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Legal Updates & News

Legal Updates

Ahead of the Summons

May 2007

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Irritable TILA Syndrome

Get out your "I'm with Stupid" T-shirts. In our last several issues, we have been tracking the demise of rescission class actions under TILA. A district court in April recognized this, yet it nevertheless allowed a *declaratory relief* claim authorizing class members to individually request that their loans be rescinded. *In re Ameriquest Mortgage Co. Mortgage Lending Practices Litigation*, ___ F. Supp. 2d ___, 2007 WL 1202544 (N.D. Ill. April 23, 2007). Break into small groups and discuss.

For more information, contact your discussion leader Michael Agoglia at magoglia@mofo.com.

Truncate This!

The newest consumer class action craze is suing retailers and restaurants for failing to truncate credit card numbers and expiration dates on credit and debit card receipts. This trend started in California but, like bad weather, is spreading east.

These suits are brought under Section 1681c(g) of the Fair Credit Reporting Act (15 U.S.C. § 1681c (g)) against major retailers and restaurants, alleging that defendants are failing to comply with the FCRA's requirement that businesses may only print the last five digits of a card number and may not print the card expiration date on an electronically printed receipt given to a consumer. This provision became effective on December 4, 2006. Within days, retailers who didn't comply found a guy with a propeller beanie outside their transom bearing a summons. Retailers sued include Costco, IKEA, In-N-Out Burger, Victoria's Secret, and others. At last count, the tally is over 150.

Are these suits cause for concern? Under Section 1681o a plaintiff can recover actual damages, but these suits all rely on the provision that allows a plaintiff to seek statutory damages of between $100 and $1,000 per violation under Section 1681n (15 U.S.C. § 1681n) if the plaintiff proves a willful violation. If a class gets certified, the potential exposure is huge. And there is no cap on damage awards.

Much depends on what the U.S. Supreme Court does with the definition of "willful" in two conjoined cases now pending and to be decided in June, *Safeco v. Burr* and *GEICO v. Edo*.

For more information, contact Dave McDowell at dmcdowell@mofo.com.

Sociologists on the Loose

Who says sociology isn't science? Not the Ninth Circuit. In *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007), the Ninth Circuit affirmed a decision by the district court certifying a class of 1.5 million current and former female Wal-Mart employees in a suit charging gender discrimination. In affirming, the court approved anecdotal evidence and, for the first time, expert sociological testimony. In that case, a sociologist employed a "social framework analysis" to identify a strong corporate culture that promoted gender bias. The Ninth Circuit brushed aside Wal-Mart's challenge

to this as junk science, holding that *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), which requires that district courts act as "gatekeepers" concerning expert evidence, simply does not apply at the class certification stage. *Dukes*, at 1248-49.

Wal-Mart was an employment discrimination case, but watch it migrate into other areas. Some of our best friends are sociologists, but how long before sociologists start opining in class action cases against financial institutions about how the company fostered a corporate culture of greed? Other Circuits differ sharply over the use of experts at class certification, so *Wal-Mart* leaves the law about as mussed as Don Imus's hairstyle.

For more information or fashion tips, contact Will Stern at wstern@mofo.com.

Are We Suitable Yet?

Congress may not be quite ready to impose securities-like suitability requirements on mortgage lenders. But what about the Third Branch? Plaintiffs' lawyers are filing lawsuits on behalf of mortgage borrowers that seek to enjoin collections on mortgages or foreclosures on homes of borrowers on suitability grounds. Currently, these suits are confined to elderly borrowers, and are based on the theory that the loans were made without regard to assessing the borrower's ability to repay. The allegation is that a "know your customer" rule arises from industry standards.

For more information, contact Michael Agoglia at magoglia@mofo.com.

Twist Ties

The California Supreme Court, which doesn't much like arbitration, heard oral argument on June 5 in a case that could offer a new twist on arbitration and unconscionability law. That case involves a "class action waiver" clause by which an employee waives his right to bring a class action. But to be unconscionable in California, as in most states, a clause must be not only substantively but also procedurally unconscionable. Assume, for a moment, that the clause flunks substantive unconscionability. What happens if the clause wasn't offered to the employee on a "take-it-or-leave-it" basis? In other words, what if the employee or bank customer could reject the agreement but still keep his job or account privileges?

That is the issue in *Gentry v. Superior Court (Circuit City)*,No. S141502. The appellate court in *Gentry* held that if an otherwise substantively unconscionable clause is not offered on a "take-it-or-leave-it" basis, the clause will be enforceable. We'll have a decision and a report in our fall issue.

For further information, contact Nancy Thomas at nthomas@mofo.com.

No File Left Behind

Federal and state legislators want to take student lenders to school. Following on the heels of the investigation by New York's Attorney General Cuomo, Congress and several states have introduced measures to address student loan issues, including bills designed to provide transparency and ones that would prohibit payments giving rise to conflicts of interest.

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