

# RECENT DEVELOPMENTS

benign language” because Congress enacted section 1692f(8) simply to prevent debt collectors from ‘using symbols on envelopes indicating that the contents pertain to debt collection.’” (quoting *Masuda v. Thomas Richards & Co.*, 759 F. Supp. 1456, 1466 (C.D. Cal. 1991)). The court held that “an interpretation of § 1692f(8) exempting benign words and symbols better effectuates Congressional purpose.”

## INJUNCTIVE AND DECLARATORY RELIEF ARE NOT AVAILABLE TO PRIVATE LITIGANT UNDER THE FDCPA

Weiss v. Regal Collections, 385 F.3d 337 (3rd Circuit 2004).

**FACTS:** On October 25, 2000 defendant bill collector Regal Collections (“Regal”) mailed a letter to Richard Weiss demanding payment of a debt allegedly owed to Citibank. Contending that certain statements in the letter constituted unfair debt collection practice in violation of the Fair Debt Collections Practices Act (“FDCPA”), 15 U.S.C. § 1692, Weiss filed a federal class action complaint seeking statutory damages on behalf of himself and a putative nationwide class. Weiss then filed an amended complaint seeking declaratory and injunctive relief under the FDCPA.

Before filing an answer, and before Weiss moved to certify a class, Regal made a Fed.R.Civ.P. 68 offer of judgment to Weiss in the amount of \$1000 plus attorney’s fees and expenses. The offer of judgment provided no relief to the class and offered neither injunctive nor declaratory relief. Weiss

declined to accept the offer of judgment. Regal then filed a motion to dismiss, arguing Weiss’s claim was rendered moot because the Rule 68 offer provided him the maximum damages available under the statute. For this reason, Regal contended the District Court no longer had subject matter jurisdiction over Weiss’s claim. The District Court agreed and dismissed the class action complaint. Weiss appealed.

**HOLDING:** Reversed and remanded.

**REASONING:** The court’s decision to reverse and remand was based on its finding that the putative class action was not rendered moot. Addressing the availability of injunctive and declaratory relief in private actions, the court found the FDCPA contained no express provision for such relief. The court also recognized that most courts have found equitable relief unavailable under the statute, at least with respect to private actions. The court explained that the remedies under the FDCPA differ depending on who brings the action. Because the statute explicitly provides declaratory and equitable relief only through action by the Federal Trade Commission, the court reasoned that the different penalty structure demonstrates Congress’ intent to preclude equitable relief in private actions. For these reasons the Court held injunctive and declaratory relief were not available to litigants acting in an individual capacity under the FDCPA.

The court concluded that because injunctive and declaratory relief were unavailable and Weiss did not allege any actual damages, the Rule 68 offer of \$1000 plus reasonable costs and fees provided the maximum statutory relief available to Weiss individually under the FDCPA.

## LANDLORD TENANT

### A CHAPTER 7 DEBTOR’S PREPAID RENT AND SECURITY DEPOSIT ARE EXEMPT FROM HIS BANKRUPTCY ESTATE

In re Casserino, 379 F.3d 1069 (9th Cir. 2004).

**FACTS:** On Nov. 22, 1999, Matthew J. Casserino filed a joint Chapter 7 petition with his then-wife. At the time Casserino was living in an apartment that he leased on a month-to-month basis. Pursuant to his rental agreement, Casserino paid \$2,000 prior to occupancy: \$750 for the first month’s rent, \$750 for the last month’s rent, and \$500 for the security deposit, of which \$100 was refundable. When Casserino filed for bankruptcy, the landlord retained \$1,150: \$750 prepaid rent and \$400 non-refundable deposit. Casserino claimed an exemption for this \$1,150. The trustee demanded the landlord remit the retained amount. The Bankruptcy Court held that Casserino was entitled to exempt the prepaid rent and deposit pursuant to Oregon law. The Bankruptcy Court affirmed its decision on appeal. The trustee then appealed, arguing that a residential leasehold interest is not a homestead and does not qualify for the exemption.

**HOLDING:** Affirmed.

**REASONING:** The Bankruptcy Court affirmed that a lease fell within the definition of “homestead” under Oregon law

because a residential lessee owns a possessory interest in the leased property. In *In re Nagel*, 216 B.R. 397, 398 (Bankr. W.D. Tex. 1997), the Texas bankruptcy court concluded that the security deposit was part of the leasehold interest because they both “arose from the same lease agreement.” In *In re Quintana*, 28 B.R. 269, 270 (Bankr. D. Colo. 1983), the Colorado bankruptcy court found that because the security deposit could be applied to unpaid rent, and prepaid rent is part of the homestead, the security deposit was also subject to homestead exemption. Similarly, Casserino’s security deposit was part of the leasehold, and thus the exemption. Only by depositing funds for a security deposit and the last month’s rent with his landlord did Casserino become entitled to take possession of the property according to the terms of the lease. If Casserino’s landlord had been required to pay these funds to the trustee, Casserino would have been in material breach of the lease. For this reason, the deposit and the lease were not severable from the homestead exemption.

Payment of the security deposit conferred on Casserino specific rights that were part of his leasehold interest. Under Oregon law, a prepaid rent deposit and a security deposit may be used by the landlord for only two purposes: to pay rent and to repair damage to the premises. Or.Rev.Stat. § 90.300(5) and (7). The actual lease Casserino signed provided that prepaid rent would be “dealt with in accordance with [Or. Rev. Stat.]

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§ 90.300”, and that the security deposit would be used “to remedy lessor’s defaults in the performance of this agreement and to repair damage to the premises.”

By the terms of his lease and of Or. Rev. Stat. § 90.300, Casserino thus had two rights: the right to live in his apartment for one month without paying additional rent, and the right, upon vacating the premises, to have repairs costing \$400 or less satisfied from his already-committed funds. Although these benefits were to be enjoyed in the future, Casserino became entitled to them upon paying the deposit, both by the terms of the lease and by operation of Oregon lease law. Because the interest protected by the homestead exemption derives from the residential leasehold, the benefits and burdens of the leasehold—including both the obligation to pay a deposit and the right to have it applied to particular purposes—are

an integral part of the leasehold. Therefore, they cannot be detached from the rest of the exemptible leasehold interest.

The court stated that interpreting Oregon’s homestead statute as not exempting rent and security deposits would produce a counter productive result. If landlords were required to turn over the leaseholder’s deposits to the bankruptcy trustee, they would presumably demand from the debtor a replacement deposit that, in many cases, he or she could not pay and could not arrange for others to pay. A debtor who could not replace the security deposit would often face eviction. This outcome would completely subvert the homestead exemption’s purpose of allowing the debtor to keep “a roof over [his] head.”, and would be at odds with Oregon’s policy to give the homestead statute a “liberal and humane interpretation.”

## ARBITRATION

### NONPARTY NOT BOUND BY ARBITRATION AGREEMENT

R.J. Griffin & Co. v. Beach Club II Homeowners Ass’n., 384 F.3d 157 (4th Cir. 2004).

**FACTS:** Drake Dev. Corp. IV (“Drake”) engaged R.J. Griffin & Co. (“Griffin”) as a contractor to construct the Beach Club II, a forty-five unit condominium. The contract called for “all claims, disputes, and other matters in question between the Contractor and the Owner arising out of, or relating to, the Contract Documents or the breach thereof” to be decided by arbitration. After construction completed in 1996, Drake filed a master deed on the property. The deed imposed restrictions on Drake, the condominium owners, and the Beach Club II Homeowners Association (“BCHA”), including arbitration of “any dispute arising out of use, ownership, or occupancy of...the common elements...and any complaint against the Grantor.”

BCHA filed suit against Drake, Griffin and two others after an inspection revealed numerous defects in the condominium units. The claims asserted against Griffin included negligence and breach of implied warranty of good workmanship. Griffin then sought an order in federal court to compel the BCHA to arbitrate the claims pursuant to the general contract and the Beach Club master deed. The district court dismissed the claim on abstention principles, but the 4th Circuit reversed, remanded, and instructed the district court to rule on the merits. The district court denied Griffin’s motion to compel arbitration. Griffin again appealed.

**HOLDING:** Affirmed.

**REASONING:** Griffin argued that BCHA was compelled to arbitrate under the arbitration clauses found in the general contract and the master deed. Griffin asserted that the general contract bound BCHA, even though not a signatory to the contract, to arbitrate any claims against him because of equitable estoppel.

Arbitration clauses are a matter of contract and cannot bind parties who did not sign the contract. While

it is possible that parties can agree to arbitrate by means other than signing the contract, equitable estoppel will only apply when one party attempts to hold another party to terms of an agreement, while simultaneously trying to avoid the agreement’s arbitration clause. Relying on *International Paper v. Schwabedissen*, 659 F.2d 836 (7th Cir. 1981) the court concluded arbitration would not be compelled because the association was seeking a direct benefit from the general construction contract. The association’s claims were derived from common law, not the contract, and thus the association was in no way relying on the contract for any benefit. Here, Griffin’s duties arose out of its role as a builder, not out of its construction contract with Drake.

Griffin further argued that that the association was compelled to arbitrate based on the master deed because the association benefited from the deed as a third party. The court, however, found that Griffin and Drake did not intend for the association to be a third-party beneficiary at the time of signing. The court concluded, therefore, that the association was not compelled to arbitrate.

### ARBITRATORS AWARD OF 6 MILLION IN PUNITIVE DAMAGES FOR CLAIM ARISING OUT OF WRONGFUL DEBT COLLECTION UPHeld

Stark v. Sandberg, Phoenix and Von Gontard, P.C., 381 F.3d 793 (8th Cir. 2004).

**FACTS:** In 1999, in hopes of shoring up a failing business, Stanley and Patricia Stark (“Starks”) borrowed \$56,900 against their home and secured the loan with a mortgage. Despite the infusion of funds, the business failed and in early 2000 the Starks petitioned for bankruptcy protection. During this same time, the Starks’ lender sold the note, which was in default, to EMC Mortgage Corporation (“EMC”) making EMC a debt collector under the provisions of the Fair Debt Collection Practices Act (“FDCPA”). During late 2000 and early 2001, despite letters from the Starks advising EMC that they were represented by counsel and not to contact them directly, EMC