DECEPTIVE TRADE PRACTICES AND WARRANTIES

MAGNUSON-MOSS EXHAUSTION RULE IS NOT JURISDICTIONAL

Maronyan v. Toyota Motor Sales, U.S.A., Inc., 658 F.3d 1038 (9th Cir. 2011).

FACTS: Mariam Maronyan leased a new car from defendant, Toyota Motor Sales. The car began to have mechanical problems within the warranty period. Toyota failed to repair the problems to Maronyan's satisfaction, and she brought suit against Toyota in federal district court. Her claim alleged breach of warranty under the Magnuson–Moss Warranty Act ("MMWA"). The district court granted Toyota's motion to dismiss for lack of subject matter jurisdiction on the ground that Maronyan did not pursue her claims through the California Dispute Settlement Program (which Toyota specified in its warranty) before filing suit in civil court.
HOLDING: Reversed.
REASONING: All parties agreed that under Section 2310(a) of the MMWA, if a warrantor establishes a requirement that a dispute settlement procedure must be used before pursuing any legal remedy, then the consumer may not commence a civil action until the dispute resolution process is completed. However, the court noted that despite the mandatory language, statutorily-created exhaustion requirements ordinarily constitute affirmative defenses that may be defeated by compelling reasons for failure to exhaust. A consumer's failure to exhaust a remedy will only deprive federal courts of subject matter jurisdiction in those cases in which Congress makes plain the jurisdictional character of the exhaustion requirement. *Weinberger v. Salfi,* 422 U.S. 749, 757 (1975). Subject matter jurisdiction is rarely lost due to lack of compliance with exhaustion requirements. *See I.A.M. Nat'l Pension Fund Benefit Plan C. v. Stockton TRI Indus.*, 727 F.2d 1204, 1208 (D.C. Cir.1984) ("Only when Congress states in clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision . . . has the Supreme Court held that exhaustion is a jurisdictional prerequisite.").

The court disagreed with Toyota's contention that Congress had mandated the MMWA exhaustion requirement as jurisdictional.

The court disagreed with Toyota's contention that Congress had mandated the MMWA exhaustion requirement as jurisdictional, concluding that the necessary "sweeping and direct" language required in *Weinberger* was not present. Only when Congress has used "sweeping and direct language that goes beyond a requirement that only exhausted claims be brought" should a failure to exhaust be seen as affecting jurisdiction. The Court has chastised lower courts for their "overly zealous" application of the term "jurisdictional" to what are accurately understood as claims-processing rules or elements of a plaintiff's claim. In two earlier cases, the court found that similarly-worded statutory exhaustion requirements did not deprive federal courts of subject matter jurisdiction. *Rumbles v. Hill*, 182 F.3d 1064 (9th Cir. 1999); *McBride Cotton and Cattle Corp. v. Veneman*, 290 F.3d 973, 978 (9th Cir. 2002). The court held that the generic language in the MMWA was not "sweeping and direct." Thus, the court held that § 2310(a)'s prerequisite that "the consumer may not commence a civil action . . . unless he initially resorts to [an informal dispute settlement procedure]" is merely a codification of the MMWA's exhaustion requirement and does not operate as a jurisdictional bar.

CONSUMER CREDIT

SUIT ON CREDIT CARD DEBT IS AN ACTION ON AN OPEN ACCOUNT

Capital One Bank v. Conti, 245 S.W.3d 490 (Tex. App.—San Antonio 2011).

FACTS: Capital One sued Duane Conti for failure to pay amounts owed on his credit card account. The undisputed facts showed that Conti made his last payment in June 2005 and that Capital One's petition was file-stamped on August 4, 2009. The trial court granted Conti's motion for summary judgment on the grounds that the suit was not commenced before the statute of limitations had expired.
HOLDING: Reversed.
REASONING: The court outlined the four elements of an open account as: 1) transactions between the parties; 2) creating a creditor-debtor relationship through a general course of dealing; 3) with the account still being open; and 4) with expectation of further dealing. *Eaves v. Unifund CCR Partners,* 301 S.W.3d 402, 408-409 (Tex. App.—El Paso 2009). A credit card debt is considered an open account because the terms of repayment remain subject to modification and the parties exchange credits and debits until either party settles the balance and closes the account.

If an action to collect a credit card debt is brought as an action on an open account, Section 16.004(c) of the Texas Civil Practices and Remedies Code establishes the applicable statute of limitations. Under Section 16.004, a person must bring an action on an open or stated account not later than four years after the day that the cause of action accrues. The cause of action accrues on the day that the dealings in which the parties were interested together cease. As the party moving for summary judgment, Conti had the burden to conclusively establish the date upon which the parties' dealings ceased. Proof of the date of last payment is not conclusive evidence of the date upon which the parties' dealings ceased. The court reasoned that a typical credit card agreement requires the credit card holder to make payments at regular intervals. Therefore, merely establishing the last date of payment is not sufficient to establish, as a matter of law, that the relationship be-

tween the parties also ceased on that date. The court concluded that by providing the trial court with proof of the date of his last payment and nothing else, Conti did not conclusively establish the date upon which the parties' dealings ceased and the cause of action accrued.

STATE CREDIT CARD CLAIMS ARE NOT PREEMPTED

Curtis v. Citibank, South Dakota, N.A., 261 P.3d 1059 (Mont. 2011).

FACTS: In July 2008, Meril Curtis's Citibank credit card was stolen by a houseguest who then made over $7,000 in unauthorized charges. After Curtis's discovery of the charges, Citibank instructed him to file a police report and furnish an affidavit. It then acknowledged that the charges were unauthorized and that Curtis was not personally liable for the charges. Nevertheless, Citibank referred the account to a debt collection agency, PRS.

Curtis filed suit against Citibank alleging libel, credit libel, violation of the Fair Debt Collection Practices Act ("FDCPA"), and violation of the Montana Consumer Protection Act ("MCPA"). Citibank moved for judgment on the pleadings arguing that Curtis's libel, credit libel, and MCPA claims were preempted by the Fair Credit Reporting Act ("FCRA"). The district court found that Citibank was entitled to judgment on the pleadings for these counts because the state law claims were in fact subject to federal preemption by the FCRA. Curtis appealed.
HOLDING: Reversed and remanded.
REASONING: The FCRA requires that consumer reporting agencies adopt "reasonable procedures for meeting the needs of commerce for information as to consumer credit, personnel, insurance, and other information in a manner that is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information" in accordance with the requirements of the Act. 15 U.S.C. §1681(b). In order to provide uniform enforcement, the FCRA allows exemption from state laws that are inconsistent with guidelines found within the Act. 15 U.S.C. §1681t. The court explained that in 1996, specific preemption provisions were inserted into the FCRA, including: "[n]o requirement or prohibition may be imposed under the laws of any State . . . with respect to any subject matter regulated under . . . section 1681s–2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies . . . ." The Act also provides guidance to financial institutions that extend credit and regularly furnish information to a "consumer reporting agency." Citibank prevailed in the lower court by arguing that in referring Curtis's account to PRS, it was simply furnishing credit information. The court disagreed.

The court found that although both parties argued about Citibank's status as a "furnisher of information" under the FCRA, the heart of the matter lay in the status of PRS as a "consumer reporting agency." The FRCA states that a "consumer reporting agency" is "any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information . . . for the purpose of furnishing consumer reports to third parties . . . ." 15 U.S.C §1681a(f). The court found that PRS is a collection agency for overdue and delinquent accounts payable. The company collected information on Curtis for the purpose of collecting an alleged debt – not for the purpose of furnishing a consumer report to an ultimate end user of credit information. Contrary to Citibank's assertions, the definition found at §1681a(f) is intended to apply to the activities of agencies such as Equifax Credit Information Services, Inc., Trans Union LLC, and Experian Information Solutions, Inc. Collection agencies such as PRS, on the other hand, are regulated by the FDCPA. No similar federal preemption provision is found within the FDCPA. As such, the court concluded that the district court erred in finding that Curtis's state law claims were preempted by the FCRA.

FAIR CREDIT BILLING ACT AUTHORIZES MULTIPLE AWARDS OF STATUTORY DAMAGES

Lyon v. Chase Bank USA, N.A., 656 F.3d 877 (9th Cir. 2011).

FACTS: Credit card holder Barbee Lyon requested information regarding a misidentified charge on his credit-card bill from Chase Bank ("Chase"). Chase failed to respond to Lyon's requests, continued to seek payment, and ultimately reported the debt as delinquent to credit agencies, despite Lyon's protest. In doing so, Chase admittedly violated multiple sections of the Fair Credit Billing Act ("FCBA") 15 U.S.C. §§1666-(j). After unsuccessfully attempting to get a direct response from Chase, Lyon and his wife filed suit, alleging claims under the FCBA and Oregon's Unlawful Debt Collection Practices Act ("UDCPA"). Chase moved to limit FCBA recovery with the argument that Lyon was precluded from recovering separate statutory penalties. The trial court granted this motion *in limine* during pretrial conference, and Chase was subsequently allowed to amend its answer to admit liability up to $1,000. The district court dismissed the UDCPA claim and limited Lyon's total recovery for the FCBA claims accordingly. Lyon appealed on the ground that the trial court erred in limiting statutory damages for Chase's multiple violations of the FCBA.
HOLDING: Reversed.
REASONING: The FCBA was enacted by Congress to regulate billing disputes, by providing a procedure for dispute identification and resolution between a cardholder and a card issuer. It requires a credit card issuer to acknowledge disputes under certain circumstances, investigate the matter, and provide a written explanation of its decision within ninety days. The creditor must send its explanation to the cardholder before attempting to collect the disputed amount, and it must notify the cardholder that he need not pay the amount in dispute until full compliance has occurred. Additionally, the FCBA prohibits a creditor from adversely reporting on the cardholder's credit rating until all requirements are met.

Pursuant to 15 U.S.C. §1640(a)(2), a creditor who fails to comply with "any requirement imposed" under the FCBA is liable for an award of statutory damages. However, §1640(g) limits a plaintiff to a single recovery for multiple violations where the violations involve "multiple failures to disclose." Chase admitted to its receipt of the billing dispute from Lyon, its lack of response or explanation of the charge, the continuation of debt collection from Lyon, and having reported the debt as delinquent to credit agencies. All these actions are in violation of the FCBA requirements. However, Chase contended that all of its FCBA violations were covered by §1640(g) and that Lyon's recovery of

statutory damages was therefore limited to a single penalty. Chase argued that §1640(g) applies uniformly to any violation of the FCBA. The court disagreed. It found that §1640(g) indicates that the single recovery limitation applies to only a subset of the violations that involve" failure to disclose to any person any information required" under the covered statutes. The court reasoned that if Congress had intended uniform application of the single-recovery limitation, it would have uniformly applied the theory instead of codifying the limitations in §1640(g).

The single recovery limitation applies to only a subset of the violations that involve" failure to disclose to any person any information required" under the covered statutes.

Chase further argued that allowing separate statutory penalties for its multiple violations would lead to a flood of consumer-created claims. The court found no merit in that position. The FCBA violations supporting liability were the direct result of Chase's own conduct. They were not attributable to Lyon, who simply sought an explanation that should have been reasonably expected even without statutory requirements. The court held that Lyon's recovery of statutory damages resulting from Chases multiple violations of the FCBA were not limited toa single statutory penalty under §1640(g).

FAIR CREDIT BILLING ACT DOES NOT REQUIRE RELIANCE

Lyon v. Chase Bank USA, N.A., 656 F.3d 877 (9th Cir. 2011).

FACTS: Barbee Lyon was a credit card holder, who filed an action against Chase Bank USA, alleging violations of the Fair Credit Billing Act ("FCBA"). Lyon requested information regarding a misidentified charge on his account. Chase failed to respond, continued to seek payment, and ultimately reported the debt as delinquent to credit agencies. Chase admitted to violating sections 1666(a)-(j) of the FCBA, under which Lyon filed suit. Chase moved to exclude evidence or argument regarding Lyon's right to recover actual damages, arguing that Lyon suffered no out-of-pocket economic loss and that an award of actual damages under the FCBA requires evidence of detrimental reliance. The district court held that Lyon had to provide evidence of detrimental reliance in order to support an award of actual damages resulting from Chase's violations of the FCBA. Because Lyon had not relied on information from Chase, as Chase had provided none, the court granted the motion. Lyon appealed.
HOLDING: Reversed.
REASONING: Pursuant to 16 U.S.C. §1640(a)(1), a creditor who fails to comply with "any requirement" imposed under the FCBA is liable for "any actual damage sustained by [the plaintiff] as a result of the failure." Chase admitted that it violated the FCBA by failing to provide a written explanation in response to Lyon's billing dispute. Chase further admitted that because no explanation was provided, it also violated the FCBA by attempting to collect the disputed charge and reporting it as delinquent to credit agencies. Chase argued, however, that Lyon could not recover actual damages because Ninth Circuit precedent requires evidence of detrimental reliance for any such recovery under §1640(a)(1). It cited *Gold Country Lenders v. Smith* (*In re Smith*), 289 F.3d 1155, 1157 (9th Cir.2002). There, the court held that a bankruptcy claimant could not recover actual damages because she failed to present evidence of her detrimental reliance, without which she could not satisfy the causation element necessary to support actual damages under §1640(a)(1). However, the court distinguished *In re Smith* – as well as the out-of-circuit decisions that it followed – because it involved Truth In Lending Act ("TILA") violations, not violations of the FCBA, and differed in ways that affect the application of §1640. The court found that Chase's suggestion that all precedent related to TILA applied with equal force to the FCBA was an oversimplification of the relevant statutes, and whether "detrimental reliance" had anything to do with causation to support an award of actual damages resulting from violations of the FCBA appeared to be a question of first impression.

The court concluded that applying such a requirement to the FCBA violations admitted in this case would distort the analysis of causation and thereby contradict the purpose of §1640(a)(1). Chase did not follow the requirements of the FCBA and then undertook collection actions prohibited by the statute. The court found there was no relevant disclosure or conduct under these circumstances that Lyon could have relied upon, making Lyon's lack of detrimental reliance immaterial to a determination of whether Chase's violations resulted in actual damages. The court stated requiring evidence of detrimental reliance on an unmade explanation would bar recovery of actual damages because such evidence could never exist. Consumers cannot rely on unmade explanations, and creditors could simply avoid actual damages under the FCBA by never responding to billing disputes—the exact conduct the statute aims to prevent. The court held that evidence of detrimental reliance is not required to support an award of actual damages resulting from violations of the FCBA, reversed the magistrate judge's order denying an award of actual damages, and remanded the issue for further proceedings.

FAIR CREDIT REPORTING ACT PREEMPTS STATE LAW CLAIMS

Purcell v. Bank of America, 659 F.3d 622 (7th Cir. 2011).

FACTS: Kristen Purcell sued Bank of America, alleging that it sent reports to credit agencies stating she was behind on loan payments, even though Bank of America had information indicating that the reports were not true. Purcell brought her claims under Section 1681s-2(a) of the Fair Credit Reporting Act ("FCRA"). Purcell also sued under several state common law theories. The Bank successfully removed the case to federal district court, which dismissed Purcell's federal claim because §1681s-2(a) does not create a private right of action.

As to the state law theories, Bank of America contended that they were preempted by the FCRA. The district court rejected the Bank's interpretation of the Act, holding that the word "laws" in §1681t(b) was limited to state *statutes*. The district court reasoned that claims based on state common law were free to proceed, because §1681t(a) provides that state law claims

are not preempted, except to the extent specified by §1681t(b). The district court dismissed Purcell's common law claims without prejudice, leaving Purcell free to file her claims in state court. The Bank appealed, asserting the dismissal should have been *with* prejudice.
HOLDING: Reversed.
REASONING: The appellate court found the district court's reasoning eerily similar to that in *Swift v. Tyson*, 41 U.S. 1 (1842), where the Supreme Court interpreted the word "laws" in the Rules of Decision Act to mean only statutes. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), famously overruled *Swift* and held that a reference to state "laws" comprises all sources of legal rules, including judicial opinions.

As in *Swift*, the district court's ruling hinged on distinguishing the words "law" from "laws." The district court felt the need to make this distinction to avoid inconsistency between §1681t(b)(1), and 15 U.S.C. §1681h(e). The appellate court reasoned that there was no basis for reading "law" to mean all laws while reading "laws" to mean only statutes, and questioned any actual legislative intent to distinguish statutory and common law. The court reasoned that §1681h(e) preempts some state claims that could arise out of reports to credit agencies, and §1681t(b)(1)(F) preempts more of these claims. An earlier statute does not defeat a later-enacted one, so there is no inconsistency between the two statutes. The Court found that §1681t(b)(1)(F) reduces the scope of state regulation without repealing any other law, which does not contradict the words of §1681h(e) due to the exceptions to §1681(b)(1)(F). All claims of willful or malicious credit reports, such as Purcell's, were preempted, and the court remanded with instructions to enter judgment for the Bank on all of Purcell's claims, state and federal alike.

DEBT COLLECTION

DEBT COLLECTOR MAY BE LIABLE FOR DAMAGES UNDER BOTH STATE AND FEDERAL LAW

Gonzales v. Arrow Financial Services, LLC, 660 F.3d 1055 (9th Cir. 2011).

FACTS: Arrow Financial Services, a collection agency, purchased the debts of 40,000 California residents. All of the debts were "obsolete" because they were more than seven years old. In 2004, Arrow attempted to collect these debts by sending identical form letters to the California residents. The letters informed each person of a past due balance owed, and offered to settle the debt for half of the outstanding amount if paid by a specified date. The letter contained three references to credit bureaus, and stated that if Arrow reported the debt, it would notify the bureaus once the settlement funds cleared. The letters also informed the recipient that failure to fulfill obligations may result in negative information being sent to credit reporting agencies.

Under the Fair Credit Reporting Act, an obsolete debt cannot be reported to a credit reporting agency.

Gonzales, who received one of these letters, sued on behalf of himself and a class constituting everyone who received a letter, claiming violations of both California's Fair Debt Collection Practices Act ("Rosenthal Act") and the federal Fair Debt Collection Practices Act ("FDCPA"). The district court granted Gonzales summary judgment on the issue of liability under the FDCPA and the Rosenthal Act. Arrow appealed, contending that permitting damages under both acts violated the FDCPA.
HOLDING: Affirmed.
REASONING: Under the Fair Credit Reporting Act, an obsolete debt cannot be reported to a credit reporting agency. 15 U.S.C. § 1681c(a)(4). Accordingly, the court found that under the "least sophisticated debtor" standard, the letters were misleading and impliedly threatened to take action that could not legally be taken — placing Arrow in violation of the FDCPA and the Rosenthal Act. Arrow argued that Gonzales was precluded from recovering statutory damages under both the FDCPA and the Rosenthal Act. The court found that that argument directly contradicted the language of both acts.

The FDCPA explicitly states that it "does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State . . . a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter." The court found this language, coupled with the FDCPA's express purpose to "promote consistent State action," as well as deter violations, established that Congress did not intend the FDCPA to preempt consistent state consumer protection laws. Next, the court showed that the Rosenthal Act also contemplated dual enforcement: its language states that it should be "cumulative and… in addition to any other…remedies under any other provision of law."

The court rejected Arrow's claim that as a general rule, a plaintiff may not receive multiple awards for the same item of damage. This general rule applies in contract and tort law, but is not applicable to the statutory damage provisions of both the FDCPA and the Rosenthal Act. The court noted that statutory damages under both provisions are not tied in any way to actual losses suffered by the plaintiff. Recognizing that state laws that permit recovery of additional statutory damages increase the protections given to consumers through further deterrence, the court held the Rosenthal Act's remedies are cumulative, regardless of the remedies afforded under the FDCPA simultaneously.