Buckley Sandler LLP

Legal Counsel to the
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Litigation Year in Review

June 22, 2011

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Major Topics

- Arbitration Agreements: *AT&T v. Concepcion*
- Servicemembers' Civil Relief Act
- UDAP Enforcement Trends
- Ancillary Products
- Collections

AT&T v. Concepcion: Background

- Individual Arbitration Clause in Cell Phone Contract: All arbitration must occur on an individual – rather than on a group/class – basis.
- California's *Discover* Rule: Class arbitration waivers in consumer contracts are unconscionable, and therefore unenforceable
- Federal Arbitration Act ("FAA")
  - When a state law prohibits arbitration outright, FAA preempts
  - But when a law is generally applicable yet is applied in a fashion that disfavors arbitration, what result?

AT&T v. Concepcion: Holding

- State law invalid, FAA preempts
- State must respect mandatory individual arbitration
- “States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."
- If a contract requires disputes to be arbitrated on an individual basis, proceeding as a class action "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."

Trends in Arbitration

- Concepcion continues 2010 trend of enforcing arbitration agreements according to their terms
  - *Stolt-Nielson S.A. v. AnimalFeeds International Corp.* (2010)
  - *American Express Co. v. Italian Colors Restaurant* (2010)
  - *Rent-A-Center, West, Inc. v. Jackson* (2010)

The CFPB and Arbitration

- CFPB is directed by statute to study arbitration and promulgate regulations
- Elizabeth Warren has written extensively on revising consumer arbitration
  - "Arbitration may seem like the *Andy of Mayberry* form of dispute resolution--folksy, cheap and fair. The data suggest, however, that it is Darth Vader's Death Star--the Empire always wins."
  - "[T]he arbitrators are beholden to the repeat players (credit card companies) that pay their fees."
  - "Arbitration clauses, for example, may look benign to the customer, but their point is often to permit the lender to escape the reach of class action lawsuits."
  - "[Arbitration] clauses can require customers to travel to distant locations, pay fees, and ultimately face an arbitrator who rules in favor of the credit card company 96% of the time."

SCRA Litigation: Background

- “Robosigning” allegations have lead to increased review of foreclosures generally
- Judicial foreclosures require SCRA affidavits
- Lead to greater focus on SCRA generally
- Most problems are appearing in non-judicial states

SCRA Enforcement

- Purpose is to financially protect active-duty servicemembers
- Applies to regular military and National Guard servicemembers
- DOJ Enforcement Priorities
  - Interest rate cap
  - Foreclosure/Repossession protections
  - Affidavits
  - Eviction protection

Recent SCRA Settlements: Terms

- May 2011 DOJ Settlements
  - Foreclosure settlements with Countrywide and Saxon
  - Credit card settlement with Bank of America
- Payments for prior SCRA violations
- Enhanced Policies and Procedures
- Foreclosure Monitoring Program
- Compliance Training – employees and contractors
- Foreclosure Review/Audit
  - Additional Interest Rate Audit for Countrywide
- Reporting, Record Retention, and DOJ right to review records

SCRA Compliance Challenges

- Servicemembers do not always notify their lenders of active duty military service
- DMDC Database Errors and Lag Time
- National Guard v. Regular Military protection dates
- Interest rate cap includes interest & fees
- 9-month post-service foreclosure limit
- Eviction – no information about non-borrower tenants

SCRA Compliance Risks

- Mistakes are costly
- High penalties
- Significant risk to corporate reputation

SCRA Litigation Landscape

- SCRA litigation on rise
  - Increased focus on SCRA compliance issues
  - Increased servicemember awareness
- Plaintiffs firms creating SCRA practice groups and soliciting plaintiffs

UDAP

- FTC Act is broad, so Congress limited suits
  - FTC only
    - Discretion in enforcement
    - Coherent body of precedent
    - Weigh actions against FTC's overall mission
  - Injunctions only
  - Policy statements
    - Statement on Unfairness
    - Statement on Deception
  - Federal banking agencies have adopted FTC interpretations & discretion
    - E.g. OCC's Statement on Unfair & Deceptive Mortgage Practices

Shift in UDAP Analysis

- Under FTC policy statement, practice is not “unfair” if consumer can reasonably avoid
- New efforts appear to be moving away from this standard
  - E.g., HOEPA Rule stated income prohibition

State AGs and UDAP

- States AGs using state UDAP statutes without similar discretion
- Wells Fargo Payment-Option ARM Settlement
  - UDAP claim that loans did not explain that first few years' minimum payments would cause negative amortization
  - 8 Attorneys General sued, settled for 8,175 borrowers at a total cost of $772 million, including over $402 million in principal forgiveness

State AGs and UDAP

- Ohio AG suits against mortgage servicers
  - Servicers violated state UDAP law through “inadequate, incompetent, and inefficient handling of complaints, inquiries, disputes, and requests for information and assistance.”
  - No statutory, regulatory, or advisory guidance on these terms
  - Policy goals are being shoehorned into UDAP law
- Foreshadow CFPB actions?
  - Cordray now leads enforcement at CFPB

State AGs and UDAP

- The future: federal private right of action for UDAP?
  - Easier for plaintiffs to file "shakedown" class action suits
  - Increased pass-through costs to consumers
  - Macey & Miller study: Plaintiff's attorneys not tied to their clients
- Retroactive declarations that loans and financial products following all black-letter law are still state UDAP violations
  - *Massachusetts v. Fremont* – "Just because we, as a society, failed earlier to recognize that loans with these … characteristics were generally unfair does not mean that we should ignore their tragic consequences and fail now to recognize their unfairness."
- Will require ethereal "fairness awareness" by lenders

State AG Settlements

- State AGs negotiating settlement with servicers
- Using UDAP to achieve variety of policy objectives
  - E.g., single point of contact
- Negotiations ongoing

Ancillary Products

- Hot topic for legislative oversight
  - 33 bills proposed in 15 states and Congress
- CFPB expected to review
- Class Action Decisions
- Gap Insurance targete
- Future trends from the UK

Ancillary Products – Class Actions

- Federal Class Action Prerequisites are representative of state law:
  - Numerosity of class
  - Commonality of questions of law & fact
  - Typicality of representatives claims
  - Ability of representatives to represent and protect the class

Ancillary Products – Class Actions

- *Grim v. Safe-Guard Products Int'l, LLC*
  - False Advertising & State UDAP claims based on sales pitches
  - Burden is on plaintiff to establish all class certification elements by "substantial evidence"
  - Plaintiff failed commonality
    - Plaintiff had no evidence to prove that sales pitches were the same across the board
    - Also failed to prove that Safe-Guard had a common policy of non-disclosure of important facts
- *Arevalo v. Bank of America Corp*.
  - Plaintiffs were involuntarily enrolled in credit protection plan ("CPP")
  - Plaintiffs sought to represent two classes – involuntarily enrolled and voluntarily enrolled borrowers
  - Court rejected the voluntary plaintiffs on the basis of standing:
    - "Here, the only apparent similarity between class representatives and class members who purchased CPP is that both groups came to be enrolled in CPP."
- Takeaway: Courts are increasingly more likely to accept class challenges on the basis of Commonality and Standing/Typicality

Ancillary Products – Minnesota AG

- *Minnesota v. Discover Financial Services* (2010)
- Suit by State AG for misleading enrollment in credit, payment, and identity protection plans
  - Read actual sale offer in rapid, muddled, stilted manner
  - Any positive acknowledgement by consumer → enrollment
    - Some consumers were enrolled even if they only agreed to receive materials
    - Sometimes will enroll people who did not give affirmative response
  - Also enroll customers who call to active card; customers unaware of additional protection plan
- Verification
  - Call recordings not always kept to ensure actual enrollment
  - Discover would not review calls to determine actual enrollment
  - Discover's review of calls was not impartial

Ancillary Products – Approved Providers Lists

- *Midwest Agency Services, Inc. v. JP Morgan Chase*
- Chase Auto Finance would only accept gap insurance contracts from approved providers, including Chase Insurance Agency but excluding plaintiffs
- Antitrust claims failed – market remained competitive overall, and Chase would still accept insurance from some third parties
- Court held no antitrust violation
  - Gap insurance was always optional
  - Competitor did not stat an “antitrust injury” – i.e. a consumer market injury

Future Trends From the UK?

- Financial Services Authority has taken made unique intervention in payment protection insurance market
- Problems in marketing of PPI
  - Consumers were told PPI was compulsory
  - Self-Employed debtors were sold employment protection
  - Borrowers not asked about preexisting medical conditions
- £5 billion in penalties
  - Many borrower receiving all principal and interest paid
  - Banks also hiring up to 6,000 additional workers to handle PPI reimbursements
- Burden appears to be on seller to ensure that arms-length transaction is fair

Ancillary Products - Takeaways

- Method of enrollment in ancillary products is becoming more litigated
  - *Grim, Arevalo, Discover*
- Complete and meaningful disclosures necessary
- Courts are keeping burden on plaintiffs to establish class status
- Competitors cannot use antitrust law without an actual harm to the consumer market
- Courts may begin to require lenders to ensure that consumers actually qualify for and need ancillary products

Collections – "Robo-signing"

- Previously thought of as a foreclosure-only issue
- *Lauber v. Encore Capital Group* (E.D. Wash.)
  - Claims identical to mortgage robosigning
    - 100-400 affidavits/day
    - No personal knowledge
    - No knowledge of record-keeping procedures
    - Business Records affidavits signed en masse, and later attached to records as needed – affiant does not know what documents he is verifying
    - Depositions of former employees to support these claims
  - Class action on FDCPA and state law claims
  - Case to watch as it progresses

Collections – "Robo-signing"

- *Midland Funding LLC v. Brent* (N.D. Oh)
  - Affiant asserted personal knowledge of account
    - Court: these are "patently false claims"
  - Defendant did not provide evidence debt amount was wrong or that Midland believed debt information to be false
  - Borrower did contest presence of debt, so affidavit was material
  - "In general, a complaint and attached affidavit act as both a message to the court and … to the debtor."
  - Court found an FDCPA violation

Collections – Time-Barred Debts

- Emerging rule is that trying to have a debtor voluntarily pay a time-barred debt is not a FDCPA or FCRA violation
  - The debt still exists; statute of limitations expiring is only end of legal remedy
- However, threats of litigation violate the FDCPA
- Least sophisticated consumer standard governs

Collections – Time-Barred Debts

- *Huertas v. Galaxy Asset Mgmt*. (3d Cir. 2011)
  - Debt was beyond NJ statute of limitations
  - Collection letter:
    - Sent "to resolve this issue"
    - If Huertas did not dispute they would assume debt was valid
    - Creditor would access private consumer information
    - "**THIS IS AN ATTEMPT TO COLLECT A DEBT**"
  - No violation of FDCPA
    - 3rd Circuit set a clear standard for what is a FDCPA violation for time-barred debts
  - Least Sophisticated Consumer standard

Collections – Time-Barred Debts

- New Mexico Attorney General UDAP Notice
- New Mexico Model Disclosure:
  - "This debt may be too old for you to be sued on it in court. If it is too old, you can't be required to pay it through a lawsuit."
  - "You can renew the debt and start the time for the filing of a lawsuit against you to collect the debt if you do any of the following: make any payment of the debt; sign a paper in which you admit that you owe the debt or in which you make a new promise to pay; sign a paper in which you give up ("waive") your right to stop the debt collector from suing you in court to collect the debt."

Collections - Telephones

- FDCPA & TCPA liability are possible
- *Veerstag v. Bennett, DeLoney & Noyes, P.C.* (D. Wyo. 2011)
  - Prerecorded debt collection calls to cell phone
  - Did not identify as debt collection calls
  - Held to be FDCPA and TCPA violations
- *Powell v. West Asset Mgmt*. (N.D. Ill. 2011)
  - Powell was not the debtor – West autodialed wrong number
  - West argued Powell had obligation to mitigate damages by answering phone and telling West they had wrong number
  - Court held as a matter of law Powell had no such obligation
  - TCPA violation by West

Collections - Telephones

- *Jachimiec v. Regent Asset Mgmt. Solutions* (S.D. Ca.)
  - Borrower left **$2.68** in his account before military deployment
  - Bank mailed a letter to borrower – returned undelivered
  - Bank charged a $5.00 "Returned Statement Fee," which put account into overdraft
  - Overdraft fees charged every day for months
  - $800 debt transferred to Regent for collection
  - Regent placed automated calls to cellphone and contacted borrower even after borrower's counsel requested communication
  - **Damages sought under FDCPA, TCPA, and State law → $14,000**