

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, New York attorney general, Office of the Comptroller of the Currency, and the National Credit Union Administration Board. 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 January 4, the **Consumer Financial Protection Bureau and the New York attorney general filed a lawsuit against Credit Acceptance Corporation in connection with its financing of consumers' used vehicle purchases.** Specifically, the complaint alleges that CAC "engaged in deceptive and abusive acts or practices in violation of the Consumer Financial Protection Act of 2010 ... by obscuring the cost of credit for auto loans and taking unreasonable advantage of consumers' lack of understanding of the risk of default and the severity of the consequences, as well as their inability to protect their interests, and for providing substantial assistance to dealers, even though CAC knew or should have known the dealers were misrepresenting the voluntary nature of add-on products." The complaint also alleges that CAC "violated New York Executive Law § 63(12) by engaging in repeated and persistent fraudulent and illegal conduct, including misstating the cost of credit, entering into unconscionable contract terms, and violating the state-law statutory disclosure regimes set out in the New York Personal Property Law. CAC likewise violated New York General Business Law § 349 by engaging in these same deceptive business practices." Finally, the complaint alleges that because CAC allegedly violated the CFPB and New York law, it also violated New York's securities fraud law.

On January 11, the **Consumer Financial Protection Bureau announced a proposed settlement with Forster & Garbus, LLP, resolving allegations that the law firm used illegal debt collection practices in violation of the Fair Debt Collection Practices Act and the Consumer Financial Protection Act's prohibition against deceptive acts and practices.** The Bureau alleged that, from 2014 through 2016, the law firm filed debt collection lawsuits against consumers without the requisite documentation supporting the debt and falsely represented to consumers that attorneys were meaningfully involved in the preparing and filing of lawsuits. If approved by the court, the order would require Forster & Garbus to: (1) retain specific documents supporting the debt before filing a debt collection lawsuit, including the name of the original creditor, evidence that the consumer authorized the debt, the chain of title supporting any sale of the debt, and a breakdown of how the debt amount was calculated; (2) certify that an attorney whose name will appear on the complaint has reviewed the documentation supporting the debt and ensured that the complaint is consistent with the documentation; (3) dismiss any pending collection lawsuit if it does not certify its compliance with the specified documentation and meaningful attorney review requirements within 120 days of the court entering the order; and (4) pay a \$100,000 penalty to the Bureau. Noting that Forster & Garbus brought the allegedly illegal lawsuits on behalf of companies like Discover and Citibank, CFPB Director Rohit Chopra stated in the news release announcing the settlement that "[t]he CFPB will be scrutinizing large financial companies that enlist debt collection outfits operating lawsuit mills."

On January 11, the **Consumer Financial Protection Bureau announced a proposed rule that would require nonbanks subject to its supervisory authority, with limited exceptions, to register each year in a public registration system established by the Bureau if they use certain terms and conditions in form contracts for consumer financial products and services that seek to waive consumer rights or other legal protections or limit the ability of consumers to enforce or exercise their rights.** The specific terms and conditions defined in the proposed rule include waivers of claims a consumer can bring in a legal action; limits on a company's liability to a consumer; limits on a consumer's ability to bring a legal action by dictating the time frame, forum, or venue for a consumer to bring a legal action; limits on the ability of a consumer to bring or participate in a class action; limits on the ability of a consumer to file complaints or post reviews; certain other waivers of consumer rights or other legal protections; and arbitration agreements. The specified terms and conditions would be covered by the proposed rule whether they are legally enforceable or not. Registrant information and information about their use of these terms and conditions would be published in the registry. The public comment

period will remain open for 60 days following publication of the proposed rule on the Bureau's website or 30 days following publication of the proposed rule in the *Federal Register*, whichever period is longer.

On January 12, the **Office of the Comptroller of the Currency issued a revised "Fair Lending" booklet of the *Comptroller's Handbook*, which replaces the booklet of the same title issued in January 2010.** The booklet assists OCC examiners in assessing fair lending risk and evaluating compliance with the Fair Housing Act and the Equal Credit Opportunity Act and its implementing regulation, Regulation B.

On January 26, the **National Credit Union Administration Board approved maintaining the current 18 percent interest rate ceiling for loans made by federal credit unions for a new 18-month period from March 11, 2023, through September 10, 2024.**

Case(s) of the Month

Dealership Was Vicariously Liable for Employees' Actions in Connection with Consumer's Fraudulent Purchase and Financing of Vehicle with Forged Documents in Violation of New Jersey Consumer Fraud Act: An individual went to a dealership and used his grandmother's personal information to buy and finance a vehicle without her knowledge. The grandmother later sued her grandson, the dealership, the dealership's salesperson, and the dealership's sales manager. The salesperson and the manager oversaw the sales transaction with the grandson. The grandmother moved for summary judgment on her New Jersey Consumer Fraud Act claim, alleging that the dealership engaged in an unconscionable business practice by transacting the sale of the vehicle in her name using forged signatures and by participating in the wrongful use of her personal information. She also alleged that the dealership was vicariously liable for the salesperson's and the sales manager's actions. The grandmother alleged that she suffered damages comprised of the deficiency owed to the financing company, tolls, and parking fines. The trial court granted summary judgment for the grandmother on her CFA claim against the dealership. The dealership appealed, arguing, in part, that it could not be vicariously liable for the salesperson's and the sales manager's actions because their actions were criminal and thus not within the scope of their employment.

The **Superior Court of New Jersey, Appellate Division**, affirmed the trial court's decision. The appellate court agreed with the trial court's findings that the salesperson and the sales manager were acting in those capacities when they completed the sale and financing transaction with the grandson and that the grandmother was not present at the transaction and did not authorize or sign the sales documents. The appellate court agreed with the trial court's conclusion that the salesperson and the sales manager enabled the grandson to complete a fraudulent purchase with forged documents and, therefore, the salesperson's and the sales manager's conduct constituted an unconscionable business practice in violation of the CFA. The appellate court also agreed with the trial court's conclusion that the dealership was liable for its employees' actions because the salesperson and the sales manager were acting within their scope of employment when they engaged in the fraudulent conduct. The trial court found that the salesperson and the sales manager were performing the kind of work they were employed to perform (i.e., effecting the sales of vehicles and associated financing) while present on their employer's premises during business hours and for the purpose of serving their employer. In addition, the trial court noted that the salesperson and the sales manager acknowledged the dealership's written policy regarding unethical conduct, which specifically included accepting or writing credit applications known to be false and forging customers' signatures on any documents and explicitly stated that the dealership could be exposed to liability for the type of conduct engaged in by the salesperson and the sales manager. See *De Medeiros v. Brilhante*, 2022 N.J. Super. Unpub. LEXIS 2514 (N.J. Super. App. Div. December 13, 2022).

This Month's CARLAWYER® Compliance Tip

Our Case of the Month discusses the extremely important and all-to-common issue of fraud committed on the dealership. In this case, not only did the grandson commit fraud on the dealership, but so too did the salesperson and sales manager. The actions by the salesperson and the sales manager were attributed to the dealership and the dealership was vicariously liable for their employees' actions. What can a dealership do to protect itself? Have a written policy regarding unethical conduct, including that writing or accepting credit applications that are false and forging customers' signatures on any documents are terminable offenses. Conduct frequent audits of your deals to ensure that no fraud occurred in the transaction. Get your sales and F&I employees AFIP certified. If you find evidence of fraud, you need to take quick and decisive action. Don't let this type of fraud take root in your dealership!

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

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