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.

UNITED STATES COURTS OF APPEALS

Class action alleging failure to warn claim not preempted by FDA inaction. The Third Circuit noted the "lawsuit does not conflict with the FDA's 'regulatory scheme' for the risks posed by mercury in fish or the warnings appropriate for that risk because the FDA simply has not regulated the matter." Fellner v. Tri-Union Seafoods, LLC, 539 F.3d 237 (3d Cir. 2008).

Federal law does not preempt personal injury claims based on mercury poisoning from canned tuna. Relying heavily on *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002). The Third Circuit unanimously rejected the argument that federal law preempts personal injury failure-to-warn claims related to mercury poisoning from canned tuna fish. Fellner v. Tri-Union Seafoods, LLC, 539 F.3d 237 (3d Cir. 2008).

Lender didn't waive TILA "accuracy" defense. The Third Circuit has found that a mortgage lender didn't waive its defense that its loan disclosures were sufficiently accurate to avoid liability under the federal Truth in Lending Act. The court held that "the defense is general, and that a defendant need not specifically raise the Act's tolerances provision in order to avoid liability for disclosure errors that fall within its range." Sterten v. Option One Mortgage Corp., 546 F.3d 278 (3d Cir. 2008).

Unpaid escrow payments are "claim" in bankruptcy. The Fifth Circuit has held that unpaid escrow payments that accumulate pre-petition in the year that a bankruptcy petition is filed, and which the creditor had a right to collect under the loan documents, constitute a "claim" under the Bankruptcy Code. Campbell v. Countrywide Home Loans Inc., 545 F.3d 348 (5th Cir. 2008).

Collection of amounts due did not violate automatic stay. The Fifth Circuit has held that although certain unpaid amounts due under a security agreement were claims under the Bankruptcy Code, attempts to collect those amounts did not violate the automatic stay. Campbell v. Countrywide Home Loans Inc., 545 F.3d 348 (5th Cir. 2008).

District Court had subject-matter jurisdiction of claim under Telephone Consumer Protection Act, but class certification was improper. The Fifth Circuit found that the amount in controversy in excess of $5 million gave the court jurisdiction, but denied class certification based on the plaintiff's failure to show a way to establishing classwide lack of consent. Gene & Gene LLC v. Biopay LLC, 541 F.3d 318 (5th Cir. 2008).

Bankruptcy court's refusal to avoid transfers made by debtor to one of its creditors just prior to its bankruptcy filing is affirmed due to state constructive trust law. The Fifth Circuit noted that "[b]ecause the creditor in this case would have received the same amount in a hypothetical Chapter 7 proceeding as a result of Texas construction trust fund law as it did in the allegedly preferential transfers, we affirm the district court's decision to refuse to avoid the transfers." *In re* NA Flash Found., Inc., 541 F.3d 385 (5th Cir. 2008).

The bankruptcy court did not abuse its discretion in imposing sanctions. The Fifth Circuit noted that "it is well-settled that a federal court, acting under its inherent authority, may impose sanctions against litigants or lawyers appearing before the court so long as the court makes a specific finding that they engaged in bad faith conduct." *In re* Yorkshire LLC, 540 F.3d 328 (5th Cir. 2008).

Payday lender didn't violate bankruptcy stay. The Sixth Circuit has held that a "payday" lender didn't violate the automatic stay in a Chapter 13 case when it cashed a post-dated check written by the debtor before she filed for bankruptcy. *In re* Meadows, 396 B.R. 485 (B.A.P. 6th Cir. 2008).

Debt collector can rely on "bona fide error" defense. The Sixth Circuit has held that misinforming a debtor that her dispute of a

mortgage payment must be in writing, even though the Fair Debt Collection Practices Act does not require a written dispute, is covered by the "bona fide error" defense to the Act. Jerman v. Carlisle, 538 F.3d 469 (6th Cir. 2008).

TILA class action certification denied. The Seventh Circuit has held that a class action can't be maintained for claims seeking rescission under the Truth in Lending Act. Andrews v. Chevy Chase Bank, 545 F.3d 570 (7th Cir. 2008).

False advertising class action decertified. The Seventh Circuit held certification was improper because the court cannot presume reliance and would require individual hearings and proof. Thorogood v. Sears, Roebuck & Co., 547 F.3d 742 (7th Cir. 2008).

Driving not a 'major life activity' under ADA. The Tenth Circuit has held that driving is not a major life activity under the Americans with Disabilities Act, even in rural Wyoming, where public transportation is virtually nonexistent and distances between towns is measured by hours rather than miles. Kellogg v. Energy Safety Servs., 544 F.3d 1121 (10th Cir. 2008).

Debt collector can enforce arbitration provision in credit card agreement. The Eight Circuit has held that a debt collector and its law firm may enforce an arbitration provision in a credit card agreement when they were sued for violation of federal debt collection laws. Koch v. Compucredit Corp., 543 F.3d 460 (8th Cir. 2008).

District court properly dismissed class action and granted defense motion to compel arbitration on an individual basis. The Eight Circuit has affirmed the district court, finding that the class action waiver was not substantively or procedurally unconscionable . Pleasants v. Am. Express Co., 541 F.3d 853 (8th Cir. 2008).

Underinsured motorist claim part of bankruptcy estate. The Eleventh Circuit has held that a claim for underinsured motorist benefits arising after a bankruptcy plan has been confirmed, but before payments are complete, becomes property of the estate. Waldron v. Brown, 536 F.3d 1239 (11th Cir. 2008).

$22 million TILA class award overturned. The Eleventh Circuit has ruled that a class of consumers who sued a lender for making a mistake in disclosing its fees was not entitled to restitution under the federal Truth in Lending Act. Christ v. Beneficial Corp., 547 F.3d 1292 (11th Cir. 2008).

Debt collector's phone calls violate debt collection law. A U.S. District Court in Illinois has held that a debt collector's calls following a cease and desist letter violate the FDCPA, even though they did not specifically reference the debt. Ramirez v. Apex Financial Mgmt., LLC, 567 F. Supp. 2d 1035 (N.D. Ill. 2008).

UNITED STATES DISTRICT COURTS

Website owner's removal of arbitration clause is binding, even absent acknowledgement. A U.S. District Court in Maryland has held that a website operator who removed an arbitration clause from its terms of service may not compel arbitration by arguing the removal was invalid because users never acknowledged it. Harold H. Huggins Realty, Inc. v. FNC, Inc., 575 F. Supp. 2d 696 (D. Md. 2008).

Plaintiff awarded enhanced attorney fees under Fair Debt Act. With a good discussion of fee-shifting statutes, a U.S. District Court in Ohio has awarded enhanced attorneys fees in a suit against a law firm that tried to garnish social security payments. Lee v. Javitch, Block & Rathbone, LLP, 568 F. Supp. 2d 770 (S.D. Ohio 2008).

Attorney's $20M lawsuit against casinos dismissed. A federal judge in New Jersey dismissed a $20 million racketeering lawsuit against seven casinos by a former New York City attorney who said they had a duty to stop her from gambling. Taveras v. Resorts Int'l Hotel, Inc., 2008 U.S. Dist. LEXIS 71670 (D.N.J. 2008).

DTPA claim based on sale of returned product sustained. Plaintiff survived Wal-Mart's motion for summary judgment as to plaintiff's DTPA claim that Wal-Mart failed to inform him that a grinder he purchased had been used and reconditioned. Jackson v. Wal-Mart Assocs., Inc., 2008 U.S. Dist. LEXIS 64197 (N.D. Tex. 2008).

STATE COURTS

Construction firm can enforce damages cap limiting liability to fees paid. The Arizona Supreme Court has held that public policy does not prevent a construction contractor from enforcing a limitation-of-liability provision in its service contract when it was successfully sued for negligence. 1800 Ocotillo, LLC v. The WLB Group, Inc., 196 P.3d 222 (2008).

Fair Credit Billing Act places burden on credit card issuer to show disputed charge was authorized. An Arkansas Appellate Court has held that the FCBA should be liberally construed in favor of the consumer and the burden of showing authorized use rests with the insurer. Danner v. Discover Bank, 99 Ark. App. 71, 257 S.W.3d 113 (Ct. App. 2008).

Seat belt suit against automaker preempted by National Traffic Motor Vehicle Safety Act. A California court has held that a tort claim against a manufacturer for not installing a combination lap/shoulder belt in a vehicle's middle backseat is preempted by a federal motor vehicle regulation. Williamson v. Mazda Motor of America, Inc., 2008 Cal. App. LEXIS 2269 (Ct. App. 2008).

Drug users can sue for consumer fraud. An Illinois Appellate court has ruled that plaintiffs who alleged they were deceived into purchasing Baycol can sue for consumer fraud, even though they did not directly rely on claims made by the drug's maker in its advertising. De Bouse v. Bayer AG, 2008 Ill. App. LEXIS 1012 (App. Ct. 2008).

Insurer not vicariously liable for insured's attorney. The Kentucky Court of Appeals has held that an insurer was not vicariously liable for the conduct of an attorney the company hired to represent its insured. Cincinnati Ins. Co. v. Hofmeister, 2008 Ky. App. LEXIS 313 (Ct. App. 2008).

Publisher liable for misleading Yellow Pages advertisement. The Oregon Supreme Court has held that a Yellow Pages publisher could be liable for fraud where an advertisement it published misrepresented the credentials of a plastic surgeon who botched a plaintiff's liposuction. Knepper v. Brown, 345 Or. 320 (2008).

Bank can be sued for identity theft prosecution. A New Jersey appellate court has held that a bank can be sued for failing to conduct a reasonable investigation before initiating a criminal complaint

against an identity theft victim. Brunson v. Affinity Fed. Credit Union, 402 N.J. Super. 430, 954 A.2d 550 (Super. Ct. App. Div. 2008).

New Jersey Consumer Fraud Act applies to bank that fails to make investment as promised. The Appellate Division Panel ruled that the client could pursue the claim because the employee failed to perform a service as advertised. The court rejected an argument that the statute does not apply to securities. The court noted that the claim was the bank failed to invest the money at all, not that it invested it badly or misled the plaintiff into investing in a bogus company. Lee v. First Union Nat'l Bank, 402 N.J. Super. 346, 954 A.2d 499 (Super. Ct. App. Div. 2008).

Consumer can recover $500 per fax. A New Jersey appellate court has held that a person who received multiple unsolicited faxes from the same phone number, but stating they were from different contractors, may recover $500 in damages for each fax. The plaintiff was not required to prove any actual damage to recover the $500 penalty. Meyer v. Howard S. Bizenholtz Constr. Servs., 402 N.J. Super. 1, 952 A.2d 507 (Super. Ct. App. Div. 2008).

Debt collector liable for filing in improper venue. The New Jersey Appellate Division has found that a law firm violated federal law when it filed a debt collection action where the creditor has its primary place of business, rather than where the debtor lived or where he signed the promissory notes underlying his debt. Rutgers-State Univ. v. Fogel, 958 A. 2d 1014 (Super. Ct. App. Div. 2008).

Express warranties at time of sale trump online digital license agreement. A New York Court has held that warranty limitations contained in an online digital license agreement that a software purchaser did not have an opportunity to see and never assented to are not binding, and do not override other express warranties made at the time of sale. That a license agreement exists is not enough to override express warranties; the purchaser must have had a chance to read its terms, or else they are not binding. Jesmer v. Retail Magic, Inc., 55 A.D.3d 171, 863 N.Y.S.2d 737, 863 N.Y.S. 2d 737 (App. Div. 2008).

Justice court has jurisdiction over eviction suit in Texas. Texas Government Code §24.471(b) does not authorize, nor could it authorize, consistent with Texas Property Code §24.004, trial of a forcible detainer suit in the 294th district court. It's the Berrys, LLC v. Edom Corner, LLC, 2008 Tex. App. LEXIS 8195 (Tex. App.—Amarillo Oct. 28, 2008, no pet. h.).

Discharged attorney entitled to contingency fee. Because attorney was hired on a contingency-fee basis and was discharged without cause, he was entitled to recover as damages the fee to which he would have been entitled had Reynolds not discharged him: one-third of the uninsured motorist benefits, or $33,333.33. Reynolds v. Nagely, 262 S.W.3d 521 (Tex. App.—Dallas 2008, no pet. h.).

Decedent's children deemed "consumers" regarding a Texas DTPA claim against funeral home for relocating decedent's body to new burial plot without family's consent. A Texas court of appeals has held that because Texas courts have allowed immediate family members to bring a common-law action for mishandling a corpse, family members should also be considered consumers under the DTPA. Serv. Corp. Int'l v. Aragon, 268 S.W. 3d 112 (Tex. App.—Eastland Aug. 07, 2008, no pet. h.).

Disclaimer contained in "clickwrap agreement" is ineffective against implied warranty claims. A Texas court of appeals has held that a "clickwrap agreement" that the plaintiff had to digitally accept before it could download and install the software at issue—was ineffective against plaintiff's implied warranty claims because the disclaimer was not "conspicuous" as a matter of law. Fieldtech Avionics & Instruments, Inc. v. Component Control.Com, Inc., 262 S.W.3d 813 (Tex. App.—Fort Worth 2008, no pet. h.).

Debt collector acted knowingly under Texas DTPA. A Texas court of appeals has found that based on his 13 years of experience, a debt collector acted knowingly and therefore an award of mental anguish damages was authorized. The court also found that the collector failed to establish the bona fide error defense under the FDCPA. CA Partners v. Spears, 2008 Tex. App. LEXIS 6789 (Tex. App.—Houston [14th Dist.] Aug 21, 2008, no pet. h.).

Arbitration waived. A Texas court of appeals has held that parties who conduct full discovery, file motions going to the merits, and seek arbitration only on the eve of trial waive any contractual right to arbitration. Citizens Nat'l Bank v. Bryce, 2008 Tex. App. LEXIS 8313 (Tex. App.—Tyler Nov. 05, 2008, no pet. h.).

To prevail in a forcible detainer suit (eviction), it is unnecessary for the plaintiff to prove title to the property. A Texas court of appeals has held that a plaintiff is only required to present sufficient evidence of ownership to demonstrate a superior right to immediate possession, not necessarily title. Elwell v. Countrywide Home Loans Inc., 267 S.W. 3d 566 (Tex. App.—Dallas 2008, no pet. h.).

Debtor may be able to recover on undisclosed claim. The Washington Supreme Court has ruled that a Chapter 7 debtor is not necessarily precluded from recovering part of an award that the bankruptcy trustee might obtain for a childhood abuse claim that the debtor failed to disclose as an asset. Miller v. Campbell, 192 P.3d 352 (Wash. 2008).