



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

Policy doesn't cover homeowners' hurricane damage. The 5th Circuit has held that an “anti-concurrent-causation” clause in a homeowners’ policy isn’t ambiguous and precludes coverage for the complete destruction of a home by a combination of wind and water during Hurricane Katrina. *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346 (5th Cir. 2007).

Injury victim's claims against an automobile manufacturer are not preempted. The U.S. Court of Appeals for the Fifth Circuit ruled that federal safety regulations do not bar state-law claims seeking to hold a carmaker liable for using unreasonably dangerous glass in car side windows. *O'Hara v. General Motors Corp.*, 2007 U.S. App. LEXIS 26788 (5th Cir. 2007).

Wrong social security number vitiates notice. The 9th Circuit has held that the failure to provide a correct social security number deprived the creditor of notice and the debt was not discharged. *Ellett v. Stanislaus*, 506 F.3d 774 (9th Cir. 2007).

Class action waiver is invalid. The 1st Circuit Court of Appeals has struck down a class action waiver contained in a company-imposed arbitration/dispute resolution program. The court, however did not reach the argument that waivers of class actions themselves violate either the FLSA or public policy. *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49 (1st Cir. 2007).

Debtor's student loans can't be discharged in bankruptcy. The 9th Circuit has held that a Chapter 7 debtor was not entitled to a discharge of his student loan obligation because a Bankruptcy Code amendment that eliminated his right to do so applies retroactively. *In re Lewis*, 506 F.3d 927 (9th Cir. 2007).

Under CAFA, defendant must establish grounds for removal. The Third Circuit has noted that “[W]here the plaintiff has not specifically averred in the complaint that the amount in controversy is less than

the jurisdictional minimum[,] the case must be remanded [only] if it appears to a legal certainty that the plaintiff *cannot* recover the jurisdictional amount.” *Frederico v. Home Depot*, 507 F.3d 188 (3d Cir. 2007).

Court did not err in concluding that plaintiff was not legally entitled to recover attorneys' fees. A Texas court of appeals has noted that although there is no “net-recovery” requirement for collecting attorney’s fees, “the no-net-recovery exception does not apply when the damages awarded by the jury are offset by settlement credits or insurance payment credits.” *Imperial Lofts, Ltd. v. Imperial Woodworks, Inc.*, —5.W.3d—(Tex. App.—Waco, 2007).

Suit over unsolicited faxes is governed by four-year federal statute of limitations. The California Court of Appeals has held that a consumer protection suit brought by a recipient of unsolicited fax advertisements isn’t time-barred because it is subject to the federal “catchall” statute of limitations -- not a shorter state limitations period. *Sznyter v. Malone*, 66 Cal. Rptr. 3d 633 (Cal. Ct. App. 2007).

Landlord liable for emotional distress. A Massachusetts court has held that a landlord could be liable for emotional distress resulting from the wrongful termination of a tenant’s rent subsidy. *Homesavers Council of Greenfield Gardens, Inc. v. Sanchez*, 874 N.E.2d 497 (Mass. App. Ct. 2007).

Letter advising consumer to phone for balance does not violate FDCPA. The 7th Circuit has held that a letter that gives a “total due,” but states that because of interest accrual the consumer should phone for the actual balance does not violate federal law. *Williams v. OSI Educ. Servs. Inc.*, 505 F.3d 675 (7th Cir. 2007).

“As is” clause does not negate Texas Deceptive Trade Practices Act claim. With one judge dissenting, a Texas court of appeals has held that an “as is” clause was ineffective to preclude a claim under the DTPA. *Kupchynsky v. Nardiello*, 230 S.W. 3d 685 (Tex. App.—Dallas, 2007).

A misrepresentation is actionable whether made to the consumer directly, or indirectly through his lawyer. In a case involving four consolidated cases, the 7th Circuit has held that if the consumer is represented by a lawyer, a debt collector must give the same written notice to the lawyer that section 1692g would require, were the consumer unrepresented and the notice sent directly

to him. *Evroy v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769 (7th Cir. 2007).

State consumer protection statute may be preempted. The 2nd Circuit has held that a state consumer protection law prohibiting expiration dates on gift cards may be preempted by federal banking law. *SPGGC, LLC v. Blumenthal*, 505 F.3d 183 (2d Cir. 2007).

Online 'clickwrap' agreement's forum clause is enforceable. The Indiana Court of Appeals held that the forum selection clause in a company's online "clickwrap" agreement is enforceable against an online purchaser and the daughter-in-law whose credit card was used in the transaction. *Adsit Co. v. Gustin*, 874 N.E.2d 1018 (Ind. Ct. App. 2007).

Consumer arbitration is mandated. The Texas Supreme Court has mandated arbitration finding no merit in the seven defenses raised by the consumer. *In re U.S. Home Corp.*, 236 S.W. 3d 761 (Tex. 2007).

Proposed class action settlement rejected. A U.S. District Judge has rejected a proposed coupon settlement and required that the matter proceed to trial. *Figueroa v. Sharper Image Corp.*, 2007 517 F. Supp. 2d 1292 (S.D. Fla. 2007).

Cash from a surrendered whole-life insurance policy is not exempt from a bankruptcy estate under Texas law. The 5th Circuit has held that Texas law does not exempt cash that comes from a whole life policy. The court noted, "Texas did not mean to exempt money from a surrendered whole-life policy, money a beneficiary will certainly never see." *Milligan v. Trautman*, 496 F.3d 366 (5th Cir. 2007).

Law firm not liable for violating Fair Debt Collection Practices Act. The 6th Circuit has ruled that a law firm hired to institute a foreclosure action was not liable for failing to provide a clearer explanation of the homeowner's deadline to request a validation of her debt under federal law. *Fed. Home Loan Mortg. Corp. v. Lamar*, 503 F. 3d 504 (6th Cir. 2007).

Law firm can't be sued by former client. The California Supreme Court has held that the statute of limitations on a legal malpractice claim was not tolled as to an attorney's former law firm and one of its partners for the period that the attorney continued to represent the client at his new firm. *Beal Bank, SSB v. Arter & Hadden, LLP*, 167 P.3d 666 (Cal. 2007).

Cell Phone Company can arbitrate Communications Act claims. The 9th Circuit has held that a cellular telephone company may enforce an arbitration clause in its customer service agreement after it was sued for improper billing in violation of the Federal Communications Act. *Lozano v. AT&T Wireless Servs. Inc.*, 504 F.3d 718 (9th Cir. 2007).

Car dealer's mailing didn't violate Fair Credit Reporting Act. A U.S. District Court in Texas has held that a letter from an automobile dealer offering the recipient pre-approved financing qualified as a "firm offer" that is protected under federal law. *Villagran v. Freeway Ford, Ltd.*, 2007 U.S. Dist. LEXIS 66596 (S.D. Tex. September 10, 2007).

Class waiver may be unenforceable in overtime case. The California Supreme Court has held that a class arbitration waiver in an employment agreement may be unenforceable with respect to a claim for overtime pay. *Gentry v. Superior Court*, 165 P.3d 556 (Cal. 2007).

Statute immunizing rental car businesses is struck down. A U.S. District Court in Florida has struck down a statute which immunizes rental car companies from liability for harm caused by their vehicles for violating the Commerce Clause. *Vanguard Car Rental USA, Inc. v. Huchon*, 2007 U.S. Dist. LEXIS 76399 (S.D. Fla. September 14, 2007).

Company collecting on bounced checks for state attorney is subject to FDCPA. The 11th Circuit has held that a private, for-profit corporation acting as an independent contractor to run a bad check diversion program for the state is not entitled to Eleventh Amendment immunity. *Rosario v. Am. Corrective Counseling Servs.*, 506 F. 3d 1039 (11th Cir. 2007).

Judgment over fiduciary breach may be dischargeable. The 2nd Circuit has held that a state court finding that a debtor breached his fiduciary duty to a former business partner does not preclude the debtor from claiming the resulting judgment was dischargeable. (*In re Hyman*, 502 F.3d 61 (2d Cir. 2007)).

Store sued for providing receipt with card expiration date. A U.S. District Court in Pennsylvania has ruled that a customer can sue a store for including her credit card expiration date on her receipt in violation of the Fair and Accurate Credit Transactions Act, even though she suffered no actual harm and the store argued it didn't act willfully. *Korman v. Walking Co.*, 503 F. Supp. 2d 755 (E.D. Pa. 2007).

Contingency fee reduces legal malpractice award. The Wyoming Supreme Court has held that a plaintiff is entitled to damages that would put him in the same position he would have enjoyed had he been successful. This means the judgment should be reduced by the amount the plaintiff would have paid in attorney's fees. *Horn v. Wooster*, 165 P.3d 69 (Wyo. 2007).

Executive's name in dunning letter violates Fair Debt Collection Practices Act. A Pennsylvania District Court has held that the signature of an executive of the debt collection company violates the Act. *Campuzano-Burgos v. Midland Credit Mgmt.*, 497 F. Supp. 2d 660 (E.D. Pa. 2007).

Executive's name in dunning letter does not violate Fair Debt Collection Practices Act. A Pennsylvania District Court has held that the signature of an executive of the debt collection company does not violate the Act. *Womack v. Nat'l Action Fin. Servs.*, 2007 U.S. Dist. LEXIS 54206 (E.D. Pa. July 26, 2007).

Golf course may be sued for damage from errant shots. The Oregon Court of Appeals has held that a golf course may be liable in negligence for damage caused by errant shots. *MEC Leasing, LLC v. Jarrett*, 164 P.3d 344 (Or. Ct. App. 2007).

Debt collector and firm can be sued for improper venue. A U.S. District Court in Massachusetts has held that a debt collector and its law firm could be sued under the federal Fair Debt Collection Practices Act for filing a collection suit in an improper venue. *Harrington v. CACV of Colo., LLC*, 508 F. Supp. 2d 128 (D. Mass. 2007).

Bankruptcy court may consider high expenses in deciding bad faith. The 3rd Circuit has held that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 does not preclude a court from considering a debtor's high income and expenses in determining whether to dismiss a petition for bad faith. *Perlin v. Hitachi Capital Am. Corp.* 497 F.3d 364 (3d Cir. 2007).

Fair Debt Act doesn't bar communications with debtor's attorney. The 9th Circuit has held that the provision in the Federal Debt Collection Practices Act that a debt collector must "cease collection of the debt" once it is contested does not prohibit continued communications with the debtor's attorney. *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926 (9th Cir. 2007).

Indirect purchaser can sue under New Hampshire consumer statute. The New Hampshire Supreme Court has held that indirect purchasers of consumer products may sue under its state consumer protection act. *LaChance v. United States Smokeless Tobacco Co.*, 931 A.2d 571 (N.H. 2007).

Statutory attorney's lien survives client's bankruptcy. The Maryland Court of Appeals (highest appellate court) has held that a statutory attorney's lien survives a bankruptcy discharge, even if no notice of the intent to claim a lien was given prior to the bankruptcy. *Rhoads v. Sommer*, 931 A.2d 508 (Md. 2007).