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All Consuming

LEGAL UPDATES FOR CONSUMER FINANCE PROFESSIONALS

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Welcome to the first issue of All Consuming. The Consumer Finance Practice Group will periodically distribute an issue of All Consuming to advise its clients and colleagues of litigation and regulatory developments affecting the consumer finance industry in jurisdictions where we practice. For our inaugural issue, we thought we would highlight three decisions from earlier this year - just in case you missed them.

Confirmation of the West Virginia Attorney General's Authority to Hire Private Counsel on Behalf of the State

by R. Scott Adams

For more than a decade, the circuit courts in West Virginia have wrestled with the issue of whether the State Attorney General has the ability to retain private attorneys to pursue litigation on behalf of the State. In June, the Supreme Court of Appeals of West Virginia issued a decision confirming the Attorney General does, in fact, have that authority. In *State of W. Va. ex rel. Discover Financial Service, Inc. v. Nibert,* 231 W. Va. 227, 744 S.E. 2d 625 (2013), the Court addressed a petition brought by a dozen large financial institutions and a pharmaceutical company seeking to disqualify private lawyers appointed by the Attorney General as "special assistant attorneys general." The petitioners argued, among other things, that no statutory or common law authority authorizes the retention of outside counsel by the Attorney General. In support of their argument, the petitioners relied upon the 1982 decision of *Manchin v. Browning,* 170 W. Va. 779, 296 S.E. 2d 909 (1982), for the proposition that the Attorney General has only the powers expressly enumerated by statute and the West Virginia Constitution. The Supreme Court of Appeals of West Virginia rejected the petitioners' argument and held that the Attorney General has the ability to retain private lawyers to represent the State. The Court further stated that the decision in *Manchin* was overruled to the extent it conflicted with the decision in *Discover*, such that the Attorney General now has additional common law powers.

In conjunction with this authority Attorney General Patrick Morrisey has

Strengthened Enforcement of Agreements to Arbitrate

by Sarah B. Smith

Arbitration sizzled in the Supreme Court of Appeals of West Virginia this summer with the Court's decision in *Credit Acceptance Corporation v. Front,* 745 S.E.2d 556, 569-70 (W. Va. 2013), a consolidated appeal of two opinions denying motions to compel arbitration. The circuit courts below concluded that the unavailability of a designated arbitration forum after the formation of the arbitration agreement rendered the agreement unenforceable. The circuit courts also interpreted the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-1-101, *et seq.,* to prohibit consumers from waiving their constitutional right to a jury trial. In a victory for arbitration proponents, the Court reversed and remanded for the entry of orders directing the cases to arbitration.

The Court first considered its jurisdiction over the appeal. In a seminal decision, the Court

dedicated a page on the Attorney General's website to outside counsel issues, including a policy he recently implemented to promote transparency in the selection process and payment of attorneys' fees.

Clarification on Statutes of Limitation

by Angela L. Beblo

In June, the Supreme Court of Appeals of West Virginia answered two certified questions interpreting statutes of limitation in West Virginia. In *Tribeca Lending, Inc. v. McCormick,* 231 W. Va. 455, 745 S.E.2d 493 (2013), McCormick asserted counterclaims in response to an eviction action, challenging the foreclosure action and claiming violations of the West Virginia Consumer Credit and Protection Act ("WVCCPA"). Upon Tribeca's motion, the circuit court conditionally dismissed the claims and certified two questions to the Supreme Court of Appeals of West Virginia.

In the first certified question, the Supreme Court of Appeals was asked whether West Virginia's lien statute (W. Va. Code § 38-1-4a), which gives a borrower one year to challenge the validity of a foreclosure sale, applied to claims relating to the underlying mortgage loan agreement that could be brought as a counterclaim to an unlawful detainer action. The Supreme Court of Appeals held that § 38-1-14a applied only to procedural challenges to the validity of a foreclosure sale and did not bar other potential claims, such as alleged violations of the WVCCPA.

In the second certified question, the Court was asked to rule on when the WVCCPA one-year statute of limitations for non-revolving loans (W.Va. Code § 46A-5-101(1)) began to run.The WVCCPA provides that no action may be brought "more than one year after the due date of the last scheduled payment of the agreement." In dispute was the meaning of the "last scheduled payment of the agreement" for the underlying defaulted mortgage loan. McCormick argued "scheduled payment" referred to the periodic payments scheduled under the original loan documents. Hence, according to McCormick, limitations began to run on the date of the last payment, or the date of maturity of the loan - in this case, 2035. Looking to the terms of the mortgage loan, Tribeca argued that for a defaulted loan that has been accelerated, the last scheduled payment is the date the full amount is due and owing after acceleration.

The Supreme Court of Appeals of West Virginia held that "if the periodic payments are accelerated under the terms of the agreement, causing all payments to become immediately due and payable by the consumer, then the statute of limitations begins to run on the date when the accelerated payment is due." The Supreme Court of Appeals of West Virginia found that, pursuant to the parties' agreement, the "last scheduled payment" was due in 2007 after Tribeca's acceleration of the loan. Thus, McCormick's counterclaims were untimely.

found that "an order denying a motion to compel arbitration is an interlocutory ruling which is subject to immediate appeal under the collateral order doctrine." *Id.* at Syl. pt. 1.

Reaching the merits, the Court advanced its unconscionability jurisprudence post *Marmet Health Care Center Inc. v. Brown,* 132 S. Ct. 1201 (2012). The Court affirmed the Federal Arbitration Act, 9 U.S.C. §1, *et seq.,* preempts statutes that target arbitration; the WVCCPA cannot prohibit jury trial waivers. The Court also held that "[w]here an arbitration agreement names a forum for arbitration that is unavailable or has failed for some reason, a court may appoint a substitute forum pursuant to section 5 of the [FAA], only if the choice of forum is an ancillary logistical concern." *Id.* at Syl. pt. 3. However, the Court determined such an analysis was unnecessary in this case because the AAA, which was alternatively designated, was available to arbitrate the claims in this case.

To learn more about the Credit Acceptance decision, read the full article.

Tidbits.

Our Consumer Finance Practice Group practices well beyond the boundaries of West Virginia. Spilman lawyers have represented clients in consumer protection cases in Kentucky, North Carolina, Ohio, Pennsylvania and Virginia. We have also assisted clients in matters pending in several other jurisdictions, and have counseled clients on compliance with federal lending, credit reporting, debt collection and privacy laws in their nationwide operations.

Spilman attorneys have defended hundreds of individual and class-action lawsuits alleging violations of federal and state consumer protection statutes, including the West Virginia Consumer Credit and Protection Act, the Federal Fair Debt Collection Practices Act, the Fair Credit Reporting Act, the Truth-in-Lending Act and Regulation Z. We have also represented clients in investigations by state and federal regulators such as the Federal Reserve Board and state attorney general offices.

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