Consumer News Alert Case Update

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

Supreme Court rejects race based diversity plans. The U.S. Supreme Court by a 5-4 majority has rejected as unconstitutional two school districts' use of admission plans that take students race into account. *Parents Involved in Community Schools v. Seattle School Dist.*, 127 S. Ct. 2738; 168 L. Ed. 2d 508 (2007).

Supreme Court okays pension termination. The Supreme Court has ruled that an employer's decision to terminate a pension plan during bankruptcy proceedings -- rather than merge the pension plan into the union's pension management fund -- does not amount to a breach of fiduciary duty by the company. *Beck v. PACE Int'l Union*, 127 S. Ct. 2310, 168 L. Ed.2d 1 (2007).

Toddler can sue parents over car seat installation. The Minnesota Supreme Court has held that a toddler injured in a motor vehicle accident can sue his parents for improperly installing and maintaining his car seat. *Harrison v. Harrison*, 733 N.W.2d 451 (Minn. 2007).

Party bound by arbitration agreement signed by mother. The 5th Circuit has held that an arbitration agreement is enforceable against a non-signatory. The court found that "as a third-party beneficiary, she is bound by the agreement to arbitrate any dispute arising from it." *J.P. Morgan Trust Co., N.A. v. Conegie*, 492 F.3d 596 (5th Cir. 2007).

Class certification reversed. In a suit over defective side-impact airbags, certification of a nationwide class was reversed and remanded with instructions to deny the certification. The court found that the plaintiffs did not sufficiently demonstrate the predominance requirement for class certification because they failed both to undertake the required "extensive analysis" of variations in state law concerning their claims and to consider how those variations impact predominance. *Cole v. Gen. Motors Corp.*, 484 F.3d 717 (5th Cir. 2007).

A wrongful death claimant who had not yet filed suit was a "known creditor" of the debtor. The 4th Circuit has held that a wrongful death claimant whose identity and potential claim were either actually known or reasonably ascertainable to the debtor, was entitled to specific notice of the bankruptcy proceeding and applicable filing dates. *Zurich Am. Ins. Co. v. Tessler*, 492 F.3d 242 (4th Cir. 2007).

A bankruptcy court denial of a Chapter 13 plan extinguishing deficiency was proper. The 2005 amendments to the Bankruptcy Code give the creditor the right to an unsecured deficiency judgment after surrender of the collateral in a situation where the debt exceeds the current value of the collateral. *Wright v. Santander Consumer U.S.A. Inc.* (*In re Wright*), 492 F.3d 829 (7th Cir. 2007).

Debtor's health education loans cannot be discharged. The 10th Circuit held that a debtor entitled to Chapter 7 bankruptcy discharge of his standard student loans based on a finding of undue hardship could not satisfy the more rigorous standard for discharge of his medical education loans. *Woody v. United States Dep't of Justice* (*In re Woody*), 494 F.3d 939 (10th Cir. 2007).

Letter does not violate Debt Collection Act. The 7th Circuit has found that a dunning letter did not violate the Fair Debt Collection Practices Act because: 1) it does not need to include the entire credit card balance as the "amount of the debt;" 2) it met the

clarity standard; and 3) an unsophisticated consumer would not believe a statement in the letters to mean that payment of the current amount due would terminate all further obligations. *Barnes v. Advanced Call Center Tech.,* 493 F.3d 838 (7th Cir. 2007).

Advertising restrictions of Texas insurance tie-in statute violate First Amendment. The 5th Circuit has held that recently enacted provisions designed to prevent an auto insurer from owning and operating auto body shops was unconstitutional to the extent it banned non-misleading and truthful advertising. *Allstate Ins. Co. v. Abbott*, 495 F.3d 151 (5th Cir. 2007).

5th Circuit rejects Katrina victims' insurance suit. The 5th Circuit has held that Hurricane Katrina victims whose homes and businesses were destroyed when flood waters breached levees in the 2005 storm cannot recover money from their insurance companies for the damage. *Vanderbrook v. Unitrin Preferred Ins. Co.* (*In re Katrina Canal Breaches Litigation*), 495 F.3d 191 (5th Cir. 2007).

Consumers can sue drug firm under state antitrust law. The Wisconsin Supreme Court held that consumers can sue an international drug firm under state antitrust law for allegedly conspiring with generic drug manufacturers to charge customers inflated prices for an antibiotic. *Meyers v. Bayer AG*, 303 Wis. 2d 295 (Wis. 2007).

The made-whole doctrine must yield to contractual subrogation. The Texas Supreme Court has held that because the made-whole doctrine must yield to Fortis Benefits' right to contractual subrogation under the plain terms of the insurance policy, Fortis can recover the $247,534.14 in benefits it paid to Vanessa Cantu from the $1.445 million settlement. *Fortis Benefits v. Cantu*, 234 S.W.3d 642 (Tex. 2007).

Initial filing date retained for transferred cases. The 3rd Circuit has held that for statute of limitations purposes, the date of filing in an improper forum counts as the filing date in the proper forum to which the case was eventually transferred, reflecting a split among the federal circuits. *Lafferty v. Gito St. Riel*, 495 F.3d 72 (3d Cir. 2007).

Hotel guest can sue Caribbean hotel in home state. The 3rd Circuit has held that a guest at a hotel in Barbados who was injured during a massage appointment he scheduled after the hotel mailed him brochures and exchanged multiple telephone calls with him can sue in federal court in his home state. *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312 (3d Cir. 2007).

Tax on jury awards and settlements is constitutional. The D.C. Circuit has reversed its holding that a portion of the Internal Revenue Code governing taxes on jury awards and settlements is unconstitutional. The court found that the tax is constitutional because it's imposed uniformly across the country. *Murphy v. IRS*, 377 U.S. App. D.C. 197 (D.C. Cir. 2007).

Expert testimony not required to establish undue hardship. The 6th Circuit has ruled that a debtor who claimed he suffered from a debilitating illness was not required to introduce expert medical testimony to establish an undue hardship for his Chapter 7 bankruptcy discharge. *Barrett v. Educ.Credit Mgmt. Corp.*, 487 F.3d 353 (6th Cir. 2007).

Class action ban in arbitration agreement invalid. The Washington Supreme Court has held that a cell phone company cannot insulate itself from liability by banning its customers from bringing class actions against it. *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007).

Debt collector not liable under Fair Debt Collection Practices Act. The 7th Circuit has held that a debt collection agency didn't violate the Federal Debt Collection Practices Act by using a dunning letter, which listed the plaintiff's past-due credit card payments as "current amounts due," without also showing the total credit card balance. *Barnes v. Advanced Call Center Techs.,* 493 F.3d 838 (7th Cir. 2007).

Court strikes down ordinance banning "for sale" sign in car. The 6th Circuit has struck down a municipal ordinance against placing a motor vehicle in a public street and advertising it for sale as an unconstitutional restraint on commercial speech. *Pagan v. Fruchey*, 492 F.3d 766 (6th Cir. 2007).

Award of attorney's fees and costs to plaintiffs is reversed. The 7th Circuit has held that the district court erred by awarding attorneys' fees because defendant's attempt to remove the case to federal court under the Class Action Fairness Act was objectively reasonable. *Lott v. Pfizer, Inc.*, 492 F.3d 789 (7th Cir. 2007).

The term "file" in the Fair Credit reporting Act includes everything contained in consumer's report. The 7th Circuit has held that a credit bureau must disclose everything in the consumer's report in a clear and accurate manner. The court noted that even accurate material may be unclear. *Gillespie v. Equifax Info. Serv.*, 484 F.3d 938 (7th Cir. 2007).

Better Business Bureau not liable for defamation. The Pennsylvania Supreme Court has held that the Better Business Bureau could not be liable for defaming a business newsletter absent proof of actual malice. *Am. Future Sys. v. Better Bus. Bureau of E. Pa.*, 923 A.2d 389 (Pa. 2007).

Attorneys' fee in "wasteful" debt collection suit may be reduced. The 1st Circuit has joined the 4th and 6th Circuits in holding that attorneys fees awarded to a successful plaintiff may be reduced based on "wasteful litigation." *French v. Corporate Receivables, Inc.*, 498 F.3d 402 (1st Cir. 2007).

Supreme Court rules in Fair Credit Act case. The United States Supreme Court has held that a violation of the Fair Credit Reporting Act is willful if it resulted from reckless disregard of a consumer's rights under the Act -- a plaintiff need not present proof the credit entity knew it was acting illegally. *Safeco Ins. Co. of Am. v. Burr*, 127 S. Ct. 2201, 167 L. Ed. 2d. 1045 (2007).

Motion to compel arbitration denied. The Court of Appeals held that Green Tree's actions had "prejudiced" Ms. Lewallen by "sen[ding] her down the road of trial preparation" when it really intended to force her into arbitration, and further held that Green Tree had "hindered the [court's] administration of Ms. Lewallen's bankruptcy estate." *Lewallen v. Green Tree Servicing, L.L.C.*, 487 F.3d 1085 (8th Cir. 2007).

Law firm's arbitration clause struck down. The 9th Circuit has held that an arbitration agreement that California-based law firm O'Melveny & Myers has required its employees to sign since 2002 is unenforceable under California law. *Davis v. O'Melveny & Meyers*, 485 F.3d 1066 (9th Cir. 2007).

Parents can sue under IDEA. The Supreme Court has held that the non-lawyer parents of a disabled student have a right to represent themselves in an Individuals with Disabilities Education Act suit over public education opportunities for their child. *Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994, 167 L. Ed. 2d 904 (May 21, 2007).

Economic loss rule does not have to be raised as an affirmative defense. The Texas Supreme Court has noted that the economic loss rule is not an affirmative defense, but held that no evidence objections and motions for judgment n.o.v., without more, did not preserve error as to the economic loss rule. *Equistar Chems. v. Dresser-Rand Co.*, 2007 Tex. LEXIS 409 (Tex. May 4, 2007).

Debtor can't keep personal injury settlement. The 11th circuit has ruled that a Chapter 7 debtor forfeited her right to keep a personal injury settlement because she failed to disclose the litigation in her bankruptcy filing. *Fla. Dep't of Revenue v. Omine* (*In re Omine*), 485 F.3d 1305 (11th Cir. 2007).

Bankruptcy Court had authority to surcharge exempt property as remedy for debtors' failure to turnover nonexempt funds. The 10th Circuit has held that bankruptcy court had power, in the exercise of its authority to enter "necessary or appropriate" orders, to surcharge Chapter 7 debtors' exempt assets when the debtors failed to comply with their turnover obligations under the Code and thus deprived the estate of other, nonexempt funds that could have been administered by the trustee. *Scrivner v. Mashburn* (*In re Scrivner*), 370 B.R. 346 (10th Cir. 2007).

Shoppers can sue under RICO for unwanted service. The 9th Circuit has held that an electronics store's customers could bring a civil RICO suit for allegedly being unknowingly signed up for Internet service when they made purchases. *Odom v. Microsoft Corp.*, 486 F.3d 541 (9th Cir. 2007).

State cannot regulate bank-issued gift certificates. The 1st Circuit has held that Federal banking law preempts a state consumer protection statute that regulates the sale of bank-issued gift certificates and cards. *SPGGC, L.L.C. v. Ayotte*, 488 F.3d 525 (1st Cir. 2007).

Firm can sue over unsolicited fax advertisements. An Illinois Appellate Court has held that a recipient of unsolicited fax advertisements could seek damages under federal consumer protection law -- state law doesn't bar a private right of action. *First Capital Mortg. Corp. v. Union Fed. Bank of Indianapolis*, 374 Ill. App. 3d 739 (2007).

Client's excessive fee claim not tolled by arbitration. The Idaho Supreme Court has held that a fee dispute arbitration proceeding does not toll the statute of limitations on a client's claim to recover excessive fees. *Wilhelm v. Frampton*, 158 P.3d 310 (Idaho 2007).

Medical records can't establish citizenship for Class Action Act purposes. The 5th Circuit has held that medical records alone cannot be used to show that two-thirds of a proposed class are citizens of a state for purposes of the Class Action Fairness Act's "local controversy" requirement. "A party's residence in a state alone does not establish domicile." *Preston v. Tenet Healthsystems Mem'l Med. Ctr., Inc.*, 485 F.3d 804 (5th Cir. 2007).

Arbitration agreement incorporated into bank signature card. The Supreme Court of Texas has held that a bank's customer is bound by an arbitration agreement by virtue of a signature card that stated: "Customer acknowledges receipt of the Bank's Account Rules and regulations including all applicable inserts…" *In re Bank One, N.A.*, 216 S.W.3d 825 (Tex. 2007).

Texas attorney general does not need to designate a class representative in suit under Insurance Code. The Texas Supreme Court noted that the statute appears to require a class representative, "but those requirements cannot be applied in a way that renders attorney general class actions impossible, a result that would frustrate the Legislature's intent." *Farmers Group, Inc. v. Lubin*, 222 S.W.3d 417 (Tex. 2007).

Credit card company can enforce choice-of-law clause. The Maryland Supreme Court has held that a credit card company could enforce a choice-of law provision in its customer agreements, even though its application exposed a cardholder to greater liability for finance charges. *Jackson v. Pasadena Receivables, Inc.*, 921 A.2d 799 (Md. 2007).

Lender's mortgage refinance form did not violate TILA. The 1st Circuit has held that a lender's form adequately advised borrowers of the effects of rescinding their same-lender refinanced loans, even though it did not explicitly explain that, upon rescission, the original loans were not cancelled and the lender retained a security interest in the borrowers' properties. *Santos-Rodriguez v. Doral Mortg. Corp.*, 485 F.3d 12 (1st Cir. 2007).

Accord and satisfaction must be based on consideration. A Texas appeals court has held that a "payment in full" check to a credit card company did not operate as an accord and satisfaction because there was no consideration to support the alleged agreement. *Petty v. Citibank N.A.*, 218 S.W.3d 242 (Tex. App.—Eastland 2007).

Employer can compel Title VII arbitration. The 8th Circuit has ruled that an employer can compel an employee to arbitrate Title VII claims, even though the claims were brought as an intervenor in an EEOC enforcement action. *EEOC v. Woodmen of the World Life Ins. Soc'y*, 479 F.3d 561 (8th Cir. 2007).

Defendant must establish Class Action Act jurisdiction. The 9th circuit has ruled that an employer has the burden of showing federal jurisdiction under the Class Action Fairness Act where an employee who sued for unpaid wages alleged that class damages did not exceed $5 million. *Lowdermilk v. United States Nat'l Bank Assoc.*, 479 F.3d 994 (9th Cir. 2007).

Car lessee can sue under Magnuson-Moss. The Florida Supreme Court has held that a long-term lessee who is entitled to enforce a car warranty under state law may also sue under the Magnuson-Moss Warranty Act. *Am. Honda Motor Co. v. Cerasani*, 955 So. 2d 543 (Fla. 2007).

Arbitration agreement signed by son is valid. The Massachusetts Supreme Court has held that an arbitration agreement signed by a son when his father entered a nursing home is enforceable with respect to the son's wrongful death suit. *Miller v. Cotter*, 863 N.E.2d (Mass. 2007).

Arbitration clause not enforceable. The South Carolina Supreme Court has held that an arbitration clause in a trade-in contract between a dealership and customer is unconscionable and unenforceable. *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663 (S.C. 2007).

Unpaid ERISA contributions dischargeable under Chapter 7. The 6th Circuit has held that a bankrupt employer's status as a fiduciary under ERISA didn't make him a fiduciary for purposes of the Bankruptcy Code. Therefore, his pre-bankruptcy failure to contribute to his company's employee pension fund under a collective bargaining agreement was a dischargeable debt. *Bd. Of Trs. v. Bucci* (*In re Bucci*), 493 F.3d 635 (6th Cir. 2007).

Customer terms can't be modified via website posting. The 9th Circuit has held that a long-distance telephone customer could not be bound by amendments to his service agreement that his provider issued through a posting on its website. *Douglas v. United States Dist. Court for the Central Dist. of Calif.*, 495 F.3d 1062 (9th Cir. 2007).

Attorney fee agreement not subject to oral modification. The Texas Supreme Court has held that a written attorney fee contract that specified only hourly rates could not be modified by evidence of an oral agreement to cap the fee. *Sacks v. Haden,* 2008 Tex. LEXIS 651 (Tex. 2008).

Duty to warn employees falls on independent contractor, not property owner. The Texas Supreme Court has seemingly reinstated the "no-duty rule" by stating that the duty to warn falls on independent contractors, not property owners, because the independent contractor controls the method of its employees' work. *GE v. Moritz*, 2008 Tex. LEXIS 576 (Tex. June 13, 2008).

Attorney's fee are recoverable for breach of warranty. The Texas Supreme Court has held that claims for breach of warranty are in fact claims for breach of contract, for which attorney's fees may be awarded under Texas law. *Med. City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.3d 55 (Tex. 2008).

Uninsured motorist does not cover collision with part of a motor vehicle. The Texas Supreme Court has held that contact with a piece of a motor vehicle that comes off of the motor vehicle is not contact with a motor vehicle for purposes of the Uninsured Motorist Statute. *Nationwide Ins. Co. v. Elchehimi,* 249 S.W.3d 430 (Tex. 2008).

Sufficient evidence supported the liability and damage findings for unreasonable collection, damages for breach of escrow and exemplary damages. A Texas appellate court has found that "there was sufficient evidence for the jury to infer that the very large man acted on behalf of EMC, and that his conduct, as well as the conduct of EMC, exceeded the bounds of reason." *EMC Mortg. Corp. v. Jones*, 252 S.W.3d 857 (Tex. App.—Dallas 2008).