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.

FEDERAL CIRCUIT COURTS

Court finds warranty plan ambiguous. The Second Circuit reversed a district court's finding in favor of the defendant because a warranty plan was unambiguous and did not apply to the first year following purchase. The Second Circuit found the contract ambiguous in several respects relevant to Plaintiff's claim. The court vacated the judgment and remanded the case to the district court with instructions to deny defendant's motion to dismiss. *Orlander v. Staples, Inc.*, 802 F.3d 289 (2d Cir. Sept. 16, 2015) http://law.justia.com/cases/federal/appellate-courts/ca2/14-2677/14-2677-2015-09-16.html

New York ban on credit card surcharges is upheld. Plaintiffs filed an action against New York in the Southern District of New York on June 4, 2013. They alleged, respectively, that New York's ban on credit card surcharges by a merchant violates the First Amendment's free-speech guarantee, is void for vagueness under the Due Process Clause of the Fourteenth Amendment, and is preempted by the Sherman Antitrust Act. The district court held (1) the law violates the First Amendment and is unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment, (2) permanently enjoin[ed] the defendants from enforcing it against the plaintiffs, and (3) dismissed Plaintiffs' preemption claim as moot, without prejudice. In a lengthy opinion tracing the history of the state and federal law, as well as the plaintiff's First Amendment and Due Process arguments, the Second Circuit vacated the judgment and remanded the matter to the district court. *Expressions Hair Design v. Schneiderman*, 803 F.3d 94 (2d Cir. Sept. 29, 2015). http://law.justia.com/cases/federal/appellate-courts/ca2/13-4533/13-4533-2015-09-29.html

Identity theft suit not preempted by the federal Fair Credit Reporting Act. The Second Circuit held that a suit under state law based on identity theft was not preempted. The court held that 15 U.S.C. 1681t(b)(1)(F) preempts only those claims that concern a defendant's responsibilities as a furnisher of information under the FCRA. These identity theft claims were not preempted because they did not concern Chase's responsibilities as a furnisher. The court further concluded that, to the extent that plaintiff's complaint seeks relief based on Chase's erroneous or otherwise improper furnishing of information to consumer reporting agencies, those claims were preempted. *Galper v. JP Morgan Chase Bank, N.A.*, 802 F.3d 437 (2d Cir. Sept. 30, 2015). http://law.justia.com/cases/federal/appellate-courts/ca2/14-867/14-867-2015-09-30.html

Antitrust attack on credit card arbitration clauses fails. The Second Circuit held that the record supported the district court's conclusion that the "final decision to adopt class-action-barring clauses was something the Issuing Banks hashed out individually and internally." *Ross v. Citigroup, Inc.*, 2015 WL 7292176 (2d Cir. Nov. 19, 2015). https://www.courtlistener.com/opinion/3155989/ross-v-citigroup-inc/

User of phone line can sue under TCPA. Leyse filed suit under the Telephone Consumer Protection Act, after receiving a prerecorded telemarketing call on the landline he shares with his roommate. Leyse was not the intended recipient of the call—his roommate was. The district court dismissed for lack of statutory standing. The Third Circuit reversed, concluding that Leyse has statutory standing. His status as a regular user of the phone line and occupant of the residence that was called brings him within the language of the Act and the zone of interests it protects. Leyse v. Bank of America, N.A., 538 Fed. Appx. 156 (3d Cir. Oct. 4, 2013). http://law.justia.com/cases/federal/appellate-courts/ca3/14-4073/14-4073-2015-10-14.html

Phone call was not communication in connection with a debt. Brown owed student loan debt. A collection employee from Van Ru left a voicemail at Brown's business that stated the caller's and Van Ru's names, a return number, and a reference number. The caller asked that someone from the business's payroll department return her call. Brown sued Van Ru for violations of the Fair Debt Collection Practices Act, 15 U.S.C. 1692c(b), alleging that the voicemail was a communication "in connection with the collection of any debt" with a third party . The district court granted Van Ru judgment on the pleadings. The Sixth Circuit affirmed. The voicemail left at Brown's business was not a "communication" as defined in the Act. A communication must "convey . . . information regarding a debt directly or indirectly to any person through any medium," and the voicemail message did not convey such information. *Brown v. Van Ru Credit Corp.*, 804 F. 3d 740 (6th Cir. Oct. 22, 2015). http://law.justia.com/cases/federal/appellate-courts/ca6/15-1323/15-1323-2015-10-22.html

Letter sent after consumer disputed debt violates Fair Debt Collection Practices Act. The Seventh Circuit held that a letter sent by a debt collector asking for additional information, and providing a way to return with payment violated the FDCPA. The court noted that once a consumer disputes a debt, the collector must cease collection until it verifies the debt. *Leeb v. Nationwide Credit Corp.*, 2015 WL 7351753 (7th Cir. Nov. 20, 2015). http://law.justia.com/cases/federal/appellate-courts/ca7/14-1329/14-1329-2015-11-20.html

Offer for the full amount requested in a Telephone Consumer Protection Act suit does not moot the case. The Seventh Circuit reversed itself, and held that an offer for the full amount requested does not moot the case. The court stated: "If an offer to satisfy all of the plaintiff's demands really moots a case, then it self-destructs," the court wrote. "Rule 68 is captioned 'Offer of Judgment.' But a district court cannot enter judgment in a moot case. All it can do is dismiss for lack of a case or controversy. So if the $3,002 offer made this case moot, then even if Chapman had accepted it the district court could not have ordered First Index to pay. It could have done nothing but dismiss the suit." *Chapman v. First Index, Inc.*, 796 F.3d 783 (7th Cir. Aug. 6, 2015). http://law.justia.com/cases/federal/appellate-courts/ca7/14-2773/14-2773-2015-08-06.html

Swearing to truth of affidavit without personal knowledge does not violate Fair Debt Collection Practices Act. The Eighth Circuit noted that Section 1692 of the FDCPA prohibits a debt collector from making a "false, deceptive or misleading representation or means in connection with the collection of any debt," or using "unfair or unconscionable means to collect or attempt to collect any debt." The consumer alleged that by swearing to the truth of the affidavit without having personal knowledge of the facts contained within it, the attorney violated both of these provisions. The court noted that even if we were to assume that Basler's attestations were literally false, Janson has not plausibly alleged that he or anyone else was misled by that falsehood. Absent an allegation that he actually did not owe rent, Janson has not plausibly alleged that the defendant's practice misled the state court in any meaningful way. *Janson v. Katharyn B. Davis, LLC*, 806 F.3d 435 (8th Cir. Nov. 17, 2015). http://law.justia.com/cases/federal/appellate-courts/ca8/15-1381/15-1381-2015-11-17.html

Attorney's fees may be awarded in a suit for damages to provide redress for a violation of the automatic bankruptcy stay. When a debtor files for bankruptcy, the Bankruptcy Code imposes an automatic stay on actions against the debtor to collect pre-petition debts. The Ninth Circuit reversed an earlier position it took in *Sternberg v. Johnston*, 595 F.3d 937 (9th Cir. 2010), and held that the court may award attorney's fees in an action for damages for violation of automatic stay. The court noted, "Having reconsidered the matter, we conclude that *Sternberg* misconstrued the plain meaning of § 362(k). To the extent it is inconsistent with this opinion, Sternberg is overruled." The court concluded, "For these reasons, § 362(k) is best read as authorizing an award of attorney's fees incurred in prosecuting an action for damages under the statute." *In re Schwartz-Tallard*, 803 F.3d 1095 (9th Cir. Oct. 14, 2015). http://law.justia.com/cases/federal/appellate-courts/ca9/12-60052/12-60052-2015-10-14.html

Court finds Credit Reporting Agency used reasonable procedures in reporting information. The Tenth Circuit affirmed the dismissal of a consumer's claim that a CRA failed to properly report and investigate a disputed lien. The court noted that although the question of whether a CRA followed reasonable procedures is ordinarily for the jury, in cases where CRAs clearly employ reasonable procedures, the issue may be decided on summary judgment. In the instant case, the court concluded that the reporting and the re-investigation both followed reasonable procedures as a matter of law. *Wright v. Experian Information Solutions*, 805 F.3d 1232 (10th Cir. Nov. 10, 2015). http://law.justia.com/cases/federal/appellate-courts/ca10/14-1371/14-1371-2015-11-10.html

FEDERAL DISTRICT COURTS

Unpaid property taxes are not a debt under the Fair Debt Collections Practices Act ("FDCPA"). The Middle District of North Carolina dismissed a plaintiff's complaint noting that a threshold requirement for application of the FDCPA is an attempt to collect a "debt," but that property taxes and associated costs do not arise out of the type of consumer transaction contemplated by the FDCPA's definition of "debt." *Armstrong v. Bardill,* No. 1:13-CV-1140, WL 5159090 (M.D.N.C. Sept. 2, 2015). http://law.justia.com/cases/federal/district-courts/north-carolina/ncmdce/1:2013cv01140/64768/15/

STATE COURTS

Arbitration in contract written in English not enforceable when contract negotiated in Spanish and translated into Spanish. A California appellate court held that an arbitration clause contained in a signed contract written in English was unenforceable when the consumer negotiated the agreement in Spanish and also signed a Spanish translation that did not contain the arbitration provision. The court noted that the consumer "is not attempting to avoid the arbitration agreement because of his limited understanding of the English language. Rather, he is relying on the fact that Pena's Motors provided him with what purported to be a Spanish trans-

lation of the English contract he was being asked to sign, a Spanish translation which did not contain the arbitration agreement." *Ramos v. Westlake Services LLC*, 2015 WL 7482148 (Cal. Ct. App. Oct. 30, 2015). http://law.justia.com/cases/california/court-of-appeal/2015/a141353.html

Agreement finance companies made with tort plaintiffs seeking funds to pay personal expenses while waiting for their lawsuits to settle or go to trial were loans. The specific issue this case presented for the Colorado Supreme Court's review centered on whether the companies forwarding of expense money to tort plaintiffs constituted a "loan." Petitioners contended they were "asset purchases," but the Colorado Uniform Consumer Credit Code interprets these transactions as loans. The Supreme Court agreed with the UCCC: these transactions are loans. Oasis Legal Fin. Grp., LLC v. Coffman, 2015 WL 7177951 (Colo. Nov. 16, 2015). http://law.justia.com/cases/colorado/supreme-court/2015/13sc497.html

The Kentucky Supreme Court applied the generally accepted rule that compliance with government regulations imposes a substantially higher standard to justify the award of punitive damages.

Kentucky Supreme Court reverses award of punitive damages in Nissan case. The Kentucky Supreme Court applied the generally accepted rule that compliance with government regulations imposes a substantially higher standard to justify the award of punitive damages. The court stated, "Successful completion of regulatory product testing weighs against a finding of gross negligence." The court noted, however, "mere compliance with regulatory products standards, either mandatory or voluntary, does not automatically foreclose a punitive damages jury instruction. In other words, proof indicating that a manufacturer exercised slight care by complying with relevant regulatory mandates is not dispositive where additional evidence is presented that tends to prove reckless or wanton conduct." In the instant case, the court found insufficient evidence of reckless or wanton care was presented. *Nissan Motor Co., Ltd. v. Maddox*, 2015 WL 5626432 (Ky. Sept. 24, 2015). http://law.justia.com/cases/kentucky/supreme-court/2015/2013-sc-000685-dg.html

Arbitration agreement signed by nursing home resident's attorney in fact not enforceable. The Kentucky Supreme Court held that the power-of-attorney instruments did not authorize the resident's attorney-in-fact to waive the resident's right to access to the courts. The court held that (1) without a clear and convincing manifestation of the principal's intention to do so, delegation to an agent of the authority to waive a trial by jury is not authorized, and the principal's assent to the waiver is not validly obtained; and (2) the arbitration agreements in these cases were never validly formed. *Extendicare Homes, Inc. v. Whisman*, 2015 WL 5634309 (Ky. Oct. 29, 2015). http://law.justia.com/cases/kentucky/supreme-court/2015/2013-sc-000426-i-0.html

Applying Minnesota payday lending law to a Delaware company that made loans over the Internet is not unconstitutional. The lender argued that the application of Minnesota law to its loans violated the extraterritoriality principle of Article I, Section 8, Clause 3 of the United States Constitution, which prohibits a state from regulating commerce that occurs "wholly outside the . . . [s]tate." The Minnesota Supreme Court noted that the commerce regulated by Minnesota's payday-lending law in this case, which involved a Delaware company lending money to residents of Minnesota and making deposits and withdrawals through Minnesota banks, was not wholly extraterritorial.

> "In this case, the "economic activity" regulated by Minnesota's payday-lending law involved more than just Integrity's signature; the law governed the entire transaction between Integrity and borrowers. The law regulated the payment of funds to and from Minnesota borrowers, which for most of these loan transactions included electronic transfers into and out of Minnesota banks, activities that certainly qualify as commerce."

Swanson v. Integrity Advance, LLC, 870 N.W.2d 90 (Minn. Oct. 7, 2015). http://law.justia.com/cases/minnesota/supreme-court/2015/a13-1388.html

Claim against hospital based on a slip and fall claim is not a health care liability claim (HCLC) under the Texas Medical Liability Act. The Texas Supreme Court reversed the court of appeal's decision that the TMLA applied to plaintiff's premises liability claim. The Supreme Court stated: "We conclude that the record before us does not reflect a substantive nexus between the safety standards Reddic claims the hospital violated and the hospital's provision of health care." The court concluded, "Thus, the record does not support the hospital's contention that Reddic's claim is an HCLC. *Reddic v. E. Texas Med. Ctr. Reg'l Health Care Sys.*, 2015 WL 6558270 (Tex. Oct. 30, 2015). http://law.justia.com/cases/texas/supreme-court/2015/14-0333.html

Deposit returned to buyer after contract cancelled should not be setoff against damages. The Vermont Supreme Court held that a buyer's recovery under the state's consumer protection act should not be offset by any deposit returned by the seller. The seller cancelled the contract and returned the deposit as required. The deposit amount was not part of the buyer's damages. *McKinstry v. Fecteau Residential Homes, Inc.*, 2015 VT 125 (Vt. Sept. 18, 2015). http://law.justia.com/cases/vermont/supreme-court/2015/2015-vt-125.html