOAN CONTRACT

Diana v. LVNV Funding, LLC, 2026 N.J. LEXIS 632 (2026).
https://www.njcourts.gov/system/files/court-opinions/2026/a_52_24.pdf

FACTS: Plaintiff Scott Diana ("Diana") opened a credit card with Credit One Bank ("Credit One") and eventually defaulted on the balanced owed. Credit One Bank closed Diana's account and sold his debt to defendant MHC Receivables, LLC ("MHC").

Diana argued that because the defendants lacked the required licenses, the debt purchases were void as a matter of law.

Through a series of transactions, Diana's debt was ultimately bought by co-defendant LVNV Funding LLC ("LVNV"). LVNV filed suit to collect Diana's unpaid debt, and Diana failed to answer. The court

entered a final default judgement against Diana for the unpaid debt, court costs, and attorney's fees.

Diana in response filed a separate suit against LVNV and other defendants involved in the sale and purchase of his debt. Diana alleged the defendants were not properly licensed as consumer lenders or sales finance companies at the time they purchased or received the assignment of his debt. Diana argued that because the defendants lacked the required licenses, the debt purchases were void as a matter of law. LVNV moved to dismiss Diana's complain against all defendants. The trial court dismissed Diana's complaint with prejudice. The Appellate Division affirmed, and the New Jersey Supreme Court granted certification. **HOLDING:** Affirmed.

REASONING: Diana argued the New Jersey Consumer Finance Licensing Act ("CFLA") contained an implied private right of action allowing him to void the loan contract. The New Jersey Supreme Court disagreed, reasoning the predecessor statutes to the CFLA expressly provided private remedies, but the CFLA did not. The court therefore declined to infer the legislature intended to create a private right of action when such a remedy was not expressly in the statute.

The court further reasoned the CFLA is penal in nature. Diana relied on the statutory phrase "constitutes a crime" to argue the CFLA implied a private right of action, but the court interpreted the phrase as defining the degree of a crime for a violation would be. Generally, New Jersey courts do not allow private plaintiff to seek injunctions to enforce state penal laws. Thus, the New Jersey Supreme Court held no right to private action was available to Diana under the CFLA.

RECENT DEVELOPMENTS

LANDLORD TENANT

LANDLORDS COLLECTING UNDER AN OWED DEBT ARE CREDITORS, NOT DEBT COLLECTORS UNDER THE FDCPA

UNDER THE FDCPA THE TERM “DEBT COLLECTOR” INCLUDES ANY CREDITOR WHO, IN THE PROCESS OF COLLECTING HIS OWN DEBTS, USES ANY NAME OTHER THAN HIS OWN WHICH WOULD INDICATE THAT A THIRD PERSON IS COLLECTING OR ATTEMPTING TO COLLECT SUCH DEBTS

THE FOCUS OF THE FALSE NAME EXCEPTION, IS ON WHETHER THE CREDITOR HAS USED A NAME TO DISGUISE TO THE CONSUMER WHO IS ACTUALLY COLLECTING THE DEBT

Degolia v. Amber Terrace Apartments, LLC, 2026 U.S. Dist. LEXIS 165916 (E.D. Mo. 2026).

FACTS: Plaintiffs Skyler Degolia (“Skyler”), Keith Mack (“Mack”), and Susan Degolia (“Susan”) entered into a one-year lease agreement with Defendant Amber Terrace Apartments, LLC (“Amber Terrace”).

The court held that Plaintiffs failed to sufficiently plead that Defendants were “debt collectors” under the FDCPA. Skyler and Mack were the tenants under the lease, and Susan was the co-signer. The lease required Plaintiffs to make all rent payments through the AppFolio online portal. Plaintiffs’ bank statements identified the

merchant for those payments through AppFolio as Millsap LLC (“Millsap”), although Millsap was not identified in the lease or other communications. After Plaintiffs vacated the apartment following a dispute with Amber Terrace, Amber Terrace sent Plaintiffs a certified letter containing an itemized statement of charges allegedly owed under the lease.

Plaintiffs filed suit against Amber Terrace, Millsap, Keith Millsap (“Keith”), and other defendants, alleging, among other things, violations of the Fair Debt Collection Practices Act (“FDCPA”). Defendants removed the action to federal court. Plaintiffs filed a Joint Motion to Remand, and Defendants jointly moved for judgment on the pleadings.

HOLDING: Joint Motion to Remand denied; judgment on the pleadings granted.

REASONING: The court held that Plaintiffs failed to sufficiently plead that Defendants were “debt collectors” under the FDCPA. Plaintiffs conceded that their FDCPA claims were limited to Millsap, Amber Terrace, and Keith, and that the principal purpose of these defendants’ businesses was not the collection of debts. Plaintiffs alternatively alleged that the Defendants regularly attempted to collect debts allegedly owed to another, but the court found those allegations conclusory and unsupported by sufficient factual allegations.

The court further reasoned that the Plaintiffs’ allegations instead indicated that Amber Terrace was attempting to collect money owed directly to it under the lease. The court acknowledged that federal courts have held that landlords collecting debts owed to them are “creditors” rather than “debt collectors” under the FDCPA. Therefore, Amber Terrace did not qualify as a debt collector merely by attempting to collect the debt Plaintiffs allegedly owed it.

Finally, the court held the false-name exception did not apply. Under the FDCPA, a creditor may qualify as a debt collector when, in collecting its own debt, it uses another name that would indicate that a third party is collecting or attempting to collect the debt. Here, the itemized statement sent to Plaintiffs identified Amber Terrace as the collector and no other entity. Accordingly, the false-name exception did not apply, and the court dismissed all of Plaintiffs’ FDCPA claims.

RECENT DEVELOPMENTS

ARBITRATION

GRANTING SUMMARY JUDGMENT IN ARBITRATION WITHOUT LIVE TESTIMONY IS NEITHER IMPROPER NOR FUNDAMENTALLY UNFAIR AS PROCEDURAL MATTER

Washington v. Bridgestone Retail Operations, LLC, 2026 U.S. Dist. LEXIS 134371 (D. Md. 2026).

https://www.govinfo.gov/content/pkg/USCOURTS-mdd-8_24-cv-00626/pdf/USCOURTS-mdd-8_24-cv-00626-1.pdf

FACTS: Plaintiff David Carlos Washington sued Defendant Bridgestone Retail Operations, LLC (“Bridgestone”) for racial discrimination, hostile work environment, and retaliation. In arbitration, Bridgestone moved for summary judgment. Washington opposed the motion, arguing the arbitrator should hear live testimony from Area Manager Darius Rice, who witnessed Washington’s termination meeting.

The arbitrator granted summary judgment in Bridgestone’s favor and closed the arbitration proceedings. Washington moved to vacate the arbitration award, arguing the arbitrator committed misconduct by refusing to hear evidence “pertinent and material to the controversy” under 9 U.S.C. § 10(a)(3). Bridgestone opposed the motion and moved to confirm the arbitration award.

HOLDING: Denied motion to vacate and granted motion to confirm.

REASONING: Washington argued the arbitrator’s refusal to hear Rice’s live testimony constituted misconduct because the testimony was pertinent and material evidence to the dispute. The court disagreed, reasoning that granting summary judgment without live witness testimony was neither improper nor fundamentally unfair, especially where Washington had adequate opportunity to participate in the arbitration proceedings.

Washington participated in the arbitration proceedings by filing four written pleadings opposing summary judgment. None challenged Bridgestone’s statements of material fact or supporting evidence. Because Washington had an adequate opportunity to dispute Bridgestone’s evidence, the arbitrator’s decision to rule on the existing record did not amount to misconduct under 9 U.S.C. § 10(a)(3).

ARBITRATION CLAUSE IN THE VEHICLE PURCHASE AGREEMENT REQUIRING ARBITRATION OF DISPUTES RELATING TO “ANY ASPECT OF THE RELATIONSHIP” EXCEEDED THE FAA’S SCOPE

WORKU’S TORT CLAIMS FROM THE CHARGING STATION ELECTROCUTION DID NOT ARISE FROM THE VEHICLE PURCHASE CONTRACT BECAUSE THE CONTRACT ADDRESSED ONLY STANDARD CAR SALE TERMS (PRICE, DELIVERY, WARRANTY), AND MENTIONED SUPERCHARGERS ONLY IN AN INCORPORATED POLICY

Worku v. Tesla, Inc., 2026 U.S. Dist. LEXIS 140811 (D. Minn. 2026).

<https://www.casemine.com/judgement/us/6a3fe8186720be855d600e64>

FACTS: Plaintiff Tiger Worku purchased a Tesla vehicle from Defendant Tesla, Inc. The vehicle purchase agreement (“Contract”) included an arbitration clause, stating that “any dispute arising out of or relating to any aspect of the relationship between Worku and Tesla” would be decided by an arbitrator. The Contract contained terms governing the sale and warranty of the vehicle and did not discuss Superchargers aside from an incorporated policy. After the sale, Worku alleged he was electrocuted while using a Tesla Supercharger and suffered physical and mental injuries. Worku filed suit asserting several tort claims, and Tesla moved to compel arbitration.

HOLDING: Motion to compel arbitration denied.

REASONING: The court explained that the Federal Arbitration Act (“FAA”) governs only disputes arising from the contract containing the arbitration agreement. Tesla argued the phrase “any aspect of the relationship” referred to the parties’ contractual relationship and therefore fell within the FAA’s scope. The court disagreed, reasoning that the Contract did not limit the phrase to a “contractual relationship” and that the parties’ relationship was far broader than their contractual relationship.

The court further explained that, for a dispute to arise from a contract, the alleged injuries must have a direct relationship to the contract. Tesla argued that its Superchargers were designed to charge Tesla vehicles and therefore were a central component of the parties’ contractual relationship. The court disagreed, reasoning that the Contract addressed only the vehicle’s sale and warranty, while Superchargers were mentioned only in an incorporated policy on which neither party relied on. Because Worku’s alleged injuries did not arise directly from the Contract, they fell outside the FAA’s scope.

WEBSITE’S REASONABLY CONSPICUOUS NOTICE OF ITS TERMS AND CONDITIONS FAILED TO ESTABLISH A USER’S UNAMBIGUOUS MANIFESTATION OF ASSENT

IF CONSUMER TAKES SOME ACTION, SUCH AS CLICKING A BUTTON OR CHECKING A BOX, THAT UNAMBIGUOUSLY MANIFESTS ASSENT TO THOSE TERMS IS CONSENT

Wong v. LaserAway, LLC, 2026 U.S. Dist. LEXIS 157356 (N.D. Cal. 2026).

<https://docs.justia.com/cases/federal/district-courts/california/candce/3%3A2026cv00529/462808/33>

FACTS: Plaintiff Caroline Wong (“Wong”) provided her tele-

The court disagreed, reasoning that the Contract addressed only the vehicle’s sale and warranty.

RECENT DEVELOPMENTS

phone number through a questionnaire on Defendant LaserAway, LLC's ("LaserAway") website. LaserAway's website included a hyperlink to its terms and conditions, which contained an arbitration provision. Wong sued LaserAway under the Telephone Consumer Protection Act, alleging that LaserAway continued to send her marketing text messages after she asked that they stop. LaserAway contended that Wong entered into a binding agreement, which included an arbitration clause, by accepting its terms and conditions when she clicked the "GET MORE INFO" button.

LaserAway moved to compel arbitration, arguing that its website provided sufficient notice of the terms and Wong manifested assent by clicking the button.

HOLDING: Denied.

REASONING: LaserAway argued that Wong entered into a binding arbitration agreement because its website provided conspicuous notice of the terms and conditions and Wong clicked the "GET MORE INFO" button. The court rejected this argument. Under California law, an online agreement based on inquiry notice required both reasonably conspicuous notice of the terms and an affirmative action by the consumer that unambiguously manifested assent to those terms. Although the website's uncluttered design and readable hyperlink may have provided reasonably conspicuous notice of the terms, notice alone did not establish Wong's unambiguous manifestation of assent to those terms.

The court reasoned clicking a button manifested assent only when the website clearly informed the user that clicking the button constituted agreement to the terms. The notice had to explicitly inform the user of the legal significance of the action required to enter into a contractual agreement. Here, the phrase "GET MORE INFO" did not communicate that clicking the button would bind the user to the linked terms and conditions. Instead, a user could reasonably understand the button as a way to obtain additional information about LaserAway's services or the terms themselves. Because the website did not connect the act of clicking "GET MORE INFO" with agreement to the terms, Wong's click did not unambiguously manifest assent, and LaserAway failed to establish an enforceable arbitration agreement.

COURT DENIES DEFENDANT'S MOTION TO COMPEL ARBITRATION IN A CLASS ACTION BROUGHT UNDER THE TELEPHONE CONSUMER PROTECTION ACT ("TCPA")

COURT HELD THAT A DEFENDANT'S CONDUCT, EVEN PRIOR TO CLASS CERTIFICATION, MAY SUPPORT AN INFERENCE THAT IT WAIVED ITS RIGHT TO COMPEL ARBITRATION OF PUTATIVE CLASS MEMBER'S CLAIMS

Moore, et al. v. Club Exploria, LLC, (7th Cir. 2026).

<https://law.justia.com/cases/federal/appellate-courts/ca7/25-2721/25-2721-2026-08-18.html>

FACTS: Club Exploria, LLC ("Exploria"), a vacation property company, contracted with third-party vendors to run a telemarketing campaign. The vendors purchased leads generated through opt-in websites and used scripted, prerecorded calls to contact potential customers. George Moore ("Moore") received two of these calls and sued Exploria, alleging he and other class members re-

ceived calls without their consent in violation of the Telephone Consumer Protection Act ("TCPA").

O v e r the next several years, Exploria actively defended the case in court.

Exploria filed pleadings with affirmative defenses, engaged in class-related discovery, filed motions on the merits, and opposed class certification. After the class was certified, Exploria sought to raise arbitration as a defense to unnamed class members' claims. The district court denied Exploria's motion to compel arbitration, holding that Exploria's conduct before and after class certification was inconsistent with an intent to arbitrate and therefore constituted waiver. Exploria appealed.

HOLDING: Affirmed.

REASONING: Exploria argued that it did not waive its arbitration rights because it moved to compel arbitration after the class was finalized. The court rejected this argument, holding that a defendant's conduct before class certification may be relevant to whether it waived the right to compel arbitration of putative class members' claims. Arbitration agreements with putative class members may also be relevant to class certification, especially where the agreements contain class-action or joinder limitations. By failing to raise arbitration during class-related discovery or in opposition to class certification, a defendant may imply that it intends to litigate the class claims in court. Thus, a defendant's pre-certification conduct may support an inference of waiver. Exploria's conduct at each stage of litigation was inconsistent with an intent to arbitrate. Therefore, the district court did not err in denying Exploria's motion to compel arbitration.

Arbitration agreements with putative class members may also be relevant to class certification, especially where the agreements contain class-action or joinder limitations.

RECENT DEVELOPMENTS

WARRANTIES

PUFFERY IS AN EXPRESSION OF OPINION BY A SELLER NOT MADE AS A REPRESENTATION OF FACT. ASSERTIONS THAT A PROPERTY IS SUPERB, SUPER FINE, AND ONE OF THE FINEST LITTLE PROPERTIES CONSTITUTE PUFFERY

THE TEXAS UNIFORM COMMERCIAL CODE ALLOWS SELLERS TO DISCLAIM BOTH THE IMPLIED WARRANTY OF MERCHANTABILITY AND THE IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE

Foster v. Corteva Agriscience LLC, 2026 U.S. Dist. LEXIS 193338 (N.D. Tex. 2026).

<https://law.justia.com/cases/federal/district-courts/texas/txndce/5:2025cv00183/408595/30/>

FACTS: Plaintiffs (the “Fosters”) had been in the cotton business in West Texas for generations and had purchased cotton seeds from Defendant Corteva Agriscience LLC (“Corteva”). In 2024, the Fosters planted Phytogen cotton seeds purchased from Corteva. The seeds failed to emerge, resulting in multiple replants and an estimated loss of over \$1.5 million. Corteva had advertised that its Phytogen cotton seeds were “Improving West Texas Cotton Yields” and were “keeping cotton king in West Texas with ‘game-changing’ high yields.” The Fosters sued Corteva under the Texas Deceptive Trade Practices Act (“DTPA”), alleging these statements were false or misleading. The Fosters also alleged Corteva breached the implied warranties of merchantability and fitness for a particular purpose.

The Fosters had entered into a Technology Use Agreement (“TUA”) with Corteva that expressly disclaimed the implied warranties of merchantability and fitness for a particular purpose. Corteva moved to dismiss all four claims under Rule 12(b)(6).

HOLDING: Motion to dismiss granted. Counts Two, Three, and Four dismissed with prejudice; Count One dismissed without prejudice.

REASONING: The court explained that a DTPA misrepresentation must concern a material fact and cannot be mere puffery or opinion. Puffery is an expression of opinion by a seller that is not made as a representation of fact. Whether a statement is one of fact or opinion depends on the circumstances,

The court noted that Texas courts have found statements describing property as “superb,” “super fine,” and “one of the finest little properties” to be puffery.

including the specificity of the statement. The court noted that Texas courts have found statements describing property as “superb,” “super fine,” and “one of the finest little properties” to be puffery.

The court concluded that Corteva’s statements that its

Phytogen seeds were “improving West Texas cotton yields” and producing “game-changing high yields” were similarly broad and did not make specific factual representations or comparisons. The statements were therefore puffery and were not actionable under the DTPA.

The court also held that the TUA validly disclaimed the implied warranties of merchantability and fitness for a particular purpose. The Texas Uniform Commercial Code allows sellers to disclaim both implied warranties if the disclaimer satisfies certain requirements. To disclaim the implied warranty of merchantability, a written disclaimer must mention “merchantability” and be conspicuous. To disclaim the implied warranty of fitness for a particular purpose, the disclaimer must be in writing and must be conspicuous. Here, the TUA’s disclaimer appeared in a stand-alone section titled “Disclaimer of Warranty” and was written in bold capital letters. The disclaimer expressly mentioned “merchantability” and “fitness for a particular purpose.” Because the disclaimer contained the required language and was conspicuous enough for a reasonable person to notice it, the court held that the disclaimer was enforceable.

BECAUSE BUYER AGREED TO ACCEPT THE PROPERTY “AS IS” AND “WITHOUT WARRANTY EXCEPT FOR THE WARRANTIES OF TITLE AND THE WARRANTIES IN THIS CONTRACT”

THE TRIAL COURT DID NOT ERR IN GRANTING DIRECTED VERDICT IN FAVOR SELLER ON DTPA EXPRESS WARRANTY CLAIM

Bassett v. Byrn, 2025 Tex. App. LEXIS 9056 (Tex. App.—Austin 2025).

<https://law.justia.com/cases/texas/third-court-of-appeals/2025/03-23-00867-cv.html>

FACTS: Defendant Justin Byrn listed a property (the “Property”) for sale. Plaintiffs Darin and Kimberly Bassett (the “Bassetts”) entered into a contract with Byrn to purchase the Property. The contract included a provision that stating the Bassetts accepted the Property “as is,” meaning in its present condition with any and all defects and without warranty except for warranties of title and warranties contained in the contract. The Bassetts retained a third party to inspect the Property, and the inspection revealed several defects. The Bassetts requested Byrn to reduce the purchase price based on those defects, and Byrn complied. The contract was then executed and the sale closed in the same month.

The Bassetts sued Byrn, alleging he made misrepresentations about the condition of the Property. The Bassetts asserted claims for fraud in a real estate transaction, fraud by nondisclosure, fraud in the inducement, breach of contract, and violations of the Texas Deceptive Trade Practices Act (“DTPA”). The trial court granted a directed verdict on the Bassetts’ breach-of-contract and warranty claims and rendered a take-nothing judgment on the remaining claims. The Bassetts appealed.

HOLDING: Affirmed.

REASONING: The Bassetts argued Byrn misrepresented the

RECENT DEVELOPMENTS

condition of the Property. The Bassetts claimed they relied on an express warranty made in Byrn's advertisement stating the Property had been "completely remodeled from the piers up" when further inspection showed the Property did not meet that standard. Byrn denied that the advertisement created an express warranty and argued that, even if it did, the contract's "as is" provision disclaimed warranties except for warranties of title and warranties contained in the contract.

The court agreed with Byrn. The "as is" provision stated the buyer accepted the Property "with any and all defects without warranty except for the warranties of title and the warranties in this contract." The court reasoned that, by agreeing to this provision, the buyer agreed to make their own independent assessment of the bargain and accept the risks that they may be wrong. The provision did not prevent the buyer from conducting an inspection of the property or negotiating repairs or treatments before closing.

The Bassetts agreed to the "as is" provision, conducted their own inspection, and discovered the defects during the inspection. Nonetheless, the Bassetts executed the purchase agreement and closed on the Property. As such, the court found that the trial court had not erred in granting Byrn's motion for directed verdict on the Bassett's DTPA express warranty claim against him.

RECENT DEVELOPMENTS

MISCELLANEOUS

CHOBANI'S TREATMENT OF AN ALLULOSE-CONTAINING PRODUCT AS SUGAR-FREE RAN AFOUL OF FDA REGULATIONS

Franco v. Chobani, LLC, 2026 U.S. App. LEXIS 22276 (7th Cir. 2026).

<https://media.ca7.uscourts.gov/cgi-bin/OpinionsWeb/process-WebInputExternal.pl?Submit=Display&Path=Y2026/D07-27/C:25-2087;J:Kirsch;aut:T:fnOp:N:3580911:S:0>

FACTS: Jason and Abigail Franco (the “Francos”) purchased Chobani Zero Sugar Yogurt. Although Chobani, LLC (“Chobani”) advertised the yogurt as sugar free, the yogurt contained four grams of allulose per serving. The United States Food and Drug Administration (“FDA”) regulations prohibited foods containing at least one-half gram of sugar per serving from being labeled “sugar free” or “zero sugar.” The FDA later issued the Allulose Guidance, stating it would exercise enforcement discretion and not enforce its labeling requirements against manufacturers that exclude allulose from “Total Sugars” pending future rulemaking. The Francos sued Chobani under state consumer protection laws, alleging that Chobani’s sugar-free labeling was deceptive because allulose qualified as sugar under FDA regulations.

The district court held that the Francos’ claims were preempted and dismissed the case. The Francos appealed.

HOLDING: Reversed.

REASONING: The Francos argued allulose qualified as sugar under FDA regulations, therefore, Chobani could not lawfully label a product containing four grams of allulose as sugar free. The court agreed, reasoning that FDA regulations defined “Total Sugars” to include all free monosaccharides and disaccharides, and allulose was undisputedly a monosaccharide. The court rejected Chobani’s argument that the regulation’s examples of glucose, fructose, lactose, and sucrose limited the definition to sugars with similar physiological characteristics. Instead, the court held the listed substances were examples of

FDA regulations defined “Total Sugars” to include all free monosaccharides and disaccharides, and allulose was undisputedly a monosaccharide.

the broader class of monosaccharides and disaccharides.

The court also rejected Chobani’s reliance on the FDA’s Allulose Guidance. The court reasoned the Allulose Guidance announced an enforcement policy rather than an interpretation of the FDA’s definition of “Total Sugars.” The FDA had not completed further rulemaking to exclude allulose from the definition, therefore, the existing regulatory definition of “Total Sugars” continued to apply.

Finally, the court explained the federal government’s decision not to enforce its labeling requirements with respect to allulose did not mean that states would take the same ap-

proach or Chobani was immune from state-law claims. Under FDA regulations, a product containing at least one-half gram of sugar could not be labeled “sugar free” or “zero sugar.” Chobani therefore ran afoul of FDA regulations by treating a product containing four grams of allulose as sugar free.

A PARTY CANNOT STATE A VIABLE CLAIM FOR WRONGFUL FORECLOSURE IF THE PARTY NEVER LOST POSSESSION OF THE PROPERTY

TEXAS DOES NOT RECOGNIZE AN ATTEMPTED WRONGFUL FORECLOSURE CAUSE OF ACTION. CLAIMS FOR ATTEMPTED WRONGFUL FORECLOSURE ARE SIMPLY NOT COGNIZABLE UNDER TEXAS LAW

Cristancho v. SWBC Mortg. Corp., 2026 U.S. Dist. LEXIS 172996 (S.D. Tex. 2026).

<https://docs.justia.com/cases/federal/district-courts/texas/txsdce/3%3A2024cv00110/1957178/37>

FACTS: Plaintiffs Mauricio Cristancho and Idali Melgar financed the purchase of their home through Defendant SWBC Mortgage Corporation (“SWBC”) and executed a deed of trust securing the loan. Cenlar, FSB (“Cenlar”) was the current mortgage servicer. After experiencing financial hardship, Plaintiffs entered into a forbearance agreement with SWBC and later sought loan-modification assistance. Plaintiffs remained in default on their mortgage, and Defendants notified them that foreclosure proceedings would be initiated. Before any foreclosure sale occurred, Plaintiffs filed suit and obtained a temporary restraining order preventing the foreclosure. Plaintiffs asserted a wrongful foreclosure claim, among other causes of action.

Defendants moved for summary judgment on Plaintiffs’ wrongful foreclosure claim, arguing the claim failed because no foreclosure sale had occurred.

HOLDING: Recommended summary judgment be granted.

REASONING: Defendants argued Plaintiffs could not maintain a wrongful foreclosure claim because no foreclosure sale had occurred and Plaintiffs never lost possession of the property. The court agreed, reasoning that a viable wrongful foreclosure claim required the Plaintiffs to have lost possession of the property.

Plaintiffs also argued the wrongful initiation of foreclosure proceedings could support a claim for damages even when no foreclosure sale ultimately occurred. The court rejected this argument, explaining that Texas law does not recognize a cause of action for attempted wrongful foreclosure. Because Plaintiffs remained in possession of the property and sought relief only for foreclosure proceedings that had been initiated but never completed, their wrongful foreclosure claim was not cognizable under Texas law. The court therefore recommended granting Defendants summary judgment on the claim.

THE LAST WORD

Welcome to the Autumn issue of the *Journal of Consumer and Commercial Law*. As usual, it contains something for every member of the Consumer and Commercial Law Section.

For example, the two articles, *The Myth of Conditional Financing After McCarthy II: Texas Court Reinforces Consumer Fights in Retail Installment Sales Contracts*, by R. Douglas Scott, and *Defendants' Claims for Attorney's Fees and Costs under the Texas Insurance Code and DTPA*, by Karl A. Schulz, are of interest whether you represent consumers or businesses.

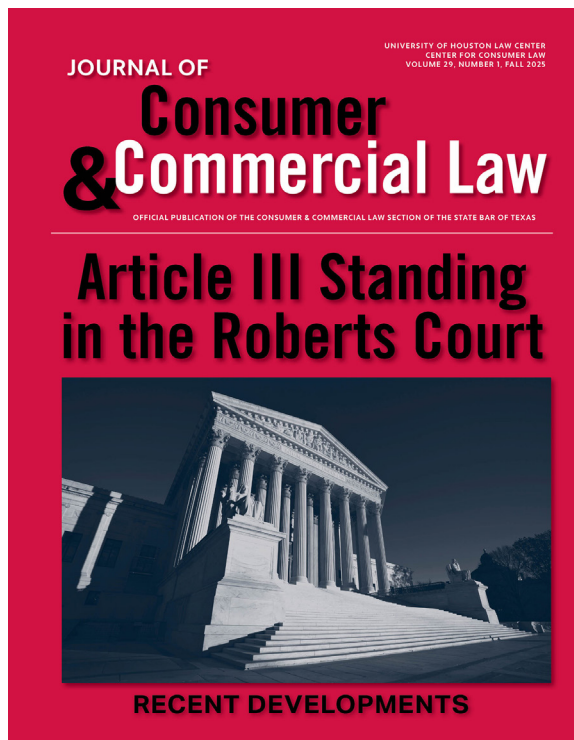
And of course, it would not be the *Journal* if we didn't digest more than 20 recent consumer and commercial law decisions.

And you may be able to help make the *Journal* even better. We welcome unsolicited lead articles about consumer or commercial law, written by practicing attorneys, judges, professors, students, or other qualified individuals. Manuscript length should be approximately 10-30 typed, double-spaced pages. Send your submission to me, alderman@uh.edu.

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/>.

Enjoy.

Richard M. Alderman
Editor-in-Chief



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