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 SUPREME COURT

Supreme Court holds smokers' consumer suit not preempted by federal law. In a decision that could have wide-ranging impact, the United States Supreme Court held that federal law neither expressly or impliedly preempts a lawsuit filed under the Maine Unfair Trade Practices Act by Maine smokers of Marlboro Lights and Cambridge Lights cigarettes. The suit claims the tobacco company deceptively used the labels "light" and "low tar" on the products, knowing that they were just as dangerous as other cigarettes. *Altria Group Inc., v. Good*, 129 S. Ct. 538 (2008).

Union pact can mandate arbitration. The United States Supreme Court held, in a split decision, that a clause in a collective bargaining agreement that requires arbitration of employees' age bias claims is enforceable as a matter of federal law. *14 Penn Place LLC v. Pyett*, 2009 U.S. Lexis 2497 (Apr. 1, 2009).

Justices rule in Wyeth drug preemption case. In a much anticipated case, the United States Supreme Court held that a state law tort claim is not preempted by federal drug labeling law. The court rejected Wyeth's claim that it could not comply with both the state-law duties underlying those claims and its federal labeling duties. *Wyeth v. Levine*, 2009 U.S. LEXIS 1774 (Mar. 4, 2009).

UNITED STATES COURTS OF APPEALS

Class action ban in commercial arbitration clause unenforceable. The U.S. Court of Appeals for the Second Circuit stated, "We conclude that, on the record before us, the plaintiffs have adequately demonstrated that the class action waiver provision at issue should not be enforced because enforcement of the clause would effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs." The court held that "the class action waiver in the Card Acceptance Agreement cannot be enforced in this case because to do so would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery." *In Re Am. Express Merch. Litig.*, 554 F.3d 300 (2nd Cir. 2009).

Class action ban struck down. The U.S. Court of Appeals for the Third Circuit rejected a credit card company's arguments that federal preemption, its mandatory arbitration clause banning class actions, and the Utah choice-of-law provision in American Express's agreement allow it to bar New Jersey consumers from bringing class actions against it. *Homa v. Am. Express Comp.*, 2009 U.S. App. LEXIS 3688 (3d Cir. Feb, 24, 2009).

Balance transfer can be set aside in bankruptcy. The Sixth Circuit held that a transfer of funds made by a debtor's use of balance transfer checks can be set aside in her bankruptcy case as a preference. *Yoppolo v. MBNA Am. Bank,* 2009 U.S. App. Lexis 6419 (6th Cir. Mar. 27, 2009).

Bankrupt debtor personally liable for debt. The Fifth Circuit held that a bankrupt debtor is personally liable for non-dischargeable debt arising out of misrepresentations that benefitted his company. The court found he was personally liable for the debt under Texas common law, which holds a corporate agent liable for his misrepresentations made on behalf of the corporation. *Morrison v. W. Builders of Amarillo, Inc.*, 555 F.3d 473 (5th Cir. 2009).

Injured airline passenger's suit not preempted. The Ninth Circuit held that the Federal Aviation Law does not preempt a personal injury claims brought by a passenger who fell from an airplane's stairs. *Martin v. Midwest Express Holdings Inc.*, 555 F.3d 806 (9th Cir. 2009).

NYC's calorie disclosure regulation isn't preempted. The Second Circuit held that Federal food labeling law doesn't preempt a New York City regulation requiring certain restaurant chains to post calorie content information. *N.Y State Rest. Ass'n v. N.Y. City Board of Health*, 556 F.3d 114 (2nd Cir. 2009).

Manifest disregard of the law is not a valid, non-statutory basis for vacating an aribtration award subject to the Federal Arbitration Act. The U.S. Court of Appeals for the Fifth Circuit noted that its ruling was demanded by the reasoning of the Supreme Court's decision last year in *Hall Street Associates v. Mattel*, 128 S. Ct. 1396 (2008). "The question before us now is whether, under the FAA, manifest disregard of the law remains valid, as an independent ground for vacatur, after Hall Street. The answer seems clear. Hall Street unequivocally held that the statutory grounds are the exclusive means for vacatur under the FAA. Our case law defines manifest disregard of the law as a nonstatutory ground for vacatur. Thus, to the extent that manifest disregard of the law constitutes a nonstatutory ground for vacatur, it is no longer a basis for vacating awards under the FAA." *Citigroup Global Mrkts v. Bacon*, 2009 U.S. App. LEXIS 4543 (5th Cir. Mar. 5, 2009).

Rate hike does not violate TILA. The Seventh Circuit held that a bank can apply penalty interest rates to the entire billing cycle in which a consumer's default occurs. The court noted, "So far one court of appeals and at least six district courts have interpreted the ambiguous Comment 1 to the ambiguous §226.9(c). All have held, as our district court did, that banks may apply higher, penalty rates of interest to the entire billing cycle in which the consumer's default occurs. *Swanson v. Bank of Am. N.A*, 2009 U.S. App. LEXIS 5812 (7th Cir. Mar. 19, 2009).

Collection letter doesn't violate Fair Debt Act. The Seventh Circuit held that a collection letter didn't violate federal consumer protection law -- even though the amount stated for "interest due" did not accurately state the total amount of interest that had accrued on an overdue credit card account. *Hahn v. Triumph P'ships*, 2009 U.S. App. LEXIS 5113 (7th Cir. Mar. 4, 2009).

Borrowers have extended right to rescind mortgage. The Eights Circuit held that homeowners had an extended, three-year right to rescind their mortgage because their lender failed to provide clear notice of their three-day loan cancellation rights under federal law. *Rand Corp. v. Moua*, 2009 U.S. App. LEXIS 5817 (8th Cir. Mar. 20, 2009).

A provision in the Bankruptcy Abuse Prevention and Consumer Protection Act that forbids attorneys to advise clients to incur debt prior to filing for bankruptcy is constitutional. The Fifth Circuit stated that, "To avoid potential constitutional questions regarding §526(a)(4)'s restrictions on speech, this court construes the statute to prevent only a debt relief agency's advice to a debtor to incur debt in contemplation of bankruptcy when doing so would be an abuse of the bankruptcy system. In so interpreting the statute, we avoid the constitutionality questions raised by [the plaintiff], and conclude that the statute only affects unprotected speech." *Hersh v. U.S.*, 553 F.3d 743 (5th Cir. 2008).

Homeowner can sue over mistake in flood designation. The Fifth Circuit held that a homeowner could pursue negligence claims against a company that mistakenly determined that her property was not in a federal flood zone and, therefore, didn't need flood insurance. *Paul v. Landsafe Flood Determination Inc.*, 550 F.3d 511(5th Cir. 2008).

The Equal Credit Opportunity Act's limitations period is triggered by occurrence of the event not discovery. The Fifth Circuit held that the discovery rule does not apply to a claim under the Equal Credit Opportunity Act. *Archer v. Nissan Motor Acceptance Corp.*, 550 F.3d 506 (5th Cir. 2008).

Debt collector did not violate FDCPA. The Seventh Circuit noted that "One who acquires a 'debt in default' is categorically not a creditor; one who acquires a 'debt not in default' is categorically not a debt collector." It also found that the debt collector's validation notice does not violate the FDCPA. *Mckinney v. Cadleway Props. Inc.,* 548 F.3d 496 (7th Cir. 2008).

Punitive damages awarded on a 1-1 ratio. The Third Circuit reduced a punitive damage award, noting that in most cases where the plaintiff wins a "substantial" compensatory award and the damages were purely economic, a 1-1 ratio should apply. *Jurinko v. Med. Protective Co.* 2008 U.S. App. LEXIS 27016 (3d Cir. Dec. 30, 2008).

Home borrowers can sue over title fees. The Sixth Circuit held that home borrowers had standing to claim that their title fees violated federal consumer protection law (RESPA) -- even though they failed to allege that they were subjected to any actual overcharges. *Carter v. Welles-Bowen Realty, Inc.,* 553 F.3d 979 (6th Cir. 2009).

Counter-defendant cannot remove under Class Action Fairness Act. In a split decision, the Fourth Circuit held that the Class Action Fairness Act's removal provision, does not permit a counter-defendant to remove a class action counterclaim to federal court. The case presents an issue of first impression — whether a party joined as a defendant to a counterclaim (the "additional counter-defendant") may remove the case to federal court solely because the counterclaim satisfies the jurisdictional requirements of the Class Action Fairness Act of 2005. *Palisades Collections v. Short*, 2009 U.S. App. LEXIS 678 (4th Cir., Jan. 15, 2009).

Credit card payments are avoidable transfers. The tenth Circuit held that Debtors made avoidable, preferential transfers of assets when they used certain credit cards to make payments on other credit card accounts shortly before they filed for bankruptcy. The court noted that, "It is essentially the same as if Debtors had drawn on their Capital One line of credit, deposited the proceeds into an account within their control, and then wrote a check to *In Re Marshall,* 550 F.3d 1251 (10th Cir. 2008).

Firm's collection fee violates Fair Debt Act. The Seventh Circuit found that a debt collector violated federal law by charging debtors a 15 percent collection fee. *Seeger v. Afni, Inc.,* 548 F.3d 1108 (7th Cir. 2008).

Dunning letters signed by corporate officers did not violate FDCPA. The Third Circuit reversed the district court, holding that letters did not violate the FDCPA because they were plainly sent on behalf of corporation and not individuals. The court noted that while the officers were deemed to have authorized the letters, they were not attorneys they did not actually write or sign the letters, and the letters were sent without the officers' knowledge. The court, therefore, answered in the negative the question certified by the district court, "Does it violate the FDCPA for a senior officer of the debt collector, who had no personal involvement in the collection of the debts, to sign dunning letters addressed to putative debtors? *Campuzano-Burgos v. Midland Credit Mgmt. Inc.*, 550 F.3d 294, 296 (3d Cir. 2008).

UNITED STATES DISTRICT COURTS

Incarceration is not a "disability" under Bankruptcy Code. A New York District Court held that an incarcerated debtor is not, by virtue of his imprisonment, disabled and, therefore, exempt from the Bankruptcy Code's credit counseling requirement. *In re Hubel*, 395 B.R. 823 (N.D.N.Y. 2008).

Class action based on untimely filing of lawsuit goes forward. A district court is Florida denied the defendants' motion to dismiss claim based on filing suit after the statute of limitations has run. The court upheld the plaintiff's allegations that Defendants' practice of attempting to collect on debts after expiration of the applicable statute of limitations and Defendants' practice regarding attorney's fees runs afoul of the FDCPA. *Gaisser v. Portfolio Recovery Assoc., LLC*, 571 F.Supp.2d 1273 (S.D. Fla. 2008).

Diet drug claims preempted by federal law. Notwithstanding the recent decision in Myeth v. Levine, a U.S. District Court in Ohio ruled that product liability claims over the diet drug Redux are preempted by federal law. *Longs v. Wyeth*, 536 F. Supp. 2d 843 (N.D. Ohio 2008).

Online Payment Confirmations Not Bound by FACTA's Receipt Restrictions. A federal court in the southern district of Florida held that online retailers are not required to comply with terms in the Fair and Accurate Credit Transaction Act that prohibit the printing of credit card expiration dates on receipts. The court considered holdings going both ways, but concluded by examining the statute in context that FACTA's restriction on "printing" credit card information on receipts, at 15 U.S.C. § 1681(c), was intended to cover paper receipts printed by merchants' cash registers, not payment confirmations displayed on-screen after an Internet purchase. *Smith v. Zazzle.com Inc.*, 589 F. Supp. 2d 1345 (S.D. Fla. 2008).

Firm may be sued over customer info found in dumpster. A U.S. District Court in Louisiana held that a tax preparation business may be liable for discarding a customer's personal information in a dumpster -- even though the plaintiff suffered no losses attributable to identity theft. *Pinero v. Jackson Hewitt Tax Serv.*, 594 F. Supp. 2d 710 (E.D. La. 2008).

Arbitration clause granting unequal power and waiving legal rights deemed unconscionable. The U.S. District Court for the Northern District of California held that an arbitration clause granting a franchisor the ability to sue in court while requiring a franchisee to arbitrate, to waive punitive damages, and to bring all actions within one year is substantively unconscionable under California law. *Bencharsky v. Cottman Transmission Sys. LLC,* 2009 U.S. Dist. LEXIS 14786 (N.D. Cal. Feb. 10, 2009).

Arbitration Agreement With Small Claims Option Held Not Unconscionable. A federal district court in West Virginia held that an agreement in a cell phone service plan that requires parties to either arbitrate or pursue actions in small claims court is not unconscionable merely because it precludes bringing actions for large sums to trial *Strawn v. AT&T Mobility, Inc.*, 593 F. Supp. 2d 894 (S.D. W.Va. 2009).

STATE COURTS

Car dealer did not misrepresent the nature of the dealer's inventory tax. A Texas appellate court held that as a matter of law, an auto dealer made no misrepresentation regarding the dealer's inventory tax, and the trial court did not err by granting summary judgment for the dealer. *Gifford v. Don Davis Auto, Inc.*, 274 S.W.3d 890 Tex. App.—Fort Worth 2008, no pet. h.).

Dental patient can't sue for use of cow bone in graft under state consumer protection act. The Washington Supreme Court held that a dental patient can't sue under a state consumer protection law for her dentist's use of cow bone for grafting, even though she specifically requested that no animal products be used. The noted that, "The term 'trade' as used by the Consumer Protection Act includes only the entrepreneurial or commercial aspects of professional services, not the substantive quality of services provided." *Michael v. Mosquera-Lacy*, 165 Wn.2d 595 (Wash. 2009).

Class-action waiver can't be enforced in wage case. A California Court of Appeal held that a class-action waiver in an employment agreement is unenforceable against a worker who claimed his employer violated state wage laws. *Franco v. Athens Disposal Comp.* 2009 Cal. App. LEXIS 374 (Cal. Ct. App. Mar. 18, 2009).

Policy covers homeowner who acted in self-defense. The Connecticut Supreme Court held that an insurance company is required to provide liability coverage for a homeowner who injured another while acting in self-defense. *Vt. Mut. Ins. Comp. v. Walukiewicz*, 966 A.2d 672 (2006).

A contractual waiver of a jury trial is enforceable. The Texas Supreme Court held a jury waiver is valid and does not create a presumption against waiver that places the burden on the party seeking enforcement to prove that the opposing party knowingly and voluntarily agreed to waive its constitutional right to a jury trial. *In re Bank of Am., N.A.*, 2009 Tex. LEXIS 36 (Tex. Feb. 27, 2009).

Clients in fee disputes with lawyers do not necessarily have a right to a trial if they agreed beforehand to binding contractual arbitration. The California Supreme Court ruled that while an arbitration under the state's Mandatory Fee Arbitration Act is nonbinding and lets either party seek a trial de novo, it also allows binding arbitration if both parties agree in writing. *Schatz v. Allen Matkins Leck Gamble & Mallory LLP*, 198 P.3d 1109 (Cal. 2009).

Cemetery liable for burial mistake. The California Court of Appeals held that a cemetery may be liable for emotional distress damages for breach of contract where it interred a stranger in a family plot. The court noted that "substantial evidence supported the trial court's determination plaintiff suffered serious emotional distress and that plaintiff's reaction to the situation was not so abnormal as to preclude recovery." *Binns v. Westminister Mem'l Park*, 171 Cal. App. 4th 700 (Cal. Ct. App. 2009).

Repossession did not breach the peace. A Texas appellate court held that towing a car parked on the street with two young children inside, did not constitute a breach of the peace, when car was promptly return upon discovery that the children were in the car. *Chapa v. Traciers*, 267 S.W.3d 386 (Tex. App.—Houston [14th Dist.] 2008, no pet. h.).

Nursing home can't enforce arbitration clause. The Missouri Supreme Court held that a nursing home can't enforce an arbitration clause in its admissions agreement against a plaintiff who sued over the wrongful death of a resident. The court held wrongful death claimants were not bound by the agreement and could bring a court action for their relative's wrongful death. *Lawrence v. Manor*, 273 S.W.3d 525 (Mo. 2009).

New Jersey Supreme Court rules lawyers may not be prohibited from using "super lawyer" in advertising. The New Jersey Supreme Court vacated an ethics opinion precluding attorneys from using their status in the "Super Lawyers" or "Best Lawyers in America" listings in their advertising. In a per curium opinion, the court noted, "state bans on truthful, fact-based claims in lawful advertising could be ruled unconstitutional when the state fails to establish that the regulated claims are actually or inherently misleading." *In re Opinion 39 of the Committee on Attorney Adver.*, 961 A.2d 722 (N.J. 2008).

Trial court has no discretion and must compel arbitration. A Texas appellate court held that once a party seeking to compel arbitration establishes that an agreement exists under the Federal Arbitration Act and that the claims raised are within the agreement's scope, the trial court has no discretion but to compel arbitration and stay its proceedings pending arbitration. *In re Stanford Group Co.*, 273 S.W.3d 807 (Tex. App. Houston [14th Dist.] 2008, no pet. h.).

Driver who got out of car to assist another was not "occupying" the car at time of accident. The Texas Supreme Court held that because the injured party was not "occupying" his car at the time of the accident, he cannot recover under this policy. *U.S. Fid. & Guar. Co. v. Goudeau*, 272 S.W.3d 603 (Tex. 2008).

Credit repair attorney suspended for six months. A bankruptcy attorney was suspended from the practice of law for six month and one day after the North Dakota Supreme Court found he did little in the way of meaningful legal work and violated rules of professional conduct. *In re McCray*, 2008 N.D. 162 (2008).

Insured can be denied coverage. New York's highest court held that an insured who failed to update his change of address and therefore was unaware of a suit filed against him can be denied coverage. The court noted, "We have long held, and recently reaffirmed, that an insurer that does not receive timely notice in accordance with a policy provision may disclaim coverage, whether it is prejudiced by the delay or not." *Briggs Ave. LLC, v. Ins. Corp. of Hannover*, 11 NY.3d 377 (2008).

Consumers cannot preemptively strike arbitration clause. The California Supreme Court held that cellular telephone customers cannot sue preemptively to strike arbitration clauses from their service contracts because they cannot demonstrate that they suffered any injury from the purportedly unconscionable terms. The phone company argued that the plaintiffs lacked standing because they didn't claim that they had been damaged by the arbitration provisions or that the company had otherwise sought to enforce those clauses against them. The court agreed that "injury in fact" is a prerequisite for suing under state law. *Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th 634 (2009).