



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 the Center for Consumer Law, www.uhccl.org.

UNITED STATES SUPREME COURT

Class action plaintiff cannot avoid removal to federal court by stipulating total damages would be less than the \$5 million jurisdictional threshold for application of the Class Action Fairness Act. Plaintiff filed a purported class action in Arkansas state court seeking reimbursement from a homeowners’ insurance company for the cost of repairing storm damage. The plaintiff stipulated that recovery would be limited to less than \$5 million, the minimum for federal court jurisdiction under the Act. The Supreme Court held that a stipulation as to damages could not overcome a judicial finding that the Act’s jurisdictional threshold had been met. “We do not agree that CAFA forbids the federal court to consider, for purposes of determining the amount in controversy, the very real possibility that a nonbinding, amount-limiting, stipulation may not survive the class certification process. This potential outcome does not result in the creation of a new case not now before the federal court. To hold otherwise would, for CAFA jurisdictional purposes, treat a nonbinding stipulation as if it were binding, exalt form over substance, and run directly counter to CAFA’s primary objective: ensuring ‘Federal court consideration of interstate cases of national importance.’” [*Standard Fire Ins. v. Knowles*, 133 S. Ct. 1345 \(2013\)](#).

Defendant in FDCPA case does not have to show bad faith to recover attorney’s fees. The United States Supreme Court held that successful defendants in civil unfair debt collection claims can be awarded attorney fees and costs without a showing that the plaintiff brought the claim in bad faith. The case involved a debtor who sued to recover from a debt collector that sent a fax to her workplace. The action, she argued, violated the law’s provision barring debt collectors from contacting debtors’ employers. After the debt collector was found not to have violated the Act, it sought and was awarded \$4,500 in costs pursuant to Federal Rule of Civil Procedure 54(d)(1), which provides that “[u]nless a federal statute, these rules, or a court order provides otherwise, costs — other than attorney’s fees — should be allowed to the prevailing party.” The debtor appealed, arguing that under the FDCPA, costs can only be awarded “[o]n a finding by the court that an action [was] brought in bad faith and for the purpose of harassment.” But in an opinion authored by Justice Clarence Thomas, the Supreme Court disagreed, holding that the language of the FDCPA does not conflict with, and therefore does not displace, a district court’s discretion to award costs under Rule 54(d)(1). [*Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166 \(2013\)](#).

UNITED STATES COURTS OF APPEAL

Debt collectors statement that student loan is “not eligible” for discharge in bankruptcy is misleading. The Second Circuit held that it is misleading for a debt collector to tell a consumer categorically that her student loan debt is “NOT eligible” for discharge in bankruptcy. The court noted that although the debtor may face “several steep procedural and substantive hurdles” to such a discharge, she has the right to seek it and may in fact obtain it. “We think that, upon reading the Collection Letter, the least sophisticated consumer might very well refrain from seeking the advice of counsel, who could then assist her in pursuing all available means

of discharging her debt through bankruptcy. The Collection Letter's capacity to discourage debtors from fully availing themselves of their legal rights renders its misrepresentation exactly the kind of 'abusive debt collection practice' that the FDCPA was designed to target." [*Easterling v. Collecto, Inc.*, 692 F.3d 229 \(2d Cir. 2012\)](#).

Online shoppers not bound by arbitration clause. The Second Circuit held that an arbitration provision contained in a confirmation email did not provide customers with sufficient notice to be contractually binding. [*Schnable v. Trilegiant Corp.*, 697 F.3d 110 \(2d Cir. 2012\)](#).

Truth in Lending Act plaintiff does not have to sue to protect rescission right. The Third Circuit held that home borrowers were not required to formally file suit before the Truth in Lending Act's three-year limitation period expired in order to preserve their right of rescission. Under TILA, consumers have an absolute right to rescind for three business days after closing on a home loan. The right to rescind is extended to three years if the lender fails to make requisite disclosures at the time the loan is made. Within three years of closing, the plaintiffs wrote a letter informing their lenders that they intended to rescind the loan based on their failure to receive the required TILA disclosures. When the lenders objected, the plaintiffs sued for rescission in federal court. The lenders argued that the plaintiffs had failed to preserve their rescission rights because their lawsuit was actually filed more than three years after closing. But the court concluded that the plaintiffs preserved their rescission rights when they sent the lenders the letter. [*Sherzer v. Homestar Mortg. Servs.*, 707 F.3d 255 \(3d Cir. 2013\)](#).

Significant motion practice without any discovery waives arbitration. The Third Circuit held that if the party seeking arbitration has engaged in significant motion practice, regardless of whether any discovery was exchanged, the right to compel arbitration has been waived. [*In re Pharmacy Benefit Managers Antitrust Litig.*, 700 F.3d 109 \(3d Cir. 2012\)](#).

*Court follows *Concepcion* and requires individual arbitration.* Plaintiff sought to represent a class of AmEx cardholders alleging false marketing. However, the arbitration clause in his credit card agreement explicitly waived any right to class arbitration. Notwithstanding plaintiff's argument that enforcing the arbitration clause would make it impossible for any person to effectively vindicate his substantive rights, the Third Circuit compelled individual arbitration. The court was apologetic, but firm: "Even if [plaintiff] cannot effectively prosecute his claim in an individual arbitration that procedure is his only remedy, illusory or not." [*Homa v. Am. Express Co.*, 494 Fed. App'x 191 \(3d Cir. 2012\)](#).

HOLA doesn't preempt fraud claim against lender. The Fourth Circuit held that federal consumer protection law does not completely preempt state-law claims brought by a plaintiff who alleged she was fraudulently induced into accepting a home loan. The plaintiff sued, arguing that her mortgage contract was unconscionable and that her lender fraudulently induced her into accepting the loan by misrepresenting the market value of her property. The lender argued that the plaintiff's state-law unconscionability claims were completely preempted by the federal Home Owners' Loan Act. The court found that the plaintiff's fraud claim was not preempted because it fell within the scope of the Act's exception for tort claims that only incidentally affect lending operations. [*McCauley v. Home Loan Investment Bank*, 710 F.3d 551 \(4th Cir. 2013\)](#).

Six months of litigation did not waive arbitration. The Fourth Circuit held that a defendant did not waive his right to arbitrate, despite litigating for more than 6 months and conducting discovery. [*Rota-McLarty v. Santander Consumer USA, Inc.*, 700 F.3d 690 \(4th Cir. 2012\)](#).

Home insurance doesn't cover Chinese drywall damage. The Virginia Supreme Court, in response to a certified question submitted by the Fourth Circuit, held that an "all risk" homeowners' insurance policy excluded coverage for damage allegedly caused by Chinese drywall. [*Travco Ins. v. Ward*, 2013 U.S. App. LEXIS 1066 \(4th Cir. Jan. 15, 2013\)](#).

Fair Credit Reporting Act damages for impairment of credit affirmed. The Fifth Circuit affirmed an award of \$20,000 in damages for impairment of credit based on the defendant's failure to properly investigate a credit dispute. [*Smith v. Santander Consumer USA, Inc.*, 703 F.3d 316 \(5th Cir. 2013\)](#).

Non-signatory cannot enforce arbitration agreement. The Fifth Circuit held that an accounting firm could not compel its clients to arbitrate their claims that the accountants had fraudulently convinced them to invest in particular securities. The accounting firm held up an arbitration agreement between its clients and a third party, a securities broker, which said that any dispute between the clients and the broker were arbitrable, including those between the clients and the broker's "officers, directors, employees or agents." The accounting firm argued that although it was not a party to that agreement, it was an agent of the broker, and could therefore enforce the arbitration agreement. The court concluded that the accountants could not compel arbitration because the actions of which their clients complained were not performed as agents of the securities broker. The court also concluded that the accountants could not rely on equitable estoppel principles to compel arbitration, primarily because the clients' claims did not rely on the agreement between the clients and the broker. [*Baldwin v. Cavett*, 2012 U.S. App. LEXIS 22777 \(5th Cir. Nov. 6, 2012\)](#).

Debt collection letter does not overshadow or contradict FDCPA's notice under least sophisticated consumer standard. The Fifth Circuit affirmed the district court's opinion finding that the collector's letter that urged "timely action" and warned of "bad consequences," did not violate the Act. [*McMurray v. ProCollect, Inc.*, 687 F.3d 665 \(5th Cir. 2012\)](#).

Mortgage foreclosure is debt collection under FDCPA. The Sixth Circuit held that a law firm that filed an action to foreclose on a mortgage engaged in "debt collection" subject to the requirements of the Fair Debt Collection Practices Act. The court noted that "every mortgage foreclosure, judicial or otherwise, is undertaken for the very purpose of obtaining payment on the underlying debt, either by persuasion (*i.e.*, forcing a settlement) or compulsion (*i.e.*, obtaining a judgment of foreclosure, selling the home at auction, and applying the proceeds from the sale to pay down the outstanding debt) Accordingly, mortgage foreclosure is debt collection under the FDCPA." The court also held that an at-

The Fifth Circuit held that an accounting firm could not compel its clients to arbitrate their claims that the accountants had fraudulently convinced them to invest in particular securities.

torney who meets the general definition of a debt collector “must comply with the FDCPA when engaged in mortgage foreclosure. And a lawyer can satisfy that definition if his principal business purpose is mortgage foreclosure or if he ‘regularly’ performs this function.” [*Glazer v. Chase Home Fin., LLC*, 704 F.3d 453 \(6th Cir. 2013\)](#).

Rented condominium fees qualify as “debt” under FDCPA. The Sixth Circuit held that an assessment owed to a condominium association qualifies as a “debt” under the Fair Debt Collection Practices Act where the owner bought the property for his personal use and now leases it. [*Haddad v. Alexander, Zelmanski, Danner & Fioritto, PLLC*, 698 F.3d 290 \(6th Cir. 2012\)](#).

Radio stations telemarketing calls did not violate TCPA. The Sixth Circuit held that a radio station’s prerecorded telemarketing call did not violate the Telephone Consumer Protection Act because the calls were exempt from the Act’s provisions. The court found the calls were “hybrid” that both announced a contest and promoted the station. [*Leyse v. Clear Channel Broad., Inc.*, 697 F.3d 360 \(6th Cir. 2012\)](#).

Lender may be liable under Fair Credit Reporting Act. The Sixth Circuit held that an auto lender may be liable under the federal Fair Credit Reporting Act for failing to reasonably investigate a divorced man’s claim that he was mistakenly listed as a co-obligor on his ex-wife’s vehicle. [*Boggio v. USAA Fed. Sav. Bank*, 696 F.3d 611 \(6th Cir. 2012\)](#).

FCRA plaintiff must show actual damages. The Eighth Circuit held that a plaintiff could not pursue a claim under the Fair Credit Reporting Act in the absence of evidence that she suffered actual damages from an allegedly inaccurate criminal background check. Alleging that she suffered emotional distress from an inaccurate report, the plaintiff sued the defendant for violating the FCRA by failing to adopt reasonable procedures to ensure the maximum possible accuracy of its credit reporting. The court held that a consumer must present “competent evidence of actual injury” to state a claim under the FCRA. “[The plaintiff] suffered no physical injury and was not medically treated for any psychological or emotional injury. [The plaintiff] offered no reasonable detail about the nature and extent of her alleged emotional distress. Although [the caseworker] witnessed [the plaintiff] crying during the meeting, corroboration of a brief episode of frustration and unhappiness does not establish the sort of concrete emotional distress that is required to constitute a genuine injury and actual damages,” the court said. [*Taylor v. Tenant Tracker*, 710 F.3d 824 \(8th Cir. 2013\)](#).

Circuit court owes “no deference” to NLRB ruling on class arbitration. One year ago, the NLRB ruled in *D.R. Horton, Inc.* that it is a violation of federal labor law for employers to require their employees to sign arbitration agreements waiving class actions, and that any arbitration agreements waiving class arbitration would be void. This week, the Eighth Circuit became the first federal circuit court to refuse to enforce the NLRB’s ruling. [*Owen v. Bristol Care, Inc.*, 702 F.3d 1050 \(8th Cir. 2013\)](#).

Toyota can’t compel arbitration of anti-lock brake system claims. The Ninth Circuit affirmed a district court decision that Toyota Motor Sales, U.S.A., a nonsignatory to several agreements with arbitration provisions, could not compel plaintiffs to arbitrate. [*Kramer v. Toyota Motor Sales, U.S.A., Inc.*, 705 F.3d 1122 \(9th Cir. 2013\)](#).

Store’s calls to customer violated TCPA. The Ninth Circuit held that Best Buy violated federal consumer protection law by placing automated, prerecorded calls notifying a customer of the status of his membership in a store “rewards” program. The plaintiff alleged that, after buying a computer from Best Buy, he began to receive prerecorded calls from the retailer, even though he was registered on the national do-not-call list and later added to the retailer’s do-not-call list. The plaintiff filed a class action under the Telephone Consumer Protection Act after he received an automated call notifying him of changes in the terms of his membership in a store rewards program. Best Buy argued that its calls were purely informational courtesy calls permitted under the Act. The court disagreed. [*Chesbro v. Best Buy Stores, L.P.*, 705 F.3d 913 \(9th Cir. 2012\)](#).

Consumer can recover damages for emotional distress under FCRA. The Tenth Circuit held that a consumer produced sufficient evidence of emotional injury to proceed with a claim under the Fair Credit Reporting Act. The plaintiff sued under the Fair Credit Reporting Act, alleging that the defendant breached duties imposed on furnishers of credit information when provided with notice of a credit dispute. The court held that the plaintiff’s evidence failed to establish that he sustained economic damage in the form of a ruined credit rating or the denial of further financing. However, the court found that the plaintiff could proceed based on his contention that he suffered emotional distress that caused his health to deteriorate as a result of the defendant’s negative credit reports. “Plaintiff described the circumstances surrounding his injury in reasonable and sufficient detail that he was not required to produce further evidence of his emotional distress. We conclude that his affidavit alone created a genuine dispute as to whether the [defendant’s] actions caused him to suffer emotional damages,” the court said. [*Llewellyn v. Allstate Home Loans, No. 11-1340*, 2013 U.S. App. LEXIS \(10th Cir. March 28, 2013\)](#).

Debtor not required to use Social Security Income in Repayment Plan. The Tenth Circuit held that a Chapter 13 debtor is not required to include Social Security income in the calculation of his projected disposable income. [*Anderson v. Cranmer \(In re Cramer\)*, 697 F.3d 1314 \(10th Cir. 2012\)](#).

Property manager is not subject to Fair Debt Collection Practices Act. The Eleventh Circuit held that a property management company that collected unpaid assessments on behalf of a homeowners association was not subject to the requirements of the Fair Debt Collections Practices Act. The court held that the defendant fell within the scope of an exemption in the FDCPA for entities “collecting or attempting to collect any debt owed ... another to the extent such activity is incidental to a bona fide fiduciary obligation.” [*Harris v. Liberty Cmty. Mgmt., Inc.*, 702 F.3d 1298 \(11th Cir. 2013\)](#).

Debt collector cannot moot lawsuit. The Eleventh Circuit held that debt collectors could not moot consumer lawsuits against them merely by offering the full amount of statutory damages the plaintiffs were entitled to under federal law. [*Zinni v. ER Solutions, Inc.*, 692 F.3d 1162 \(11th Cir. 2012\)](#).

UNITED STATES DISTRICT COURTS

Debt collector must disclose his company name. The district court in Colorado held that the Fair Debt Collection Practices Act requires a debt collector to disclose its company name in a voicemail left for the consumer. The court noted that the Act required meaningful disclosure of the caller's identity. The only way for an identity disclosure to be meaningful to a consumer is if it disclosed the name of the collection agency, rather than the personal name of the caller. [*Torres v. ProCollect*, 865 F. Supp. 2d 1103 \(D. Colo. 2012\)](#).

STATE COURTS

School student must arbitrate tort claims. A California Court of Appeal held that a prep school student must arbitrate her personal injury claims against the school and one of its teachers. The plaintiff attended a private college preparatory school and withdrew after an incident with a teacher. After withdrawing from the school, the plaintiff sued the school for defamation, negligent infliction of emotional distress, and negligent hiring and supervision. She also sued the teacher for battery, defamation and negligent infliction of emotional distress. The court agreed that the plaintiff's tort claims were subject to arbitration in accordance with the enrollment contract her parents signed. [*Bigler v. Harker Sch.*, 213 Cal. App. 4th 727 \(2013\)](#).

Fees charged for tax refund checks violated Truth in Lending Act. A California Court of Appeal held that a "handling fee" charged by a bank in connection with tax refund checks constituted an undisclosed finance charge that violated the federal Truth In Lending Act. The defendant provides certain tax preparation services, including arranging refund anticipation loans and electronic refund checks through certain banks. The state of California sued, alleging violations of various federal and state consumer protection laws. In particular, the state argued that certain "handling fees" that affiliated banks charged for electronic refund checks constituted undisclosed finance charges under TILA. The court agreed, finding that "in the present case, the handling fee was a condition to customers receiving [the defendant's] tax services on credit. [The defendant] does not establish why the fee's application to administrative aspects related to the extension of this credit matters, and we are not aware of any reason why it should." [*People v. JTH Tax, Inc.*, 212 Cal. App. 4th 1219 \(2013\)](#).

State prohibition against class action waiver is preempted by Federal Arbitration Act. A California Court of Appeal held that a "poison pill" in an automobile purchase contract did not render an arbitration clause in the agreement unenforceable. When plaintiff sued, the dealership moved to compel arbitration pursuant to a clause in its standard sales contract that included a class action waiver. The arbitration clause included a "poison pill" provision that purported to render the entire clause unenforceable in the event that the class action waiver was deemed unenforceable. The plaintiff contended that, because a state consumer protection law expressly barred class action waivers, the poison pill clause was triggered to preclude arbitration. The court disagreed and found the state law prohibition preempted by the FAA. [*Flores v. West Covina Auto Grp.*, 212 Cal. App. 4th 895 \(2013\)](#).

Landlord may be liable for attack by tenant's dog. The Connecticut Supreme Court held that a landlord may be liable for injuries suffered by a tenant who was bitten by another tenant's dog. [*Gialalone v. Wallingford Hous. Auth.*, 51 A.3d 352 \(Conn. 2012\)](#).

Fraud claim is subject to arbitration provision. The Florida Supreme Court held that an action for fraud was within the scope of an arbitration provision in a contract for the purchase of real property. "We hold that the action here based on fraud is within the scope of the arbitration provision because it has a clear contractual nexus with, and thus a significant relationship to, the contract. This relationship exists because: (1) the fraud claim is inextricably intertwined with both the circumstances that surrounded the transaction from which the contract emanated and the contract itself; and (2) resolution of the fraud claim requires the construction and consideration of duties arising under the contract." [*Jackson v. Shakespeare Found., Inc.*, 108 So. 3d 587 \(Fla. 2013\)](#).

TCPA suit is governed by federal not state limitations. The Illinois Appellate Court held a private action under the Telephone Consumer Protection Act was not barred by the state's two-year statute of limitations for claims seeking statutory penalties. The court decided that TCPA claims brought in state court are subject to the four-year federal catchall statute of limitations rather than the state two-year limitations period, citing *Mims v. Arrow Financial Services*, 132 S. Ct. 740 (2012). [*Wellington Homes v. W. Dundee China Palace Rest., Inc.*, 2013 Ill. App. LEXIS 44 \(Ill. Ct. App. Feb. 4, 2013\)](#).

Estate isn't bound by nursing home arbitration clause. The Illinois Supreme Court held that the estate of a nursing home patient was not required to arbitrate a wrongful death claim pursuant to a clause in the defendant's admissions contract. The court decided that, under state law, a wrongful death action is not a true asset of a decedent's estate that a decedent may limit via an arbitration agreement. "[A] wrongful death action does not accrue until death and is not brought for the benefit of the decedent's estate, but for the next of kin who are the true parties in interest. [The plaintiff in this case], as [the patient's] personal representative in the wrongful death action, is merely a nominal party, effectively filing suit as a statutory trustee on behalf of the next of kin. [The plaintiff] is not prosecuting the wrongful death claim on behalf of [the patient], and thus the plaintiff is not bound by [the patient's] agreement to arbitrate for purposes of this cause of action," the court said. [*Carter v. SSC Odin Operating Co., LLC*, 976 N.E.2d 344 \(Ill. 2012\)](#).

Mortgage holder and homeowner's association not responsible for injury on abandoned property. An Indiana trial court found that the defendants had not breached a duty of care owed to the injured child. The Indiana Court of Appeals affirmed the trial court's grant of summary judgment. The court found it came down to basic premises liability law. Neither the mortgage company nor the association were "possessors" of the property, so they owed no duty to those coming onto the premises. [*Erwin v. HSBC Mortg. Servs., Inc.*, 983 N.E. 2d 174 \(Ind. Ct. App. 2013\)](#).

Legal malpractice plaintiff cannot recover "lost" punitive damages. The Kentucky Supreme Court held that a legal malpractice plaintiff could not recover lost punitive damages when suing an attorney who allegedly mishandled her personal injury case. The court held that lost punitive damages are not recoverable in a legal malpractice suit, explaining that "the nexus between the attorney accused of malpractice and the actual wrongdoer is far too attenuated. As such, a client's general right to be made whole should yield in light of the nature and purpose of punitive damages." [*Osborne v. Keeney*, No. 2010-SC-000397-DG, 2012 Ky. LEXIS 203 \(Ky. Dec. 20, 2012\)](#).

Defendant can't moot consumer class action. Maryland's highest court held that a consumer fraud defendant could not moot a putative class action by tendering full individual relief to the lead plaintiff. The court noted: "[A] tender of individual relief to the putative class representative does not moot a class action if the individual plaintiff has not had a reasonable opportunity to seek class certification, including any necessary discovery." [*Frazier v. Castle Ford, Ltd.*, 59 A.3d 1016 \(Md. Ct. App. 2013\).](#)

Lodestar attorney's fees should consider amount of recovery. The Minnesota Supreme Court held that the amount at stake in a lemon law case should have been considered in determining the reasonableness of attorney fees to be awarded under the lodestar method. The plaintiff recovered \$230,000 in attorney fees and costs, based largely on over 600 hours billed by the plaintiff's attorneys at \$350 to \$375 per hour. The state supreme court first concluded that

the lodestar method is the proper approach for determining reasonable attorney fees under state lemon law. The court agreed with the defendant that the amount involved in the litigation and the results obtained must be considered when determining fees under

The court agreed with the defendant that the amount involved in the litigation and the results obtained must be considered when determining fees under the lodestar method.

der the lodestar method. "It is true that a cap on fees or an examination of the proportionality between the amount of recovery and the fees expended could hamper the ability of consumers to vindicate their rights relative to inexpensive products. But ignoring, as the [trial] court did, the amount involved in the litigation contravenes the principles that underlie statutory attorney fees provisions . . ." "[Trial] courts, therefore, are directed to exclude from fee awards 'hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.' Because billing judgment is necessarily related to the merits of the case and the amount at issue in a consumer protection case, divorcing an award of attorney fees entirely from the amount at stake in the litigation would relieve attorneys from the need to exercise such judgment." [*Green v. BMW of N. Am.*, 826 N.W.2d 530 \(Minn. Feb. 2013\).](#)

Payday lender can't enforce online arbitration clause. The Montana Supreme Court held that a payday lender could not enforce an arbitration clause included in its online loan application form. The court noted: "[The defendant] has presented no evidence to suggest that [the plaintiff] qualifies as a sophisticated party with significant business experience. Further, it appears that economic duress compelled [the plaintiff] to enter into this contract for a \$600 payday loan with a 780 percent APR . . ." It continued: "The arbitration clause qualifies as a contract of adhesion and falls outside [the plaintiff's] reasonable expectations, and, therefore, the arbitration clause is unconscionable." [*Kelker v. Geneva-Roth Ventures, No. 12-0313*, 2013 Mont. LEXIS 68 \(Mont. March 12, 2013\).](#)

"Open and obvious" rule does not bar shopper's negligence suit. The Nevada Supreme Court held a store could be liable for failing to protect a customer from tripping over an "open and obvious" hazard. The plaintiff sued Costco for negligence for injuries sustained when he tripped and fell over a wooden pallet that an employee had left in a store aisle. Costco argued that it did not breach a duty of care because the hazard created by the pallet was open and obvious. The state supreme court, recognizing the "evolution" of state premises liability law, held that the open and obvious nature of a dangerous condition no longer automatically relieves a property owner from the general duty of reasonable care. The court noted: "The fact that a dangerous condition may be open and obvious bears on the assessment of whether reasonable care was exercised by the landowner," but held it is not a complete bar. [*Foster v. Costco Wholesale Corp.*, 291 P.3d 150 \(Nev. 2013\).](#)

Home seller does not have to disclose property was scene of a grisly murder/suicide. A Pennsylvania appellate court held that neither the seller nor the real estate agent had a duty to disclose psychological defects because they are not "material." [*Milliken v. Jacono*, 60 A.3d 133 \(Pa. Super. Ct. 2013\).](#)

Nursing home cannot force arbitration of wrongful death suit. A Pennsylvania appellate court has ruled that an arbitration clause in a nursing home admission contract was not broad enough to encompass a claim for wrongful death. [*Setlock v. Pinebrook Pers. Care & Ret. Ctr.*, 56 A.3d 904 \(Pa. Super. Ct. 2012\).](#)

Arbitration clause in debt adjuster's agreement is unenforceable. The Washington Supreme Court held that a debt adjuster could not enforce a binding arbitration clause in its service contract when sued by a customer for violating state consumer protection law. The court concluded that the clause was unconscionable based on its "loser pays" provision, a 30-day time limit for requesting arbitration, and a provision designating Orange County, California as the sole venue for arbitration. The court also found that its decision was consistent with the decision in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), and not preempted by the FAA. In discussing why there was no preemption, the court explained that the defendant's arbitration clause "contained numerous unconscionable provisions based on the specific facts at issue in the current case. *Concepcion* provides no basis for preempting our relevant case law nor does it require the enforcement of [the defendant's] arbitration clause." [*Gandee v. LDL Freedom Enters.*, 293 P.3d 1197 \(Wash. 2013\).](#)

Arbitration clause unenforceable due to loss of forum. The Wisconsin Court of Appeals held that a nursing home could not demand arbitration of a wrongful death claim when the service designated in its admissions contract had exited the consumer-arbitration. Defendant sought to compel arbitration pursuant to an alternative dispute resolution agreement executed at the time of the husband's admission. The agreement designated the National Arbitration Forum (NAF) as the parties' exclusive forum for the arbitration of disputes. The plaintiff argued that the clause was unenforceable because the NAF had ceased providing consumer arbitration services. The court agreed that the loss of NAF as a forum for the parties' dispute rendered the defendant's arbitration clause unenforceable. The court found the forum to be an integral part of the ADR Agreement. [*Riley v. Extendicare Health Facilities, Inc.*, 826 N.W.2d 398 \(Wisc. Ct. App. 2013\).](#)