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 view the full opinion, click on the link; or if that does not work, copy the link and paste it to your browser. 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

High cost no bar to waiver of class action. The U.S. Supreme Court held that plaintiffs cannot avoid a contractual waiver of class arbitration on the ground that the cost of individually arbitrating their claims exceeds their potential recovery. The justices ruled against a group of merchants seeking to bring a class action against a credit card company alleging antitrust violations. In response to American Express' motion to compel individual arbitration in accordance with a class action waiver between the parties, the plaintiffs submitted evidence that the cost of individually arbitrating each claim could exceed $1 million, while the maximum statutory recovery for each claimant was less than $13,000. The Court noted: "[T]he fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy," adding to the court's ruling in *AT&T Mobility v. Concepcion* that the Federal Arbitration Act trumps a state law requiring classwide arbitration proceedings "all but resolves this case." *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).
http://www.supremecourt.gov/opinions/12pdf/12-133_19m1.pdf

Supreme Court upholds arbitrator's decision allowing class arbitration. The U.S. Supreme Court upheld an arbitrator's decision that a particular arbitration clause authorized class arbitration. Justice Kagan wrote the main opinion, which was unanimous. The standard of review of arbitrators' decisions under the Federal Arbitration Act is highly deferential. So "the sole question for us," the Court stated, "is whether the arbitrator (even arguably) interpreted the parties contract, not whether he got its meaning right or wrong." The Court agreed that the arbitrator was interpreting the contract, and that was that. In a concurring opinion, Justice Alito and Justice Thomas suggested that any eventual class arbitration judgment in the case would be susceptible to collateral attack. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013).
http://www.supremecourt.gov/opinions/12pdf/12-135_e1p3.pdf

Consumer's claim against towing company not preempted by federal law. The Supreme Court held that the Federal Aviation Administration Authorization Act of 1994, which regulates motor carriers, does not preempt a claim arising out of the storage and disposal of a car. The Court noted: "Disposal of abandoned vehicles by a "storage company" is regulated by chapter 262 of the New Hampshire Revised Statutes Annotated. See N. H. Rev. Stat. Ann. §§262:31 to 262:40–c (West 2004 and 2012 West Cum. Supp.). Dan's City relied on those laws to dispose of Pelkey's vehicle for nonpayment of towing and storage fees. According to Pelkey, however, Dan's City failed to comply with New Hampshire's provisions governing the sale of stored vehicles and the application of sale proceeds…. We hold, in accord with the New Hampshire Supreme Court, that state-law claims stemming from the storage and disposal of a car, once towing has ended, are not sufficiently connected to a motor carrier's service with respect to the transportation of property to warrant pre-emption under §14501(c)(1). The New Hampshire law in point regulates no towing services, no carriage of property. Instead, it trains on custodians of stored vehicles seeking to sell them. Congress did not displace the State's

regulation of that activity by any federal prescription." *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769 (2013).
http://www.supremecourt.gov/opinions/12pdf/12-52_l537.pdf

UNITED STATES COURTS OF APPEAL

Lender who repossessed car violated bankruptcy stay. The Second Circuit held that a car lender willfully violated the automatic stay in a Chapter 13 case by failing to return a repossessed vehicle to the debtor promptly after receiving notice of his bankruptcy petition. The court noted, "[The plaintiff] retained at least an equitable interest in the vehicle under New York law. Thus, under United States v. Whiting Pools, Inc., 462 U.S. 198 (1983), the filing of [the plaintiff's] bankruptcy petition transformed the equitable interest into a possessory interest held by [the plaintiff's] estate…." "We conclude that [the defendant] 'exercised control' over 'property' of [the plaintiff's] bankruptcy estate in contravention of §362 when it failed to relinquish the vehicle promptly after it learned that a Chapter 13 petition was filed." Weber v. SEFCU (*In re Weber)*, 719 F.3d 72 (2d Cir. 2013).
http://docs.justia.com/cases/federal/appellate-courts/ca2/12-1632/12-1632-2013-05-08.pdf

Writing requirement violates Fair Debt Collection Act. The Second Circuit held that a debt collection notice violated federal law by stating that the debtors could only dispute the validity of their debts in writing, *Hooks v. Forman, Holt, Eliades & Ravin, LLC*, 717 F.3d 282 (2d Cir. 2013).
http://www.ca2.uscourts.gov/decisions/isysquery/99051a01-2242-4d98-8c10-767c3382e472/1/doc/12-3639_errata_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/99051a01-2242-4d98-8c10-767c3382e472/1/hilite/

Court discusses when additional discovery must be allowed on arbitrability. The Third Circuit clarified when district courts must allow discovery about arbitrability. The court stated: "[W]hen it is apparent, based on 'the face of the complaint, and documents relied upon in the complaint,' that certain of a party's claims 'are subject to an enforceable arbitration clause, a motion to compel arbitration should be considered under a Rule 12(b)(6) standard without discovery's delay.' But if the complaint and its supporting documents are unclear regarding the agreement to arbitrate, or if the plaintiff has responded to a motion to compel arbitration with additional facts sufficient to place the agreement to arbitrate an issue, then 'the parties should be entitled to discovery on the question of arbitrability before a court entertains further briefing on [the] question.' After limited discovery, the court may entertain a renewed motion to compel arbitration, this time judging the motion under a summary judgment standard. In the event that summary judgment is not warranted because … there is 'a genuine dispute as to the enforceability of the arbitration clause,' the 'court may then proceed summarily to a trial regarding the 'making of the arbitration agreement.'" *Guidotti v. Legal Helpers Debt Resolution, LLC,* 716 F.3d 764 (3d Cir. 2013). http://www2.ca3.uscourts.gov/opinarch/121170p.pdf

Debt Collector can continue to call debtor's brother in-law. The Fourth Circuit held that a debt collector's repeated phone calls to the debtor's brother-in-law did not violate the Fair Debt Collection Practices Act because the collector reasonably believed he gave incomplete earlier responses. *Worsham v. Accounts Receivable Mgmt., Inc*., 497 F. App'x 274 (4th Cir. 2012). http://www.ca4.uscourts.gov/Opinions/Unpublished/112390.U.pdf

Long-term unemployment justified student loan discharge. The Seventh Circuit held that a debtor who was out of work for ten years, filing 200 applications for employment during that time, could be discharged under the Bankruptcy Act's undue hardship standard. *Krieger v. Educ. Credit Mgmt. Corp.,* 713 F.3d 882 (7th Cir. 2013).
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D04-10/C:12-3592:J:Easterbrook:aut:T:fnOp:N:1116029:S:0

Third party may not enforce arbitration clause. The Ninth Circuit held that a debt processor could not enforce an arbitration provision contained in an agreement between a consumer and a debt-settlement program. *Rajagopalan v. NoteWorld, LLC*, 718 F.3d 844 (9th Cir. 2013). http://cdn.ca9.uscourts.gov/datastore/opinions/2013/05/20/12-35205.pdf

Montana state law pre-empted by Federal Arbitration Act. The Ninth Circuit considered whether a Montana state-law contract rule that says adhesive contracts that contain provisions that are "not in the reasonable expectations of both parties when contracting" are void as against public policy and can be used to void an arbitration provision. The question before the court was whether the Montana rule was overriden by section 2 of the Federal Arbitration Act (FAA). Relying on *AT&T Mobility v. Concepcion*, the court upheld the arbitration clause. The court noted: "We take *Concepcion* to mean what its plain language says: Any general state-law contract defense, based in unconscionability or otherwise, that has a disproportionate effect on arbitration is displaced by the FAA. We find support for this reading from the illustration in Concepcion involving a case "finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery."" *Mortensen v. Bresnan Communs., LLC*, 2013 U.S. App. LEXIS 14211 (9th Cir. 2013). http://cdn.ca9.uscourts.gov/datastore/opinions/2013/07/15/11-35823.pdf

Attorneys' fees must be tied to redemption value of coupons. The Ninth Circuit held that an attorneys' fee award to class counsel violated the Class Action Fairness Act ("CAFA"), and specifically 28 U.S.C. § 1712(a)-(c), which governs the calculation of attorneys' fees in class action cases containing a coupon component. The court held that when a settlement provides for coupon relief, either in whole or in part, any attorneys' fee that is "attributable to the award of coupons" must be calculated using the redemption value of the coupons. The court reversed the district court's award and remanded, because the district court awarded fees that were "attributable to" the coupon relief, but failed to first calculate the redemption value of those coupons. *Feder v. Frank (In Re HP Inkjet Printer Litig.)*, 716 F.3d 1173 (9th Cir. 2013).
http://cdn.ca9.uscourts.gov/datastore/opinions/2013/05/15/11-16097.pdf

The court held that when a settlement provides for coupon relief, either in whole or in part, any attorneys' fee that is "attributable to the award of coupons" must be calculated using the redemption value of the coupons.

The 11th Circuit affirms an arbitrator's decision to allow a class action. The plaintiffs are mobile phone consumers who allege they were charged unlawful penalties for canceling phone service. Under the Wireless Industry Arbitration Rules of the AAA, an arbitrator found the arbitration clause allowed class actions and certified the class. The wireless provider then moved to vacate that determination in federal court, claiming the arbitrator exceeded his authority and refused to apply the law. The court, however, carefully applied the Supreme Court's language in *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013) and held that because the arbitrator engaged with the contract's language and the parties' intent, his construction of the contract must be upheld. *Southern Commc'ns Servs., Inc. v. Thomas*, 720 F.3d 1352 (11th Cir. 2013). http://www.ca11.uscourts.gov/opinions/ops/201115587.pdf

Court follows Sutter and affirms attorneys' fee award. The D.C. Court of Appeals relied on the Supreme Court's opinion in *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013) , and refused to vacate an arbitration attorneys' fee award. Co-counsel argued the arbitrator exceeded his powers by addressing an issue outside the scope of the arbitration and by basing his award on notions of ethics instead of the co-counsel agreement. In its analysis, the court summarized that the "'sole question' before the court in a challenge [that an arbitrator exceeded his power] is 'whether the arbitrator (even arguably) interpreted the parties' contract,'" citing *Sutter.* Given that limited question, and the fact that the court said there was "no doubt" the arbitrator reached his decisions after interpreting the parties' co-counsel agreement, the court affirmed the district court's denial of the motion to vacate. *Wolf v. Sprenger + Lang, PLLC*, 2013 D.C. App. LEXIS 393 (D.C. 2013). http://statecasefiles.justia.com/documents/district-of-columbia/court-of-appeals/and11-cv-0.pdf?ts=1373554924

STATE COURTS

Defendant that litigated for 21 months cannot compel arbitration. The New Jersey Supreme Court held that a medical provider who litigated a case in court for 21 months and then, only three days before the scheduled start of a jury trial, demand to shift the case over to arbitration, could not. Even the strong policy in favor of arbitration did not help the defendant in this case. *Cole v. New Jersey Medical Center*, 52 A.3d 176 (N.J. 2012). http://njlaw.rutgers.edu/collections/courts/supreme/a-6-12.opn.html

Class action prohibition in arbitration provision is unenforceable. The Massachusetts Supreme Court stated that, after *Concepcion*, a general public-policy-based prohibition on class-action bans could not be sustained. However, the court concluded that the principle that arbitration procedures must not effectively preclude plaintiffs from pursuing their claims survives *Concepcion*. In the instant case, the court found the ban effectively denied meaningful relief and, therefore, was unenforceable. *Feeney v. Dell Inc.,* 908 N.E.2d 753 (Mass. 2009).
http://masscases.com/cases/sjc/454/454mass192.html
Subsquently reversed, *Feeney v. Dell Inc.*, 466 Mass. 1001, ____N.E.2d____ (2013).
http://masscases.com/cases/sjc/466/466mass1001.html