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 into your browser. To subscribe and begin receiving your free copy of the Consumer News Alert, visit http://www.peopleslawyer.net/

U.S. SUPREME COURT

Supreme Court holds FCRA class action requires class members suffer "injury in fact." In a 5-4 decision, with significant implications for class actions, the Supreme Court rejected the idea that violation of a statute can ever be grounds enough for a lawsuit unless it comes with a more concrete "injury in fact" to potential plaintiffs. Justice Thomas joined the three liberals in dissent.

The majority said most of the 8,000 people in the class action case lacked the legal right to sue. Of those class members who were wrongly flagged by the credit reporting agency as potential matches to individuals on a terrorist watch list, only about a quarter had their reports sent to third parties.

The bulk of the class members suffered no concrete harm because the reputational risk of the false alerts never materialized. Justice Kavanaugh wrote for the court. "A letter that is not sent does not harm anyone, no matter how insulting the letter is, so too here."
TransUnion LLC v. Ramirez, ___ 594 U.S. ___ (2021).
https://www.supremecourt.gov/opinions/20pdf/20-297_4g25.pdf

FEDERAL CIRCUIT COURTS OF APPEALS

Proposed class action claiming Fair Credit Reporting Act violations must go to arbitration due to a prior subscriber agreement signed by the proposed lead plaintiff. The Eleventh Circuit held that the arbitration provision from the previous subscription was still valid.

The court found that because Comcast was only able to conduct the credit report search using information on file from a former contract, the plaintiff's FCRA claims pertain to his original subscriber agreement. "Here, the Arbitration Provision is different in that it applies broadly to all disputes between the parties and applies even if the dispute arises after the Subscriber Agreement is terminated."
Hearn v. Comcast Cable Commc'ns, LLC, 992 F.3d 1209 (11th Cir. 2021).
https://www.courtlistener.com/opinion/4870818/michael-hearn-v-comcast-cable-communications-llc/?q=Michael%20Hearn%20v.%20Comcast%20Cable%20Communications

Amazon cannot force arbitration of minors' privacy suit. The Ninth Circuit affirmed a district court ruling that Amazon cannot arbitrate suits brought by minors, alleging Alexa voice-activated speakers violate state privacy laws.

The court found that the minors are not trying to enforce a contract between their parents and Amazon. The panel unanimously determined in their five-page opinion that the minors, who are nonsignatories to the contracts, cannot be compelled into arbitration because they are not trying to enforce any rights or duties formed by the contracts Amazon holds with their parents.
B.F. v. Amazon.com Inc, ___ F. App'x ___ (9th Cir. 2021).
https://dockets.justia.com/docket/circuit-courts/ca9/20-35359

"Whether conduct violates the Fair Debt Collection Practices Act requires an objective analysis that considers whether the least sophisticated debtor would likely be misled by a communication." The Ninth Circuit found that false but non-material representations are not likely to mislead the least sophisticated consumer and therefore are not actionable under the FDCPA.
Mott v. PNC Fin. Servs. Grp., Inc., ___ F. App'x ___ (9th Cir. 2021).
https://www.leagle.com/decision/infco20210528170

A debt collector's communication of a consumer's personal information to a third-party print vendor violated the Fair Debt Collection Practices Act's prohibition on third-party communications in connection with debt collection. Plaintiff alleged that Preferred Collection transmitted his personal information—including his name, the balance of the debt, that the debt stemmed from his son's medical treatment, and his son's name—to a print vendor to generate and mail a dunning letter. The district court dismissed the case, holding that Preferred Collection's communication with its print vendor did not trigger FDCPA liability because it was not "in connection with the collection of any debt."

The Eleventh Circuit applied "an atextual reading" of "in connection with the collection of any debt" in § 1692c(b) of the FDCPA. The court found that "in connection with" is "invariably a vague, loose connective" phrase. It held that "connection" is broadly defined to mean "relationship or association" and "in connection with" to broadly mean "with reference to [or] concerning," and further noted that § 1692c(b) differed from other sections of the FDCPA.
Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 994 F. 3d 1341 (11th Cir. 2021).
https://scholar.google.com/scholar_case?case=16964404624440555939&hl=en&as_sdt=6&as_vis=1&oi=scholarr

Fair Credit Reporting Act dismissal reversed. The Seventh Circuit reversed a dismissal of an FCRA claim based on a notice of dispute, finding such claims do not require precise language and an inadequate notice does not eliminate the duty to reinvestigate altogether.
Davis v. Experian Info. Sols., Inc., 849 F. App'x 690 (9th Cir. 2021) (mem).
https://cdn.ca9.uscourts.gov/datastore/memoranda/2021/06/10/20-15667.pdf

Telephone Consumer Protection Act applies to job-recruiting Robocalls. The Ninth Circuit unanimously ruled that a lower court misread the TCPA, along with an accompanying Federal Communications Commission "implementing regulation" governing robocall consent standards.

> The panel wrote in their opinion:
> "The applicable statutory provision prohibits in plain terms 'any call,' regardless of content, that is made to a cellphone using an automatic telephone dialing system or an artificial or pre-recorded voice, unless the call is made either for emergency purposes or with the prior express consent of the person being called."

Loyhayem v. Fraser Fin. & Ins. Servs., Inc., ___ F.4th ___ (9th Cir. 2021).
https://cdn.ca9.uscourts.gov/datastore/opinions/2021/08/10/20-56014.pdf

Fifth Circuit holds receipt of a single, unsolicited text message is sufficient to establish Telephone Consumer Protection Act standing under Article III. The court noted Article III of the United States Constitution limits judicial power to "Cases" and "Controversies."

To invoke that power, a plaintiff must satisfy the tripartite "irreducible constitutional minimum" for standing. The plaintiff must have an injury in fact; that injury must be traceable to the challenged conduct of the defendant; and a favorable judgment must be likely to redress that injury.

This is a case about standing's first requirement—injury in fact. To establish injury in fact, a plaintiff must show he "suffered an invasion of a legally protected interest that is concrete and particularized." But concrete does not mean tangible. "Although tangible injuries are perhaps easier to recognize[,] . . . intangible injuries can nevertheless be concrete."

When a plaintiff asserts harm to an intangible interest, courts look to "both history and the judgment of Congress" to determine whether that injury satisfies Article III's constitutional minimum. The Fifth Circuit concluded Cranor has alleged a cognizable injury in fact: nuisance arising out of an unsolicited text advertisement.
Cranor v. 5 Star Nutrition, L.L.C., 998 F.3d 686 (5th Cir. 2021).
https://www.ca5.uscourts.gov/opinions/pub/19/19-51173-CV0.pdf

Former employee must arbitrate gateway questions. A plaintiff sued his former employer, Charter Communications, asserting Kentucky state law claims arising out of his termination. After the case was removed to federal court in the Western District of Kentucky, Charter moved to compel arbitration and dismiss, or in the alternative, stay the lawsuit.

Before the plaintiff's termination, Charter had announced a dispute resolution program that would require all employees to arbitrate any employment dispute with Charter unless the employee opted out within 30 days. The plaintiff did not opt out, and as a result, the district court dismissed the plaintiff's suit against Charter and compelled him to arbitrate his employment claims.

Plaintiff appealed to the Sixth Circuit Court of Appeals, arguing that an arbitration agreement did not cover his employment claims, that it was unconscionable, and that defendant failed to give adequate consideration in return for his agreement to arbitrate.

The court affirmed the district court's decision to compel arbitration, holding that the arbitration agreement expressly reserved these "gateway" questions concerning coverage and enforceability of the arbitration agreement for the arbitrator to resolve.
Anderson v. Charter Commc'ns, Inc., ___ F. App'x ___ (6th Cir. 2021).
https://www.opn.ca6.uscourts.gov/opinions.pdf/21a0285n-06.pdf

Boiler plate language does not trigger protections of Fair Debt Collection Practices Act pertaining to communications that were not in connection with collection of a debt. The Eighth Circuit recently affirmed summary judgment in favor of a mortgage loan servicer,

finding that the communications from the mortgage loan servicer were not communications "in connection with the collection of a debt" as required under the Fair Debt Collection Practices Act ("FDCPA") because they did not contain any information about the loan, such as the principal amount remaining due, the past due amount, or a request for payment.

The court also held that although each letter included a "Mini-Miranda" statement in the disclosures section, which stated that "[t]his communication is from a debt collector and it is for the purpose of collecting a debt and any information obtained will be used for that purpose," the inclusion of such boilerplate language "[does] not automatically trigger the protections of the FDCPA, just as the absence of such [disclosures] does not have dispositive significance."

Heinz v. Carrington Mortg. Servs., LLC, 3 F.4th 1107 (8th 2021).
https://law.justia.com/cases/federal/appellate-courts/ca8/19-3717/19-3717-2021-07-09.html

The Second Circuit affirmed the district court's decision to deny a motion by Donald Trump, the Trump Corporation, and other Trump family members to compel arbitration of claims related to the multilevel marketing scheme ACN. Defendants argued that, because the plaintiffs had agreed to arbitrate any claim they might have against ACN, the same arbitration clause should force arbitration of any claims against the Trump defendants related to their endorsement of ACN.

The Second Circuit agreed that equitable estoppel did not apply, noting:

> In order to establish equitable estoppel in the present context so as to bind a signatory of a contract (here, the plaintiffs) to arbitrate with one or more nonsignatories (here, the defendants), there must be a close relationship among the signatories and non-signatories such that it can reasonably be inferred that the signatories had knowledge of, and consented to, the extension of their agreement to arbitrate to the non-signatories. Here, there neither is nor was such a relationship. There was no corporate relationship between the defendants and ACN of which the plaintiffs had knowledge, the defendants do not own or control ACN, and the defendants are not named in the IBO agreements between ACN and the plaintiffs.

Doe v. Trump Corp., 6 F.4th 400 (2d Cir. 2021).
https://www.sdnyblog.com/files/2021/08/20-1228_opn-1.pdf

FEDERAL DISTRICT COURTS

Judge reverses class certification and ends debt collection suit. An Illinois federal judge walked back class certification for consumers accusing a Texas debt collector of illegally sending misleading debt collection notices and dismissed the action.

The judge said the fact that recent Seventh Circuit precedent dictates confusion is not injury enough to support litigation.

Tataru v. RGS Fin., Inc., ___ F. Supp. 3d ___ (N.D. Ill. 2021).
https://law.justia.com/cases/federal/district-courts/illinois/ilndce/1:2018cv06106/356249/109/

Spouse may not sue husband's employer over COVID infection. A California federal judge dismissed an amended suit brought by a spouse looking to hold her husband's employer responsible for her COVID-19 infection.

The judge found that the state's workers' compensation law bars her argument, further noting that the employer's duty to provide a safe work environment does not extend to non-employees. "Such claims are subject to dismissal for the reason that defendant's duty to provide a safe workplace to its employees does not extend to nonemployees who, like Corby Kuciemba, contract a viral infection away from those premises," the judge wrote in her order.

Kuciemba v. Victory Woodworks, Inc., ___ F. Supp. 3d ___ (N.D. Cal. 2021).
https://www.govinfo.gov/content/pkg/USCOURTS-cand-3_20-cv-09355/pdf/USCOURTS-cand-3_20-cv-09355-1.pdf

Employee handbook does not create enforceable arbitration clause. A judge in the Western District of Wisconsin found no valid arbitration agreement existed, because of a disclaimer in a 48-page employee handbook.

An employee of Pember Companies Inc. brought a proposed class action under the Fair Labor Standards Act and Wisconsin law for unpaid wages. Pember responded with a motion to compel arbitration based on a dispute resolution procedure contained in its handbook, which provides:

> I agree that all problems, claims and disputes experienced by me or Pember . . . related to my employment shall be resolved as outlined below. I agree to submit all such disputes to final and binding arbitration. Arbitration shall be the sole and exclusive forum and remedy for all covered disputes of either Pember . . . or me.

The dispute resolution policy limited employees to individual claims and not class or collective actions. Further, the policy declared that it is "binding" and provided that the employee has read the entire provision and understands its restrictions and that the provision can only be revised by Pember's president.

But the handbook did not conclude with that language and also contained an employee acknowledgment form on its last page, which O'Bryan signed. The bolded text of the acknowledgment form seemed to undo any agreement to arbitrate. It declared in pertinent part:

> **Unless I have an individual written employment contract, my employment relationship with Pember . . . is at will.**
>
> **I acknowledge that this handbook is neither a contract of employment nor a legal document.**

The court had to determine "which statement should control" – the handbook's statement that the arbitration provision was "binding" or the acknowledgment's contract disclaimer. The disclaimer did not merely say the handbook was not an employment contract but instead declared it was not "a legal document." The phrase's plain meaning, according to the court, was "that the handbook created no enforceable right for either Pember or its employees."

O'Bryan v. Pember Cos., ___ F. Supp. 3d ___ (N.D. Wis. 2021).
https://www.employmentclassactionreport.com/wp-content/uploads/sites/8/2021/05/Opinion-and-Order.pdf

Plaintiff's subjective interpretation of a debt collection letter is insufficient to confer FDCPA standing. Defendant United Holding Group, LLC purchased a debt owed by the plaintiff and hired defendant Eastpoint Recovery Group, Inc. ("Eastpoint") to help collect it. Eastpoint sent the plaintiff a letter identifying the account and stated:

> The account listed above has been assigned to this agency for collection. We are a professional collection agency attempting to collect a debt. Any information

> we obtain will be used as a basis to *enforce* collection of this debt. (Emphasis supplied by the court).

Plaintiff filed a claim under the FDCPA, alleging that the letter was misleading and that the inclusion of the word "enforce" made the letter threatening and confusing to him.

In granting Eastpoint's motion to dismiss, the district court for the Southern District of Florida noted that "confusion – on its own – is not an injury in fact." Rather, the plaintiff's "subjective interpretation of the word 'enforce' did not result in a concrete and particularized injury necessary to confer Article III standing."

Further, the court held that even if the plaintiff had suffered a concrete injury, he lacked standing because the alleged harm—fear and emotional distress based on the use of the word "enforce" in the collection letter—was not traceable to the claimed violations of the FDCPA. Rather, the court found that the plaintiff's distress was caused by his default on his debt and concern over the consequences.
Preisler v. Eastpoint Recovery Grp., ___ F. Supp. 3d ___ (S.D. Fla. 2021).
https://casetext.com/case/preisler-v-eastpoint-recovery-grp

Harvard students' COVID-19 suit dismissed. U.S. District Judge Indira Talwani found Harvard's promotional materials touting the benefits of its Cambridge, Massachusetts, campus, hands-on learning, networking opportunities, and other perks of attending the renowned Ivy League school do not amount to a binding contract to offer these services regardless of the circumstances. She said:

> Where plaintiffs have provided virtually no direct language from the promotional and other materials, and have not alleged that Harvard charged less money for online instruction in degree-granting programs, the amended complaint fails to plausibly allege facts suggesting that Harvard would reasonably expect students to understand from such material that Harvard had promised to provide in-person instruction.

Judge Talwani wrote, "even where, during a global pandemic, the governor and public health officials dictated otherwise."
Barkhordar v. President and Fellows of Harvard Coll., ___ F. Supp. 3d. ___ (D. Mass. 2021).
https://www.forbes.com/sites/michaeltnietzel/2021/06/21/harvard-wins-dismissal-of-lawsuit-seeking-covid-19-tuition-refund/?sh=64c8020274a7
https://storage.courtlistener.com/recap/gov.uscourts.mad.221627/gov.uscourts.mad.221627.94.0.pdf

The Bankruptcy Court for the District of Maryland resolved a conflict between the strong presumption in favor of enforcing arbitration agreements and the Bankruptcy Code's emphasis on centralization of claims. Based on an analysis of the two statutory schemes and their underlying policies and concerns, the court decided to lift the automatic stay to allow the prepetition arbitration proceeding to go forward with respect to non-core claims.

In the context of bankruptcy proceedings, a cause of action is constitutionally core when it stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process. The court found that, with respect to constitutionally core proceedings, the bankruptcy court has the discretion to retain the proceeding and refuse to enforce the parties' arbitration agreement, but its discretion is far more limited with respect to non-core proceedings.

The court held that the bankruptcy claims were non-arbitrable because they would not exist absent the bankruptcy case and thus extended from the bankruptcy itself. The court recognized that a debtor may be able to plead an action in a way that transforms certain pure state law claims into claims under the Bankruptcy Code but found that those concerns were not warranted in this case. Because the FDCPA non-bankruptcy claims and the contract claims were claims that existed prior to and independently of the bankruptcy proceedings, the court held that these categories of claims were non-core and lifted the stay to allow the arbitration proceedings to continue.
In re McPherson, ___ B.R. ___ (Bankr. D. Md. 2021).
https://www.govinfo.gov/content/pkg/USCOURTS-mdb-1_21-bk-10205/pdf/USCOURTS-mdb-1_21-bk-10205-0.pdf

Ticket buyers' class action denied. A Florida federal court determined that a plaintiff suing StubHub's parent company over its pandemic-related refund policy cannot bring a class action representing ticket buyers in over 50,000 transactions because the case would be unwieldy.

U.S. District Judge James S. Moody Jr. agreed with the company that a class action would pose "glaring" issues related to damages and liability. "For example, if a buyer prefers a voucher to a refund, how could she have been deceived . . . and how would that amount to any breach of contract or unjust enrichment?" the judge wrote Friday. "The court agrees with defendant that all of these uncertainties render the proposed classes unmanageable."
Shiflett v. Viagogo Ent. Inc., ___ F. Supp. 3d ___ (M.D. Fla. 2021).
https://www.docketbird.com/court-documents/Shiflett-v-Viagogo-Entertainment-Inc/ORDER-Plaintiff-s-Motion-for-Class-Certification-Dkt-50-is-denied-Signed-by-Judge-James-S-Moody-Jr-on-7-16-2021/flmd-8:2020-cv-01880-00058

STATE COURTS

Supreme Court of Texas discusses the burden of proof for enforcing a disputed electronic signature and the importance of the authentication process. Plaintiffs, employees of Aerotek, sued for wrongful termination. Based upon an electronically executed arbitration agreement, Aerotek moved to compel arbitration. The trial court denied the motion to compel, and an appellate court affirmed.

The Texas Supreme Court reversed, finding:

> Aerotek's evidence showing the security procedures its hiring application used to verify that a candidate electronically signed his MAA was uncontroverted. To enter the application, a candidate was required to create for himself a unique identifier, a user ID, a password, and security questions, all unknown to Aerotek. The candidate was required to enter personal information and sign documents by clicking on them. The application recorded and timestamped the candidate's every action. The application's business rules made it so that the application could not be submitted until all steps were completed and all required signatures provided, including on the MAA. Once a candidate submitted his application, Aerotek could not modify its contents. Aerotek provided the signed MAAs marked with timestamps identical to those in its database records showing each Employee's progress through the application.

Aerotek, Inc. v. Boyd, 624 S.W.3d 199 (Tex. 2021).
https://law.justia.com/cases/texas/supreme-court/2021/20-0290.html

Lawsuit challenging Austin's payday loan ordinance may proceed. A

Texas appellate court has revived TitleMax of Texas Inc.'s lawsuit against the city of Austin challenging ordinances that place restrictions on payday loans and repayment plans. The court pointed to a recent Texas Supreme Court decision it said cleared the way for the suit to proceed.

The panel found that based on the Texas Supreme Court's ruling in *Texas Propane Gas Association v. City of Houston*, TitleMax can bring the challenge because the "essence" of the ordinances is civil even though the ordinances carry criminal penalties.

TitleMax of Tex., Inc. v. City of Austin, ___ S.W.3d ___ (Tex. App.—Amarillo 2021).
https://law.justia.com/cases/texas/seventh-court-of-appeals/2021/07-20-00305-cv.html

Texas Insurance Code incorporates part of the DTPA by providing a cause of action for unlawful deceptive trade practice[s] defined under DTPA section 17.46. It is generally true that only consumers can state DTPA claims. However, Plaintiff's DTPA claim was asserted pursuant to Chapter 541 of the Texas Insurance Code. Tex. Ins. Code § 541.151 which "incorporates part of the DTPA by providing a cause of action for 'unlawful deceptive trade practice[s]' defined under DTPA section 17.46."

Riverstone Corp. Cap. Ltd. v. Frank Swingle & Assocs., Inc., ___ F. Supp. 3d. ___ (N.D. Tex. 2021). https://www.govinfo.gov/content/pkg/USCOURTS-txnd-3_20-cv-02509/pdf/USCOURTS-txnd-3_20-cv-02509-0.pdf

FEDERAL NEWS

New rights for homeowners. A new VA final rule, effective July 27, provides substantial new rights for qualified homeowners exiting a COVID-19 related forbearance program.

Regular payments must resume, but forborne payments will not be due until the end of mortgage term and are interest-free. A new NCLC Digital Library article describes both this new right to defer forborne payments and options for homeowners who cannot afford their regular monthly payments that become due after exiting forbearance. Read the article here.

Of special note, links to NCLC's Mortgage Servicing and Loan Modifications § 12.3 for a limited time are all open to the public.