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

Cingular customers must arbitrate individual claims. The Eleventh Circuit held that in light of the Supreme Court's decision in *Concepcion*, Cingular's contract requiring arbitration and prohibiting class claims is enforceable. The court stated "we now hold that, in light of *Concepcion*, the class action waiver in the Plaintiffs' arbitration agreements is enforceable under the FAA." *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205 (11th Cir. 2011).

Amended complaint revives right to enforce arbitration clause that had been waived. The Eleventh Circuit held that a consumer fraud plaintiff's filing of an amended complaint revived a bank's right to enforce an arbitration clause containing a class action waiver. The court noted that the plaintiff's filing of the amended complaint nullified the bank's waiver of its arbitration rights. It held that "when a plaintiff files an amended pleading that unexpectedly changes the shape of the case, the case may be 'so alter[ed] . . . that the [defendant] should be relieved from its waiver.'" *Krinsk v. SunTrust Banks, Inc.*, 654 F.3d 1194 (11th Cir. 2011).

Passenger may sue airline over frequent flier program. The Ninth Circuit held that Federal aviation law does not preempt a passenger's claim against an airline for a breach of the implied covenant of good faith and fair dealing. *Ginsberg v. Northwest, Inc.*, 653 F.3d 1033 (9th Cir. 2011).

Magnuson-Moss exhaustion rule is not jurisdictional. The Ninth Circuit held that a federal court is not deprived of subject matter jurisdiction in a breach-of-warranty lawsuit by the plaintiff's failure to first engage in dispute resolution under the terms of her new car lease. The court stated, "The only question before us is whether [plaintiff's] failure to comply with the MMWA's requirement that a consumer resort to an informal dispute settlement procedure before filing a civil action deprives the court of subject matter jurisdiction. We hold that it does not." *Maronyan v. Toyota Motor Sales, U.S.A., Inc.*, 658 F.3d 1038 (9th Cir. 2011).

Debt collector may be liable for damages under both state and federal law. The Ninth Circuit held that a debt collector that sent collection letters concerning obsolete debts to 40,000 individuals could be liable in a class action for statutory damages under both federal and California law. *Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055 (9th Cir. 2011).

Arbitration clause not enforceable with respect to claim under Magnuson-Moss. The Ninth Circuit held that a used car dealer could not enforce a written warranty provision that mandated predispute binding arbitration if it was sued for violating the Magnuson-Moss Warranty Act. The court explained that enforcing the rule "advances the statute's purpose of protecting consumers from being forced into involuntary agreements that they cannot

negotiate. In enacting the [Act], Congress sought to address the extreme inequality in bargaining power that vendors wielded over consumers by 'providing consumers with access to reasonable and effective remedies' for breaches of warranty, and by 'provid[ing] the Federal Trade Commission (FTC) with means of better protecting consumers.'" As the court noted, the Fifth and Eleventh Circuits have made contrary rulings. *Kolev v. Euromotors West/The Auto Gallery*, 658 F.3d 1024 (9th Cir. 2011).

Consumer is not limited to single recovery of statutory damages under Fair Credit Billing Act. The Ninth Circuit held that a plaintiff wasn't limited to a single recovery of statutory damages for multiple violations of the Fair Credit Billing Act. Chase Bank admittedly committed multiple violations of the Fair Credit Billing Act by misidentifying a $645 charge on the plaintiff's credit card account, failing to respond to her requests for information about it, continuing to seek payment for the charge despite her protests, and reporting the debt as delinquent to credit agencies. When the plaintiff sued, Chase argued that her damages were limited to the $1,000 statutory penalty because §1640(g) expressly limits recovery for multiple violations where the violations involved "multiple failures to disclose." But the court decided that §1640(g) did not limit the plaintiff's statutory damages. *Lyon v. Chase Bank USA, N.A.*, 656 F.3d 877 (9th Cir. 2011).

Fair Credit Reporting Act preempts state law claims. The Seventh Circuit held that the federal consumer protection law completely preempts state claims brought by a borrower who claimed that her bank falsely reported to credit agencies that she was behind on her loan payments. The plaintiff sued in state court, alleging that Bank of America told credit agencies that she was behind in payments on a loan, even though the bank knew that she wasn't. Her complaint asserted claims for willful violations of Indiana consumer protection law as well as violations of the Fair Credit Reporting Act (FCRA). The FCRA generally provides that no requirement may be imposed under the "laws" of any state with respect to the furnishers of information to consumer reporting agencies. In finding complete preemption, the court rejected the plaintiff's argument that the Act only prohibits claims brought under state statutes and not common-law causes of action, suggesting that such a conclusion was contrary to legislative-drafting manuals used by the House and the Senate. *Purcell v. Bank of Am.*, 659 F.3d 622 (7th Cir. 2011).

Car manufacturer liable for passenger's death. The Fifth Circuit held that the manufacturer of a sports utility vehicle could be liable for the death of a passenger who was ejected from her reclined seat in a rollover crash. The claim was based on a design defect in the front seat. The court noted, "To succeed on their design defect claim, the [plaintiffs] must have shown that a safer alternative—limiting the seat recline to a 45 degree angle—would have prevented or significantly reduced the risk of [their daughter's] injuries. The [plaintiffs'] expert . . . testified that seats reclined more than a 45 degree angle lead to a significantly increased risk of ejection. He further testified that ejection increases the risk of serious injury or death by six to thirteen times. The Texas statute only requires proof of a safer alternative design that 'in reasonable probability' would have reduced the claimant's injuries, which [the expert's] testimony adequately provided." *Goodner v. Hyundai Motor Co.*, 650 F.3d 1034 (5th Cir. 2011).

Home lender may recover attorneys' fees incurred in connection with a borrower's Chapter 13 bankruptcy case. The Fifth Circuit held that a lender could recover attorneys' fees pursuant to the terms of a deed of trust. The lender contended that it was entitled to its attorney fees based on language in the deed of trust providing that the "lender may do and pay for whatever is reasonable or appropriate to protect lender's interest in the property and rights under this security instrument." The court stated that, "In light of this language, it is clear that the deed of trust contemplates entitlement to attorney's fees incurred to protect Countrywide's interest in the property or rights under the deed of trust." *Velazquez v. Countrywide Home Loans Servicing, L.P. (In re Velazquez)*, 660 F.3d 893 (5th Cir. 2011).

Judgment creditor's lien on homestead unenforceable. The Fifth Circuit held that a judgment creditor did not have an enforceable lien against the proceeds of the sale of a debtor's home in excess of the $125,000 homestead exemption claimed in the debtor's bankruptcy case. The court recognized that the Bankruptcy Act exempts only $125,000 of a homestead exemption, but the court concluded that the enforceability of the plaintiff's lien was a matter of applicable Texas law. Under Texas law, a lien is unenforceable against homestead property. The court said that the "bankruptcy laws that place a cap on the value of a homestead did not convert [the plaintiff's] lien on the homestead from one that was unenforceable pre-petition to one that was enforceable as to the homestead post-petition." *Smith v. HD Smith Wholesale Drug Co. (In re McCombs)*, 659 F.3d 503 (5th Cir. 2011).

The Fifth Circuit held that a judgment creditor did not have an enforceable lien against the proceeds of the sale of a debtor's home in excess of the $125,000 homestead exemption claimed in the debtor's bankruptcy case.

Bankruptcy lawyer fined for "unreasonable reliance" on information provided by client. The Third Circuit held that a bankruptcy attorney could be sanctioned for relying on statements by its client. The court explained that "a reasonable attorney would not file a motion for relief from stay for cause without inquiring of the client whether it had any information relevant to the alleged cause, that is, the debtor's failure to make payments. Had [the lawyer] made even that most minimal of inquiries, [the bank] presumably would have provided her with the information in its files concerning the flood insurance dispute, and [the lawyer] could have included that information in her motion for relief from stay—or, perhaps, advised the client that seeking such a motion would be inappropriate under the circumstances." *In re Taylor*, 655 F.3d 274 (3d Cir. 2011).

State law determines the statute of limitations for a violation of the Telephone Consumer Protection Law. The Second Circuit held that the appropriate limitations period for a class action alleging that a business sent unsolicited fax advertisements in violation of federal consumer protection law was determined by state law. The defendant argued that the complaint was time-barred under the two-year statute of limitations provided in the Connecticut law, which specifically recognizes a cause of action for unsolicited faxes. The plaintiff countered that his lawsuit was timely because the federal "catch-all" four-year limitations period applied and his claims were tolled during the pendency of earlier proceedings in state and federal court. But the court concluded that the state limitations period governed and barred the plaintiff's lawsuit.

"[W]hile a TCPA diversity action is somewhat unusual in that the cause of action is created by federal rather than state law, that federal law authorizes TCPA claims only as 'otherwise permitted' by state law. This indicates that 'Congress intended to give states a fair measure of control over solving the problems that the TCPA addresses.' . . ." Therefore, state law determines the time period within which such actions may be brought. *Giovanniello v. ALM Media, LLC*, 660 F.3d 587 (2d Cir. 2011).

Customers can recover costs of litigating damages from data theft. The First Circuit held that a grocery chain could be liable for the "reasonably foreseeable" costs incurred by customers to mitigate the hacking of their credit and debit card numbers. *Anderson v. Hannaford Bros. Co.*, 659 F.3d 151 (1st Cir. 2011).

BANKRUPTCY APPELLATE PANELS

Bankruptcy debtor can avoid liens to stop foreclosure. The Bankruptcy Appellate Panel for the Eighth Circuit held that Chapter 7 debtors could avoid judicial liens on their homestead property in order to prevent a bank from continuing foreclosure proceedings. *White v. Commercial Bank & Trust Co. (In re White)*, 2011 Bankr. LEXIS 4307 (B.A.P. 8th Cir. Nov. 16, 2011).

A Chapter 13 debtor could "strip off" wholly unsecured liens on his principal residence. The Eighth Circuit Bankruptcy Appellate Panel ruled that a debtor may strip off junior liens on his residence, which was fully secured by a first lien. The debtor's proposed bankruptcy plan treated the claim of the senior lienholder as secured, but "stripped off" or avoided the liens of the second and third lienholders – treating their claims as wholly unsecured. The junior lienholders argued that the proposed strip off of their claims was prohibited by §1322(b)(2) of the Bankruptcy Code. The Code permits a Chapter 13 plan to "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims." But the court decided that Section 1322(b)(2)'s antimodification did not apply because the value of the debtor's principal residence is less than the claim of the senior lienholder and there is, therefore, no value securing the junior lienholders, rendering their claims unsecured under §506(a). *Fisette v. Keller (In re Fisette)*, 455 B.R. 177 (B.A.P. 8th Cir. 2011). *But see In re Quiros-Amy*, 456 B.R. 140 (Bankr. S.D. Fla. 2011).

The debtor's proposed bankruptcy plan treated the claim of the senior lienholder as secured, but "stripped off" or avoided the liens of the second and third lienholders – treating their claims as wholly unsecured.

STATE COURTS

Recording of an assignment is not necessary for foreclosure. The Arizona Supreme Court held state law did not bar the commencement of foreclosure proceedings even though an assignment of a deed of trust for the borrower's home had not been recorded. *Vasquez v. Saxon Mortg., Inc.*, 2011 Ariz. LEXIS 80 (Ariz. Nov. 18, 2011).

Car dealer forfeited right to arbitrate class claims. The California Court of Appeal held that a car dealer forfeited its right to enforce an arbitration clause in its customer agreement when it responded to a putative class action for failing to adequately disclose finance charges. *Roberts v. El Cajon Motors, Inc.*, 200 Cal. App. 4th 832 (2011).

Plaintiff cannot recover amount of undiscounted medical bills. The California Supreme Court held that a personal injury plaintiff can't recover the face amount of her medical bills when her service providers accepted lesser sums as payment. "When a tortiously injured person receives medical care for his or her injuries, the provider of that care often accepts as full payment, pursuant to a preexisting contract with the injured person's health insurer, an amount less than that stated in the provider's bill. In that circumstance, may the injured person recover from the tortfeasor, as economic damages for past medical expenses, the undiscounted sum stated in the provider's bill but never paid by or on behalf of the injured person? We hold no such recovery is allowed, for the simple reason that the injured plaintiff did not suffer any economic loss in that amount." *Howell v. Hamilton Meats & Provisions*, 52 Cal. 4th 541 (Cal. 2011), *reh'g denied*, 2011 Cal. LEXIS 11417 (Nov. 2, 2011).

A landlord can enforce a liability waiver against a tenant injured while exercising at his apartment complex's health club. A California Court of Appeals held that although landlords generally may not waive liability for their negligence, that rule does not apply in this context. The court stated, "We conclude that where a landlord chooses to enhance its offering by providing an on-site health club or exercise facility that goes well beyond bare habitability, there is no reason why the landlord may not protect itself by requiring the tenant, as a condition of use of the amenity, to execute the same waiver or release of liability that could lawfully be required by the operator of a separate, stand-alone health club or exercise facility," the court said. *Lewis Operating Corp. v. Superior Court*, 200 Cal. App. 4th 940 (2011).

Lender can be sued for "fraudulent" ARM disclosures. The California Court of Appeals held that a home lender can be sued under Truth-in-Lending, fraud and state unfair competition law based on its alleged failure to clearly disclose the negative consequences when only the scheduled monthly payments are made on an adjustable rate mortgage loan. *Boschma v. Home Loan Ctr., Inc.*, 198 Cal. App. 4th 230 (2011).

Punitive damages claim does not survive death of tortfeasor. The Supreme Court of Iowa held that a claim for punitive damage does not survive the death of the wrongdoer. "The sole question presented by this appeal is whether a right to punitive damages survives the death of the wrongdoer. On several previous occasions, we have held that punitive damages may not be recovered from the estate of a deceased tortfeasor. Upon our review, we are not persuaded that we should reconsider these precedents." *In re Estate of Vajgrt*, 801 N.W.2d 570 (Iowa 2011).

Class plaintiffs do not need to show receipt of junk faxes. The Kansas Supreme Court held that plaintiffs were not required to establish the actual receipt of unsolicited fax advertisements in order to proceed with a class action under the Telephone Consumer Protection Act. *Critchfield Physical Therapy v. Taranto Group, Inc.*, 2011 Kan. LEXIS 328 (Sept. 30, 2011).

Business cannot sue Better Business Bureau over unfavorable rating. The Missouri Court of Appeals held that a business does not have a claim against the BBB based on a "C" rating. The court stated, "Moreover, . . . the BBB's 'C' rating of Castle Rock is not sufficiently factual to be susceptible of being proved true or false. Although one may disagree with the BBB's evaluation of the underlying objective facts, the rating itself cannot be proved true or false. Therefore, the rating is protected as opinion under the First Amendment." *Castle Rock Remodeling, LLC v. Better Bus. Bureau of Greater St. Louis, Inc.*, 2011 Mo. App. LEXIS 1437 (Nov. 1, 2011).

State credit card claims are not preempted. The Montana Supreme Court held that Federal law does not preempt state tort claims against Citibank for taking steps to collect a credit card debt that the company allegedly knew to be due to unauthorized charges. *Curtis v. Citibank, S.D., N.A.*, 261 P.3d 1059 (Mont. 2011).

Pharmacist may have duty for customer-specific risk. The Nevada Supreme Court held that when a pharmacist has knowledge of a customer-specific risk with respect to a prescribed medication, he or she has a duty to exercise reasonable care in warning the customer or notifying the prescribing doctor of this risk. *Klasch v. Walgreen Co.*, 2011 Nev. LEXIS 93 (Nev. 2011).

Lender may be liable under state consumer protection act for conduct in connection with foreclosure. The New Jersey Supreme Court held that a home lender may be liable for consumer fraud law based on its alleged breach of agreements to forbear on foreclosure proceedings. "We hold that the post-foreclosure-judgment agreements in this case were both in form and substance an extension of credit to plaintiff originating from the initial loan. Fraudulent lending practices, even in a post-judgment setting, may be the basis for a Consumer Fraud Act lawsuit[,]" the court said. *Gonzalez v. Wilshire Credit Corp.*, 25 A.3d 1103 (N.J. 2011).

Car dealer's arbitration provision prohibiting class relief unenforceable. The New Jersey Appellate Division held that a new car dealer cannot enforce arbitration language waiving a customer's right to class-wide relief. The court recognized that *Concepcion* does not allow the clause to be invalidated per se on public policy ground, but found that, "the provisions before us are simply too convoluted and inconsistent to be enforced." NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp., 24 A.3d 777 (N.J. Super. Ct. App. Div. 2011).

Law firm cannot sue bank over counterfeit check. New York's highest court held that a law firm couldn't sue its bank for negligently misrepresenting that a counterfeit check received from a client had cleared. The firm agreed to represent a Hong Kong company to collect debts from its North American customers. The client instructed the firm to take its $10,000 retainer from a $198,000 Citibank check purportedly from one of the client's customers. After taking its retainer, the firm was to wire the remaining balance to the client. After being told the check had "cleared," the firm wired the balance of the check to the client. The court concluded that the firm could not show reasonable reliance, explaining that the bank's employee's alleged statement that the check had cleared was "an ambiguous remark that may have been intended to mean only that the amount of the check was available (as indeed it was) in [the firm's] account. Reliance on this statement as assurance that final settlement had occurred was, under the circumstances here, unreasonable as a matter of law." *Greenberg, Trager & Herbst, LLP v. HSBC Bank USA*, 17 N.Y.3d 565 (2011).

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Arbitration provision unconscionable and unenforceable. The Vermont Supreme Court held that a home inspector's arbitration clause was unenforceable. The court noted that "the contract's limitation on [the defendant's] liability creates a disingenuous arbitration remedy for the plaintiffs. Even standing alone, limiting liability to $285 irrespective of the actual damages incurred by the customer would be, at minimum, highly suspect. But under this contract's governing arbitration rules, the plaintiffs could not recover even the cost of the filing fee much less any compensatory damages. Thus, the liability limit in the contract is a complete impediment to any effective remedy for the home inspector's negligence or even intentional tort." *Glassford v. BrickKicker*, 2011 VT 118 (2011).

Automated call didn't violate Telephone Consumer Protection Act. West Virginia's highest court held that an automated call to a home didn't violate the federal TCPA because it was placed in response to a resident's Craigslist advertisement. *Mey v. Pep Boys-Manny, Moe & Jack*, 717 S.E.2d 235 (W. Va. 2011).