

Week 13 – Final Exam Review II

5:30 Today's agenda

Charts

Sample exam questions

6:00 Guest Speaker: Bethany Coleman-Fire

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 9th day of April, two thousand eighteen.

Present: ROSEMARY S. POOLER,
REENA RAGGI,
CHRISTOPHER F. DRONEY,
Circuit Judges.

GILBERTO FRANCO, ON BEHALF OF HIMSELF AND ALL
OTHERS SIMILARLY SITUATED,

Plaintiff-Appellant,

v.

15-4003; 17-1134

ALLIED INTERSTATE LLC, FKA ALLIED INTERSTATE, INC.,

Defendant-Appellee.

Appearing for Appellant: Adina Hyman Rosenbaum, Public Citizen Litigation Group,
Washington, D.C.

Andrew T. Thomasson, Philip D. Stern, Stern Thomasson LLP,
Springfield, N.J. (*on the brief*).

1 Appearing for Appellee: Casey Devin Laffey, Reed Smith LLP (Nana Japaridze, *on the*
2 *brief*) New York, N.Y.

3
4 Appeal from the United States District Court for the Southern District of New York (Forrest, J.).

5
6 **ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED,**
7 **AND DECREED** that the judgment of said District Court be and it hereby is **VACATED** and
8 **REMANDED**.

9
10 Plaintiff-Appellant Gilberto Franco appeals from the November 30, 2015 judgment of the
11 District Court for the Southern District of New York (Forrest, J.), following a rejected Federal
12 Rule of Civil Procedure 68 offer on his individual claim in his putative class action suit regarding
13 Defendant-Appellee Allied Interstate's debt collection practices. This is the second appeal in this
14 matter. *See Franco v. Allied Interstate LLC*, 602 F. App'x 40 (2d Cir. 2015) (summary order)
15 ("*Franco I*"). In *Franco I*, we held that an unaccepted Rule 68 offer could not moot a claim in
16 the absence of judgment. On remand, the district court entered judgment in favor of the plaintiff.
17 This appeal followed. We again remand, as an unaccepted Rule 68 offer is a legal nullity and
18 therefore provides no basis for the entry of judgment. We assume the parties' familiarity with the
19 underlying facts, procedural history, and specification of issues for review.

20
21 "We review *de novo* the district court's conclusion that [a plaintiff's] claims are moot."
22 *Cty. of Suffolk v. Sebelius*, 605 F.3d 135, 139 (2d Cir. 2010). "We review a district court's denial
23 of class certification for abuse of discretion." *Sergeants Benevolent Ass'n Health & Welfare*
24 *Fund v. Sanofi-Aventis U.S. LLP*, 806 F.3d 71, 86 (2d Cir. 2015). To the extent that the district
25 court's decision "was based on conclusions of law, we review such conclusions *de novo*, and to
26 the extent that its decision was based on findings of fact, we review such findings for clear
27 error." *Id.*

28
29 During the pendency of this appeal, multiple decisions have issued, which control the
30 outcome of this case. Consistent with our own precedent, the Supreme Court has now ruled that
31 an unaccepted Rule 68 offer of judgment will not moot a claim. As the Supreme Court explained,

32
33 When a plaintiff rejects such an offer—however good the terms—her interest in the
34 lawsuit remains just what it was before. And so too does the court's ability to grant her
35 relief. An unaccepted settlement offer—like any unaccepted contract offer—is a legal
36 nullity, with no operative effect.

37
38 *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 670 (2016) (quoting *Genesis Healthcare Corp. v.*
39 *Symczyk*, 569 U.S. 66, 81 (2013) (Kagan, J., dissenting)).

40
41 Subsequently, in *Radha Geismann, M.D., P.C. v. ZocDoc, Inc.*, 850 F.3d 507, 513 (2d
42 Cir. 2017), we went a step beyond *Campbell-Ewald*, and held that an unaccepted Rule 68 offer
43 does not moot a claim even where, as here, the district court subsequently enters judgment in
44 favor of the plaintiff, and the defendant attempts to tender judgment. Allied Interstate's attempts
45 to circumvent this clear precedent are unavailing. We see no meritorious grounds for
46 distinguishing *Geismann*.

1 Allied Interstate also asserts that the district court denied class certification in its initial
2 2014 ruling, which was the subject of *Franco I*, and that this suit should now be treated as an
3 individual claim rather than a putative class action. This is incorrect. The district court's initial
4 2014 decision found that Franco's individual claim was mooted by the Rule 68 offer, and denied
5 class certification in the absence of a named plaintiff. The district court clearly explained that the
6 denial of class certification was a mere byproduct of the mootness of the individual claim,
7 writing, "[i]n the absence of a claim against defendant, plaintiff cannot adequately represent the
8 purported class." *Franco v. Allied Interstate LLC*, No. 13-cv-4053, 2014 WL 1329168, at *5
9 (S.D.N.Y. Apr. 2, 2014), *vacated and remanded*, 602 F. App'x 40 (2d Cir. 2015). In *Franco I*,
10 we vacated and remanded, finding that the individual claim was not moot. Thus the sole ground
11 for the denial of class certification was vacated by our decision. As the district court recognized
12 in the decision underlying the instant appeal, the effect of *Franco I* was to revive the class
13 certification motion on remand. *See Franco v. Allied Interstate LLC*, No. 13-cv-4053, 2015 WL
14 7758534, at *4 (S.D.N.Y. Nov. 30, 2015) (addressing viability of class claims). Since we again
15 hold that the individual claim is not moot, the class certification motion will again be open on
16 remand. Accordingly, the district court may consider whether Franco is entitled to a "fair
17 opportunity to show that certification is warranted" before rendering judgment on his claim.
18 *Campbell-Ewald Co.*, 136 S. Ct. at 672.

19
20 In light of our decision today, the funds deposited by Allied Interstate with the clerk of
21 the court in satisfaction of the judgment should be returned.

22
23 The judgment of the district court hereby is VACATED and REMANDED for further
24 proceedings not inconsistent with this order.

25
26 FOR THE COURT:
27 Catherine O'Hagan Wolfe, Clerk
28

Announcements

Legal Aid Bankruptcy Clinic

April 18 – 7:00pm to 8:00pm

First United Methodist Church

FBA Settlement CLE

April 19 – 12:00pm to 1:00pm

Portland District Courthouse

Oregon Consumer League Meeting

April 19 – 7:00pm to 8:00pm

Independent Living Resources



2018 Final Exam Outline

Fact Pattern A – UTPA

1. Laundry list
2. Claim elements
3. Ascertainable loss
4. “Person” definition

Fact Pattern B – UTPA

5. Laundry list
6. “Services” definition
7. Fee shifting scheme
8. Ascertainable loss

Fact Pattern C – FCRA

9. Statute of limitations
10. Claim elements
11. Claim elements
12. Claim elements

Fact Pattern D – FCRA

13. Damages
14. Damages
15. Fee shifting scheme
16. Claim elements

Fact Pattern E – FDCPA

17. Claim elements
18. “Collector” definition
19. Damages
20. Lodestar

Fact Pattern F – FDCPA

21. Claim elements
22. Article III standing
23. “Debt” definition
24. Statute of limitations

2018 Final Exam Outline

Fact Pattern G – TCPA

- 25. Damages
- 26. Statute of limitations
- 27. *Spokeo*
- 28. Fee shifting scheme

Fact Pattern H – TCPA

- 29. Article III standing
- 30. Mootness
- 31. *Campbell-Ewald*
- 32. *ACA International*

Fact Pattern E – ORLTA

- 33. Tenant remedies
- 34. “minor defect” definition
- 35. Permissible entry
- 36. Fee shifting scheme

Fact Pattern F – ORLTA

- 37. Eviction lawsuits
- 38. Eviction lawsuits
- 39. Eviction lawsuits
- 40. Statute of limitations

Damages Chart

CONSUMER LAW	STATUTORY AUTHORITY	EMOTIONAL HARM	ECONOMIC LOSS	STATUTORY DAMAGES	PUNITIVE DAMAGES
UTPA	ORS 646.638		X	X	X
FCRA	15 U.S.C. § 1681n	X	X	X	X
FDCPA	15 U.S.C. § 1692k	X	X	X	
TCPA	47 U.S.C. § 227(b)(3)		X	X	
ORTLA	ORS 90 et seq.		X	X *	

Fee Shifting Chart


CONSUMER LAW	STATUTORY AUTHORITY	AMERICAN RULE	PREVAILING PLAINTIFF	PREVAILING PARTY
UTPA	ORS 646.638(3)		X	
FCRA	15 U.S.C. § 1681o(a)(2)		X	
FDCPA	15 U.S.C. § 1692k(a)(3)		X	
TCPA	47 U.S.C. § 227(b)(3)	X		
ORLTA	ORS 90.255			X

Statute of Limitations Chart

CONSUMER LAW	STATUTORY AUTHORITY	ONE YEAR	TWO YEARS	THREE YEARS	FOUR YEARS
UTPA	ORS 646.638	X			
FCRA	15 U.S.C. § 1681n		X *		
FDCPA	15 U.S.C. § 1692k	X			
TCPA	28 U.S.C. § 1658				X
ORLTA	ORS 90 et seq.	X			

Fact Pattern A

In January 2015, a consumer bought a laptop from Best Buy. Best Buy assured the consumer that the laptop came installed with an operating system. The consumer later discovered the laptop did not have an operating system, and had to spend another \$100 to install one.

- 
4. What is the applicable fee shifting scheme under the UTPA?
 - a. The American rule
 - b. Prevailing party
 - c. Prevailing plaintiff
 - d. Prevailing defendant

4. What is the applicable fee shifting scheme under the UTPA?


- a. The American rule
- b. Prevailing party
- c. Prevailing plaintiff
- d. Prevailing defendant

5. What is the applicable statute of limitations under the UTPA?

- a. One year
- b. Two years
- c. Three years
- d. Four years


5. What is the applicable statute of limitations under the UTPA?

- a. One year
- b. Two years
- c. Three years
- d. Four years



Fact Pattern A

In July 2000, a consumer bought a mattress advertised as “new” from a mattress store. In July 2015, the consumer cleaned his bedding for the first time. While changing his sheets, the consumer saw the mattress tag for the first time, and learned for the first time that the mattress was not “new” but was instead a returned mattress the store had been using as its floor model.

- 
2. The attorney for the mattress store later argued that the mattress store cannot be liable under the UTPA unless it had actual knowledge that its conduct violated the UTPA. Is this argument correct?
- a. Yes, only a jury can evaluate whether the mattress store had the proper scienter
 - b. No, the mattress store is liable if it knew or should have known its conduct violated the UTPA
 - c. No, the UTPA is a strict liability statute
 - d. Yes, it is unreasonable to hold a business accountable for conditions it didn't know about

2. The attorney for the mattress store later argued that the mattress store cannot be liable under the UTPA unless it had actual knowledge that its conduct violated the UTPA. Is this argument correct?
- a. Yes, only a jury can evaluate whether the mattress store had the proper scienter
 - b. No, the mattress store is liable if it knew or should have known its conduct violated the UTPA
 - c. No, the UTPA is a strict liability statute
 - d. Yes, it is unreasonable to hold a business accountable for conditions it didn't know about



Fact Pattern A

On January 1, 2016, a consumer bought a Honda Civic from a car dealership. The salesperson assured the consumer that the Honda Civic had only one prior owner. However, the salesperson had knowledge that the Honda Civic actually had two prior owners. On February 1, 2016, the consumer looked the Honda Civic up on Carfax and discovered for the first time that the Honda Civic actually had two prior owners.

1. Of the following, which subsection of the UTPA's 'laundry list' did the car dealership most likely violate?
 - a. ORS 646.608(1)(a)
 - b. ORS 646.608(1)(e)
 - c. ORS 646.608(1)(h)
 - d. ORS 646.608(1)(m)

1. Of the following, which subsection of the UTPA's 'laundry list' did the car dealership most likely violate?

- a. ORS 646.608(1)(a)
- b. ORS 646.608(1)(e)
- c. ORS 646.608(1)(h)
- d. ORS 646.608(1)(m)

Fact Pattern B

In January 2010, Chase Bank furnished false credit information to Trans Union concerning a consumer. The consumer discovered the false information for the first time in January 2014 and sent a dispute letter directly to Chase Bank in February 2014. In January 2015 the consumer discovered the false information was still on her Trans Union credit report. In February 2015 the consumer sent a dispute letter to Trans Union for the first time. Trans Union never provided notice of the dispute to Chase Bank. Instead, Trans Union determined the dispute was frivolous in May 2015 and notified the consumer of its determination for the first time in July 2015. The consumer sued Chase Bank and Trans Union in Oregon district court under the FCRA in August 2015.

6. Why will the consumer's FCRA claim against Chase Bank fail?

- a. General duties regarding the initial furnishing of accurate credit information are only enforceable by federal or state agencies
- b. Trans Union never sent Chase Bank notice of the dispute
- c. No private right of action exists for a furnisher's violation of 15 U.S.C. § 1681s-2(a)
- d. All of the above


6. Why will the consumer's FCRA claim against Chase Bank fail?


- a. General duties regarding the initial furnishing of accurate credit information are only enforceable by federal or state agencies
- b. Trans Union never sent Chase Bank notice of the dispute
- c. No private right of action exists for a furnisher's violation of 15 U.S.C. § 1681s-2(a)
- d. All of the above




Fact Pattern B

In January 2016, a consumer mailed Experian a detailed dispute letter asking it to remove false derogatory credit information from her credit report. Experian received the dispute letter but negligently misfiled it under a different person's name. By April 2016, Experian had negligently failed to timely remove the false information from the consumer's credit report or perform any reinvestigation.

- 
7. How soon was Experian required to notify the furnisher that the consumer had disputed its false derogatory credit information?
- a. Within 5 days
 - b. Within 5 business days
 - c. Within 30 days
 - d. Within 30 business days

- 
7. How soon was Experian required to notify the furnisher that the consumer had disputed its false derogatory credit information?
- a. Within 5 days
 - b. Within 5 business days
 - c. Within 30 days
 - d. Within 30 business days

- 
9. What is the applicable fee shifting scheme under the FCRA?
- a. The American rule
 - b. Prevailing party
 - c. Prevailing plaintiff
 - d. Prevailing defendant

9. What is the applicable fee shifting scheme under the FCRA?

- a. The American rule
- b. Prevailing party
- c. Prevailing plaintiff
- d. Prevailing defendant

10. What is the applicable statute of limitations under the FCRA?

- a. One year
- b. Two years after the discovery of the violation, or five years after the date on which the violation occurred, which ever is earlier
- c. Two years, regardless of when the violation occurred
- d. Two years after the discovery of the violation, or five years after the date on which the violation occurred, which ever is later

10. What is the applicable statute of limitations under the FCRA?

- a. One year
- b. Two years after the discovery of the violation, or five years after the date on which the violation occurred, which ever is earlier
- c. Two years, regardless of when the violation occurred
- d. Two years after the discovery of the violation, or five years after the date on which the violation occurred, which ever is later

Fact Pattern C

US Bank assigned a consumer's overdrawn checking account balance to a national third party debt collector. The debt collector then placed a collection call to the consumer's cell phone at 7am. During the call, the consumer informed the collector that she was represented by an attorney and asks to receive no further calls. The collector called the consumer again the next day by mistake. The consumer then filed an action against US Bank and the debt collector under the FDCPA.

11. Which FDCPA subsection contains the most relevant basis for liability against the debt collector?

- a. 15 U.S.C. § 1692b
- b. 15 U.S.C. § 1692c
- c. 15 U.S.C. § 1692e
- d. 15 U.S.C. § 1692i

11. Which FDCPA subsection contains the most relevant basis for liability against the debt collector?

- a. 15 U.S.C. § 1692b
- b. 15 U.S.C. § 1692c
- c. 15 U.S.C. § 1692e
- d. 15 U.S.C. § 1692i

12. Is US Bank likely a “debt collector” as defined at 15 U.S.C. § 1692(a)(6)?

- a. No, assuming US Bank’s principal purpose is not debt collection
- b. No, assuming US Bank does not regularly collect debts owed to others
- c. Yes
- d. Both A and B are correct

12. Is US Bank likely a “debt collector” as defined at 15 U.S.C. § 1692(a)(6)?

- a. No, assuming US Bank’s principal purpose is not debt collection
- b. No, assuming US Bank does not regularly collect debts owed to others
- c. Yes
- d. Both A and B are correct

13. If the consumer prevails in her FDCPA action against the debt collector, what damages may she recover under 15 U.S.C. § 1692k?

- a. Actual damages and additional statutory damages up to \$1,000
- b. Actual damages or statutory damages, plus punitive damages
- c. Only statutory damages of up to \$1,000
- d. Only actual damages or statutory damages

13. If the consumer prevails in her FDCPA action against the debt collector, what damages may she recover under 15 U.S.C. § 1692k?

- a. Actual damages and additional statutory damages up to \$1,000
- b. Actual damages or statutory damages, plus punitive damages
- c. Only statutory damages of up to \$1,000
- d. Only actual damages or statutory damages

- 14.** The attorney for the debt collector argues that the debt collector is not liable under the FDCPA because the collections activity at issue did not concern a “debt” as defined at 15 U.S.C. § 1692a(5). Which of the following facts, if true, would most support this argument?
- a. The consumer never signed her checking account agreement with US Bank
 - b. The consumer opened the US Bank checking account solely for use in her small business
 - c. The consumer never actually owed a debt to US Bank
 - d. US Bank doesn’t generally issue small business checking accounts

14. The attorney for the debt collector argues that the debt collector is not liable under the FDCPA because the collections activity at issue did not concern a “debt” as defined at 15 U.S.C. § 1692a(5). Which of the following facts, if true, would most support this argument?

- a. The consumer never signed her checking account agreement with US Bank
- b. The consumer opened the US Bank checking account solely for use in her small business
- c. The consumer never actually owed a debt to US Bank
- d. US Bank doesn’t generally issue small business checking accounts