ALSTON & BIRD

PAYMENTS DOCKET

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REGULATORY & ENFORCEMENT

CFPB Issues Report Highlighting Recent Issues and Trends Uncovered by Supervision Program

In July, the Consumer Financial Protection Bureau (CFPB) issued its latest report, Supervisory Highlights, which provides an overview of the abusive acts or practices that its supervision program has identified certain supervised institutions engaging in over the past year. Among the principal issues and trends identified by the CFPB's supervision program were:

- Depository institutions' unfair practice of assessing both nonsufficient funds and line-of-credit transfer fees on the same transaction.
- Several unfair or deceptive acts by payday lenders in violation of Regulation Z, including preemptively prohibiting consumers from using certain forms of communication, falsely representing that legal action was imminent in collection letters, and wrongfully deducting wages by more than the amounts agreed to by borrowers.
- Deceptive marketing of auto loans, which occurred when lenders used advertisements that pictured cars that were significantly larger, more expensive, and newer than the advertised loan offers were good for.
- Deceptive collection practices by auto loan servicers, including (1) collecting interest on fraudulently inflated loans; (2) canceling autopay without adequate notice; and (3) abusing cross-collateralization by requiring borrowers to pay off other debts before redeeming auto loans.
- Multiple issues with consumer reporting companies' (CRCs) compliance with the Fair Credit Reporting Act, including CRCs' policies and procedures for onboarding end users and periodically reassessing end users' permissible purposes and for verifying the accuracy and integrity of furnished information. The CFPB also identified issues related to CRCs' provision of consumer notice and related disclosures.
- Several unlawful and deceptive acts by consumer debt collectors, including continuing attempts to collect uncollectible debt under state workers' compensation laws and falsely representing the financial benefit of paying balances in full by a date certain.
- Lenders unlawfully discriminating when granting pricing exceptions across a range of characteristics protected by the Equal Credit Opportunity Act, as well as improper handling and treatment of applicants' criminal histories and reliance on income derived from public assistance.
- Institutions' failure to implement adequate information technology controls that could mitigate or prevent cyber-attacks, including inadequate password and log-in controls and failure to require multi-factor authentication.
- Potential violations of Regulation Z by mortgage originators, including by offering compensation plans that allowed a loan originator that originated both brokered-out and in-house loans to receive a different level of compensation and failing to round interest rates according to the precise terms of the promissory notes due to internal system rounding limitations.
- Multiple failures by mortgage servicers to comply with UDAAP and other related regulations.
- Several instances in which depository and nondepository institutions violated the Remittance Rule, including by failing to develop and maintain written policies and procedures to ensure compliance with error resolution requirements.

Pennsylvania and CFPB Bring Novel Suits Against Fintech Company Under the CFPA

Commonwealth of Pennsylvania Office of Attorney General v. Snap Finance LLC, et al., No. 200501529 (Philadelphia County Court of Common Pleas).

CFPB v. Snap Finance LLC, et al., No. 2:23-cv-00462 (D. Utah).

The Pennsylvania attorney general and digital finance company Snap Finance LLC agreed in May 2023 to an $11 million settlement to resolve claims that Snap Finance took advantage of low-income consumers with poor or no credit who have difficulty obtaining traditional loans. Following Snap Finance's agreement to settle with the Pennsylvania AG, the CFPB sued Snap Finance under the Consumer Financial Protection Act (CFPA) for the same conduct.

According to the CFPB, Snap Finance's advertising and servicing efforts were deceptive and abusive under the CFPA. As part of its marketing efforts, Snap Finance allegedly provided its merchant partners with display advertisements that featured the phrase "100 Day Cash Payoff" without further explanation of the terms of financing. Consumers who received financing from Snap Finance reasonably believed they had entered into a 100-day financing agreement so that their automatically scheduled payments would fulfill their payment obligations after 100 days. But in fact, consumers had to affirmatively exercise the 100-day early payment discount option, and if they missed the deadline, pay significantly more than the "cash" price under the terms of their purchase agreements with Snap Finance. Additionally, as part of its servicing efforts, Snap Finance allegedly threatened consumers with collection actions that it does not bring.

On September 18, 2023, Snap Finance moved to dismiss the CFPB's claims under the CFPA, describing the CFPB's enforcement action as "a first-of-its-kind attempt to impose the federal consumer financial laws that it enforces on state-regulated lease-to-own ('LTO') agreements." According to Snap Finance, its purchase agreements operate like traditional LTO agreements, not as a form of credit, the functional equivalent of purchase finance arrangements, or credit sales. If Snap Finance is correct, its purchase agreements would fall outside the CFPB's regulatory authority.

States Regulate Earned Wage Access Products

Many fintech firms are offering earned wage access (EWA) either directly to consumers or to employers that then provide them to their employees as an employee benefit. EWA lets employees receive advances on money they've earned before their payday. But unlike traditional payday loans, these financial products generally charge the consumer a fee rather than interest.

While this type of financial product had been unregulated, Nevada and Missouri recently passed laws to regulate the industry. Nevada's law—which applies to both direct-to-consumer and employer-integrated EWA providers—creates a licensing regime for EWA products to functionally regulate EWA products in the same way the state has regulated tech-enabled lending or money transmission. The Nevada law prohibits EWA service providers from sharing tips or optional fees with the consumer's employer, using a consumer's credit report or score to determine the consumer's eligibility, charge late fees or report a consumer to a credit reporting agency for the consumer's failure to pay, or compel the consumer's payment through civil action or debt collection.

The Missouri law is similar to the Nevada law. One notable addition to the Missouri law is that it prohibits accepting payment from consumers via credit card or charge card, likely to avoid a situation where the consumer finds themselves in a debt cycle paying credit card interest on what would have otherwise been an interest-free advance.

While these two states are the first to regulate this financial product, they likely will not be the last. Georgia, Kansas, New Jersey, New York, Texas, Utah, and Virginia are now considering their own legislation to regulate EWA products. And California has opted to regulate EWA products like credit through its Department of Financial Protection and Innovation rather than legislate the issue.

Democratic Senators Seek Information on Mobile Payment Service's Consumer Protection Policies

On June 15, 2023, Sherrod Brown (D-OH), the chairman of the U.S. Senate Committee on Banking, Housing, and Urban Affairs, along with fellow Senators Jack Reed (D-RI), Robert Menendez (D-NJ), and Elizabeth Warren (D-MA), signed a letter to the president and CEO of PayPal Inc. about its subsidiary Venmo. The letter seeks information about reports of fraud, fraudulently induced customer-initiated transactions, and Venmo's policies and practices aimed at detecting and eliminating fraud committed on Venmo's platform.

The letter follows a series of reports from *Consumer Reports* and Pew Research Center, among others, describing risks of fraud to and data exposure of Venmo consumers. Independent reports cited in the letter indicate that as many as 9% of Venmo's frequent users were victims of fraudulently induced transactions, and 12% have accidentally sent money to the wrong recipient.

State Regulator Penalizes Fintech for Unlicensed Services and Unlawful Interest Rates

Regulators in California, Connecticut, and Washington, D.C. entered into separate consent orders with Solo Funds Inc., a California-based fintech company, that operates a website and mobile app that matched borrowers of small-dollar, short-term loans with individual lenders. The regulators alleged that Solo engaged in unlicensed financial services and charged unlawful interest rates.

Solo's community finance platform allowed potential borrowers to request loans of up to $500, and then allowed individual lenders to review the requested loans and fund them. Solo called the interest rate on these loans a "tip" and indicated to borrowers that offering the maximum tip—up to 12% for a 15-day loan—would make their loan more likely to receive funding. Solo also told new borrowers that they needed to offer a tip to avoid the risk of not having their loan request fulfilled.

All three regulators alleged that Solo had engaged in deceptive practices. In particular, the regulators alleged that labeling a loan expense a "tip" or "donation," rather than an interest rate, deceived borrowers in violation of both federal and state laws. California also alleged that Solo's practice of claiming the loans had 0% APR was an additional deceptive practice. California and Connecticut further alleged that Solo had failed to register and obtain required licenses to operate as a broker of consumer loans. Finally, California alleged that, when accounting for lender tips, the 12% interest rate on a 15-day loan exceeded the maximum permissible interest rate in California. The consent orders require Solo to pay penalties totaling $180,000, reimburse borrowers, and operate under injunctions that require it to obtain required licenses and halt the alleged deceptive practices.

Installment Lender Enters Consent Order with CFPB

The CFPB entered a consent order on May 31, 2023 with OneMain Financial, an installment lender. OneMain agreed to pay $20 million in redress and penalties related to its add-on sales practices and its failure to refund interest to consumers who canceled purchases during a "full refund period."

OneMain, one of the largest nonbank installment lenders in the United States, allegedly directed its employees to offer consumers a full refund on certain add-on products if the consumer canceled their purchase within a certain period. The add-on products were largely credit insurance, along with other benefits like roadside assistance, identity theft protection, and discounts on entertainment. When customers canceled optional credit insurance products during the applicable cancellation period, they received a refund on any prepaid interest. However, when customers canceled other types of add-on products within the applicable cancellation period, they did not receive refunds for any interest, prepaid or otherwise.

The consent order also states that OneMain expected its employees to sell an average of 1.3 add-on products with each loan, creating an incentive for employees to mislead consumers about the optional nature of the add-on products. Many employees allegedly did so, either by verbally misleading consumers about the optional nature of the add-ons or by adding the add-ons to a loan sheet before showing the loan sheet to a consumer. The consent order also states that employees were expected to make it seem difficult to remove the products once they had been added.

The consent order requires OneMain to halt the challenged sales practices, amend its policies governing canceled purchases of add-on products, include interest payments when issuing refunds, pay at least $10 million to consumers for redress, and pay $10 million to the CFPB as a civil penalty.

Bitcoin Company Enters Consent Order with New York AG to Reimburse Customers

The New York Attorney General's Office (NYAG) entered into an assurance of discontinuance with Coin Cafe Inc. on May 18, 2023. Coin Cafe buys, sells, stores, and offers to buy and sell bitcoin through its website. The NYAG alleges that in order to do so, Coin Cafe was required to register with the NYAG as a commodity broker-dealer pursuant to New York law. Coin Cafe never did so. The NYAG also alleges that Coin Cafe charged consumers a percentage of the value of their account to store bitcoin, which in some instances could exceed $10,000 monthly for certain large accounts. The NYAG finally alleges that Coin Cafe inadequately communicated increased storage fees to consumers.

The assurance of discontinuance requires Coin Cafe to refund New York consumers, totaling $508,000. It also requires Coin Cafe to offer to refund consumers in other jurisdictions, which could total up to $3.75 million.

NEW LAWSUITS

Continued Bank and Digital Payments Lawsuits Filed over Purported Scams

Weeks v. Early Warning Services LLC, et al., No. C-15-CV-23-001703 (Montgomery County Circuit Court, Maryland).

Weeks v. Citibank NA, No. 8:23-cv-01798 (D. Md.).

Mbaba v. Wells Fargo Bank, et al., No. D-202-CV-2023-03847 (Albuquerque District Court, New Mexico).

In every issue of the *Payments Docket* thus far, we have reported on the wave of lawsuits and class actions against banks, digital payments networks, and other related parties over alleged scams against users of digital payment networks like Zelle and Venmo. These allegations have continued, this time in Maryland and New Mexico state courts.

In the Maryland state court case, the plaintiff alleges that six unauthorized transfers through Zelle came out of his bank accounts in one day. He claims that the transactions were suspiciously completed late at night and in a relativity narrow time frame as if the intent was to prevent their discovery. The plaintiff asserts that he attempted to resolve this matter with the bank and Zelle for over two years without any resolution. The complaint challenges the bank's alleged boasting about its protections for its customers' recommendation of Zelle as a safe tool to use to transfer money in and out of their accounts. The plaintiff asserts claims for breach of contract, fraud, negligence, and violations of Maryland commercial law. In July 2023, the bank removed the case to the District of Maryland. In September 2023, the court granted an order staying the case as to Citibank while the parties finalized settlement. In October 2023, the plaintiff filed a motion to dismiss the case against Zelle due to discussions with and assistance from Zelle.

In the New Mexico state court case, the plaintiff alleges that she was scammed in multiple transactions via Zelle. She asserts that she reported this to her bank, which refused to stop the pending transactions. The plaintiff also claims that the bank failed to notify her of the suspicious transactions.

Class Action Alleges Bank Collected Unlawful Fees and Costs

Boczek v. Pentagon Federal Credit Union, No. 1:23-cv-00043 (N.D. W. Va.).

A new class action alleges that Pedfed, a loan servicer, impermissibly profits from borrowers by charging and collecting illegal payment processing fees when borrowers make their monthly loan payments by telephone.

Specifically, the plaintiff alleges that when a borrower whose loan is serviced by Penfed makes a payment over the phone, Penfed charges the borrower a $5.00 fee. The plaintiff claims that the usual cost that a servicer like Penfed pays a vendor to process this type of transaction is $0.30 or less per transaction. He asserts that no agreements or statute authorizes Penfed to collect these fees. The complaint alleges that by charging or collecting these fees, Penfed attempted to collect from the plaintiff a part of Penfed's fee or charge for services rendered in violation of West Virginia law. The plaintiff proposes a class of all persons with a loan securing property in West Virginia if the lender, broker, or loan servicer is Penfed and paid a fee to Penfed for making a loan payment by telephone.

The complaint alleges violations of the West Virginia Consumer Credit and Protection Act. Among other relief, the plaintiff is seeking class certification, actual or compensatory damages, and an award of a civil penalty to all class members for each violation of the West Virginia Consumer Credit and Protection Act.

Credit Cards Hit with Familiar Accusations of Price Fixing

Block Inc. v. Visa Inc., et al., No. 1:23-cv-05377 (E.D.N.Y.).

In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, No. 1:05-md-01720 (E.D.N.Y.).

Block Inc., the parent company of upstart payment processor Square, has filed suit against payment card issuers Visa and Mastercard for "interchange fees" paid in connection with processing Visa and Mastercard payments. In its complaint, Block accuses Visa and Mastercard of conspiring to engage in "anticompetitive conduct" and "price fixing" by, among other things, charging Square "all or nothing" fixed fees to process payments on the Visa and Mastercard networks, which purportedly remain artificially "inflated" by their market dominance. Visa and Mastercard filed answers largely denying the allegations in Block's complaint.

Shortly after the case was filed, it was transferred into the long-running MDL *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, which has been pending since 2005 and previously resulted in a $5.6 billion settlement that was largely approved on appeal.

Property Management Company Sued by Payment Processor and Merchant Bank for Unpaid Chargebacks and Processing Fees

Banc of California N.A., et al. v. Klein, et al., No. 9:23-cv-81089 (S.D. Fla.).

In August, New York–based residential property management company ManageGo LLC and its principal, Naftali Klein, were sued by their former payment processor for allegedly incurring more than $600,000 in unpaid chargebacks and related processing fees and charges. According to the plaintiffs' complaint, the processor originally planned to terminate the parties' contractual relationship in June 2023, but after the merchant represented that it needed additional time to find a replacement processor, the parties mutually agreed to postpone the termination until the end of August 2023.

In the interim, however, the processor claims that the merchant incurred hundreds of thousands of dollars in liabilities for chargebacks and unpaid fees, and when the plaintiffs sought recovery of those funds directly from the bank accounts that the merchant was required to maintain as security, the plaintiffs discovered that the merchant had already emptied and closed those bank accounts. The plaintiffs assert claims for fraud, conversion, breach of contract, and others; seek compensatory and punitive damages and restitution and/or disgorgement; and demand a jury trial on all counts.

On October 2, 2023, the defendants moved to dismiss the plaintiffs' first amended complaint as an improper shotgun pleading and also for failure to state a claim. On November 14, 2023, the court granted the defendants' motion to the extent the plaintiffs' first amended complaint constitutes an impermissible shotgun pleading by improperly incorporating all preceding allegations after Count I. The court dismissed the first amended complaint without prejudice and gave the plaintiffs one final opportunity to file an amended pleading on or before December 1, 2023. On November 29, 2023, the plaintiffs filed their second amended complaint.

Whiskey Bar Brings Claims Against POS Company That Allegedly Failed to Process Transactions

Old Hickory Whiskey Bar Co. v. Qlaborate LLC, No. 23TC-177472384 (Florida Circuit Court).

On July 14, 2023, the owner and operator of a whiskey bar in Pensacola, Florida filed a lawsuit in Florida state court against Qlaborate, a hospitality services company that provides point of service software. The bar owner alleges that during a four-month period, Qlaborate failed to properly capture, authorize, transmit, and process credit card payments from the bar's patrons, causing the bar to not receive hundreds of thousands of dollars. When Qlaborate tried to retroactively process the credit card payments months later, some patrons allegedly grew concerned that their cards had been stolen, hacked, or misappropriated by the plaintiff. The bar owner also allegedly incurred additional bank fees and costs as a result of credit card companies denying the credit card charges. The bar owner brings multiple claims against Qlaborate, including breach of contract and breach of implied warranties.

Lawsuit Filed Against Payment Processor over Residual Revenue Payments

KMF Services LLC v. FISERV Inc., et al., No. 3:23-cv-00815 (M.D. Fla.).

On July 13, 2023, two companies that sell payment processing services to merchants filed a complaint in Florida federal court. The action arises out of two agent agreements under which the plaintiffs agreed to sell CardConnect's payment processing services to merchants in exchange for a certain percentage of the revenue generated by any merchant accounts the plaintiffs onboarded. The plaintiffs allege that the agent agreements allow CardConnect to deduct certain credit card fees and assessments before calculating the plaintiffs' monthly residual payments. At the end of 2022, CardConnect discovered it had inadvertently not deducted approximately $640,000 in credit card network fees and assessments from 2018 to 2022, resulting in incorrect calculations of the plaintiff's monthly residuals. After discovering this error, CardConnect allegedly began deducting funds from the plaintiffs' monthly residual payments to remedy its error. The plaintiffs allege that most of these incorrect calculations relate to residual payments beyond the applicable contractual statute of limitations in the agent agreements and bring claims for breach of contract and unjust enrichment. The plaintiffs also seek an injunction against CardConnect from withholding any additional residual payments.

On September 25, 2023, the defendants filed a motion to dismiss. The defendants have agreed to pause any further deductions from the plaintiffs' accounts.

Officers and Directors of Blockchain Financial Services Company Hit with Shareholder Derivative Lawsuit

Hertel v. Errez, et al., No. 3:23-cv-01165 (S.D. Cal.).

On June 23, 2023, the shareholders of a blockchain financial services company, RYVYL Inc., sued the company's officers and directors in California federal court for breach of their fiduciary duties. The shareholders allege that from January 29, 2021 through January 20, 2023, RYVYL's directors made misleading statements in filings with the SEC and failed to disclose adverse information about the company's business prospects and operations. Specifically, when RYVYL initiated its initial public offering in February 2021, shares of its common stock were $10.50 a share.

According to the shareholders, the directors concealed the company's inadequate internal controls from investors and instead made a series of false and misleading statements touting the health of the company. The complaint alleges that the officers and directors did not disclose the severity of RYVYL's internal controls issue until January 20, 2023, when it revealed in a Form 8-K that several of its previously filed financial statements should no longer be relied upon, causing the company's stock price to drop precipitously.

The shareholders also allege that the defendants pushed through related-party transactions, caused RYVYL to repurchase the company's stock at artificially inflated rates, and engaged in insider trading. RYVYL, its CEO, its CFO, its former CFO, and members of its board are also subject to a separate federal securities fraud class action relating to the same alleged misconduct.

NOTEWORTHY CASE DEVELOPMENTS

D.C. Circuit Gives Nod of Approval to Trial Court's Certification of Three Classes in Sweeping ATM Fee Litigation

National ATM Council Inc., et al. v. Visa Inc., et al., No. 21-07109 (D.C. Cir.).

Following the trial court's 2021 decision to certify three separate classes of ATM operators and consumers in litigation against Visa and Mastercard over their alleged imposition of artificially inflated ATM transaction fees, the D.C. Circuit Court of Appeals affirmed the class certification decisions, sending the class action back to the district court for trial.

In their challenge to the class certification orders, Visa and Mastercard focused exclusively on purported errors in the trial court's predominance analysis, arguing that the class members could not establish a damages model sufficient to prove a "common antitrust injury" and that the district court failed to conduct the necessary "rigorous analysis" into this predominance requirement under Federal Rule of Civil Procedure 23(b)(3) before certifying the classes.

The circuit court disagreed, finding that although the district court's legal reasoning was "brief," it was nevertheless "materially correct." Specifically, the appellate court concluded that the district court properly held that at the class certification stage, "common evidence sufficient for class certification need not conclusively establish class-wide liability and damages," and instead that plaintiffs need only "present creditable evidence from which questions common to the class members' claims could be resolved at trial in one stroke." Finding that this inquiry was satisfied for all three putative classes, the court of appeals affirmed the tripartite class certification decision in whole and remanded the case to the trial court for further proceedings.

Texas Payments Company Seeks to Take TCPA Issue to the Tenth Circuit

Scherrer v. FPT Operating Company LLC d/b/a Talus Payments, No. 1:19-cv-03703 (D. Colo.).

On July 20, 2023, a District of Colorado court denied a motion to dismiss by Talus Payments in a putative Telephone Consumer Protection Act (TCPA) class action. The plaintiff alleges that Talus violated the TCPA by calling her cellular telephone and those of the purported class without their prior consent using an automatic telephone dialing system (ATDS).

In its motion, Talus argues that under the U.S. Supreme Court's decision in *Facebook Inc. v. Duguid*, "[t]o qualify as an 'automatic telephone dialing system,' a device must have the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator." An autodialer cannot be an ATDS if it has no capacity to generate phone numbers randomly or sequentially. Consequently, Talus argues, its autodialer—which is not alleged to have generated phone numbers but only to have stored phone numbers and used a random or sequential number generator to determine a dialing order for those stored numbers—would not qualify as an ATDS.

The court disagreed. It found that "an autodialer that stores a list of telephone numbers using a random or sequential number generator to determine the dialing order is an ATDS under the TCPA." Considering the Supreme Court's reasoning, it concluded that "the Supreme Court anticipated instances in which a random or sequential number generator would be used to store telephone numbers and generate the calling order but without generating the numbers themselves."

Talus has moved for the court to certify its denial order for interlocutory appeal to the Tenth Circuit.

Tax Prep Company Seeks to Derail Class Action with Mandatory Arbitration

Pabon v. H&R Block Inc., et al., No. 2:23-cv-05363 (E.D.N.Y.).

In July 2023, tax-preparation software company H&R Block was sued in a putative class action on behalf of a nationwide class and New York subclass of persons who used H&R Block's software to prepare or file their tax returns though November 23, 2022. According to the complaint, to use H&R Block's tax preparation software, customers must share sensitive, personal, and confidential tax return information, including social security numbers and other personal identifiable information. H&R Block allegedly transmitted this information unlawfully to Meta and Google due to the use or incorporation of Metal Pixel and Google Analytics in H&R Block's software. The plaintiffs allege this gives rise to a host of causes of action.

In September 2023, H&R Block filed a letter with the court requesting a pre-motion conference regarding its intention to file, among other motions, a motion to compel arbitration, a motion to dismiss pursuant to Rule 12(b)(6), and a motion to bifurcate to establish a bifurcated schedule for briefing and resolving the arbitration issue before reaching the merits of the case.

H&R Block's letter indicates that it will move to compel arbitration on an individual basis. Its request is based on the straightforward argument that all H&R Block customers agreed to mandatory arbitration and that each of their agreements contained an express class action waiver.

Court Certifies Crypto Investor Class Action

Zakinov, et al. v. Ripple Labs Inc., et al., No. 4:18-cv-06753 (N.D. Cal.).

On June 30, 2023, a California federal judge certified a class of investors who accused XRP cryptocurrency developer Ripple Labs and its CEO of engaging in an unregistered securities offering. The plaintiffs allege that the XRP cryptocurrency issued by Ripple is a security under relevant securities laws and should have been registered and that Ripple's failure to do so was a violation of federal and state law. The plaintiffs also allege that Ripple Labs and its CEO used deceptive tactics to increase profits from XRP's price rise. Ripple is separately litigating an enforcement case with the SEC over whether XRP is a security that should be subject to the agency's regulations.

Ripple argued the named plaintiffs could not adequately represent the class because many potential class members disagree with the premise of the lawsuit—they do not believe XRP should be considered a security. But the court found the legal test for what qualifies as a "security" is an objective one, and thus the subjective beliefs of the class members are not relevant. The court also found it is irrelevant that the named plaintiff made his XRP purchases indirectly, while other class members purchased XRP directly from Ripple.

The court certified a nationwide class of investors who purchased XRP from July 3, 2017 through June 30, 2023 (the date of the order granting the motion for class certification) and retained the XRP or sold the XRP at a loss. The court, however, limited the class to U.S. XRP purchasers to give other countries the chance to regulate cryptocurrency in a manner they deem appropriate.

Consumer Attempts to Unwind Arbitration Award

Kass v. PayPal Inc., No. 22-02575 (7th Cir.).

The Seventh Circuit Court of Appeals unwound a 2018 order from a district court that forced a plaintiff to arbitrate her dispute against PayPal. In 2017, a woman and her charitable organization filed a lawsuit in Illinois federal court challenging the way PayPal distributes charitable donations. The Illinois federal court sent the lawsuit to arbitration after determining the plaintiff had accepted PayPal's user agreement and its arbitration clause when she created a PayPal account. After the case was sent to arbitration, PayPal obtained an arbitrator's award in its favor and then confirmed that award in federal court.

The plaintiff argued a trial was necessary to determine if she knowingly agreed to the arbitration clause. The plaintiff contended she did not receive the email from PayPal with the user agreement. PayPal, on the other hand, argued the arbitrator's award should stand because the plaintiff received the user agreement as part of the company's typical email notice practices.

The Seventh Circuit rejected the district court's finding that the plaintiff's denial that she had received notice from PayPal was insufficient under the "mailbox rule," under which contract terms are generally deemed accepted if the sender can prove the terms were sent, regardless of how the mail recipient subsequently handled the document. The Seventh Circuit found that when a party denies signing a contract, "the denial is an assertion of fact." Because the plaintiff offered evidence that denied she received notice from PayPal of the mandatory arbitration clause, the Seventh Circuit found that a jury must decide whether she received the notice.

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