Consumer News Alert Recent Decisions

Since 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 discussed during the past few months. To subscribe and begin receiving your free copy of the Consumer News Alert in your mailbox, visit www.peopleslawyer.net.

UNITED STATES SUPREME COURT

The Supreme Court rules that the EEOC's conciliation efforts are subject to judicial review in claims of unlawful discrimination against an employer. The EEOC filed suit against Mach Mining, LLC on the basis of sex discrimination as to the company's hiring practices. After deciding that reasonable cause existed, the EEOC sent a letter to Mach Mining inviting the employer to participate in an informal conciliation proceeding with the plaintiff to attempt to rectify the charge. Later, the EEOC sent a second letter to Mach Mining, stating it had determined that conciliation efforts had been unsuccessful. The EEOC then filed suit in federal court. In response, Mach Mining argued, pursuant to Title VII of the Civil Rights Act of 1964, that the EEOC had failed to conciliate in good faith prior to filing suit. The EEOC moved for summary judgment on that issue, contending that the sufficiency of its conciliation efforts were not subject to judicial review. The trial court agreed with Mach Mining to the extent that the EEOC's conciliation efforts were, in fact, subject to judicial review, but the Seventh Circuit reversed and found that the EEOC's conciliation efforts were not subject to judicial review. The Supreme Court reversed the Seventh Circuit's decision, holding that although the EEOC maintains wide discretion with respect to the informal means by which conciliation efforts are achieved, the courts are authorized to employ judicial review of the EEOC's conciliation efforts in cases involving a charge of unlawful discrimination. *Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645 (April 29, 2015). https://supreme.justia.com/cases/federal/us/575/13-1019/

Debtor who converts from a Chapter 13 to a Chapter 7 is entitled to return of post petition wages not distributed by the Chapter 13 trustee. The United States Supreme Court held that absent a bad-faith conversion, 11 U.S.C. 348(f) limits a converted Chapter 7 estate to property belonging to the debtor "as of the date" of the original Chapter 13 filing. By excluding post-petition wages from the converted Chapter 7 estate, the statute removes those earnings from the pool of assets to be liquidated and distributed to creditors. Allowing a terminated Chapter 13 trustee to disburse those earnings to the same creditors would be incompatible with that statutory design. When a case is converted, the Chapter 13 trustee is stripped of authority to distribute "payment[s] in accordance with the plan." *Harris v. Viegelahn*, 135 S. Ct. 1829 (May 18, 2015). https://supreme.justia.com/cases/federal/us/575/14-400/

The Supreme Court has held that the Employee Retirement Income Security Act's (ERISA) six-year statute of limitations does not bar an action against the managers of a 401K despite the fact that the decision to invest in the funds which was the subject of the suit was made more than six years before the filing of the suit. The suit by former and current employees of Edison International alleged that the fund managers breached their fiduciary duties by placing em-

ployee 401k funds in "retail" mutual funds which had higher fees than the lower priced "institutional" funds that were available to the managers. Because the suit had been filed more than six years after the selection of the funds, the district court dismissed the case as barred y ERISA's six year statute of limitations, and the Ninth Circuit affirmed that dismissal. Reversing that decision, the Supreme Court noted that the fiduciary duty at issue in the ERISA context derived from the common law of trusts, and that the common law of trusts imposed a continuing duty to monitor and remove imprudent investments. Because of this continuing duty, the court ruled that dismissal of the action based merely upon the date of the initial selection of the funds was erroneous. *Tibble v. Edison Int'l*, 135 S. Ct. 1823 (May 18, 2015) https://supreme.justia.com/cases/federal/us/575/13-550/

Bankruptcy court may not award fees to professionals for defending fee applications. The United States Supreme Court held that Section 330(a)(1) of the Bankruptcy Code does not permit bankruptcy courts to award fees to section 327(a) professionals for defending fee applications. The American Rule provides the basic point of reference for attorney's fees: Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise. Congress did not depart from the American Rule in section 330(a)(1) for fee-defense litigation. The phrase "reasonable compensation for services rendered" necessarily implies "loyal and disinterested service in the interest of" a client, Time spent litigating a fee application against the bankruptcy estate's administrator cannot be fairly described as "labor performed for"—let alone "disinterested service to"—that administrator. Requiring bankruptcy attorneys to bear the costs of their fee-defense litigation under section 330(a)(1) creates no disincentive to bankruptcy practice. *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158 (June 15, 2015). https://supreme.justia.com/cases/federal/us/576/14-103/

U.S. Supreme Court affirms the use of "disparate impact" analysis to find violations of the Fair Housing Act.

The U.S. Supreme Court affirms the use of "disparate impact" analysis to find violations of the Fair Housing Act ("FHA"). Disparate impact analysis does not require proof of an intent to discriminate, but allows statistical proof that an action results in a disparate impact on a protected group to prove a violation of the law. The State of Texas and private parties had argued that the use of "disparate impact" analysis was illegal because it may require housing authorities to use race as a basis for making decisions in housing subsidies. The Supreme Court held that the FHA as amended by congress clearly contemplated and allowed disparate impact analysis. *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (June 25, 2015). http://www.supremecourt.gov/opinions/14pdf/13-1371_m64o.pdf

FEDERAL CIRCUIT COURTS

Cases should be stayed, not dismissed, during arbitration. The Second Circuit held that a court should stay a case when it grants a motion to dismiss. The court noted that when the case is dismissed the matter is immediately appealable as a final order. The court recognized the administrative advantages of a rule permitting dismissal, but held that the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ("FAA"), requires a stay of proceedings when all claims are referred to arbitration and a stay is requested. *Katz v. Cellco P'ship,* 794 F.3d 341 (2d Cir. July 28, 2015). http://law.justia.com/cases/federal/appellate-courts/ca2/14-138/14-138-2015-07-28.html

Demanding fees in a foreclosure complaint in a way contrary to the underlying agreement is actionable under the FDCPA. The Third Circuit held that an attorney who in a foreclosure complaint attempted to collect fees for services not yet performed violated the Fair Debt Collection Practices Act. *Kaymark v. Bank of Am., N.A.*, 783 F.3d 168 (3d Cir. April 7, 2015). http://law.justia.com/cases/federal/appellate-courts/ca3/14-1816/14-1816-2015-04-07.html

Debt collector has the burden to prove a third party communication fits within an exception provided by the FDCPA. The Third Circuit considered a case of first impression: who has the burden to prove a challenged communication fits, or does not fit, with the exception of the Act. The court stated:

> Under the Fair Debt Collection Practices Act … a debt collector is liable to a consumer for contacting third parties in pursuit of that consumer's debt unless the communication falls under a statutory exception. One of those exceptions covers communication with a third party "for the purpose of acquiring location information about the consumer" but, even then, prohibits more than one such contact "unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information." 15 U.S.C. § 1692b…. We conclude that the debt collector bears that burden.

Evankavitch v. Green Tree Servicing, LLC, 793 F.3d 355 (3d Cir. July 13, 2015). http://law.justia.com/cases/federal/appellate-courts/ca3/14-1114/14-1114-2015-07-13.html

Minor changes in telemarketing language do not defeat class certification. The Third Circuit held that a district court was wrong in refusing to certify a class. The district court recognized the plaintiff's theory of a sham enterprise, but focused on the fact that different sales pitches were used and different products were pitched. The Third Circuit vacated, reasoning that the district court did not adequately consider evidence of the structure of each of the alleged fraudulent schemes and related FTC investigations. "If absolute conformity of conduct and harm were required for class certification, unscrupulous businesses could victimize consumers with impunity merely by tweaking the language in a telemarketing script or directing some (or all) of the telemarketers not to use a script at all but to simply orally convey a general theme designed to get access to personal information such as account numbers." *Reyes v. Netdeposit, LLC*, 2015 WL 5131287 (3d Cir. Sept. 2, 2015). http://law.justia.com/cases/federal/appellate-courts/ca3/14-1228/14-1228-2015-09-02.html

Falsity requires all reasonable experts agree. The Fourth Circuit held that "to state a false advertising claim on a theory that representations have been proven to be false, plaintiffs must allege that all reasonable experts in the field agree that the representations

are false." "When litigants concede that some reasonable and duly qualified scientific experts agree with a scientific proposition, they cannot also argue that the proposition is 'literally false.'" *In re GNC Corp.*, 789 F.3d 505 (4th Cir. June 19, 2015). http://www.ca4.uscourts.gov/Opinions/Published/141724.P.pdf

Texas Debt Collection Act award of $75,000 for mental anguish and $156,775 for attorney's fees is affirmed. The Fifth Circuit reviewed the scope and liability provisions of the TDCA, and held that any person, not just debtors, who has sustained actual damages from a Texas Debt Collection Act violation has standing to sue. The court also found that the term "actual damages" includes mental anguish, and significantly that the economic loss rule does not bar TDCA violations. *McCaig v. Wells Fargo Bank (Texas), N.A.*, 788 F.3d 463 (5th Cir. June 10, 2015). http://www.ca5.uscourts.gov/opinions/pub/14/14-40114-CV0.pdf

Rule 68 offer to individual plaintiff does not moot class action. Plaintiff filed suit seeking statutory damages for alleged violations of the Electronic Funds Transfer Act (EFTA), 15 U.S.C. § 1693, et seq., after he was charged $2.95 for an ATM withdrawal but was not given notice or informed of the fee. At issue was whether a Federal Rule of Civil Procedure 68 offer mooted plaintiff's individual claim and the class action claims. Finding the reasoning of the Ninth and Eleventh Circuits persuasive, the Fifth Circuit held that an unaccepted offer of judgment to a named plaintiff in a class action "is a legal nullity, with no operative effect." Nothing in Rule 68 alters that basic principle. Accordingly, given that plaintiff's individual claim was not mooted by the unaccepted offer in this case, neither were the class claims. *Hooks v. Landmark Indus., Inc.*, 2015 WL 4760253 (5th Cir. Aug. 12, 2015). http://law.justia.com/cases/federal/appellate-courts/ca5/14-20496/14-20496-2015-08-12.html

No advertisement, no Telephone Consumer Protection Act liability.

No advertisement, no Telephone Consumer Protection Act liability. The Sixth Circuit considered whether a fax from Medco, titled "Formulary Notification," was an advertisement. The fax stated that "The health plans of many of your patients have adopted" Medco's formulary and asked the receiver to "consider prescribing plan-preferred drugs" to "help lower medication costs for patients." -Under the Commission's analysis, if the primary purpose of the fax at issue is informational rather than promotional, the TCPA does not apply. The court began with the TCPA's definition of "advertisement" at Section 227(a)(5) as "any material advertising the commercial availability or quality of any property, goods, or services." The court noted that the Federal Communication Commissions interpretation of this provision is that if the primary purpose of the fax at issue is informational rather than promotional, the TCPA does not apply. "That aptly describes the faxes here," the court said. "They contain only information—parts of the formulary—and do not seek to promote products or services to make a profit." *Sandusky Wellness Ctr., LLC v. Medco Health Solutions, Inc.*, 788 F.3d 218 (6th Cir. June 3, 2015). http://law.justia.com/cases/federal/appellate-courts/ca6/14-4201/14-4201-2015-06-03.html

Telephone Consumer Protection Act imposes direct liability on business. The Sixth Circuit held that a plaintiff's standing in a junk fax case doesn't depend on whether it printed out a fax that was sent to it. The court recognized that receiving an unsolicited fax injures people in ways other than the waste of paper and ink, and held that Congress could appropriately allow people to sue over faxes they never printed. The court also held that under the TCPA someone who has a fax advertisement for his or her business sent by a contractor or other third party is directly liable as a principal if the fax violates the TCPA. *Imhoff Inv., L.L.C. v. Alfoccino, Inc.*, 792 F.3d 627 (6th Cir. July 7, 2015). http://law.justia.com/cases/federal/appellate-courts/ca6/14-1704/14-1704-2015-07-07.html

Providing a creditor with a cell phone number is "prior express consent" under the Telephone Consumer Protection Act ("TCPA"). When the plaintiff obtained a mortgage, he used a home number. Subsequently, he discontinued his home phone service, and notified the lender that his cell phone was his new contact number. Ultimately the plaintiff fell behind on his mortgage, and the cell number was used by the mortgage company in collection efforts. The Sixth Circuit affirmed the district court's finding that the provision of the cell phone number to the mortgage company was "prior express consent" under the TCPA such that the mortgage company's use of the cell phone number was not in violation of the TCPA. *Hill v. Homeward Residential, Inc.*, 2015 WL 4978464 (6th Cir. Aug. 21, 2015). http://caselaw.findlaw.com/us-6th-circuit/1711496.html

Is arbitration a "darling of federal policy"? Writing for the Seventh Circuit, Judge Richard Posner enforced an arbitration clause, while questioning the often stated position that arbitration should be the favored method of dispute resolution or arbitration. "And it's not clear why, so far as eliciting the meaning of a given arbitration clause is concerned, such a clause should be distinguished from any other clause in a contract." Judge Posner also hits the nail on the head when he questions why the defendant even wants arbitration, when it would easily prevail in court. "But doubtless it wants arbitration because the arbitration clause disallows class action arbitration. If the Andermanns' claims have to be arbitrated all by themselves, they probably won't be brought at all, because the Andermanns if they prevail will be entitled only to modest statutory damages." *Andermann v. Sprint Spectrum L.P.*, 785 F.3d 1157 (7th Cir. May 11, 2015). http://law.justia.com/cases/federal/appellate-courts/ca7/14-3478/14-3478-2015-05-11.html

Class satisfied Rule 23's ascertainability requirement. The district court certified a plaintiff class of individuals "who purchased Instaflex within the applicable statute of limitations of the respective Class States for personal use until the date notice is disseminated," under Rule 23(a) and (b)(3). The Seventh Circuit rejected defendant's argument that Rule 23(b)(3) implies a heightened ascertainability requirement, noting an implicit requirement under Rule 23 that a class must be defined clearly and that membership be defined by objective criteria rather than by, for example, a class member's state of mind. In addressing this requirement, courts have sometimes used the term "ascertainability." Class definitions fail this requirement when they were too vague or subjective, or when class membership was defined in terms of success on the merits (fail-safe classes). This class satisfied "ascertainability" *Mullins v. Direct*

Digital, LLC, 795 F.3d 654 (7th Cir. July 28, 2015). http://law.justia.com/cases/federal/appellate-courts/ca7/15-1776/15-1776-2015-07-28.html

Filing a proof of claim on a time-barred debt is not, alone, a prohibited debt collection practice under the federal Fair Debt Collection Practices Act (FDCPA). The United States Bankruptcy Appellate Panel for the Eighth Circuit held that since the inclusion of a debt in a bankruptcy petition is essentially an invitation to the creditor to file a proof of claim, the mere filing of such a proof of claim, even for a time barred but otherwise valid debt, is not a violation of the FDCPA. The Eighth Circuit declined to follow the Eleventh Circuit's recent decision in *Crawford v. LVNV Funding LLC,* 758 F.3d 1254 (11th Cir. 2014) which reached a contrary conclusion. *In re Gatewood,* 533 B.R. 905 (B.A.P. 8th Cir. July 10, 2015). http://law.justia.com/cases/federal/appellate-courts/ca8/15-6008/15-6008-2015-07-10.html

Truth in Lending requires a security interest in a primary residence. The Eleventh Circuit affirmed a grant of summary judgment in favor of the defendant, alleged to have failed to make proper disclosures. The court concluded that defendant did not take the requisite interest in plaintiffs' primary residence to trigger the TILA protections on which plaintiffs rely. *Lankhorst v. Indep. Sav. Plan Co.*, 787 F.3d 1100 (11th Cir. May 28, 2015). http://law.justia.com/cases/federal/appellate-courts/ca11/14-11449/14-11449-2015-05-29.html

Communication directed to attorney may violate FDCPA. The Eleventh Circuit Court of Appeals potentially expanded the scope of actionable conduct under the Fair Debt Collection Practices Act ("FDCPA") to include communications directed to a debtor's attorney. While the court held that it may be a high bar to establish a violation, litigation related activities are not exempted from coverage under the FDCPA. *Miljkovic v. Shafritz & Dinkin, P.A.*, 791 F.3d 1291 (11th Cir. June 30, 2015). http://media.ca11.uscourts.gov/opinions/pub/files/201413715.pdf

To be a debt collector under the Fair Debt Collection Practices Act, the entity must meet a statutory test. Capital One purchased the account in question as part of a portfolio of credit card accounts from HSBC. The plaintiff argued, in keeping with the majority rule, that Capital One fell within the definition of "debt collector" under § 1692a(6)(F)(iii) because the subject debt was in default at the time it was acquired by Capital One. The Eleventh Circuit disagreed, stating that before a defendant can be brought within the scope of the FDCPA, it must satisfy one of the two "substantive requirements" of the "debt collector" definition: either having a principal purpose of debt collection or regularly collecting debts owed or due another. *Davidson v. Capital One Bank (USA), N.A.*, 2015 WL 4994733 (11th Cir. Aug. 21, 2015). http://media.ca11.uscourts.gov/opinions/pub/files/201414200.pdf

FEDERAL DISTRICT COURTS

The United States District Court for the Northern District of California dismissed a proposed class action which alleged that LinkedIn was a Consumer Reporting Agency ("CSA") under the Fair Credit Reporting Act ("FCRA"), and that LinkedIn violated the law with an online feature for businesses to check applicants' references on the site without the applicants' knowledge. The Plaintiffs unsuccessfully argued that the site's "Reference Search" feature produced "Consumer Reports" ("CR") under the law. The class representatives used LinkedIn to apply for jobs, alleging that they were denied employment opportunities after the potential employers connected with them on LinkedIn, and that LinkedIn's provision of the "Reference Search" function to prospective employers violated the FCRA. The Court rejected this argument for multiple reasons, including the fact that the LinkedIn feature is excluded from the FCRA definition of "Consumer Report" because the applicants voluntarily provide the information with the intention of LinkedIn publishing it. The Court also held that because LinkedIn is not a CSA which gathers CR to sell to 3rd parties for a fee, it could not create a CR. *Sweet v. LinkedIn Corp.*, No. 5:14-CV-04531-PSG, 2015 WL 1744254, (N.D. Cal. Apr. 14, 2015). https://docs.justia.com/cases/federal/districtcourts/california/candce/5:2014cv04531/281365/33

Uber arbitration agreement held unenforceable.

Uber arbitration agreement held unenforceable. The U.S. District Court for the Northern District of California held that both the 2013 and 2014 versions of Uber's contracts with its drivers were both procedurally and substantively unconscionable, and, therefore, unenforceable as a matter of California law. The court found that although plaintiff validly assented to the terms of the contract, the arbitration provisions were procedurally unconscionable because the opt-out clause was "inconspicuous and incredibly onerous to comply with." The court also found the provision was substantively unconscionable because it is "permeated with substantively unconscionable terms:" it waives plaintiffs' right to bring certain claims in any forum, it has an impermissible fee-shifting clause, a carve-out that "permits Uber to litigate the claims most valuable to it in court . . . while requiring its drivers to arbitrate those claims . . . they are most likely to bring against Uber," and a provision that gives Uber authority to modify contract terms unilaterally and at any time. *Mohamed v. Uber Technologies, Inc.*, No. C-14-5200 EMC, 2015 WL 3749716 (N.D. Cal. June 9, 2015). http://www.employmentlawblog.info/images/uber%20decision.pdf

The U.S. District Court for the Eastern District of Louisiana has dismissed a potential class action against eBay alleging that the company was responsible for increasing its users' risk of identity theft following a data breach in 2014. The court ruled the plaintiff lacked standing under Article III of the Constitution to pursue the claims because the alleged injury was too speculative to meet the "certainly impending" standard established by the Supreme Court in Clapper vs. Amnesty International USA. *Green v. eBay Inc.*, No. CIV.A. 14-1688, 2015 WL 2066531 (E.D. La. May 4, 2015). http://law.justia.com/cases/federal/district-courts/louisiana/laedce/2:2014cv01688/162697/38/

U.S. District Court finds "sign-in-wrap" arbitration agreement invalid and unenforceable. A court for the Eastern District of New York defined a new category of online agreement called the "sign-in-wrap" where text indicates that acceptance of the "terms of use" is required to continue, but the user never actually has to click a box accepting the terms of use as in most "clickwrap" agreements. The court held that such a "sign-in-wrap" agreement was

an insufficient basis upon which to compel arbitration. Ber*kson v. Gogo LLC*, No. 14-CV-1199, 2015 WL 1600755 (E.D.N.Y. Apr. 9, 2015). https://www.truthinadvertising.org/wp-content/uploads/2015/04/Berkson-v-Gogo-memo-and-order.pdf

Clickwrap did not constitute assent. A Tennessee federal judge denied the motion for partial summary judgment as to a breach of contract claim because there was evidence that the plaintiff did not actually assent to the "clickwrap agreement" requiring acceptance of new contract terms on defendant's website. Despite defendant's evidence that the plaintiff's online account had accepted a 2009 change in contract terms with a clickwrap acceptance, the court held that a factual dispute existed because the plaintiff alleged that he did not access the website or authorize an agent to do so. *Jim Schumacher, LLC v. Spireon, Inc.*, No. 3:12-CV-625, 2015 WL 3949349 (E.D. Tenn. June 29, 2015). http://law.justia.com/cases/federal/districtcourts/tennessee/tnedce/3:2012cv00625/66200/76/

STATE COURTS

California Supreme Court upholds class action waiver in arbitration clause. The California Supreme Court rejected arguments that a class-action ban in an arbitration clause, together with a few other provisions that were unfavorable to a consumer, rendered the arbitration clause unconscionable. The opinion emphasized that an arbitration clause, like any other contract, may be challenged on unconscionability grounds, and that the unconscionability standard must be "the same for arbitration and non-arbitration agreements." The Court recognized that under *Concepcion* a class action waiver cannot itself be held unconscionable. The other provisions at issue in the clause, however, did not render it so unfair as to be unconscionable. *Sanchez v. Valencia Holding Co., LLC*, 353 P.3d 741 (Cal. Aug. 3, 2015). http://law.justia.com/cases/california/supreme-court/2015/s199119.html

The right to challenge an arbitration award on grounds set forth in the Federal Arbitration Act cannot be waived by contract.

The right to challenge an arbitration award on grounds set forth in the Federal Arbitration Act cannot be waived by contract. A Georgia appellate court has held that a contract restricting the challenging of an award impinges on the Georgia Arbitration Code (which is analogous to the Federal Act) and is unenforceable. Thus, the losing party in the arbitration can pursue an action in court to vacate or modify the award pursuant to state and federal arbitration law. *Atlanta Flooring Design Centers, Inc. v. R.G. Williams Const., Inc.*, 773 S.E.2d 868 (Ga. Ct. App. July 16, 2015) https://scholar.google.com/scholar_case?case=18353269951745897592&q=Atlanta+Flooring+Design+Centers,+Inc.+v.+R.G.+Williams+Construction,+Inc.,&hl=en&as_sdt=6,44&as_vis=1

Arbitration agreement unconscionable and unenforceable. The Hawaiian Supreme Court in an aggressive decision applied its state contract law to conclude that the condo owners did not agree to a developer's arbitration agreement, but held that even if they did, the agreement was unconscionable because it prohibited both discovery and punitive damages. Under state law, the court found that the fact that the arbitration clause was not in the sales contract, but in a separate "auxiliary document," there was no clear intent to arbitrate. The court also found that the inability of the condo owners to do discovery deprived them of an adequate alternative forum, and that the preclusion of punitive damages was "substantively unconscionable" in a contract of adhesion. *Narayan v. Ritz-Carlton Dev. Co.*, 350 P.3d 995 (Haw. June 3, 2015). http://law.justia.com/cases/hawaii/supreme-court/2015/scwc-12-0000819.html

Iowa Supreme Court affirms summary judgment against casino patron who claimed she won a large "bonus" award. Patron won 185 credits, or $1.85, while playing a penny slot machine at a Casino. At the same time, a message appeared on the screen stating, "Bonus Award - $41797550.16." The game rules, which were available when the player started to play, did not provide for any kind of bonus. They also included the statement "MALFUNCTION VOIDS ALL PAYS AND PLAYS." Patron filed suit asserting breach of contract, estoppel, and consumer fraud. The court affirmed the lower court summary judgment in favor of defendant on all three counts. *McKee v. Isle of Capri Casinos, Inc.*, 864 N.W.2d 518 (Iowa April 24, 2015). http://law.justia.com/cases/iowa/supreme-court/2015/140802.html

Slip and fall in Hospital is not a health care liability claim. The Texas Supreme Court reversed a trial and appellate court ruling that dismissed the plaintiff's claim for failure to comply with the Texas Medical Liability Act. The supreme court held the Act did not apply because the plaintiff's claim was based on safety standards and had nothing to do with the providing of health care. *Ross v. St. Luke's Episcopal Hosp.*, 462 S.W.3d 496 (Tex. May 1, 2015). http://law.justia.com/cases/texas/supreme-court/2015/13-0439.html

Exemplary damages cap is not an affirmative defense. The Texas Supreme Court held that: (i) the exemplary damages cap, Tex. Civ. Prac. & Rem. Code § 41.008(b), is not a matter "constituting an avoidance or affirmative defense" and need not be affirmatively pleaded because it applies automatically when invoked and does not require proof of additional facts, and (ii) because Petitioner timely asserted the cap in her motion for new trial, the exemplary damages must be capped at $200,000. *Zorrilla v. Aypco Constr. II, LLC*, No. 14-0067, 2015 WL 3641299 (Tex. June 12, 2015). http://law.justia.com/cases/texas/supreme-court/2015/14-0067.html

Demand letter from EPA constitutes a "suit." The Texas Supreme Court held that a demand letter from the EPA to a potentially responsible party ("PRP") under CERCLA and administrative proceedings under CERCLA constitute a "suit" that triggers an insurer's obligations under a CGL policy. *McGinnes Indus. Maint. Corp. v. Phoenix Ins. Co.*, No. 14-0465, 2015 WL 4080146 (Tex. June 26, 2015). http://law.justia.com/cases/texas/supreme-court/2015/14-0465-0.html

Arbitration provision that excepted any fee claims by attorney from its scope but require client arbitrate all claims, was not substantively unconscionable.

Arbitration provision that excepted any fee claims by attorney from its scope but require client arbitrate all claims, was not substantively unconscionable. The Texas Supreme Court reversed a lower court ruling that an arbitration clause was substantively one-sided, unconscionable and unenforceable. The supreme court noted, "In sum, although the provision was one-sided in the sense that it excepted any fee claims by Royston, Razor from its scope, excepting that one type of dispute does not make the agreement so grossly one-sided so as to be unconscionable." *Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*, No. 13-1026, 2015 WL 3976101 (Tex. June 26, 2015). http://law.justia.com/cases/texas/supreme-court/2015/14-0109.html