Consumer News Alert Recent Decisions

Since October 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 highlighted during the past few months. To subscribe and begin receiving your free copy of the Consumer News Alert in your mailbox, visit www.peopleslawyer.net.

UNITED STATES SUPREME COURT

States cannot not void class action arbitration ban based on unconscionability. The U.S. Supreme Court ruled in *AT&T Mobility LLC v. Concepcion* that companies can use arbitration clauses in consumer and employment contracts to block class actions. The Court found that the Federal Arbitration Act preempts California contract law, specifically the California Supreme Court's 2005 decision in *Discover Bank v. Superior Court of Los Angeles*. The practical effect of this decision is to allow any business or employer to ban the use of class actions against it by imposing arbitration upon its customers or employees, and including a class action ban within that agreement. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

UNITED STATES COURTS OF APPEAL

Class action challenging airfares is preempted. The Ninth Circuit held that federal law preempts a class action alleging that two foreign airlines violated state law by charging excessive fares. *In re Korean Air Lines Co.*, 642 F.3d 685 (9th Cir. 2011).

CAFA "defendant" does not include counterclaim defendants. The Ninth Circuit Court of Appeals held that the term1 "defendant," as used in section 5 of the Class Action Fairness Act includes only original or true defendants. *Westwood Apex v. Contreras*, 2011 U.S. App. LEXIS 8914 (9th Cir. May 2, 2011).

State law regarding repossession not preempted by National Bank Act. The Ninth Circuit held that a bank may be denied a deficiency judgment based on its failure to follow California post-sale notice provisions. The bank argued federal law barred the claim. The court concluded that the federal law did not preempt the state notice requirements. Specifically, the court concluded that the notice requirements fell within the scope of state activity permitted under the federal law's express preemption and savings clauses. *Aguayo v. U.S. Bank*, 2011 U.S. App. LEXIS 15806 (9th Cir. Aug. 1, 2011).

Use of Social Security number with owner's permission may still constitute identity theft. The Eight Circuit held that even though the defendant had permission to use another person's Social Security number, his use of it qualified as use "without lawful authority" under federal law, and constituted identity theft. *United States v. Retana*, 641 F.3d 272 (8th Cir. 2011).

FDCPA does not prohibit communication with consumer's lawyer after consumer requests debt collector cease all communication. The Seventh Circuit held that although §1692c(c) of the FDCPA prohibits any communication with the consumer unless it comes within one of the subsection's three provisos, the prohibition does not apply to the consumer's attorney. *Tinsley v. Integrity Fin. Partners, Inc.*, 634 F.3d 416 (7th Cir. 2011).

Fair Debt Collection Practices Act does not apply to communication provided to judge. The Seventh Circuit held that the FDCPA does not apply to an allegedly misleading statement contained in a state-court complaint. *O'Rourke v. Palisades Acquisition XVI, LLC*, 635 F.3d 938 (7th Cir. 2011).

Landlord's agent is not debt collector under Fair Debt Collection Practices Act. The Seventh Circuit held that an apartment manager is not liable under the FDCPA in connection with an attempted eviction. The court stated, "It follows that AMC 'obtained' an interest in Carter's debt to Jackson Square Properties when AMC became Jackson Square's agent— which occurred before Carter got behind in her rent (if, indeed, that ever occurred, a question that the state's court of appeals did not reach). Section 1692a(6)(F)(iii) thus tells us that AMC is not a debt collector and does not owe Carter any duties under the FDCPA." *Carter v. AMC. LLC*, 2011 U.S. App. LEXIS 9753 (7th Cir. May 13, 2011).

Default motion filed before default may violate Fair Debt Collection Practices Act. The Sixth Circuit held that a debt collector may have violated federal law by serving a motion for a default judgment in a state court collection proceeding before the expiration of the time the debtor had to answer the complaint. Grden argued the motion for default was misleading because it falsely suggested that Grden had already missed the deadline to respond to Leikin's collection action. The court noted, "We think the record would allow a jury to agree with Grden on that point." *Grden v. Leikin Ingber & Winters PC*, 641 F.3d 169 (6th Cir. 2011).

Threat to file suit or filing after statute of limitations may violate FDCPA. The Fifth Circuit has recognized that taking any action beyond requests for payment on a time barred debt may well constitute a violation of the FDCPA. The court found, however, that the relevant statute of limitation had not yet run. *Castro v. Collectivo, Inc.*, 634 F.3d 779 (5th Cir. 2011).

Debt collector may attempt to collect a time-barred debt. The Third Circuit held that the FDCPA does not bar collection of a debt after the expiration of the statute of limitations. The court noted that, "Although our Court has not yet addressed the issue, the majority of courts have held that when the expiration of the statute of limitations does not invalidate a debt, but merely renders it unenforceable, the FDCPA permits a debt collector to seek voluntary repayment of the time-barred debt so long as the debt collector does not initiate or threaten legal action." *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28 (3d Cir. 2011).

UNITED STATES DISTRICT COURTS

Debt collector's letter does not threaten legal action or review in violation of FDCPA. The District Court in Minnesota found that a collector's letter did not misrepresent that the claim had been reviewed by an attorney or threatened. The court held that when the letter was read in full, the language found objectionable did not convey the threats alleged by the consumer. *Adams v. J.C. Christensen & Assocs., Inc.*, 2011 U.S. Dist. LEXIS 33019 (D. Minn. Mar. 28, 2011).

Telephone message may violate FDCPA. The District Court for Minnesota held that leaving a phone message that was overheard by the consumer's children may violate the FDCPA's prohibitions on communication with third parties. The court also noted that the Act does not require an intent element to establish a violation of section 1692c(b). *Zortman v. J.C. Christensen & Assocs., Inc.*, 2011 U.S. Dist. LEXIS 44982 (D. Minn. Apr. 26, 2011).

Collection letter does not have to include tax advice. The District Court for the Eastern District of Virginia held that a letter to a consumer does not violate the law because it fails to include advice regarding the tax consequences of settling a debt for less than fair value. *Landes v. Cavalry Portfolio Servs., LLC*, 2011 U.S. Dist. LEXIS 35467 (E.D. Va. Mar. 30, 2011).

The District Court for the Eastern District of Virginia held that a letter to a consumer does not violate the law because it fails to include advice regarding the tax consequences of settling a debt for less than fair value.

Bona fide error defense may apply to error of law. The District Court for the Southern District of Texas held that *Jerman v. Carlisle*, 130 S. Ct. 1605 (2010) does not hold that all errors of law are automatically violations of the FDCPA, and allowed a collector to rely on the defense although the state court filing was time-barred. *Hare v. Hosto & Buchan, PLLC*, 2011 U.S. Dist. LEXIS 33614 (S.D. Tex. Mar. 30, 2011).

Condominium association fees are debt under Fair Debt Collection Practices Act. The District Court for the Southern District of Florida, noting that times have changed, held that contrary to earlier Florida case law, association assessment fees are debts within the meaning of the FDCPA. *Abby v. Paige*, 2011 U.S. Dist. LEXIS 36175 (S.D. Fla. Apr. 1, 2011).

Truth in Lending requires borrower only exercise right of rescission within three years. The District Court for the Northern District of Illinois held that the TILA statute of limitations requires that the borrower exercise the right to rescind within three years, but does not require that a lawsuit be filed. The court also noted that if the borrower establishes the right to sue for violation of the TILA's rescission provisions, the borrower may bring a claim for damages, notwithstanding the Act's one-year limitation provision. *Calvin v. Am. Fid. Mortg. Servs.*, 2011 U.S. Dist. LEXIS 47855 (N.D. Ill. May 3, 2011).

Debt collector's verification notice must include writing requirement. The District Court for the Eastern District of Virginia held that a debt collector's failure to advise the consumer in its validation notice that she had to dispute the debt in writing was grounds for liability under the FDCPA. *Bicking v. Law Offices of Rubenstein & Cogan*, 2011 U.S. Dist. LEXIS 48623 (E.D. Va. May 5, 2011).

Political "robocalls" may violate TCPA. A U.S. District Court in Maryland held that a defendant may be liable for failing to comply with the identification requirements of the federal Telephone Consumer Protection Act. The defendants allegedly arranged to have 112,000 anonymous prerecorded telephone calls made to Maryland residents on Election Day in November 2010. The defendants argued that political robocalls are exempt from the Act's identification requirements. The court disagreed, explaining that the provisions at issue apply to all calls made using an "automatic telephone dialing system," not just calls made for a commercial purpose. *State v. Universal Elections*, 2011 U.S. Dist. LEXIS 55883 (D. Md. May 25, 2011).

Ignoring law can result in willful violation of Fair Credit Reporting Act. The District Court for the Northern District of California held that a credit bureau and towing company engaged in a willful violation of the FCRA by pulling a credit report after the Ninth Circuit held that furnishing a credit report for a towing-related debt was impermissible under the law. *Holman v. Experian Info. Solutions, Inc.*, 2011 U.S. Dist. LEXIS 56070 (N.D. Cal. May 25, 2011).

MERS tracking is not a substitute for recording. The U.S. District Court, District of Oregon, held that a trustee violated state law in a non-judicial foreclosure of a loan. The court found that because no assignments of the deed were ever recorded, they were only tracked by MERS, the trustee violated the Oregon Trust Deed Act. *Hooker v. Nw. Tr. Servs. Inc.*, 2011 U.S. Dist. LEXIS 57005 (D. Or. May 25, 2011).

Interest on attorney's fee award does not accrue until judgment is entered quantifying the amount. The U.S. District Court for the Northern District of Illinois held that post judgment interest on substantial attorneys' fees should not have been awarded. The court found that interest does not run until judgment is entered, and the fees were immediately paid thereafter. *In re Trans Union Corp. Privacy Litig.*, 2011 U.S. Dist. LEXIS 54117 (N.D. Ill. May 20, 2011).

STATE COURTS

State arbitration act allows easier judicial review. The Texas Supreme Court paved the way for easier judicial review of arbitration awards decided under the Texas General Arbitration Act (TAA). The court decided the TAA does not preclude an agreement for judicial review of an arbitration award for reversible error. The court also found that the Federal Arbitration Act (FAA) does not pre-empt enforcement of such an agreement. "[W]e hold that the TAA presents no impediment to an agreement that limits the authority of an arbitrator in deciding a matter and thus allows for judicial review of an arbitration award for reversible error," *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84 (Tex. 2011).

State does not need to pass law to allow enforcement of TCPA. The Illinois Supreme Court held that a state court lawsuit over unsolicited faxes can go forward under the federal Telephone Consumer Protection Act even though the state legislature hadn't passed enabling legislation. The court noted that the TCPA's language "merely acknowledges that states have the right to structure their own court system; that neutral state laws and court rules concerning state court jurisdiction and procedure apply to TCPA claims; and that state courts are not obligated to change their procedural rules to accommodate TCPA claims." *Italia Foods, Inc. v. Sun Tours, Inc.*, 2011 Ill. LEXIS 1091 (Ill. June 3, 2011).

MERS cannot foreclose if it doesn't hold underlying note. In a case with possible far reaching consequences, a New York appellate court held that the ubiquitous Mortgage Electronic Registration Systems (MERS), nominal holder of millions of mortgages, does not have the right to foreclose on a mortgage in default or assign that right to anyone else if it does not hold the underlying promissory note. It is estimated that MERS is involved in about 60 percent of the mortgages originated in the United States. "This Court is mindful of the impact that this decision may have on the mortgage industry in New York, and perhaps the nation. Nonetheless, the law must not yield to expediency and the convenience of lending institutions. Proper procedures must be followed to ensure the reliability of the chain of ownership, to secure the dependable transfer of property, and to assure the enforcement of the rules that govern real property." *Bank of N.Y. v. Silverberg*, 2011 NY Slip Op 5002 (N.Y. App. Div. 2d Dep't 2011).

Arbitration provision does not apply to negligence claim against nursing home. The West Virginia Supreme Court held that an arbitration agreement, adopted prior to an occurrence of negligence, did not apply to a claim based on that negligent act. "Congress did not intend for arbitration agreements, adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, and which require questions about the negligence be submitted to arbitration, to be governed by the Federal Arbitration Act." The court held that "as a matter of public policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence," *Brown v. Genesis Healthcare Corp.*, 2011 W. Va. LEXIS 61 (W. Va. June 29, 2011).

The West Virginia Supreme Court held that an arbitration agreement, adopted prior to an occurrence of negligence, did not apply to a claim based on that negligent act.

Junk fax lawsuit may not be brought as a class action. The Telephone Consumer Protection Act generally prohibits the use of fax machines to send unsolicited advertisements, provides a private right of action and fixes damages for such claims at $500 or actual damages, whichever is greater. A New Jersey appellate court held that a claim under the TCPA may not be brought on behalf of a class. The court noted that by imposing a statutory award of $500, a sum considerably in excess of any real or sustained damages, Congress has presented an aggrieved party with an incentive to act in his or her own interest without the necessity of class action relief. It also noted that courts are divided on this issue. *Local Baking Prods. v. Kosher Bagel Munch, Inc.*, 2011 N.J. Super. LEXIS 143 (App. Div. July 19, 2011).

Aluminum bat maker liable for pitcher's death. The Montana Supreme Court held that a baseball bat manufacturer was responsible under a strict liability theory to a pitcher injured as a result of a failure to warn regarding the dangers of the aluminum bat. The manufacturer argued that state law allows only actual users of a product to bring a failure-to-warn claim and that the company owed no duty to bystanders like pitchers and fielders. The court noted, "A warning of the bat's risks to only the batter standing at the plate inadequately communicates the potential risk of harm posed by the bat's increased exit speed. In this context, all of the players, including [the plaintiffs' son], were users or consumers placed at risk by the increased exit speed caused by [the manufacturer's] bat. [The manufacturer] is subject to liability to all players in the game . . . for the physical harm caused by its bat's increased exit speed." *Patch v. Hillerich & Bradsby Co.*, 2011 MT 175, 361 Mont. 241 (2011).

Arbitration agreement designating NAF as arbitrator is unenforceable. The New Mexico Supreme Court held that a title lender's customer cannot be forced into arbitration. The court noted, "We base our reversal of those decisions [compelling arbitration] on our holding that the arbitration provisions in the title loan contract cannot be enforced because the involvement of the now-unavailable National Arbitration Forum (NAF) to arbitrate contract disputes was an integral requirement of the parties' agreement." *Rivera v. Am. Gen. Fin. Servs., Inc.*, No. 32,340 (N.M. July 27, 2011).

Seller of wine bottles liable under Deceptive Trade Practices Act for misrepresentation about vintage. A Texas appellate court held that a representation regarding wine was not a mere breach of contract and was actionable under the DTPA. *Mewhinney v. London Wineman, Inc.*, 339 S.W.3d 177 (Tex. App. Dallas 2011).