# 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. If a link does not work, it may be necessary to cut and paste it to your browser. To subscribe and begin receiving your free copy of the Consumer News Alert in your mailbox, visit www.peopleslawyer.net

**FEDERAL CIRCUIT COURTS**

*Debt collector must face claim over voicemail.* The Third Circuit revived a putative class action alleging a debt collector violated federal law when it did not use its actual corporate name in a voicemail. The court reasoned that the use of an alternative business moniker was enough to support a Fair Debt Collection Practices Act allegation. Levins v. Healthcare Revenue Recovery Grp. LLC, 902 F.3d 274 (3d Cir. 2018).
https://law.justia.com/cases/federal/appellate-courts/ca3/17-3330/17-3330-2018-08-22.html

*Debt collector's letter referencing the possibility of forgiveness of the debt being reported to the IRS may violate FDCPA*. The Third Circuit held that a statement in debt collection letters saying forgiveness of the debt may be reported to the IRS could constitute a violation of the Fair Debt Collection Practices Act because the debts in question were too small to be reported. The decision revived a potential class action against Midland Credit Management, Inc.. Schultz v. Midland Credit Mgmt., Inc., 905 F.3d 159 (3d Cir. 2018).
https://law.justia.com/cases/federal/appellate-courts/ca3/17-2244/17-2244-2018-09-24.html

*Fifth Circuit panel rejects an administrative subpoena from the Consumer Financial Protection Bureau* that sought documents and other information from a Texas-based public records search company. This case marks only the second time that an appeals court has declined to enforce one of the consumer watchdog agency's so-called civil investigative demands. In a six-page decision, the three-judge panel said the CID issued to The Source for Public Data, L.P., failed to give adequate notice of what conduct the CFPB was investigating and what law the agency thought might have been broken. CFPB v. The Source for Public Data, L.P., 903 F.3d 456 (5th Cir. 2018).
https://www.hudsoncook.com/insights/2018-09-07-decision.pdf

*Person may have a claim under the Fair Debt Collection Practices Act even if he denies owing the debt.* Debt collector retained the defendant law firm to file a complaint against plaintiff arising out of an unpaid credit card debt. Plaintiff denied owing the debt and that lawsuit was dismissed. Plaintiff then brought this action under the FDCPA alleging that the defendants continued pursuing a lawsuit against him even after being informed that he was not obligated on the debt. Under the FDCPA, a "consumer" is defined as one who is "obligated or allegedly obligated to pay any debt." Based on this definition, the district court dismissed the complaint, holding that plaintiff did not have standing to bring the action as long as he denied owing the debt because he was not "obligated or allegedly obligated" on the debt. The Seventh Circuit reversed, giving plaintiff leave to amend his complaint if necessary. The Court found that a plain reading of the FDCPA demonstrates that the phrase "obligated or allegedly obligated" did not require the plaintiff to allege he or she was obligated on

the debt. Loja v. Main St. Acquisition Corp., 906 F.3d 680 (7th Cir. 2018).
https://law.justia.com/cases/federal/appellate-courts/ca7/17-2477/17-2477-2018-10-18.html

*Court rejects attorneys' fees in settlement*. The Ninth Circuit panel vacated an $8.7 million attorneys' fees award in a $38 million settlement resolving claims that the company enrolled consumers in a bogus membership rewards program without their consent that charged them monthly fees. The three-judge panel found that the lower court erred by considering $20 credits given to class members as cash rather than coupons under the Class Action Fairness Act. As a result, the panel said, the attorneys' fees could be inflated. "Nothing in the record could have given the district court reason to believe that any class member, let alone all class members, would have viewed the $20 credit as equivalently useful to $20 in cash." In re EasySaver Rewards Litigation, 906 F.3d 747 (9th Cir. 2018).
http://cdn.ca9.uscourts.gov/datastore/opinions/2018/10/03/16-56307.pdf

*Food and drug regulations do not preempt misbranding*. The Ninth Circuit revived a putative class action alleging supplement maker MusclePharm Corp. mislabeled the protein content of an Arnold Schwarzenegger-branded supplement. The court held the plaintiff can claim the company misrepresented the source of the protein. The panel found U.S. Food and Drug Administration regulations on protein content and measurement in supplements preempt plaintiff Tucker Durnford's claim that MusclePharm Corp. misrepresented how much protein was in its "Arnold Schwarzenegger Series Iron Mass" supplement. "It does not, however, preempt a misbranding theory premised on the label's allegedly false or misleading implication that the Supplement's protein came entirely from two specifically named, genuine protein sources." Durnford v. MusclePharm Corp., 907 F.3d 595 (9th Cir. 2018).
http://cdn.ca9.uscourts.gov/datastore/opinions/2018/10/12/16-15374.pdf

*Arbitrator decides issue of class arbitration*. In agreement with the Second and Eleventh Circuits, the Tenth Circuit held that an arbitration agreement's incorporation of AAA rules was "clear and unmistakable" evidence that the parties intended an arbitrator to decide whether the agreement allows for arbitration of class claims.
Dish Network L.L.C. v. Ray, 900 F.3d 1240 (10th Cir. 2018).
https://law.justia.com/cases/federal/appellate-courts/ca10/17-1013/17-1013-2018-08-21.html

*Court should decide class arbitrability questions*. The Eleventh Circuit ruled Wednesday that class arbitrability should be decided by a court if an arbitration clause is silent on the issue, but sent a dispute over class arbitrability between consumers and a prison contractor to an arbitrator after determining that the terms of service agreement clearly states that was the parties' preference. JPay Inc. v. Kobel, 904 F.3d 923 (11th Cir. 2018).
http://media.ca11.uscourts.gov/opinions/pub/files/201713611.pdf

*What is standard for the injury threshold in TCPA suit?* The Eleventh Circuit is weighing whether a single unwanted text message from a lawyer to a former client qualifies as a concrete injury to sustain a claim under the Telephone Consumer Protection Act. The judges asked several questions, including whether there is a difference in the analysis between one text and 12 or even hundreds, whether the past customer relationship between Salcedo and Hanna's firm makes a difference, and whether the details of how Salcedo reacted or responded to the text and how much of his time was allegedly wasted matters. Salcedo v. Hanna, ___ F.3d ___ (11th Cir. 2018).

*FACTA class settlement upheld*. The Eleventh Circuit affirmed a class settlement where the defendant allegedly violated the federal Fair and Accurate Credit Transactions Act (FACTA) by printing point-of-sale credit card receipts that included more than the last five digits of the card number. Over objections, the court held that the named plaintiff had *Spokeo* standing. The court also awarded one-third of the settlement as attorney's fees, finding a lodestar analysis was not required. Muransky v. Godiva Chocolatier, Inc., 905 F.3d 1200 (11th Cir. 2018).
http://media.ca11.uscourts.gov/opinions/pub/files/201616486.pdf

*Consumer bound by arbitration agreement contained on the packaging*. The Eleventh Circuit held that consumers were properly compelled to arbitration and a putative class action was properly dismissed based on an arbitration provision and class action waiver conspicuously appearing on the product's packaging.

Homeowners filed a class action complaint against Tamko alleging that the company's shingles failed to comply with industry standard and were not as-warranted. In response, Tamko moved to compel arbitration and dismiss the class action complaint based on an arbitration provision and class action waiver that appeared on the exterior wrapping of every package of shingles. The United States District Court for the Middle District of Florida granted the motion, and the homeowners appealed.

In affirming the District Court, the Eleventh Circuit held that: (1) the shingle wrappers conveyed a valid offer of Tamko's product terms, including that any dispute must be arbitrated on an individual basis; and (2) the roofer's acceptance of the product terms by opening and installing the shingles was imputed to the homeowners. Dye v. Tamko Building Products, Inc., 908 F.3d 675 (11th Cir. 2018).
https://law.justia.com/cases/federal/appellate-courts/ca11/17-14052/17-14052-2018-11-02.html

**FEDERAL DISTRICT COURTS**

*Customer not forced to arbitrate based on contract with acquiring company.* A California federal court held that DirecTV cannot force the customer behind a proposed class action accusing the company of placing unauthorized robocalls to arbitrate his claims. The judge found the customer signed a contract with AT&T, not its recently acquired DirecTV unit. The judge stated, "It was not the parties' intent to enter into an arbitration agreement that would cover claims against an entity (like DirecTV) that became affiliated with AT&T Mobility years after [Revitch] entered into the contract ... as the result of an acquisition by AT&T Mobility's parent company and not due to an assignment of any obligations in the original contract." Revitch v. DirecTV, LLC, ___ F.Supp.3d ___ (N.D. Cal. 2018).
https://www.leagle.com/decision/infdco20180824c88

**A California federal court held that DirecTV cannot force the customer behind a proposed class action accusing the company of placing unauthorized robocalls to arbitrate his claims.**

*Company that did not prove agency status cannot rely on arbitration clause*. A company accused of making unsolicited phone calls for AT&T cannot move a Telephone Consumer Protection Act case out of court for now, because it did not prove it acted as an agent for the telecom giant when seeking arbitration, an Illinois federal judge ruled. Thompson v. AT&T Services, Inc. ___ F.Supp.3d ___ (N.D. Ill. 2018).
https://us-arbitration.shearman.com/siteFiles/24071/ 2108.09.24% 20 Thompson%20v.%20AT&T%20Services,%20Inc.,%20No.%20117-CV-03607%20(N.D.%20Ill.%20....pdf

*Court holds company's non-disparagement clause unlawful*. A district court in Florida, in a case brought by the Federal Trade Commission against weight-loss supplement marketer Roca Labs, granted the FTC's summary judgment motion in a case in which the FTC challenged the company's enforcement of "gag clauses" to stop consumers from posting negative reviews. The court found that the defendants violated the FTC Act by making deceptive weight-loss claims about their dietary supplements, known as Roca Labs Formula or "Gastric Bypass Alternative." The court also found that the defendants' threats to sue, and filing of lawsuits against dissatisfied consumers for violating non-disparagement clauses in their online sales contracts, unfairly suppressed negative information about the defendants and their products, to the detriment of subsequent purchasers, in violation of the FTC Act. FTC v. Roca Labs, Inc., ___ F.Supp.3d ___ (M.D. Fla. 2018).

https://www.ftc.gov/system/files/documents/cases/roca_labs_opinion_grant_msj_deny_partial_msj_9-25-18.pdf

*Child who used mobile app not bound by arbitration clause*. A California federal judge shot down Viacom's bid to send to arbitration a proposed class action accusing it of unlawfully collecting and selling personal information belonging to children who used one of its mobile apps. The court ruled that there was no evidence that the users had ever seen or agreed to the arbitration requirement.

Amanda Rushing and her minor daughter, identified as L.L., sued Viacom in August 2017 for allegedly violating child privacy laws by secretly gathering kids' personal information as they played the mobile game "Llama Spit Spit" and selling that data to advertising networks that used it to target ads. Viacom countered that the suit should be shipped off to arbitration because users of its apps are repeatedly reminded while downloading and installing the software about a clause in the end user license agreement that requires the use of arbitration to resolve such disputes.

In a four-page order issued Monday, U.S. District Judge James Donato refused to grant Viacom's request to stay the case pending arbitration, finding that an agreement to arbitrate such disagreements had never been formed between the parties because the plaintiffs had not received adequate notice of the existence of the arbitration clause, which app users did not have to explicitly consent to in order to download and play the game. "Arbitration is a matter of contract, and there can be no contract without an offer and an acceptance," Judge Donato wrote. "A user cannot accept an offer through silence and inaction where she could not reasonably have known that an offer was ever made to her. That is the situation here, and consequently Viacom's motion is denied." Rushing v. Viacom Inc., ___ F.Supp.3d ___ (N.D. Cal. 2018).
https://us-arbitration.shearman.com/siteFiles/24605/2018.10.15%20Rushing%20et%20al%20v.%20Viacom%20Inc.%20et%20al,%20317-cv-04492,%20No.%2083%20(N.D....pdf

*Hertz can force arbitration in rental fee case*. An Illinois federal judge sided with Hertz Corp. in a putative class action suit against the rental car company brought by a customer, saying a contract required arbitration for the bulk of claims accusing Hertz of repeatedly charging improper fees. Kurth v. The Hertz Corp., ___ F.Supp.3d ___ (N.D. Ill. 2018).
https://law.justia.com/cases/federal/district-courts/illinois/ilndce/1:2018cv02785/351591/35/

*Plaintiff must arbitrate FDCPA claims against loan servicer*. The US District Court for the Western District of Washington held that arbitration provisions in promissory notes signed by the plaintiff were broad enough to encompass her FCRA claim against the servicer of her student loans. The court found that the arbitration clause at issue – which provided for arbitration as to any claim that "ar[ose] from or relate[d] in any way to the Note" – was broad enough to encompass the plaintiff's FCRA claims against Navient because its "reporting or investigatory actions on the loans [we]re inherently related to the underlying promissory Notes." Howard v. Navient Solutions, ___ F.Supp.3d ___ (W.D. Wash. 2018).
https://www.consumerfinancialserviceslawmonitor.com/wp-content/uploads/sites/501/2018/10/Howard-v.-Navient-Sols._-LLC_-2018-U.S.-Dist.-LEXIS-180.pdf

*Court denies arbitration under "effective vindication" exception to the Federal Arbitration Act.* The U.S. District Court for the Western District of Washington denied a motion to compel arbitration. Per the terms of the loan agreements, the borrowers consented to binding arbitration for any disputes and agreed per the choice-of-law provision that tribal law applied, effectively waiving any protections they might have enjoyed under federal and state law. According to the court, the arbitration clause operated as a prospective waiver of most federal statutory remedies. The court found that while the FAA gives parties the freedom to structure arbitration agreements as they choose, that freedom does not extend to a substantive waiver of federally protected statutory rights. Titus v. ZestFinance, Inc., ___ F.Supp.3d ___ (W.D. Wash. 2018).
https://www.leagle.com/decision/infdco20181023d42

*Credit union must face suit over misleading overdraft policy*. The largest credit union in New England must face a proposed class action by customers who say its overdraft policies are unclear. A Massachusetts federal district court judge ruled Thursday, upholding breach of contract claims while tossing other claims for equitable relief. The judge stated, "I find that Plaintiff has plausibly argued that the contracts, even when construed together, are ambiguous as to whether they use the 'available balance' method to determine whether an account has been overdrafted." He continued, "This ambiguity presents a factual dispute not appropriate for resolution on this motion." Salls v. Digital Federal Credit Union, ___ F.Supp.3d ___ (D. Mass. 2018).
https://buckleysandler.com/sites/default/files/Buckley%20Sandler%20Infobytes%20-%20Salls%20v.%20Digital%20Federal%20Credit%20Union%20-%20district%20court%20opinion%202018.11.08.pdf

*The violation of a procedural right granted by statute may be sufficient in and of itself to constitute concrete injury under* Spokeo. A United States District Court for the Western District of Michigan stated that "the alleged violation of § 1692f(8) [FDCPA] in this case is sufficient in and of itself to constitute concrete injury in fact where Congress conferred the procedural right to protect a plaintiff's privacy interests and the alleged procedural violation entails a degree of risk sufficient to meet the concreteness require-

ment. The risk of harm is traceable to Defendant's purported failure to comply with federal law. In short, the Court is satisfied as to the existence of its power to hear this case." Brown v. Asset Acceptance, LLC, 2018 WL 6011934 (W.D. Mich. 2018).

**STATE COURTS**

*Legal settlement cash advances are not loans.* The Georgia Supreme Court handed a win to the consumer legal funding industry finding that legal case "investments" are not loans and are, therefore, outside the scope of state usury laws. The court found that the advance was not a loan under either the Georgia loan act or payday lending law. "We agree with our Court of Appeals that, when the obligation to repay is only contingent and limited, there generally is no 'loan.'" Ruth v. Cherokee Funding, LLC, ___ S.E.2d ___ (Ga. 2018). https://law.justia.com/cases/georgia/supreme-court/2018/s17g2021.html

**The court found that the advance was not a loan under either the Georgia loan act or payday lending law.**

**MISCELLANEOUS**

*Seventeen AGs say HUD should not change disparate impact rule.* A coalition of state attorneys general has urged the U.S. Department of Housing and Urban Development to leave alone its Obama-era rule on disparate impact liability under the Fair Housing Act, saying it is already consistent with U.S. Supreme Court precedent.

Led by North Carolina's Attorney General Josh Stein, seventeen top prosecutors told HUD in a comment letter dated Monday that no changes need to be made to the so-called disparate impact rule, which the agency has said it is eyeing for potential rewrites in light of the Supreme Court's 2015 decision in Texas Department of Housing and Community Affairs v. Inclusive Communities Project Inc.. Read more, here: https://www.enewspf.com/latest-news/latest-local-news/attorney-general-madigan-joins-coalition-urging-hud-to-retain-rules-on-fair-housing/

*President approves prohibition on pharmacy "gag clauses."* President Trump signed a pair of bills designed to ban the practice of hiding lower prescription drug costs from patients, the federal government said Wednesday. The President signed the Patient Right to Know Drug Prices Act, S. 2554, and the Know the Lowest Price Act of 2018, S. 2553, which ban the use of so-called "gag clauses." These clauses prevent pharmacists from proactively letting customers know if the out-of-pocket cost of a medication is less than what they would pay with insurance. The ban on the clauses applies to both Medicare plans and private insurance plans. Read more here, http://fortune.com/2018/10/11/trump-administration-gag-clause-compare-prescription-prices/