Week 13 - Final Exam Review II

5:30 Today's agenda

Charts

Sample exam questions

6:00 Guest Speaker: Bethany Coleman-Fire

15-4003(L) Franco v. Allied Interstate LLC 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 WHE CHING A SUMMAY ORDER IS A DOCUMENT RECURS WHITH THE COUNT, A PARTY WHIT CHIEF CHIEF THE FEDERAL APPENDIX OR A BELCTRONIC DATABASE (WHITH THE NOTATION "SUMMARY ORDER "A PARTY CHING A SUMMARY ORDER MUST SERVE A COPY OF IT OR ANY PARTY NOT PERFES ENTED 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 9^{th} day of April, two thousand eighteen. ROSEMARY S. POOLER, REENA RAGGI, CHRISTOPHER F. DRONEY, Circuit Judges. GILBERTO FRANCO, ON BEHALF OF HIMSELF AND ALL
OTHERS SIMILARLY SITUATED, Plaintiff-Appellant, 16 17 18 15-4003; 17-1134 19 20 21 22 23 24 ALLIED INTERSTATE LLC, FKA ALLIED INTERSTATE, INC., Defendant-Appellee. 25 Appearing for Appellant: 26 27 Adina Hyman Rosenbaum, Public Citizen Litigation Group, Washington, D.C. 28 29 Andrew T. Thomasson, Philip D. Stern, Stern Thomasson LLP, Springfield, N.J. (on the brief).

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

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

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

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

"We review de novo the district court's conclusion that [a plaintiff's] claims are moot."

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

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

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

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

Subsequently, in Radha Geismann, M.D., P.C. v. ZooDoc, Inc., 850 F.3d \$07, \$13 (2d Cir. 2017), we went a step beyond Campbell-Ewald, and held that an unaccepted Rule 68 offer does not moot a claim even where, as here, the district court subsequently enters judgment in favor of the plaintiff, and the defendant attempts to tender judgment. Allied Interstate's attempts to circumvent this clear precedent are unavailing. We see no meritorious grounds for distinguishing Geismann.

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

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

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

FOR THE COURT: Catherine O'Hagan Wolfe, Clerk

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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	
ORLTA	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 app	licable fee	shifting schen	ne under the	UTPA?
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- a. The American rule
- b. Prevailing party
- c. Prevailing plaintiff
- d. Prevailing defendant

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

5.	What is the	applicable statute	e of limitations	under the	UTPA?
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- a. One year
- b. Two years
- c. Three years
- d. Four years

5.	What is	the applic	able statut	e of limitation	ns under the	UTPA?
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- a. One year
- b. Two years
- c. Three years
- d. Four years

Fact Pattern A

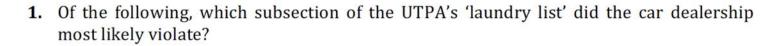
In July 2000, a consumer bought a mattress advertised as "new" from a mattress store. In July 2015, the consumer cleaned his bedding for the first time. While changing his sheets, the consumer saw the mattress tag for the first time, and learned for the first time that the mattress was not "new" but 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
 - 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

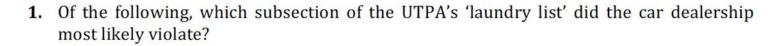
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 - a. Yes, only a jury can evaluate whether the mattress store had the proper scienter
 - b. No, the mattress store is liable if it knew or should have known its conduct violated the UTPA
 - c. No, the UTPA is a strict liability statute
 - d. Yes, 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.



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



- 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

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 - 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.		oon was Experian required to notify the furnisher that the consumer had disputed e derogatory credit information?
	a.	Within 5 days
	b.	Within 5 business days
	c.	Within 30 days

d. Within 30 business days

7	How so	oon was Experian required to notify the furnisher that the consumer had disputed
<i>,</i> .		e derogatory credit information?
	a.	Within 5 days
	b.	Within 5 business days

c. Within 30 days

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

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

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

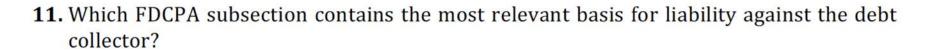
- a. One year
- b. Two years after the discovery of the violation, or five years after the date on which the violation occurred, which ever is earlier
- c. Two years, regardless of when the violation occurred
- d. Two years after the discovery of the violation, or five years after the date on which the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

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

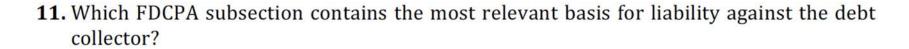
- a. One year
- b. Two years after the discovery of the violation, or five years after the date on which the violation occurred, which ever is earlier
- c. Two years, regardless of when the violation occurred
- d. Two years after the discovery of the violation, or five years after the date on which the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



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



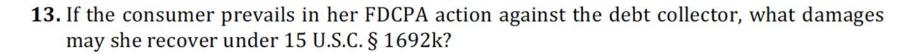
- a. 15 U.S.C. § 1692b
- b. 15 U.S.C. § 1692c
- c. 15 U.S.C. § 1692e
- d. 15 U.S.C. § 1692i

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

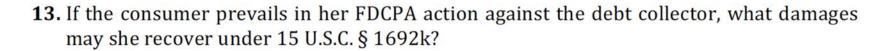
- a. No, assuming US Bank's principal purpose is not debt collection
- b. No, assuming US Bank does not regularly collect debts owed to others
- c. Yes
- d. Both A and B are correct

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



- 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



- 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
 - 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
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