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 http://www.peopleslawyer.net/

U.S. SUPREME COURT

Supreme Court decides FDCPA statute of limitations. The Supreme Court held that absent the application of an equitable doctrine, the FDCPA's statute of limitations begins to run on the date on which the alleged FDCPA violation occurs, not the date on which the violation is discovered.

The Court considered whether a discovery rule applies to the FDCPA's statute of limitations, which provides that actions must be brought "within one year from the date on which the violation occurs." 15 U.S.C. § 1692k(d). Stating that the phrase "discovery rule" has no "generally accepted meaning," the Court addressed two concepts—"the application of a general discovery rule as a principle of statutory interpretation and the application of a fraud-specific discovery rule as an equitable doctrine."

The Court held that there is no general discovery rule that applies to all FDCPA cases, refusing to read such a discovery rule into language it considered unambiguous. The Court also recognized that it has applied an equity-based discovery rule in fraud cases. The Court stated, however, that the petitioner could not rely on that equitable doctrine because he had failed to preserve the issue in the court of appeals or raise it in his petition for certiorari. The Court therefore affirmed the court of appeals, which had held that the action was untimely. Rotkiske v. Klemm, 140 S. Ct. 355 (2019).
https://www.supremecourt.gov/opinions/19pdf/18-328_pm02.pdf

FEDERAL CIRCUIT COURTS OF APPEALS

College did not owe students fiduciary duty. The First Circuit ruled against efforts by former Mount Ida College students to hold the school and its leaders accountable for the rushed and haphazard way it closed, affirming that colleges do not owe a fiduciary duty to students. A fraud allegation against school officials for offering rosy outlooks or omitting vital information while financial conditions worsened also came up short. Students failed to show evidence of false statements or to prove the college had a duty to disclose the financial decline, according to the opinion. Squeri v. Mount Ida College, 954 F.3d 56 (1st Cir. 2020).
https://law.justia.com/cases/federal/appellate-courts/ca1/19-1624/19-1624-2020-03-25.html

Night Club texting platforms are autodialers. The Second Circuit ruled that online texting systems being used by a New York

nightclub are a type of prohibited automatic telephone dialing system, adding to the list of competing definitions of illegal autodialers proffered by appeals courts around the country.

A three-judge panel revived and remanded a proposed class action alleging that La Boom Disco Inc. sent lead Plaintiff at least 300 unwanted advertising text messages over more than a year-and-a-half in violation of the Telephone Consumer Protection Act. The decision is a broad reading of the statute, finding that calling from a list of numbers violates the statute. Duran v. La Boom Disco, Inc., ___ F.3d ___ (2d Cir. 2020). https://law.justia.com/cases/federal/appellate-courts/ca2/19-600/19-600-2020-04-07.html

Business card with fax number may constitute consent to receive faxes. The Third Circuit ruled that distributing a business card with a fax number on it can be sufficient to establish "express invitation or permission" to receive faxes, and dismissed a proposed class action under the Telephone Consumer Protection Act over allegedly unwanted faxes.

A divided three-judge panel found that the use of "express consent" and "express invitation or permission" in the TCPA are interchangeable, and apply to unwanted phone calls and faxes equally.

In a decision that waded into unsettled questions for the circuit about what constitutes a violation of the TCPA, Judge Joseph Greenaway, who wrote the majority opinion, further rejected arguments that the law requires faxes to include an opt-out clause even when the recipient is found to have "solicited" for the fax. "Its purpose is not to curb permitted, invited, and consented to—*i.e.*, solicited—faxes," Greenaway said. "As such, under the TCPA, solicited faxes do not need to contain opt-out notices." Physicians Healthsource, Inc. v. Cephalon, Inc., 954 F.3d 615 (3d Cir. 2020). https://images.law.com/contrib/content/uploads/documents/402/60851/PHI-v.-Cephalon.pdf

Court denies 7,600-person class in debt collection suit. The Fifth Circuit held a lower court erred in certifying a class of more than 7,600 recipients of medical debt collection letters from Medicredit. The court found that the named plaintiff had not shown Medicredit threatened legal action while also not actually intending to sue.

Plaintiff said in her underlying suit that the debt collector had sent her a letter that led her to believe she was going to be sued over her debt. Following receipt of the letter and a subsequent conversation with the medical center, Flecha filed suit under the Fair Debt Collection Practices Act, claiming Medicredit's letter made a false threat of legal action. A Texas federal court later certified a class of an estimated 7,650 individuals who had received the same letter.

On appeal, the Fifth Circuit vacated certification, saying plaintiff had not provided "*any* evidence concerning [the medical center's] intent to sue (or lack thereof)—let alone any evidence of *class-wide* intent." "This lack of evidence concerning [the medical center's] class-wide intent is fatal to class certification…." Flecha v. Medicredit Inc., 946 F.3d 762 (5th Cir. 2020). https://law.justia.com/cases/federal/appellate-courts/ca5/18-50551/18-50551-2020-01-08.html

Sixth Circuit reminds parties that notice must be given before binding class members. A recent decision by the U.S. Court of Appeals for the Sixth Circuit provides an important reminder that if defendants want absent class members to be bound by a summary judgment ruling in their favor, generally they must insist that notice be given to the class before that ruling is made.

In the case at hand, the district court certified a class and then, before ordering notice to the class, granted summary judgment in favor of the defendant. The Sixth Circuit affirmed the district court's summary judgment ruling, finding that none of the causes of action were viable under state law. But it also ruled that the class certification ruling in effect was a nullity due to the failure to give notice, and the judgment would apply only to the named plaintiffs. The Sixth Circuit rejected the defendant's suggested approach of remanding so that post-judgment notice could be provided to the class because "post-judgment notice would present no meaningful opportunity for class members to make their case;" rather, it "would only invite parties to enter a fight that they already lost." Faber v. Ciox Health, LLC, 944 F.3d 593 (6th Cir. 2019). https://law.justia.com/cases/federal/appellate-courts/ca6/18-5896/18-5896-2019-12-05.html

Fair Debt Collection Act claim fails. The Sixth Circuit affirmed the dismissal of a Fair Debt Collection Practices Act suit from Buchholz, a Michigan resident, who said a law firm's debt-collection letters made him feel anxious. Buchholz argued that the letters misled him into believing that a lawyer had reviewed his debts and that the firm might sue him if he did not promptly pay up.

The court found in its de novo review of the case that the firm's letters did not threaten litigation and Buchholz never indicated that he refused to pay those debts. "Rather, he fears what might happen if he does not pay. So far as we know, Buchholz might decide to pay his debts, warding off any prospect of litigation," the order said. "Because Buchholz has neither alleged that MNT has threatened to sue him nor that he refuses to pay his debts, we cannot infer that litigation is 'certainly impending.'" "So even if anxiety is a cognizable injury—and we have our doubts—the anxiety that Buchholz alleges is not traceable to anyone but him," the judges said. Buchholz v. Meyer Njus Tanick, PA, 946 F.3d 855 (6th Cir. 2020). https://law.justia.com/cases/federal/appellate-courts/ca6/18-2261/18-2261-2020-01-03.html

Debt collector letter using the terms "original" and "current" creditor does not violate FDCPA. The Seventh Circuit found that a letter sent by a debt collector to a debtor listing the "original" and "current" creditors did not violate 15 U.S.C. § 1692g(a)(2) of the Fair Debt Collection Practices Act because the letter clearly and unambiguously identified the purchaser of the debt as the "current creditor." Section 1692(g)(a)(2) did not require a detailed explanation of the transactions leading to the debt collector's notice, and no evidence of confusion could change the result. Dennis v. Niagara Credit Sols., Inc., 946 F.3d 368 (7th Cir. 2019). https://law.justia.com/cases/federal/appellate-courts/ca7/19-1654/19-1654-2019-12-30.html

Court affirms $5.7M judgment in junk fax suit. The Seventh Circuit upheld a $5.7 million judgment against a pharmaceutical wholesaler accused of sending junk faxes to a class of medical professionals, saying the wholesaler failed to show adequate evidence that customers consented to receiving the company's advertisements.

The faxes at issue were sent to former customers of Allscripts, an electronic health care record system vendor that A-S Medication purchased in 2009 in a full asset sale. A-S argued that customers' consent to receive faxes transferred over with everything else in the purchase, but a three-judge panel disagreed. The panel found that the Telephone Consumer Protection Act must be construed liberally in favor of consumer protection. The

TCPA bars advertisers from sending ads via fax unless they have an established business relationship, prior express permission or invitation from its recipients, the panel said.

> Given those requirements, it would seem odd if a company could solicit express prior permission to send fax advertisements, then transfer that permission to a completely different company who in turn may send advertisements with impunity until the consumer affirmatively terminates its previous permission. Indeed, such a practice could eviscerate the entire statutory scheme which is designed to protect consumers from receiving unwanted contact from unknown entities or individuals.

Physicians Healthsource Inc. v. A-S Medication Sols. LLC, 950 F.3d 959 (7th Cir. 2020).
https://law.justia.com/cases/federal/appellate-courts/ca7/19-1452/19-1452-2020-02-24.html

New standard for class action notice when arbitration clause may exist. The Seventh Circuit created a new test for district courts to utilize in these circumstances and concluded that a court: (1) may not authorize notice to individuals shown to have entered mutual arbitration agreements waiving their right to join the action; and (2) must give the defendant an opportunity to make that showing. Bigger v. Facebook, Inc., 947 F.3d 1043 (7th Cir. 2020).
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2020/D01-24/C:19-1944:J:Kanne:aut:T:fnOp:N:2464184:S:0

Suit against condominium association board director to collect attorneys' fees is not for a consumer debt. The Seventh Circuit found that the former board director failed to state a cause of action under the Fair Debt Collections Practices Act, 15 U.S.C. 1692, et seq., because the attorneys' fees at issue and authorized under the association's "Restated Declaration" agreement for violations of the board's rules or obligations did not constitute a "debt" under the FDCPA's limited, consumer-protection-focused definition.

Suit against condominium association board director to collect attorneys' fees is not for a consumer debt.

It was undisputed that the association's state court action requested that the court impose a financial obligation on the former board director by requiring him to pay fees. However, the Court noted that to determine whether the demand qualifies as a "debt" under the FDCPA "[t]he crucial question is the legal source of the obligation."

The former board director argued that any obligation to pay the association's counsel's attorneys' fees was a consumer debt because but for his condominium purchase he never would have served on the association board; but for his board service, he never would have become ensnared in the state court action; and but for the state court action, he never would have found himself on the receiving end of the association's counsel's legal demand to pay attorneys' fees.
Reviewing Congress's limited definition of "debt" under the FDCPA to consumer debt, however, the Seventh Circuit determined that the attorneys' fees at issue did not "aris[e] out of" a consumer transaction as Congress employed that requirement in defining "debt" (15 U.S.C. § 1692a(5)) and, therefore, fell outside the scope of the statute. Spiegel v. Kim, 952 F.3d 844 (7th Cir. 2020).
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2020/D03-06/C:18-2449:J:Scudder:aut:T:fnOp:N:2484043:S:0

Arbitration under Federal Arbitration Act voluntarily waived. The issue presented to the Seventh Circuit was this: Did a party asserting a right to arbitration in its motion to dismiss, but withdrawing it when the opposing party threatened sanctions for a "frivolous claim" voluntarily waive its right to arbitration, despite asking the court to compel it? The district court denied the request for arbitration, finding:

> Coaster Dynamix waived its right to arbitrate by expressly withdrawing the arbitration demand in its second motion to dismiss. "Coaster chose a course inconsistent with submitting the case to an arbitral forum." Nor did the court allow Coaster Dynamix to rescind its waiver.

The Seventh Circuit affirmed, finding that Coaster waived its right to arbitration and failed to prove an "abnormal circumstance" warranting rescission of its waiver.

> Federal law favors arbitration. Like other contractual rights, though, the right to arbitrate is waivable. A waiver can be express or implied through action. Either way, the question is whether "based on all the circumstances, the party against whom the waiver is to be enforced has acted inconsistently with the right to arbitrate."

Next, the court addressed the test for waiver as follows:

> The analysis can be short when the basis of the waiver is an express abandonment of the right. In most situations, "I waive arbitration" answers the question. The district court found that Coaster Dynamix's withdrawal of the arbitration argument amounted to an explicit waiver of any right to arbitrate.

Brickstructures, Inc. v. Coaster Dynamix Inc., 952 F.3d 887 (7th Cir. 2020).
https://law.justia.com/cases/federal/appellate-courts/ca7/19-2187/19-2187-2020-03-11.html

AT&T cannot impose arbitration. The Ninth Circuit blocked AT&T from contesting a decision that barred it from forcing customers into arbitration over claims that the wireless giant misrepresented unlimited cellphone data plans.

In an unpublished decision, the panel upheld a California court ruling that found the proposed class of consumers need not pursue their claims in private after a state supreme court ruling set a precedent in their favor. "We hold that AT&T's arbitration agreement is unenforceable," the court said. "Accordingly, we affirm the district court's order denying AT&T's motion to compel arbitration." Roberts v. AT&T Mobility LLC, ___ F. App'x ___ (9th Cir. 2020).
https://law.justia.com/cases/federal/appellate-courts/ca9/18-15593/18-15593-2020-02-18.html

Individual class members must show standing to recover damages. The Ninth Circuit found that each individual class member in a class action lawsuit was required to have standing to recover damages, but also agreed with the plaintiff that each of the 8,185 class members had standing. The court relied on the Supreme Court case *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1543 (2016), and held that each class member was not required to show that TransUnion actually disclosed his or her credit report to a third party because TransUnion's violation of the consumers' statutory rights under the FCRA constituted a concrete injury sufficient to confer standing. *Ramirez v. TransUnion LLC*, 951 F.3d 1008 (9th Cir. 2020).

https://law.justia.com/cases/federal/appellate-courts/ca9/17-17244/17-17244-2020-02-27.html

Ninth Circuit defines "debt collector" under FDCPA. Reversing the district court's dismissal of an action under the Fair Debt Collection Practices Act and remanding, the Ninth Circuit held that a business that bought and profited from consumer debts, but outsourced direct collection activities, qualified as a "debt collector" subject to the requirements of the Act. The panel held that an entity that otherwise meets the "principal purpose" definition of debt collector under 15 U.S.C. § 1692(a)(6) (defining debt collector as "any business the principal purpose of which is the collection of any debts") cannot avoid liability under the FDCPA merely by hiring a third party to perform its debt collection activities.

Judge Bea, dissenting, wrote that the complaint failed to allege that the defendant acted directly in any way to violate the plaintiff's rights under the FDCPA; the plaintiff did not adequately allege that the defendant's "principal purpose" was the "collection of any debts;" and the word "collection" must, in context, describe the action of collecting. McAdory v. M.N.S. & Assocs., LLC, 952 F.3d 1089 (9th Cir. 2020).
https://cdn.ca9.uscourts.gov/datastore/opinions/2020/03/09/18-35923.pdf

Even 16 minutes late is too late for filing an appeal. The Tenth Circuit upheld a district court's denial of a motion for leave to file an untimely appeal.

The district court entered its final judgment on November 14, triggering the 30-day clock for Hammer to appeal the decision by 11:59 p.m. on December 14. At 12:16 a.m. on December 15, she filed a motion for an extension of the deadline to appeal, citing "several client emergencies," "significant gastrointestinal issues," and interrupted access to her office network and printer. She also detailed her struggles with the court's Electronic Case Filing system, noting that she mistakenly logged into a training website rather than the court's official filing page, and then accidentally logged into the official filing page using incorrect credentials.

The court framed the issue as whether Hammer's individual errors or delays rendered the court clerk's office "inaccessible" under Rule 26(a)(3) of the Federal Rules of Appellate Procedure. It held that they did not, referencing cases from around the country where neither power outages at 11:50 p.m., FedEx's failure to deliver filings on time, nor failed internet connections made the court "inaccessible." The court's system, not the litigant's, must malfunction to excuse a late filing. Chung v. Lamb, 794 F. App'x 773 (10th Cir. 2019).
https://www.accountsrecovery.net/wp-content/uploads/2019/12/Boscoe-Chung-v-Lamb.pdf

One-year contractual limit bars wrongful death suit. The Tenth Circuit affirmed the dismissal of a suit accusing a home security company of causing a customer's death in a house fire, saying in that a contractual provision setting a one-year time limit for civil claims was valid and enforceable.

The three-judge panel unanimously affirmed a Kansas federal judge's decision to grant ADT's motion to dismiss in a suit accusing the company of causing the death of customer, who died of smoke inhalation in August 2016 as a result of an accidental fire at her home. Frost v. ADT, LLC, 947 F.3d 1261 (10th Cir. 2020).
https://law.justia.com/cases/federal/appellate-courts/ca10/18-3259/18-3259-2020-01-17.html

The Eleventh Circuit confirmed that neither JP Morgan Chase nor its law firm violated the Fair Debt Collection Practices Act when they named the siblings of a deceased man in a state-court foreclosure action related to his home, holding they are not "debt collectors" as defined by the Act. In an unpublished, unanimous decision, the panel affirmed a Florida federal court's finding that the claims against Chase and its law firm are not actionable under the FDCPA. The assertion from the plaintiffs that Chase collects debt that is owed to another party is wrong, the panel said.

"In attempting to foreclose on [deceased borrower] Clinton Arbuckle's mortgage, Chase was acting on its own behalf and cannot be considered as attempting to collect debts 'owed or due another,'" the panel said. "Chase is the originating lender and is therefore exempt from the FDCPA's definition of 'debt collector.'" Anderman v. JP Morgan Chase Bank, N.A., ___ F. App'x ___ (11th Cir. 2020).
https://law.justia.com/cases/federal/appellate-courts/ca11/19-13734/19-13734-2020-02-11.html

Suit over collection of phantom debt dismissed. The Eleventh Circuit affirmed the dismissal of a student-loan borrower's claims against the Pennsylvania Higher Education Assistance Agency under the Fair Debt Collection Practices Act. The district court found the guaranty agency does not qualify as a debt collector under the statute.

In a 2-1 decision, the appeals court agreed with the agency that it was not acting as a debt collector under the FDCPA when it tried to collect payment for nonexistent student loan debt from Georgia resident Hope Darrisaw. The statute excludes from its definition of "debt collector" anyone "collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity … is incidental to a bona fide fiduciary obligation." A guaranty agency acts as a fiduciary to the federal government and is thus exempt from limitations placed on debt collectors, according to the opinion. Darrisaw v. Pa. Higher Educ. Assistance Agency, 949 F.3d 1302 (11th Cir. 2020).
https://law.justia.com/cases/federal/appellate-courts/ca11/17-12113/17-12113-2020-02-07.html

Privacy dispute subject to arbitration. The Eleventh Circuit on Wednesday handed DirecTV a win in a privacy dispute, finding that a customer's contract requires arbitrating his claim because the claim only arises out of his relationship with DirecTV.

In an unpublished opinion characterized as "narrow" and tailored only to the facts of the current disagreement over an arbitration clause, a three-judge panel said a Georgia federal judge erred in denying DirecTV's move to push René Romero's complaint into arbitration. The court found the agreement to arbitrate—worded as applying to "claims arising out of or relating to any aspect of the relationship between us"—covers Romero's action under the Satellite Television Extension and Localism Act, because the underlying claim would never have cropped up if he were not a DirecTV customer. Cordoba v. DirecTV, LLC, ___ F. App'x ___ (11th Cir. 2020). https://www.courtlistener.com/opinion/4728096/sebastian-cordoba-v-directv-llc/

FEDERAL DISTRICT COURTS

DTPA implied warranty claim against remote manufacturer permitted. A U.S. District Court for the Northern District of Texas has allowed a DTPA implied warranty claim against an automobile manufacturer to proceed, notwithstanding Texas Supreme Court language that appears to prohibit such suits. The court noted that in *PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship*, the Texas Supreme Court explained that "a downstream buyer *can* sue

DTPA implied warranty claim against remote manufacturer permitted.

a remote seller for breach of implied warranty, but *cannot* sue under the DTPA." 146 S.W.3d. 79, 89 (Tex. 2004) (emphasis in original). The court continues, however, to note that "BMW mischaracterizes the holding of this case in its application here." Mize v. BMW of N. Am., LLC, 2020 U.S. Dist. LEXIS 55557 (N.D. Tex. 2020).

Children not bound by parents' arbitration agreement. A Seattle federal judge refused to arbitrate suits brought by children alleging Amazon's Alexa voice-activated speakers violate state privacy laws. The judge stated the children cannot be bound by the arbitration agreement in the conditions of use for a product their parents bought.

In his decision, U.S. District Judge Richard A. Jones denied Amazon Inc.'s request to arbitrate the proposed class claims by several parents and children that the Seattle-based online retailer has built a massive database containing billions of voice recordings without their consent. But just because the parents who purchased an Alexa device agreed to an arbitration clause, that does not mean their children are also bound by that agreement, according to the order. Judge Jones said the children, at most, received an indirect benefit of enjoying the use of the Alexa device from their parents' agreements with Amazon, meaning they cannot be bound by the arbitration clause. B.F. v. Amazon.com, Inc., 2020 WL 1808908 (W.D. Wash. 2020).

Court adopts broad definition of predictive dialer. The case presented a variety of contentious TCPA issues, including: (1) whether calling a phone number previously belonging to a consenting consumer negates or mitigates liability; (2) what qualifies as an Automatic Telephone Dialing System, or "ATDS," under the statute; and (3) whether calls placed to a potentially non-working number are still considered violations of the TCPA.

Credit One placed 380 calls to plaintiff Alejandro Jiminez's phone number between January and March of 2017. Even though some evidence suggested that 43 of the attempted calls were made while the phone number was not in service, the Southern District of New York held Credit One liable for the statutorily-fixed amount of $500 per call, resulting in a $190,000 judgment. Although Jiminez was not a customer of Credit One, Credit One did have consent from the consumer who previously owned the number to call. The court found such prior consent immaterial.

In its order, the Court also deferred to the Federal Communications Commission's 2003 Order, 2008 Ruling, and 2012 Order—all providing a broad definition of predictive dialers and indicating that predictive dialers are ATDSs under the TCPA. Jiminez v. Credit One Bank, N.A., 2019 WL 6251369 (S.D.N.Y. 2019).
https://www.consumerfinancialserviceslawmonitor.com/wp-content/uploads/sites/501/2019/12/2019-TCPA-Case-Jiminez-v.-Credit-One-Bank-final-order.pdf

Plaintiff that receives compensation before filing complaint cannot represent a class. A California federal judge gave CamelBak Products LLC a win Thursday in a proposed class action alleging its "spill-proof" water bottles were defective. The court said the plaintiff has no standing to sue because she was compensated before she filed the complaint. The judge noted that although the plaintiff initially rejected a replacement bottle and check sent her in response to her issues with a defective bottle, she was still made whole by the offer, and, therefore, is not suitable to bring the class action suit.

While the plaintiff argued she did not accept the gifts, as she has maintained both the bottle and $20 in escrow, the judge rejected the argument, as previous courts have routinely done, saying accepting her argument would in effect discourage future plaintiffs from resolving their disputes without going to court. She was already made whole prior to filing the lawsuit, and cannot represent the proposed class, according to the opinion. Lepkowski v. CamelBak Prods. LLC, 2019 WL 6771785 (N.D. Cal. 2019).
https://law.justia.com/cases/federal/district-courts/california/candce/4:2019cv04598/345976/31/

Court refuses to enforce arbitration provision when plaintiff claims he never visited the website. The United States District Court for the Northern District of Georgia refused to submit to arbitration a dispute alleging violation of the Telephone Consumer Protection Act because plaintiff provided a declaration stating that he did not visit defendant Apollo Interactive, Inc.'s website. In doing so, the court kept alive a TCPA class action where Hobbs allegedly provided his telephone number—and may or may not have agreed to arbitrate—in an online submission.

The court's ruling on the motion to dismiss came down to dueling declarations. Defendant Apollo presented a declaration attesting that on August 29, 2018 at 3:57 p.m., Hobbs's contact information was entered in its website from a specific IP address located in Norcross, Georgia. Contrastingly, Hobbs produced his own declaration stating that he did not visit the website and, furthermore, that he could not have visited the website at that time. According to Hobbs, he was driving from his job at the Atlanta Zoo to Columbus, Georgia at the precise time when his contact information was submitted to the site. Hobbs v. Apollo Interactive, 2019 WL 6878863 (M.D. Ga. 2019).
https://www.consumerfinancialserviceslawmonitor.com/wp-content/uploads/sites/501/2020/01/Hobbs-v.-Apollo-Interactive_-Inc._-2019-U.S.-Dist.-LEXI.pdf

Uber data breach lawsuit sent to arbitration. A California federal judge sent to arbitration a proposed class action alleging Uber failed to secure riders' and drivers' personal information after hackers stole 57 million accounts and the rideshare service stayed mum about paying the thieves a $100,000 ransom. The court found that riders and drivers were required to sign up for an account before they could use the service. The agreement they signed included terms and conditions and services agreements that both contain arbitration provisions. Heller v. Rasier, LLC, 2020 WL 413243 (C.D. Cal. 2020).
https://www.jdsupra.com/legalnews/ca-central-district-court-upholds-78831/

Nintendo can arbitrate controller dispute. A suit alleging Nintendo sold defective Switch controllers will go to arbitration, after a Washington federal judge on Monday found that the game company and console buyers had a valid arbitration agreement.

Although the judge granted Nintendo's bid to compel arbitration, he also denied the company's move to dismiss the case, instead pausing the proposed class action pending the outcome of the arbitration.

Nintendo moved to dismiss and compel arbitration in the proposed class action in November, arguing that the end-user license agreements that buyers accepted when buying the console stipulate that any disputes coming from those agreements be sent to arbitration.

The plaintiff opposed the motion, arguing that the arbitration

provision is unenforceable, because California law and Ninth Circuit precedent hold that an arbitration clause that precludes injunctive relief, such as the one in the Switch's end-user license agreement, is null and void. However, Judge Zilly rejected this argument, saying the language of the end-user license agreement allows the arbitrator to "grant whatever relief would be available in a court under law or in equity." As the agreement does not preclude injunctive relief, it is valid and enforceable. Diaz v. Nintendo of Am. Inc., 2020 WL 996859 (W.D. Wash. 2020). https://www.courtlistener.com/recap/gov.uscourts.wawd.275807/gov.uscourts.wawd.275807.36.0.pdf

STATE COURTS

Emails did not create a contract. The Texas Supreme Court considered whether an exchange of emails and documents constituted a "definitive agreement."

The parties signed a bidding agreement that, "unless and until a definitive agreement has been executed and delivered, no contract or agreement providing for a transaction between the Parties shall be deemed to exist." The court found that by including the No Obligation Clause in the Confidentiality Agreement, Chalker and LNO agreed that a definitive agreement was a condition precedent to contract formation.

The court noted that despite numerous emails indicating the parties may have believed they reached agreement, "Although the emails are writings, they do not form a definitive agreement." The court also held that the sellers did not waive their right to a definitive agreement as a matter of law. Chalker Energy Partners III LLC v. Le Norman Operating LLC, 595 S.W.3d 668 (Tex. 2020). https://law.justia.com/cases/texas/supreme-court/2020/18-0352.html

Real estate contract found unconscionable. A Texas court of appeals found a real estate contract to be unconscionable under the DTPA based on price. In addition to DTPA damages, the court also ruled the promissory note, deed of trust and vendor's lien in special warranty deed were void pursuant to the DTPA. Sadeghian v. Jaco, 2020 WL 400172 (Tex. App.—Dallas 2020, no pet h.) (mem. op.).
https://casetext.com/case/sadeghian-v-jaco-3

Real estate contract found unconscionable.

Car dealer waived arbitration. A New Jersey appeals court held that a car dealership waived its right to force arbitration of "hidden fee" claims based on a vehicle order contract due to its previously unsuccessful attempt to compel arbitration solely under a lease agreement.

Nearly a year after losing an appellate decision on the validity of an arbitration clause in the lease agreement, the dealer failed to convince the two-judge panel to overturn a trial court ruling that the dealership had waived its right to compel arbitration of the plaintiff's claims based on an arbitration provision in his "motor vehicle retail order" agreement.

"Defendant's failure to proffer all relevant documentation, despite its awareness of the MVRO arbitration provision from the onset, is the sort of piecemeal litigation strategy prohibited under *Cole*," and constitutes a waiver. The court also found that the dealer's "after-the-fact assertion of arbitration under the MVRO clearly prejudiced" the plaintiff. The dealership's "initial motion to compel arbitration did not mention the MVRO's provision," and the business "waited over a year to assert the MVRO arbitration provision," the court said. Trout v. Winner Ford, 2019 WL 6486886 (N.J. Super. Ct. App. Div. 2019).
https://law.justia.com/cases/new-jersey/appellate-division-unpublished/2019/a3732-18.html

Third party additional insured bound by policy's arbitration clause. The California Court of Appeal, Third District, reversed a trial court's holding that an additional insured was not bound by an arbitration agreement in an insurance policy. The court held that an arbitration agreement in a commercial general liability policy bound a "third party beneficiary" under the policy that was also "equitably estopped" from avoiding the arbitration clause. The court reversed the trial court, vacated its order denying Philadelphia's petition to compel arbitration, and directed the trial court to order arbitration of the coverage dispute.

The coverage dispute arose out of personal injuries suffered in the parking lot of the Fresno Convention Center during the 2013 Future Farmers of America annual convention. During the event, an attendee tripped over a large pothole in the parking lot of the convention center, hit his head on a car, and suffered serious injuries. The injured attendee sued the City of Fresno as well as SMG.

Under California law, "there are six theories by which a nonsignatory may be bound to arbitrate[.]" The court was concerned with two: (1) the intended third-party beneficiary theory, and (2) the equitable estoppel theory. Based upon the facts and circumstances of the case. The court held that SMG was bound to arbitrate its coverage dispute under both theories. Based upon the license agreement (entered into between SMG and FFA) and the policy, the court held that SMG is an intended beneficiary of the policy. And, "SMG's tender [to Philadelphia] also constitutes a knowing claim of contract benefits, namely defense and indemnity." Phila. Indem. Ins. Co. v. SMG Holdings, Inc., 257 Cal. Rptr. 3d 775 (Cal. Ct. App. 2019). https://law.justia.com/cases/california/court-of-appeal/2020/c082841.html

FEDERAL NEWS

Supreme Court will not take up a payday lender's constitutional challenge to the CFPB, pending at the Fifth Circuit. The justices denied a bid from All American Check Cashing Inc. to skip straight to the high court with its questions about the agency's constitutionality, before the Fifth Circuit renders a judgment on the check cashing and payday loan company's appeal of an enforcement action over allegedly improper business practices.

All American contends it is unconstitutional for the CFPB to be set up with a single leader who can only be removed for cause, and that its enforcement actions are therefore invalid. After Monday's high court denial, it will now be up to the Fifth Circuit to determine the constitutionality of the agency's structure. Click *here* for more.

FCC says emailed faxes are exempt from TCPA. In a ruling that could have sweeping implications, the Federal Communications Commission clarified Monday that online fax services are not actually sending out faxes—at least not how the Telephone Consumer Protection Act defines them.

That means that junk fax suits cannot be aimed at companies or entities that send out such "online faxes," as long as those messages are not delivered to a traditional fax machine, according to the FCC. "Congress did not intend the statute's prohibition to apply to faxes sent to equipment

other than a telephone facsimile machine," the agency said in its four-page declaratory ruling. Because email inboxes do not operate in the same way fax machines do, the FCC found that unsolicited messages sent by online fax services do not cause the same kind of harm to consumers that the TCPA is intended to target. 34 FCC Rcd 11950 (2019). https://www.fcc.gov/document/granted-request-declaratory-ruling-filed-amerifactors-financial

EEOC rescinds policy against binding arbitration of discrimination disputes. The Commission in 1997 adopted the Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment (July 10, 1997) (Policy Statement). Since its issuance, the Supreme Court has ruled that agreements to arbitrate employment-related disputes are enforceable under the Federal Arbitration Act (FAA) for disputes between employers and employees. Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001). In other arbitration-related cases the Court has decided since 1997, the Court rejected concerns about using the arbitral forum—both within and outside the context of employment discrimination claims. Those decisions conflict with the 1997 Policy Statement.

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Although the rescinded policy recognizes the validity of arbitration agreements between employers and employees, case law also now makes clear that the EEOC continues to be fully available to employees as an avenue to assert EEO rights and to investigate in the public interest. The EEOC may hear disputes, regardless of whether the parties have entered into an enforceable arbitration agreement. Click *here* for more.

The CFPB's new abusiveness policy statement. On Friday, the CFPB issued a Policy Statement on Abusive Acts or Practices. According to one commentator the Policy Statement is disappointing in several respects. The Policy Statement described several limits to how the Bureau plans to use its abusiveness power. The Bureau explained that it would challenge "conduct as abusive…if the Bureau concludes that the harms to consumers from the conduct outweigh its benefits to consumers." In this respect, the Bureau's interpretation of abusiveness implies the use of cost-benefit analysis. If I recall correctly, during the Bureau's symposium on abusiveness, Pat McCoy pointed out that Congress did not include such a cost-benefit test when it enacted the abusiveness power. Chris Peterson made the same point Friday in a tweet. Congress plainly had cost-benefit analysis on its mind when it gave the Bureau the power to pursue abusive acts, because it included a cost-benefit test in the very section, § 5531, conferring upon the Bureau the ability to address abusive practices. That test appears in the provisions giving the Bureau the power to act against unfair practices. § 5531(c)(1). Elsewhere in the statute, Congress directed the Bureau to consider costs and benefits when issuing rules. § 5512(b)(2). It thus seems fairly clear that Congress knew about cost-benefit analysis and chose not to have it be a factor in enforcement and supervisory actions based on abusiveness. Accordingly, the Bureau's statement seems unjustifiable as a matter of statutory interpretation of the text and seems more rooted in its own policy views than what Congress wrote or intended. Click *here* for more.

STATE NEWS

The Texas Supreme Court has entered an order (Emergency Order 10) protecting stimulus payments from garnishment until May 7, 2020. The order basically provides that in any action to collect a consumer debt as defined by Texas Finance Code section 392.001(2), a writ of garnishment under Rule 658 of the Texas Rules of Civil Procedure may issue, but service of the writ of garnishment may not occur until after May 7, 2020. The order also deals with default judgments and receivers. The Texas Supreme Court has also temporarily halted eviction proceedings across the state until April 30 (Emergency Order 9). Click *here* for more.