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

States cannot not void class action arbitration ban based on unconscionability. The U.S. Supreme Court held that companies can use arbitration clauses in consumer and employment contracts to block class actions. The Court found that the Federal Arbitration Act preempts California contract law, specifically the California Supreme Court's 2005 decision in *Discover Bank v. Superior Court of Los Angeles*. The practical effect of this decision is to allow any business or employer to ban the use of class actions against it by imposing arbitration upon its customers or employees, and including a class action ban within that agreement. *AT&T v. Concepcion,* 2011 U.S. LEXIS 3367 (April 27, 2011).

United States Supreme Court holds that Truth in Lending Act regulation does not require a bank to notify a credit card holder in advance that finance charges would be increased to a pre-set contractual rate. The Court noted "This case presents the question whether Regulation Z requires an issuer to notify a cardholder of an interest-rate increase instituted pursuant to a provision of the cardholder agreement giving the issuer discretion to increase the rate, up to a stated maximum, in the event of the cardholder's delinquency or default. We conclude that the version of Regulation Z applicable in this case does not require such notice." *Chase Bank USA v. McCoy*, 131 S. Ct. 871 (2011).

Supreme Court holds vaccine suit is preempted. The United States Supreme Court held that the federal Vaccine Act preempts defect claims brought by a plaintiff who alleged that she suffered injuries as a result of receiving a diphtheria, tetanus and pertussis vaccine as a child. *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068 (2011).

Personal injury suits against automakers based on rear seat lap belts not preempted. The United States Supreme Court opened the door to state personal injury suits against automakers in a decision involving vehicle lap belts. The justices, in a unanimous decision by Justice Stephen Breyer, held that a federal motor vehicle safety regulation did not preempt state tort suits claiming that manufacturers should have installed lap-and-shoulder belts instead of lap belts on rear inner seats. *Williamson v. Mazda Motor of Am., Inc*., 131 S. Ct. 1131 (2011).

UNITED STATES COURTS OF APPEAL

Debt collector may be liable under FDCPA for venue violation. The Second Circuit held that a debt collector may be liable for damages under federal law for filing a collection action in an improper venue, reversing a dismissal. The court stated that the issue was whether a debt collector violates the FDCPA's venue provisions by suing a consumer in a city court in the State of New York when that court lacks power to hear the action because the consumer does not reside in that city or a town contiguous thereto. "We hold that such a suit is not brought in the 'judicial district or similar legal entity' in which the consumer resides, even when the consumer resides elsewhere within the county containing the city court, and therefore determine that Hess's complaint states a claim upon which relief can be granted." *Hess v. Cohen & Slamowitz LLP,* 2011 U.S. App. LEXIS 3512 (2nd Cir. Feb. 23, 2011).

Job applicant could not sue for "bankruptcy discrimination." The Third Circuit held that a plaintiff could not sue for discrimination based on an allegation that he was denied a job because of his prior bankruptcy. The court noted that section 525(b) of the Bankruptcy Act does not create a cause of action against private employers who engage in discriminatory hiring. *Rea v. Federated Investors*, 627 F.3d 937 (3rd Cir. 2010).

Communication directed to consumer's attorney is actionable under the FDCPA. The Third Circuit held that a law firm's letter to the debtor's attorney might have violated the FDCPA. The plaintiff alleged the defendant violated the FDCPA by demanding $910 in attorney fees when court rule permits only $15.43, $335 for searches when court rule permits only $75, $160 for recording fees when the actual fee was only $60, and $475 for service of process when statute and court rule limit reimbursement to $175. The court noted that "if an otherwise improper communication would escape FDCPA liability simply because that communication was directed to a consumer's attorney, it would undermine the deterrent effect of strict liability." *Allen v. LaSalle Bank*, 629 F.3d 364 (3rd Cir. 2011).

Attempt to collect time-barred debt does not violate FDCPA. The Third Circuit held that a debt collector did not violate federal consumer protection law when it requested payment of a delinquent credit card account after the statute of limitations had expired. "Even the least sophisticated consumer would not understand [the defendant's] letter to explicitly or implicitly threaten litigation. Furthermore, the [Act] requires debt collectors to inform a debtor 'that the debt collector is attempting to collect a debt.' Since it is appropriate for a debt collector to request voluntary repayment of a time-barred debt, it would be unfair if debt collectors were found to violate the [Act] both if they include the mandated language (because inclusion would threaten suit) and if they do not (because failure to include a mandatory notice violates the statute)." *Huertas v. Galaxy Asset Mgmt.*, 2011 U.S. App. LEXIS 7397 (3rd Cir. Apr. 11, 2011).

Lawyers may advertise past success. The Fifth Circuit held that a state disciplinary rule prohibiting lawyers from advertising their past litigation successes impermissibly infringes on freedom of speech. *Public Citizen Inc. v. La. Att'y Disciplinary Bd.*, 632 F.3d 212 (5th Cir. 2011).

Phone bill debt subject to Texas four-year statute of limitations. The Fifth Circuit held that state law governs the collection of debts arising out of a phone bill.

Phone bill debt subject to Texas four-year statute of limitations. The Fifth Circuit held that state law governs the collection of debts arising out of a phone bill. The parties disputed whether actions to collect debts based on mobile phone bills are governed by a two-year statute of limitations under the Federal Communication Act (FCA) or a four-year statute of limitations under Texas law. The court concluded that § 415(a) of the FCA does not apply to the plaintiffs' debts, because Congress has not made clear that it intended for § 415(a) to preempt state statutes of limitations with respect to actions to collect debts like those at issue. *Castro v. Collecto, Inc.*, 634 F.3d 779 (5th Cir. 2011).

Bankruptcy repayment plan has minimum duration. The Sixth Circuit held that a Chapter 13 bankruptcy plan involving "above median" debtors could not be approved without providing for the payment of unsecured claims for a minimum period of 60 months. *Baud v. Carroll*, 634 F.3d 327 (6th Cir. 2011).

Federal standards do not preempt motorcycle helmet class action suit. The Sixth Circuit held that the National Traffic and Motor Vehicle Safety Act of 1966 does not preempt a class action over allegedly defective motorcycle helmets. *Fabian v. Fulmer Helmets, Inc.*, 628 F.3d 278 (6th Cir. 2010).

Consumer's deceptive trade practices award dischargeable in bankruptcy. The Seventh Circuit held that a home improvement contractor could discharge in his bankruptcy case a state court judgment for deceptive trade practices. The court found that the Bankruptcy Act's fraud exception did not apply because the evidence did not establish that the debtor acted with the requisite intent to deceive or defraud. *Reeves v. Davis*, 2011 U.S. App. LEXIS 4978 (7th Cir. Mar. 14, 2011).

A law firm could not establish a "bona fide error" defense. The Ninth Circuit affirmed a $311,000 jury verdict against a law firm that sued on a time-barred debt. The firm sued to collect a $3,800 balance on a credit card account that the bank had written off as a bad debt in 2000. The plaintiff sued the firm for attempting to collect a time-barred debt in violation of the Fair Debt Collection Practices Act. The court concluded that the firm was not protected by the Act's "bona fide error" defense because the firm's procedures were inadequate for the purpose of identifying time-barred cases. *McCollough v. Johnson, Rodenberg & Lauinger, LLC*, 2011 U.S. App. LEXIS 4072 (9th Cir. Mar. 4, 2011).

Debt Collector did not establish "bona fide error" defense. The Eleventh Circuit held that a debt collector could not avail itself of the "bona fide error" defense when sued for violating federal consumer protection law. The court concluded, " In sum, ICS cited no internal controls it employs to reduce the incidence of improper debt collection. Rather, ICS's procedure is to outsource its oversight task to its creditor AAA, which must report only debts that are 'validly due and owing.'" *Owen v. I.C. Sys., Inc.*, 629 F.3d 1263 (11th Cir. 2011).

Pain pump litigation preempted by federal law. The 11th Circuit held that federal law regulating medical devices preempts state product liability claims against the manufacturer of a pain pump. *Wolicki-Gables v. Arrow Int'l, Inc.*, 634 F.3d 1296 (11th Cir. 2011).

UNITED STATES DISTRICT COURTS

Option to customize software does not make it a service rather than a good. A U.S. District Court in Illinois held that the four-year statute of limitations that attaches to contracts under the Illinois Uniform Commercial Code bars the plaintiff's action arising from the purchase of customizable pricing and "eAuction" software. The plaintiff unsuccessfully argued that the UCC does not apply if the "predominant feature of the [contract] was a transfer of intellectual property rights." *Surplus.com, Inc. v. Oracle Corp.*, 2010 U.S. Dist. LEXIS 136254 (N.D. Ill. Dec. 23, 2010).

Process server may be subject to Fair Debt Collection Practices Act. The U.S. District Court for the Northern District of Illinois held that a process server who takes on the secondary role of debt collector is not exempt from liability under the FDCPA. *Spiegel v. Judicial Att'y. Servs., Inc.*, 2011 U.S. Dist. LEXIS 9350 (N.D. Ill. Feb. 1, 2011).

Customer can sue over forged convenience checks. A U.S. District Court in Minnesota held that a credit card company may have violated federal fair credit reporting law by failing to respond adequately to a customer's complaint that her boyfriend had forged her convenience checks. The plaintiff sued, alleging that the defendant violated the Fair Credit Reporting Act by failing to conduct a reasonable investigation of her fraud claim. The court concluded that the plaintiff's evidence was sufficient for her to proceed on an inadequate investigation claim under the Act. *Meyer v. F.I.A. Card Servs.*, 2011 U.S. Dist. LEXIS 9685 (D. Minn. Feb. 1, 2011).

Company cannot force customer to arbitrate. A U.S. District Court in Pennsylvania held that a tax services company could not enforce an arbitration clause in its customer agreement when it was sued for alleged violations of the Truth in Lending Act, the Fair Debt Collection Practices Act, and various state laws. The court found the arbitration provision unconscionable because it required Mr. Antkowiak to pay all costs, the requirement to arbitrate claims is unilateral, the provision contains a waiver of the right to pursue a class action, and Mr. Antkowiak would be required to arbitrate the claims in Houston, Texas. *Antkowiak v. TaxMasters*, 2011 U.S. Dist. LEXIS 27468 (E.D. Penn. Mar. 17, 2011).

STATE COURTS

State supreme court strikes down class action ban. The Kentucky Supreme Court held that a contractual ban on class action litigation is void and unenforceable. The court also determined that: 1) the Service Agreement's choice of law provision is not enforceable, and Kentucky law, rather than New York law, is applicable; 2) the Service Agreement's general arbitration provision is not unconscionable and is severable, and 3) the provision imposing a confidentiality requirement upon the litigants to arbitration proceedings is void. *Schnuerle v. Insight Communs. Co.*, 2010 Ky. LEXIS 288 (Ky. Dec. 16, 2010).

Bank can be sued for deceptive foreclosure. A California Court of Appeal held that a bank may be liable for foreclosing on a home after allegedly promising to modify a mortgage in order get the homeowner to forgo the protections of bankruptcy. *Aceves v. U.S. Bank N.A.*, 192 Cal. App. 4th 218 (Cal. Ct. App. 2011).

Judge cannot request "volunteers" for a long jury trial. The Alabama Supreme Court held that a judge violated a product liability defendant's right to a randomly selected jury when he asked for a show of hands of prospective jurors able to sit through a long trial. *Ford Motor Co. v. Duckett*, 2011 Ala. LEXIS 21 (Ala. Feb. 11, 2011).

Court may not substitute arbitrator when contract designated NAF. The Illinois Supreme Court held that a personal computer company could not enforce an arbitration agreement in its sales contract that designated an arbitral forum that no longer accepts consumer arbitrations. The court noted that the "plain language of [Gateway's arbitration] provision penalizes any party for bringing a dispute in any forum other than the NAF. It is self-evident that the provision was intended to apply if the NAF was available to administer arbitrations. That is the whole point of the clause. Gateway, which drafted the agreement and presented the nonnegotiable terms to [the plaintiff] when he purchased his computer, sought, by this clause, to ensure that only the NAF would administer any arbitrations that arose under the agreement." *Carr v. Gateway, Inc.*, 241 Ill. 2d 15 (Ill. 2011).

Debt collector cannot enforce an arbitration award without proof that the consumer agreed to arbitrate. The Louisiana Supreme Court ruled that under the plain language of the FAA, a party seeking to confirm an arbitral award must provide the court with a copy of the arbitration agreement between the parties. The collector argued that the failure of the debtor to move to vacate the award within the statutorily prescribed deadline meant the debtor waived all defenses. In essence, if no motion to vacate, modify, or correct an arbitral award is filed within three months, a court is legally required to confirm the award as a purely ministerial act. The court disagreed and that where, as here, the party seeking confirmation has failed to proffer sufficient admissible evidence to make a prima facie case that the parties entered a valid agreement to arbitrate, the court cannot confirm the award. *FIA Card Servs., N.A. v. Weaver*, 2011 La. LEXIS 605 (La. Mar. 15, 2011).

The party alleging unconscionability of an arbitration agreement due to the possibility of high costs, must show the likelihood of incurring such costs.

Possibility of high costs not sufficient to defeat arbitration agreement. The Texas Supreme Court held that the party alleging unconscionability of an arbitration agreement due to the possibility of high costs, must show the likelihood of incurring such costs. The court also held that a defendant who led the consumer on a "wild goose chase," by moving for arbitration when there is no viable defense to the consumer's claim, could be sanctioned by the trial court. *In re Olshan*, 328 S.W.3d 883 (Tex. 2010).

Landlord liable for attack by tenant's pit bull. A Maryland appellate court found that a landlord may be liable based on negligence theories for injuries suffered by a child in an attack by a tenant's pit bull. *Solesky v. Tracey*, 2011 Md. App. LEXIS 47 (Md. Ct. Spec. App. Apr. 5, 2011).