



# Consumer News Alert Recent Decisions

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](http://www.peopleslawyer.net).

## UNITED STATES SUPREME COURT

*Supreme Court rules nonparties can enforce arbitration agreement.* The United States Supreme Court has held that a litigant who was not a party to an arbitration agreement may still seek injunctive relief under the agreement if the relevant state contract law gives him enforcement rights. The court noted that, “Because ‘traditional principles’ of state law allow a contract to be enforced by or against nonparties to the contract through ‘assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel,’ the Sixth Circuit’s holding that nonparties to a contract are categorically barred from §3 relief was error.” *Arthur Andersen LLP v. Carlisle*, 129 S.Ct. 1896 (2009).

*Justices rule in recusal case.* The Supreme Court has held that the Due Process Clause requires an elected judge to recuse himself from a case involving a campaign donor where there is a likely potential for bias. *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252 (2009).

*Supreme Court makes age bias cases tough for plaintiffs.* In what some say is a surprise ruling, the United States Supreme Court has made “mixed-motive” claims under the Age Discrimination in Employment Act a much tougher task for plaintiffs. The court held that plaintiffs cannot bring mixed-motive disparate-treatment claims under the ADEA. Instead, plaintiffs must prove that age is the but-for cause of an adverse employment decision in order to get relief. *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343 (2009).

*Supreme Court rules on ID theft law.* The United States Supreme Court has held that a federal “aggravated identity theft” statute that adds two years to the sentence of someone who uses false identity documents in commission of another crime requires proof that the offender knew the information belonged to another person. *Flores-Figueroa v. U.S.*, 129 S.Ct. 1886 (2009).

## UNITED STATES COURTS OF APPEALS

*Judge can order local counsel in bankruptcy case.* The Tenth Circuit has held that a judge had the authority to limit the representation of a creditors’ committee in a bankruptcy case to local counsel. *In re Southwest Food Distributors, LLC*, 561 F.3d 1106 (10th Cir. 2009).

*Arbitration clause waiving class actions deemed unconscionable under Oregon law.* The Ninth Circuit has held that an arbitration clause in a wireless card service agreement prohibiting class actions is substantively unconscionable and thus unenforceable under Oregon law when it acts to prohibit class members’ recovery of what would, individually, be relatively small damage awards. Having concluded that the class action waiver was substantively unconscionable, the court next looked to sever it from the arbitration clause—but found that severability was impossible in keeping with T-Mobile’s terms. *Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087 (9th Cir. 2009).

*Law firm didn’t violate Fair Debt Collection Practices Act.* In a 2-1 decision, the Sixth Circuit has held that a law firm did not violate federal consumer protection law when it filed a debt collection complaint on a credit card account without noting the exact nature of the underlying debt. *Miller v. Javitch, Block & Rathbone*, 561 F.3d 588 (6th Cir. 2009) (rehearing and rehearing en banc denied on May 29, 2009).

*Electronic transfer case not time-barred.* The Sixth Circuit has held that the one year statute of limitations under the Electronic Funds Transfer Act begins when the first recurring transfer takes place, not when the plaintiff arranges it. This statute covers a wide range of electronic money transfers—from ATM withdrawals and debit-card payments to banking by phone—and subjects them to

a litany of procedural requirements designed to protect consumers from transactions made in error or without their consent. *Wike v. Vertrue, Inc.*, 566 F.3d 590 (6th Cir. 2009).

*Wrongful death claimants subject to arbitration clause.* The Fifth Circuit has held that under the federal common law of contracts, the statutory beneficiaries of a wrongful death action in Texas are bound by an arbitration agreement between the decedent and his employer. The court noted, “While it is true that damages for a wrongful death action are for the exclusive benefit of the beneficiaries and are meant to compensate them for their own personal loss, the cause of action is still entirely derivative of the decedent’s rights.” *Graves v. BP America, Inc.*, 568 F.3d 221 (5th Cir. 2009).

*Bankruptcy courts may consider future events.* The Fifth Circuit has held that a bankruptcy court may consider a future event that is reasonably certain to occur at the time of projecting the debtor’s disposable income. *In re Nowlin*, 2009 WL 2105356 (5th Cir.).

*Bankruptcy court may set aside balance transfer.* The Sixth Circuit has held that a bankruptcy court may set aside as a preferential transfer a debtor’s use of convenience checks from one credit card company to pay off another credit card account. The court stated: “The issue this case presents is whether two \$5,000 ‘convenience checks’ paid from the debtor’s Chase Bank account to offset the balance on her MBNA credit card account shortly before filing for bankruptcy are preferential transfers within the meaning of 11 U.S.C. § 547(b). We conclude that they are avoidable preferential transfers and we affirm the bankruptcy court’s decision.” *In re Wells*, 561 F.3d 633 (6th Cir. 2009) (rehearing and rehearing en banc denied on July 14, 2009).

*Law firm may be liable under Fair Debt Act for false credit card statement.* The Sixth Circuit has ruled that a law firm representing a debt collector may be liable under the Fair Debt Collection Practices Act for attaching to its complaint an account that only resembled the actual credit-card statement. It also held that the FDCPA was constitutional, even when applied to a document contained in a judicial pleading. *Hartman v. Great Seneca Financial Corp.*, 569 F.3d 606 (6th Cir. 2009).

*Consumer damages against telemarketer for violation of TCPA limited.* The Sixth Circuit has held that a consumer could only recover statutory damages on a “per call” basis against a business that allegedly violated federal law by making unsolicited telemarketing calls. The court stated, “We believe that this language unambiguously allows for statutory damages on only a per-call basis.” *Charvat v. GVN Michigan, Inc.*, 561 F.3d 623 (6th Cir. 2009).

*University’s failure to provide transcript violates automatic stay.* In an interesting case, the Seventh Circuit has held that a university’s refusal to provide a transcript to a student debtor who owed tuition was a violation of the automatic stay. *In re Kuehn*, 563 F.3d 289 (7th Cir. 2009).

*Debtors can claim vehicle deduction in bankruptcy.* The Fifth Circuit has held that debtors should have been allowed to claim a vehicle deduction in their bankruptcy case, even though they had no loan or lease payments to make on their two cars. *In re Tate*, 2009 WL 1608890 (5th Cir.).

*Credit card agreement allowing change in interest rate was not clear and conspicuous.* The Ninth Circuit has held that the disclosure

provision when “taken as a whole” was not clear and conspicuous enough for a reasonable cardholder to understand. *Barrer v. Chase Bank USA, N.A.*, 566 F.3d 883 (9th Cir. 2009).

*Contract disclaimer can bar most claims.* The Fifth Circuit held that under Texas law, a disclaimer of warranty could bar negligent misrepresentation, fraud, and DTPA claims. *Thermacor Process, L.P. v. BASF Corp.*, 567 F.3d 736 (5th Cir. 2009).

*Consumer class action cannot be moved to federal court.* The First Circuit has held that a Florida grocery chain that was sued in state court for failing to protect customer information could not remove the case to federal court to be consolidated with similar class actions from around the country. The class defined to consist entirely of Florida citizens sued a single corporation, also a Florida citizen, in Florida state court. The court agreed with the district court, which found that this case fit squarely within CAFA’s home state exception and granted the Plaintiff’s motion to remand. *In re Hannaford Bros. Co. Customer Data Security Breach Litig.*, 564 F.3d 75 (1st Cir. 2009).

## UNITED STATES DISTRICT COURT

*E-mailed confirmation containing credit card expiration date is not a FACTA violation.* The U.S. District Court for the Southern District of Florida has held that e-mail order confirmations are not “printed” for purposes of the Fair and Accurate Credit Transactions Act, and thus failure to remove a credit card’s expiration date in an electronic confirmation is not a FACTA violation. *Turner v. Ticket Animal LLC*, 2009 WL 1035241 (S.D. Fla.).

*Arbitration was waived.* A Texas appellate court has held that a party who substantially invoked the judicial process prejudiced the other party by pursuing an aggressive litigation strategy and abruptly switching to an arbitration strategy to seek an advantage, waived any right to arbitration provided by the agreement at issue. *Okorafor v. Uncle Sam & Associates, Inc.*, 2009 WL 1086936 (Tex. App.—Houston [1st Dist.]).

*Golfer cannot be sued for failure to yell “fore.”* The New York Appellate Division has held that a golfer cannot be sued for negligence even if he failed to yell “fore!” before hitting a shot that struck his playing companion in the eye. *Anand v. Kapoor*, 61 A.D.3d 787 (N.Y. App. Div. 2009).

*District court holds class action ban in arbitration clause is unenforceable.* The United States District Court for the Western District of Washington has found that a class action ban is unconscionable and unenforceable. The court noted that the cost of pursuit significantly outweighs the potential recovery if each of the plaintiffs was to proceed on an individual basis. Indeed, “The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.” *Coneff v. AT & T Corp.*, 620 F. Supp. 2d 1248 (W.D. Wash. 2009).

*Court certifies debt collection class action claim against law firm.* A federal district court in Connecticut certified a FDCPA class action based on letters, finding the letters were similar in material respects and that the differences go to the merits of the class action claims. The court noted that given the common content of the letters sent directly to consumers, the commonality test had been met. The court found that the letters to the attorneys were sufficiently similar to warrant class action treatment, and even if different, could be addressed by dividing the group into two

classes. The typicality test was satisfied because Wolpoff “failed to identify any unique ‘claims or defenses.’” *Lemire v. Wolpoff & Abramson, LLP*, 256 F.R.D. 321 (D. Conn. 2009).

*Website agreement is illusory and unenforceable.* The U.S. District Court for the Northern District of Texas held that an arbitration clause is unenforceable because the terms of use agreement that reserved to the website operator the right to unilaterally modify the agreement was an unenforceable “illusory contract.” The court said that, in view of its determination that the contract was illusory and thus unenforceable, there was no need to discuss the Plaintiff’s argument that the contract was also unconscionable. *Harris v. Blockbuster Inc.*, 2009 WL 1011732 (N.D. Tex.).

*Unconscionable attorneys’ fee clause does not affect enforceability of arbitration clause.* A California court has held that an attorney’s fee provision in a click-to-agree contract requiring a customer to pay all fees and costs regardless of instigator or outcome is substantively unconscionable and will be excised. “The attorneys’ fees provisions in Defendants’ contracts, whereby Plaintiff must always pay Defendants’ attorneys’ fees, even if the Plaintiff ultimately prevails, clearly constitute substantive unconscionability.” The court held, however, that the unconscionability did not impact an arbitration clause contained elsewhere in the contract. *Huff v. Liberty League Int’l Inc.*, 2009 WL 1033788 (C.D. Cal.).

*Auto lender must return debtor’s vehicle.* The Seventh Circuit held that an auto lender was required to return a repossessed vehicle once the borrower filed for bankruptcy. The court noted that “the primary goal of reorganization bankruptcy is to group all of the debtor’s property together in his estate such that he may rehabilitate his credit and pay off his debts; this necessarily extends to all property, even property lawfully seized.” *Thompson v. General Motors Acceptance Corp., LLC*, 566 F.3d 699 (7th Cir. 2009).

*Credit agency is not required to process fraud alert from Lifelock.* A United States district court in California has held that Experian isn’t required to process a fraud alert issued by an identity theft prevention service on behalf of its customer. Under the law, when a consumer reporting agency like Experian receives a valid request for a fraud alert, the reporting agency is required to place certain information in the requesting consumer’s file, refer the request to the other reporting agencies, and send the consumer certain disclosures. The FCRA requires consumer reporting agencies to place a fraud alert “[u]pon the direct request of a consumer, or an individual acting on behalf of or as a personal representative of a consumer, who asserts in good faith a suspicion that the consumer has been or is about to become a victim of fraud or related crime, including identity theft . . . .” The court found that under the clear terms of the legislative history, any request for a fraud alert “must” be made by “an individual” and not by a company like Lifelock. *Experian Info. Solutions, Inc. v. Lifelock, Inc.*, 2009 WL 1449037 (C.D. Cal.).

## TEXAS

*Intentional injury exclusion requires intentional damage, not just intentional conduct.* A high-speed police chase resulting in a traffic accident sparked a personal-injury lawsuit against the fleeing driver by the family injured in the crash. The Texas Supreme Court held that the insurer did not establish as a matter of law that its insured intentionally caused the family’s injuries. The exclusion requires intentional damage, not just intentional conduct. *Tanner v. Nationwide Mut. Fire Ins. Co.*, 2009 WL 1028048 (Tex.).

*Arbitration waived by invoking judicial process.* The judicial process is substantially invoked when the party seeking arbitration has taken specific and deliberate actions, after the filing of the suit, that are inconsistent with the right to arbitrate or has actively tried, but failed to achieve a satisfactory result through litigation before turning to arbitration. *Holmes, Woods & Diggs v. Gentry*, 2009 WL 2152562 (Tex. App. — Dallas).

*An insurer has no duty to defend and no liability under a policy unless and until the insured in question complies with the notice-of-suit conditions and demands a defense.* A Texas appellate court has held that this rule applies, even when the insurer knows that the insured has been sued and served. The court noted that the Texas Supreme Court has consistently held that an insurer has no duty to defend or indemnify an insured unless the insured forwards suit papers and requests a defense in compliance with the policy’s notice-of-suit conditions. *Jenkins v. State And County Mut. Fire Ins. Co.*, 2009 WL 1650071 (Tex. App. — Fort Worth) (Rule 53.7(f) motion granted on July 31, 2009).

*A provision in an insurance contract that establishes a limitations period shorter than two years is void.* A Texas Court of Appeals has held that language in an insurance policy violates the Texas Civil Practice and Remedies Code, which provides that “[A] person may not enter a stipulation, contract, or agreement that purports to limit the time in which to bring suit on the stipulation, contract, or agreement to a period shorter than two years. A stipulation, contract, or agreement that establishes a limitations period that is shorter than two years is void in this state.” *Spicewood Summit Office Condo. Ass’n, Inc. v. America First Lloyd’s Ins. Co.*, 2009 WL 1657568 (Tex. App. — Austin) (petition for review filed on July 27, 2009).

*Bankruptcy trustee can pursue claims that the debtor would have been judicially estopped from pursuing herself.* A Texas appellate court has held that judicial estoppel does not foreclose the bankruptcy trustee or administrator of the estate from pursuing claims the debtor failed to disclose in her bankruptcy filing. *Bailey v. Barnhart Interest, Inc.*, 2009 WL 1660510 (Tex. App. — Houston [14th Dist.]).

*Evidence insufficient to find DTPA violation based on deception regarding “structural” repairs.* A Texas appellate court has upheld a jury’s finding of no violation of the DTPA, holding that the term “structural repairs” denotes work performed on the load-bearing portions of a residence, and does not include \$81,000 in repairs done following a rainstorm. *Robertson v. Odum*, 2009 WL 2356624 (Tex. App.-- Houston [14th Dist.]).

## OTHER STATE COURTS

*California Supreme Court allows bank to setoff against otherwise exempt funds.* The California Supreme Court rejected the argument that Bank of America’s practice for collecting insufficient fund fees, or NSF’s, violated the court’s own ruling in *Kruger v. Wells Fargo Bank*, 11 Cal. 3d 352, which held that financial institutions cannot take public benefit money, or so-called “exempt funds,” such as Social Security payments, out of bank accounts to cover credit card debt. The court stated, “Here, unlike in *Kruger*, the bank is not setting off independent, past debt. Instead, the transaction occurs within a single account and is triggered by a customer’s overdraft, causing the bank to recoup those funds from a subsequent deposit and charge an NSF fee. We do not agree with Plaintiffs . . . that there is no meaningful difference between satisfying a debt external to an account and recouping an

overdraft of an account from funds later deposited into that same account.” *Miller v. Bank of America*, 207 P.3d 531 (Cal. 2009) (modification denied on July 22, 2009).

*Debt collector liable to victim of mistaken identity.* A California appellate court has held that a victim of mistaken identity was entitled to damages for a debt collector’s attempts to collect on a consumer debt that she did not owe. *Komarova v. National Credit Acceptance, Inc.*, 95 Cal. Rptr. 3d 880 (Cal. Ct. App. 2009).

*Fact that anyone can edit entries means Wikipedia is too unreliable for judicial notice.* A New Jersey appellate court has held that Wikipedia entries are not appropriate sources for judicial notice because they can be changed at any time, including by parties to litigation. *Palisades Collection, L.L.C. v. Graubard*, 2009 WL 1025176 (N.J. Super. Ct. App. Div.).

*Federal law preempts defective defibrillator suit.* The Wisconsin Supreme Court has held that federal law preempts state product liability claims alleging defects in a heart defibrillator that was implanted in the plaintiff. *Blunt v. Medtronic, Inc.*, 760 N.W.2d 396 (Wis. 2009).

*Class action waiver unenforceable despite “opt-out.”* A California court has held that the mere presence of an opt-out clause in a class action waiver provision does not save the provision from being unenforceable under California law as an unconscionable contract of adhesion. The court noted that putative class members did not make an informed choice to not “opt-out,” because “[T]he members of the putative class received nothing that explains the disadvantages of consenting to the arbitration and class waiver provisions; nothing clearly explaining the costs of arbitration; and nothing explaining the practical consequences of a class action waiver.” *Duran v. Discover Bank*, 2009 WL 1709569 (Cal. Dist. Ct. App.).

*Wisconsin high court rejects design defect claims over lead paint.* In a closely watched case, the Wisconsin Supreme Court has ruled that a young boy who was exposed to lead paint cannot sue the manufacturers for defectively designing a key ingredient. *Godoy v. E.I. du Pont de Nemours & Co.*, 2009 WL 2018791 (Wis.).

*Attorney can send unsolicited fax newsletters.* New York’s highest court has held that unsolicited faxes sent as newsletters by an attorney that included his contact information did not constitute advertisements in violation of the federal “junk fax” law. The court stated, “We conclude that Bluestone’s ‘Attorney Malpractice Report’ fits the FCC’s framework for an ‘informational message,’ and thus the 14 faxes are not ‘unsolicited advertisement[s]’ within the meaning of the [Act].” *Stern v. Bluestone*, 12 N.Y.3d 873 (2009).

*State damages cap applies to consumer protection claims.* Maryland’s highest court held that the statutory cap on non-economic damages applies to personal injury claims authorized by a state consumer protection act. *Green v. N.B.S., Inc.*, 2009 WL 2151367 (Md.).

*Only lead plaintiff must show “injury in fact.”* In an important consumer class action suit against the tobacco industry for false advertising, the California Supreme Court ruled that only the lead plaintiff needs to show “injury in fact.” The court also noted that reliance can be presumed in many circumstances where a plaintiff class alleges consumer fraud. *In re Tobacco II Cases*, 207 P.3d 20 (Cal. 2009) (time for grant or denial of rehearing extended to August 14, 2009 on June 10, 2009).

## A New Jersey appellate court has held that Wikipedia entries are not appropriate sources for judicial notice because they can be changed at any time, including by parties to litigation.

*Arbitration proceeding does not shield debt collector from liability.* A California appellate court has held that arbitrations before the National Arbitration Forum (NAF) do not shield debt collectors from liability for violating consumers’ rights. The court reviewed decisions discussing the privilege when applied to debt collection violations, concluding, “We agree with the majority of these cases that the privilege cannot be used to shield violations of the Act.” *Komarova v. National Credit Acceptance, Inc.*, 95 Cal. Rptr. 3d 880 (Cal. Ct. App. 2009).

*Car buyer cannot sue eBay seller in state where purchaser resides.* A Kentucky court has held that Kentucky does not have jurisdiction over a Missouri defendant who allegedly sold a “lemon” via eBay to a Kentucky car buyer. *Robey v. Hinnners*, 2009 WL 1491387 (Ky. App.).

*Junk fax suit can be brought in state court.* The Oklahoma Supreme Court has held that consumers who received junk faxes can sue for violations of federal consumer protection law in state court. *MLC Mortg. Corp. v. Sun America Mortg. Co.*, 2009 WL 1464131 (Okla.).

*Court rejects disappointed buyer’s suit over used Mercedes described as “gorgeous.”* A New York appellate court has held that an eBay ad’s claim that a used Mercedes was “gorgeous” was not enough to sustain claims of fraud and breach of warranty filed by a disgruntled buyer after problems surfaced. Noting it was a used car, the court stated, “Plaintiff could have contacted Defendants to inquire about the vehicle or its history (as Defendants’ advertisement specifically invited prospective purchasers to do), procured a vehicle history report (as recommended on eBay’s website) or hired a mechanic in Nevada to inspect and/or examine the car before purchasing it.” *Nigro v. Lee*, 63 A.D.3d 1490 (N.Y. App. Div. 2009).