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 SUPREME COURT

Supreme Court reviews FDCPA's bona fide error defense. In a case involving an attorney who told a consumer that unless the debt was disputed in writing it would be assumed valid, the lower court found this to be a violation of the FDCPA, but also found that it was a bona fide error on the part of the attorney. The Supreme Court found that the bona fide error defense in §1692k(c) does not apply to a violation resulting from a debt collector's mistaken interpretation of the legal requirements of the FDCPA. The Court noted, "We have long recognized the 'common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.'" *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605 (U.S. 2010).

Court may enhance award under fee-shifting statute. The United States Supreme Court ruled that under federal fee-shifting statutes, judges may award fees that go above the "lodestar" amount under rare circumstances, including superior performance by the attorneys. The ruling involved a $4.5 million fee enhancement that Georgia was required to pay lawyers who brought and won a class action suit challenging the state's foster care system. *Perdue v. Kenny A.*, 130 S. Ct. 1662 (U.S. 2010).

Bankruptcy court may restructure student loan. The United States Supreme Court ruled in favor of a loan delinquent who used the bankruptcy laws to restructure his debt. The Court said that a bankruptcy court order that forgave part of the debt was valid, even though the student did not show at an adversary proceeding that repayment would pose an "undue hardship." *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (U.S. 2010).

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Supreme Court upholds Bankruptcy Act provision. The United States Supreme Court upheld the federal law that bars "debt relief agencies," including lawyers, from advising clients to incur more debt for filing for bankruptcy. A Minnesota-based law firm asserted that the provision should not cover lawyers. The district court ruled the provision unconstitutional as applied to the firm. The Supreme Court ruled that lawyers are included in the definition of "debt relief agencies," and that the requirements of the law do not run afoul of the First Amendment. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324 (U.S. 2010).

Litigants have no immediate right to appeal an order to compel documents allegedly subject to the attorney-client privilege. The Supreme Court held that there is no immediate right to appeal, and that "the collateral order doctrine does not extend to disclosure orders adverse to the attorney-client privilege." The Court acknowledged the importance of the attorney-client privilege but said that importance was outweighed by "the cost of allowing immediate appeal of the entire class of relevant orders." *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599 (U.S. 2009).

UNITED STATES COURTS OF APPEALS

Bank did not violate TILA by increasing APR. The First Circuit held that a bank did not violate the Truth in Lending Act when it made a credit card holder's APR increase effective from the beginning of the month. The plaintiff alleged that the bank violated the Act by applying a rate increase to the annual percentage rate retroactive to the start of the month in which she defaulted, without prior notice. The court relied in part on a Federal Reserve Board amicus brief, which noted that the regulation at issue had changed. "It is the Board's position that at the time of the transactions at issue in this case, Regulation Z did not require a change-in-terms notice to be provided when a creditor increased a rate to a figure at or below the maximum allowed by the contract in the event of default." *Shaner v. Chase Bank USA, N.A.*, 587 F.3d 488 (1st Cir. 2009).

ADA claim is dischargeable in bankruptcy. The First Circuit ruled in a case of first impression that an Americans with Disabilities Act (ADA) discrimination claim against a company in bankruptcy should be treated like a dischargeable bankruptcy claim. *Rederford v. US Airways, Inc.*, 589 F.3d 30 (1st Cir. 2009).

Debtors not eligible for Chapter 13 relief. The First Circuit Bankruptcy Appellate Panel held that a married couple did not meet the income eligibility requirements for Chapter 13 bankruptcy relief, even when taking into account a loan from a family friend. The court agreed with the trustee, who explained that "the Bankruptcy Code defines an 'individual with regular income' as an 'individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title.'" *In re Pellegrino*, 423 B.R. 586 (B.A.P. 1st Cir. 2010).

Non-party can compel arbitration in sexual harassment case. The Second Circuit held that ESPN can require arbitration in a sexual harassment case, even though it was not a party to the plaintiff's employment agreement. The court stated, "It is undisputed that ESPN is not a signatory to the arbitration agreement. ESPN is also not mentioned, expressly or by implication, in either the arbitration agreement, or in any of the other documents relating to Ragone's initial employment that are contained in the record." Nevertheless, the court found that Ragone's complaint contains numerous allegations which support the district court's conclusion that her "claims of unlawful harassment and retaliation against AVI and ESPN rely on the concerted actions of both defendants and are therefore substantially interdependent." *Ragone v. Atlantic Video*, 595 F.3d 115 (2d Cir. 2010).

Court rejects New York's advertising limits. The Second Circuit rejected most of New York's advertising limits, holding that a ban on the use of nicknames like "Heavy Hitters" or client testimonials about pending cases violates the First Amendment. The court also held that preventing lawyers from employing special effects or portraying a judge in an ad did not "materially advance" the state's interest in prohibiting misleading speech. *Alexander v. Cahill*, 598 F. 3d 79 (2d Cir. 2010).

Law firm violated Fair Debt Collection Practices Act. The Second Circuit held that a law firm violated federal debt collection law by personally serving a debtor with a summons and complaint, without explaining that commencement of the lawsuit did not affect the debtor's continuing right to dispute the debt. *Ellis v. Solomon & Solomon, P.C.*, 591 F.3d 130 (2d Cir. 2010).

Debit card overdraft processing method not unlawful. The Third Circuit affirmed the dismissal of a class action against a bank, which alleged that the bank's policy of re-ordering transactions violated New Jersey law. *Hassler v. Sovereign Bank*, 2010 U.S. App. LEXIS 5445 (3d Cir. Mar. 15, 2010).

Defective sperm cannot be basis for products liability suits. The Third Circuit held that genetic defects in sperm from a sperm bank cannot form the basis for a products liability suit. The court noted that allowing such a claim would be tantamount to recognizing a claim of "wrongful life." *D.D. v. Idant Labs.*, 2010 U.S. App. LEXIS 6815 (3d Cir. Apr. 1, 2010).

Bankruptcy court cannot decide student loan costs. The Fourth Circuit held that a bankruptcy court lacked jurisdiction to determine the interest and collection costs resulting from a default on a student loan that occurred after a Chapter 13 estate was closed and the debtor discharged. *In re Kirkland*, 600 F.3d 310 (4th Cir. 2010).

Borrowers cannot rescind credit transaction they did not complete. The Fourth Circuit held that the right to rescind under the Truth in Lending Act does not apply to an unconsummated credit transaction. *Weintraub v. Quicken Loans, Inc.*, 594 F.3d 270 (4th Cir. 2010).

Consumer "gripe" site cannot be sued for defamation. The Fourth Circuit held that a federal law protecting interactive computer

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service providers bars a lawsuit brought by a car dealer that alleged it was defamed by comments posted on a consumer website. The court noted that the Communications Decency Act of 1996 precludes plaintiffs from holding interactive computer service providers liable for the publication of information created and developed by others. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.,* 591 F.3d 250 (4th Cir. 2009).

Plaintiff not entitled to attorney's fees even though insurer violated ERISA. The Fifth Circuit held that even though an insurer wrongly denied disability benefits under ERISA, the insured was not entitled to attorney's fees because the insurer did not act in bad faith. *Schexnayder v. Hartford Life & Accident Ins. Co.*, 600 F.3d 465 (5th Cir. 2010).

Garnishment of bank account containing only social security income did not violate FDCPA. The Sixth Circuit reversed a judgment under the FDCPA against an attorney who garnished a debtor's bank account containing nothing except social security proceeds. The court found that although the money in the account was exempt from garnishment, the attorney did not make any false representations or fail to conduct a reasonable inquiry in connection with the garnishment proceeding. *Lee v. Javitch, Block & Rathbone LLP*, 601 F.3d 654 (6th Cir. 2010).

Student loan debt can be considered prior to discharge. A student loan lender contended that the issues presented in the complaint were not ripe for adjudication until, and unless, the debtor received a discharge order under §1328. The Sixth Circuit held that "the question of whether Cassim's student loan debt owed to Educational Credit is dischargeable was constitutionally ripe for review by the bankruptcy court despite the fact that Cassim had yet to receive a discharge under §1328." *In re Cassim*, 594 F.3d 432 (6th Cir. 2010).

Indiana pay-day lending law unconstitutional. The Indiana version of the Model Consumer Credit Code contains a territorial application provision "which states that a loan is deemed to occur in Indiana if a resident of the state, enters into a consumer sale, lease or loan transaction with a creditor . . . in another state and the creditor . . . has advertised or solicited sales, leases, or loans in Indiana by any means, including by mail, brochure, telephone, print, radio, television, the Internet, or electronic means." Writing for the Seventh Circuit, Judge Posner found the provision unconstitutional under the Commerce Clause, noting that "the contract was, in short, made and executed in Illinois, and that is enough to show that the territorial-application provision violates the commerce clause." *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660 (7th Cir. 2010).

Use of "suggested retail price" may constitute fraud. The Seventh Circuit held that a store that claimed its prices were discounted from an inflated, made-up "suggested retail price" may have violated a state consumer fraud statute. *Kim v. Carter's Inc.*, 598 F.3d 362 (7th Cir. 2010).

Student loan found dischargeable in bankruptcy. The Eighth Circuit Bankruptcy Appellate Panel ruled that a debtor's student loans are dischargeable under §528(a)(8) because paying them would impose an undue hardship on the debtor and her dependents. The debtor received a discharge for her Chapter 7 bankruptcy petition in 2004. Three years later, she filed an adversary proceeding seeking to discharge $300,000 in student loan debt as an undue hardship pursuant to §528(a)(8). She claimed that her family operated at a loss each month, and that she could not work outside the home because she had to take care of her five children, especially twin boys who suffered from autism. *In re Walker*, 2010 Bankr. LEXIS 932 (B.A.P. 8th Cir. Apr. 9, 2010).

Release signed by injured skier enforceable. The Eighth Circuit held that a release signed by a skier precluding him from pursuing a personal injury claim against a ski resort is enforceable under Minnesota law. *Myers v. Lutsen Mts. Corp.*, 587 F.3d 891 (8th Cir. 2009).

Federal law does not preempt lawsuit against generic drug manufacturers. The United States Court of Appeals for the Eighth Circuit held that generic drug manufacturers cannot use federal preemption to avoid liability for failing to warn of their drugs' dangers. The Eighth Circuit ruled that the approval of a generic drug's label by the U.S. Food and Drug Administration (FDA) does NOT preempt claims against the drug makers for failing to warn consumers of known risks. *Mensing v. Wyeth, Inc.*, 588 F.3d 603 (8th Cir. 2009).

Computer maker cannot enforce arbitration clause. The Ninth Circuit held that a notebook computer manufacturer could not enforce an arbitration clause in its customer agreements. *Omstead v. Dell, Inc.*, 594 F.3d 1081 (9th Cir. 2010).

Class action waiver in arbitration clause unenforceable. The Ninth Circuit held that a Texas choice-of-law clause was unenforceable and insufficient to support a class action waiver. "Here, the Agreement's choice-of-law provision is unenforceable for the same reasons identified in *Oestreicher*. The class action waiver is unconscionable under California law because it satisfies the *Discover Bank* test, and California has a materially greater interest than Texas in applying its own law." *Omstead v. Dell, Inc.*, 594 F.3d 1081 (9th Cir. 2010).

Property acquired upon parent's death isn't part of bankruptcy estate. A Tenth Circuit Bankruptcy Appellate Panel ruled that the property a Chapter 7 debtor received upon the death of her father is not a part of her bankruptcy estate. The bankruptcy trustee argued that the POD property was part of the bankruptcy estate under §541(a)(5)(A) of the Bankruptcy Code. The statute makes property acquired by "bequest, devise, or inheritance" within 180 days of a bankruptcy filing part of a debtor's estate. But, the court concluded that the statute does not apply to property acquired through the operation of "will substitutes" like POD or transfer on death (TOD) accounts. *In re Hall*, 2009 Bankr. LEXIS 3868 (B.A.P. 10th Cir. Dec. 4, 2009).

ERISA preempts state insurance regulation. The Tenth Circuit held that federal law preempts a state regulation that restricts the discretion that insurance companies have in denying claims brought under employee benefit plans. *Hancock v. Metro. Life Ins. Co.*, 590 F.3d 1141 (10th Cir. 2009).

Debt collector may violate federal law by failing to register with state. The Eleventh Circuit held that a debt collector may violate federal consumer protection law by failing to register as a collection agency in accordance with state law. *LeBlanc v. Unifund CCR Ptnrs*, 601 F.3d 1185 (11th Cir. 2010).

In light of the plain meaning of the arbitration provision, the court cannot appoint another arbitrator even though the NAF is an unavailable forum.

UNITED STATES DISTRICT COURTS

Arbitration clause designating NAF as arbitrator is not enforceable. A district court in Texas held that a consumer could not be forced to arbitrate because the named arbitrator, NAF, no longer performed consumer arbitrations. The court stated that "in light of the plain meaning of the arbitration provision, the court cannot appoint another arbitrator even though the NAF is an unavailable forum, the parties 'cannot be compelled to arbitrate a dispute if [they have] not agreed to do so.'" *Ranzy v. Extra Cash of Tex., Inc.*, 2010 U.S. Dist. LEXIS 22551 (S.D. Tex. Mar. 11, 2010).

High internet service early termination fee may be unlawful penalty. A United States district court in Idaho held that an early termination fee of $200 for internet service that cost $14.95 per month on an annual contract might be an unenforceable liquidated damages clause under California law. The court identified the difference between alternatives and liquidated damages. "If one mode of performance had been clearly inferior to the other at the time of the contract, and had existed merely to coerce the owner to choose the first mode, then the element of rational choice would have been lacking." *Seraphin v. SBC Internet Servs., Inc.,* 2010 U.S. Dist. LEXIS 29626 (D. Idaho Mar. 29, 2010).

Arbitration ban on class action is valid. The United States District Court for Northern Virginia held that an arbitration agreement was valid and enforceable despite the agreement's ban on class actions. *Wince v. Easterbrooke Cellular Corp.*, 681 F. Supp. 2d 688 (N. D. W. Va. 2010).

Lawyer solicitation rule is unconstitutional. A United States district court in Texas held that a state law prohibiting an attorney from soliciting clients within 30 days of a person's arrest or being served with a summons violates the First Amendment. *McKinley v. Abbott*, 2010 U.S. Dist. LEXIS 33499 (W.D. Tex. Mar. 25, 2010).

Spanish sentence in collection letter gives rise to claim under FDCPA. A United States district court held that a Spanish sentence inserted into an English language notice of a dunning letter violated the FDCPA by overshadowing the rest of the letter. *Ehrich v. I.C. Sys., Inc.,* 681 F. Supp. 2d 265 (E.D.N.Y. 2010).

Opt out provision saves arbitration clause class action waiver. The United States District Court for the Eastern District of Pennsylvania held a payday loan agreement containing a class action waiver was not unconscionable because it contained a provision allowing the borrower to unconditionally opt out of arbitration. *Clerk v. ACE Cash Express, Inc.*, 2010 U.S. Dist. LEXIS 7978 (E.D. Pa. Jan. 29, 2010).

Electronically displayed e-mail confirmations are not protected by the Fair and Accurate Credit Transactions Act. The United States District Court for the Northern District of Illinois held e-mail confirmations are neither "electronically printed" nor provided "at the point of the sale or transaction" and therefore are not subject to the FACTA. *Shlahtichman v. 1-800 Contacts, Inc.*, 2009 U.S. Dist. LEXIS 112379 (N.D. Ill. Dec. 2, 2009).

Bona fide error defense depends on use of software. A federal court held that the mere use of software by a debt collector was not sufficient to establish a bona fide error. The court held that the debt collector must also establish that the software was properly used. *Regan v. Law Offices of Edwin A. Abrahamsen & Assocs., P.C.*, 2010 U.S. Dist. LEXIS 2233 (E.D. Pa. Jan. 11, 2010).

STATE COURTS

Wrongful death suit is not subject to arbitration. A California court of appeals has held that the family of a man who died on a hiking expedition in Africa was not required to arbitrate wrongful death claims against the travel company that organized the trip. The court found the wrongful death suit is not subject to arbitration. *Lhotka v. Geographic Expeditions, Inc.*, 104 Cal. Rptr. 3d 844 (Cal. Ct. App. 1st Dist. 2010).

State debt collection law is not unconstitutional when applied to a law firm. The Alaska Supreme Court held that debt collectors who use unfair or deceptive tactics during collection litigation cannot rely on the First Amendment's petition clause as a defense. "[The firm] has not persuasively demonstrated that [the plaintiff's] … claims will, if successful, unduly restrict [the firm's] right to petition the government for redress of grievances. [The plaintiff's] claims would appear to burden [the firm's] petitioning activities no more than our rules of professional conduct or standards of practice already do." *Pepper v. Routh Crabtree, APC*, 219 P.3d 1017 (Alaska 2009).

Injunctive relief pursuant to the Texas Debt Collection Act (TDCA) does not require proof of irreparable injury. A Texas appellate court has held that it is not necessary to comply with the common law requirements for injunctive relief in a suit under the TDCA. The court noted that "where a statute provides for a right to an injunction for a violation, a party does not have to establish the general equitable principles for a temporary injunction." *Marauder Corp. v. Beall*, 301 S.W.3d 817 (Tex. App.—Dallas 2009).

Consumers who claim they were misled into purchasing Vioxx cannot sue the drug maker. A California court of appeals held that purchasers of Vioxx may not maintain a class action against Merck, the drug's manufacturer. The plaintiffs sued contending that due to its cardiovascular risks, Vioxx was not as safe as other less expensive pain relievers. They sought recovery, on behalf of all persons and entities in California who paid for Vioxx, of the difference in price between what they paid for Vioxx and what they would have paid for a safer, equally effective pain reliever. *In re Vioxx Class Cases*, 103 Cal. Rptr. 3d 83 (Cal. Ct. App. 2d Dist. 2009).

Insurance covers unsolicited fax lawsuit. The Florida Supreme Court has ruled, in answering a certified question from the Elev-

The court noted that even though a person's signature on a contract is usually deemed as assent to its terms, even if the party does not read it, an exception exists for documents that do not appear to be contracts when the terms are not called to the signee's attention.

enth Circuit, that a business was entitled to coverage under its commercial liability policy when it was sued for allegedly sending unsolicited fax advertisements in violation of federal law. *Penzer v. Transp. Ins. Co.*, 29 So. 3d 1000 (Fla. 2010).

Whether consumer relied on seller's misrepresentation is question for jury. A Texas appellate court has held that the fact the consumer had a home inspected does not, as a matter of law, negate reliance on the seller's misrepresentations. *Bernstein v. Thomas*, 298 S.W.3d 817 (Tex. App.—Dallas 2009).

Negligent attorney's fee is not deductible. The Washington Supreme Court held that a legal malpractice award should have been based on the total amount of a settlement lost to the client, without deducting the negligent attorney's hypothetical contingent fee. *Shoemake v. Ferrer*, 225 P.3d 990 (Wash. 2010).

Car dealer cannot enforce arbitration clause. The South Carolina Supreme Court held that a car dealer could not enforce an arbitration clause after being sued by a customer who claimed that he had been the victim of a "bait and switch." The court noted, "Partain argues that even if his claim is encompassed by language of the arbitration clause, the clause does not apply because the alleged actions of Upstate Auto constitute 'illegal and outrageous acts' unforeseeable to a reasonable consumer in the context of normal business dealings. We agree." *Partain v. Upstate Auto Group*, 689 S.E.2d 602 (S.C. 2010).

Tanning salon may be liable for customer's injury notwithstanding signed release. The Colorado Supreme Court held that a release signed by a tanning booth customer does not bar a strict liability claim against the booth's manufacturer after she was injured. *Boles v. Sun Ergoline, Inc.*, 223 P.3d 724 (Colo. 2010).

Buried arbitration clause not enforceable. A California appellate court held that an arbitration clause in an electronic employment contract was not enforceable. The court noted that even though a person's signature on a contract is usually deemed as an assent to its terms, even if the party does not read it, an exception exists for documents that do not appear to be contracts when the terms are not called to the signee's attention. "In such a case, no contract is formed with respect to the undisclosed term." *Adams v. Superior Court*, 2010 Cal. App. Unpub. LEXIS 1236 (Cal. Ct. App. 4th Dist. Feb. 22, 2010).