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 APPEAL

Bankruptcy Code's debt relief clauses as applied to attorneys upheld. The Second Circuit held that the Bankruptcy Code's restrictions on "debt relief agencies," which apply to attorneys, do not violate free speech protections. *Conn. Bar Ass'n v. U.S.*, 620 F.3d 81 (2nd Cir. 2010).

Attorney not entitled to attorney fees for his own work in his bankruptcy case. The Second Circuit held that a lawyer acting pro se could not recover his attorney's fees. Based on his success on the claim, the lawyer argued that he was entitled to attorney's fees under §7430 of the Internal Revenue Code, which permits a prevailing party to recover litigation costs. But the 2nd Circuit held that a lawyer appearing pro se is not entitled to attorney's fees. *U.S. Dep't of Justice v. Hudson*, 2010 U.S. App. LEXIS 23338 (2nd Cir. Nov. 10, 2010).

Class action over cell phone hazards is preempted. The Third Circuit held that regulations promulgated by the Federal Communications Commission preempt a class action alleging that cell phone users are exposed to dangerous levels of radiation. *Farina v. Nokia Inc.*, 625 F.3d 97 (3rd Cir. 2010).

Claims against insecticide manufacturer not preempted. The Third Circuit held that farmers' claims of negligent misrepresentation, fraud, and breach of state consumer fraud statutes based on manufacturer's brochure were not preempted by FIFRA. *Indian Brand Farms Inc. v. Novartis Crop Prot. Inc.*, 617 F.3d 207 (3rd Cir. 2010).

Debtor and bankruptcy trustee can't collect FMLA award. The Fifth Circuit held that a bankruptcy trustee could not collect a $1 million employment award that the debtor failed to disclose as an asset. The court noted, "Considering all of the costs and consequences that Lubke's (the debtor) inconsistent positions have engendered, we conclude that equity does not support further continuation of this litigation and that both Lubke and Reed (the trustee) must be judicially estopped from pursuing it." *Reed v. City of Arlington*, 620 F.3d 477 (5th Cir. 2010).

NAF arbitration provision unenforceable. The Fifth Circuit affirmed the denial of arbitration when the forum becomes unavailable. The court found the forum was mandatory and the designated forum became unavailable when NAF ceased to handle consumer arbitrations. *Ranzy v. Tijerina*, 2010 U.S. App. LEXIS 17872 (5th Cir. Aug. 25, 2010).

Bankruptcy debtor must pay fees to cure mortgage default. The Sixth Circuit held that a Chapter 13 debtor was required to pay fees and costs as part of curing an arrearage on her home mortgage. *Deutsche Bank Nat'l Trust Co. v. Tucker*, 621 F.3d 460 (6th Cir. 2010).

Defendants waived arbitration rights. The Sixth Circuit held that defendants waived their right to compel arbitration by "sleeping" on them for 26 months, while plaintiffs incurred the costs of litigation. *Hurley v. Deutsche Bank Trust Co. Americas*, 610 F.3d 334 (6th Cir. 2010).

FDCPA does not require explicit demand for payment. The Seventh Circuit held that a loan modification letter violated the FDCPA, despite the fact that the letter made no explicit demand for repayment. The court noted that the Act applies to any letter sent

"in connection with an attempt to collect a debt," and that these letters satisfied that standard. *Gburek v. Litton*, 614 F.3d 380 (7th Cir. 2010).

Income of separated spouses combined in bankruptcy. The Eighth Circuit Bankruptcy Appellate Panel held that spouses who filed a joint bankruptcy petition while separated must combine their incomes for the purpose of determining the "applicable commitment period" for repaying creditors. *Harman v. Fink*, 435 B.R. 596 (B.A.P. 8th Cir. 2010).

"Owner" can't resell software. The Ninth Circuit has sided with the computer software industry in its effort to squelch sales of secondhand programs covered by widely used licensing agreements. A three-judge panel concluded the first-sale doctrine didn't apply to used software programs peddled on eBay. The court noted that pursuant to the agreement, the company owned the software. *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010).

Credit card customers may maintain class action under FACTA. The Ninth Circuit held that card customers may be entitled to class certification on a claim that a theater chain violated federal law by wrongfully printing a portion of their account numbers on receipts. *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708 (9th Cir. 2010).

Tire wear class action entitled to certification. The Ninth Circuit held that a class action lawsuit alleging certain Land Rover vehicles were subject to excessive tire wear could proceed as a class action. The court noted that the claims were susceptible to proof by generalized evidence. *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168 (9th Cir. 2010).

Class action is removed from state court. The Ninth Circuit held that a telephone company produced sufficient evidence of likely damages in a class action against it to satisfy the $5 million jurisdictional requirements for removal of the case from state court. The court noted that the amount in controversy is simply an estimate of the total amount in dispute, not a prospective assessment of defendant's liability. *Lewis v. Verizon Commc'ns, Inc.*, 2010 U.S. App. LEXIS 23725 (9th Cir. Nov. 3, 2010).

Attorney is "credit repair organization" under Credit Repair Organization Act. The Ninth Circuit held that an attorney who charged for credit repair services was subject to the provisions of the CROA. *Rannis v. Recchia*, 380 F. App'x 646 (9th Cir. 2010).
Attorneys' fee award upheld. The Tenth Circuit has upheld a lodestar fee award of $63,000 in a FDCPA class action case, notwithstanding the fact that the district court failed to specifically discuss the *Johnson* factors. *Anchondo v. Anderson, Crenshaw & Assocs.*, 616 F.3d 1098 (10th Cir. 2010).

Law firm filing non-judicial foreclosure didn't violate Fair Debt Collection Practices Act. The Tenth Circuit held that a law firm did not violate federal debt collection law in the course of communicating with a debtor following the commencement of a non-judicial foreclosure. The court assumed that the attorney's conduct constituted "debt collection," but found no violation of the FDCPA. *Maynard v. Bryan W. Cannon, P.C*, 2010 U.S. App. LEXIS 23308 (10th Cir. Nov. 10, 2010).

Satellite TV customers may proceed as a class. The Eleventh Circuit held that customers could proceed as a class in federal court, even though no single customer could meet the jurisdictional amount. "The putative class [in this case] exceeded 100 persons, and the amount of controversy - in the aggregate - exceeded $5,000,000, exclusive of interest and costs. As the plaintiff class was comprised entirely of Georgia residents, there was sufficient diversity, since DirecTV is a California corporation. These factors alone were sufficient to allow the district court to exercise subject matter jurisdiction, and the further requirements and exceptions to jurisdiction under [the Act] neither apply nor warrant discussion here." *Cappuccitti v. DirecTV, Inc.*, 623 F.3d 1118 (11th Cir. 2010).

Points are not actionable under RESPA. The Eleventh Circuit found that points charged by a lender do not fit within the language of RESPA. "The principal question this appeal presents is whether, in connection with a residential mortgage loan, charging a loan discount payment—otherwise known as "points" or "discount points"—to provide a specific, below-market interest rate constitutes the "rendering of a real estate settlement service within the meaning of § 2607(b)." The court concluded they do not. *Wooten v. Quicken Loans, Inc.*, 2010 U.S. App. LEXIS 24077 (11th Cir. Nov. 23, 2010).

PayPal seller is Fair Debt Collection Practices Act Consumer. The Eleventh Circuit held that an online seller's PayPal obligation is a "debt" subject to the requirements of federal law. The court noted the requirements of the FDCPA, "the FDCPA [applies] only to payment obligations of a (1) consumer arising out of a (2) transaction in which the money, property, insurance, or services at issue are (3) primarily for personal, family, or household purposes. *Oppenheim v. I.C. System, Inc.*, 2010 U.S. App. LEXIS 24888 (11th Cir. Dec. 7, 2010).

UNITED STATES DISTRICT COURTS

iPhone contract arbitration provision is enforceable. An Alabama U.S. district court held that AT&T Mobility's iPhone wireless service contract, including a mandatory arbitration provision and a class action waiver, was neither procedurally nor substantively unconscionable under Alabama law. *Powell v. AT&T Mobility, LLC*, 2010 U.S. Dist. LEXIS 110760 (N.D. Ala. Sept. 30, 2010).

Credit reporting agency liable for not acting promptly. A federal district court in Florida held that failing to remove an inaccurate entry after being provided with proof that it was incorrect results in liability under the Fair Credit Reporting Act. The court, however, awarded only actual damages, and denied statutory or punitive damages. *Lee v. Sec. Check, LLC*, 2010 U.S. Dist. LEXIS 82630 (M.D. Fla. Aug. 5, 2010).

No bona fide error defense for mistake of law. A federal district court in Indiana held that an attorney debt collector could not raise mistake of law as a defense to a FDCPA class action lawsuit. The court noted that the Supreme Court has held mistake of law is not with the scope of the bona fide error defense. *Campbell v. Hall*, 2010 U.S. Dist. LEXIS 94236 (N.D. Ind. Sept. 9, 2010).

Arbitration clause found unenforceable. The U.S. District Court in Montana held a mandatory arbitration clause in an internet service provider's terms of service—which was presented in capitalized text in the ninth paragraph of the unsigned document—was an inconspicuous part of a contract of adhesion and unenforceable under Montana law. *Mortensen v. Bresnan Commc'ns, LLC*, 2010 U.S. Dist. LEXIS 120603 (D. Mont. Nov. 15, 2010).

Fair Credit Reporting Act requires showing that report is misleading to user of report. A federal district court held that a consumer credit report is misleading only when the consumer of the report is misled. The fact that the report may be misleading to a layperson is not relevant. *Elsady v. Rapid Global Bus. Solutions, Inc.*, 2010 U.S. Dist. LEXIS 69052 (E.D. Mich. July 12, 2010).

A U.S. District Court held that that a jury's punitive damage award of $500,000 exceeded the constitutional maximum for punitive awards.

Punitive damages for violations of FCRA cannot exceed compensatory damages by a 9-1 ratio. A U.S. District Court held that that a jury's punitive damage award of $500,000 exceeded the constitutional maximum for punitive awards. The court noted that this standard is not changed by the fact that the defendant is a repeat violator. Because the jury's compensatory award was just $30,000, the maximum punitive award would be $270,000. *Dixon-Rollins v. Experian Info. Solutions, Inc.*, 2010 U.S. Dist. LEXIS 100015 (E.D. Pa. Sept. 23, 2010).

Bankruptcy attorney sanctioned for charging fee to client's credit card. A U.S. Bankruptcy Court in Ohio held that an attorney who charged his retainer to the debtor's credit card violated the Act's prohibition on assuming more debt to pay legal fees. The court noted, "Section 526(a)(4) explicitly prohibits an attorney from advising a debtor to incur more debt for the purpose of obtaining bankruptcy related legal services. Section 526(a)(4) does not provide that this prohibition may be waived if a client is advised of the consequences of charging a credit card immediately prior to pursuing bankruptcy relief." U.S. Bankruptcy Court for the Southern District of Ohio. In re Seidel, No. 09-58731. Sept. 30, 2010. Lawyers USA No. 993-2342.

STATE COURTS

Texas Supreme Court discusses commercial reasonableness under Article 9. The court recognized that a secured creditor that seeks to recover a deficiency must prove that it acted in a "commercially reasonable" manner in disposing of collateral. With one dissent, it held that the jury may determine commercial reasonableness by employing a standard other than that stated in the jury charge. *Regal Fin. Co. v. Tex Star Motors, Inc.*, 2010 Tex. LEXIS 611 (Tex. Aug. 20, 2010).

Texas law on asbestos successor liability unconstitutional. The Texas Supreme Court held that a Texas state law limiting corporations' successor liability for personal injury claims from asbestos exposure violates the state constitution as applied to a widow's suit alleging that her husband contracted mesothelioma from workplace exposure. *Robinson v. Crown Cork & Seal Co.*, 2010 Tex. LEXIS 796 (Tex. Oct. 22, 2010).

Wrongful death claimants are bound by a patient's arbitration agreement with his doctor. The plaintiff's husband died after receiving treatment from the defendant for a fractured hip. The plaintiff and her adult children sued the defendant for medical malpractice and wrongful death. The California Supreme Court ruled that the plaintiff and her children were bound by the arbitration clause, despite not being signatories to the agreement. *Ruiz v. Podolsky*, 237 P.3d 584 (Cal. 2010).

Lender not liable for "yield spread premium." A home lender didn't trigger the protections of federal consumer protection law when it paid a "yield spread premium" to a mortgage broker, the Louisiana Supreme Court ruled in reversing judgment. *Bank of N.Y. v. Parnell*, 2010 La. LEXIS 2615 (La. Nov. 30, 2010).

Class arbitration waiver is unenforceable. The Missouri Supreme Court held that a consumer lender could not enforce a class arbitration waiver in its loan agreement. The court found the waiver unconscionable, and invalidated the arbitration agreement in its entirety. *Brewer v. Mo. Title Loans, Inc.*, 323 S.W.3d 18 (Mo. 2010).

Federal law preempts airline customer's travel certificate suit. Airline customer sued on expired gift certificate, arguing that state law prohibited sale of certificates with an expiration date. The California Court of Appeal held that the federal Airline Deregulation Act preempts state law prohibiting gift certificates with expiration dates. *Tanen v. Sw. Airlines Co.*, 114. Cal. Rptr. 3d 743 (Cal. Ct. App. 2010).