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.*

UNITED STATES COURTS OF APPEALS

Hands-free wireless device law constitutional. The Seventh Circuit held that a Chicago law requiring the use of hands-free wireless devices by drivers is constitutional. The law prohibits the use of wireless telephones without a "hands-free" device while driving a motor vehicle. *Schor v. City of Chicago*, 576 F.3d 775 (7th Cir. 2009).

Debtor can deduct mortgage payments for means test calculation. The First Circuit held that a Chapter 7 debtor could deduct mortgage payments due for property he planned to surrender for the purpose of determining whether he satisfied the Bankruptcy Code's new means test. *In re Rudler*, 576 F.3d 37 (1st Cir. 2009).

Bankruptcy doesn't bar sexual assault claims. The Seventh Circuit held that a doctor's bankruptcy discharge did not bar sexual assault claims brought by two patients who alleged he had molested them while they were under his care. The court noted that the claims were timely, and that the bankruptcy court committed no error in finding that Tidwell and Sterling-Ahlla received insufficient notice of Smith's petition to have compelled them to take action to preserve their rights before the bar date and before Smith was discharged. *In re Smith,* 582 F.3d 767 (7th Cir. 2009).

Lender can repossess car after bankruptcy. The Ninth Circuit held that an auto lender did not violate a bankruptcy discharge injunction when it repossessed a vehicle that a debtor had elected to keep and continue to make payments. *In re Dumont*, 581 F.3d 1104 (9th Cir. 2009).

Surety must discharge entire debt to be entitled to subrogation. The Fifth Circuit held that where a surety pays only part of a single debt, he cannot receive rights of subrogation. The surety must discharge the entire underlying obligation before achieving subrogation, otherwise the surety would compete with the creditor for recovery, potentially diminishing the creditor's recovery. *RaboAgrifinance, Inc. v. Terra XXI Ltd,* 583 F.3d 348 (5th Cir. 2009).

Debtor can claim vehicle expense in bankruptcy. The Eight Circuit held that a Chapter 13 debtor could claim a vehicle-ownership expense in his bankruptcy case, even though he owned his vehicle outright. In doing so, the court join the Fifth and Seventh Circuits in construing the plain language of 11 U.S.C. § 707(b)(2)(A)(ii)(I) to permit a debtor with above-median income to claim a vehicle-ownership expense for a vehicle that the debtor owns outright and without encumbrance. *In re Tate*, 571 F.3d 423 (5th Cir. 2009); *In re Ross-Tousey*, 549 F.3d 1148 (7th Cir. 2008); *In re Washburn*, 579 F.3d 934 (8th Cir. 2009).

Fair Credit Reporting Act does not require actual damages. The Sixth Circuit held that a plaintiff is not required to show actual damages in order to sue check verification services for erroneously reporting the status of thousands of consumer accounts. The court noted that the FCRA's private right of action does not require proof of actual damages as a prerequisite to the recovery of statutory damages for a willful violation of the Act. *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702 (6th Cir. 2009).

Delaware sports lottery violates federal law. The Third Circuit held that the proposed Delaware sports lottery violates the federal Professional and Amateur Sports Protection Act. *OFC Comm'r of Baseball v. Markell*, 579 F.3d 293 (3rd Cir. 2009).

Attorney fee awards subject to offset. The Sixth Circuit held that attorney fees awarded in Social Security benefits cases can be offset by the amounts that the plaintiffs owed the federal government. *Bryant v. Comm'r of Soc. Sec.*, 578 F.3d 443 (6th Cir. 2009).

Lawyers who send debt collection letters should state clearly, prominently and conspicuously that although the letter is from a lawyer, the lawyer is acting solely as a debt collector and not in any legal capacity when sending the letter. The Fifth Circuit noted that the letter was printed on the law firm's letterhead, but it was unsigned. On the back, the letter indicated that it was from a "debt collector" and included the sentence, "At this point in time, no attorney with this firm has personally reviewed the particular circumstances of your account." The court remanded the case, stating that, "Debt collectors acting solely as debt collectors must not send the message that a lawyer is involved, because this deceptively sends the message that the 'price of poker has gone up." *Gonzalez v. Kay*, 577 F.3d 600 (5th Cir. 2009).

FACTA is constitutional. The Eleventh Circuit held that the statutory damage provisions of the Fair and Accurate Transactions Act are not unconstitutionally vague or excessive. *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301 (11th Cir. 2009).

Collection letter violates Fair Debt Act. The Seventh Circuit held that a debt collection letter violated federal consumer protection law by stating that a debtor's personal information could be collected. *Ruth v. Triumph P'ships*, 577 F.3d 790 (7th Cir. 2009).

Homestead designation does not establish acquisition of interest for purposes of Bankruptcy Code exemptions. The Ninth Circuit held that the perfection of a homestead exemption does not constitute acquisition of a property interest for purposes of Section 522(p)(1). *In re Greene*, 583 F.3d 614 (9th Cir. 2009).

Claims based on alleged rape not subject to arbitration clause. The Fifth Circuit held that claims arising from an alleged rape that occurred in the victim's bedroom are not subject to the employer's mandatory arbitration provision. *Jones v. Halliburton, Co.*, 583 F.3d 228 (5th Cir. 2009).

Credit card issuer can enforce arbitration clause. The Eight Circuit held that a credit card company could require arbitration in accordance with its card member agreement when sued by a customer who alleged that her interest rate had been hiked in violation of state law. *Cicle v. Chase Bank USA*, 583 F.3d 549 (8th Cir. 2009).

Consumer claim against home lenders preempted. The Eight Circuit held that Federal banking law preempts a consumer class action alleging that mortgage lenders engaged in the unauthorized practice of law by charging a fee for the preparation of loan documents by nonlawyers. *Casey v. F.D.I.C.*, 583 F.3d 586 (8th Cir. 2009).

Phone message violated FDCPA. The Eleventh Circuit held that a phone message that did not identify the caller and did not have the mini-Miranda warning violated the Fair Debt Collection Practices Act. The court also noted that there is not a "right" to leave answering machine messages. *Edwards v. Niagara Credit Solutions, Inc.*, 584 F.3d 1350 (11th Cir. 2009).

No "deductions" for above-median debtors. The Ninth Circuit held that Chapter 13 debtors cannot deduct payments to secured creditors for property they intend to abandon. "Items that the debtor has surrendered or intends to surrender are not necessary for his or her support or maintenance. … Phantom payments for the surrendered item are not reasonably necessary for a debtor's support and maintenance…." *In re Smith*, 2009 WL 3338406 (9th Cir. Oct. 5, 2009).

Class action ban is unenforceable. The Ninth Circuit invalidated a class action ban found in DirecTV's contracts. The court ruled that DirecTV's contractual class action ban violates a "fundamental policy" of California and that the company could not use the "choice-of-law" provision in its contract to avoid the application of California law in this case. *Masters v. DirecTV, Inc.*, 2009 U.S. App. LEXIS 25479 (9th Cir. Nov. 19, 2009).

Credit card arbitration agreement is enforceable. The Eighth Circuit held that an arbitration agreement in a cardholder's agreement was not "so substantively unconscionable that, when considered with any procedurally unconscionability inherent in the agreement, it is unenforceable." Applying Missouri law, the court concluded that the cardholder failed to show that the clause should not be enforced. *Cicle v. Chase Bank USA*, 583 F.3d 549 (8th Cir. 2009).

Tax liability not discharged in Bankruptcy. The Ninth Circuit held that a husband and wife's bankruptcy did not extinguish their federal income tax liability relating to a previously filed joint return. The court noted that "[i]f the IRS has a claim for taxes for which the return was due within three years before the bankruptcy petition was filed, the claim … is nondischargeable in bankruptcy under §523(a)(1)(A). Because the [taxpayers in this case] filed their bankruptcy petition on September 28, 1994, less than three years after their 1990 taxes were due on October 15, 1991, their 1990 tax liability was not discharged." *Severo v. C.I.R.*, 586 F.3d 1213 (9th Cir. 2009).

Arbitrators determine if fees must be paid prior to arbitration. The Fifth Circuit ruled that the issue of whether a party must pay a $26,000 deposit prior to arbitration, and the consequences of not paying, should be resolved by the arbitrators. The court noted that, "In determining whether a dispute falls within the agreement to arbitrate, the Supreme Court has decided that, absent an agreement to the contrary, the parties intend that the arbitrator, not the courts, should decide certain procedural questions which grow out of the dispute and bear on its final disposition." *Dealer Computer Servs., Inc. v. Old Colony Motors, Inc.*, 2009 WL 3859936 (5th Cir. Nov. 19, 2009).

UNITED STATES DISTRICT COURTS

Class action alleging violations of Fair Debt Collection Practices Act (FDCPA) properly certified as class action despite de minimis recovery for class members. A district court in Florida denied a motion to decertify a class based on the argument that the amount per class member was de minimis. The defendant argued, "should Plaintiff class prevail, the maximum recovery per class member would be $1.24." Plaintiff countered that "courts have not allowed the prospect of de minimis individual recovery to defeat certification of FDCPA classes." The district court denied the motion, determining that class action treatment was warranted. *Hicks v. Client Servs., Inc.*, 257 F.R.D. 699 (S.D. Fla. 2009).

Law firm violated Fair Debt Act. A U.S. District Court in New York held that a law firm violated federal debt collection law by sending out a debt collection letter without undertaking a "meaningful review" of the debtor's case. *Miller v. Upton, Cohen & Slamowitz*, 2009 WL 3212556 (E.D.N.Y. Oct. 5, 2009).

Spouses' debt treated separately under Chapter 13. A U.S. Bankruptcy Court in Kansas held that a husband and wife were eligible for Chapter 13 protection even though their combined unsecured debts exceeded the limit provided in the Bankruptcy Code. *In re Werts*, 410 B.R. 677 (Bankr. D. Kan. 2009).

Business credit card user not within scope of FACTA. A U.S. District Court in Illinois held that a business was not a "consumer" and therefore could not maintain a claim under the Fair and Accurate Credit Transaction Act. *Pezl v. Amore Mio, Inc.*, 259 F.R.D. 344 (N.D. Ill. 2009).

Dell's mandatory arbitration clause defeated. A U.S. District Court in Washington state found that the arbitration provision in Dell's contract was unenforceable, based in part on the decision of the NAF to stop conducting consumer arbitrations. The court held that "the parties' selection of NAF is integral to the arbitration clause," that "to appoint a substitute arbitrator would constitute a wholesale revision of the arbitration clause," and that Dell's class action ban could not survive "the failure of the arbitration clause." He therefore, held that "the arbitration clause and the class action waiver are unenforceable." *Carideo v. Dell, Inc.*, Slip Copy, 2009 WL 3485933 (W.D. Wash. Oct. 26, 2009).

Website terms that users click to accept impose forum selection clause. The U.S. District Court for the Southern District of New York held that users of the Match.com website who checked a box to accept the terms of service must pursue a lawsuit against the service in the forum designated in the contract. The court found the forum-selection clause was reasonably communicated, noting it was set out from the rest of the terms by a "Jurisdiction and Choice of Law" heading in bold-face print. *Brodsky v. Match.com, LLC*, Slip Copy, 2009 WL 3490277 (S.D.N.Y. Oct. 28, 2009).

Reporter can't tweet. A U.S. District Court in Georgia ruled that a reporter could not cover a criminal trial by sending electronic messages directly from the courtroom to his newspaper's Twitter website. *U.S. v. Shelnutt*, Slip Copy, 2009 WL 3681827 (M.D. Ga. Nov. 2, 2009).

Fair Credit Reporting Act does not preempt state law claims against mortgage servicer. A U.S. District Court for the Southern District of Texas held that the Fair Credit Reporting Act does not preempt claims for damaging a borrower's credit. *Ortiz v. Nat'l City Home Loan Servs.*, Slip Copy, 2009 WL 3255088 (S.D. Tex. Sept. 29, 2009).

Emails about debt "acknowledge" debt and extend statute of limitations under Virginia law. A U.S. District Court in Virginia held that two e-mails about future negotiations to resolve an unpaid note acknowledged the amount owed and reset the limitations period under which a creditor could sue to collect it. The court noted that the "acknowledgement" dispute was the central focus of the individual's motion for judgment because the six-year statute of limitations had run out, unless the court could find that he acknowledged the debt in a signed writing, which resets the limitations period under Virginia law. *Ferguson v. Ingoldsby, Slip Copy, 2009 WL 3763676 (E.D. Va. Nov. 5, 2009).*

Government liable for Hurricane Katrina damage. A U.S. District Court in Louisiana held that the federal government is liable for damage suffered by five property owners when a system of levees failed during Hurricane Katrina. *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644 (E.D. La. 2009).

STATE COURTS

Court affirms D.C. Consumer Protection Act allows true "private attorney general" claims. The D.C. Court of Appeals stated, "We agree that the 2000 Amendments to the CPPA permit Mr. Grayson to pursue his CPPA claim on behalf of himself and the general public regardless of whether he has experienced an injury in fact as a result of the appellees' trade practices." *Grayson v. AT&T Corp.*, 980 A.2d 1137 (D.C. 2009).

Landlord liable for guest's fall. Massachusetts' highest court held that a landlord could be liable for breaching an implied warranty of habitability with respect to a tenant's guest who fell from an apartment porch. The court affirmed a $454,000 jury verdict. *Scott v. Garfield*, 912 N.E.2d 1000 (Mass. 2009).

Lawyer may be liable for client's bankruptcy losses. The Massachusetts Court of Appeals held a lawyer may be liable for damages flowing from his failure to file a bankruptcy petition on behalf of a client. The court affirmed a $17,000 malpractice verdict, noting that, "evidence of [the plaintiff's] employment status and earnings gave the jury a basis to infer that she no longer was 'judgment proof' and that collection efforts would in fact cause her harm, at least as to the amount of the debt she owed." *Don v. Soo Hoo*, 912 N.E.2d 18 (Mass. App. Ct. 2009).

Doctor can't force arbitration of malpractice claim. The California Court of Appeals held that a doctor couldn't enforce an arbitration agreement when sued for malpractice by the child of woman who died shortly after surgery. *Rodriguez v. Superior Court*, 98 Cal. Rptr. 3d 728 (Cal. Ct. App. 2009).

Statutory grounds are the exclusive grounds for vacating or modifying an arbitration award under the FAA. A Texas appellate court held that "manifest disregard" of the law and gross mistake are not grounds for vacating an arbitration award under the FAA. *Ancor Holdings, LLC v. Peterson, Goldman & Villani, Inc.*, 294 S.W.3d 818 (Tex. App.—Dallas 2009).

A disclaimer regarding merchantability, in capital letters equal in size to the surrounding text, and in contrasting bold type, is conspicuous and is an effective disclaimer of the implied warranties of merchantability and fitness. A Texas court of appeals held that UCC warranties were properly disclaimed. It also held that the Texas DTPA does not apply to a subrogee who cannot qualify as a consumer in its own right. *Dewayne Rogers Logging, Inc. v. Propac Industries, Ltd.*, 2009 WL 2712324 (Tex. App.—Tyler Aug. 31, 2009).

Award of contractual attorney's fees to prevailing party requires party must "gain something." The Texas Supreme Court agreed with the United States Supreme Court, which held that to prevail, a claimant must obtain actual and meaningful relief, something that materially alters the parties' legal relationship. The Texas court held that "a client must gain something before attorney's fees can be awarded." *Intercontinental Group P'ship v. KB Home Lone Star L.P., 295 S.W.3d 650* (Tex. 2009).

Texas attorney's fees provision requires party to "gain something." Chapter 38 of the Texas Civil and Practices Code provides for the award of attorney's fees to a prevailing party in a breach of contract suit. The Texas Supreme Court held that to "prevail" a "party must (1) prevail on a cause of action for which attorney's fees are recoverable, and (2) recover damages." *MBM Fin. Corp. v. Woodlands Operating Co.*, 292 S.W.3d 660 (Tex. 2009).

No tort recovery for defective product. The Tennessee Supreme Court held that State law does not recognize an exception to the economic loss doctrine for the product itself when a defect renders it unreasonably dangerous and causes damage by means of a sudden, calamitous event. The court held that damage to a bus that caught fire due to an alleged engine defect was economic loss. *Lincoln General Ins. Co. v. Detroit Diesel Corp.*, 293 S.W.3d 487 (Tenn. 2009).

Ambiguity in insurance policy should be resolved in favor of coverage. A Texas appellate court reviewed the meaning of the term "you" in an insurance policy, finding it to be ambiguous. The court noted that, "Because the meaning of 'you' is susceptible of two opposing reasonable interpretations under the circumstances of this case, it is ambiguous." The court concluded that "If a contract is susceptible to more than one reasonable interpretation, or if its meaning is uncertain or doubtful, we will resolve any ambiguity in favor of coverage." *Verhoev v. Progressive County Mut. Ins. Co*., 2009 WL 2357004 (Tex. App.—Fort Worth July 30, 2009).

Evidence insufficient to find DTPA violation based on deception regarding "structural" repairs. A Texas appellate court 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. Odom*, 2009 WL 2370980 (Tex. App.—Houston [14th Dist.] July 30, 2009).

State damages cap applies top 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.,* 976 A.2d 279 (Md. 2009).

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 July 21, 2009).

Med-mal plaintiff cannot bring consumer suit. The Washington Supreme Court ruled that a plaintiff who claimed that she underwent unnecessary surgery can't sue under state consumer protection law in addition to seeking damages for medical malpractice. *Ambach v. French*, 216 P.3d 405 (Wash. 2009).

Nursing home can't force arbitration of a negligence claim. The Nebraska Supreme Court held that a nursing home couldn't demand arbitration of a negligence lawsuit based on language in an admissions form signed by the plaintiff on behalf of his mother. *Koricic v. Beverly Enterprises*, 773 N.W.2d 145 (Neb. 2009).

The better rule, and the rule we adopt, is that a malpractice plaintiff may recover damages for attorney's fees paid in the underlying case to the extent the fees were proximately caused by the defendant attorney's negligence.

Legal malpractice plaintiffs may recover attorney's fees paid to correct lawyers mistake. The Texas Supreme Court held that legal malpractice plaintiffs may recover money they had to spend on attorney's fees arising out of the underlying lawsuit. The court noted, "We see little difference between damages measured by the amount the malpractice plaintiff would have, but did not, recover and collect in an underlying suit and damages measured by attorney's fees it paid for representation in the underlying suit, if it was the defendant's negligence that proximately caused the fees…." "In both instances, the attorney's negligence caused identifiable economic harm to the malpractice plaintiff. The better rule, and the rule we adopt, is that a malpractice plaintiff may recover damages for attorney's fees paid in the underlying case to the extent the fees were proximately caused by the defendant attorney's negligence." *Akin, Gump, Strauss, Hauer, & Feld, LLP v. Nat'l Dev. & Research Corp.*, 53 Tex. Sup. Ct. J. 77 (Tex. 2009).

Bank has burden to establish sale was in commercially reasonable manner. A Texas court of appeals held that under the Texas Business and Commercial Code §9.610(b), the Bank had the burden to establish that a repossession sale was conducted in a commercially reasonable manner. The court noted "the Bank failed to produce summary judgment evidence on any of the factors the courts of this state have traditionally considered in evaluating the commercial reasonableness of collateral disposition." *Jantzen v. American Nat'l Bank of Texas*, 2009 WL 3449735 (Tex. App.—Dallas Oct. 28, 2009).