



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

The statutory grounds provided by the Federal Arbitration Act (FAA) for expedited judicial review may not be modified by agreement. The United States Supreme Court has held that grounds stated in the FAA constitute the exclusive grounds for prompt vacatur and modification of awards for parties seeking expedited review under the FAA. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (March 25, 2008).

Supreme Court rules on liability in securities fraud case. The United States Supreme Court has held that investors in a company that committed fraud may not impose liability under the Securities Exchange Act against the company’s vendors for their role in the scheme. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., et al.*, 128 S. Ct. 761, 169 L. Ed. 2d 627 (January 15, 2008).

No Sovereign Immunity for DA Contractors. The 9th Circuit has held that private companies that run diversion programs administered by dozens of California district attorneys are now open to legal attack. It ruled that state sovereign immunity does not extend to a private contractor hired by the Santa Clara County DA’s office to go after individuals who passed bad checks. *Del Campo v. Kennedy*, 517 F.3d 1070 (9th Cir. 2008).

Letter constituted “firm offer” of credit. In a putative class action under the Fair Credit Reporting Act (FCRA) challenging the legality of an unsolicited letter to consumers about the offering of credit for a home loan, the First Circuit affirmed summary judgment for defendant, finding defendant’s letter constituted a “firm offer of credit” under FCRA. *Sullivan v. Greenwood Credit Union*, 2008 U.S. App. LEXIS 5774 (1st Cir. March 19, 2008).

\$21M punitive damages award violates due process. The Oregon Supreme Court has reversed a \$21 million punitive damage award for an insurer’s bad faith failure to settle a wrongful death case against its insured, holding it violated due process where the compensatory damages against the insured was less than \$900,000. *Goddard, v. Farmers Ins. Co. of Oregon*, 179 P.3d 645 (Or. 2008).

Class action attorneys’ fee award vacated. The Fifth Circuit stated the district court “abdicated its responsibility” to ensure the fee allocations were fair and reasonable by using “flawed” procedures “inconsistent with well-established class action principles and basic judicial standards of transparency and fairness.” *In re: High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220 (5th Cir. 2008).

Seeking filing fee from debtor may violate Fair Debt Collection Practices Act. A federal District Court has ruled that a law firm may be liable under the Fair Debt Collection Practices Act for seeking a filing fee in addition to an arbitration award on a credit card debt, even though the firm later withdrew its request for the fee. *Eads v. Wolpoff & Abramson, LLP*, 2008 U.S. Dist. LEXIS 26309 (W.D. Tex. February 27, 2008).

Seatbelt design claim preempted by federal law. The Indiana Court of Appeals has held that federal law and seatbelt regulations preempt state-law claims that a vehicle’s rear center seatbelt was defectively designed because it didn’t include a shoulder strap. *Roland v. GM*, 881 N.E.2d 722 (Ind. Ct. App. 2008). *Creditor is only entitled to a “prime-plus” interest rate on its secured claim in Chapter 13.* The 5th Circuit has followed the decision in *Till* and held that the secured party is entitled to interest rate, calculated as prime plus, equal to 7.5%, and not the 17.5% specified in the note. *Drive Fin. Servs., L.P. v. Jordan*, 2008 U.S. App. LEXIS 5334 (5th Cir. March 12, 2008).

A debt collector cannot be sued under the Fair Debt Collection Practices Act for failing to inform credit reporting agencies that a debt was disputed, but may be liable for an idle threat to sue. The 8th Circuit has held that a debt collector has no affirmative obligation to report that a debt is in dispute, but recognized that a threat to sue, without a realistic intent to do so, may violate the FDCPA. *Wilhelm v. Credico, Inc., et al.*, 519 F.3d 416 (8th Cir. 2008).

Striking Bankruptcy petition, rather than dismissing case, was permissible remedy for noncompliance with 109(h). A federal district court has held that striking an individual's Chapter 7 petition and retroactively annulling the automatic stay is a permissible remedy for the individual's noncompliance with the Bankruptcy Code's credit counseling requirement. Recognizing a split of authority, the court noted that Section 109(h) "does not explicitly articulate consequences for a debtor's failure to seek and obtain pre-petition credit counseling; it just describes ineligibility." *Wytenbach v. Comm'r*, 382 B.R. 726 (S.D. Tex. 2008).

Attorney liable as "debt collector" under Fair Debt Collection Practices Act. The 6th Circuit has held that an attorney running a collection agency may be liable as a "debt collector" under the Fair Debt Collection Practices Act for sending a potentially deceptive collection letter. *Kistner v. Law Offices of Michael P. Margelefsky*, 518 F.3d 433 (6th Cir. 2008).

Untimely notice may not defeat insurance coverage. The Texas Supreme Court has held that the failure of an insured to timely notify its insurer of a claim or suit will not defeat coverage unless the insurer was actually prejudiced by the delay. "We hold that an insured's failure to timely notify its insurer of a claim or suit does not defeat coverage if the insurer was not prejudiced by the delay." *PAJ, Inc. v. Hanover Ins. Co.*, 243 S.W.3d 630 (Tex. 2008).

Convenience checks constitute a transfer of property. A Bankruptcy Appellate Panel has held that convenience checks drawn on one credit card account to reduce balance on another credit card account qualified as transfer of interest of debtor in property, with result that trustee could recover payments as preferential transfers. *Meoli v. MBNA Am. Bank, N.A. (In re Wells)*, 82 B.R. 355 (B.A.P. 6th Cir. 2008).

Collection letter violates Fair Debt Act. The 2nd Circuit has held that a debt collector violated federal consumer protection law where its collection letter misled a debtor about the amount of time he had to dispute the amount he owed. *Jacobson v.*

Healthcare Fin. Servs., Inc., 516 F.3d 85 (2d Cir. 2008).

Court must review class action settlement. The 9th Circuit has held that when parties enter into a binding class action settlement agreement, which requires court approval and provide the required notice of the settlement to the district court prior to the district court's entry of the final judgment, the district court should hold a hearing and review the settlement agreement to determine if it is fair, reasonable, and adequate. Failure to do so—even when the district court has already drafted a summary judgment order—is an abuse of discretion. *In re Syncor ERISA Litig.*, 516 F.3d 1095 (9th Cir. 2008).

Attorneys' fees reduced based on size of recovery. The 11th Circuit has affirmed an award of reduced attorneys' fees in a debt collection case, noting that, "Having considered the amount and nature of damages awarded, the court may lawfully award low fees or no fees without reciting the 12 factors bearing on reasonableness." *Thornton v. Wolpoff & Abramson, L.L.P.*, 2008 U.S. App. LEXIS 1604 (11th Cir. January 23, 2008).

A Texas attorney who participated in an arbitration in New York was not barred from sharing a fee even though he wasn't admitted to the practice of law in the state. A U.S. District Court in New York, addressing the applicability of New York's unauthorized practice rules to the arbitration context, has ruled that an

attorney participating in an arbitration was not engaged in the unauthorized practice of law. *Prudential Equity Group, LLC v. Ajamie*, 2008 U.S. Dist. LEXIS 14108 (S.D.N.Y. February 27, 2008).

Arbitration agreement found unenforceable. The 5th Circuit reversed and remanded an arbitrator's judgment where the arbitration agreement was illusory and unenforceable, noting that "most courts that have considered this issue have held that if a party retains the unilateral, unrestricted right to terminate the arbitration agreement, it is illusory." *Morrison v. Amway Corp.*, 517 F.3d 248 (5th Cir. 2008).

National Bank Act pre-empts state law claim. The 9th Circuit has held that state law claims arising out of the use of convenience checks was pre-empted by federal law. *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032 (9th Cir. 2008).

State law bad faith claim is preempted by ERISA. The Arkansas Supreme Court has held that ERISA preempts an employee claim for bad faith arising out of a denial of disability payments. *Selmon v. Metro. Life Ins. Co.*, 2008 Ark. LEXIS 114 (February 21, 2008).

Use of credit card creates contract. A Texas court of appeals relied on South Dakota law to conclude that "the use of an accepted credit card or the issuance of a credit card agreement and the expiration of thirty days from the date of issuance without written notice from a cardholder to cancel" creates a binding contract. *Hinojosa v. Citibank (S.D.), N.A.*, 2008 Tex. App. LEXIS 1532 (March 4, 2008).

Bankruptcy Appellate Panel finds "disposable income" to be only the starting point in determining "projected disposable income." The court saw no reason to believe that Congress intended to eliminate the bankruptcy courts' discretion to deviate from an application of that formula where significant circumstances supported doing so. *In re Lanning*, 380 B.R. 17 (B.A.P. 10th Cir. 2007).

Homestead protection extends to proceeds of sale. The 1st Circuit has held that the Bankruptcy Code's homestead exemption applied to protect the proceeds from a debtor's post-petition sale of his home. *Pasquina v. Cunningham (In re Cunningham)*, 513 F.3d 318 (1st Cir. 2008).

Named plaintiff had no standing to file class action. The Texas Supreme Court reversed a court of appeal's judgment allowing the certification process to continue, finding the named plaintiffs in a putative class action do not have standing to assert their own individual claims because the claim is based on the fear of an injury rather than an actual injury. *DaimlerChrysler Corp. v. Inman*, 2008 Tex. LEXIS 91, 51 Tex. Sup. J. 422 (February 1, 2008).

Pennsylvania consumer protection law is inapplicable to attorney's fraud. The Pennsylvania Supreme Court has held that its state consumer protection and unfair trade practices act doesn't provide a cause of action against a lawyer for fraudulent disbursement of settlement proceeds. *Beyers v. Richmond*, 937 A.2d 1082 (Pa. 2007).

Fraud claim against insurer not barred by release. A California Court of Appeals has held that a homeowners' association that settled its earthquake claims with its insurer and released it from future claims can keep the money and sue for fraud based on

the insurer's failure to inform it of the true policy limits. *Vill. Northridge Homeowners Ass'n v. State Farm Fire & Cas. Co.*, 69 Cal. Rptr. 3d 551 (Cal. Ct. App. 2007).

Court upholds sanctions against attorney and client. A federal district court has upheld sanctions against a client and attorney based on conduct during a deposition. *GMAC Bank v. HTFC Corp.*, 2008 U.S. Dist. LEXIS 15878 (E.D. Pa. February 29, 2008).

Summary judgment for defendants in RESPA case. The 11th Circuit has upheld a summary judgment for the defendant finding that a revised pricing policy for credit reports did not violate RESPA's anti-kickback provision; all of the money charged for the credit reports was paid over to the other defendant; and the increase in price was related to services actually performed for the customers who locked in loans. *Krupa v. Landsafe, Inc.*, 514 F.3d 1153 (11th Cir. 2008).

Bankruptcy exemption cap does not apply to homestead interest established within 1215-day period if debtor acquired title before period. The 5th Circuit has noted that for purposes of the bankruptcy code, the exemption cap does not apply to homestead interest established within 1215-day period if debtor acquired title before period. *Wallace v. Rogers (In re Rogers)*, 513 F.3d 212 (5th Cir. 2008).

Home equity loan penalties do not apply to valid liens that were refinanced. The Texas Supreme Court has limited the applicability of the home equity penalty provisions, noting that it has long been the law in Texas that a party that pays off a valid lien against a homestead is subrogated to the position of the prior lender. *LaSalle Bank Nat'l Ass'n v. White*, 246 S.W.3d 616 (Tex. 2007).

Party appealing decision of arbitrator has burden of proof. A Texas Appellate Court has held that the trial court did not err in holding Statewide Remodeling Inc. to the burden of bringing forth a complete record of the arbitration proceedings, including a transcript of the arbitration hearing. *Statewide Remodeling, Inc. v. Williams*, 244 S.W.3d 564 (Tex. App.—Dallas, 2008).

Punitive damages are available under Title VII despite no compensatory damages. The 5th Circuit has held that an employee seeking relief under Title VII and §1981 may be awarded punitive damages despite receiving no award for compensatory damages. *Abner v. Kansas City S. R.R. Co.*, 513 F.3d 154 (5th Cir. 2008).

Party is prohibited from directly or indirectly filing claims in any federal court or agency in Texas without the express written permission of a judge. The 5th Circuit has held that a vexatious litigant may be enjoined from filing suit. The court noted that, "Federal courts have the power to enjoin plaintiffs from future filings when those plaintiffs consistently abuse the court system and harass their opponents." *Baum v. Blue Moon Ventures, LLC*, 513 F.3d 181 (5th Cir. 2008).

Federal unsolicited merchandise statute does not create private cause of action. The 3rd Circuit has held that the Postal Reorganization Act prohibiting a sender from billing for unordered merchandise does not expressly or impliedly authorize private suits. Only the FTC may enforce the Act. *Wisniewski v. Rodale, Inc.*, 510 F.3d 294 (3d Cir. 2007).

Statutory damages caps is constitutional. The Ohio Supreme Court has held that state tort reform statutes capping non-economic and punitive damage awards in certain tort actions do not violate the Ohio Constitution. *Arbino v. Johnson & Johnson et al.*, 880 N.E.2d 420 (Ohio 2007).

Liability of credit bureau based on identity theft is affirmed. The 4th Circuit has rejected all of Equifax's arguments on liability and most as to emotional distress damages, affirming the award, reducing the emotional damages from \$245,000 to \$150,000, leaving in place the award of \$106,000 for economic damages. *Sloane v. Equifax Info. Servs., LLC*, 510 F.3d 495 (4th Cir. 2007).

Class action ban in arbitration clause is enforceable. The 3rd Circuit has held that an arbitration provision is not unconscionable simply because it requires cases to proceed on an individual basis and not consolidated with any other claim. *Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007).

Class certification reversed. The Texas Supreme Court has reversed certification in a class action suit brought against Best Buy to recover restocking fees deducted from returns made on certain returned merchandise. The court finds individualized inquiry will predominate over common issues of proof, making the claim inappropriate for class certification. *Best Buy Co. v. Barrera*, 2007 Tex. LEXIS 1029, 51 Tex. Sup. J. 170 (November 30, 2007).

Rule forcing lawyers to serve as arbitrators is constitutional. The 9th Circuit has held that a local court rule requiring experienced attorneys to periodically serve as arbitrators for minimal compensation doesn't amount to an unconstitutional taking of property. *Scheeble v. Justices of Supreme Court of Ariz.*, 508 F.3d 887 (9th Cir. 2007).

"No call" phone number protected despite business use. The Colorado Supreme Court has held that a consumer whose home phone was used for business calls didn't lose protection under a state "no-call" statute. *Holcomb v. Jan-Pro Cleaning Sys. of S. Colo.*, 172 P.3d 888 (Colo. 2007).

Grandparent visitation statute is unconstitutional. The Hawaii Supreme Court has held Hawaii's grandparent visitation statute is unconstitutional because it grants non-parents rights without requiring a "harm to the child" showing. *Doe v. Doe*, 172 P.3d 1067 (Haw. 2007).

Fair Credit reporting Act Amendment is not retroactive. The 7th Circuit has held that the amendment to the FCRA that precludes a private right to action may not be retroactively applied to claims that accrued before the statute's effective date. *Killingsworth v. HSBC Bank Nevada, N.A.*, 507 F.3d 614 (7th Cir. 2007).

Med-mal claim against doctor is dischargeable. The 9th Circuit has held that a medical malpractice judgment against a doctor based on his failure to obtain the patient's informed consent is dischargeable in the doctor's subsequent bankruptcy proceeding. *Ditto v. McCurdy*, 510 F.3d 1070 (9th Cir. 2007).

Individual with medical power of attorney can consent to arbitration clause. The Tennessee Supreme Court has held that a medical power of attorney covering "health care decisions" grants the attorney-in-fact power to enter into binding arbitration on behalf of the party who granted the power of attorney. *Owens v. Nat'l Health Corp.*, 2008 Tenn. LEXIS 29 (February 7, 2008).

E-mailed class action waiver not enforceable. The 1st Circuit has held that a class-action waiver in an employment policy that was disseminated by e-mail is unconscionable and can't be enforced with respect to overtime claims brought under the Fair Labor Standards Act. *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49 (1st Cir. 2007).

Company that purchased bad checks is a "Debt Collector." The court rejected argument of defendant, a company that purchased bad checks, that because it purchased the checks involved, it was not a "debt collector" under the FDCPA since it was collecting its own debts, not those of another. The court distinguished those who acquire a debt with the intent to continue to service it from those who buy for collection--the case here. The court also stressed the difference between buying a debt, which is not in default from buying one which was in default when acquired. *FTC v. Check Investors, Inc.*, 502 F.3d 159 (3d Cir. 2007).

Attorney must disgorge fees. The 9th Circuit has held that an attorney failed to honor his legal and ethical obligations and the bankruptcy court did not abuse its discretion in disgorging him of his attorney's fees nor in sanctioning him. *Hale v. U.S. Trustee*, 509 F.3d 1139 (9th Cir. 2007).

Liquidated Damages clause precludes duty to mitigate harm. Maryland's highest court has held that a party to a contract with a liquidated damages clause does not have to mitigate damages when the other party breaches the agreement. *Barrie School v. Patch*, 933 A.2d 382 (Md. 2007).

Volunteer assistant coach injured in softball game can't sue. A Texas Appellate Court held that the inherent risk doctrine limits liability of a head coach and league for an injury caused when a bat slipped out of the hand of the head coach and injured the assistant coach. *Chrismon v. Brown*, 46 S.W.3d 102 (Tex. App.—Houston 2007).

Class action ban in arbitration agreement is invalid. A Florida appeals court struck down a class action ban in an auto lease agreement. Among other things, the ruling was based on the fact that application of the ban would "dramatically undermine" the statute's "private enforcement mechanisms." *S.D.S. Autos, Inc. v. Chrzanowski*, 976 So.2d 600 (Fla. Dt. Ct. App. 2007).

Federal auto window standards don't preempt claim. The 5th Circuit has held that compliance with a federal standard for window glazing didn't preempt a lawsuit claiming the failure to use advanced glazing technology caused a child's injuries in a rollover accident. *O'Hara v. GM*, 508 F.3d 753 (5th Cir. 2007).

Congress did not waive the sovereign immunity of the United States by enacting the Fair Debt Collection Practices Act (FDCPA). The 5th Circuit has held that the Department of Education is not subject to liability under the Fair Debt Collection Practices Act. *Wagstaff v. U.S. Dep't of Educ.*, 509 F.3d 661 (5th Cir. 2007).

Private action available for satellite signal piracy. The 3rd Circuit has held that a private right of action exists under the Federal Communications Act for the piracy of encrypted satellite television transmissions. *DIRECTV Inc. v. Seijas*, 508 F.3d 123 (3d Cir. 2007).