

Consumer News Alert Case Update



Since October, 2006, the Center for Consumer Law has published the “*Consumer News Alert*.” This short newsletter contains everything from consumer tips and scam alerts, to shopping hints and financial calculators. It also has a section just for attorneys, highlighting recent decisions. The *Alert* is delivered by email three times a week. Below is a listing of the cases highlighted during the past few months. To subscribe and receive a copy of the *Consumer News Alert* in your mailbox, visit www.peopleslawyer.net

Cable TV arbitration clause applies retroactively to subscriber claims. A federal court of appeals has held that an arbitration clause applies to claims that existed prior to the date of the arbitration clause. *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006).

New York judge rules that woman can seek punitive damages for attack by Oreo the cockapoo. Knowingly harboring a dangerous dog, even a cockapoo, can be costly. *Marsh v. Femina*, 819 N.Y.S.2d 211 (N.Y. Sup. Ct. 2006).

Even a broad “as is” clause may not bar claims for fraud and negligent misrepresentation. A recent Texas case reconciles the Texas Supreme Court’s decisions in *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997), and *Prudential Ins. Co. of Am. v. Jefferson Assocs.*, 896 S.W.2d 156 (Tex. 1995). *Ltd. Warehouse Assocs Corp. Centre II, Inc. v. Celotex Corp.*, 192 S.W.3d 225 (Tex. App.—Houston [14th Dist.] 2006, pet. filed).

A contract for deed buyer entitles him to liquidated damages of \$250 a day if annual statement is not sent. The Texas Supreme Court holds that an annual statement is effective even if it does not comply with the statute. *Flores v. Millennium Interests, Ltd.*, 185 S.W.3d 427 (Tex. 2005).

Texas Supreme Court recognizes the right of the executor of an estate to maintain a legal malpractice claim against an attorney who prepared the will. The court recognized that there is no legal bar preventing an estate’s personal representative from maintaining a legal malpractice claim on behalf of the estate against the decedent’s estate planners.

Belt v. Oppenheimer, Blend, Harrison, & Tate, Inc., 192 S.W.3d 780 (Tex. 2006).

A judge who had enough. A judge has denied a motion for summary judgment by a debt collector against a consumer, despite the fact that the consumer never appeared in court. The judge found that the plaintiff’s allegation and support were insufficient as a matter of law to support the motion. “The mere fact that plaintiff obtained the records from AT&T and then retained them is an insufficient basis for their introduction into evidence.” *Palisades Collection, L.L.C. v. Gonzalez*, 809 N.Y.S.2d 482 (N.Y. Civ. Ct. 2005).

Fifth Circuit discusses how to treat attorneys’ fees in bankruptcy. The reasonable attorneys’ fees associated with collecting support obligations should be treated as support obligations. Conversely, those attorneys’ fees associated with collecting discharged debt should be treated as discharged debt. *In re Egleston*, 448 F.3d 803 (5th Cir. 2006).

Consumers win important class action ruling. In a major victory for consumers, the First Circuit Court of Appeals became the second federal circuit to tell a company offering consumer services that it cannot simply ban class actions by inserting a provision in an arbitration clause in its contracts. *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006).

Family Medical Leave Act (FMLA) does not guarantee an employee a job after leave. The FMLA provides an employee with only a limited right to restoration to his or her previous employment position. In particular, an employer can avoid liability under the FMLA if it can prove that it “would not have retained an employee had the employee not been on FMLA leave.” *Yashenko v. Harrah’s NC Casino Co., L.L.C.*, 446 F.3d 541 (8th Cir. 2006).

Debtor may pursue claim under FMLA even if it was not listed as an asset in bankruptcy. The Eighth Circuit has ruled that a debtor is not barred from pursuing a Family Medical Leave Act claim by his failure to list the claim as a potential asset in his bankruptcy filing. *Stallings v. Hussmann Corp.*, 447 F.3d 1041 (8th Cir. 2006).

Check Guarantee Company is a debt collector under federal law. The Eighth Circuit has held that the Fair Debt Collection Practices Act applies to a check guarantee company. The court found that although the company was not a creditor, it was a debt collector. *Volden v. Innovative Fin. Sys., Inc.*, 440 F.3d 947 (8th Cir. 2006).

Lawyer foreclosing on deed of trust is a debt collector. The Fourth Circuit has held that a law firm enforcing a deed of trust is a debt collector for purposes of the Fair Debt Collection Practices Act. The court also held that the bona fide error defense applies to errors of law as well as fact. *Wilson v. Draper & Goldberg P.L.L.C.*, 443 F.3d 373 (4th Cir. 2006).

Arbitrator and organization are immune from liability for bias. Arbitration awards may be challenged on appeal based on the bias of the arbitrator. A cause of action for damages, however, may not be brought against the arbitrator or the sponsoring organization for bias or failure to disclose a conflict. *Pullara v. Am. Arbitration Ass'n, Inc.*, 191 S.W.3d 903 (Tex. App.—Texarkana 2006, pet. filed).

Isolated racist comment is not sufficient to create hostile work environment. The Fourth Circuit has held that an employee cannot sue over an isolated racist comment. An isolated racist comment by a co-worker could not be reasonably construed as creating a hostile work environment such that an employee who complained could sue for retaliation when he was fired. *Jordan v. Alternative Res. Corp.*, 458 F.3d 332 (4th Cir. 2006).

\$100 million punitive award vacated in 'light' cigarette case. The Oregon Court of Appeals has overturned a \$100 million punitive award in a light cigarette case, finding that the jury was improperly allowed to consider the harm caused by the defendant in other states. *Estate of Schwarz v. Philip Morris, Inc.*, 135 P.3d 409 (Or. Ct. App. 2006).

Arbitration provision found unconscionable and unenforceable. The Wisconsin Supreme Court has held that an arbitration provision in a loan agreement that was one-sided and presented on a take-it-or-leave-it basis to a person who had little bargaining power is unconscionable. *Wisconsin Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155 (Wis. 2006).

Arbitration clause binding even when one party has right to "opt out." The Texas Supreme Court has enforced an arbitration clause against a homeowner, even though the manufacturer had the unilateral option to opt-out of arbitration and choose to go to court. The court also found the agreement was not illusory, because the manufacturer was not a promisor and therefore was not required to give consideration for the agreement that created its third-party beneficiary status. *In re Palm Harbor Homes Inc.*, 195 S.W.3d 672 (Tex. 2006).

Insured's failure to give timely notice before settling a lawsuit does not automatically justify insurer's refusal to pay. The Texas Court of Appeals found that the insurer produced no evidence that the actions of its insured or the settling carriers caused prejudice, as required by the policy. *Coastal Ref. & Mktg., Inc. v U.S. Fid.*

& Guar. Co., 2006 WL 1459869 (Tex. App.—Houston [14th Dist.] 2006, no pet. h.).

Unpaid worker's compensation premiums not entitled to priority in bankruptcy. The Supreme Court holds claims for unpaid worker's compensation premiums owed by bankrupt employer are not entitled to priority. The Bankruptcy Code accords a priority, among unsecured creditors' claims, for unpaid "wages, salaries, or commissions," and for unpaid contributions to "an employee benefit plan." The Supreme Court held that premiums owed by an employer to a workers' compensation carrier do not fit within either category. *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 126 S. Ct. 2105 (2006).

Sanctions against an attorney are non-dischargeable in bankruptcy. The Second Circuit has held that sanctions in the form of defense costs entered against a lawyer under Rule 11 is a non-dischargeable debt "for willful and malicious injury by the debtor to another" for purposes of Bankruptcy Code Section 523(a)(6). *Ball v. A.O. Smith Corporation*, 451 F.3d 66 (2nd Cir. 2006).

Pacemaker manufacturer not liable for improperly implanted device. An Illinois Appellate Court has ruled that a pacemaker manufacturer had no duty to ensure that its heart device was implanted by qualified personnel at an adequate medical facility. Relying in part on the learned intermediary rule, the court found a medical device manufacturer has no duty to warn physicians of the device's dangers which the medical community generally appreciates and no duty to ensure a qualified doctor performed the surgery. *Kennedy, v Medtronic, Inc.*, 851 N.E.2d 778 (Ill. App. Ct. 2006).

Four year statute of limitation applies to claim for restitution. The Texas appellate court held that claims for restitution for unjust enrichment, like "money had and received", arose out of general assumpsit and are based upon quasi-contract; thus, these claims are properly characterized as based on a debt not evidenced by a writing. *Friberg-Cooper Water Supply Corp. v. Elledge*, 197 S.W.3d 826 (Tex. App.—Fort Worth 2006, pet. filed).

Consumers are not entitled to a copy of their full credit files following a reinvestigation. The Eleventh Circuit considered whether the Fair Credit Reporting Act requires a consumer reporting agency to provide a consumer with his complete file following a reinvestigation of disputed items of his credit history. The court held that the plain language of the Act does not require the disclosure of the complete file to the consumer. The "consumer report" referenced in section 1681i(a)(6)(B)(ii) is not the "consumer's file" because that section states that the required "consumer report" is "based upon the consumer's file." *Nunnally v. Equifax Info. Servs., L.L.C.*, 451 F.3d 768 (11th Cir. 2006).

The Florida high court has ruled that cigarette makers do not have to pay \$145 billion to Florida smokers. The state's top court refused to reinstate a punitive-damage award the companies said would bankrupt them. The court vacated the punitive damages award, unanimously finding it excessive as a matter of law. *Engle v. Liggett Group, Inc.*, 2006 WL 1843363 (Fla. 2006).

Truth in Lending claim not barred by bankruptcy omission. The Eleventh Circuit has ruled that a homeowner can sue a lender for failing to make certain disclosures associated with his mortgage, even though he failed to list the claim as an asset before the confirmation of his bankruptcy case. *Ajaka v. Brooksameric Mortgage Corp.*, 453 F.3d 1339 (11th Cir. 2006).

Court discusses vexatious-litigant statute. The Texas Court of Appeals for the 1st District notes that in addition to the first requirement that there not be a reasonable probability that the plaintiff will prevail in the litigation against the defendant, the vexatious-litigant statute has a second requirement that the defendant prove one of three grounds before a trial court can declare a plaintiff a vexatious litigant. *Douglas v. American Title Co.*, 196 S.W.3d 876 (Tex. App.—Houston [1st Dist.] 2006, no pet. h.).

Texas Supreme Court finds contingency fee arrangement unconscionable. The court finds that an attorney's contingency fee in a series of royalty-claim disputes was unconscionable by providing that the client would pay the fee's present value if the client terminated the relationship. *Hoover Slovacek L.L.P. v. Walton*, 2006 WL 1791694 (Tex. 2006).

County court may not award more than \$5,000 on appeal of small claims court judgment. The judgment of a small claims court may be appealed to a county court, which will try the case de novo. The county court, however, may not render a decision in excess of the jurisdictional limits of the court from which the appeal arose. *Kendzioriski v. Saunders*, 191 S.W.3d 395 (Tex. App.—Austin 2006, no pet. h.).

Plaintiff sanction for frivolous consumer claims. The Seventh Circuit has imposed sanctions on an individual who it found filed frivolous consumer related claims against eBay. The court noted, “[w]hen dealing with a frivolous litigator who, despite due warning or the imposition of sanctions, continues to waste judicial resources, we impose a filing bar preventing the litigant from filing in this court or any federal court in this circuit.” *McCready v. Ebay, Inc.*, 453 F.3d 882 (7th Cir. 2006).

Woman can sue husband for exposing her to AIDS. The California Supreme Court has ruled a woman could sue her husband for exposing her to the risk of AIDS infection without having to prove that he actually knew that he had acquired HIV through his extra-marital activities. *John B. v. Superior Court*, 137 P.3d 153 (Cal. 2006).

Court finds “check” was deceptive. The back of a check and invoice contained small-print disclosures revealing that cashing or depositing the check would constitute agreement to pay a monthly fee for internet access, but the front of the check and the invoice contained no such disclosures. *F.T.C. v. Cyberspace.com L.L.C.*, 453 F.3d 1196 (9th Cir. 2006).

Filing a lawsuit without having the immediate means of proving the debt does not violate the Fair Debt Collection Practices Act. The Sixth Circuit finds that a debt collector who filed a lawsuit without having any available proof that the money was in fact owed did not violate the FDCPA. The court found this was not

harassment or a deceptive practice. *Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324 (6th Cir. 2006).

Parents of golfer struck by lightning can sue golf course. The Kansas Supreme Court has held that a golf course that sounded a horn when there was a dangerous weather condition could be liable if it did not reasonably sound the alarm. *Sall v. T's Inc.*, 136 P.3d 471 (Kan. 2006).

Patient's claims against manufacturer of angioplasty catheter were preempted by Medical Device Amendments for Food and Drug Act. The Second Circuit has held that claims for negligence, breach of warranty, and strict liability were all pre-empted to the extent they alleged liability despite the manufacturer's adherence to standards required by the FDA. *Riegel v. Medtronic, Inc.*, 451 F.3d 104 (2nd Cir. 2006).

Unemployed debtors may want to stay unemployed during their bankruptcy. The Fifth Circuit has held that a bankruptcy court can consider post-petition events -- particularly a debtor's changed employment status -- when deciding whether to dismiss a Chapter 7 petition. *In re Cortez*, 457 F.3d 448 (5th Cir. 2006).

New bankruptcy code section declared unconstitutional. U.S. District Judge David Godbey of Dallas recently ruled that a controversial provision in the new bankruptcy code, restricting the advice bankruptcy lawyers can give to their clients, is unconstitutional. *Hersh v. U.S.*, 347 B.R. 19 (Bankr. N.D. Tex. 2006).

Credit agency sued for not correcting error in consumer file held by another agency. The Fifth Circuit has held that a credit agency may be sued for failing to take steps to correct an error in a credit report, even though the plaintiff's file was "owned" by another agency. *Morris v. Equifax Info. Servs.*, 457 F.3d 460 (5th Cir. 2006).

Collection letter questioning debtor's honesty violates Fair Debt Collection Practices Act. The Seventh Circuit has held that a letter that stated “You are either honest or dishonest you cannot be both,” violates federal law. *McMillan v. Collection Prof'ls, Inc.*, 455 F.3d 754 (7th Cir. 2006).

Class action ban in arbitration clause voided. The New Jersey Supreme Court held that corporations cannot use class action bans in their consumer contracts to avoid liability for cheating consumers. The Court rejected an attempt by a payday lender charging 608% interest to use a class action ban to avoid accountability and struck down the ban as “unconscionable and unenforceable.” *Muhammad v. County Bank of Rehoboth Beach, Delaware*, 2006 WL 2273448 (N.J. 2006).

The Motor Vehicle Franchise Contract Arbitration Fairness Act of 2002, which restricts automobile manufacturers ability to require automobile dealers to arbitrate, does not apply to all disputes. The Second Circuit has held that this law applies only to “motor vehicle franchise contracts” and does not affect arbitration agreements in other types of contracts. *Arciniaga v. General Motors Corp.*, 2006 WL 2260872 (2nd Cir. 2006).

A Plaintiff who sues for legal malpractice cannot recover lost punitive damages. The Illinois Supreme Court has held that even if it was proven that the plaintiff would have recovered punitive damages in the underlying lawsuit, such damages are not recoverable against the attorney in a malpractice suit. *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 2006 WL 1702282 (Ill. 2006).

Mortgage company could charge fee for payoff information. The Eighth circuit held that charging a \$20 fee for payoff information does not violate the Real Estate Settlement Procedures Act. *Watt vs. GMAC Mortgage*, 457 F.3d 781 (8th Cir. 2006).

Employee has no privacy right in at-work computer. The Ninth Circuit has held that an employee has no expectation of privacy in his workplace computer where the employer has implemented a computer monitoring policy. *U.S. vs. Ziegler*, 456 F.3d 1138 (9th Cir. 2006).

Chapter 13 debtor may "cram down" car loan. The Sixth Circuit has ruled that a Chapter 13 debtor whose vehicle was repossessed does not have to pay the full redemption value to regain her car. *In re Curry*, 2006 WL 2286365 (B.A.P. 6th Cir. 2006).

A debtor may waive the protections of the Fair Debt Collection Practices Act, which requires a debt collector to cease communication with the debtor upon written request. The Ninth Circuit further held that for purposes of 15 U.S.C. § 1692g, verification of a debt involves nothing more than the debt collector confirming in writing that the amount being demanded is what the creditor is claiming is owed. *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162 (9th Cir. 2006).

Grandparent visitation statute is constitutional. The Utah Supreme Court has held that state law granting visitation rights to grandparents does not infringe upon a parent's constitutional right to manage the care, control, and custody of a child. *In re Estate of S.T.T.*, 144 P.3d 1083 (Utah 2006).

Look at the facts in determining unconscionability of arbitration clauses. In determining the unconscionability of an arbitration clause, courts should look to facts at the time the clause was signed, not when enforced. *Overstreet v. Contigroup Cos., Inc.*, 462 F.3d 409 (5th Cir. 2006).

Lawyer had no 'expectation of privacy' in firm's computer files. The Massachusetts Supreme Court has ruled that an attorney lacked standing to challenge a police seizure of computer files from the law firm for which he worked. *Commonwealth v. Bryant*, 852 N.E.2d 1072 (Mass. 2006).

Discharge injunction violated by refusal to release lien on car. The First Circuit has held that an auto lender violated the Chapter 7 discharge injunction by refusing to discharge its lien on the debtors' vehicle until they paid the remaining balance on their prepetition loan. *In re Pratt*, 462 F.3d 14 (1st Cir. 2006).

Employer can not enforce waiver in severance package. The Ninth Circuit has ruled that employees who lost their jobs as part of a reduction in force could sue the company for age discrimination,

even though their severance packages purportedly waived their right to sue. *Syverson v. Int'l Bus. Machs. Corp.*, 461 F.3d 1147 (9th Cir. 2006).

Insured can not recover for "diminished value" of car. An insured can't recover for the diminished market value of a vehicle following an auto accident if the insurer has paid for full and adequate repairs. *Davis v. Farmers Ins. Co. of Ariz.*, 142 P.3d 17 (N.M. Ct. App. 2006).

Chapter 7 debtor cannot exclude retirement savings from income. The Ninth Circuit has held that a debtor cannot exclude her regular retirement contributions in determining her disposable income for Chapter 7 bankruptcy protection. *Hebbring v. U.S. Tr.*, 463 F.3d 902 (9th Cir. 2006).

Attorney who filed foreclosure suit can be sued under Fair Debt Collection Practices Act. The Fifth Circuit has held that an attorney who filed a foreclosure action for a client could be sued as a "debt collector" under the Fair Debt Collection Practices Act. *Kaltenbach v. Richards*, 464 F.3d 524 (5th Cir. 2006).

Chapter 13 debtors can't tithe. A bankruptcy court has ruled that Chapter 13 debtors who are above the median income under the bankruptcy reform act's "means test" can not use their disposable income to make charitable donations. *In re Diagostino*, 347 B.R. 116 (Bankr. N.D.N.Y. 2006).

Providing two different rescission disclosure forms may violate Truth in Lending. The Seventh Circuit held that providing two different disclosure forms may have the potential to mislead the ordinary consumer. It also noted that the remedy of rescission may be available even after the note is paid in full. *Handy v. Anchor Mortgage Corp.*, 464 F.3d 760 (7th Cir. 2006).

Debt collector can be sued for threat of legal action. The Third Circuit has held that a debt collector could be sued under the Fair Debt Collection Practices Act for threatening a debtor with legal action when it had no intention of referring the matter to an attorney for collection. *Brown v. Card Serv. Ctr.*, 464 F.3d 450 (3rd Cir. 2006).

Plaintiff injured by golf ball can sue. The Oklahoma Court of Appeals has held that a painter working near a fairway injured by a golf ball may be able to sue the golfer. *Thomas v. Wheat*, 143 P.3d 767 (Okla. Civ. App. 2006).

Class action waiver in arbitration clause is unenforceable. The Illinois Supreme Court has held that a wireless telephone company could not enforce a class action waiver in an arbitration clause contained in its customer service agreement. *Kinkel v. Cingular Wireless L.L.C.*, 223 Ill.2d 1 (Ill. 2006).

A lender who provided incorrect rescission forms can be sued. The Seventh Circuit has held that a borrower could rescind a home loan two years after the fact because at closing, the lender provided two different rescission forms, one of which was inappropriate. *Handy v. Anchor Mortgage Corp.*, 464 F.3d 760 (7th Cir. 2006).

Attorney can not recover fees incurred in collecting fees. A New York appellate court has ruled that an attorney may not enforce a provision in a retainer agreement holding the client liable for fees incurred in the collection of the lawyer's fees. *Ween v. Dow*, 822 N.Y.S.2d 257 (2006).

Bankruptcy Code preempts state law abuse of process claim. The Pennsylvania Supreme Court has held that a state law abuse of process claim based on the filing of a frivolous claim in a bankruptcy proceeding is completely preempted by the Bankruptcy Code. *Stone Crushed P'ship v. Kassab Archbold Jackson & O'Brien*, 908 A.2d 875 (Pa. 2006).

Cable TV not 'utility' under Bankruptcy Code. The Fifth Circuit has ruled that cable television is not a "utility" under the Bankruptcy Code, and therefore a cable provider is not required to continue service to a debtor despite his offer of adequate assurances of future payment. *In re Darby*, 2006 WL 3290286 (5th Cir. 2006).

An individual can not sue under HIPAA. The Fifth Circuit has held that no private right of action exists under the Health Insurance Portability and Accountability Act. *Acara v. Banks*, 2006 WL 3262444 (5th Cir. 2006).

Satellite TV company can sue for piracy. The Fifth Circuit has ruled that a satellite television company has a private right of action to sue for the piracy of satellite TV signals under the Federal Wiretap Act. *DirectTV, Inc. v. Bennett*, 2006 WL 3262442 (5th Cir. 2006).

Legal malpractice claim governed by statewide standard. The Tennessee Supreme Court has held that a legal malpractice claim is governed by a single, statewide professional standard of care, not a standard specific to a certain locality. *Chapman v. Bearfield*, 2006 WL 3162923 (Tenn 2006).

Attorney can be sued for failing to advise client of risk of losing. A California Court of Appeals has held that a lawyer who represented a party in homeowners dispute could be sued for failing to advise his client that her failure to settle exposed her to the risk of having to pay her opponents' attorney's fees, which were well in excess of the original amount in dispute. *Charnay v. Cobert*, 145 Cal. App. 4th 170, 51 Cal. Rptr. 3d 471 (Cal. Ct. App. 2006).

Bankruptcy provision is unconstitutional. A U.S. District Court in Minnesota has ruled that the provisions of the 2005 bankruptcy reform act establishing advertising requirements and placing limitations on how attorneys may advise their clients are unconstitutional. *Milavetz v. United States*, 2006 WL 3524399 (Bankr. D.Minn. 2006).

Claim against debtor who failed to prevent son's death can't be discharged. An Eighth Circuit Bankruptcy Appellate Panel has held that a wrongful death claim against a debtor who failed to take steps to prevent the death of her son at the hands of her boyfriend is not dischargeable. *In re Patch*, 2006 WL 3392743 (B.A.P. 8th Cir. 2006).



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Debtor lacks standing to sue over medical malpractice. The Mississippi Supreme Court has held that a debtor cannot pursue a medical malpractice action because the right to sue belongs to his bankruptcy estate. *Pruitt v. Hancock Medical Center*, 2006 WL 3316972 (Miss. 2006).

A valid "as is" clause disclaims warranties and DTPA claims. A Texas court of appeals has held that a valid "as is" clause disclaims implied warranties, negates causation for DTPA claims, and disclaims the implied warranty of good and workmanlike development. *Welwood v. Cypress Creek Estates*, 205 S.W.3d 722 (Tex. App.—Dallas 2006, no pet. hist.).