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. To subscribe and begin receiving your free copy of the Consumer News Alert in your mailbox, visit www.peopleslawyer.net.

UNITED STATES SUPREME COURT

Board of Dental Examiners concerted action to exclude non-dentists from the market for teeth whitening services constituted an anti-competitive and unfair method of competition under the Federal Trade Commission Act. The United States Supreme Court held the Board could not assert state-action immunity and upheld the FTC's decision that the action was anti-competitive. The Court noted that because a controlling number of the Board's decision-makers are active market participants in the occupation being regulated, the Board could invoke immunity only if the challenged restraint was clearly articulated and affirmatively expressed as state policy, actively supervised by the state. That requirement was not met. *N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n*, 135 S. Ct. 1101 (Feb. 25, 2015). http://www.supremecourt.gov/opinions/14pdf/13-534_19m2.pdf

Class action law helps defendants remove cases to federal court. The U.S. Supreme Court held that a defendant removing a class action lawsuit to federal court under the Class Action Fairness Act of 2005 does not need to include actual evidence to establish the required amount in controversy. The Court ruled that a lower court's decision to remand the case to state court was based in part on its erroneous application of a presumption against removal — a rule that federal courts must "narrowly construe" removal statutes and resolve all doubts in favor of remand. By a 5-4 vote, the court held that no such presumption exists when removal is sought pursuant to the Class Action Fairness Act of 2005. *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547 (Dec. 15, 2014). http://www.supremecourt.gov/opinions/14pdf/13-719_8mjp.pdf

UNITED STATES CIRCUIT COURTS

FTC Act imposes strict liability for false advertising. The D.C. Circuit held that when the FTC does not seek restitution or monetary relief, and the sole remedy sought is injunctive relief, the Act imposes strict liability. There is no exception for the unwitting dissemination of false advertising. *POM Wonderful, LLC v. Fed. Trade Comm'n*, 777 F.3d 478 (D.C. Cir. Jan. 30, 2015). http://www.cadc.uscourts.gov/internet/opinions.nsf/CF44C4FA22F615C585257DDD00549353/$file/13-1060-1535012.pdf

Mere delay in seeking arbitration without some resultant prejudice is insufficient grounds to find a conduct-based waiver. The First Circuit held that to find a conduct based waiver of an arbitration clause there must be more than mere delay, but the required showing of prejudice is "tame at best." Prejudice may be inferred from a protracted delay in assertion of arbitration rights when the delay is accompanied by sufficient litigation activity. *Joca-Roca Real Estate, LLC v. Brennan*, 772 F.3d 945 (1st Cir. Dec. 1, 2014). https://scholar.google.com/scholar_case?case=17838254500929537585&q=Joca-Roca+Real+Estate,+LLC+v.+Brennan,&hl=en&as_sdt=6,32&as_vis=1

Classwide measure of damages not required for class certification. The Second Circuit held that the Supreme Court's 2013 decision in

Comcast v. Behrend does not foreclose the certification of a class action where the plaintiffs' damages must be calculated individually. Rather, the individualized nature of damages is just one factor courts should examine. *Roach v. T.L. Cannon Corp.*,788 F.3d 401 (2d Cir. Feb. 10, 2015). http://law.justia.com/cases/federal/appellate-courts/ca2/13-3070/13-3070-2015-02-10.html

Debt collector does not have to total amounts due. The Third Circuit held that a debt collector does not violate the Fair Debt Collection Practices Act by failing to total the two amounts due. The court noted that even the least sophisticated consumer is able to perform simple addition. *DiBattista v. Buckalew, Frizell & Crevina, LLP*, 574 Fed. Appx. 107 (3d Cir. Jul. 21, 2014). http://digitalcommons.law.villanova.edu/thirdcircuit_2014/748

Attempt to collect fees for services not yet performed violates Fair Debt Collection Practices Act. The Third Circuit held that by attempting to collect fees for legal services not yet performed in a mortgage foreclosure, an attorney violated FDCPA sections 1692e(2)(A), (5), and (10). The court found the Act imposes strict liability on debt collectors who "use any false, deceptive, or misleading representation or means in connection with the collection of any debt," and section 1692f(1) by attempting to collect "an amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." *Kaymark v. Bank of Am., N.A.*, 783 F.3d 168 (3d Cir. Apr. 7, 2015). http://www2.ca3.uscourts.gov/opinarch/141816p.pdf

Fair Debt Collection Practices Act does not apply to a person collecting a debt that was not in default when it was obtained. The Fourth Circuit held that the FDCPA does not apply to a rental agent to whom a lease was assigned before payment was due. Under the lease, the tenant was required to submit her monthly rental payments to the agent. Therefore, the agent's acquisition of the rent payments occurred before they were in default. *Ramsay v. Sawyer Prop. Mgmt. of Md., LLC*, 593 Fed. Appx. 204 (4th Cir. Dec. 9, 2014). http://law.justia.com/cases/federal/appellate-courts/ca4/13-1795/13-1795-2014-12-09.html

The Fifth Circuit held that if an arbitration panel could have been interpreting a contract, its interpretation may not be appealed on the grounds that the panel exceeded his

Interpretation of contract is for the arbitrators. The Fifth Circuit held that if an arbitration panel could have been interpreting a contract, its interpretation may not be appealed on the grounds that the panel exceeded his authority. [(9 U.S.C. §10(a)(4)]. The court noted that, " the Supreme Court has made clear that district courts' review of arbitrators' awards under § 10(a)(4) is limited to the "sole question . . . [of] whether the arbitrator (even arguably) interpreted the parties' contract." *BNSF Ry. Co. v. Alstom Transp., Inc.*, 777 F.3d 785 (5th Cir. Feb 6, 2015). http://www.ca5.uscourts.gov/opinions%5Cpub%5C13/13-11274-CV0.pdf

Advertisements are not immune from Lanham Act scrutiny simply because their claims are open to scientific or public debate. The Fifth Circuit noted that although the First Amendment ensures a robust discourse in the pages of academic journals, it does not immunize false or misleading commercial claims from Lanham Act liability. *Eastman Chem. Co. v. PlastiPure, Inc.*, 775 F.3d 230 (5th Cir. Dec. 22, 2014). https://scholar.google.com/scholar_case?case=7293483340641616634&hl=en&as_sdt=6&as_vis=1&oi=scholarr

Arbitration awards may be vacated when arbitrators exceed the express limitations of the contractual mandate, or act contrary to express contractual provisions. The Fifth Circuit affirmed a decision vacating an arbitration award where the arbitrator-selection mechanism in the contracts was not followed, and the arbitrator "acted contrary" to a forum selection requirement of the arbitration clause. *PoolRe Ins. Corp. v. Organizational Strategies, Inc.*, 783 F.3d 256 (5th Cir. Apr. 7, 2015). http://www.ca5.uscourts.gov/opinions/pub/14/14-20433-CV0.pdf

Online payments must be credited the day the consumer authorizes them. The Seventh Circuit looked at whether a payment made directly through the creditor must be credited at the time of the consumer's authorization or when received. The court noted that,

> "When a consumer interacts directly with a mortgage servicer (such as by delivering a check, personally paying by telephone, or filling out an electronic authorization form on a servicer's website), it is the servicer that decides how quickly to collect that payment through the banking system. The servicer is in control of the timing, and without the directive to credit the payment instrument when it reaches the servicer, the servicer could decide to collect payment through a slower method in order to rack up late fees."

The court held that that an electronic authorization for a mortgage payment entered on the mortgage servicer's website is a "payment instrument or other means of payment," and TILA requires mortgage services to credit these authorizations when they "reach the mortgage servicer." *Fridman v. NYCB Mortg. Co. LLC*, 780 F.3d 773 (7th Cir. Mar. 11, 2015). https://scholar.google.com/scholar_case?case=10951445704027384088&hl=en&as_sdt=6&as_vis=1&oi=scholarr

Fees in excess of plaintiff's possible recovery not enough to invalidate prohibition against class action. Relying on *American Express Co. v. Italian Colors*, the Eighth Circuit noted that courts were not interested in the comparison between each class member's damage and their potential costs of arbitration. Instead, it focused on whether plaintiffs had proven that the costs of arbitration were so high that they could not proceed. It found the plaintiffs' themselves did not submit any affidavits stating that they could not afford the costs of arbitration, relying on an affidavit of their lawyer to that effect. The Court held "[t]he Appellants failed to carry their burden to show that the costs of individual arbitration 'are so high as to make access to the forum impracticable' or to prevent them from effectively vindicating their rights in the arbitral forum." *Torres v. Simpatico, Inc.*, (8th Cir. Mar. 25, 2015). https://scholar.google.com/scholar_case?case=9685188042806718444&hl=en&as_sdt=6&as_vis=1&oi=scholarr

Former employee lacks standing to challenge employer's new arbitration clause. A former server alleged the restaurant where she had worked violated the FLSA. A month later, the restaurant rolled out a new arbitration agreement for employees essentially preventing them from joining the class. The plaintiffs asked the court to enjoin the restaurant from using its new arbitration agreement to reduce the number of potential plaintiffs. The district court granted the injunction "to prevent a chilling effect on future collection actions under the [FLSA]."

The Eighth Circuit reversed. It found that the plaintiffs "lacked standing to challenge the current employees' arbitration agree-

ment," which deprived the district court of jurisdiction to enjoin enforcement of the new arbitration agreement. The court did not buy the argument that the new arbitration agreement caused plaintiffs to suffer a "concrete and particularized injury" in the form of an increased pro rata share of litigation expenses. The court concluded, "one must resort to pure speculation to conclude the former employees' portion of the litigation costs is any greater than it would have been absent the agreement." *Conners v. Gusano's Chicago Style Pizzeria*, 779 F.3d 835 (8th Cir. Mar. 9, 2015). https://scholar.google.com/scholar_case?case=475929258926369417&hl=en&as_sdt=6&as_vis=1&oi=scholarr

Failure to file suit within three years bars right of rescission. The Eight Circuit, following *Jesinoski v. Countrywide Home Loans*, 135 S. Ct. 790 (2015), held that a claim for rescission under Truth in Lending was not time-barred by 15 U.S.C. 1635(f) because of the failure to file a lawsuit within three years of their transaction with Bank of America. *Bank of Am., N.A. v. Peterson*, 746 F.3d 357 (8th Cir. Apr. 15, 2015). http://cases.justia.com/federal/appellate-courts/ca8/12-2508/12-2508-2015-04-15.pdf?ts=1429111867

Courts should not intervene mid-arbitration. The Ninth Circuit held that a court should intervene in an arbitration only in truly "extreme" situations. The court noted that courts may only engage in the very front and very back end of an arbitration. At the outset, courts may determine whether the parties agreed to arbitrate the dispute, and at the end, courts may determine if the arbitration met the basic fairness requirements of the Federal Arbitration Act. *Sussex v. U.S. Dist. Ct. for D. Nevada*, 776 F.3d 1092 (9th Cir. Jan. 27, 2015). http://cdn.ca9.uscourts.gov/datastore/opinions/2015/01/27/14-70158.pdf

Defendant may not moot class action by offer to named plaintiff. The Eleventh Circuit held that a plaintiff's individual claim is not mooted by an unaccepted Rule 68 offer of judgment, and a proffer that moots a named plaintiff's individual claim does not moot a class action, even if the proffer comes before the plaintiff has moved to certify the class. *Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698 (11th Cir. Dec. 1, 2014). http://media.ca11.uscourts.gov/opinions/pub/files/201315417.pdf

UNITED STATES DISTRICT COURTS

Facebook to face class action over children's online purchases. A U.S. district judge in California held that Facebook must face a nationwide class-action lawsuit seeking to force the social media company to provide refunds when children spend their parents' money on its website without permission. The judge noted, however, that although the plaintiffs could not pursue refunds as a group under U.S. Supreme Court precedent, they could still seek individual refunds. *I.B. et al v. Facebook, Inc.*, 2015 U.S. Dist. LEXIS 29357 (N.D. Cal. Mar. 10, 2015). http://www.leagle.com/decision/In%20FDCO%2020150311971.xml/I.B.%20v.%20FACEBOOK,%20INC.

Class action against Facebook not dismissed. A federal district court in California rejected a motion to dismiss a class action against Facebook for intercepting the content of users' electronic messages in order to determine if users "like" a webpage (for purposes of Facebook's "like" counter) and in order to help Facebook send users targeted advertising. *Campbell v. Facebook, Inc.*, 2014 U.S. Dist. LEXIS 177331 (N.D. Cal. Dec. 23, 2014). https://cases.justia.com/federal/district-courts/california/candce/4:2013cv05996/273216/43/0.pdf?ts=1419413755

STATE COURTS

A California Court of Appeals held that an arbitration clause found unconscionable may be enforced if the offensive provisions are severed.

Unconscionable provisions in an arbitration clause may be severed. A California Court of Appeals held that an arbitration clause found unconscionable may be enforced if the offensive provisions are severed. The court noted that the unconscionable provisions concern only exceptions to the finality of the arbitration award, and can be deleted without affecting the core purpose and intent of the arbitration agreement. The deletion of these exceptions creates a binding arbitration award and promotes the fundamental attributes of arbitration, including speed, efficiency, and lower costs. *Trabert v. Consumer Portfolio Servs., Inc.*, 184 Cal. Rptr. 3d 596 (Cal. Ct. App. Mar. 3, 2015). http://cases.justia.com/california/court-of-appeal/2015-d065556.pdf?ts=1425402024

Consumer must arbitrate home invasion and assault. A Missouri Court of Appeals held that the dispute between a man who rented a refrigerator and company service man wearing a company uniform who allegedly assaulted an robbed him, must go to arbitration. The court held that it has to enforce the arbitration clause, and let the arbitrator decide whether the dispute over the person beating up the consumer is covered by the consumer's contract about renting the refrigerator. *Johnson v. Rent-A-Center*, 2014 Mo. App. LEXIS 1227 (Mo. Ct. App. Nov. 4, 2014). https://scholar.google.com/scholar_case?case=13210190760421860693&hl=en&as_sdt=6&as_vis=1&oi=scholarr (opinion withdrawn)

Plaintiff entitled to costs even if defendant voluntarily paid amount requested before judgment. Defendant owed $277 to a cash-advance company, which assigned the debt to Plaintiff. Plaintiff filed a complaint for the recovery of money in county court, but prior to the entry of judgment, defendant voluntarily paid plaintiff the full amount sought. The Nebraska Supreme Court held plaintiff was entitled to its costs in the action notwithstanding payment. *Credit Mgmt. Servs., Inc. v. Jefferson*, 861 N.W.2d 432 (Neb. Apr. 10, 2015). http://cases.justia.com/nebraska/supreme-court/2015-s-14-545.pdf?ts=1428674537

Individual differences in treatment or potential damages with respect to the various vehicle contracts does not defeat commonality in putative class action. The supreme court of North Dakota reversed and remanded the district court's order denying certification of a usury class action. Among other things, the court noted, "Each putative plaintiff signed the same standard form contract, albeit with varying price terms written in for each respective vehicle. The district court noted the potential class members were not all charged the same usurious rates or excessive fees or subject to varying inaccurate or incomplete disclosures. However, these variations speak more to the issue of damages, and it is well established that differences in the degree of injury or damages will not bar a finding of commonality." *Baker v. Autos, Inc.*, 860 N.W.2d 788 (N.D. Mar. 24, 2015). http://law.justia.com/cases/north-dakota/supreme-court/2015/20140033.html

Federal Arbitration Act preempts Section 74.451 of the Texas Civil Practice and Remedies Code, relating to agreements to arbitrate health care liability claims. The Texas Supreme Court held that the section of the Texas Medical Liability Act requiring an attorney to sign a clause requiring arbitration is preempted by federal law. The court held that it is not saved by the provisions of the McCarran-Ferguson Act, which provides an exemption from preemption that applies to state statutes enacted for the purpose of regulating the business of insurance. The court noted that Section 74.451 of the Texas Civil Practice and Remedies Code was not a law enacted by the Texas Legislature for the purpose of regulating the business of insurance. It simply applies to agreements to arbitrate health care liability claims between patients and health care providers. Accordingly, the MFA does not exempt section 74.451 from preemption by the FAA, and the trial court should have granted the motion to compel arbitration. *Fredericksburg Care Co., L.P. v. Perez*, 58 Tex. Sup. J. 452 (Tex. Mar. 6, 2015). http://caselaw.findlaw.com/tx-supreme-court/1694070.html

Timeliness of claim is for arbitrator to decide. The Texas Supreme Court considered whether a court or an arbitrator decides if a demand for arbitration was timely under the arbitration agreement's statute of limitations. The court held that "courts must defer to arbitrators to determine the meaning and effect of a contractual deadline." *G.T. Leach Builders, LLC v. Sapphire V.P., L.P.*, 58 Tex. Sup. J. 532 (Tex. March 20, 2015). http://www.txcourts.gov/media/907938/130497.pdf

Guest in a hotel is a mere licensee, not a tenant. A Texas Court of Appeals held that no landlord tenant relationship exists between a hotel and its guest, and has no right of possession to the hotel room. *Olley v. HVM, L.L.C.*, 449 S.W.3d 572 (Tex. App.–Houston [14th Dist.] Oct. 14, 2014). http://cases.justia.com/texas/fourteenth-court-of-appeals/2014-14-13-00779-cv.pdf?ts=1413278971