

By Eric 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 Department of Justice, Consumer Financial Protection Bureau, Federal Financial Institutions Examination Council, Federal Reserve Board, and Federal Trade 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 September 28, the **Department of Justice announced a settlement with Westlake Financial, resolving allegations that the company violated the Servicemembers Civil Relief Act by failing to provide interest rate benefits to qualified servicemembers for the entire period required under the Act and by improperly delaying approval of interest rate benefit requests.** Under the settlement, Westlake agreed to pay \$185,460 to 250 servicemembers who did not receive interest rate benefits back to the date their military orders were issued or who had to wait more than 60 days to receive their benefits. Servicemembers who did not receive interest rate benefits back to the date their orders were issued will receive a refund of any excess interest they paid, as well as an additional payment of three times the overpayment or \$100, whichever is higher. Servicemembers whose interest rate approvals were delayed more than 60 days will receive \$500. Westlake will also be required to pay an additional \$40,000 civil penalty to the United States. Finally, the agreement requires Westlake to revise its SCRA policies and procedures and training to ensure that interest rate benefits are timely and appropriately applied to servicemember accounts.

On September 29, the **Consumer Financial Protection Bureau sued MoneyLion Technologies, Inc., an online lender, and 38 of its subsidiaries, alleging that the defendants' practices violated the Military Lending Act and the Consumer Financial Protection Act.** Specifically, the complaint alleged that the defendants overcharged servicemembers and their dependents by imposing membership fees that, together with stated loan interest rate charges, exceeded the MLA's 36% rate cap. The complaint also alleged that the defendants collected on these illegal loans and associated fees, failed to give requisite disclosures, and inserted illegal arbitration clauses designed to take away servicemembers' ability to vindicate their rights in court. According to the complaint, the defendants required consumers to join a MoneyLion membership program and pay monthly membership fees to access a "low-APR" installment loan product, but the defendants did not allow consumers to cancel their memberships until their loans were paid in full and, in some instances, until they paid their past-due membership fees. The defendants allegedly misled consumers by telling them at the time of enrollment that they could cancel their memberships for any reason. The Bureau is seeking monetary relief for consumers, disgorgement of unjust gains, an end to unlawful practices, and a civil money penalty.

On October 3, the **Federal Financial Institutions Examination Council, on behalf of its members, released an update to the October 2018 Cybersecurity Resource Guide for Financial Institutions.** The purpose of the guide is to help financial institutions meet their security control objectives and prepare to respond to cyber incidents. In response to the increasing prevalence of ransomware incidents, the updated guide now includes ransomware-specific resources to address this threat.

On October 5, the **Department of Justice announced a settlement with AmeriCredit Financial Services, Inc., d/b/a GM Financial, for violating the Servicemembers Civil Relief Act by improperly denying servicemembers' requests to terminate their vehicle leases, charging servicemembers improper early termination fees or lease amounts after termination, failing to provide servicemembers timely refunds of lease amounts they paid in advance after termination, and repossessing vehicles from servicemembers without court orders.** Under the consent order, AmeriCredit agreed to pay \$3,534,171 to affected servicemembers and a \$65,480 civil penalty to the United States. The order also requires AmeriCredit to repair the servicemembers' credit, provide SCRA training to its employees, and implement policies and procedures that comply with the SCRA.

On October 13, the **Consumer Financial Protection Bureau and the Federal Reserve Board announced that they are increasing the dollar thresholds in Regulation Z (Truth in Lending) and Regulation M (Consumer Leasing) for exempt consumer credit and lease transactions.** The Dodd-Frank Act provides that the dollar amount thresholds for TILA and the

CLA must be adjusted annually by any annual percentage increase in the consumer price index. Based on the annual percentage increase in the consumer price index as of June 1, 2022, the protections of TILA and the CLA generally will apply to consumer credit transactions and consumer leases of \$66,400 or less in 2023. However, private education loans and loans secured by real property (such as mortgages) are subject to TILA regardless of the loan amount.

The Federal Trade Commission recently extended the deadline to comment on its advance notice of proposed rulemaking on the prevalence of commercial surveillance and data security practices that harm consumers and whether new rules are needed to protect consumers' privacy and information. Comments are now due by November 21, 2022.

On October 18, the **Federal Trade Commission filed a complaint and obtained a proposed court order against Passport Automotive Group, Inc., its president and vice president, and several of the D.C.-based dealerships Passport owns and operates.** The proposed order resolves allegations that the defendants represented in advertisements that consumers could purchase inspected, reconditioned, or certified vehicles at specific prices that already included the costs of inspection, reconditioning, preparation, and certification; however, in many instances, when consumers attempted to purchase these vehicles for the advertised prices, the defendants allegedly charged them hundreds to thousands of dollars in fees for inspection, reconditioning, preparation, and certification. The FTC also alleged that the defendants discriminated on the basis of race, color, and national origin in violation of the Equal Credit Opportunity Act by imposing higher financing costs and fees on Black and Latino consumers, on average, than non-Latino White consumers. The proposed order would require the defendants to establish a fair lending program, including a provision that would require each dealership to either charge no financing markup or charge the same markup rate to all consumers; prohibit the defendants from misrepresenting the cost or terms to buy, lease, or finance a vehicle; prohibit the defendants from misrepresenting whether a fee or charge is optional and require the express, informed consent of the consumer before charging a fee; and require the defendants to pay \$3.38 million to be used for consumer relief.

On October 19, 2022, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit issued its ruling in *Community Financial Services Association of America v. Consumer Financial Protection Bureau*, **holding that the CFPB's funding mechanism violates the Constitution's separation of powers, thus rendering the Bureau's 2017 Payday Lending Rule invalid.** The court concluded that the "Bureau's funding apparatus cannot be reconciled with the Appropriations Clause and the clause's underpinning, the constitutional separation of powers." The CFPB obtains funding by requesting an amount that is "determined by the Director to be reasonably necessary to carry out" the CFPB's functions from the Federal Reserve Board, which must be granted provided it does not exceed 12% of the Federal Reserve Board's total operating expenses. Because the CFPB obtains its funding through the Federal Reserve Board, it is not required to rely on congressional appropriations legislation for its monies. Further, the CFPB's monetary requests are not subject to review by the Committees on Appropriations. The court further concluded that, although the CFPB had the authority to promulgate the Payday Lending Rule, "the agency lacked the wherewithal to exercise that power via constitutionally appropriated funds." Because the CFPB could not have promulgated the rule but for its unconstitutional funding, the court found that the unconstitutional funding provision inflicted harm on the plaintiffs, requiring the Payday Lending Rule to be vacated.

On October 20, the **Federal Trade Commission issued an advance notice of proposed rulemaking (ANPR) seeking comment on deceptive or unfair acts or practices relating to "junk fees."** 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." Comments must be received within 60 days after the ANPR is published in the *Federal Register*.

On October 27, the **Consumer Financial Protection Bureau released an outline of proposals under consideration for its rulemaking on personal financial data rights.** The Bureau is developing proposals to require financial institutions offering deposit accounts, credit cards, digital wallets, prepaid cards, and other transaction accounts to set up secure methods for data sharing. The Bureau is pursuing this rulemaking pursuant to a dormant authority under Section 1033(a) of the Dodd-Frank Act. Section 1033(a) authorizes the Bureau to prescribe rules requiring "a covered person [to] make available to a

consumer, upon request, information in the control or possession of the covered person concerning the consumer financial product or service that the consumer obtained from such covered person, including information relating to any transaction, series of transactions, or to the account including costs, charges and usage data." Pursuant to its obligations under the Small Business Regulatory Enforcement Fairness Act of 1996, the Bureau is seeking feedback from small entities on the proposals under consideration. A report based on the input received from the small entities will be prepared, and the Bureau will then consider the input as it develops a proposed rule. The Bureau has provided a high-level summary and discussion guide of the regulatory provisions it is considering proposing. These proposals address the following topics: (1) coverage of data providers who would be subject to the proposals under consideration; (2) recipients of information, including consumers and authorized third parties; (3) the types of information that would need to be made available; (4) how and when information would need to be made available; (5) third-party obligations; (6) record retention obligations; and (7) implementation period. The summary and discussion guide also illustrates how the Bureau's proposals under consideration would apply to a hypothetical transaction involving data access to an authorized third party.

Case(s) of the Month

Under Pennsylvania Motor Vehicle Sales Finance Act's Single-Document Rule, Retail Installment Contract, Which Did Not Include Arbitration Provision or Incorporate Contemporaneously Signed Purchase Agreement and Arbitration Agreement, Governed Dispute, and, Therefore, Dealership Was Not Entitled to Compel Arbitration: Two individuals bought used vehicles from a dealership. In connection with their purchases, the buyers each signed a retail installment contract, a retail purchase agreement, and an arbitration agreement. In each transaction, the RIC did not include an arbitration provision or make any reference to the RPA or the arbitration agreement. Further, the RIC contained an integration clause stating that the RIC itself is the entire contract between the parties. Each RPA explicitly incorporated the arbitration agreement by reference. The buyers brought a putative class action lawsuit against the dealership for breaching its purchase contracts with them and violating Pennsylvania's Unfair Trade Practices and Consumer Protection Law by failing to complete the permanent licensing and registration of their vehicles despite collecting fees to do so and by improperly issuing temporary plates. The dealership moved to compel arbitration. The **U.S. District Court for the Eastern District of Pennsylvania** denied the motion. With respect to arbitration, the court noted that the Pennsylvania Motor Vehicle Sales Finance Act creates a single-document rule for installment sales of vehicles that requires all agreements between buyers and sellers to be incorporated into one document - the RIC - either in fact or by reference. The RIC signed by the plaintiffs did not include an arbitration provision and did not incorporate by reference the RPA or the arbitration agreement. The RIC also contained an integration clause. Therefore, the court concluded that, under the MVSFA's single-document rule, the RIC subsumed the RPA and the arbitration agreement and governed the dispute. The court rejected the dealership's argument that arbitration should be compelled because the Federal Arbitration Act preempted the state's MVSFA. See *Jennings v. Carvana LLC*, 2022 U.S. Dist. LEXIS 178402 (E.D. Pa. September 30, 2022).

This Month's CARLAWYER® Compliance Tip

Our Case of the Month spotlights yet another arbitration provision issue for consideration – single document rule issues. Generally, in states that have a single document rule, all of the agreements between buyers and sellers must be included into one document, either in fact, or by reference. In this case, the RIC did not include an arbitration provision nor did it incorporate by reference the purchase agreement or the arbitration agreement. It also contained an integration clause stating that the RIC itself is the entire contract between the parties. Are you in a single document rule state? Does your RIC include an arbitration provision or incorporate one by reference? If not, you may have to defend a class action lawsuit in court vs. going to arbitration. You'll want to talk to your friendly attorney about these issues.

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

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