The CARLAWYER©

By Eric L. Johnson

Here's our monthly article on selected legal developments we think might interest the auto sales, finance, and leasing world. This month, the developments involve the Consumer Financial Protection Bureau, Federal Financial Institutions Examination Council, Federal Reserve Board, Federal Trade Commission, and the Federal Communications Commission. As usual, our article features the "Case(s) of the Month" and our "Compliance Tip." Note that this column does not offer legal advice. Always check with your lawyer to learn how what we report might apply to you or if you have questions.

Federal Developments

On December 7, the **Consumer Financial Protection Bureau released a report on the utilization of certain protections under the Servicemembers Civil Relief Act by members of the National Guard and Reserves on active duty**. Specifically, the report looks at whether these servicemembers are receiving SCRA interest rate reduction benefits and SCRA protections against vehicle repossession without a court order. The report uses data from the Bureau's Consumer Credit Panel from 2007 to 2018 matched to activation data from the Department of Defense. The report also provides recommendations to creditors to increase servicemember access to SCRA protections.

On December 12, the **Consumer Financial Protection Bureau issued a proposed rule that would require certain nonbank covered entities (with exclusions for insured depository institutions and insured credit unions) to report to an online registry final public orders and judgments, including consent and stipulated orders and judgments, issued by any government agency or court against an entity for violation of federal and state consumer protection laws**. According to the Bureau's news release, the proposed online registry "will allow the CFPB to track and mitigate the risks posed by repeat offenders, while also being able to monitor all lawbreakers subject to agency and court orders." The registry would be created and maintained by the Bureau, and the entities required to register would provide basic identifying information about the company and the order or judgment, including a copy of the order or judgment, and periodically update the registry to ensure its continued accuracy and completeness. The proposed rule would also require certain larger nonbanks supervised by the Bureau to designate a senior executive to submit an annual statement attesting to the steps taken to oversee the activities subject to the order or judgment and whether the executive knows of any violations of, or other instances of noncompliance with, the order or judgment. Comments must be received within 60 days after the proposed rule is published in the *Federal Register*, which is expected shortly.

On December 15, the **Federal Financial Institutions Examination Council's Task Force on Consumer Compliance adopted revised examination procedures for the Fair Debt Collection Practices Act and its implementing regulation, Regulation F**. The revised examination procedures incorporate the CFPB's 2020 and 2021 final debt collection rules that went into effect on November 30, 2021.

On December 16, the **Federal Reserve Board announced the adoption of a final rule that implements the Adjustable Interest Rate (LIBOR) Act**. The final rule establishes benchmark replacements for certain contracts that use the LIBOR reference rate and do not have terms that provide for the use of a clearly defined and practicable replacement benchmark rate when the LIBOR reference rate in its current form is discontinued on June 30, 2023. The final rule also provides additional definitions and clarifications consistent with the Adjustable Interest Rate (LIBOR) Act.

On December 20, the **Consumer Financial Protection Bureau entered into a consent order with Wells Fargo Bank in which the bank agreed to pay more than $2 billion in redress to consumers and a $1.7 billion civil penalty for, among other legal violations, illegally assessing fees and interest charges when servicing auto financing and mortgage loan accounts, wrongly repossessing cars, misapplying payments, failing to refund certain unearned fees on debt cancellation products, incorrectly denying mortgage loan modifications to certain qualified borrowers, charging unlawful overdraft fees, applying other incorrect charges to checking and savings accounts, and improperly freezing or closing customer accounts.**

On December 19, the **Federal Reserve Board and the Federal Deposit Insurance Corporation announced the 2023 asset-size thresholds used to define "small bank" and "intermediate small bank" under their Community Reinvestment Act regulations**.

The **Federal Trade Commission recently extended the public comment period on an advance notice of proposed rulemaking regarding deceptive or unfair acts or practices relating to "junk fees**." Comments may now be submitted until February 8, 2023. For purposes of the ANPR, the FTC stated that "the term 'junk fees' refers to unfair or deceptive fees that are charged for goods or services that have little or no added value to the consumer, including goods or services that consumers would reasonably assume to be included within the overall advertised price; the term also encompasses 'hidden fees,' which are fees for goods or services that are deceptive or unfair, including because they are disclosed only at a later stage in the consumer's purchasing process or not at all, whether or not the fees are described as corresponding to goods or services that have independent value to the consumer. These terms may overlap - a junk fee can be a hidden fee, but not all junk fees are hidden fees."

On December 27, the **Federal Communications Commission issued an order that, among other things, affirmed the numerical call limits and opt-out requirements for callers exempted from the Telephone Consumer Protection Act and allowed such exempted callers to obtain either oral or written consent for additional calls**. The TCPA restricts certain calls to residential and wireless phone numbers absent the prior express consent of the called party or a statutory exemption but authorizes the FCC to exempt certain calls from these restrictions. The FCC has since exempted calls to residential numbers that are not made for a commercial purpose, calls made for a commercial purpose that do not contain an unsolicited advertisement, calls from tax-exempt nonprofit organizations, and healthcare-related calls subject to the Health Insurance Portability and Accountability Act; for wireless numbers, the FCC has exempted calls from package delivery companies, financial institutions, prison inmate calling services, and certain healthcare providers, subject to specific conditions. In 2020, the FCC adopted measures to implement Section 8 of the Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act by limiting the number of exempted calls that can be made to residential lines, requiring that callers making exempt calls allow consumers to opt out of future exempt calls, and codifying in its rules the existing exemptions for certain types of calls to wireless numbers, including calls by package delivery companies, financial institutions, prison inmate calling services, and healthcare providers. In the current order, the FCC granted the petitioners' request to allow exempted callers the option of obtaining either oral or written consent if they wish to make more calls than the numerical limits. However, the FCC denied the petitioners' request to revise any of the numerical limitations on the number of exempt non-telemarketing calls to residential lines. The FCC also concluded that the different numerical limitations for different categories of exempt calls to residential lines are constitutional. Finally, the FCC denied the petitioners' request to reconsider the expanded opt-out requirements for exempt informational calls.

Case(s) of the Month

Magistrate Recommended that Court Compel Arbitration of Vehicle Lessee's Claims Challenging Fee He Was Required to Pay to Exercise His Lease Purchase Option Pursuant to Arbitration Provision in Retail Lease Order: When an individual leased a vehicle from a dealership, the parties entered into a Retail Lease Order and a Florida Motor Vehicle Lease Agreement. The lease was assigned to a lease titling trust. The lessee filed a class action complaint against the attorney-in-fact and exclusive servicing agent for the trust, the initial beneficiary of the trust, and the beneficial owner of leases/leased vehicles assigned to the trust for violating federal and Florida law by forcing him to pay amounts that had not previously been disclosed to him and that were not permitted under the terms of the FMVLA when he exercised his option to purchase the vehicle prior to expiration of the lease. The defendants moved to compel arbitration of the lessee's individual claims pursuant to an arbitration provision in the RLO. A magistrate judge for the **U.S. District Court for the Southern District of Florida** recommended that the court grant the motion. The magistrate first addressed whether the defendants, as nonparties to the RLO containing the arbitration provision, could enforce the arbitration provision, which states that it applies to any claim or dispute between the lessee and the dealership or its employees, agents, successors, or assigns. The magistrate determined that the lessee did not contest the assertion that the RLO was assigned, and the RLO specifically provides that it can be assigned. Therefore, the magistrate determined that the defendants, as assignees of the RLO or the assignee's agents, could enforce the arbitration agreement against the lessee. Even if the RLO was not assigned, the magistrate concluded that the defendants could enforce the arbitration agreement under the doctrine of equitable estoppel because the lessee's claims will require reference to the RLO. The

magistrate went on to determine that the wording of the RLO's arbitration provision reflects the lessee's and the dealership's agreement to delegate all arbitrability issues, including whether the arbitration provision applies to the lessee's claims, to the arbitrator, as the arbitration provision, by its terms, extends to "the interpretation and scope of this Arbitration Provision, and the arbitrability of the claim or dispute." *See* ***Scherer v. Hyundai Capital America, Inc.***, 2022 U.S. Dist. LEXIS 212562 (S.D. Fla. November 22, 2022).

This Month's *CARLAWYER©* Compliance Tip

Our Case of the Month highlights two issues that often prove frustrating to motor vehicle dealers: options to purchase at the end of a lease term and arbitration. The plaintiff lessee filed a class action against the attorney-in-fact and exclusive servicing agent for the trust, the initial beneficiary of the trust, and the beneficial owner of leases/leased vehicles assigned to the trust claiming that he was forced to pay amounts that had not been disclosed to him and that were not permitted under Florida law when he exercised his option to purchase the vehicle before the lease expired. On arbitration the issue was whether the defendants could enforce the arbitration provision, which states that it applies to any claim or dispute between the lessee and the dealership or its employees, agents, successors, or assigns. Does your Lease Agreement clearly disclose to your lessees any amounts they may be required to pay to exercise their purchase option? Is your arbitration agreement clear that it applies to any disputes not only with your dealership, but also to any assignees of your dealership? Time to kick off the New Year with some coffee, a review of your consumer-facing documents and a call to your knowledgeable attorney!

So, there's this month's roundup! Stay legal, and we'll see you next month.

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