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 refuses to review ruling endorsing class action arbitration. In 2019, the Second Circuit found that class arbitration works just fine, so long as the entire putative class executed identical arbitration agreements that incorporated the rules of the American Arbitration Association (AAA) and do not include an express class action waiver. The court observed that the incorporation of the AAA rules into the RESOLVE Program agreement gave the arbitrator the power under those rules to decide issues of arbitrability.

Sterling Jewelers then applied for certiorari, asking the Supreme Court to consider whether an arbitrator can certify a class and bind all parties – including absent class members – without finding that all members of the putative class consented to the process. The Supreme Court denied Sterling Jewelers' application.

Jock v. Sterling Jewelers Inc., 942 F.3d 617 (2d Cir. 2019), *cert. denied*, No. 19-1382, S. Ct., WL 5882321 (U.S. Oct. 5, 2020). https://law.justia.com/cases/federal/appellate-courts/ca2/18-153/18-153-2019-11-18.html.

Questions of arbitration agreement formation must be decided by a Court. The Tenth Circuit held that a challenge to whether an arbitration agreement was ever formed can only be resolved by a court, even if the arbitration agreement delegates issues of arbitrability to the arbitrator.

The court began by reviewing U.S. Supreme Court case law on delegation clauses in arbitration agreements. "While courts typically resolve 'arbitrability' issues such as the validity, scope, or enforcement of an arbitration contract, delegation clauses within arbitration contracts can commit the determination of such issues to an arbitrator." "The delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement." The Supreme Court has "recognized that parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." "An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other."

The court then noted, "But not all arbitrability issues can be delegated." Analyzing the Supreme Court's directives in *Rent-A-Center* and *Granite City*, the Tenth Circuit concluded that, "while issues such as the 'scope' and 'enforceability" of an arbitration clause can be committed to an arbitrator through a '[delegation] provision,' courts must 'always' resolve 'whether the clause was agreed to' by the parties." "The issue of whether an arbitration agreement was formed between the parties must always be decided by a court, regardless of whether the alleged agreement contained a delegation clause or whether one of the parties specifically challenged such a clause." "Courts must therefore first determine whether an arbitration agreement was indeed formed before enforcing a delegation clause therein."
Fedor v. United Healthcare, No. 19-2066, 2020 WL 5540551 (10th Cir. Sep. 16, 2020). https://law.justia.com/cases/federal/appellate-courts/ca10/19-2066/19-2066-2020-09-16.html.

FEDERAL CIRCUIT COURTS OF APPEALS

Court revives suit over "100% Parm Cheese label." The Seventh Circuit has given new life to claims that grated cheese made by Kraft Heinz Co. misleads consumers by claiming to be "100% Grated Parmesan Cheese," saying the question of whether consumers would be misled is a factual dispute that can't be decided at a motion to dismiss

While the district court had found that the ingredients list — which shows that the cheese contains other ingredients — cures the alleged deception of the front label, the panel judges found that this is asking too much of the average customer, who is unlikely to scrutinize the labeling the way attorneys or judges would. "Consumer-protection laws do not impose on average consumers an obligation to question the labels they see and to parse them as lawyers might for ambiguities, especially in the seconds usually spent picking a low-cost product," the panel wrote.

> According to the court, if there are multiple ways to interpret a label, and one of those ways is deceptive, then it's up to a factfinder to decide if consumers would be misled.

Bell et al. v. Albertson Companies Inc., et al., No. 19-2741, and Bell et al. v. Publix Super Markets Inc. et al., No. 19-2581, in the U.S. Court of Appeals for the Seventh Circuit. https://www.govinfo.gov/content/pkg/USCOURTS-ca7-19-02741/pdf/USCOURTS-ca7-19-02741-0.pdf.

Consumer bound by arbitration clause against acquired company. The Fourth Circuit held that a West Virginia woman must arbitrate claims that DirecTV violated the Telephone Consumer Protection Act because she is bound by a contract she signed with AT&T before it acquired the satellite TV provider.

A split three-judge panel ruled that Diana Mey signed an arbitration agreement with AT&T Inc. upon opening a new line of service in 2012 and that arbitration clause was extended to potential TCPA claims against DirecTV LLC when the telecommunications company acquired the satellite service provider in 2015.

The 2012 agreement mandated that disputes against AT&T and its "affiliates" go to arbitration, and DirecTV is considered an "affiliate" of AT&T due to the 2015 acquisition, the majority said the agreement extended its protections against litigation to DirecTV.
Diana Mey v. DirecTV LLC, No. 18-1534, in the U.S. Court of Appeals for the Fourth Circuit. https://www.govinfo.gov/content/pkg/USCOURTS-ca4-18-01534/pdf/USCOURTS-ca4-18-01534-0.pdf.

Consumer bound to terms of 2014 arbitration agreement. The Ninth Circuit held that a former Experian subscriber must arbitrate her false advertising claims against the consumer credit reporting company. The court found that her single visit to the Experian website in 2018 does not allow her to invoke the company's updated arbitration terms, which are more lenient than the ones she agreed to when she bought its services years earlier in 2014.

"Stover assented only once to the terms of a single contract that Experian later modified without providing notice," the court said. "Stover had no obligation to investigate whether Experian issued new terms without providing notice to her that it had done so. Indeed, the opposite rule would lead to absurd results: contract drafters who included a change-of-terms provision would be permitted to bind individuals daily, or even hourly, to subsequent changes in the terms."
Rachel Stover v. Experian Holdings, Inc. et al., No. 19-55204, in the U.S. Court of Appeals for the Ninth Circuit. https://cdn.ca9.uscourts.gov/datastore/opinions/2020/10/21/19-55204.pdf.

FAA does not apply to independent contractor's class action wage claims. The United States Court of Appeals for the First Circuit ruled on the transportation worker exemption contained in Section 1 of the Federal Arbitration Act (FAA). The court upheld a district court's decision not to compel Amazon "AmFlex" delivery drivers (who are independent contractors) to arbitrate their wage claims.

The Federal Arbitration Act sets forth a procedural framework that requires courts to treat arbitration agreements as "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." While the FAA applies broadly, Section 1 of the statute renders its provisions inapplicable to contracts of employment of seamen, railroad employees, and other transportation workers engaged in interstate commerce. The First Circuit addressed the question whether AmFlex drivers who do not cross state lines themselves, but who deliver goods that have crossed state lines, qualify as transportation workers "engaged in foreign or interstate commerce" who are exempt from the FAA under Section 1.

The court then addressed Amazon's argument that Waithaka and the other AmFlex delivery drivers in his putative class were not engaged in interstate commerce, and thus were not covered by the transportation worker exemption, because they operated entirely within Massachusetts and did not themselves carry goods across state lines. The court rejected Amazon's "cramped construction" of the transportation worker exemption, reasoning that "regardless of whether the workers themselves physically cross state lines[,] … [b]y virtue of their work transporting goods or people 'within the flow of interstate commerce,' … Waithaka and other AmFlex workers are 'a class of workers engaged in … interstate commerce.'"
Waithaka v. Amazon.com, Inc., 966 F.3d 10 (1st Cir. 2020). https://law.justia.com/cases/federal/appellate-courts/ca1/19-1848/19-1848-2020-07-17.html.

Arbitration awards cannot be modified unless a material miscalculation appears on the face of the award. An arbitration panel awarded a couple more than $777,000 in damages along with attorney fees and costs of arbitration. Defendant asked a Colorado federal court to modify the damage award pursuant to section 11(a) of the Federal Arbitration Act based on "an evident material miscalculation of figures." Defendant claimed that the panel had accidently awarded the couple a double recovery instead of only awarding one of the alternative measure of damages offered by the couple's damages expert.

On appeal, the Tenth Circuit first considered Section

11(a)'s plain meaning. That section provides, in relevant part, that a court may modify an award if it contains "an evident material miscalculation of figures." The court found that, in ordinary English, a "miscalculation of figures" refers to mathematical, not legal, errors; that "material" means important, essential or relevant; and that "evident" means plain or obvious. Section 11(a) thus allows courts to correct obvious, significant mathematical errors.

The court focused, however, on whether the term "evident" meant that the error had to be obvious on the face of the award or after one looked to the arbitration record. Because the text could support either possibility, the court considered that a "face-of-the-award limitation" best supported the FAA's purposes. Mid Atlantic Corp. v. Bien, Nos. 18-1195 and 18-1200 (10th Cir. Apr. 14, 2020). https://law.justia.com/cases/federal/appellate-courts/ca10/18-1195/18-1195-2020-04-14.html.

Auto dialer that dials from a stored list of numbers only—qualifies as an ATDS, under TCPA.
The Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq. ("TCPA"), contains an auto dialer ban, which generally makes it a finable offense to use an automatic telephone dialing system ("ATDS") to make unconsented-to calls or texts

The question in this case is whether, as a matter of statutory interpretation, the Avaya auto dialer system that PHEAA uses to make collection-related calls qualifies as an ATDS. Although it is clear from the text of the auto dialer definition under § 227(a) that a device that generates and dials random or sequential numbers qualifies as an ATDS, it is not clear whether a device like the Avaya system—that dials from a stored list of numbers only—qualifies as an ATDS. Fortunately, related provisions clear up any ambiguity. We hold that the plain text of § 227, read in its entirety, makes clear that devices that dial from a stored list of numbers are subject to the auto dialer ban.
Allan v. Pennsylvania Higher Education Assistance Agency, No. 19-2043 (6th Cir. Jul. 29, 2020). www.opn.ca6.uscourts.gov/opinions.pdf/20a0233p-06.pdf

Debt collector's failure to use the FDCPA's precise language in its notices is not a violation. The Second Circuit affirmed the dismissal of plaintiff's action under the FDCPA because the debt collector did not omit statutorily required information in a debt collection notice it sent to plaintiff seeking rental arrears. The court noted that the failure to use the FDCPA's precise language in its notices was not a violation, as there was no requirement in the statute that any of its provisions be quoted verbatim. The court also found that the Plaintiff's argument that the debt collector violated 15 U.S.C.§1692g lacked merit because the least sophisticated consumer would not, upon reading a letter stating that she had the right to dispute that she owed rent arrears totaling $12,209.26, rationally think that she did not also have a right to dispute a portion of that debt.
Chaperon v. Sontag & Hyman, PC, No. 19-4244, 2020 U.S. App. LEXIS 28176 (2d Cir. 2020). https://casetext.com/case/chaperon-v-sontag-hyman-pc-1.

Omitting a favorable credit item does create a misleading credit report. The Fifth Circuit affirmed a district court's dismissal of a plaintiff's FCRA claims against two consumer reporting agencies (CRAs), holding that omitting a favorable credit item does not render a credit report misleading.

The plaintiff filed a lawsuit after the CRAs stopped reporting a favorable item—a timely paid credit card account—and refused to restore it, alleging that the refusal to include the item on his consumer report violated section 1681e(b), which requires CRAs to follow "reasonable procedures to assure maximum possible accuracy" of consumer information. As a result, the plaintiff claimed his creditworthiness was harmed, which caused him to be denied a credit card and rejected for a mortgage. The district court dismissed the suit.

The 5th Circuit found that the omission of a single credit item does not render a report "inaccurate" or "misleading." According to the court, a "credit report does not become inaccurate whenever there is an omission, but only when an omission renders the report misleading in such a way and to such an extent that it can be expected to adversely affect credit decisions." As such, "[b]usinesses relying on credit reports have no reason to believe that a credit report reflects all relevant information on a consumer." The Fifth Circuit further held that the plaintiff failed to state a claim for violations of section 1681i(a), which requires agencies to conduct an investigation if consumers dispute "the completeness or accuracy of any item of information contained in a consumer's file." The court held that because the plaintiff "disputed the completeness of his credit report, not of an item in that report," the statute did not require an investigation.
Hammer v. Equifax Info. Servs., No. 19-10199 (5th Cir., Sep. 2020).
https://buckleyfirm.com/sites/default/files/Buckley%20InfoBytes%20-%20Hammer%20v.%20Equifax%20et%20al%20-%20Fifth%20Circuit%20Opinion%202020.09.09.pdf

Class-action "incentive" awards are prohibited. The Eleventh Circuit held that so-called "incentive" or "service" awards to named class-action plaintiffs are unlawful. That is, in a class-action settlement, a named plaintiff may not be paid extra money (over and above money paid to *all* class members) as reimbursement/compensation for her efforts on behalf of the class or as an incentive to act as a representative plaintiff.

As recognized by the court, such awards are common in most class actions. The court noted that, "in approving the settlement here, the district court repeated several errors that, while clear to us, have become commonplace in everyday class-action practice." The district court awarded the class representative a $6,000 "[i]ncentive [p]ayment," as "acknowledgment of his role in prosecuting th[e] case on behalf of the [c]lass [m]embers." Relying on two Supreme Court cases from the1800s, the court stated, "in so doing, we conclude, the court ignored on-point Supreme Court precedent prohibiting such awards.

The court recognized, however, that the District Court was acting as most other courts act. "We don't necessarily fault the district court—it handled the class-action settlement here in pretty much exactly the same way that hundreds of courts before it has handled similar settlements. But familiarity breeds inattention, and it falls to us to correct the errors in the case before us."
Johnson v. NPAS Solutions, No. 18-12344 (11th Cir., Sep. 17, 2020). https://media.ca11.uscourts.gov/opinions/pub/files/201812344.pdf.

Arbitration award stands despite alleged misrepresentation of contract. The Eleventh Circuit refused to vacate an employee's arbitration award for nearly $4 million for wrongful termination based on the employer's claim that the arbitration panel misinterpreted the parties' employment and arbitration agreements in

The employee brought several claims in arbitration, including a claim for wrongful termination, when his employer fired him three days after he sent his employer a letter threatening to challenge in arbitration a "final warning" letter, which he received from his employer after he allegedly behaved inappropriately and aggressively towards his colleagues. Despite language in the employment agreement, which indicated that the employee was employed "at will" and could be terminated at any time and

for no reason, the arbitration panel ruled in the employee's favor on the wrongful termination claim.

The employee moved to confirm the award, and the employer moved to vacate it. The U.S. District Court for the Southern District of Florida granted the employer's motion to vacate, reasoning that the arbitrators "exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4). The employee appealed.

On appeal, the majority emphasized the "very narrow[]" nature of § 10(a)(4) as "among the narrowest known to the law." A serious interpretive error does not justify vacatur under § 10(a)(4). After all, the court reasoned, the "'sole question' under § 10(a)(4) . . . is 'whether the arbitrator (even arguably) interpreted the parties' contract, not whether she got its meaning right or wrong.'"

Gherardi v. Citigroup Global Markets Inc., (11th Cir. Sept. 17, 2020). https://cases.justia.com/federal/appellate-courts/ca11/18-13181/18-13181-2020-09-17.pdf?ts=1600349438.

Who decides if an agreement subject to arbitration exists? The Third Circuit recently addressed what's been called the "queen of all threshold issues" in arbitration law: does a court or an arbitrator decide whether an agreement exists, if the purported agreement delegates that decision to an arbitrator? The Court answered this circular question by holding that, under the Federal Arbitration Act, questions about the making of an agreement to arbitrate are for the courts to decide "unless the parties have clearly and unmistakably referred those issues to arbitration in a written contract whose formation is not in issue." In the instant case, formation of the contract was in dispute, so the Court had authority to decide whether an agreement existed.

In MZM Constr. Co. v. N.J. Bldg. Laborers Statewide Benefit Funds, (3rd Cir. 2020).
https://www2.ca3.uscourts.gov/opinarch/183791p.pdf.

Enforcement of arbitration clause would lead to "absurd results." A split Ninth Circuit on affirmed a lower court's ruling that DirectTV can't force a customer accusing the company of placing unauthorized robocalls to arbitrate his claims. The court held that to enforce an agreement he signed with AT&T before it purchased DirecTV would lead to "absurd results."

The 2-1 opinion authored by Circuit Judge Diarmuid Fionntain O'Scannlain held that the Federal Arbitration Act does not preempt California law requiring courts to interpret contracts to avoid absurd results. The majority acknowledged its ruling is in contrast to a recent Fourth Circuit opinion that examined an "identical" arbitration clause also applied to Telephone Consumer Protection Act claims.

Because the plaintiff in the proposed class action signed an arbitration agreement with AT&T, the panel's majority said that under DirecTV's interpretation of the agreement, Revich "would be forced to arbitrate any dispute with any corporate entity that happens to be acquired by AT&T, even if neither the entity nor the dispute has anything to do with providing wireless services to plaintiff— and even if the entity becomes an affiliate years or even decades in the future."

The panel added, "No one disputes that arbitration clauses subject to the [Federal Arbitration Act] must be enforced in federal courts. But we are mindful that arbitration is a matter of consent, and we conclude that DirecTV has failed to establish that Revitch consented to arbitrate this pending dispute."

Jeremy Revitch v. DirecTV LLC (9th Cir., 2020) https://cdn.ca9.uscourts.gov/datastore/opinions/2020/09/30/18-16823.pdf

Dunning letter stating zero balance for interest not misleading under FDCPA. Plaintiff Joseph Degroot defaulted on a credit card debt, which was subsequently placed with a collection agency. The agency sent the plaintiff a collection letter stating that "interest and fees are no longer being added to your account," which the plaintiff took to mean that the account had been charged off. The debt was then placed with a second agency, which sent the plaintiff its own collection letter that included an itemized breakdown of the debt, as follows:

Balance Due at Charge-Off: $425.86
Interest: $0.00
Other Charges: $0.00
Payments Made: $0.00
Current Balance: $425.86

The district court granted the defendant's motion to dismiss, finding that the second letter had accurately and correctly disclosed the amount of the debt, and that letter did not imply fees or interest would be added to the debt in the future. The court also noted that even if the letter did imply that fees and interest would begin to accrue at a later date if the debt remained outstanding, the statement was not false or misleading given that state law provided for the assessment of fees and interest on "static" debts in certain circumstances.

Degroot v. Client Services (7th Cir., 2020). https://law.justia.com/cases/federal/appellate-courts/ca7/20-1089/20-1089-2020-10-08.html

Debt collector's letter may overshadow validation notice. The Second Circuit recently reversed a District Court decision and held that a law firm's letter threatening imminent litigation may have violated the FDCPA. The defendant law firm sent a collection letter to plaintiff seeking to collect a debt. Although the letter included the standard validation notice informing the debtor of his right to dispute the debt within 30 days, it also include language that the firm had been instructed to commence a lawsuit, that there may be "no further notice" before the filing of the lawsuit, that a lawsuit could be avoided by paying "now," and that the debtor may be liable for defendant's attorneys' fees in the lawsuit. The debtor then brought this action under the FDCPA, alleging violations because (i) the language about an imminent lawsuit overshadowed the required 30-day validation notice, and (ii) the claim about attorneys' fees was false. Defendant filed a motion to dismiss, and the District Court dismissed the action.

The second Circuit reversed. The Court found that the threatening language overshadowed the validation notice in violation of the FDCPA. "Even if the letter does not literally demand immediate payment, these warnings, combined with the all-caps admonition that no further notice might follow before a lawsuit is filed, could have created the misimpression that immediate payment is the consumer's only means of avoiding a parade of collateral consequences, thereby overshadowing the consumer's validation rights."

Mizrachi v. Wilson, Elser, Moskowitz, Edelman & Dicker LLP, 2020 WL 6494875 (2d Cir. Nov. 5, 2020). https://www.courtlistener.com/opinion/4803593/mizrachi-v-wilson-elser-moskowitz-edelman-dicker-llp/.

FEDERAL DISTRICT COURTS

DTPA claim is not added to Magnuson-Moss for purposes of amount in controversy.

Plaintiff sued BMW under Magnuson-Moss and the DTPA. Plaintiff sued in federal court claiming the amount in controversy exceeded the $50,000 required by Magnuson-Moss. The court found that the amount alleged for warranty damages under

Magnuson-Moss did not exceed the statutory limit. Plaintiff then argued that the amount recoverable under the DTA should be added to the amount in controversy amount. The court disagreed. It found noted that, while the Court could consider treble damages under the DTPA if it were conducting a diversity jurisdiction analysis of the amount in controversy…, the Court may not do so when determining the amount in controversy in an MMWA claim.
Alam v. BMW of N. Am., LLC, 2020 U.S. Dist. LEXIS 134220 (W.D. Tex. 2020). https://casetext.com/case/alam-v-bmw-of-n-am-llc.

The mere fact that a franchisor violated the FTC Rule did not give rise to a claim under the Texas DTPA. United States District Court for the Western District of Texas examined whether a violation of an FTC rules automatically gives rise to a claim under the DTPA. The court recognized that some Texas courts have allowed a violation of the FTCA to be used as the basis for finding an independent violation of the Texas DTPA. *See Texas Cookie Co. v. Hendricks & Peralta, Inc.*, 747 S.W.2d 873, 877 (Tex. App.-Corpus Christi 1988, writ den.). However, the Fifth Circuit recently pointed out that "no provision of Texas or Federal Law declares violations of the FTC Franchise Rule to be actionable deceptive trade practices under the Texas DTPA." *Yumilicious Franchise, L.L.C. v. Barrie*, 819 F.3d 170, 176 (5th Cir. 2016). The court in the instant case followed the Fifth Circuit.
Arruda v. Curves Int'l, Inc., No. 6:20-cv-00092-ADA, 2020 U.S. Dist. LEXIS 132273 (W.D. Tex. 2020). https://casetext.com/case/arruda-v-curves-intl-inc.

Consumer Reporting Agency must reinvestigate disputed inquiries. The Eastern District of Pennsylvania provided some helpful clarifications regarding the reinvestigation obligations of a consumer reporting agency ("CRA") under the Fair Credit Reporting Act ("FCRA"). Section 611(a) of the FCRA requires a CRA to conduct a reasonable reinvestigation of any item of information in a consumer's file if the consumer alleges the item to be inaccurate.

A home security company called Safe Home pulled a credit report on the plaintiff. Not only did he not authorize Safe Home to do so, he explicitly instructed them not to. The plaintiff noticed the inquiry on this credit report and disputed the inquiry with TransUnion ("TU"), the CRA that had prepared the credit report. When plaintiff called TU to dispute, they told him they could not remove the inquiry and to call Safe Home.

While TU conceded that the plaintiff had lodged the dispute and that it conducted no reinvestigation, TU asserted several arguments as to why it was not obligated to do so. TU was not obligated to reinvestigate because plaintiff's file was accurate. The court found that while the inquiry in this case was technically accurate, it was misleading and, therefore, inaccurate:

TU did not have to reinvestigate because plaintiff did not preliminarily "show" an inaccuracy. As long as the accuracy of some piece of information in the consumer's file is disputed directly with a CRA, a consumer has fulfilled his duty to trigger the CRA's reasonable reinvestigation obligation; and TU's duty to reinvestigate is limited to information provided by furnishers. Section 611 explicitly grants consumers the right to dispute the "completeness or accuracy of any item of information contained in a consumer's file," subject to two exceptions not relevant in this case.

Having found plaintiff satisfied the requirements for class certification and TU's arguments to be lacking, the court granted class certification.
Norman v. Trans Union, Inc., No. 18-5225, 2020 U.S. Dist. LEXIS 146642 (E.D. Pa. Aug. 14, 2020). https://www.leagle.com/decision/infdco20200817b26.

Claim arising from servicing of loan does not give rise to DTPA consumer status. The District Court for the Eastern District of Texas considered whether a plaintiff was a consumer when claims relate to the servicing of her loan. Performance of any services incidental to the loan transaction, such as acceleration, abandonment, and foreclosure, does not transform Plaintiff into a "consumer" under the DTPA. The court cited *Sgroe v. Wells Fargo Bank, N.A.,* 941 F. Supp. 2d 731, 746 (E.D. Tex. 2013), wherein the court found the mortgagor was not a consumer because, "it is undisputed that [the plaintiff]'s claims arise out of a loan and do not involve the purchase or lease of either goods or services." The court concluded "Plaintiff here is similarly not a consumer under the DTPA."
Pittman v. U.S. Bank NA, No. 4:19-CV-00397-RWS, 2020 U.S. Dist. LEXIS 175739 (E.D. Tex. 2020). https://cases.justia.com/federal/district-courts/texas/txedce/4:2019cv00397/189945/73/0.pdf?ts=1588930045.

Letter that provides notice of change in debt ownership may be actionable under FDCPA. The U.S. District Court for the Middle District of Florida denied a debt collector's motion for summary judgment, holding that a letter which provides notice of a change in debt ownership and requests payments be remitted to the new owner qualifies as a communication related to a debt under the Fair Debt Collection Practices Act ("FDCPA"), which restricts how debt collectors can collect from debtors. The court noted that that a communication from a debt collector can have dual purposes, such as giving notice and demanding payment.
Valenzuela v. Axiom Acquisition Ventures, LLC.
https://casetext.com/case/valenzuela-v-axiom-acquisition-ventures-llc

N.J. District Court permits incentive awards for named plaintiff. As noted earlier in this *Alert,* in *Johnson v. NPAS Sols., LLC*, No. 18-12344 (11th Cir. Sep. 17, 2020), the Eleventh Circuit invalidated the use of incentive awards for named plaintiffs in a TCPA class action as inconsistent with the Federal Rules. Now, in at least one circuit, the practice has been deemed unlawful.

In *Johnson* the court held, "A plaintiff suing on behalf of a class can be reimbursed for attorneys' fees and expenses incurred in carrying on the litigation, but he cannot be paid a salary or be reimbursed for his personal expenses." Although it noted that incentive awards are commonplace in class actions, the Eleventh Circuit found them to be unlawful and reversed the district court's approval of a $6,000 payment to the class representative. District Courts in the Eleventh Circuit have already rejected class settlements that include incentive payments.

At least one court outside the Eleventh Circuit, however, has recently rejected the holding in *Johnson*, paving the way for a circuit split. The New Jersey District Court noted that "Until and unless the Supreme Court or Third Circuit bars incentive awards or payments to class plaintiffs, they will be approved by this Court if appropriate under the circumstances. Here the incentive payments to the class plaintiffs is appropriate given their substantial contribution to the successful settlement of the case."
Somogyi v. Freedom Mortgage Corp., *2020 WL 6146875, *9 (Oct. 20, 2020).* https://www.govinfo.gov/content/pkg/USCOURTS-njd-1_17-cv-06546/pdf/USCOURTS-njd-1_17-cv-06546-0.pdf.

STATE COURTS

Legal malpractice cannot simply be converted to a DTPA claim. The Dallas Court of Appeals reviewed a negligence claim against attorneys to determine if the attorneys also violated the DTPA. After finding sufficient evidence to support a negligence finding, the court concluded that the consumers attempt to reclassify the conduct as a DTPA violation failed. The court found that each of the alleged DTPA violations were simply a reclassification of the negligence allegations. "On this record, we conclude the Webbs' DTPA claims are barred by the anti-fracturing rule."
Webb v. Ellis, 2020 Tex. App. LEXIS 3527 (Tex. App.—Dallas 2020, no pet. h.). https://casetext.com/case/webb-v-ellis-2.

Deceptive meeting voids law firm's arbitration clause. A Texas appellate court has declined to enforce an arbitration clause in a dispute between an automobile crash victim and a law firm, finding the trial judge had enough evidence to determine the man was "tricked" into signing a contract that contained an arbitration provision.

A Fifth Court of Appeals panel upheld the ruling in favor of injured motorist Eric Herman, declining to send the dispute with Law Firm PLLC to arbitration. Herman had alleged a non-attorney representative of the firm met with him for less than 10 minutes at a McDonald's, told him the paperwork he was asked to sign was not a contract, and refused to provide Herman a copy.

But what Herman signed was actually a lawyer-client agreement, in which he agreed to arbitrate any dispute with the law firm, and which entitled the firm to a contingency fee of 35% to 48% of any recovery in his collision suit, according to the opinion.
Daspit Law Firm PLLC v. Eric Herman and Law Offices of Anjel K. Avant PLLC, dba Avant Law Firm, No. 05-19-00615-cv, in the Fifth Court of Appeals of Texas. https://law.justia.com/cases/texas/fifth-court-of-appeals/2020/05-19-00615-cv.html.

Nominal damages are not available when the harm is entirely economic and subject to proof. Lost profits must be shown with reasonable certainty. First Service Credit Union refused to provide funds to plaintiff Chehab immediately after the deposit of a wire transfer. Plaintiff filed suit alleging breach of contract, breach of fiduciary duty and DTPA, because his deposit contract with the bank required it to make funds available immediately. The court of appeals found nominal damages were not recoverable, noting that "by pleading for monetary damages, Chehab is not entitled to recover nominal damages."

The court also noted that damages are a required element of each of Chehab's claims. To avoid summary judgment when presented with a no-evidence motion, an injured party must do more than show that he suffered some lost profits. He must show the amount of the loss by competent evidence with reasonable certainty. At a minimum, opinions or estimates of lost profits must be based on objective facts, figures, or data from which the amount of lost profits may be ascertained. The court concluded, "Chehab's claims did not raise a genuine issue of fact as to whether Chehab suffered any lost profits damages resulting from First Service's alleged breach of contract, breach of fiduciary duty, or violation of the DTPA."
Chehab v. First Serv. Credit Union, 2020 Tex. App. LEXIS 7136 (Tex. App.—Houston [14th Dist.] 2020, no pet. h.). https://cases.justia.com/texas/fourteenth-court-of-appeals/2020-14-18-00969-cv.pdf?ts=1599135339.

DTPA consumer established reliance, knowledge, producing cause, and a corporate agent may be individually liable under DTPA. In an interesting DTPA opinion, the Austin Court of Appeals discusses numerous provisions of the DTPA to conclude that the consumer has established liability and a knowing violation of the Act.
Kerr v. Lambert, No. 03-19-00359-CV, 2020 Tex. App. LEXIS 8387 (Tex. App.—Austin Oct. 23, 2020). https://casetext.com/case/kerr-v-lambert.

Arbitration does not require signature to be enforceable unless express language requires it. A Houston Court of Appeals reviewed whether an employee's agreement to arbitrate disputes was valid. The court noted that the strong policy favoring arbitration applies only after a valid agreement is established. It then reviewed the agreement at issue and held that the failure of the employer to sign the agreement did not invalidate it.
SK Plymouth v. Simmons, 605 S.W.3d 706 (Tex. App.—Houston [1st Dist.] 2020). https://casetext.com/case/sk-plymouth-llc-v-simmons-5.

A Texas Court of Appeals held that a person modifying a loan cannot qualify as a consumer under the DTPA. The court noted that "Generally, a person cannot qualify as a consumer if the underlying transaction is a pure loan because money is considered neither a good nor a service." The court also held that the Texas Debt Collection Act does not apply because statements regarding loan modifications do not concern the "character, extent, or amount of consumer debt" for purposes of the TDCA. *Compass Bank v. Collier,* 2020 Tex. App. LEXIS 8646 (Tex. App.—Beaumont 2020). https://cases.justia.com/texas/ninth-court-of-appeals/2020-09-19-00112-cv.pdf?ts=1604582128.

FEDERAL NEWS

FINRA postpones in-person arbitrations and mediations until 2021. Due to the COVID-19 pandemic, FINRA has extended the postponement of all in-person arbitration and mediation hearings scheduled through January 1, 2021. If parties decide to postpone an in-person hearing, the postponement will not affect other case deadlines. However, if all parties and arbitrators agree to proceed in-person based on their own assessment of public health conditions, and applicable state and local orders allow, a case may proceed with an in-person hearing provided that the participants comply with state and local orders related to the COVID-19 pandemic.
Parties may also opt to proceed telephonically or by Zoom, or a panel may order that the hearings take place telephonically or by Zoom. For more information, click here, https://www.finra.org/rules-guidance/key-topics/covid-19/arb-hearings

The Consumer Financial Protection Bureau recently released the Debt Collection Final Rule. With the rule, the Bureau also began releasing compliance aids to assist industry. As the implementation period for the final rule progresses, the Bureau will continue to provide more compliance aids.

To provide more clarity and transparency on how the Bureau provides assistance during the implementation period, the Bureau has developed this resource that provides an overview of the Regulatory Implementation and Guidance (RIG) team at the Bureau, the RIG team's strategy for providing assistance to industry, and instructions for how to find compliance aids related to the Debt Collection Final Rule. It also provides a link to the Bureau's Debt Collection compliance aid resource webpage, your dedicated access point to Debt Collection materials such as compliance aids, supervisory guidance, and any subsequent rules the Bureau publishes regarding debt collection.