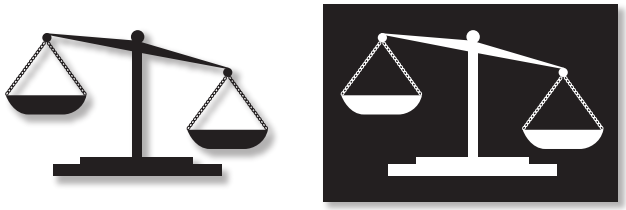

# Consumer News Alert
# Case Update

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 some of the cases highlighted during the past few months. To subscribe and begin receiving your free copy of the *Consumer News Alert* in your mailbox, visit www.peopleslawyer.net

*Borrowers can't pursue rescission class action under TILA.* The First Circuit has held that residential borrowers seeking to rescind their home loans can't pursue class action relief under the Truth in Lending Act. The court stated, "We ground this holding primarily on our conclusion that Congress did not intend rescission suits to receive class-action treatment." *McKenna v. First Horizon Home Loan Corp.*, 2007 WL 210850 (1st Cir. 2007)

*Arbitration awards should not be overturned by viewing the potential conflict of interest of an arbitrator based on a "mere appearance" standard.* In an en banc opinion, the Fifth Circuit concluded "that the Federal Arbitration Act ('FAA') does not mandate the extreme remedy of vacatur for nondisclosure of a trivial past association." *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 2007 WL 111343 (5th Cir. 2007)

*Settlement funds exempt from bankruptcy estate even after investment.* The Sixth Circuit Bankruptcy Appellate Panel has ruled that funds received by a Chapter 7 debtor in a settlement with his disability insurer retained their exempt status even after they were invested in a mutual fund. *In re Alam*, 2006 WL 3816765 (B.A.P. 6th Cir. 2006)

*Airplane may be consumer product covered by the Magnuson Moss Warranty Act.* The Seventh Circuit has noted that although not all airplanes are consumer products under Magnuson-Moss, those used as personal aircraft may be. *Waypoint Aviation Servs., Inc. v. Sandel Avionics, Inc.*, 469 F.3d 1071 (7th Cir. 2006)

*Asbestos claims not subject to single occurrence limit.* The California Court of Appeal has ruled that asbestos claims brought against a manufacturer did not constitute a single "occurrence" limiting the amount of coverage afforded by the company's primary liability insurer. *London Market Insurers v. Truck Ins. Exch.*, 146 Cal. App. 4th 648, 53 Cal. Rptr. 3d 154 (Cal. Ct. App. 2007)

*Trial court abused its discretion in concluding an arbitration clause was procedurally unconscionable.* A Texas Court of Appeals has reversed a lower court finding of unconscionability, finding among other things that "reliance upon an oral representation that is directly contradicted by the express, unambiguous terms of a written agreement between the parties is not justified as a matter of law." *TMI, Inc. v. Brooks*, 2007 WL 43814 (Tex. App.—Houston [14th Dist.] 2007)

*Consequential damages caused by employee dishonesty covered by insurance.* The Montana Supreme Court has ruled that a business is covered for consequential damages stemming from alleged theft committed by its chief financial officer, even though its employee dishonesty policy limited coverage to "direct" losses. *Frontline Processing Corp. v. Am. Econ. Ins. Co.*, 149 P.3d 906 (Mont. 2006)

*Charges that arbitration clause is unfair must be heard locally in court.* In an en banc hearing, the Ninth Circuit held that a one-woman franchise operator in California cannot be forced to go to Boston to challenge a national company's mandatory arbitration clause before an arbitrator in its home town. *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257 (9th Cir. 2006)

*A person who has agreed to arbitrate disputes with one party may in some cases be required to arbitrate related disputes with others.* The Texas Supreme Court has held that a person who seeks to derive a direct benefit from the contract containing an arbitration provision may be equitably estopped from refusing arbitration. *Meyer v. WMCO-GP, L.L.C.*, 2006 WL 3751585, (Tex. 2006)

*The Texas Supreme Court has held that UIM insurance covers prejudgment interest that the underinsured motorist would owe the insured.* At the same time it also ruled that under Chapter 38 of the Civil Practice and Remedies Code, a claim for UIM benefits is not presented until the trial court signs a judgment establishing the negligence and underinsured status of the other motorist. *Brainard v. Trinity Universal Insurance Co.*, 2006 WL 3751572 (Tex. 2006)

*Arbitration class action ban struck down.* The Florida Circuit

Court, affirming the value of class actions to consumers, noted that, "The chance that Ms. Reuter could have obtained competent counsel absent the possibility of class action status or successfully recognized a potential claim that she could pursue without benefit of counsel is effectively zero." *Reuter v. Davis*, 2006 WL 3743016 (Fla. Cir. Ct. 2006)

*Fee for guardian ad litem found unreasonable.* The Texas Supreme Court concluded that a $100,000 fee awarded to a state senator for serving as guardian ad litem for a minor injured in a 2001 accident is not reasonable. *Land Rover U.K. Ltd. v. Hinojosa*, 2006 WL 3691614 (Tex. 2006)

*Nursing home not entitled to arbitrate wrongful death claim.* The Oklahoma Supreme Court has held that a nursing home could not demand arbitration of a wrongful death claim pursuant to a dispute resolution clause in its admissions contract. *Bruner v. Timberlane Manor Ltd. P'ship*, 2006 WL 3593740 (Okla. 2006)

*Discovery rule applies to legal malpractice claim.* The highest court in Maryland has held that the statute of limitations did not bar a legal malpractice claim, even though it had been 14 years since the lawyer failed to include a waiver-of-alimony provision in his client's prenuptial agreement. *Dashiell v. Meeks*, 396 Md. 149, 913 A.2d 10 (Md. 2006)

*Second Circuit places burden of proof on party asserting jurisdiction.* The court held that CAFA did not change the traditional rule and that defendant bears the burden of establishing federal subject matter jurisdiction. Defendant must show that it appears to a "reasonable probability" that the aggregate claims of the plaintiff class are in excess of $ 5 million. *Blockbuster, Inc. v. Galeno*, 472 F.3d 53 (2d Cir. 2006)

*Insurance applicants don't have duty to disclose information that wasn't requested.* The Sixth Circuit has held that under federal common law, applicants for insurance have no duty to disclose undiagnosed symptoms or medical history not specifically requested by an insurance company. *Metropolitan Life Ins. Co. v. Conger*, 2007 WL 91737 (6th Cir. 2007)

*Defendant can't get expert witness fees as "costs."* The Sixth Circuit has held that a defendant that prevailed in a business dispute could not recover its expert witness fees as part of an award of costs. *L & W Supply Corp. v. Acuity*, 2007 WL 148759 (6th Cir. 2007)

*Non-parties required to arbitrate*. A Texas appellate court has held that the deceased's children & parents are bound by an arbitration agreement signed by the deceased under the theory of direct benefit estoppel. In Re Ford Motor Company, 2006 WL 3613173, (Tex. App.—San Antonio 2006)

*Employer can consent to search of employee's computer.* The 9th Circuit has held that although an employee has a reasonable expectation of privacy in his workplace office, his employer retains the right to consent to a search of his office and computer. *U.S. v. Ziegler*, 474 F.3d 1184 (9th Cir. 2006)

*Patient bound by arbitration agreement.*The California Supreme Court has ruled that an arbitration agreement signed when a chiropractor first treated a patient applied to a medical malpractice claim arising from treatment of a different condition two years later. *Reigelsperger v. Siller,* 150 P.3d 764 (Cal. 2007)

*Law firm that handles evictions may be liable under Fair Debt Collection Practices Act.* The New Jersey Supreme Court has held that a law firm that regularly handles evictions may be held liable under the Fair Debt Collection Practices Act. *Hodges v. Feinstein, Raiss, Klein & Bookerr, L.L.C.*, 897 A.2d 1055 (N.J. 2006)

*Social hosts liable for injuries caused by underage drinking.* The South Carolina Supreme Court has held that an adult social host can be held liable for injuries caused by a minor who is served alcohol at a party. *Marcum v. Bowden*, 2007 WL 415672 (S.C. 2007)

*Bankruptcy debtor forfeited his right to convert from Chapter 7 to Chapter 13 by bad-faith concealment of assets.* The United States Supreme Court has held that a debtor does not have an absolute right to convert a Chapter 7 to a Chapter 13 bankruptcy. Marrama v. Citizens Bank of Mass., 127 S.Ct. 1105 (U.S. 2007)

*No homestead exemption for boat.* The Texas Supreme Court ahs ruled that a boat didn't qualify for homestead exemption under state law even though it served as the debtor's primary residence. *Norris v. Thomas*, 215 S.W.3d 851 (Tex. 2007)

*Covering part of license plate can lead to traffic stop and arrest.* The Texas Court of Criminal Appeals held that a motorist driving a vehicle with part of its license plate covered is violating the law. *State v. Johnson*, 2007 WL 461521 (Tex. Crim. App. 2007)

*Arbitrator's award satisfied the "essence" test, which requires, in some logical way, that an arbitration award be derived from the wording or purpose of the parties' contract*. The Fifth Circuit held that the arbitration clause granted the arbitrator sufficient authority to consider the validity of the exculpatory clause, and the arbitrator did not ignore any plainly governing principles of applicable law. *Apache Bohai Corp. LDC v. Texaco China BV*, 480 F.3d 397 (5th Cir. 2007)

*Lawyer without written retainer can recover in quantum meruit.* A New York Appellate Court has ruled that a lawyer who failed to obtain a written retainer agreement or letter of engagement in violation of state rules may still recover the reasonable value of his professional services rendered on a quantum meruit basis. *Seth Rubenstein, P.C. v. Ganea*, 2007 WL 1016998 (N.Y. App. Div. 2007)

*Bankruptcy order on uncontested claim is final judgment.* The 2nd Circuit has held that a bankruptcy order allowing an uncontested proof of claim constitutes a final judgment on the merits giving rise to res judicata. *EDP Med. Comp. Sys., Inc. v. U.S.*, 480 F.3d 621 (2nd Cir. 2007)

*Court affirms finding of DTPA violations*. The appellate court affirmed a jury's finding that an automobile dealer violated the DTPA and that the claims were not a mere breach of contract. Bossier Chrysler-Dodge II, Inc. v. Riley, 2007 WL 765213 (Tex. App.—Waco 2007)

*Car lessee can sue under Magnuson-Moss Act*. The Florida Supreme Court has held that a long-term car lessee who is entitled to enforce a warranty under state lemon law may also sue for breach of warranty under the federal Magnuson-Moss Warranty Act. *Am. Honda Motor Co., Inc. v. Cerasani*, 2007 WL 1074922 (Fla. 2007)