CONSUMER FINANCE WEB CONFERENCE SERIES

Significant Cases of 2012

Consumer Law Update
Significant Cases of 2012

Jonathan W. Garlough
Rebecca R. Hanson
Christi A. Lawson
Michael C. Lueder

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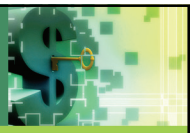

FCRA

FCRA: Limitations on Private Right of Action Against Furnishers

- The FCRA requires furnishers of information to consumer reporting agencies to refrain from knowingly reporting false information and to correct any information later discovered to be inaccurate. 15 U.S.C. § 1681s – 2(a).
- If a consumer disputes information with the CRA, both the CRA and the furnisher have a duty to reasonably investigate and verify that the information is accurate. 15 U.S.C. § 1681i (a)(1)(A), 1681s – 2(b).
- In December, the Second Circuit joined other circuits to hold that there is no private right of action against a furnisher for a violation of 15 U.S.C. § 1681s – 2(a).

  Longman v. Wachovia Bank, 702 F.3d 148 (2d Cir. 2012); Accord: e.g., Boggio v. USAA Federal Sav. Bank, 696 F.3d 611, 615-16 (6th Cir. 2012); Sanders v. Mountain Am. Fed. Credit Union, 689 F.3d 1138,1147 (10th Cir.2012); SimmsParris v. Countrywide Fin. Corp., 652 F.3d 355, 358 (3d Cir. 2011)

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FCRA: Duty To Investigate

- Bank's policy requiring certain documentation to launch an investigation does not trump FCRA requirements that a furnisher conduct a reasonable investigation once a CRA informs it that its reporting has been challenged
- Frank Boggio's ex-wife signed him up for a car loan without his knowledge. The loan went into default.
- Frank complained to the credit reporting agencies which then passed the complaint on to the furnisher, USAA Federal Savings Bank
- USAA did not change its credit reporting about Frank or conduct a substantive investigation because Frank failed to submit a police report and/or a fraud affidavit regarding his ex-wife's purported forgery of his name
- Sixth Circuit Court of Appeals ruled USAA could not place additional conditions on its statutory duty to investigate

  Boggio v. USAA Federal Savings Bank, 696 F.3d 611, 2012 WL 4478797 (6th Cir. 2012)

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FRCA: Advice of Counsel Defense

- Applying the standard originally set forth by the U. S. Supreme Court in *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47 (2007), the court rejected Fuges' claim that Southwest could not utilize the safe harbor, because it had not actually interpreted the FCRA before concluding the statute did not apply to it
- Court explained that the proper test under *Safeco* is one of "objective reasonableness" and "subjective bad faith" is therefore irrelevant
- Court therefore held that Southwest did not lose the potential protection of the "reasonable interpretation" defense, even if it never actually interpreted the FCRA prior to the commencement of the lawsuit. *Safeco* requires only that the "company's reading of the statute is objectively reasonable."
- Decision highlights potential for expansion of advice of counsel defense

Fuges v. Southwest Financial Services, Ltd., No. 11-4504, 2012 U.S. App. Lexis 25009 (3d Cir. Dec. 6, 2012)

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FRCA: Statutory Damages Requiring Individual Analysis

- Appellate court reversed class certification of FCRA claim. Court held that merely alleging a violation of the same legal provision under the FCRA is not sufficient to meet the requirements for class certification.
- Under the FCRA a plaintiff must show willfulness to recover statutory damages. An individualized inquiry is typically required to determine willfulness. Therefore, statutory damages claims under the FCRA may be inappropriate for class actions.
- It remains to be seen whether this decision opens the door to future holding that class actions are not appropriate for certain FCRA claims

Soutter v. Equifax Information Services, LLC, No. 11-1564, 2012 U.S. App. Lexis 24891 (4th Cir. Dec. 3, 2012) (unpublished opin.)

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HAMP

HAMP: Private Right of Action Based on State Law?

- The Home Affordable Mortgage Program does not provide for a private right of action
- However, borrower's state law claims based on HAMP are not preempted
- Court rejects "end run" theory based on "the novel assumption that where Congress does not create a private right of action for violation of a federal law, no right of action exists under state law, either."

  Wigod v. Wells Fargo Bank, 673 F.3d 547 (7th Cir. 2012)

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FDCPA

FDCPA: Foreclosure Equals Debt Collection

- Often a lender will sue to foreclose on property and not seek a deficiency balance
- Most courts have held that mortgage foreclosures are legal enforcements of a security interest and therefore outside of the scope of FDCPA
- The Sixth Circuit now holds that such conduct is debt collection, thereby triggering all of the FDCPA's requirements
- This case requires lenders and their counsel to reassess their practices. Even if a lender is not covered under the FDCPA because of the original creditor exception, it still may be subject to state debt collection laws, which often follow federal court interpretations.

  Glazer v. Chase Home Finance LLC, No. 10-3416, 2013 U.S. App. Lexis 845 (6th Cir. Jan. 2013)

FDCPA Requires Absolutely Accurate Notices

- Debt collectors violated law by saying the following about a borrowers student loan debt:

  ACCOUNT INELIGIBLE FOR BANKRUPTCY DISCHARGE
  Your account is NOT eligible for bankruptcy discharge and must be resolved.

- Second Circuit found this misleading as such debt can be discharged upon a showing of undue hardship

- This case highlights the absolute accuracy required in debt collection notices

  Easterling v. Collecto, Inc., 692 F.3d 229 (2d Cir. 2012)

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RESPA

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RESPA: No Split In Settlement Fee = No Violation

- In *Freeman v. Quicken Loans, Inc.,* the U.S. Supreme Court ruled that in order to establish a violation of RESPA, a charge for settlement services must be divided between two or more persons
- Plaintiffs claimed they were charged loan discount fees for which no services were provided
- "The dispute between the parties boils down to whether this provision prohibits the collection of an unearned charge by a single settlement-service provider – what we might call an undivided unearned fee – or whether it covers only transactions in which a provider shares a part of a settlement-service charge with one or more other persons who did nothing to earn that part," wrote Justice Antonin Scalia. "In our view, § 2607(b) unambiguously covers only a settlement-service provider's splitting of a fee with one or more other persons; it cannot be understood to reach a single provider's retention of an unearned fee."

  Freeman v. Quicken Loans, Inc., 132 S. Ct 2034, 2039, 2040 (2012)

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MOOTNESS

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Offer of Judgment v. Settlement Offer

- Debt collectors offer statutory penalty plus $1 and attorneys fees to settle. Plaintiffs reject the offer and defendant moves to dismiss as nothing remained at stake.
- Eleventh Circuit finds claims not moot because defendant did not offer to have a judgment taken against it
- Case differed from others where defendant made a Rule 68 Offer of Judgment

Zinni v. ER Solutions, Inc., 692 F.3d (11th Cir. 2012), pet. for cert. filed 81 U.S. L.W. 3346 (Dec. 17, 2012)

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Rule 68 May Be Valuable Tool

- In the context of Rule 68, courts generally hold that a valid offer of judgment that provides complete relief to the plaintiff, even if rejected, renders a party's claims moot and eliminates the court's subject matter jurisdiction
- To effectuate the purposes of Rule 68, an offer of judgment must specify a definite sum or other relief for which judgment may be entered and must be unconditional
- Court in *Warren* held that the case was not moot, because the offer did not satisfy the plaintiff's claims for an unspecified award of actual damages. Thus, Rule 68 may be more effective in cases involving solely statutory damages.
- Court in *Johnson v. Midwest ATM, Inc., et al.*, Case No. 11-1926 (D. Mn. July 31, 2012), relied upon decision in *Warren* to dismiss class action under the EFTA as moot, because defendant had offered more than the statutory maximum individual recovery to the named plaintiff, and 1.01% (maximum allowed per statute is 1.0%) of defendant's net worth to the class members, together with the costs of the action, and a reasonable attorney's fee as determined by the court
- Other district courts have also addressed the issue and more circuit decisions are likely. Courts and Defendants counsel view Rule 68 as a tool to control cases driven by attorneys' fees.

Warren v. Sessoms & Rogers, P.A., 676 F.3d 365, 370-71 (4th Cir. 2012)

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ARBITRATION

CFPB's New Rules Prohibit Mandatory Arbitration Provisions

- January 20, 2013: "A contract or other agreement for a consumer credit transaction secured by a dwelling . . . may not include terms that require arbitration or any other non-judicial procedure to resolve any controversy or settle any claims arising out of the transaction."
- 12 CFR § 1026.36(h)

Recent Supreme Court Arbitration Decisions

- 2010: Where an arbitration agreement is silent as to the permissibility of class arbitration, imposing class arbitration is inconsistent with the FAA
- 2011: A state law that "stands as an obstacle" to enforcing arbitration agreement on its terms is preempted by the FAA
  - Note: Court appears to doom unconscionable arguments premised on contract of adhesion, noting that the "times in which consumer contracts were anything other than adhesive are long past."
- 2012: Federal statute does not preclude arbitration unless it includes an express "contrary Congressional command" to the FAA's promotion of arbitration
- 2012: Interpretation of state law excepting personal injury and wrongful death claims from enforcement of arbitration agreement is preempted by FAA

Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 130 S. Ct. 1758 (2010); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012); *Marmet Health Care Center, Inc. v Brown*, 132 S. Ct. 1201 (2012)

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Two Arbitration Cases On Supreme Court's Docket

- Second Circuit: A class action waiver is unenforceable if plaintiffs demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their federal statutory rights
- QP: Whether the Federal Arbitration Act permits courts, invoking the "substantive law of arbitrability," to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim?
- Oral argument scheduled for February 27

In re American Express Merchants' Litigation, 667 F.3d 204 (2d Cir. 2012)

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Two Arbitration Cases On Court's Docket (cont.)

- Third Circuit: Arbitration agreement which provides that "no civil action concerning any dispute under this Agreement shall be instituted before any court" reflects parties' agreement to submit to class arbitration
- QP: Whether arbitrator exceeds his powers by determining that parties agreed to authorize class arbitration based on broad language in agreement requiring arbitration of any dispute arising under the contract?
- Oral argument scheduled for March 25

Sutter v. Oxford Health Plans LLC, 675 F.3d 215 (3d Cir. 2012)

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Nonsignatories' Ability To Compel Arbitration – Equitable Estoppel

- Pre-2009: Federal courts applied federal common law governing non-signatories' ability to compel arbitration

MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942 (11th Cir. 1999)

- Two tests for equitable estoppel:
  1. When signatory must rely on the terms of the agreement in asserting its claims against nonsignatory
  2. When signatory raises allegations of substantially interdependent and concerted misconduct by both nonsignatory and signatories to agreement

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Special Concerns Regarding Non-signatories (cont.)

- 2009: Supreme Court requires traditional principles of State law to govern equitable estoppel

  Arthur Andersen LLP v. Carlisle, 129 S. Ct. 1896 (2009)

- Post-*Carlisle:* Courts split as to *Carlisle*'s impact

  Lawson v. Life of the S. Insur. Co., 648 F.3d 1166, 1171, 1172 & n.4 (11th Cir. 2011) (*Carlisle* abrogates *MS Dealer*)

  Aggarao v. Mol Ship Mgmt Co., 675 F.3d 355 (4th Cir. 2012) (continuing to apply broader *MS Dealer* test)

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Advice On Arbitration Clauses

- Use simple language
- Make the arbitration provision conspicuous
- Be wary of agreements that limit the ability to recover for certain claims or preclude damages
- Offer to exclude cases that fit within the jurisdiction of small claims courts
- Provide a mechanism to pay the costs of consumers who can cannot afford the initial costs of arbitration

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Arbitration Advice (cont.)

- Specify the governing rules and make sure they are readily available to the other side
- **Expressly provide that the arbitration will waive the right to a jury and to a class action**
- Avoid wholly one way arbitration provisions
- Focus on who is covered, or not covered, by the arbitration provision (i.e., do you want franchisees, franchisors, affiliates, or other entities covered)
- Be careful about requiring that arbitration must be conducted pursuant to particular set of rules (ex: NAF)

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STANDING

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STANDING: The Huge Case That Wasn't

- Under Article III of the United States Constitution, federal courts may only adjudicate actual cases and controversies. To have standing the plaintiffs must allege an injury in fact.
- Does a homebuyer who brings a RESPA claim without proof of actual damages have standing to recover statutory damages?
- Supreme Court dismissed the appeal as improvidently allowed

First American Financial Corp. v. Edwards, 132 S. Ct. 2536 (2012)

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STANDING: It Is Not Over

- The standing issue is not going to go away. In *Charvat v. First National Bank of Wahoo,* the plaintiff filed a class action over the bank's failure to post a fee notice on its automatic teller machine. The district court concluded *Charvat* did not allege "injury in fact" because the fee notice was already contained on the ATM electronic screen and she was not damaged.
- Briefing is underway before the Eighth Circuit

Charvat v. First National Bank of Wahoo, No. 12-2797, (8th Cir. Aug. 2, 2012)

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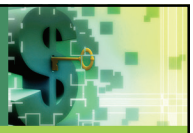
TCPA

TCPA

- Congress did not deprive federal courts of federal question jurisdiction over private TCPA suits

Mims v. Arrow Financial Services, LLC, 132 S. Ct. 740 (2012)

TCPA: Express Consent



- Consent to call a given number must come from the current subscriber
- Seventh Circuit rejected idea that it is the "intended recipient's" consent that matters
- This case greatly increases risk of using autodialers and pre-recorded messaging. Companies should consider a program of periodically auditing all numbers used with a live call to limit potential exposure.

Soppet v. Enhanced Recovery Co., LLC, 679 F.3d 637 (7th Cir.)

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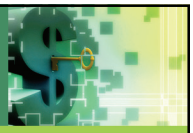
TCPA: Express Consent



- The Seventh Circuit Court of Appeals will soon clarify what constitutes "express consent" under the TCPA
- In *Thrasher-Lyon v. CCS Commercial, LLC,* Farmers Insurance claimed Melissa Thrasher-Lyon owed it money due to a subrogation claim it had following a accident Thrasher-Lyon had while riding her bike
- The district court noted that while the TCPA permits the use of an automatic telephone dialing system when a party has provided express consent, "Thrasher-Lyon's provision of her telephone number to various parties was not express consent to receive robo-calls on her cell phone." Providing a telephone number is not the same thing as giving permission to be called with an autodialer.
- The Court's ruling ignored a FCC 1992 order which stated, "Persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at that number which they have given, absent instructions to the contrary."
- The district court certified the case for an immediate appeal. Last month the Seventh Circuit invited the FCC to file an amicus brief and set a briefing schedule.

Thrasher–Lyon v. CCS Commercial LLC, No. 12-3891 (7th Cir.)

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TCPA: Express Consent

- The Ninth Circuit Court of Appeals ruled on October 12, 2012 that express consent to call a number must have been provided at the beginning of the transaction and that providing such numbers at a later date does not constitute express consent for purposes of using an autodialer or prerecorded messages
- There was a great deal of concern about this ruling as it seemed to contradict prior FCC decisions
- On December 28, 2012 the U.S. Court of Appeals for the Ninth Circuit withdrew the concerning language of its earlier decision

  Meyer v. Portfolio Recovery Associates LLC, 9th Cir., No. 11-56600, Amended Opinion 12/28/2012

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TILA

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TILA Rescission

- TILA provides that certain transactions may be rescinded within three years, if proper disclosures and notices are not provided. 15 U.S.C. §1635 (f).
- In McOmie-Gray, the Ninth Circuit Court of Appeals considered whether a consumer who gives proper notice of rescission during this extended three year period but fails to sue during that time is barred from bringing a claim
- Courts are split on this issue
- The Ninth Circuit's view is that the rescission notice is not self-effectuating and a lawsuit must be brought within the three-year rescission period to be timely

McOmie–Gray v. Bank of America Home Loans, 667 F.3d 1325 (9th Cir. 2012)

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TILA Rescission

- In *Gilbert v. Residential Funding LLC*, the U.S. Court for the Fourth Circuit held that simply notifying the creditor of cancellation during the three year rescission period was sufficient to rescind the loan. TILA does not require the filing of a lawsuit. To complete a rescission either the creditor must acknowledge the right of rescission is available and unwind the transaction or the borrower must file a lawsuit to enforce the right to rescind. However, the sending of the letter is all that is required to exercise the right to rescind.
- The Fourth Circuit's decision closely parallels the arguments that the Consumer Financial Protection Bureau has raised in four amicus briefs in other circuits. The CFPB has taken the position that suit does not need to be filed within a three year period, only that notice be given within that time.

Gilbert v. Residential Funding LLC, 678 F.3d 271 (4th Cir. 2012)

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TILA Hypertechnicality

- TILA requires that lenders in closed-end transactions disclose the number, amount and due date or period of payments scheduled to repay the loan. 15 U.S.C. § 1638(a)(6).
- Facts: Lender disclosed that 359 payments of $541.92 due beginning 03/01/2002 and one payment of $536.01 due on 02/01/2032. The disclosures did not provide that payments were to be made monthly, nor that there would be 360 payments.
- First Circuit ruled a reasonable person would understand payments here to be made monthly therefore no violation

  In re DiVittori, 670 F.3d 273 (1st Cir. 2012)

- Contradicts the Seventh Circuit ruling in a different case that held, "when it comes to the T-in-L Act, 'hypertechnicality reigns.'"

  Hamm v. Ameriquest Mortgage Co., 506 F.3d 525 (7th Cir. 2007)

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UDAAP

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2012 UDAAP Enforcement Actions

- Consumer Financial Protection Bureau conducted its first UDAAP enforcement actions
- States continue to enforce similar violations
- What is UDAAP?
  - Some guidance came out of enforcement actions, still no concrete, meaningful rules

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UDAAP: Capital One

- Bureau's first UDAAP enforcement action
- Focused on allegedly deceptive and misleading marketing tactics
- High pressured sales tactics
- Credit card add-on products themselves were not criticized
- Bureau will hold banks responsible for actions of vendors
- $140 million paid to consumers; $60 million paid in civil penalties

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UDAAP: Discover

- Bureau's second UDAAP enforcement action
- Deceptive telemarketing and sales tactics
- Also involved credit-card add-on products
- Marketing scripts contained misleading language
- Customer representatives downplayed key terms; spoke more rapidly during mandatory disclosure portion of call
- $200 million to customers; $14 million in civil penalties

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UDAAP: American Express

- Bureau's third UDAAP enforcement action
- Credit card add-on products
- Misrepresented sign-up bonuses
- Charged late fees in violation of CARD act
- Misrepresented impact on credit score
- Discriminated against applicants based on age
- $85 million paid to consumers; $27.5 million in civil penalties

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UDAAP: Florida Actions Against Prepaid Card Companies

- Florida Attorney General investigated several prepaid companies over allegations that consumers supposedly were deceived about fees and misled into believing that using the prepaid cards would improve their credit scores
- Consumer complaints played a role in Florida's decision to take up the investigation
- The prepaid card companies denied any wrongdoing but entered into settlements with Florida and agreed to pay a combined total of $115,000 to a charitable organization and also paid the Attorney General's costs and fees associated with the actions

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UDAAP Actions Will Continue in 2013

- Bureau is investigating mortgage lenders and brokers for making misleading statements in violation of the MAP rule
- HCSC was sued in late December in federal court by a putative nationwide class alleging that the bank engaged in "unfair, deceptive, and unconscionable assessment and collection of excessive overdraft fees"

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Thank You For Attending

Open for Q & A

Christi A. Lawson
Foley & Lardner LLP
111 North Orange Avenue
Suite 1800
Orlando, FL 32801
clawson@foley.com

Michael C. Lueder
Foley & Lardner LLP
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
mlueder@foley.com

Rebecca R. Hanson
Foley & Lardner LLP
321 North Clark Street
Suite 2800
Chicago, IL 60654
rhanson@foley.com

Jonathan W. Garlough
Foley & Lardner LLP
321 North Clark Street
Suite 2800
Chicago, IL 60654
jgarlough@foley.com

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