CONSUMER FINANCIAL SERVICES LAW REPORT

FOCUSING ON SIGNIFICANT CASELAW AND EMERGING TRENDS

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CREDIT REPAIR

ARBITRATION ALLOWED UNDER CROA

The U.S. Supreme Court has ruled that consumers' "right to sue," as contemplated by the Credit Repair Organizations Act, is not limited to actions in courts of law but includes arbitration,. The High Court therefore held that an arbitration agreement in a consumer credit card agreement must be enforced according to its terms. The Court reversed the 9th U.S. Circuit Court of Appeals' conclusion that the CROA's "right to sue" language meant "the right to bring an action in a court of law" exclusively and thus invalidated the arbitration agreement. (*CompuCredit Corp. v. Greenwood*, No. 10-948, 2012 WL 43514 (U.S. 01/10/12).)

"Had Congress meant to prohibit these very common provisions in the CROA, it would have done so in a manner less obtuse than what respondents suggest," wrote Justice Antonin G. Scalia for the 8-1 majority. "When it has restricted the use of arbitration in other contexts, it has done so with a clarity that far exceeds the claimed indications in the CROA." Only Justice Ruth B. Ginsburg disagreed.

Wanda Greenwood and other consumers with low credit scores applied for and received Aspire Visa credit cards marketed by petitioner CompuCredit Corp. and issued by Columbus Bank and Trust, now a division of Synovus Bank. In their applications they agreed to binding arbitration on an individual basis of "[a]ny claim, dispute or controversy (whether in contract, tort, or otherwise) at any time arising from" their accounts.

Greenwood brought a putative class action against CompuCredit and Columbus, alleging that they violated CROA through misleading representations that the subprime credit card could be used to rebuild their poor credit, and by charging multiple fees when the accounts were opened that greatly reduced the cards' advertised $300 credit limit.

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ment, which would also change relevant provisions in the eligible obligations rule and the rule governing the purchase of assets and assumption of liabilities. The NCUA says that it "has received many questions about the loan participation rule, indicating confusion about its application and its relationship to these other rules." The proposed rule would reorganize the current rule and direct its regulatory provisions to the purchase of a loan participation. The NCUA wants to improve understanding of the transactions covered under the rule, as well as the requirements for purchase and ongoing monitoring and the applicability of related provisions. Comments are due no later than Feb. 21, 2012. *Find the proposed amendment at* gpo.gov/fdsys/pkg/FR-2011-12-22/pdf/2011-32719.pdf.

GUEST COMMENTARY

CONSUMER FINANCIAL SERVICES LAW IN REVIEW: 2011'S SIGNIFICANT CASES AND EMERGING TRENDS

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The year 2011 saw an increase in civil filings in federal and state courts, fueled by the ongoing economic downturn. Many of these cases involved consumer credit disputes, foreclosures and contracts. Numerous decisions affecting both substantive law and procedural devices will significantly impact the financial services industry in the future. This article discusses several of these important cases and previews important issues to be decided in 2012.

SUPREME COURT DECISIONS AFFECT CLASS ACTIONS

In *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the U.S. Supreme Court continued to treat arbitration clauses favorably, as was done in three 2010 decisions that enforced arbitration agreements "according to their terms." The Federal Arbitration Act, 9 U.S.C. § 1 *et seq*., "reflects the fundamental principle that arbitration is a matter of contract." (*Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010); *Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp*., 130 S. Ct. 1758 (2010); *Am. Express Co. v. Italian Colors Restaurant*, 130 S. Ct. 2401 (2010).) According to the Court in *Concepcion*, the FAA preempts states from "conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures."

Concepcion reversed *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), the most recent in a line of California state and federal court decisions applying *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), to limit a company's right to arbitrate if the arbitration clause contained a class action waiver, and thus allowed consumers to avoid arbitration by bringing suit on a classwide basis under California law. Overturning *Discover Bank* and its progeny, the *Concepcion* Court explained that "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." The Court clarified that the FAA applies to all consumer arbitration agreements, including those found in "contracts of adhesion," because "the times in which consumer contracts were anything other than adhesive are long past."

In the wake of *Concepcion*, several major putative class actions have already been remanded for reconsideration of motions to compel arbitration. (*See, e.g.*, *Fensterstock v. Educ. Fin. Partners*, 426 Fed. Appx. 14 (2d Cir. 2011); *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205 (11th Cir. 2011); *Green v. Supershuttle Int'l, Inc.*, 653 F.3d 766 (2011); *Larsen v. JPMorgan Chase Bank, N.A.*, Nos. 10-12936, 10-12937, 2011 WL 3794755 (11th Cir. 08/26/11).)

DUKES HEIGHTENS CLASS CERTIFICATION RULE

The Supreme Court also clarified the proof necessary to demonstrate the elements of class certification under Rule 23 of the Federal Rules of Civil Procedure, holding in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), that "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule — that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law

or fact, etc." In *Wal-Mart*, the Supreme Court found that a putative class of 1.5 million female employees of Wal-Mart failed to meet the "commonality" requirement of Rule 23(a), and that claims for monetary relief cannot be sustained under Rule 23(b)(2) unless those damages are incidental to injunctive or declaratory relief. Where each class member may be entitled to individualized damages, Rule 23(b)(3) certification is appropriate because that section includes procedural protections, such as mandatory notice and the right to opt out, that the other sections of Rule 23(b) do not.

Wal-Mart was an employment discrimination case, but its heightened class certification standard is already impacting consumer finance cases because it requires that plaintiffs alleging discrimination show either that the defendant used biased standards that impacted all plaintiffs or that the defendant operated under a general policy of discrimination. For example, federal district courts in California and Kentucky have recently denied class certification based on a failure to demonstrate commonality among the putative class in cases alleging discriminatory mortgage lending practices. (*See*, *e.g.*, *In re Wells Fargo Residential Mortgage Lending Discrimination Litig.*, No. 08-MD-01930 MMC, 2011 WL 3903117 (N.D. Cal. 09/06/11); *In re Countrywide Fin. Mortgage Lending Practices Litig.*, MDL No. 1974, 2011 WL 4862174 (W.D. Ky. 10/13/11).)

PREEMPTION

Many originally predicted that the Dodd-Frank Act would be both a limitation of federal preemption and a rollback of OCC preemptive authority. However, the few reported cases decided since the passage of DFA do not suggest a sea change in the standards for federal preemption for national banks. The holdings in the handful of preemption cases reported do not squarely address the fundamental issues related to the preemption standard post-Dodd-Frank; rather, those issues are generally discussed in *dicta*.

Dodd-Frank provides, among other bases of preemption, that state consumer financial laws are preempted if, in accord with *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), the state law "prevents or significantly interferes" with a national bank's exercise of a federally authorized power. A "state consumer financial law" means a state law that does not directly or indirectly discriminate against national banks and that "directly and specifically" regulates the manner, content, or terms and conditions of any financial transaction, or any account related thereto, with respect to a consumer.

The OCC has contended that the standard set forth in Dodd-Frank simply codifies the approach the OCC and courts have taken over the past 15 years. Others have argued that by emphasizing the "significant interference" language in *Barnett*, Congress intended to create a heightened preemption standard as compared to what the OCC, and some courts, have been applying since *Barnett*.

The OCC promulgated amended preemption regulations on July 21, 2011, in which it articulated its position that Dodd-Frank did not change the preemption standard it has applied since 1996. Recent federal court decisions also seem to indicate little change, with decisions in three reported cases all holding that various state laws were preempted, with the courts at times going out of their way to express their views regarding the impact of Dodd-Frank on preemption. However, as discussed below, the question of the Dodd-Frank preemption standard was not clearly at issue in any of these cases and many of the core issues related to the preemption standard adopted by Dodd-Frank and the preemption regulations issued by the OCC have not yet been litigated.

The first appellate ruling commenting on preemption post-Dodd-Frank came on May 11, 2011, in *Baptista v. JP Morgan Chase Bank*, 640 F.3d 1194 (11th Cir. 2011). The 11th U.S. Circuit Court of Appeals held that the preemption test is whether there is a significant conflict between the state and federal statutes. The *Baptista* court held that the Florida law prohibiting banks from charging check cashing fees was in substantial and irreconcilable conflict with the National Bank Act, and thus was preempted. The court held that Dodd-Frank provides that "State consumer financial laws are preempted . . . if . . . in accordance with [*Barnett*], the State consumer financial law prevents or significantly interferes with the exercise by [a] national bank of its powers."

The 11th Circuit concluded that the Florida law substantially conflicted with the authorization of national banks to charge non-accountholders with check-cashing fees. However, this case ultimately involves the "prevents" prong of the "prevents or significantly interferes" standard, and thus likely could not be used as precedent regarding whether Dodd-Frank created a heightened preemption standard with respect to the "significant interference" prong. Moreover, the court's reference to Dodd-Frank may be best understood as *dicta* since the act was not effective at the time the court issued the opinion.

An Iowa federal district court addressed preemption in *U.S. Bank N.A. v. Schipper*, No. 4:10-cv-00064, 2011 WL 4347892 (S.D. Iowa 08/29/11), a case involving the attempted application of state laws regarding payment processing to a national bank. The district court held that a state statute regulating state bank electronic funds transfers was preempted with respect to how a national bank could provide services to those state banks. U.S. Bank provided EFT services to Iowa state-chartered banks and sought a declaration that state regulators could not enforce the Iowa Electronic Transfer of Funds Act against the national bank or any other financial insti-

tution engaging in business with the national bank. The district court agreed, finding that the OCC has specified that national banks may provide to other financial institutions any service the bank may perform for itself, including EFT services, without qualification or reservation. Furthermore, the court held that the Iowa statute, while not directly enforceable against a national bank, does significantly impair the bank's ability to exercise its federally granted powers.

Notably, the district court also commented that Dodd-Frank adopted the same standard applied by the U.S. Supreme Court in its 2007 *Watters v. Wachovia* decision, and that it did not materially alter the standard for National Bank Act preemption. 127 S. Ct. 1559 (2007). However, the court made this statement in a cursory footnote. Moreover, the Iowa law at issue likely was not a consumer financial law, and thus Dodd-Frank would not have been implicated.

Finally, in *Davis v. World Savings Bank, FSB*, No. 10-1761, 2011 WL 3796170 (D.D.C. 08/29/11), the focus was not on whether the *Barnett* preemption standard was the right one to apply, but rather whether the Home Owners' Loan Act preemption rules or the national bank standard applied. After the plaintiff defaulted on his mortgage, he brought a number of state law claims against the defendant, a federal thrift. The defendant moved to dismiss, arguing the claims were preempted by HOLA. The court agreed, dismissing the complaint. The court noted that as a result of Dodd-Frank, HOLA will no longer occupy the field in any area of state law, and preemption will be governed by the standards applicable to national banks.

However, the new standards under Dodd-Frank and the OCC's regulations did not apply retroactively to the plaintiff's claims. Because DFA expressly provides that 12 U.S.C.A. § 1465 was not effective until July 21, 2011, the court found that the preemption standards applicable when plaintiff entered into his mortgage — which were the HOLA standards that occupy the field and preempt state law — were controlling, rather than the new standards applicable as a result of Dodd-Frank. This case exemplifies the confusion courts may face with respect to the transition to Dodd-Frank's standards.

FDCPA DEMANDS CAUTION FROM ATTORNEY DEBT COLLECTORS

To avoid liability under the Fair Debt Collection Practices Act, the court in *Lesher v. Law Offices of Mitchell N. Kay, P.C.*, 650 F.3d 993 (3d Cir. 2011), held that attorney debt collectors must either involve themselves personally in mailing collection letters or ensure that collection letters contain clear disclaimers indicating that the attorney's office is acting as a debt collector, not as an attorney. After *Lesher*, whether a disclaimer is clear is an open question. The defendant in *Lesher* included a disclaimer on the back of its collection letter indicating that no attorney had actively reviewed the debtor's account. This was insufficient in the court's view, because the body of the letter gave the impression that the creditor had retained the law firm to collect the debt. The court also stated that it was deceptive for a law firm to "raise the specter" of legal action by "using its law firm title" when it was not acting in a legal capacity at the time it sent the letter. *Id.* at 1003.

Thus, the opinion narrowly read would require attorney debt collectors to put disclaimers in the body of their letters to steer clear of FDCPA violations. More broadly read, the opinion may be interpreted to mean that attorney debt collectors cannot send collection letters on law firm letterhead without violating the FDCPA unless an attorney was actively involved in mailing the letter.

SCRA: RETROACTIVE APPLICATION FOR MONEY DAMAGES

Following *Gordon v. Pete's Auto Service of Denbigh, Inc.*, 637 F.3d 454 (4th Cir. 2011), financial institutions may end up litigating more Servicemembers Civil Relief Act claims in federal court. The SCRA protects deployed servicemembers from foreclosures by allowing servicemembers to sue to reverse them. But until recently the SCRA did not allow servicemembers to sue for money damages. The Veterans Benefits Act changed that in 2010, adding section 802 to the SCRA, which grants servicemembers the right to sue for money damages in federal court, and to recover attorneys' fees and court costs.

In *Gordon*, the question presented was whether a servicemember injured before 2010 could bring a damages claim under section 802 in federal court. The 4th Circuit rejected the defendant's contention that allowing such a claim to proceed would unfairly change the parties' substantive rights and obligations in violation of the U.S. Constitution. The court concluded that applying section 802 retroactively merely gave the servicemember a key to the federal courts, not a new claim and was thus neither unfair nor unconstitutional.

DATA PRIVACY

In *Pineda v. Williams Sonoma Stores, Inc.*, 246 P.3d 612 (Cal. 2011), the California Supreme Court held that a cardholder's ZIP code constitutes personal identification information as that term is used in Section 1747.08 of the California Song-Beverly Credit Card Act of 1971. The defendant asked for and recorded the plaintiff's ZIP code when she used her credit card at the defendant's store. The defendant allegedly performed searches us-

ing the ZIP code to determine the customer's address, which would be used for marketing purposes and allegedly could be sold to other businesses. The plaintiff argued that asking for her ZIP code violated Song-Beverly, which prohibits businesses from requesting PII during a credit card transaction.

The state Supreme Court held that PII, which includes the cardholder's address and telephone number, is intended to include all components of the address, including the ZIP code. California's top court further stated that to find otherwise would permit retailers to obtain indirectly what they are prohibited from obtaining directly, since such information could be used to locate a cardholder's complete address or telephone number. As a result of this decision, retailers face a new wave of litigation — with no requirement that plaintiffs prove actual damages. In class actions based on *Pineda*, retailers face the prospect of substantial penalties. The decision has chilled California retailers' marketing and anti-fraud efforts.

In *Anderson v. Hannaford Brothers Co.*, 659 F.3d 151 (1st Cir. 2011), the 1st Circuit held that, in Maine, customers may bring negligence and implied contract claims against merchants that lose or fail to protect their payment card data and that those customers may recover their reasonably-incurred costs to mitigate the impact of the data loss. A class of consumer-plaintiffs sued a grocery chain after it admitted that hackers broke into its computer system and stole millions of customer credit and debit card numbers. The district court found that the plaintiffs' damages — costs to avoid liability for unauthorized charges — were unforeseeable and therefore not recoverable.

The appellate panel disagreed, holding that under Maine law, incidental costs expended in good faith to mitigate the harm caused by the data loss are recoverable, including costs to replace the cards and purchase fraud insurance. *Hannaford* may allow cases without allegations of actual theft or misuse of customers' data to go beyond the motion to dismiss stage.

A LOOK AHEAD

In 2011, the U.S. Supreme Court granted certiorari in three cases that could substantially impact financial services law. In *Magner v. Gallagher*, No. 10-1032, 2011 WL 531692 (S.Ct. *certiorari granted* 11/07/11), the Court will decide whether disparate impact claims are cognizable under the Federal Housing Act, and if so, whether such claims should be analyzed under the burden shifting approach used by three circuits, under the balancing test used by four circuits, under a hybrid approach used by two circuits, or under another test. The result will largely determine how difficult it will be for plaintiffs to bring discrimination claims against lenders.

In *Freeman v. Quicken Loans*, No. 10-1042, 2011 WL 578903 (S.Ct. *certiorari granted* 10/11/11), the Court will decide whether Section 8(b) of the Real Estate Settlement Procedure Act prohibits charging an unearned fee only if the fee is divided between two or more parties. In another RESPA case, *Edwards v. First American*, No. 10-708 (S.Ct. *certiorari granted* 06/20/11), the Court will decide whether the plaintiff has an "injury-in-fact," giving her standing to sue where she does not claim that the alleged kickback at issue impacted the price or quality of her settlement service.

Both *Freeman* and *Edwards* could significantly expand lenders' and settlement service providers' exposure to RESPA's criminal penalties and damages provisions. It is hoped that these rulings will bring some clarity to this area following years of inconsistent regulatory guidance.

Beyond the Supreme Court, the year 2012 also will likely see continued focus in both federal and state courts and by attorneys general on the foreclosure arena. In 2011, several state courts announced decisions invalidating prior foreclosures because of a lack of standing to foreclose as a result of notes that were not properly assigned. (*See, e.g., Deutsche Bank Nat. Trust Co. v. Mitchell*, 27 A.3d 1229 (N.J. Super. Ct. App. Div. 2011).) Massachusetts was particularly active in this respect. (*See U.S. Bank Nat. Ass'n v. Ibanez*, 941 N.E.2d 40 (Mass. 2011).) It remains to be seen how the thousands of sales invalidated by these rules will be resolved, and what new steps need to be taken to foreclose mortgages where ownership of the mortgage and note were separated.

FAIR DEBT

FAX NOT 'COMMUNICATION' UNDER FDCPA WITHOUT MORE

An employment verification request from a debt collector to a debtor's employer did not qualify as a third-party communication under the Fair Debt Collection Practices Act, according to the 10th U.S. Circuit Court of Appeals. The appellate panel therefore affirmed the lower court's rejection of the debtor's FDCPA claim against the debt collector, explaining that there was not enough information in the fax to alert the employer to the employee's debt. (*Marx v. General Revenue Corp.*, No. 1:08-CV-02243, 2011 WL 6396478 (10th Cir. 12/21/11).)

Olivea Marx defaulted on her student loan with EdFund, a division of the California Student Aid Commission, which hired General Revenue Corp. to collect. GRC faxed an employment verification form to Marx's employer as fax as part of GRC's inquiry into Marx's eligibility for wage garnishment. This form displayed GRC's

